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Managerialism and the erosion of professional discretion: the case of the crown prosecution service

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ABSTRACT

Public prosecutors must balance professional autonomy with the imperative of maintaining public trust. The conflicting objectives their role entails demand that they enjoy broad discretion. Yet, they must also uphold public confidence with the legitimacy of the role resting on transparency and accountability. This article examines how the Crown Prosecution Service (CPS) has sought to balance these two aspects through policy-making. The rise of managerialism in public services, including the CPS, has introduced control mechanisms to monitor staff performance. Drawing on Foucauldian understandings of disciplinary power, the article shows how these practices also create unspoken norms that constrain staff discretion and de-professionalise CPS lawyers. The judicial review case brought by the End Violence Against Women (EVAW) coalition against the CPS in 2021 exemplifies this phenomenon, showing how internal performance targets and managerial practices led to a cautious approach in prosecuting rape cases. This example of how audit culture can distort organisational objectives by reshaping lawyers' roles and ultimately eroding their capacity to uphold the rule of law captures the process of de-professionalisation. However, as the EVAW case indicates, this de-professionalisation not only impacts lawyers but also has significant repercussions for victims and could erode public trust in the justice system.

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Introduction

At the most basic level, public prosecutors decide whether to prosecute individual cases or not, namely whether to bring the full force of the law against an individual for a particular criminal offence.¹ Public prosecutors also therefore contribute to the structuration of the criminal justice process, deciding whether individual cases should be processed through the system or dealt

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with through out-of-court disposals (Sepulveda and Wilenmann 2022). As a result, their decisions not only affect the criminal justice system and wider communities but also have a potentially life-changing impact on the lives of defendants and victims. Their task is complex as it mediates between various, often conflicting, objectives, such as accuracy, efficiency, equal treatment, controlling or reducing crime as well as protecting the rights of victims (Sun Beale 2015, Sklansky 2016, p. 477). Professional discretion allows public prosecutors to apply their specialist knowledge and judgement to complex, context-specific situations, ensuring high-quality and tailored decisions (Ashworth 1987, p. 606, see also Sklansky 2018, p. 453). However, this autonomy can lead to concerns about an accountability deficit, where professionals operate with significant power and limited public oversight (Sklansky 2018). Additionally, the risk of arbitrariness arises when discretion is exercised without adequate checks and balances, leading to inconsistent or biased decision-making (Davis 2009). Balancing these competing demands requires robust frameworks that support professional autonomy while ensuring accountability through transparent, participatory, and ethical governance structures.

This article examines how the Crown Prosecution Service (CPS)² navigates the enduring challenges arising from the tension between necessary prosecutorial discretion and the demands for accountability, democratic oversight, and the mitigation of arbitrariness. In recent years, the CPS has faced renewed public criticism due to several factors, including the handling of high-profile cases (Fouzder 2020, Wright 2024), a series of failures in the disclosure of evidence (Dennis 2018), and declining prosecution rates for rape and serious sexual assaults (Topping and Barr 2020). Some of this increased criticism is linked to Keir Starmer's rise to prominence as a political leader. As the former Director of Public Prosecutions (2008–2013), the Leader of the Opposition (2020–2024) and now the Prime Minister, Starmer's past decisions and the performance of the CPS during his tenure have been revisited and critically scrutinised by the media and political opponents (Stacey 2023). These ongoing criticisms, particularly allegations of a reluctance to prosecute rape cases (highlighted by the judicial review case brought by the End Violence Against Women (EVAW) coalition against the CPS in 2021), suggested a need to revisit research conducted in 2012.

The analysis draws on my own observational and interview data, collected during four months of observational fieldwork in a large CPS office in late 2012 and in 31 interviews with CPS staff. Ethical approval was obtained from the University of Warwick: all data was anonymised at the point of collection, full information was provided to participants, and consent forms were signed by interview respondents. Although collected almost thirteen years ago, the quality and depth of the data still provide important insights into CPS operations. The CPS is notably under-researched (Soubise 2017, Widdicombe 2024a), making my data particularly valuable. Unlike more recent studies,

which have primarily relied on a limited number of interviews – Fairclough conducted 13 interviews with criminal practitioners (between November 2014 and April 2015), including just two CPS employees (Fairclough 2018); Porter conducted nine interviews with CPS prosecutors in 2017 (Porter 2020); and Thornton conducted a total of 50 interviews with criminal practitioners, but only seven with current or former CPS employees in 2021 and 2022 (Thornton 2023) – my own study included 31 interviews with CPS staff and extensive ethnographic observations within a CPS office. While Widdicombe’s study involved 34 interviews with CPS staff across seven CPS areas in 2016 and 2017 (Widdicombe 2024a, 2024b), it did not include ethnographic observations. These observations offer a unique and comprehensive understanding of the decision-making processes and day-to-day operations within the CPS, which are not captured by interview data alone. Engaging in ethnographic observations enabled me to build a relationship of trust with my interviewees, fostering an environment where they felt comfortable sharing candid and detailed insights. Additionally, the ethnographic observations allowed me to cross-reference their statements with my own observations, ensuring a more comprehensive and accurate understanding of CPS operations. Interviews, due to their formal nature, can produce presentational data which is linked to the image that participants aim to project to the researcher and others (Van Maanen 1979). Such data may not always “reflect daily routines and experiences” (Hodgson 2000, p. 142). In contrast, ethnographic observations capture the practical realities faced by CPS staff, providing a more nuanced and authentic understanding of their operations. This makes my 2012 data particularly insightful and relevant despite their age, offering unique perspectives on the CPS internal workings and the practical realities faced by its staff. Throughout the paper, these data are complemented by and compared with the findings of more recent empirical studies and official reports where available, providing a robust and nuanced understanding of CPS operations.

Drawing on insights from the sociology of the professions, this paper begins by examining the contextual challenges in regulating prosecutorial discretion, highlighting the broad discretion granted to public prosecutors and the need for a strong legitimacy basis to mediate between conflicting objectives. Part 2 shows how CPS policymaking has managed to structure prosecutorial discretion in a manner that aligns with societal expectations for transparency and accountability, while still maintaining essential professional autonomy. However, the rise of managerialism within public services in England and Wales, including the CPS, has introduced a new layer of control aimed at monitoring staff performance. Utilising Foucauldian concepts of disciplinary power, part 3 introduces the shift from autonomy to conformity, demonstrating how these managerial practices have stimulated the emergence of implicit norms that restrict prosecutorial discretion. Part 4 illustrates this shift through the

lens of the EAW judicial review case, highlighting the impact on CPS lawyers and victims. By exploring the EAW case, this article sheds light on the broader impact of managerialism on public services and the delicate balance required to ensure that prosecutorial discretion is exercised in a manner that upholds both professional standards and public trust. The findings suggest that while managerial controls can enhance accountability, they must be carefully designed to avoid creating counterproductive norms that undermine the very goals they seek to achieve.

Contextual challenges in regulating prosecutorial discretion

Prior to the establishment of the CPS in England and Wales, little guidance framed prosecutorial discretion. The role of the Director of Public Prosecutions (DPP) was limited to a small number of cases and prosecution arrangements were largely under the control of respective local police forces (Roach 2002, Hancock and Jackson 2006, White 2006). Most police forces employed solicitors and barristers to advise them on prosecution decisions and to represent them in criminal courts. The relationship between police forces and the solicitors or barristers they employed was strictly that which exists between a lawyer and their client: lawyers acted on police instructions and their advice was not binding on the police (Sanders and Cole 1982). By and large, prosecuting lawyers had limited decision-making powers and simply took instructions from the true public prosecutors: the police. Since prosecuting lawyers did not actually make decisions to prosecute, it follows that there was little need for greater regulation of prosecutorial discretion or, to put it more accurately, any regulation of prosecutorial discretion was part of regulating police discretion (Sanders 1984).

One of the key aims behind the creation of the CPS was to transfer prosecutorial discretion from the police to legal professionals. The 1981 Royal Commission on Criminal Procedure found that some cases were prosecuted without sufficient evidence to justify such prosecution and despite legal advice against it (Philips 1981, para. 6.23, see also McConville and Baldwin 1981). It therefore recommended the introduction of a new independent prosecution authority to review police cases and decide whether or not to prosecute them. The “Philips principle”, as it became known (White 2006), separates the investigative and the prosecuting functions within the criminal justice system. It recommends that these two functions are given to two institutions, independent from each other. The CPS was established to “make the conduct of prosecution the responsibility of someone who is both *legally qualified* and is not identified with the investigative process” in the interests of fairness (Philips 1981, para. 7.3 emphasis added). As a result, the police remained in charge of investigations but lost the power to prosecute cases in court to the newly created CPS. Although most commentators have focused on the need for the prosecutor to

be independent of the investigative process, the legal qualification of the public prosecutor is also important, since it indicates the expectation that this would improve the quality of such decisions. Thus, the Commission refers to “the importance of independent legal expertise” (para. 7.3) and asserts:

We want to secure that after a clearly defined point during the preparation of a case for trial and during its presentation at trial *someone with legal qualifications* makes the variety of decisions necessary to ensure that only properly selected, prepared and presented cases come before the court for disposal. (para. 7.6 – emphasis added)

One of the main reasons for the Commission’s emphasis on the necessity of independent legal expertise undoubtedly lies in its capacity to enhance public trust and, consequently, confidence in the rule of law. The significance of this is heightened by the complexity and ambiguity of the normative framework that guides public prosecutors. These norms encompass expectations related to conduct, communication, and ethical standards, yet they are often unspoken and unwritten, despite playing a crucial role in shaping the professional identity of individuals, influencing how they perceive their roles and responsibilities (e.g. Sommerlad 2002, see also, Green 2006 describing how lawyers take their cues from the conduct of those around them when making decisions). Classically, the only form of explicit regulation of such professions is ethical standards drawn up by the professions themselves and enforced by way of self-regulation (Nicolson and Webb 1999, chap. 3). As barristers or solicitors, public prosecutors are subject to these professional codes of conduct. In particular, public prosecutors in an adversarial system are supposed to act impartially, not as if acting for a client, and not seeking convictions as such but fulfilling the role of “minister of justice” (Ashworth and Blake 1998, Young and Sanders 2004, Garg 2024). As “officers of the court”, prosecuting lawyers should “assist the court in the fair administration of justice, and not knowingly [...] deceive or mislead the court” (Ashworth and Blake 1998, p. 17). This involves, for example, not relying on inadmissible evidence for the prosecution case. However, Young and Sanders warn against making too much of this “minister of justice” role and point out that defence lawyers also have a central duty to the administration of justice which takes precedence over their duty to their client (Young and Sanders 2004, p. 195). In fact, the latest editions of the codes of conduct do not mention any specific ethical duty of public prosecutors. Instead, the duty to the administration of justice or the public interest is overriding for all lawyers, whether prosecuting or defending. The Bar Standards Board Handbook states: “You owe a duty to the court to act with independence in the interests of justice. This duty overrides any inconsistent obligations which you may have (other than obligations under the criminal law)” (Bar Standards Board 2024, r. C3). The Handbook specifically provides that the duty to the court overrides any other core duty, including the duty to act in the best interests of the client (Bar Standards Board 2024, r. C4).

Similarly, the introduction to the Solicitors Regulation Authority Principles specifies that

[s]hould the Principles come into conflict, those which safeguard the wider public interest (such as the rule of law, and public confidence in a trustworthy solicitors' profession and a safe and effective market for regulated legal services) take precedence over an individual client's interests. You should, where relevant, inform your client of the circumstances in which your duty to the Court and other professional obligations will outweigh your duty to them. (Solicitors Regulation Authority 2019)

This lack of clear regulation and the fact that much of the prosecutor's accountability stems from unspoken norms and self-regulation is inherently problematic. Literature on prosecutorial discretion and accountability predominantly emanates from the United States where issues of prosecutorial misconduct have long preoccupied criminal justice scholars (e.g. Sklansky 2018, Bellin 2020). Many US commentators have lamented the lack of legal checks in place to frame or guide prosecutorial discretion and avoid prosecutorial misconduct (e.g. Bibas 2009, Wright and Miller 2010). In particular, the vagueness of the "do justice" rule has been consistently criticised (see, amongst others, Zacharias 1991, Green 1999, Medwed 2009, Griffin and Yaroshefsky 2017). This rule requires public prosecutors not to pursue a prosecution at all costs, but to perform a "minister of justice" role. Originally emanating from case law (*Berger v. United States* 295 U.S. 78 (1935)), it was adopted without further definition in professional codes of conduct. Standard 3.1.2 (b) of the American Bar Association Criminal Justice Standards for the Prosecution Function provides that "[t]he primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict." (American Bar Association 2017). More broadly, professional rules or injunctions to be "neutral" have been criticised for failing to provide "meaningful principles to govern prosecutors' exercise of discretion" (Green and Zacharias 2004, p. 904) or a strong basis for accountability through disciplinary sanctions (Zacharias 2001). Similarly in the British context, Jackson warns against codes of conduct that are vague and self-legitimising, failing to provide a strong basis for accountability (Jackson 2006, p. 37).

Policymaking at the CPS: structuring prosecutorial discretion

The need to establish the legitimacy of the CPS as the main prosecution agency in England and Wales has led successive Directors of Public Prosecutions (DPP) to use their policy-making power to increase the transparency and consistency of prosecutorial decisions. Section 10 of the Prosecution of Offences Act 1985 mandates the DPP, as the head of the CPS, to publish a Code for Crown Prosecutors. The Code outlines the principles and guidelines for prosecutorial decisions, including a two-stage test for prosecution and various procedural guidelines. Over time, this Code has been supplemented with

numerous policy documents on specific themes and legal issues, all accessible on the CPS website.³ As I have detailed elsewhere (Soubise 2023), while consistency was the initial goal for a national prosecution service, transparency has become equally important to establish legitimacy in the face of ongoing criticism. In an effort to build public confidence, the CPS adopted a transparent approach to explain its decision-making processes to the public and other criminal justice agencies, for instance simplifying the language of the Code for Crown Prosecutors for broader understanding. Generally welcomed by commentators (Ashworth 1987, Fionda and Ashworth 1994, Ormerod 2012, Sanders 2016), such transparency enhances democratic oversight and effective review of decisions, including through external accountability channels.

Democratic oversight has been enhanced through the publication of CPS policies, providing a transparent framework that allows Members of Parliament (MPs) to scrutinise and evaluate the guidelines governing prosecutorial decisions. This transparency ensures that prosecutorial practices are subject to democratic oversight, enabling MPs to hold the CPS accountable for its policies, whilst sheltering CPS decisions in individual cases from political interference. The ability to review these policies allows Parliament to ensure that the CPS operates within the bounds of fairness, legality, and public interest.

Importantly, CPS policies and guidance not only promote transparency, but also allow the review of prosecutorial decisions against specific and consistent criteria. The implementation of internal scrutiny mechanisms potentially allows for the systematic review of prosecutorial decisions to ensure that decisions align with established policies and guidance, in turn encouraging adherence to policy. In 2010, the CPS introduced the Core Quality Standards (CQS – now renamed Casework Quality Standards) and a monitoring scheme by which CPS managers evaluate the quality of decisions on a random sample of cases against those standards. Compliance with the law, the Code for Crown Prosecutors, Attorney General guidance and relevant policies and guidance issued by the DPP is one of the overarching principles of the Casework Quality Standards and Standard 2 on legal decision-making includes “correctly applying the law and the Code for Crown Prosecutors in each case” as one of its benchmarks of quality (Crown Prosecution Service 2014). Although these hierarchical checks have been described as being more concerned with the speed and form of decisions, than with their substantial quality (Soubise 2023, pp. 435–436), a focus on more qualitative criteria (such as compliance with guidance) could lead to improvements in terms of accountability.

Moreover, the publication of policies and guidance on prosecutorial decision-making also enhances the effectiveness and accessibility of external accountability channels, such as the Victim’s Right to Review (VRR) scheme (on the VRR scheme, see e.g. Manikis 2017, Iliadis and Flynn 2018). By

making these policies publicly available, the CPS ensures that victims are well-informed about their rights and the procedures for challenging prosecutorial decisions. This transparency therefore empowers victims to engage more confidently with the VRR scheme, knowing the criteria and standards that should guide prosecutorial decisions. Finally, although generally reluctant to interfere with prosecutorial discretion (*R. v. DPP, ex p. Manning and Another* [2000] 3 W.L.R. 463), courts in England and Wales have indicated their willingness to treat prosecution decisions as susceptible to judicial review if the Crown Prosecutor has failed to act in accordance with the relevant prosecution policy. For instance, in *R v DPP ex p C* ([1995] 1 Cr App R 136), a CPS decision not to prosecute was quashed because the decision-maker had failed to have regard to one of the matters identified in the relevant part of the Code for Crown Prosecutors. Such willingness extends not only to decisions not to prosecute, but also to decisions to prosecute which were traditionally seen as best challenged through the criminal courts, rather than through judicial review, as can be seen in the case of *R. (on the application of E) v DPP* ([2011] EWHC 1465 (Admin)) where a 14-year-old girl applied for judicial review of a decision to prosecute her for the alleged sexual abuse of her two younger sisters. The Divisional Court quashed the decision to prosecute E, on the basis that the Crown Prosecutor had not followed the DPP's Guidance on prosecuting children for sexual offences. Although the courts generally refrain from interfering with decisions to prosecute or not, it remains that "the more policies there are and the more specific their content, the greater opportunity for challenging the lawfulness of the content and/or the application in a given case." (Ormerod 2012, p. 654). With the proliferation of policy and guidance increasing the risk of litigation, the CPS understandably try to minimise this risk by ensuring that individual decisions conform to policies.

The above policies structure the professional discretion of public prosecutors whilst respecting their expertise as legal professionals and as such are generally well-accepted by prosecutors, as the following quotes from my interviews with prosecutors illustrate:

I think you need guidelines and [the policies] usually set out most of the things that you can come across. It does give a national uniform approach. [Interview respondent EW2]⁴

All our decisions are subjective and if we didn't have some sort of guidance ... you know ... We'd all be off making decisions on a ... a whim ... so yes, I think on the whole [the policies] are useful. [Interview respondent EW9]

It is important policy-wise that we have a stance on certain ... like domestic violence and it is treated the same throughout the country. So, it's understandable why we have policies, it's to create a corporate approach to everything. [Interview respondent EW11]

[Policies] are good to inform the public of what we think of things, I think. It's good that the public know that we are addressing issues that are of concerns, so DV [Domestic Violence], hate crime, other things like that. [Interview respondent EW25]

However, whilst CPS published policies and guidance structure the professional discretion of public prosecutors and respects their individual expertise as legal professionals, there remains scope for improvement. Existing academic commentary on the Code for Crown Prosecutors frequently criticises its lack of clarity in guiding prosecutorial discretion. For instance, Rogers (2006) advocates for a three-stage test to supplant the two-stage test in the Code for Crown Prosecutors. Although guidance tailored to specific legal issues allows public prosecutors to exercise discretion, this flexibility can also engender arbitrariness and inconsistency. While the guidance delineates the boundaries of prosecutorial discretion, it cannot eliminate these risks. Flexibility is crucial to enable prosecutors to tailor decisions to the unique circumstances of each case. Indeed, “legal rules cannot be applied mechanically” (Mascini 2019, p. 133). This individualisation relies on the expert judgement and commitment to ethical decision-making of qualified lawyers, which are core aspects of their professionalism and autonomy (see, e.g. Evans 2019). However, this same flexibility inherently risks arbitrariness and inconsistency in decision-making, potentially threatening public confidence in the justice system. Interestingly, prosecutors I interviewed did not perceive policies and guidelines as impediments to their professional judgement, suggesting they might view the existing balance between guidance and discretion as adequate for maintaining both professional autonomy and public trust:

It's a question of how you interpret guidelines anyway. Some people can interpret the same guideline different ways, so I don't think you'll ever achieve a common standard across the board because people will just have different opinions. But I suppose they've got to be there. [Interview respondent EW4]

I don't [feel constrained by policies]. Because every case is on its merits, as far as I'm concerned. The policies just help to inform the public and yourself of the approach that you should be adopting. [...] the policy document is too broad to fetter you, but it helps just to reinforce certain principles that you should be adhering to, I think. [Interview respondent EW25]⁵

Widdicombe's more recent interviews with Crown Prosecutors (2024b) highlight the diverse ways in which Crown Prosecutors interpret and apply the Code for Crown Prosecutors. This flexibility in interpreting guidelines aligns with my observation that prosecutors do not see policies as impediments to their professional judgement. Widdicombe's findings emphasise the adaptability of the Evidential Test, which is seen as a “moveable feast” (Widdicombe 2024a, p. 510) rather than a strict guideline, supporting the notion that policies are perceived as flexible tools. His research shows that Crown Prosecutors apply the Evidential Test differently based on individual judgement and case specifics,

reinforcing the idea that policies and guidelines are used to inform rather than restrict prosecutorial discretion. This consistency in observations across different time periods underscores the enduring relevance of this finding.

In summary, CPS policies and guidance offer a more structured and transparent framework that exceeds the often ambiguous “do justice” requirement critiqued in the US literature, as well as the current ethical guidelines governing legal professions. They offer a more reliable and equitable system, enhancing public trust and ensuring that prosecutorial decisions are made based on published standards rather than subjective interpretations of justice. Yet, maintaining a constant focus on enhancing the clarity and specificity of principles for prosecution is imperative to achieving a balance between the requisite discretion and consistent, equitable decision-making (Jackson 2006). Nevertheless, while discretion is advantageous for tailoring decisions to the nuances of individual cases, there are inherent tensions in balancing this discretion with the need for consistency and fairness. These tensions are further complicated by unspoken expectations, which can shape discretion in ways that further complicate efforts to ensure transparency and accountability. These implicit norms, arising from the apparatus of control in place at the CPS in line with New Public Management (NPM) principles (Hood 1991), can undermine the effectiveness of CPS policies and guidance and play a role in the de-professionalisation of Crown Prosecutors and Crown Advocates.

From autonomy to conformity: new public management and the disciplinary control of prosecutors

The development of NPM in the 1980s and 1990s was designed to transform the public sector through the application of private sector market principles and managerial techniques to public administration (Hood 1991, Osborne and Gaebler 1992). The core idea was to make public services more efficient, accountable, and transparent by adopting practices such as performance measurement, competitive tendering, and a focus on customer service. This emphasis on efficiency led to significant changes in various sectors, including the criminal justice system, where managerial techniques were applied to streamline operations and improve outcomes (see, e.g. Jones 1993, Field and Thomas 1994, Lacey 1994, Raine and Willson 1997, Brownlee 1998). However, these measures were also designed to reduce professional discretion, as standardised procedures and performance targets have impacted the decision-making process (e.g. McEwan 2011, Ward 2015, Hodgson 2020).

The NPM emphasis on quantitative performance data, while intended to enhance consistency and demonstrate value for money, often serves as a poor proxy for actual quality. This issue is particularly pronounced in professional services, where practitioners, such as public prosecutors, must navigate conflicting goals and make decisions on a case-by-case basis (Sun Beale

2015). The reliance on standardised metrics can undermine the nuanced judgement and discretion required in this context, potentially compromising the effectiveness and fairness of decision-making (in the context of welfare benefits, see Hill 2019). Similar to the various CPS policies and guidance, the introduction and development of managerial methods at the CPS was undoubtedly aimed at improving transparency and accountability to bolster its legitimacy (as discussed above). However, these changes also reinforced hierarchical centralisation and further limited the individual discretion of prosecutors, as decision-making processes are more tightly controlled by higher levels of management, reducing the autonomy of individual prosecutors (Soubise 2023). This autonomy is further constrained: here, Michel Foucault's theory of disciplinary power is helpful to analyse how the implementation of an apparatus of control to monitor staff performance has resulted in the creation of new, unspoken norms.

In *Discipline and Punish: The Birth of the Prison*, originally published in 1975, Foucault (1982) explores how power operates in modern societies through subtle and pervasive means rather than overt displays of force. Foucault contrasts disciplinary power with earlier forms of sovereign power, which were characterised by public spectacles of punishment. Disciplinary power, by contrast, is about controlling and regulating behaviour through less visible means, such as surveillance, normalisation, and examination. Hierarchical observation involves constant surveillance, where individuals are aware they might be watched at any time, leading them to regulate their own behaviour. The normalisation process involves setting standards or norms and judging individuals based on their adherence to these norms. Those who deviate are corrected or punished. Finally, combining surveillance and normalisation, examinations are used to assess and document individuals, further embedding disciplinary power into society.

The segmentation of the prosecution process into smaller, more manageable parts, which can be closely monitored and controlled exemplifies Foucault's concept of disciplinary power. Within the CPS, the prosecution process is divided into specific tasks (e.g. pre-charge advice, trial preparation), with each prosecutor performing narrowly defined roles. This segmentation ensures that each task is performed efficiently and consistently, exemplifying Foucault's idea of detailed control over activities. Foucault also highlights how disciplinary power reduces individual autonomy by imposing strict rules and routines. Similarly, the CPS's narrowly defined roles and standardised procedures limit prosecutors' discretion, distributing decision-making power across multiple individuals. This reduces the likelihood of deviations from established norms and ensures that decisions are predictable and controlled.

The application of NPM to the CPS has led to the pervasive use of audits, evaluations, and performance metrics to monitor and control professional activities, further embodying Foucault's principles of disciplinary power.

Constant monitoring and evaluation of prosecutors' performance is achieved by setting specific targets and using quantitative data to assess whether these targets are met. These performance metrics produce continuous surveillance and ensure that prosecutors' awareness that their actions are constantly being monitored and evaluated induces a state of conscious and permanent visibility. Continuous observation is perhaps best illustrated by the recording of prosecution decisions on a central database and their constant review by other colleagues, facilitated by the segmentation of the prosecution process. This continual exposure of individual decisions to the scrutiny of supervisors and colleagues reinforces the disciplinary power structure, driving prosecutors to conform to standardised procedures and performance expectations, thereby minimising individual discretion and promoting uniform decision making.

Driven by NPM principles, the segmentation of the prosecution process and the development of an audit culture have generated new, often implicit norms which encourage self-regulation. In other words, "normalisation" is a key form of self-disciplinary governmentality which, by subtly influencing individuals to conform to societal standards without explicit coercion, exerts social control with minimal force. Individuals internalise these norms and regulate their own behaviour, reducing the need for external enforcement. Norms can be both explicit and implicit, with clearly defined standards co-existing alongside more subtle, undocumented expectations. Through continuous monitoring and evaluation using standardised metrics and targets, the CPS has created expectations that shape prosecutors' decision-making and professional identities. This process ensures that prosecutors internalise these standards, shaping their practices to conform to prescribed norms. Constant surveillance and evaluation create a self-regulating environment where deviations are quickly identified and corrected, reinforcing desired behaviours. This approach constrains staff discretion and undermines CPS' strategy of enhancing transparency and accountability. It emphasises efficiency, surveillance, and control, while minimising individual discretion and autonomy.

This process of norm creation and internalisation by prosecutors is evidenced by quotes from public prosecutors mistaking unspoken norms for official CPS policies and guidance. Although the quotes refer to policies requiring prosecutors to summon victims of domestic abuse or forbidding them to discontinue cases in specific instances, no such published policy exists. Instead, the quotes echo Porter's findings on the habitual use of "witness summons" and tendency to continue with prosecutions despite victims' wishes in cases of domestic abuse in which the victim withdraws their support for the prosecution. Focusing specifically on intimate partner abuse, Porter showed that these "working practices" undermined the goals of CPS published policies to support victims and ensure justice by promoting a case-by-case approach. Instead, NPM practices prioritise efficiency and standardisation over the nuanced needs of individual cases, creating implicit norms which

constrain prosecutorial discretion by reducing prosecutors' ability to make decisions on a case-by-case basis, increasing pressure to prosecute, and potentially compromising victim autonomy (Porter 2019). A similar unspoken norm existed during my own fieldwork at a CPS office around the discontinuance of cases where the charge had been reviewed and authorised by the CPS. The attrition rate target which managers reminded staff of during meetings, the instruction that all discontinuances be authorised by a manager and the auditing of discontinued cases all served to reinforce the norm in prosecutors' mind (Soubise 2023, pp. 437–438).

One prosecutor (Interview Respondent EW16) highlighted the negative impact of targets and performance indicators: “Anything that’s saying ‘we aren’t prosecuting enough of X, Y and Z cases’, ‘we need more’ or ‘we need to stop dropping’, I think they’re very negative and damaging and constraining [...]”. As the interviewee was specifically asked to comment on CPS policies, the quote demonstrates confusion between performance targets and formal CPS policies. Such confusion is further highlighted when they expressed frustration with how these perceived policies conflict with their independent judgement under the Code for Crown Prosecutors:

I’m supposed to be an independent prosecutor under the Code for Crown Prosecutors and I’m saying ‘there’s no evidence for this, there’s no public interest for this’ but somebody’s saying ‘well, no, there’s a policy that says we have to continue with it anyway’.

This frustration underscores the conflict between performance targets and the professional autonomy required to uphold the rule of law. The prosecutor concluded that these norms are incompatible with their duties as an independent prosecutor: “I don’t see that as being right or compatible with my duties as an independent prosecutor or under the Code.”

Another prosecutor (Interview Respondent EW18) highlighted the need for flexibility in prosecutorial decisions, mistakenly referring to working practices as policies: “I think it’s good to have policy, but I think everyone has to accept that policies have to be flexible. It’s all well and good to have policies to give people guidance but the reality is often very different.” The same prosecutor went on to express concerns about overzealous prosecution in cases with insufficient evidence, again confusing working practices with formal policies: “We sometimes prosecute things such as domestic violence to the point of no return when in many cases there just isn’t that ... There isn’t even the evidence in some cases.” They further mentioned pressures to prosecute, reflecting the influence of ongoing public criticism of some prosecution patterns (mentioned at the start of this paper): “But we’re so desperate to prosecute them that we summons people.” The prosecutor noted that these expectations sometimes lead to excessive actions: “I think sometimes we go too far on those things.”

Thornton's more recent data from 2021–2022 further support these findings. He observed that targets and “box-ticking” exercises significantly influenced prosecutorial decisions, often leading to the pursuit of hopeless cases to meet statistical goals. For instance, prosecutors reported being instructed to run cases to trial simply because all witnesses were present, or to go through the motions even when key witnesses were absent, purely for “box-ticking” purposes (Thornton 2023, p. 71). This aligns with my findings that performance targets can create implicit norms that constrain prosecutorial discretion and lead to confusion between performance metrics and formal policies. Thornton also notes that some prosecutors internalised these targets to the extent that they became part of their professional *habitus*, affecting their decision-making processes and reinforcing the pressures to conform to these implicit norms (Thornton 2023, p. 73).

NPM has thus undermined the professionalism of CPS prosecutors, constraining their autonomy by obliging them to focus on performance targets. The constant oversight ensures compliance with standardised procedures and exerts a subtle form of control over prosecutors' behaviour, aligning their actions with organisational goals and performance metrics. Power (1997) argues that auditing values and practices can become ingrained in organisational culture, shaping how employees perceive and perform their roles. This shift often redirects objectives towards meeting audit criteria instead of achieving substantive goals. Similarly, Fournier (1999) shows how professionalism can act as a disciplinary discourse in a Foucauldian sense, embedding professionals in a “network of accountability” and defining appropriate conduct, so that individual objectives are aligned with organisational expectations. This disciplinary logic inscribes “autonomous” professional practice within a framework that governs conduct at a distance, effectively reducing the scope for professional discretion and autonomy. Evetts (2009) elaborates on this transformation, highlighting how NPM has led to the emergence of a “new professionalism” that serves organisational imperatives and that is characterised by increased managerial control and accountability measures, which reconfigure professional roles and undermine traditional values of autonomy and discretion. Unlike traditional professionalism, which emphasises expertise, ethical standards, and autonomy, NPM prioritises efficiency, cost control, and measurable outcomes.

The drive to enhance trust through managerialism can be seen as part of a wider effort to undermine public sector professionalism. This shift has not only affected prosecutors at the CPS but has also transformed the legal practice of defence lawyers (see, e.g. Newman and Welsh 2019, Johnston 2020, Thornton 2023). The imposition of performance metrics and standardised procedures has constrained their professional judgement, aligning their actions more closely with organisational goals rather than the nuanced demands of justice. By prioritising performance metrics and cost control, NPM displaces the core values of professional practice, leading to a de-professionalisation of

roles such as those of CPS prosecutors and defence lawyers. This shift not only impacts the quality of legal practice but also raises broader questions about the role and identity of professionals in the public sector.

Crucially, these new norms or “working practices” are not always expressly communicated, nor published. As argued by Porter, these NPM practices “operate, *often in unacknowledged ways*, to influence how [prosecutors] make decisions (...)” (Porter 2019, p. 510, emphasis added). As a result, they cannot be scrutinised by defendants, victims, or the public at large, negatively impacting transparency and accountability of prosecutorial decision-making. This lack of reviewability and consequent lack of accountability was recently illustrated in the judicial review case brought by the End Violence Against Women (EVAW) Coalition against the CPS in 2020 (*R (on the application of End Violence Against women Coalition) v Director of Public Prosecutions* [2020] EWHC 929 (Admin) and *R (on the application of End Violence Against women Coalition) v Director of Public Prosecutions* [2021] EWCA Civ 350 (on appeal)).

The impact on CPS lawyers and victims: the EVAW case

This judicial review case exemplifies the de-professionalisation of CPS lawyers due to managerial practices that undermine formal policies aimed at transparency and accountability. NPM practices create an environment where prosecutors feel constrained by unspoken expectations, leading to either a bold approach or a more cautious attitude, resulting in variations in prosecution rates for rape and other serious sexual offences. The case underscores how the drive for performance metrics conflicts with the core values of justice and fairness, ultimately affecting the professional autonomy and discretion of CPS lawyers. This de-professionalisation not only impacts the lawyers but also has significant repercussions for victims, as inconsistent prosecution practices can undermine the legitimacy and effectiveness of the CPS.

The EVAW coalition argued that, in 2016, the CPS had changed its approach to prosecuting rape cases, leading to a significant drop in the number of cases being charged and prosecuted. They claimed that the CPS had unlawfully shifted from a merits-based approach to a “bookmaker’s” approach in prosecuting rape and other sexual offences. The merits-based approach evaluates the likelihood of conviction based on the intrinsic merits of each case, focusing on the quality and strength of the evidence. In contrast, the bookmaker’s approach assesses the statistical probability of conviction based on past verdicts, often leading to the dismissal of cases with lower perceived chances of success, regardless of their merits. The EVAW coalition highlighted the removal of detailed legal guidance on the merits-based approach from CPS training materials and guidance documents starting around late 2016 (*R (on the application of End Violence Against Women Coalition) v Director of Public*

Prosecutions [2020] EWHC 929 (Admin) at [8]). Additionally, they pointed to a series of training sessions known as “Roadshows” held in 2016–2017, where it was allegedly suggested that weaker cases should be dropped, and a performance indicator of a 60 percent conviction rate was mentioned (*ibid.* at [10]). The CPS acknowledged that a 60 percent conviction rate was mentioned during training sessions but claimed that this was an aspiration rather than a minimum target.

This shift exemplifies the de-professionalisation of CPS lawyers, as it undermines their autonomy and discretion. Previously, a prosecutor, exercising their professional autonomy, would have focused on the merits of each case. However, the introduction of performance metrics, such as the 60 percent conviction rate mentioned during training sessions, has created new unspoken norms within the CPS. These norms prioritise achieving specific targets over the intrinsic merits of each case, leading prosecutors to assess the statistical probability of conviction based on past verdicts. This approach often results in the dismissal of cases with lower perceived chances of success, regardless of their merits, in order to meet performance indicators. Consequently, these unspoken norms constrain professional autonomy and discretion, as prosecutors feel pressured to conform to performance metrics rather than exercising independent judgement. This method can perpetuate myths and stereotypes, particularly in cases of sexual offences where societal biases and misconceptions about victims’ behaviour and credibility may have influenced past outcomes. As a result, the pursuit of justice based on the actual merits of each case is undermined. These examples illustrate the erosion of autonomy resulting from NPM practices, which not only de-professionalises CPS lawyers but also significantly impacts victims.

The creation of implicit expectations for prosecutors through managerial practices was acknowledged by CPS representatives in their evidence to the court. Senior CPS officials, including the Director of Legal Services and the DPP, appear to recognise that the way managers promoted the merits-based approach prior to 2016 led some prosecutors to feel pressured to prosecute nearly every Rape and Serious Sexual Offences (RASSO) case. They gave evidence that some prosecutors believed there was a presumption in favour of prosecution, leading to confusion and inconsistent application of the full Code test (*R (on the application of End Violence Against women Coalition) v Director of Public Prosecutions* [2021] EWCA Civ 350, at [40]–[56]). The CPS argued that the decision to remove references to the merits-based approach from training materials and guidance documents was aimed at clarifying that only cases meeting the full Code test should proceed, thereby addressing the implicit expectations created by previous managerial communications.

The CPS further argued that the changes were intended to clarify and reinforce the correct application of the full Code test. Yet, while the CPS maintains that it did not encourage prosecutors to adopt a bookmaker’s approach or

change their approach to tackling myths, stereotypes, or prejudices in serious sexual offence cases, the emphasis on conviction rates during the training presentations could have inadvertently created new implicit expectations among prosecutors. This might have led some to believe that achieving higher conviction rates was prioritised over a merits-based approach to case evaluation. Thus, it is not impossible that the roadshows influenced prosecutors to adopt practices aligned with the bookmaker's approach, even if this was not the CPS's intention. Similarly, although the CPS described the 60-percent conviction rate as an aspiration, it is possible that it was perceived by some prosecutors as a directive, influencing their decision-making.

The Court of Appeal's dismissal of the End Violence Against Women Coalition's claims highlights the significant implications of managerial practices and the unspoken norms they create within the CPS. The Court found that the CPS' actions, including the removal of references to the merits-based approach from training materials, aimed to ensure the correct application of the full Code test and were lawful. The judgment has significant implications, particularly regarding the reviewability of managerial practices and the implicit expectations they create. Any norms or pressures arising from these practices remain unchecked and unchallenged. As these implicit norms are not officially recognised or codified within the CPS, they do not appear in formal policies or guidelines, making it difficult to identify and address them through legal or procedural means. While the CPS can present its published policies as transparent and accountable, the reality is that these policies may be eclipsed by unspoken norms that influence prosecutorial decisions. This creates a risk that prosecutors may feel pressured to prioritise performance metrics, such as conviction rates, over the merits-based approach outlined in the formal guidelines. In reality, the transparency provided by published policies is superficial, potentially eroding public trust in the CPS. If the public perceives that prosecutorial decisions are influenced by unreviewable and unpublished norms, confidence in the fairness and integrity of the justice system may be compromised. The EVAW judgment underscores the need for clearer guidelines to ensure that all norms influencing prosecutorial decisions are formally recognised and documented. Further, this case underlines the way in which managerial practices and the norms they have generated have weakened CPS lawyers' autonomy, constraining their professional judgment and discretion.

Conclusion

Drawing on data from 2012 on prosecutorial discretion, and in light of ongoing criticisms of the CPS, this article has explored how the CPS is currently negotiating the difficult balance between professional discretion and societal demands for transparency and accountability. It concludes that, despite the

publication of numerous policies and guidance, the decision-making process of CPS prosecutors continues to be significantly constrained by implicit norms arising from managerial practices that prioritise performance metrics. These metrics are unreliable indicators of adherence to published policies. Consequently, managerial practices that rely on these metrics risk creating implicit norms that contradict the official guidelines. The problem is compounded by the fact that these implicit norms lack clear definitions. Because they are implicit, they are not formally articulated or documented, making them inherently vague and open to interpretation. Additionally, since these norms are not part of any official guidance or policy documents, they are inherently opaque, inaccessible and therefore unreviewable. As a result, the introduction of performance metrics and control mechanisms, while intended to enhance accountability, in fact merely provides a veneer of legitimacy. This superficial appearance of compliance with societal expectations can mask deeper issues within the organisation, where unspoken norms and pressures significantly influence prosecutorial decision-making.

The judicial review case brought by the End Violence Against Women (EVAW) coalition against the CPS in 2021 serves as a critical example of this phenomenon. The case highlighted how internal performance targets and managerial practices led to a cautious approach in prosecuting rape cases, ultimately undermining the CPS's stated goals of justice and fairness. This disconnect between official policies and actual practices poses a significant risk to the CPS's legitimacy, as it erodes public trust and confidence in the justice system. The Court of Appeal's decision in the EVAW case highlighted that managerial practices and the implicit expectations they create are not subject to formal review or scrutiny. This veneer of legitimacy is problematic because it creates a false sense of accountability and trust, masking the underlying issues and allowing questionable practices to persist unchallenged. It ultimately undermines the integrity of the justice system and erodes public confidence in the CPS's commitment to fairness and justice.

The de-professionalisation of CPS lawyers due to managerial controls highlights the need for a balanced approach to ensure true accountability and transparency. While hierarchical checks are essential for ensuring accountability, they must be carefully balanced to avoid creating a mere facade of legitimacy. True accountability and transparency require that prosecutorial discretion be exercised free from undue internal pressures and implicit norms. The findings of this article underscore the need for a more nuanced approach to managerialism within public services, one that genuinely supports the principles of justice and upholds the integrity of prosecutorial decision-making. These examples illustrate how audit culture can distort organisational goals by reconfiguring individuals' subjectivities and constraining their autonomy, which is core to professionalism and lawyers'

capacity to serve the rule of law. This de-professionalisation not only impacts the lawyers but also has significant repercussions for victims, as inconsistent prosecution practices can undermine the legitimacy and effectiveness of the CPS.

Notes

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2. It is worth noting that the CPS does not have a monopoly over the prosecution process in England and Wales. In addition to private prosecutions, there are several specialist prosecuting agencies (e.g., Serious Fraud Office, Health and Safety Executive). In addition to those national agencies, local authorities are also responsible for prosecuting certain offences (e.g. benefit fraud). Finally, alternatives to prosecution (such as cautions, penalty notices or restorative justice initiatives) remain largely in the hands of the police, rather than the CPS.
3. <https://www.cps.gov.uk/prosecution-guidance> (accessed 22 January 2025).
4. Interviewees are coded by the letters EW for England and Wales and a number (e.g. EW-16).
5. Similar views were expressed by interview respondents EW3, EW20, EW21, EW23, EW24, EW27, EW29, and EW30.

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