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Research Article

"Cerberus at the Gate": The Fundamental Connection between Prosecutorial Discretion and Justice

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Prosecutors are routinely accused of somehow failing the public whom they serve. Controversy arises when the prosecutor is seen to be too harsh, too lenient, too politically active, not politically active enough, and so on. What unites the voices in this conversation is some set of presupposed beliefs about the proper constraints on prosecutorial discretion. Yet, there is no clear normative framework which offers a general explanation of how and why prosecutorial discretion should be constrained. This article devises such a framework, arguing that prosecutorial discretion is fundamentally connected to the concept of justice, and that the prosecutor should be bound to do justice rather than simply serve the law. Questions about how to constrain prosecutorial discretion must therefore be answered by reference to some conception of justice, and prosecutors must be evaluated based on this, not simply based on whether they have complied with legal rules.

Keywords: prosecutorial discretion, justice, moral and political philosophy, applied philosophy, criminal law

1. Introduction

The domain of the criminal law is one which the ordinary citizen would rather not enter. Nevertheless, every day many find themselves before a judge, jury, or bench of magistrates, standing trial for a crime they may or may not have committed. In most legal systems, no one reaches this point without the approval of a prosecutor, usually a public prosecutor,[1] who must decide who should and should not be prosecuted. In this sense, the prosecutor is a metaphorical

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"Cerberus at the gate" of the whole criminal justice system, deciding who goes in and who stays out.[2] Similar descriptions of the prosecutor as a gatekeeper are not hard to find.[3] At stake in the prosecutor's gatekeeping decision is the imposition of a whole range of harms distinctive to undergoing criminal prosecution, such as strain on relationships, physical and mental health, and loss of employment, all of which are additional to the risk that the accused will ultimately be convicted and deprived of their liberty or even their life.[4]

This raises an obvious question: how should a prosecutor make decisions about who does or does not get prosecuted? More precisely, how and why should their exercise of discretion in this regard be constrained? The answer may also seem obvious: prosecutors should prosecute people who are (probably) guilty and decline to prosecute those who are not. But this somewhat flippant response would miss the point entirely. It is not just the outcome we are interested in, but the process by which the decision is made and the remedies which exist when the prosecutor appears to have got it wrong. This worry has motivated attempts to theorize prosecutorial discretion, in an effort to pin down what exactly should constrain such discretion in a liberal-democratic criminal law.[5] Such theories tend to argue either that the prosecutor should zealously serve the law or that they should transcend service to the law in favor of administering justice.

The arguments in the existing literature also tend to be localized and therefore jurisdictionally contingent. By contrast, in this article I argue that prosecutorial discretion has a conceptual connection to justice, such that exercising prosecutorial discretion ought to be constrained by an overarching requirement to do justice. I distinguish between the concept of justice and particular *conceptions* of justice (in particular socio-political contexts, such as racial justice, social justice, economic justice, and so on) and argue that the fundamental connection exists only between the concept of justice and prosecutorial discretion. The concept of justice is, in simplest terms, the most general understanding of justice, one which does nothing more (and nothing less) than differentiate what it means to try to do justice from what it means to try to do something else.[6] The concept is distinct from, but related to, various conceptions of justice, such as racial justice, social justice, economic justice, and so on. More specifically, the concept of justice is prior to these particular conceptions of justice and, as such, serves a different purpose. Whereas conceptions of justice purport to flesh out the meaning of justice in particular circumstances, the concept of justice has a pre-interpretive function: it helps us "distinguish conceptions of justice we reject, even deplore" from those which we would not properly count as conceptions of justice at all.[7]

In making this argument, I also defend the claim that the exercise of prosecutorial discretion is a feature of any legal system except one which is completely arbitrary. Thus, what follows is limited not to any particular jurisdiction, but applies to any legal system which strives for the principled exercise of discretion in the decision of whether or not to prosecute. This is not to suggest that prosecutorial decision-making is the same everywhere, but rather that the relationship between justice and prosecutorial discretion is of the same kind in any legal system which features prosecutorial discretion subject to normative constraints.

I then argue that this connection between law and justice entails three main consequences in any jurisdiction where prosecutorial discretion is exercised. First, justice is the correct norm to use as an overarching constraint on the exercise of prosecutorial discretion, and constraints on prosecutorial discretion should therefore be evaluated based on how faithful they are to doing justice. This provides a basis on which to critique both theories of prosecution, such as Rogers' three-part test,[8] and of legal rules which limit the exercise of prosecutors' discretion, such as the Crown Prosecution Service's (CPS) "full code test."[9] Second, divergent outcomes between factually similar cases in different jurisdictions can be explained as applications of different *conceptions* of justice. This, in turn, means that such outcomes do not necessarily imperil the rule of law in the way which they are sometimes supposed to. Finally, consideration of which conception, or conceptions, of justice are favored in a particular jurisdiction should weigh heavily in the selection of that jurisdiction's prosecutors, whether appointed or elected. Ultimately, the article aims to shift the debate away from a clash of law versus justice, and toward a more systematic discussion of what justice requires in the context of prosecutorial discretion.

The article develops this argument over four sections. Section 2 sets out the problem with constraining prosecutorial discretion in more detail and explains why existing approaches or local legal constraints, such as the full code test, are inadequate on their own. Section 3 then posits and defends what I call the "fundamental connection thesis" (FCT). The FCT provides that there is a fundamental connection between the exercise of prosecutorial discretion and justice, such that the exercise of the former necessarily triggers an obligation for the prosecutor to be bound to do justice, even where other obligations suggest otherwise. Section 4 discusses the implications of the FCT, noting what does and does not follow from embracing the thesis's conclusions. Finally, Section 5 offers concluding remarks.

2. The Problem with Prosecutorial Discretion

In this article, I take prosecutorial discretion to mean the decisions made by prosecutors about whether or not to charge someone with a crime, or to make some sort of informal or alternative disposition of a case.[10] This discretion is inherent in the role of a prosecutor in at least two ways, regardless of the specific rules guiding prosecutorial activity in any given jurisdiction. First, prosecutors must decide whether the case with which they are presented fits in some way with the substantive criminal law, i.e. whether there is a prima facie case that an offense has been committed, and, if so, which one.[11] And second, the prosecutor must make some sort of determination as to whether there is sufficient admissible evidence which can be used to prove that the accused, in fact, committed the offense.[12]

In common law systems, there is often a further aspect to the exercise of prosecutorial discretion, which entails determining whether or not it is in the public interest to proceed with prosecution. For example, in England and Wales, Crown prosecutors must apply the "public interest test" set out in the *Code for Crown Prosecutors*.[13] Scotland has a similar code,[14] and the US Department of Justice's *Principles of Federal Prosecution* refers to a number of grounds which may count in favor of, or against, proceeding with a federal prosecution.[15] All of these tests require the prosecutor to make a determination about the appropriateness of proceeding with a prosecution, based on considerations other than whether or not there is sufficient evidence that the accused has committed an offense. "Prosecutorial discretion" should be taken to include any and all such aspects of the decision-making process and its outcome, for present purposes.

Prosecutorial discretion crops up frequently as a reason for public outrage, and as a key target for criminal justice reform. Claims about prosecutorial failings abound and tend to focus on emerging areas of public concern which are connected to broader social movements.[16] Controversy arises when the prosecutor is seen to be too harsh,[17] too lenient,[18] too politically active,[19] too politically inactive,[20] and so on. Meanwhile, academics, especially (but not exclusively) in the United States, put the prosecutor in their crosshairs for a variety of reasons, usually to do with the exercise of their discretion. For example, prosecutors have been described as drivers of the "racial inequity" and the "excessive severity" of the criminal justice system,[21] with prosecutorial discretion being characterized as "largely responsible for the tremendous injustices" of the criminal process.[22] As one American commentator put it: "Prosecutors are the Darth Vader of academic writing: mysterious, powerful, and for the most part, bad."[23]

So why is prosecutorial discretion the source of so much public ire, and such emphatic academic criticism? This section addresses this question, and, in doing so, provides a rebuttal to this criticism, situating the "problem" with prosecutorial discretion within the broader, enduring conflict between those who believe legal actors must practice strict rule-adherence, and those who would entrust legal actors with discretion to apply the law. It is this tension that helps explain why so many commentators are so mistrustful of prosecutors and their discretion. I argue below that prosecutorial discretion is wrongly blamed for the inequities and failings of the criminal justice system because it appears to conflict with a powerful political ideal: the rule of law. However, the extent of this conflict is easily overstated, and below I defend the positive value of prosecutorial discretion.

Moreover, the problem is not just that prosecutorial discretion appears to cut against strict adherence to legal rules, it is that the stakes are also very high. This is true not just because prosecution exposes the accused to a risk of conviction and all of the harms this entails,[24] but also because there are distinct "harms of prosecution."[25] These are harms which the accused person suffers simply by being the subject of prosecution, regardless of whether or not their prosecution results in punishment.[26] These harms include, but are not necessarily limited to: the risks to one's job, livelihood, and personal relationships; the possibility of being held in custody on remand; the mental and physical stress caused by having a possible trial; the confiscation of one's property; and the increasing danger of becoming the target of vigilante justice.[27] The harms of prosecution are doled out, or withheld, every time a prosecutor decides whether or not to charge someone with a criminal offense.

To help illustrate these points, I will now discuss the most extreme theory of prosecutorial discretion, Bellin's "servant of the law" model, which advocates for legal constraints that reduce prosecutorial discretion into nothing more than fact-sensitive prosecutorial rule-adherence, removing any conception of justice from the equation.[28] Ultimately, I will reject Bellin's approach, but its failings will point towards a more plausible theory, the fundamental connection thesis, which I flesh out in section 3.

2.1. The Extreme View: Bellin's "Servant of the Law" Model

Bellin's approach, laid out in his 2020 article "Theories of Prosecution,"[29] presents a fundamental challenge to the whole enterprise present enquiry, as Bellin's goal is the reduction of the scope of prosecutorial discretion to a bare minimum, in favor or strict adherence to legal rules. If Bellin's argument holds and prosecutors really ought to have only minimal discretion, there is no need to elaborate a normative framework for constraining their discretion. It will already have been constrained out of existence. I will therefore show why Bellin's approach is both implausible and undesirable and provide a positive argument for why prosecutorial discretion is valuable.

Bellin begins with a "long unanswered question" in mind: "what is the role of the American prosecutor?"[30] However, his ambitions are larger than answering this seemingly descriptive question about US prosecutors. As becomes clear, Bellin is interested in a "*normative* theory of prosecutorial behavior" one which can ground the rules or standards governing prosecutorial discretion and allow us to figure out what those rules or standards should be.[31] To make the case for the need for such a theory, Bellin points to the current trend of "progressive prosecution" which has taken hold in the US.[32] This trend has seen a wave of reform-minded prosecutors, with varying agendas, elected as public prosecutors (known as district attorneys, or "DAs") for major US cities such as Philadelphia and New York City. Once in office, these prosecutors then take a variety of steps, according to Bellin, such as "declining to [enforce] locally unpopular laws" or seeking social justice by "vigorously prosecuting police officers" who break the law.[33] However, this trend can also cut against the so-called progressive movement, with DAs in more conservative parts of the US demonstrating their "tough on crime" credentials, for example, by being much more likely to seek the death penalty.[34] For Bellin, these starkly divergent practices in different US jurisdictions share a common problem: despite being contradictory approaches to prosecution, any of the different approaches can seemingly be justified under the "roaming mandate" of simply telling prosecutors to "do justice."[35]

Bellin identifies two basic flaws with the "doing justice" approach, which I refer to here as inconsistency and indeterminacy.[36] The first problem, according to Bellin, is that the meaning of justice is vague and contestable, which can lead to inconsistent outcomes. This is evident in his critique of both progressive and conservative prosecutors "all doing their own justice thing" to justify very different prosecutorial approaches.[37] This leads to inconsistency in terms of outcomes, as DAs in different parts of the US may end up prosecuting (or not prosecuting) under very similar circumstances, for very different reasons. Bellin attributes this problem to the overarching mandate of "seeking justice."[38] After all, as Bellin wryly observes, "philosophers have been trying to define 'justice' for thousands of years and report little progress."[39] He concludes that, though justice may be a "great slogan," it works best as a "job description … for superheroes," not prosecutors.[40] In the real world, he argues, justice requires clear rules which are capable of guiding prosecutors' behavior.

Bellin is certainly not wrong to identify the need for a normative theory of prosecution, nor to critically examine the "doing justice" approach which prevails in his jurisdiction. And he is entirely correct in saying that such a theory of prosecutorial discretion could bring the benefits of greater clarity and determinacy about the prosecutorial role and help provide a normative benchmark against which prosecutorial discretion can be evaluated. But, in framing the problem as one of divergent outcomes, Bellin misses the point, assuming that certainty of outcome is the most important value at play, optimizing it at all costs without an argument as to why it must be prioritized in this way. Moreover, it seems very unlikely that any theory, no matter how well crafted, could solve the problems that Bellin has raised with the wildly different approaches of different DAs in the US. Though he does not mention it as a cause, a simpler explanation is that wildly different prosecutorial approaches are a fairly predictable outcome of a system where prosecutors are frequently appointed not on merit but instead elected based on partisan allegiance via state and local elections.

It is ill-advised to dispense with justice so casually, especially when one is seeking to set up a system of criminal justice. Bellin's justification for this, namely, the identification of the so-called inconsistency problem, is simply illogical. Consensus on the meaning of many foundational pillars of the criminal law is rarely forthcoming. The modern debate on criminalization theories is one prime example, with scholars offering starkly different theories on what behavior ought to be a crime and why.[41] But presumably Bellin would not take this as a sign that we should abandon the process of creating new crimes, since agreement is just too difficult to secure. Nor, presumably, would he characterize a debate about the proper aims and scope of criminal law as futile. As such, it is difficult to see how the mere existence of disparate prosecution outcomes can be attributed solely to the notion that prosecutorial discretion should be guided by justice. More broadly, Bellin does not explain why consistency of outcome should be prioritized over all else, nor why "doing justice" cannot be refined as a normative standard to address his concerns without jettisoning justice altogether. Bellin's conclusion is simply too quick.

The second key criticism which Bellin offers is that justice-based constraints on prosecutorial discretion are *indeterminate*. By this, he means that "doing justice" as a normative standard offers insufficient guidance to prosecutors faced with making "hard decisions about real cases."[42] Individual prosecutors, according to Bellin, can learn very little about how to handle such cases from a mandate to seek justice.[43] This echoes concerns of earlier commentators, such as Zacharias, who argued that requiring prosecutors to simply do justice "establishes no identifiable norm" and leaves them with only their own personal morality to guide their conduct.[44] Again, this is an unconvincing reason for completely abandoning the notion that prosecutors should ultimately seek to do justice. Bellin acknowledges this, saying that the requirement to do justice "may well be the best of a flawed set of alternatives."[45] Unfortunately, Bellin does not continue his analysis to unpack why he thinks justice is indeterminate, but law is not. Nor does he explain how this *uncertainty* in the application of a mandate to do justice in hard cases is equivalent to *indeterminacy* of the requirement to seek justice.

An immediate problem with this line of critique is that uncertainty and indeterminacy are not the same thing.[46] In this context, uncertainty would refer to difficulty in arriving at a correct application of law or justice to a particular prosecution decision. Indeterminacy, by contrast, would refer to law or justice being fundamentally unable to determine the right correct approach to take. Uncertainty is therefore far less fatal to the enterprise of theorizing prosecutorial discretion than indeterminacy is. Bellin correctly identifies that there is inevitably going to be uncertainty in how the notion of justice can be applied to a particular hard case. Yet he then appears to move from this to embracing a kind of "no-right-answer" approach when it comes to justice. Not only does this elide the distinction between uncertainty and indeterminacy, it also fails to provide a persuasive argument for the determinacy of law, as opposed to justice.

On closer examination, this tactic is nothing more than a restatement of the idea that certainty in the application of the law is possible, but certainty in the application of justice is not. What is missing is an account of why justice is indeterminate, and indeterminate in a way that law is not. The best explanation of this gap in Bellin's argument is that he has presupposed that a "good" theory of prosecution is one which can effectively pre-empt all (or even many) tough, value-laden decisions, ostensibly by providing a catalogue of situation-specific concrete rules of the form "if X then Y." This sets up Bellin's conclusion, explored below, that the best theory of prosecution is one which enjoins to do nothing more than serve the law, since laws paradigmatically use an "if X then Y" framework.

But again, there is an issue with the underlying reasoning here. Specifically, there is no reason to think that a normative theory of prosecution should be designed with this end in mind. In fact, this line of thinking puts the cart before the horse, trying to reverse-engineer a theory of prosecution by seeking out a rule that is easy to apply in practice. But there is no reason to assume that the accessibility of straightforward answers should be prioritized above all else. On the contrary, it is not difficult to imagine the pitfalls of such an approach where prosecution decisions are made by some sort of sophisticated prosecutorial algorithm designed to apply the law and maximize certainty. All of this illustrates the need for an argument that engages with competing values at stake, rather than insist that only certainty is valuable and only law can provide it. As such, Bellin's second line of argument in his diagnosis of the problem is ultimately unconvincing.

Given the above criticism, it is unsurprising that I find his proposed solution to the problem is also ultimately lacking. In simple terms, Bellin argues that the only defensible theory of prosecution charges prosecutors to do nothing more, and nothing less, than act as "servants of the law."[47] This offers several benefits, according to Bellin, all of which owe to the fact that it is easily applied: prosecutors must do what the law says, and not do what the law prohibits. The result, he argues, is a prosecutor who is "indifferent to winning a case, and zealous only in ensuring that the laws are followed."[48] On Bellin's view, this approach therefore solves the problems of inconsistency and indeterminacy which were discussed above.

Bellin gives examples of specific scenarios where this approach is preferable than a mandate to "do justice". One such example is at the stage of making a charging decision.[49] At the charging stage, the prosecutor as a servant of the law should charge based on how the facts of a case match up to the crimes in their jurisdiction.[50] Overcharging and undercharging would be prohibited, on Bellin's account, because prosecutors should adhere to the legal requirement to charge based on sufficient evidence for serious cases, and divert minor charges only where authorized to do so by the legislature.[51] If this is out of deference to the separation of powers, then it is worth observing here that legislation does not take place in a political or moral vacuum, and prosecutors would just be deferring to whatever conception of justice (among other considerations) informed the legislature.

In any case, it is difficult to see how a requirement to serve the law provides any rational basis for preferring a more minor charge over a more serious one, or vice versa. After all, in both cases the prosecutor is serving the law. The choice of which law to serve cannot possibly be resolved by reference to the law which one ends up serving. If I go to a restaurant which serves both burgers and fish and chips, and commit to only order foods which are on the menu, how can the menu answer the question of what I should eat for dinner? It cannot, and the same is true for the law's ability to tell prosecutors which law to serve, or how to serve it.

Ultimately, Bellin's servant of the law model has been shown to be flawed. It overstates the problems with enjoining prosecutors to do justice, assumes that justice is indeterminate but that law is not, and its only key benefit is that of increased certainty. In what remains of this article, I offer an alternative to this theory which avoids the pitfalls of the servant of the law approach and which has a number of distinctive benefits. However, before offering my proposed approach, a brief diversion into the wider context of the problem of prosecutorial discretion is necessary.

2.2. Rule of Law Versus Discretion: A Clash of Values

Bellin's approach, as outlined above, would reduce prosecutorial discretion to an absolute minimum in the name of optimizing certainty of outcome. Implicit in Bellin's argument is a hidden premise, and one which must be unpacked before further progress can be made. Though unstated, the premise which underlies Bellin's elevation of legal certainty above all else, including justice, should be familiar to legal philosophers: the "servant of the law" model is a localized expression of a strong preference for the use of legal rules instead of discretion. That is, in general, the argument is predicated on the idea that decisions should generally be constrained to produce uniform outcomes produced by general rules, rather than giving officials discretion to make such decisions. But it is far from obvious that adherence to rules is generally more valuable than exercising discretion, nor is it clear that rule-adherence should be preferred in the context of prosecution. On the contrary, in what remains of this section I argue that prosecutorial discretion is valuable and essential in the context of the criminal justice system, and should not be deprioritized in favor of rule-adherence.

To demonstrate why prosecutorial discretion is not just an aberration which needs to be whittled away to nothing by legal rules, as Bellin suggests, some brief context on the "rules versus discretion" debate is necessary. Law is typically thought of as being intimately connected to the idea of rules. When lawyers or legal philosophers speak of "the law," we tend to talk in terms of legal obligations and duties, imposed by legal rules.[52] Rules, as generally understood in legal scholarship, mandate certain consequences when specific triggering conditions are satisfied.[53] Rules therefore operate in an "all-or-nothing fashion": when a rule applies and the facts it stipulates are fulfilled, then its answer to those facts must be accepted.[54] So, for example, the rule that the speed limit for a motor car traveling on a dual carriageway in Great Britain is 70 miles per hour means that anyone who travels in excess of this speed, e.g. 75 miles per hour, on a dual carriageway in Great Britain is speeding. There may be exceptions to a rule such as this, but these only flesh out and refine the scope of the rule.[55] The value of rules is that they provide certain outcomes: they either apply or they do not.

By contrast, discretion is much less clear-cut. The nature of discretion is that it vests individuals or institutions with the power to make certain decisions subject to some set of predetermined standards.[56] Discretion can be limited by legal rules to varying degrees, depending on how much relative freedom one wants to accord the person exercising the discretion. It is perhaps unsurprising, then, that the certainty of rules, compared to the more amorphous nature of discretion, makes rules intuitively attractive as a form of regulating prosecutorial discretion, given how much is at stake for individuals accused of crimes (to say nothing of the victims of crime and the general public). This flows naturally from a commitment to the rule of law, a principle which has attained a highly privileged status within legal scholarship and legal systems around the world, and which privileges the equal application of the law to all, without fear or favor.[57]

And, of course, the value of rules in doing this is observable across a range of contexts, not just within the criminal law. A game of rugby, for example, or a disciplinary code of conduct at a school, would scarcely be possible without rules. Similarly, legal rules help organize society and guide human conduct.[58] For these reasons, any legal system committed to the rule of law must provide some restriction to prosecutorial discretion; there must be at least some rules to guide their behavior.[59] As such, we might suggest that discretion is simply a potentially dangerous and illiberal gray area in which lawlessness can thrive and individual prosecutors have the potential to do great injustices. As such, the argument might go, we need to simply eliminate discretion as much as possible, in the service of legal certainty. But this would be too hasty, not to mention unrealistic.

After all, the rigor of rules and their all-or-nothing application is not without drawbacks. In particular, problems can arise when legal rules, formulated to be of general application to the citizens of a jurisdiction, lead to injustice in individual circumstances. The law cannot prescribe just outcomes for every possible set of circumstances in advance, especially in complex human societies undergoing constant socio-political change. Rather, the law is designed as a set of universal rules of general application, which can present problems for another value typically thought of as an important one for legal systems: doing particularized justice in individual cases. The value of discretion, including prosecutorial discretion, is, therefore, that it allows for the preservation of universal legal rules, whilst providing for a means of tailoring those rules' application to particular circumstances in order to minimize injustice, without creating a rule that would cause harm when generalized to other, similar circumstances. As such, discretion is better conceived of as an important and valuable way for reasoned, human judgment to refine, apply, and develop the law, in a manner consistent with a general commitment to doing particularized justice.[60]

There is therefore a clash of values between legal certainty on the one hand and individualized justice on the other. Against this backdrop, anxiety about reining in prosecutorial discretion and the corresponding impulse to regulate prosecutors' discretion through the imposition of rules can be better understood. I take the value of doing justice to be self-evident, particularly in the context of criminal cases. But the question remains: why prioritize doing justice over following rules, where the two conflict? Or, put differently, why *shouldn't* we just prioritize rule-adherence in the way Bellin suggests?

My answer to these questions is simple: we should not confine the prosecutor to being a simple servant of the law, adhering to some catalogue of legal rules for disposing of individual cases, because this would render it impossible to do particularized justice. On this point, it is worth remembering that the rule of law is only one of a handful of important virtues of a legal system, sitting alongside – not above – others such as justice and respect for the dignity of all persons.[61] Moreover, even if a legislature were somehow able to produce a set of prosecutorial rules so compendious that it could tell a prosecutor how to dispose of every case that came before them,[62] such a legal system would inevitably cause "considerable injustice to virtually everyone accused" of committing a crime.[63] Rules alone are simply too broadly stated to be applied in an assembly line fashion, without sacrificing justice along the way.

And in the context of criminal law, and of prosecutorial discretion in particular, such an approach would strike a wholly inappropriate balance. The reason for this, as explored in more depth in the next section, is that prosecutors exercise a crucial gatekeeping function as part of the role within the criminal justice system. The prosecutor cannot simply decline to make a decision about whether or not someone should be prosecuted; it is precisely their job to make such decisions. Prosecutorial discretion is therefore a paradigm example of a case where law "cannot be sequestered from human participation."[64] As such, it is also a paradigm example of the value of discretion which should be exercised by reference to an appropriate normative standard, to help ensure that discretion is exercised in a principled way, minimizing arbitrariness and prosecutors accountable for their decisions.

So, there is good reason to think that discretion is valuable per se in the context of what prosecutors do. This is not to say that legal certainty is not valuable at all in this context, or that prosecutors should have free rein to disregard the law and exercise an untrammeled discretion to do as they please in individual cases.[65] On the contrary, we should generally expect prosecutors across a given jurisdiction to decide similar cases similarly. But what we should not do is what Bellin suggests, which would optimize legal certainty to the degree prosecutors would be expected to dispose of similar cases *identically*. Instead, their discretion must be bounded by an appropriate normative standard, and it is this task to which the article now turns.

3. Doing Justice and Exercising Prosecutorial Discretion

By now, it is evident that some sort of limit on prosecutorial discretion is desirable, but that, if we evaluate prosecutors solely by reference to how faithfully they serve the law, something essential will be missing from the picture. This section defends the view that the essential thing which is missing on such an account is justice. Of course, this raises two questions. First, why should prosecutors prioritize justice and not the advancement of some other goal? And second, what exactly is meant by "justice" in this context? To answer these questions, this section advances what I call the Fundamental Connection Thesis (FCT). In simplest terms, the FCT holds that prosecutorial discretion necessarily engages the concept of justice, and that we should require prosecutors to prioritize justice over other possible demands placed on them.

Specifically, we should require prosecutors to prioritize doing justice because prosecutors serve a crucial gatekeeping function in the criminal justice system. The FCT therefore provides that prosecutors should do justice, but that the particular conception of justice they do is an independent question which must be answered by reference to some other set of normative considerations. Taking each component of this argument in turn will help to illustrate the FCT's core claims.

In order to understand the significance of the FCT's claim that prosecutorial discretion and justice are fundamentally connected, we must first confront a definitional issue. The claim refers to the "concept of justice" and I give this phrase a very particular meaning here. Specifically, the *concept* of justice refers to the most general understanding of what justice is, an understanding which does nothing more (and nothing less) than differentiate what it means to do justice from what it means to do something else.[66] In Dworkin's terms, the concept of justice is "the plateau from which arguments about justice largely proceed" and is used to "distinguish conceptions of justice we reject, even deplore, from conceptions we would not count as conceptions of justice at all … "[67] So the concept of justice is distinct from, but related to, various *conceptions* of justice, such as racial justice, social justice, economic justice, and so on. The distinction is such that the concept of justice provides "an agenda that distinguishes the enterprise of producing a conception of justice from the agenda of producing a conception of something else."[68] The phrase "concept of justice" is therefore something of an umbrella term: it captures the unifying similarity that all conceptions of justice share. In doing so, the concept marks out a target at which different conceptions of justice aim. Moreover, the concept is what makes conceptions such as retributive justice, for example, conceptions *of justice* and not of some other virtue, such as kindness, honesty, compassion, and so on. Within the space delineated by the concept of justice, conceptions of justice then provide, or purport to provide, "the truth and the whole truth about justice,"[69] as, for example, Rawls' *A Theory of Justice* or Nozick's *Anarchy, State, and Utopia*, do.[70]

Distinguishing between the concept of justice, as compared to different conceptions of justice, is a useful exercise, both in general and for the task of supporting the fundamental connection thesis. Disagreements about which conception of justice is best have often crowded out discussion about what the concept of justice even is, and this has undermined our ability to meaningfully identify the value of justice in contexts such as guiding prosecutorial discretion.[71] For present purposes, the utility of the distinction is that it allows a very general account of the relationship between prosecutorial discretion and justice to be given, without having to commit to any particular conception(s) of justice. This is especially important because, as I will argue in section 4, the logic of the fundamental connection thesis also cuts against any argument that there can only be one correct conception of justice by which prosecutorial discretion should be evaluated.

Returning to the preliminary task of sketching the concept of justice, it remains to explain what characterizes the concept of justice employed in the FCT. Here, I turn to Gardner, who devoted considerable energy to fleshing out the meaning of the concept of justice. Gardner, following Rawls, argues that we can understand the concept of justice by looking at the "distinctive priorities of the just person."[72] To elucidate these distinctive concerns of the just person, Gardner goes back to Aristotle, who posited that justice was simply a species of proportionality.[73] Gardner argues that the concept of justice refers specifically to proportionality in the allocation of benefits and burdens.[74] As such, we can think of justice as inherently allocative: it involves assigning benefits and burdens in one of two different senses, which Gardner calls "distributive" and "corrective" allocation.

The first sense of allocation consists of allocating benefits and burdens among persons, where some good needs to be divided up among many.[75] This type of "distributive" allocation, as Gardner calls it, involves asking whether some "good or ill … is divided up in the proper way among those who are, on a given occasion, candidates for receiving it."[76] By contrast, "corrective" allocation concerns situations in which a good or ill has been wrongly transferred between persons, altering a status quo which must now be restored.[77] In the former case, scarcity is required; if there is no scarcity of a given good or ill, then we have no need to ensure that it is proportionately distributed. For example, there is no "quota of abstention from torture" that must be distributed among the police, despite the fact that we consider torture to be unjust.[78] This is because such a case falls into the second context, where scarcity is not required because a given good (in this case, freedom from torture) is "essentially allocative."[79]

A good or ill is essentially allocative where it is conceptually impossible for the good or ill in question to come about incidentally, without being allocated. The paradigmatic example Gardner gives for this is punishment, which has to be given *to* someone *for* something.[80] Even though it makes no sense to talk about punishment as a scarce good to be distributed fairly, it is still "essentially allocative" in that someone has to mete punishment out in order for it to be punishment, and therefore it can be meted out justly or unjustly.[81] The essence of the concept of justice is therefore the allocation of benefits and burdens among those who are good candidates for receiving them, whether this is because of scarcity or the essentially allocative character of the benefit or burden in question.[82] So the concept of justice is concerned with "who gets what, and on what grounds."[83]

This brings us back to the first claim in the FCT, which is that prosecutorial discretion and justice have an inherent connection. Specifically, my argument here is that a fundamental connection arises because there are certain core features of prosecutorial discretion which necessarily engage the concept of justice. In fact, as will now be shown, the exercise of prosecutorial discretion is a paradigm case of corrective allocation, and therefore of the concept of justice.

In particular, the decision of whether or not to prosecute necessarily involves deciding whether or not to allocate certain burdens to the accused and to the complainant. The burdens to the accused are well explained by Jonathan Rogers, who refers to them as the distinct "harms of prosecution."[84] These are harms which the accused person suffers simply by being the subject of prosecution, regardless of whether or not the accused is ultimately punished.[85] These harms include, but are not limited to: the risks to one's job, livelihood, and personal relationships; the possibility of being held in custody on remand; the mental and physical stress caused by having a possible trial; the confiscation of one's property; and the increasing danger of becoming the target of vigilante justice.[86] As Rogers notes, these harms are largely irreparable, even if the accused is subsequently acquitted or the prosecution is abandoned partway through.[87] Furthermore, the defendant is placed under the burden of responding to the charges against them, being "called to answer" for their conduct through the evidentiary and procedural mechanisms of the criminal trial.[88] They (together with any lawyers or other advisers) must respond to the foundational challenge that they have acted wrongfully, and illegally, in the face of the threat of the defendant's losing their liberty if they are convicted. Moreover, the decision to prosecute imposes burdens on other individuals, not just the defendant. Notably, prosecution places burdens (or at least the risk of burdens) on the complainant, such as having to testify at trial and confront the accused. There may also be similar burdens on the complainant's mental and physical health caused by the stress of the trial process, and the same may be said of other witnesses too, where relevant.

All of this establishes that prosecutorial discretion necessarily involves the imposition of harm, but this alone is not enough to show that it necessarily engages the concept of justice. After all, it could still be argued that what is needed is simply a justification for the imposition of these harms, regardless of whether such a justification has anything to do with justice. For example, it is conceivable that a prosecutor could choose to be guided only by expediency and efficiency, aiming to move defendants through the system as quickly as possible, even on minimal evidence.[89] Such an approach would appear to provide a justification for imposing the harms of prosecution without engaging the concept of justice. But this appearance would be deceptive.

The decision to prosecute someone is not one which is separable from the imposition of the harms of prosecution, because the harms follow the decision to prosecute. But this does not mean that the decision to prosecute is *reducible to* the decision of whether or not to impose these harms. Explicit consideration of the harmful consequences may bear on how the prosecutor exercises their discretion, but it does not follow that the justification of such consequences is dispositive of the question of whether or not to prosecute. If that were so, then the prosecutor could properly decide whether someone should be prosecuted simply by asking themselves whether or not it would be justified to subject them to the harms of prosecution. But clearly such an approach would be defective. In all cases, the inescapable question is whether or not someone ought to be prosecuted, that is what prosecutors must decide. We can readily imagine a prosecutor who decides who to prosecute without any consideration of how they are allocating the benefits and burdens involved in such a decision. But they will allocate those benefits and burdens nonetheless. This is what connects the exercise of prosecutorial discretion to Gardner's concept of justice: prosecution decisions are just decisions about who gets prosecuted and on what grounds. In other words, they are fundamentally allocative.

The result is that there is an inherent connection between exercising prosecutorial discretion and doing justice.

So far, so good. But little is gained from recognizing the first limb of the FCT alone. After all, a connection between two things is not enough by itself to say that one should primarily evaluate one in terms of the other.[90] So the mere presence of a connection, however intimate, between the concept of justice and the exercise of prosecutorial discretion does not suffice to bear out the FCT. Instead, what is needed is a reason to prioritize justice above other norms in the context of prosecutorial discretion. In order to provide such a reason, I now turn to the second limb of the FCT, which holds that doing justice should be the prosecutor's primary concern, even to the exclusion of other considerations if necessary.

The second limb of the FCT starts by recognizing that a prosecutor may be under a variety of pressures, and sensitive to a variety of concerns, when considering how to exercise their discretion with respect to charging, which cannot be resolved by reference to logical priority or rationality alone. I briefly consider two example cases from English law, to demonstrate this.

The first is the case of the prosecutions which followed the 2011 riots in England. In these cases, many prosecutors felt that civil order was at risk of breaking down, and therefore that prosecution of participants in the riots was virtually guaranteed to be in the public interest.[91] As such, prosecutions and trials took place swiftly in all-night courts, despite levels of evidence and investigation which prosecutors themselves admitted was "the bare minimum."[92] In the second example, the *Corner House* case, bribery charges against a Saudi national were discontinued, not because of any lack of evidence of criminal wrongdoing, but due to an explicit threat from a Saudi official that Saudi Arabia would withdraw from a counter-terrorism agreement with the UK unless the charges were discontinued.[93] This was on the grounds that the public interest in continued national security outweighed the public interest in upholding the rule of law by bringing a prosecution.[94] The House of Lords allowed the appeal, holding that the Director of the Serious Fraud Office was entitled to take this threat into account as part of his prosecutorial discretion.[95]

In either of the above cases, the important feature is not the outcome itself. Rather, it is worth noting that, whatever qualms one might have with the substance of the above decisions, neither can be described as irrational. So, rationality alone does not help in establishing the FCT. To do so requires us to make a claim about the guiding principles that should form prosecution's "rational horizon" (to borrow a term from Gardner).[96] The rational horizon of a person (or institution) is best understood as the "different rationally significant features of actions" which motivate that person to choose a particular action.[97] Gardner gives the example of two people, one whose rational horizon is honesty, and the other whose rational horizon is loyalty.[98] These two people might sometimes agree on a particular course of action (one which could be motivated by either honesty or loyalty). But, when push comes to shove, the honest person would choose to betray another rather than deceive them, whereas the loyal person would choose to deceive instead of betray.[99] The upshot of this for prosecutorial discretion is that, as recognized above, there will inevitably be cases where a prosecutor can rationally choose to either prosecute, decline to do so, or dispose of the case through some alternative diversion program.[100] And so the real question becomes what the rational horizon of the prosecutor ought to be: justice, or something else? If it is justice, then the second limb of the FCT is made out. If not, then the FCT cannot be sustained.

My argument is that the rational horizon of the prosecutor should be to do justice. To see why, we need only return to the distinctive role of the prosecutor as gatekeeper of the criminal justice system. It is, after all, the prosecutor who must make fine-grained, fact-sensitive decisions when exercising their discretion. And these decisions are both significant for the parties involved, given that they allocate the unique burdens of prosecution described above, and are unique to the prosecutor's role. No other actor in the criminal justice system bears this responsibility or has this power.[101] The prosecutor is therefore uniquely situated to act as a gatekeeper, and their role within the broader system requires them to exercise discretion over who gets prosecuted. As long as we want the criminal justice system to do justice, we must have some safeguards in place to minimize injustices. An explicit requirement to do justice is therefore a normatively attractive way of achieving this: it directs the prosecutor to do exactly what we expect them to do. And it is precisely at this stage in the process at which potential injustices can be rooted out most easily, before the harms of prosecution have been allocated.

In Damaska's words, it is "surely convenient to let the Cerberus at the gate of the system" prevent miscarriages of justice before they occur, rather than rely on other mechanisms, such as trial by jury, to do so later in the process.[102] But Damaska's point can be made more strongly. It is not just "convenient" to give prosecutors this role; it is right to place this expectation on them because they are ultimately tasked with deciding who does or does not receive the harms of prosecution. The prosecutor is therefore a crucial bulwark, exercising their discretion at a key moment in the criminal process, the point of no return for the accused. They exercise this discretion, and answer questions of justice, regardless of whether they are being explicitly required to do justice. When so much is at stake, nothing less than a requirement to do justice can express what we expect of prosecutors. Without this, prosecutors would be nothing more than automatons, which, as I have argued above, is not only undesirable, but unrealistic. Prosecutors will always have to exercise human judgment when deciding who is prosecuted and who is not. With a requirement to do justice, we can ask more of them than to simply try to exercise this judgment in some sort of mechanical, value-neutral way that only "serves the law." Through prosecutors, we can inject the wisdom of human experience into the criminal process. Thus, the second claim of the FCT is made out.

So, the concept of justice and the nature of prosecutorial discretion, when combined, lead to the conclusion that we should evaluate prosecutors' exercise of their discretion by reference to justice. This bears out the fundamental connection thesis by linking the concept of justice to the act of deciding whether or not to charge someone with a criminal offense. But it still leaves unsettled the question of which conception, or conceptions, of justice ought to be used as a normative benchmark. It is to this issue, along with some other implications of the fundamental connection thesis, that I now turn.

4. The Implications of the Fundamental Connection Thesis

If, as I have argued, the FCT holds true, then two key conclusions will follow: (a) current approaches to prosecutorial discretion should be evaluated based on whether or not they are compatible with the prosecutor's overarching duty to do justice and (b) divergent outcomes in factually similar cases can be justified where two different prosecutors are applying different conceptions of justice.

However, I should also clarify two potential possible interpretations which the FCT might seem to endorse, but which do not follow from my argument: (c) that any one conception, or set of conceptions, of justice is the "right" one for a prosecutor to apply and (d) that prosecutors can always simply ignore the law entirely. Each of these four propositions, two which follow and two which do not, will now be examined in more detail. This will give a fuller picture of the bite of my argument, demonstrating how it connects to the realities of the day-to-day functioning of the criminal justice system in particular jurisdictions.

4.1. Justice as a Normative Framework

The first conclusion which follows from the FCT is that justice is the right normative benchmark for evaluating how prosecutorial discretion is exercised. Moreover, this holds with respect to both individual prosecutorial decisions, and the overall system of legal rules which regulate those decisions. With respect to the former, there are two approaches that can be taken to regulating prosecutors' discretion: internal and external review.[103] If the FCT is correct, then justice is the right normative framework that should be used to evaluate prosecutorial decision making under each of these forms of review.

Internal review refers to the rules and procedures that govern how the prosecutor should discharge their duties: if they fall foul of these rules, then this becomes a matter for internal disciplinary processes.[104] Internal review therefore consists of "setting prosecutorial goals from the inside" and then policing those goals through internal mechanisms.[105] By contrast, external review is based on oversight of prosecutorial discretion by non-prosecutorial actors, such as judges or politicians.[106] A version of this will be familiar to English lawyers: the High Court retains the power to quash decisions of Crown prosecutors through judicial review. This remedy is, however, "highly exceptional" and "very rare" in practice.[107] Judicial reviews of decisions not to prosecute are governed by the *Wednesbury* standard for unreasonableness, a very high bar which requires that the decision was so absurd that no reasonable prosecutor would have made the same decision.[108] This may involve the enforcement of internal CPS policy or reference to general public law standards.[109] External enforcement of limitations on prosecutorial discretion gives individuals a potential remedy which does not rely solely on prosecutors' internal procedures, in the event that these are inadequate or that prosecutors fail to effectively enforce their own internal rules.

Regardless of whether the review is internal or external, it is worth evaluating whether the standards imposed when reviewing the exercise of prosecutorial discretion are the right ones. But this evaluation can only be meaningful if there is some understanding of what prosecutorial discretion should be aiming at. The FCT offers justice as a normative benchmark for evaluating these review mechanisms. In other words, the FCT holds that justice is the overarching norm relevant to how prosecutorial discretion is exercised. So, if one wants to evaluate how well prosecutors are being held to account by judicial review in England and Wales, then the relevant question would be: to what extent is judicial review of prosecutorial decisions compatible with the requirement to do justice?

4.1.1. Divergent Outcomes in Factually Similar Cases

The upshot of reframing the choice of prosecutor as a choice of which conception(s) of justice should prevail is that we can see the disparity of outcome among US prosecutors, of which Bellin is so critical, in a very different light. It is simply a result of different conceptions of justice prevailing in different jurisdictions. Seen this way, it is hardly surprising that outcomes in deeply conservative parts of the US would differ so sharply from those of more reliably left-leaning big cities, such as New York and Philadelphia. Moreover, contrary to the criticism that this is somehow an endorsement of rogue prosecutors, abusing their power to simply bring about their own preferences as to how the criminal law should be applied, the FCT simply recognizes the importance of exercising careful discretion at the point of entry into the criminal justice system. It does not militate against legal certainty as a goal but simply places a constraint on the means which can legitimately be used to pursue it. This is not a flat denial of the importance of legal certainty, but simply an argument against turning legal certainty into a juridical sacred cow, sacrificing justice along the way.

Critics may find this conclusion about divergent outcomes unsavory, but it does not have to be. Rather, it simply highlights the importance of choosing prosecutors or setting up institutions responsible for prosecution, carefully, in order to ensure that they do the brand of justice preferred by the polity in question. This is true regardless of whether or not prosecutors are elected, as consideration of how a prosecutor conceives of justice can be undertaken during the appointment process of a prosecutor. So, the FCT says nothing about which mechanism a given jurisdiction should use to select its prosecutors, but does highlight the importance of choosing wisely, and provides a benchmark against which candidates should be evaluated.

Ultimately, though, the question of which conception(s) of justice a prosecutor should adhere to is best understood as a question of political morality, and one which depends on the broader aims of the criminal law in a given jurisdiction. Though this may disappoint advocates of more zealous activism among prosecutors, it ultimately reinforces the legitimacy of the "progressive prosecution" movement: locally selected prosecutors can be understood as applying locally preferred conceptions of justice, rather than simply flouting the law in the name of doing justice. And the conceptions of justice do still act as meaningful constraints on prosecutorial discretion *within* a given jurisdiction, for example, by helping to shape internal rules for prosecutors. But, as the FCT helps to show, there is no good reason to think that the priorities of prosecutors in *different* jurisdictions, applying *different* conceptions of justice, will reach the same conclusions on how to dispose of two similar cases. Thus, the FCT leads to a greater understanding of why prosecutors will not, and should not, always reach uniformity in how they dispose of similar cases: they are following different conceptions of justice.

4.1.2. Agnosticism about Conceptions of Justice

Moving to those propositions which do not follow from my argument, the first conclusion which should not be drawn is that I am endorsing one particular "brand" of justice which prosecutors should seek, always and everywhere. In fact, if the FCT is right, there is not necessarily any one conception of justice which must be applied, always and everywhere. Rather, the decision of which conception(s) should be applied to evaluate prosecutorial discretion is an independent one which must be resolved by reference to something other than the connection between prosecutorial discretion and justice. To see why there cannot be one correct conception of justice in the abstract, we need only return to the relationship between concept and conception, as examined in the previous section.

The concept of justice is very general and tells us only what distinguishes the project of doing justice from the project of doing something else. By contrast, different conceptions of justice flesh out the concept of justice in different ways, arguing, for example, that justice consists of giving people what they deserve, of correcting racial or social inequities, and so on. The fundamental connection thesis relates prosecutorial discretion to the concept of justice but is silent as to which conception is the right one for any particular jurisdiction. This is simply a consequence of the logic of the fundamental connection thesis: what connects prosecutorial discretion and justice is the allocative character of the former, which is characteristic of the latter. But this says nothing about *how* the benefits and burdens of prosecution are to be allocated. For that, a conception, or some conceptions, of justice are required. And simply returning to the concept of justice itself cannot, by definition, provide a single correct conception of justice. If it could, then it would be a conception itself, rather than a concept. So, the choice of which conception(s) of justice is right will need to be made in virtue of something else.

In this vein, the political process of selecting public prosecutors could be a promising means of selecting certain conceptions of justice which the members of a given polity endorse. Methods of choosing such prosecutors vary widely. For example, in England and Wales any qualified lawyer can apply to work as a prosecutor at the CPS,[110] though the highest-ranking prosecutor, the Director of Public Prosecutions (DPP), is appointed directly by the Attorney General, a member of the UK government.[111] In the US, the Office of the United States Attorneys, which falls under the Department of Justice more generally, consists of federal prosecutors who are appointed directly by the President.[112] But at state level, many local prosecutors (DAs) are directly elected.[113]

This latter method of directly electing prosecutors is a clearcut example of how a conception of justice can be chosen: prosecutors run for election on certain platforms, and the winner of the election has a plausible claim to represent the conception(s) of justice favored by a majority of voters in their jurisdiction. This is not without its faults, of course, not least because partisan elections may simply lead to party-line voting, rather than consideration of a prosecutor's merits. But the fact remains that the link between the concept of justice and the exercise of prosecutorial discretion simply does not require any one conception or set of conceptions of justice. On the contrary, this question can only be resolved through recourse to something other than the concept of justice.

4.1.3. De Facto Decriminalization and Bypassing Law Entirely

A second conclusion which does not follow is that I am suggesting that prosecutors can, or should, bypass the law entirely and go straight to justice. On the contrary, the FCT provides no justification for prosecutors flouting the rule of law capriciously or arbitrarily. This is because of the logic of the FCT: prosecutorial *discretion* is linked to the concept of justice because the exercise of discretion entails engaging with questions of justice. But it cannot, and does not, follow that adherence to justice can justify refusing to exercise prosecutorial discretion entirely. Discretion is exercised with respect to the charging decision itself, as opposed to the decision of whether to exercise discretion at all. In other words, the prosecutor has discretion to decide whether or not to charge a given person with a particular offense, but they do not have the power to refuse to make that decision in the first place. The act of adjudication is required, and so refusing to adjudicate in the first place is not justified by the FCT. This should help to allay Bellin's fear of different prosecutors "all doing their justice thing," having free rein to simply ignore the law altogether.[114] If this does happen, it will not be justified by the prosecutor's duty to do justice.

The situation becomes more complicated, however, in the context of de facto decriminalization of whole categories of offenses, in the sense of simply refusing to prosecute *anyone* for a given offense. Rogers argues that such behavior from a prosecutor would be a violation of the separation of powers, and thus should not be condoned.[115] However, he argues that the prosecutor is still entitled, by virtue of their role as an administrator of justice, to make decisions about how best to prioritize the resources of their office in prosecuting some offenses more zealously than others.[116] This may mean, for example, that some low level offenses, such as shoplifting, are only rarely actually prosecuted. But, in Rogers' view, it would still never be justifiable for a prosecutor to flat out refuse to prosecute anyone for a duly created criminal offense. I take a slightly different view about the role of the prosecutor here.

My view, and the conclusion of the FCT if applied to the question of de facto decriminalization, is that everything turns on what the conception of justice being applied requires. For example, if a particular local jurisdiction chose to prioritize racial justice, but their state legislature subsequently passed a new criminal law which expressly criminalized Black people being in certain areas of the state after sundown, a prosecutor could justifiably refuse to prosecute anyone arrested for this offense. This would, of course, be an inroad on the rule of law. But again, it is not obvious that this alone is a definitive reason against giving prosecutors such power. On the contrary, the separation of powers argument which Rogers relies on to argue against de facto decriminalization cuts against prosecutors enforcing a flatly unjust law: there is nothing in the separation of powers between branches of government which can justify doing an injustice. The above example might seem farfetched. But this also tells us something significant, which is that it is only in exceptional circumstances, where an existing (or new) criminal prohibition and the requirements of a jurisdiction's conception of justice come into direct conflict, that the FCT would justify a prosecutor's decision to effectively decriminalize conduct which some other state actor has criminalized. Otherwise, there is nothing in the FCT which would lead inexorably to such a conclusion.

5. Conclusion

This article set out to provide an argument for a fundamental connection between the exercise of prosecutorial discretion and the concept of justice. Further, the article aimed to show that this connection, combined with the prosecutor's normative role as a gatekeeper of the criminal justice system, demonstrates that prosecutorial discretion should be subject to an overarching normative requirement to do justice. Along the way, I rejected the strategy of blindly elevating rule of law concerns above all else and endorsing a model such as the "servant of the law" approach. Instead, I argued for embracing the inherent connection between prosecutorial discretion and the concept of justice, with the latter acting as a normative constraint on the former.

If the FCT is accepted, then we may safely conclude that prosecutors should be bound to do justice, not just serve the law. In rejecting the servant of the law approach, my argument provides a blueprint for more theorizing on the thornier issues regarding prosecutorial discretion. In particular, the agenda for future research must include careful evaluation of the best means of discovering and giving effect to a particular jurisdiction's chosen conception(s) of justice. This will require not just a debate about how to best select prosecutors so that justice can be done, but also serious engagement with familiar and trusted legal rules, such as the full code test in England and Wales. Freed from the Sisyphean task of trying to formulate a compendium of legal rules that can whittle prosecutorial discretion down to nothing, we must now ask: how faithfully do our legal rules give effect to the prosecutor's duty to justice? The answer, whatever it may be in a given jurisdiction, will point either to a reasoned endorsement of the status quo or to an agenda for reform. In either case, by directing our efforts in this way, we can at least begin to bring about a system where prosecutors' discretion is trusted rather than feared.

Notes

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1 In this article, any reference to a prosecutor refers to a public prosecutor, i.e. a state actor whose official role is the prosecution of criminal offenses. I clarify this because in some jurisdictions, such as England and Wales it is possible for an individual or organization to initiate criminal proceedings themselves, see § 6(1) of the Prosecution of Offences Act 1985 (UK).

2 Damaska, "Reality of Prosecutorial Discretion," 129.

3 The Brennan Center for Justice, "Principles for the Prosecutor"; House of Commons Justice Committee, *The Crown Prosecution Service*, at paragraph [2].

4 See Rogers, "Restructuring Prosecutorial Discretion," 795. Rogers refers to these the harms of prosecution.

5 For example, see Rogers, "Restructuring Prosecutorial Discretion"; Bellin, "Theories of Prosecution"; Bellin, "The Power of Prosecutors"; Davis, "The Prosecutor's Ethical Duty"; Green, "Prosecutorial Ethics in Retrospect"; Zacharias, "Can Prosecutors Do Justice?"

6 Waldron, "The Primacy of Justice," 270.

7 Dworkin, *Law's Empire*, 75.

8 Rogers, "Restructuring Prosecutorial Discretion," 795 et seq. Rogers would have prosecutors in England and Wales adopt a three stage test which asks: (i) whether the prosecutor is more likely than not to prove their case, (ii) whether there is an aim of punishment which would justify the costs of prosecution, and (iii) whether it is fair to make the defendant bear the harms of prosecution in order to try to achieve the aims identified at stage (ii). I discuss Rogers' approach in more detail in section 4 below.

9 *Code for Crown Prosecutors* (8th edn, 2018) [4.6] and [4.9].

10 Rogers, "Restructuring Prosecutorial Discretion," 775. I follow Rogers here. As such, I make no claims about the other ways in which prosecutors might exercise discretion, such as how to present a case at trial.

11 Damaska, "Reality of Prosecutorial Discretion," 120.

12 Ibid. As Damaska explains, these features of the prosecutorial role are common to both continental and common law approaches to public prosecution – see Damaska, pp. 119–124.

13 See note 9 above at paragraphs [4.9]–[4.14].

14 Crown Office and Procurator Fiscal Service, *Prosecution Code* (2023) § 3.

15 US Department of Justice, *Justice Manual*, Title 9: "Principles of Federal Prosecution".

16 The most prominent example is that of the very low rate at which suspected instances of rape are successfully prosecuted. For example, see Barr and Topping, "CPS Betraying Rape Victims."

17 See Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, 19–20 (noting the historically "aggressive use" of the death penalty in Harris County, Texas, USA but praising the county's new (at the time) district attorney for bringing death penalty case numbers down).

18 See Barr and Topping, "CPS Betraying Rape Victims."

19 Bellin, "Theories of Prosecution," 1207.

20 John Pfaff, for example, refers to prosecutors as "the engines driving mass incarceration" in *Causes of Mass Incarceration*, 206. Similarly, Davis states that prosecutors have "an ethical duty to take action that significantly reduces the incarceration rate." See Angela J Davis, "The Prosecutor's Ethical Duty," 1064.

21 Sklansky, "The Nature of Prosecutorial Power," 474.

22 Davis, *Arbitrary Justice*, 17.

23 Bellin, "Reassessing Prosecutorial Power," 837.

24 See Zachary Hoskins, "Criminalization and the Collateral Consequence of Conviction," 12; Criminal Law and Philosophy, 625; and more recently Andrei Poama and Milena Tripkovic, "Collateral Legal Consequences and the Power to Punish." In addition to the harm of losing one's liberty, there are also numerous knock-on effects of conviction which may further harm those who are convicted.

25 Rogers, "Restructuring Prosecutorial Discretion," 788–93. See also Malcolm Feeley, *Process Is the Punishment*, which conceived of the pre-trial and trial costs imposed on criminal defendants (i.e. the harms of prosecution) as a form of punishment.

26 Rogers, "Restructuring Prosecutorial Discretion," 788.

27 Ibid., 788.

28 Ibid.

29 Ibid.

30 Ibid., 1207.

31 Ibid., 1207, 1210.

32 Ibid., 1218–20.

33 Ibid., 1218.

34 Ibid., 1210–11. For more on the serious disparities in the US relating to prosecutors seeking the death penalty, see Katherine Barnes, "Place Matters (Most)."

35 Bellin, "Theories of Prosecution," 1220 (internal quotation marks omitted). US constitutional law has recognized a prosecutorial duty to do justice since the early 20th century, see *Berger v United States* (1935) 295 US 78.

36 Bellin, "Theories of Prosecution," 1216–20.

37 Ibid., 1210.

38 Ibid., 1216–17.

39 Ibid., 1208.

40 Ibid., 1208, 1220.

41 For example, see Duff, *The Realm of Criminal Law*; Moore, *Placing Blame*; Chiao, *Criminal Law*.

42 Bellin, "Theories of Prosecution," 1219.

43 Ibid.

44 Zacharias, "Can Prosecutors Do Justice?," 48. It is worth observing that Zacharias takes this starting point as the premise for trying to defend a plausible conception of justice, rather than as a justification for abandoning the whole enterprise of doing justice.

45 Bellin, "Theories of Prosecution," 1219.

46 On the difference between indeterminacy and uncertainty, see Dworkin, *Justice for Hedgehogs*, 90–94.

47 Bellin, "Theories of Prosecution," 1212. This phrase is actually borrowed from the same US Supreme Court opinion which charges prosecutors to "seek justice"; see *Berger v. United States* (n 31), 88.

48 Bellin, "Theories of Prosecution," 1236.

49 Ibid., 1236–43.

50 Ibid., 1236–37.

51 Ibid., 1237.

52 See, for example, the discussion in Dworkin, "The Model of Rules."

53 Ibid., 25–26.

54 Ibid., 25.

55 Ibid.

56 Ibid., 32.

57 For an overview of the basic principles of the rule of law and a clear statement of the rule of law's value, see Raz, *The Authority of Law*, ch. 11.

58 On some accounts, this is partially constitutive of what makes a rule a law. Shapiro refers to this as "the practical difference thesis," as he argues that law must make some sort of practical difference in individuals' reasoning about how to act. See Shapiro, "Law, Morality, and Conduct"; Shapiro, "On Hart's Way Out."

59 Dworkin, "The Model of Rules," 33.

60 Rogers makes a similar point about the importance of prosecutors in applying and developing the substantive criminal law in "Role of the Prosecutor."

61 Raz, *The Authority of Law*, 211.

62 I take this to be impossible, as no legislature could produce a universal set of rules for human behavior which anticipated every possible factual scenario with sufficient precision to dictate an outcome, without the rules ceasing to be universal.

63 O'Malley, *Towards a Coherent System*, 42.

64 Tamanaha, *The Rule of Law*, 123.

65 I address this potential misinterpretation of my argument in section 4.

66 Waldron, "The Primacy of Justice," 270.

67 Dworkin, *Law's Empire*, 74, 75.

68 Waldron, "The Primacy of Justice," 270.

69 Ibid.

70 Rawls, *A Theory of Justice*; Nozick, *Anarchy, State and Utopia*.

71 Waldron, "The Primacy of Justice," 270–71.

72 Gardner, *Law as a Leap of Faith: Essays on Law in General*, 242.

73 Ibid., citing the *Nichomachean Ethics*, 1131a29.

74 Gardner, *Law as a Leap of Faith: Essays on Law in General*, 242–43.

75 Ibid., 243.

76 Ibid.

77 Ibid.

78 Ibid., 264.

79 Ibid., 267.

80 Ibid.

81 Ibid.

82 Ibid.

83 Green, *The Germ of Justice*, 161.

84 Rogers, "Restructuring Prosecutorial Discretion," 788–93.

85 Ibid., 788.

86 Ibid.

87 Ibid.

88 See generally Duff et al., *The Trial on Trial*, ch. 5.

89 Such an approach would be a typical example of Packer's "crime control" values in action. See Packer, *Limits of Criminal Sanction*, 158–63.

90 I am grateful to Mark Dsouza for this point.

91 Chloe Peacock, *Justifying Injustice*.

92 Ibid.

93 R (on the application of Corner House Research) v Director of the Serious Fraud Office [2008] UKHL 60; [2009] 1 AC 756.

94 Ibid., paragraphs [1]–[4] (Divisional Court).

95 Ibid., see paragraphs [48] (Lord Bingham), [49] (Lord Hoffmann), [50] (Lord Rodger), [57] (Lady Hale), and [58] (Lord Brown) (House of Lords).

96 Gardner, *Leap of Faith*, 240.

97 Ibid.

98 Ibid., 241.

99 Ibid.

100 For an overview of diversion programs, see Bellin, "Theories of Prosecution," 1238–42. These typically involve informal resolutions to low-level offending, such as required attendance at drug/addiction counseling, community service, or simply avoid arrest for any further offenses for a set period of time.

101 Again, I leave the notion of private prosecutions in England and Wales to one side here. Though a private prosecutor, such as a charity or a private citizen, can initiate a prosecution and therefore allocate the harms of prosecution, they do so subject to the oversight of the Director of Public Prosecutions, who would ultimately be bound to do justice if my argument is accepted. Moreover, if private prosecutions are not directly caught by the FCT, that suggests to me that *they* are an aberration, rather than that the FCT is false.

102 Damaska, "The Reality of Prosecutorial Discretion," 129.

103 Bellin refers to the dichotomy between rules and standards; see Bellin, "Theories of Prosecution," 1209. I prefer the distinction between internal and external review, as this distinction gets to the heart of which institutional actors should have responsibility for ensuring that any normative limitation on prosecutorial discretion is adhered to in practice. This is true regardless of whether such limitations take the form of rules or standards, or both.

104 Wright and Miller, "The Screening/Bargaining Tradeoff," 55.

105 Ibid., 55.

106 Ibid., "The Screening/Bargaining Tradeoff," 51–53.

107 Sharma v Browne-Antoine, [2006] UKPC 57; [2007] 1 WLR 780 (PC) (appeal from Trinidad and Tobago) paragraph [14(5)]; R (Pepushi) v Crown Prosecution Service [2004] EWHC 798 (Admin) paragraph [49].

108 Associated Picture Houses Ltd v Wednesbury Corporation [1947] 1 All ER 498.

109 See R v DPP Ex p. Kebilene. [2000] 2 AC 326 (where it was held that fraud or corruption on the part of the prosecutor would lead to their decision being quashed).

110 The only requirements are that the applicant is qualified solicitor or barrister in England and Wales, with at least a Lower Second Class Honours degree (2:2). See https://nationalcareers.service.gov.uk/job-profiles/crown-prosecutor.

111 Prosecution of Offences Act 1985 (UK), § 2(1).

112 See https://www.justice.gov/usao.

113 For example, in Texas DAs are elected, though candidates for office must meet citizenship and residency requirements, not have any felonies on their criminal record, and must be a practicing lawyer at the time of filing for candidacy. See Vernon's Annotated Texas Constitution, Article 5, § 21.

114 Bellin, "Theories of Prosecution," 1210.

115 Rogers, "Restructuring Prosecutorial Discretion," 785–86.

116 Ibid.

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