YALE LAW & POLICY REVIEW

Defending Progressive Prosecution: A Review of *Charged* by Emily Bazelon

*Jeffrey Bellin**

CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION. By Emily Bazelon. New York: Random House. 2019. 448 pp. $24.99.

"Progressive prosecutors" are taking over District Attorney's Offices across the nation with a mandate to reform the criminal justice system from the inside. Emily Bazelon's new book, Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*, chronicles this potentially transformative moment in American criminal justice.*

This Essay highlights the importance of Charged *to modern criminal justice debates and leverages its concrete framing to offer a generally applicable theory of prosecutor-driven criminal justice reform. The theory seeks to reconcile reformers' newfound embrace of prosecutorial discretion with long-standing worries, both inside and outside the academy, about the dangerous accumulation of prosecutorial power. It also offers the potential to broaden the reform movement's appeal beyond progressive jurisdictions.*

* Professor, William & Mary Law School. Thanks to Emily Bazelon, Adam Gershowitz, and participants in the Duke Law School Criminal Justice Books Conference for comments.

INTRODUCTION

The familiar concept of "checks and balances" captures the ideal of the American criminal justice system.[1] Legislatures legislate, police arrest, grand juries charge, prosecutors prosecute, juries convict, judges sentence, parole boards release, governors pardon. The redundancy is the point. The involvement of a multitude of independent actors guards against abuse of the State's most dangerous power: the power to punish.

For the past several decades, criminal justice commentators mourned the loss of checks and balances. Mandatory sentences removed judicial discretion.[2] Trials disappeared.[3] Legislatures abolished parole.[4] Pardons became infrequent.[5] Power accumulated in the hands of a single shadowy actor, the prosecutor. Iconic legal scholar William Stuntz observed in 2001 that, in the modern American system, "checks and balances are an illusion."[6] "The criminal justice system seems characterized by diffused

1. *See* Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 399 (2013) ("Checks and balances are essential not only to the separation of powers in criminal justice but also to the promotion of morally appropriate punishments."); Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. CRIM. L. & CRIMINOLOGY 1, 8 (2017) ("The criminal justice system has historically had its own system of checks and balances between the legislature, prosecutors, trial judges, and the trial jury.").
2. Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 354 (2009) ("Sentencing enhancements and mandatory minimum sentences give prosecutors undeniable power.").
3. Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 103 (2018) (documenting a decrease in criminal trials in the years 2006-16).
4. *See* Graham v. Florida, 560 U.S. 48, 109–10 (2010) (Thomas, J., dissenting) (noting that through the Sentencing Reform Act of 1984, "Congress abolished parole for federal offenders" and "several States have followed suit").
5. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1348-49 (2008) ("[T]he percentage of federal grants of clemency applications has declined sharply" and "[s]tate level pardons have also fallen in recent decades.").
6. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 599 (2001)

power, but its real difficulty is that it concentrates power in prosecutors."[7] Today, Stuntz's view stands triumphant. Commentators assail the "prosecutor king"[8] who presides over the criminal justice system, wielding "virtually unchecked powers"[9] to generate mass incarceration and foster injustice.[10]

The prosecutor-king narrative takes an intriguing turn in an excellent new book by Emily Bazelon, *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*.[11] Bazelon, a New York Times journalist and member of the Yale Law School faculty, begins with the familiar critique. Bazelon argues in her Introduction that American prosecutors use their "breathtaking power" to generate "disastrous results for millions of people churning through the criminal justice system."[12] The novelty of *Charged* is that it goes on to make a compelling case that the solution to the system's many problems is for prosecutors to take on an *even more* prominent role. To dethrone the "kings of the courtroom,"[13] commentators like Stuntz urged legislators, judges, and other actors to create more robust checks on prosecutor power.[14] Flipping the script,

7. *Id*.

8. *See, e.g.,* Erik Luna, *Prosecutor King*, 1 STAN. J. CRIM. L. & POL'Y 48 (2014).

9. Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 887 (1998).

10. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 17 (2007) ("[P]rosecutorial discretion is largely responsible for the tremendous injustices in our criminal justice system."); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 206 (2017) ("Prosecutors have been and remain the engines driving mass incarceration."); Erik Luna & Marianne Wade, *Introduction to Prosecutorial Power: A Transnational Symposium*, 67 WASH. & LEE L. REV. 1285, 1285 (2010) ("[P]rosecutors *are* the criminal justice system.").

11. EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019).

12. *Id.* at xxv.

13. *The Kings of the Courtroom*, ECONOMIST (Oct. 4, 2014), https://www.economist.com/united-states/2014/10/04/the-kings-of-the-courtroom [https://perma.cc/S2GX-J3BK].

14. *See* Stuntz, *supra* note 6, at 587 ("The last, and probably best, solution is to increase judicial power over criminal law."); *see also* RACHEL ELISE BARKOW, PRISONERS OF POLITICS 9 (2019) ("One key pillar of reform is to institute greater checks on prosecutors."); PFAFF, *supra* note 10, at 159 (emphasizing the "need to regulate [prosecutors'] behavior" as the key to reform).

Charged calls upon prosecutors to counteract the system's severity by taking decisions out of the hands of judges, juries, legislators, and police. Bazelon explains: "The power of the D.A.[] makes him or her the actor—the only actor—who can start to fix what's broken without changing a single law."[15]

Bazelon is no outlier. *Charged* highlights a major new phenomenon that threatens to upend the longstanding academic consensus. Outside the ivory halls, the reform conversation no longer centers prosecutorial power as the disease afflicting the criminal justice system. Prosecutors are the cure. The Darth Vader of criminal justice commentary has become its Captain Marvel.[16]

Charged skillfully narrates the dizzying developments of the past two years that changed the criminal justice reform conversation. Self-proclaimed "progressive prosecutors" are winning elections in major American cities, spearheading "a national movement to leverage prosecutorial power to achieve criminal justice reform."[17] Larry Krasner in Philadelphia. Kim Foxx in Chicago. Marilyn Mosby in Baltimore. Rachel Rollins in Boston. Chesa Boudin in San Francisco. John Creuzot in Dallas.[18]

---

15. BAZELON, *supra* note 11, at xxvii; *see also id.* at 296 ("The movement to elect a new kind of prosecutor is the most promising means of reform I see on the political landscape.").

16. Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018) ("Prosecutors are the Darth Vader of academic writing: mysterious, powerful and, for the most part, bad.") [hereinafter Bellin, *Reassessing Prosecutorial Power*]. Darth Vader is the villain in the Star Wars movies; Captain Marvel is the most powerful Avenger superhero. *See* Anyone Under 30.

17. *See* Jeffrey Bellin, *Theories of Prosecution*, 108 CAL. L. REV. 1203, 1206 (2020) [hereinafter Bellin, *Theories of Prosecution*]; Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 2-3 (2019) (arguing that progressive prosecutors "us[e] their power and discretion with the goals of not only enforcing the law, but also reducing mass incarceration, eliminating racial disparities, and seeking justice for all, including the accused"); David Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. Online 25 (2017) (discussing the movement); Editorial Board, *A Wiser Generation of Prosecutors*, N.Y. TIMES (Feb. 6, 2017), https://www.nytimes.com/2017/02/06/opinion/a-wiser-generation-of-prosecutors.html [https://perma.cc/JE8Z-T2MZ] (embracing the new wave of "local prosecutors who are open to rethinking how they do their enormously influential jobs").

18. *See* Farah Stockman, *How 'End Mass Incarceration' Became a Slogan for D.A. Candidates*, N.Y. TIMES (Oct. 25, 2018),

The list is long and growing. Bazelon estimates that, already, "12 percent of the population live[s] in a city or county with a D.A. who . . . could be considered a reformer."[19] With progressive prosecutors taking the helm, traditional academic proposals to limit prosecutorial power seem increasingly passé.[20] Reformers no longer cry out for checks on prosecutors. Instead, they want everyone to get out of prosecutors' way.

Charged does as good a job as any book in recent memory of weaving together individual stories, timely reporting, and the latest criminal justice research. Synthesizing this material, Bazelon makes a strong case that the new wave of prosecutors, not legislators, governors, police, or judges, "hold the key to change."[21] By anchoring her analysis in deeply-researched case studies, she fosters refreshingly precise thinking—as opposed to slogans—about what we should expect from prosecutors. Bazelon also provides a helpful explanation for reformers' prosecutorial focus. She writes: "While it would be nice if lawmakers and the courts threw themselves into fixing the criminal justice system, in the meantime, elections for prosecutors represent a shortcut to addressing a lot of dysfunction."[22] The key benefit of this approach is speed. "[W]e can stop

---

https://www.nytimes.com/2018/10/25/us/texas-district-attorney-race-mass-incarceration.html [https://perma.cc/UZ24-CBY3] (so characterizing Krasner, Rollins, and Creuzot); Allison Young, *The Facts on Progressive Prosecutors,* CTR. FOR AM. PROGRESS (Mar. 19, 2020), https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/19/481939/progressive-prosecutors-reforming-criminal-justice/ [https://perma.cc/97LX-CUWP] (so characterizing Foxx and Boudin); Tim Prudente, *Baltimore State's Attorney Mosby Stands with Progressive Prosecutors, Also Airs Dispute with Gov. Hogan at St. Louis Rally,* BALT. SUN (Jan. 15, 2020), https://www.baltimoresun.com/politics/bs-md-ci--20200115-r6j3hfsllbh3vcdpxjoaq36gqu-story.html [https://perma.cc/J9ST-SG4W] (so characterizing Mosby).

19. BAZELON, *supra* note 11, at 290.

20. *See* Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1417 (2010) (describing "academic solutions to the problems of prosecutorial discretion" as taking "two forms: the promulgation of internal office guidelines to control prosecutorial decision-making and the development of external limitations through restrictive legislation or heightened judicial review").

21. BAZELON, *supra* note 11, at xxvii.

22. *Id.* at xxxi.

caging people needlessly *right now* if we choose prosecutors who will open the locks."[23]

For those versed in the frustrating politics of criminal justice reform, Bazelon's message holds great appeal. *Charged*'s primary weakness is its tendency, like the progressive prosecution movement it describes, to preach to the converted. *Charged* and the prosecutor-driven reform movement target the like-minded, i.e., political "progressives," a minority of the American population.[24] Yet the new vision of prosecutors that emerges from Bazelon's narrative has the potential to appeal to a broader constituency.

To achieve more mainstream appeal, both among academic theorists and non-progressive voters, the prosecutor-driven-reform movement must overcome two objections. The first objection points to an apparent internal inconsistency in *Charged* and the movement it chronicles. *Charged* simultaneously laments the accumulation of prosecutorial power while celebrating the use of that power to achieve progressive policies. This may look to critics like an uncomfortable injection of politics into District Attorney's Offices.[25] Commentators often oppose presidential power, for example, right up until a presidential election. Unchecked executive power is good for my President, not yours. If this is all that is going on, then the inspirational rhetoric of "progressive prosecution" masks a mundane effort to draft local prosecutors into the familiar partisan power struggles that afflict the rest of government.[26] A second, related objection is that an even more prosecutor-dominated future jeopardizes the system's separation of powers, further weakening its checks and balances. Critics argue that progressive prosecutors exceed their traditional law-enforcement function: prosecutors are not supposed to counteract

23. *Id.*

24. Bazelon relates a concern expressed by a Republican District Attorney from Wisconsin, "that the national reform movement seemed like a liberals-only cause." *Id.* at 155. *See also* Lydia Saad, *Conservative Lead in U.S. Ideology Is Down to Single Digits*, GALLUP (Jan. 11, 2018), https://news.gallup.com/poll/225074/conservative-lead-ideology-down-single-digits.aspx [https://perma.cc/W63J-2M6Y] ("Thirty-five percent of U.S. adults in 2017 identified as conservative and 26% as liberal.").

25. *Cf.* David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 650 (2017) (highlighting the "risk that prosecutorial decision-making will become inappropriately politicized").

26. For example, Bazelon praises the ability of local prosecutors to "stand up to Trump" and "fight the Trump administration." BAZELON, *supra* note 11, at xxviii, 92.

legislative policy decisions or usurp judges and juries by unilaterally redefining the punishment (if any) for statutory crimes.[27] "[D]istrict attorneys do not make laws. That is the job of the Legislature."[28]

Against this tumultuous backdrop, this Essay has two goals. Most obviously, I seek to spotlight Bazelon's important new book—the first to document a powerful new feature of the American criminal justice landscape. Next, I want to leverage Bazelon's crisp framing of the issues to answer these two powerful objections to prosecutor-driven criminal justice reform. As explained below, I think a clear principle answers both objections. This principle can filter progressive prosecution into a non-partisan formula, focusing on lenience (and checks and balances) rather than nominally "progressive" sensibilities. At the same time, this generally-applicable framework can help to reconcile the shifting landscape of American prosecution with traditional academic narratives of criminal justice.

While I develop my answer to the objections to prosecutor-driven reform in the body of this Essay, I can sketch the contours here in the Introduction. The answer begins with a clearer conception of the American prosecutor's role, and prosecutorial power generally. Despite its popularity, the prosecutor-king narrative pioneered by Stuntz and

27. *See, e.g.,* Jonathan Edwards, *Norfolk Prosecutor Can't Dismiss All Marijuana Cases, Virginia Supreme Court Says*, VIRGINIAN-PILOT (May 3, 2019), https://pilotonline.com/news/local/crime/article_d260c5ce-6d3f-11e9-96bb-0364d44e54da.html [https://perma.cc/66L7-MLKN] (noting that both sides "believed the other side was violating the state constitution's division of powers"); Tom Jackman, *In Some Big Cities, Reform-Minded Prosecutors and Police Chiefs Have Been At Odds*, WASH. POST (July 17, 2019), https://www.washingtonpost.com/crime-law/2019/07/17/prosecutors-launch-reforms-police-chiefs-convene-national-summit-dc-with-district-attorney-counterparts/ [https://perma.cc/QRR3-7JPN] (quoting D.C. Police Chief's criticism: "police and prosecutors take an oath to enforce" the laws and should not "unilaterally decide they can decline to prosecute certain crimes"); Alicia Victoria Lozano & Lauren Mayk, *U.S. Attorney McSwain, Philadelphia District Attorney Krasner Clash Despite Shared Vision for Safer City*, NBC PHILA. (June 20, 2019), https://www.nbcphiladelphia.com/news/local/US-Attorney-William-McSwain-Philadelphia-District-Attorney-Larry-Krasner-Clash-Despite-Shared-Vision-for-Safer-City-511582102.html [https://perma.cc/7DEP-7DWT] (offering similar criticism).

28. Michael D. O'Keefe, *The True Role of The District Attorney*, BOS. GLOBE (May 28, 2019), https://www.bostonglobe.com/opinion/2019/05/28/the-true-role-district-attorney/VWBCgWHw2rI8mYOomJYpyN/story.html [https://perma.cc/E632-XE7C].

animating *Charged* is hyperbolic. Prosecutors are not unilaterally doling out America's criminal justice outcomes. Contrary to the prominent voices quoted throughout *Charged*[29] and in the academic literature,[30] mass incarceration did not arise because increasingly aggressive prosecutors seized too much power from hapless legislators and judges.[31] Rather, the phenomenon came about through a slow-developing consensus among those, including prosecutors, who were supposed to check *the State's* power to punish.[32] "Legislators, judges, police, governors, voters, etc., are not 'shocked, shocked' at the outputs of the American criminal justice system."[33] Mass incarceration arose when all of these important actors jumped on the same "tough-on-crime" bandwagon.[34] As American incarceration rates reached unprecedented heights, traditional checks on the ability of any one actor (such as a prosecutor) to impose punishment remained in place. They just were not exercised as often.[35]

A consensus, rather than prosecutor-centered explanation, for American punitiveness shines a clarifying light on the role of the American prosecutor and the available pathways for prosecutor-driven reform. Progressive prosecutors are not well positioned to reverse mass incarceration because of their "breathtaking power" relative to other actors[36] or because "prosecutors are the criminal justice system."[37] Prosecutors can reduce the criminal justice system's severity because it

29. BAZELON, *supra* note 11, at xxv-xxvi ("unfettered power of prosecutors"); 132-133 (citing to John Pfaff), 338 (citing to Angela Davis), 360-361 (citing to Jed Rakoff and William Stuntz).

30. *See* Bellin, *Reassessing Prosecutorial Power*, *supra* note 16, at 854 (summarizing academic trends).

31. *Id.*

32. See Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 200 (2019) [hereinafter Bellin, *The Power of Prosecutors*].

33. *Id.*

34. *See* JEREMY TRAVIS ET AL. EDS., NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 70 (Jeremy Travis et al. eds., 2014).

35. *Id.*; Bellin, *The Power of Prosecutors*, *supra* note 32, at 200.

36. BAZELON, *supra* note 11, at xxv.

37. Luna & Wade, *supra* note 10, at 1285.

"takes a village to incarcerate,"[38] and *any* dissenting actor in the chain can short-circuit the State's power to punish.

Cutting through the illusion of prosecutor dominance reveals an important, if nuanced, distinction between the two opposing dimensions of the prosecutorial function. Sometimes prosecutors seek to punish. To do so, they require consensus. This is where checks and balances and separation of powers play a critical role. Prosecutors react to decisions by legislators who define offenses and authorize punishments, and police who investigate and arrest. Prosecutors then work to obtain the approval of juries and judges to impose legislatively-authorized (or mandated) punishments. Parole boards, judges, and governors adjust sentences on the back end, after conviction. Through it all, great power is exercised. But it is an expression of the State's power, not the prosecutor's power. When it comes to imposing punishment, prosecutorial power is contingent on other actors. This inability to inflict punishment unilaterally is the essence of our system's checks and balances and the proper focus for concerns about their erosion.

Prosecutors also exercise a power of lenience. In this role, prosecutors are themselves acting as a check on the State's power to punish. Just like other powerful criminal justice actors, such as police, prosecutors are *supposed* to act unilaterally to dispense lenience. No consensus is required. (Think of the police officer who gives a speeding motorist a warning rather than a ticket.) In this context, prosecutorial power may well counteract the will of other actors. A prosecutor who announces that she will no longer enforce marijuana laws frustrates a legislature that recently rebuffed efforts to repeal those laws. Yet this is not a repudiation of checks and balances or a violation of separation of powers. The prosecutor's action illustrates these concepts in action—the prosecutor is acting as a check on the State's power to punish. Importantly, prosecutorial lenience is itself subject to restraint through political accountability. In almost every State, chief prosecutors are elected.[39] While American voters have traditionally

38. Bellin, *Reassessing Prosecutorial Power, supra* note 16, at 837; *see also* Bellin, *The Power of Prosecutors, supra* note 32, at 181 ("The track is laid by legislators and passes through critical gateways controlled by police, judges, and other actors. A journey on that track begins when the police arrest a person and deliver the case to the prosecutor for a charging decision. But no punishment may be imposed until a jury convicts or the defendant agrees, with judicial approval, to plead guilty. And even then, a judge (or legislature) selects the punishment.").

39. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 451 (2001) ("[O]nly the District of

shown little interest in reining in officials who act too punitively, voters can and do counteract unpopular leniency at the ballot box.[40]

This twofold conceptualization of prosecutorial power offers the raw material for fashioning a neutral principle that can animate prosecutor-driven criminal justice reform and expand the movement's appeal. By focusing on the prosecutor's structural role as a check on the State's power to punish, reformers avoid the corrosive partisanship that mars the modern political landscape. Importantly, this framing of the District Attorney as a check on government overreach can radiate beyond progressive strongholds to moderate and conservative jurisdictions sorely in need of *prosecutor*-driven reform.[41]

Reform-minded prosecutors animated by a principle of lenience would work to broadly ratchet down, not redistribute, the system's severity. As a result, a more robust prosecutorial role would not exacerbate worries about the accumulation of prosecutorial power or the erosion of the system's separation of powers. A new wave of aggressively lenient prosecutors would be performing, not repudiating, the American ideal of checks and balances.

I. TWO FACES OF PROSECUTORIAL POWER

Charged anchors its discussion in two case studies. Bazelon explains: "These two stories illustrate the damage prosecutors can do and also the precious second chances they can extend that allow people to make things right in their own lives."[42] As discussed below, the stories also highlight distinct dimensions of prosecutorial power. The first story invites analysis of prosecutorial decision-making in the face of policy disagreement, specifically disagreement between a prosecutor and the New York Legislature about the proper punishment for unlawfully carrying a loaded gun. This is where progressive prosecution can contribute most meaningfully to the American criminal justice landscape, offering the prospect of leniency to those guilty of statutory crimes. The second story explores prosecutors' power to punish, a power wielded improperly, in Bazelon's view, in a Tennessee murder prosecution. As I will explain, the Tennessee story, while important, offers little direct support for

Columbia and four states—Delaware, New Jersey, Rhode Island, and Connecticut—maintain a system of appointed prosecutors.").

40. *See infra* text accompanying notes 149-153.

41. *See* Bellin, *Theories of Prosecution*, *supra* note 17, at 1250-51.

42. BAZELON, *supra* note 11, at xxix.

progressive prosecution or transformative prosecutorial power. Instead, this story illustrates generally-applicable dangers of prosecutorial excess and the importance of existing checks against government overreach.

A. "Kevin"

The first case study focuses on the prosecutor's power to decline to pursue a case against a defendant who, after committing a criminal offense, faces severe penal consequences. This is the power of lenience, which I describe elsewhere as "the unreviewable ability to (discretely) open exits from an otherwise inflexible system."[43] This story, and thousands like it, lie at the core of the potential for prosecutor-driven criminal justice reform. The story is Kevin's.

Kevin, a pseudonym, is a twenty-year-old resident of the Brownsville neighborhood in Brooklyn.[44] As Kevin tells it, one night, he is hanging out with friends in an apartment. A loaded handgun sits on a table near the front door. As one friend leaves the apartment, police appear outside "as if they were about to knock."[45] Seeing the gun inside, the police "burst in through the open door."[46] Kevin grabs the gun and takes off running. The officers quickly apprehend him. An officer asks the group whose gun it was. Kevin explains, "I had the gun on me, so it was only right to say it was mine."[47]

Bazelon's narrative shifts to a Brooklyn court where, "if you knew how to look for it," the proceedings "offered a display of enormous prosecutorial power."[48] She explains: "The prosecutors held power in the Brooklyn gun court, and Kevin had entered the system at a moment in which that was more true, in courts across the country, than ever before."[49]

---

43. Bellin, *Reassessing Prosecutorial Power*, *supra* note 16, at 835.

44. BAZELON, *supra* note 11, at xiii.

45. *Id*. at xix.

46. *Id.* at xx (describing police entry), 23 (describing police observing the gun).

47. *Id.* at xxi. Bazelon explains Kevin's actions as "taking the gun charge for [his friend,] Chris." *Id.* at 33. Notably, the friend's possession of the firearm would have been a less serious offense. N.Y. PENAL LAW § 265.03(3) ("Such possession shall not . . . constitute a violation of this subdivision if such possession takes place in such person's home.").

48. BAZELON, *supra* note 11, at xxiii.

49. *Id*. at xxv.

Anyone familiar with the academic literature will recognize this conceptualization of prosecutor power.[50] They may also know that I am not a fan.[51] I critique this common framing in another piece because:

> It removes the legislature from the equation by framing the criminal justice system as a discrete, unchangeable set of pathways. It overlooks the role of police by spontaneously placing the defendant on the track awaiting the decision of the powerful prosecutor. And it discounts the influence of judges, parole and probation officers, and governors.[52]

Bazelon's case study provides an opportunity to clarify my disagreement with this framing of prosecutorial power and (helpfully, I hope) distinguish between two kinds of power, one that the prosecutor can exercise unilaterally and another that the prosecutor cannot. The prosecutor's power to punish Kevin derives from actions already taken by the legislature and police. Going forward, the prosecutor's power to punish will be contingent on what juries and judges do in this or similar cases. Yes, the prosecutor can send Kevin to prison – but only if a chorus of other powerful criminal justice actors concur.

The prosecutor does have a power that can be exercised unilaterally. It is not the power to punish. It is the power to let Kevin go. Like the police officer who could have declined to arrest Kevin,[53] the legislatures of many states that do not criminalize gun possession,[54] or the Supreme Court, coincidentally on the verge of declaring a constitutional right to carry a gun,[55] the prosecutor can let Kevin off the legal hook. This power is especially meaningful here because the criminal case against Kevin is open and shut. The famous aphorism about legal strategy comes to mind: "If the facts are against you, argue the law. If the law is against you, argue the

50. Bellin, *The Power of Prosecutors*, *supra* note 32, at 200 (highlighting this type of framing as "epitomiz[ing] the genre" of academic commentary).

51. *Id.*

52. *Id.*

53. *See* WAYNE R. LAFAVE ET AL., 4 CRIMINAL PROCEDURE § 13.2(b) (4th ed. 2017) ("[D]iscretion is regularly exercised by the police in deciding when to arrest.").

54. *See* Jeffrey Bellin, *The Right to Remain Armed*, 93 WASH. U. L. REV. 1, 17-19 (2015) (chronicling state gun law landscape).

55. *Id.* at 18-21 (chronicling likely trajectory of Supreme Court Second Amendment rulings).

facts. If the law and the facts are against you, pound the table and yell like hell."[56]

Kevin's attorney, and Bazelon, who is openly in Kevin's corner, are in pound the table mode.

Start with the facts. Even in Kevin's own recounting, he is guilty of possessing a loaded firearm.[57] The police caught him red-handed.

The law is even worse for Kevin. Well before his arrest, New York enacted a strict set of statutes criminalizing unlicensed gun possession, with a goal of suppressing gun violence. Kevin himself recognizes the public policy dilemma that faced the legislature. As Bazelon explains: "The year Kevin was twelve, more than a hundred people were shot in and around Brownsville and another thirty were killed . . . . Guns were a fact of life. 'I could find someone with a gun before I could find someone with a diploma,' Kevin told me.'"[58]

It is helpful to a candid discussion of the prosecutor's role that Kevin's offense is a non-trivial gun crime—a type of law that many progressives support. Bazelon's view of guns is fatalistic: "The guns could be no more controlled, in the end, than the damage they did could be contained."[59] Yet later in the book, Bazelon notes the amazing transformation of New York City and Brownsville. "Brownsville had once been as violent as any crime-ridden city in the developing world. Now it was safer than the wealthy parts of New York were a generation ago."[60] The damage that guns used to do in New York City has been contained.[61] Maybe they are wrong, but New

56. GoodReads, *Carl Sandburg Quotes*, https://www.goodreads.com/quotes/918291-if-the-facts-are-against-you-argue-the-law-if [https://perma.cc/MT4S-P2DM].

57. *See* People v. Minervini, 22 Misc. 3d 1112(A) (N.Y. Sup. Ct. 2009) ("[T]o convict the defendant of that crime, the People would be required to prove he unlawfully possessed a loaded and operable firearm, and that such possession did not take place in his 'home or place of business.'").

58. BAZELON, *supra* note 11, at xiv-xv.

59. *Id.* at xviii.

60. *Id.* at 199.

61. *See* Jeffrey Bellin, *The Inverse Relationship Between the Constitutionality and Effectiveness of New York City "Stop and Frisk"*, 94 B.U. L. REV. 1495, 1520 (2014) ("[B]etween 1990 and 2012, while the City's population grew by almost a million people, the number of homicides dropped from 2,245 to 419.") (citing FRANKLIN E. ZIMRING, THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL 4 (2011).

York's politicians (including progressives) claim that the strict enforcement of gun laws deserve some of the credit.[62]

A key component of New York's gun suppression efforts are four handgun possession offenses, each titled "criminal possession of a weapon" (CPW) and distinguished by degrees. Bazelon characterizes the four CPW offenses as a "menu of options" of varying severity, from which the prosecutor selects according to taste.[63] The prosecutor's role in selecting a charge, Bazelon suggests, is to "get it right" by determining, "How dangerous was Kevin? What punishment did he deserve, and what consequence for him would serve the community's interests?"[64]

At least on its face, the charging dynamic is more static. New York's legislature does not really frame its gun laws as a menu. Each offense applies to a different factual scenario:

- CPW (First Degree): a person "possesses ten or more firearms;"[65]
- CPW (Second Degree): a person "possesses any loaded firearm;"[66]
- CPW (Third Degree): (i) the person has a prior criminal conviction;[67] or (ii) the firearm "has been defaced for the purpose of concealment or prevention of the detection of a crime;"[68] and
- CPW (Fourth Degree) (misdemeanor): a person "possesses any firearm . . . ."[69]

---

62. *See, e.g.*, Press Release, New York City, *Mayor Bill de Blasio Joins Mayors Against Illegal Guns* (Jan. 30, 2014), https://www1.nyc.gov/office-of-the-mayor/news/725-14/mayor-bill-de-blasio-joins-mayors-against-illegal-guns (quoting mayor urging vigorous enforcement of gun laws); George Pataki, *Frisks Save Lives*, N.Y. POST, (July 11, 2012), https://nypost.com/2012/07/11/frisks-save-lives/ (writing, as a former New York Governor, that "establishing mandatory minimum sentences for illegal gun possession made the city and state safer"); *see infra* text accompanying notes 86-89.

63. "The law that governed here gave the D.A.'s office an array of options." BAZELON, *supra* note 11, at xxiii, 134.

64. *Id*. at xxiii.

65. N.Y. PENAL LAW § 265.04.

66. *Id.* § 265 (class C (violent) felony); § 70.02(3)(b) (providing for a mandatory 3.5-year sentence).

67. Bazelon relates Kevin's two previous run-ins with the law, but since both cases appear to have been resolved without a "conviction," this charge likely did not apply. BAZELON, *supra* note 11, at xvi, xvii.

68. N.Y. PENAL LAW § 265.02 (class D (violent) felony); § 70.02(3)(c) (providing a mandatory two-year sentence).

Given this framework, it is unsurprising that Brooklyn's progressive prosecutors ultimately charge Kevin with CPW (Second Degree). The charge does not reflect the prosecutor's perception of Kevin's dangerousness or the community's interest. It reflects the fact that the firearm Kevin possessed was loaded.

In any event, any disagreement about charging is quickly subsumed by the realities of American criminal justice. As in many cases, Kevin's initial charge is the beginning, not the end, of the process. Due to America's tendency to criminalize frequently-engaged-in behavior and vigorously police violations, this country's courts are overwhelmed.[70] This means that prosecutors face strong pressure to bargain for admissions of guilt. Upwards of ninety-five percent of criminal convictions result from guilty pleas.[71] The CPW (Second Degree) charge is an initial offer – a signal of what the prosecution believes its evidence will prove at trial. If Kevin is willing to plead guilty, preserving court resources and foregoing the potential for an acquittal, the prosecutor will reduce the charge or offer other concessions.

In Kevin's case, each side feels pressure to bargain. For the prosecutor, there is a significant likelihood of a loss at trial. Bazelon reports that as the case progresses through the New York courts: (1) the judge assigned to Kevin's case excludes his statement to police that the gun was his; and (2) a government test on material found on the gun grip fails to turn up Kevin's DNA.[72] These are important developments, not because they suggest Kevin is innocent. We know from Kevin's own account that he committed the charged offense. Rather, they increase the chances that a jury will acquit. Litigants bargain in the "shadow of trial."[73] For the

69. N.Y. PENAL LAW § 265.01.

70. *See* ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018) (chronicling the dysfunction of New York courts); Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 278 (2011) (documenting enormous state prosecutor caseloads and resulting problems).

71. *See* Missouri v. Frye, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

72. BAZELON, *supra* note 11, at 122-23.

73. Bellin, *The Power of Prosecutors*, *supra* note 32, at 210 ("Judges and legislatures indirectly dictate the terms of prosecutors' plea offers by setting the backdrop against which defendants assess those offers."); Bellin, *Reassessing Prosecutorial Power*, *supra* note 16, at 850 ("Studies suggest that

prosecutor, the shadow of a Brooklyn jury trial has begun to look ominous.[74]

The shadow of trial doesn't look so great for Kevin either. He has a real chance at an acquittal; but, if Kevin loses at trial, the mandatory sentence that attaches to the CPW (Second Degree) offense means that even a sympathetic judge cannot keep him out of prison.[75] Of course, Kevin has little incentive to plead guilty to the *charged* offense. If he is going to be convicted of carrying a loaded firearm, he might as well take his chances at trial. The obvious middle ground involves a guilty plea to the misdemeanor (unloaded) firearm offense, a crime that does not include any mandatory sentence but would result in a criminal record and judicially-selected sentence.

Bazelon would like prosecutors to look beyond the shadow of trial to loftier considerations. She highlights the needs of the community, the threat (if any) posed by Kevin's conduct and, ultimately, justice.[76] In light of the severe sentence that attaches to the offense, Bazelon believes that prosecuting Kevin for CPW (Second Degree) is unjust. That makes sense. It is important to acknowledge, however, the import of this position. Bazelon and those who champion progressive prosecution are not just asking prosecutors to reform their own excesses (that's the theme of Bazelon's second case study, which we will get to below). Kevin's CPW (Second Degree) charge is not an example of "overcharging" – it is the charge that precisely fits the provable facts.[77] If CPW (Second Degree) is the wrong charge, as Bazelon contends, then we are asking prosecutors to "undercharge." Specifically, we are asking prosecutors to reverse a specific policy choice made by the legislature and supported by other important criminal justice actors, such as police.[78] This dynamic lies at the core of the progressive prosecution movement. It is the same dynamic in play when progressive prosecutors announce that they will not prosecute offenses

---

plea deals across a large number of cases reflect a predictable discount from generally agreed-upon, likely trial outcomes.").

74. *See* David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 886-87 (1995) (reporting high acquittal rates for Brooklyn gun possession cases).

75. *See supra* note 66.

76. BAZELON, *supra* note 11, at xxiii.

77. Bellin, *Theories of Prosecution*, *supra* note 17, at 1224-25 (discussing the ill-defined concept of "overcharging").

78. *See infra* text at notes 86-90.

viewed as unjust, like marijuana possession or shoplifting,[79] or that trigger unduly harsh punishments.

Ultimately, Brooklyn's prosecutors agree to place Kevin's case in a diversion program called "Youth and Congregations in Partnership" (YCP).[80] If Kevin completes a program consisting of drug testing, curfews, and weekly trips to a social worker, the prosecutor will dismiss the case after a year.[81] Bazelon reports that the burdensome conditions are actually a "relief" to Kevin because now "his friends and the neighborhood could see that he hadn't gotten off scot-free, that he wasn't a snitch."[82]

After the judge assigned to Kevin's case refuses to sign off on the agreement, viewing it as too lenient, the parties take the case to another judge. Kevin completes the year, plus eighty hours of community service. The prosecution dismisses the case and Kevin's record is cleared.[83] Bazelon notes that this is the third time that criminal charges against Kevin were resolved through a diversion program.[84]

In Bazelon's view, this is what justice looks like because Kevin is not dangerous. The community did not need to place him behind bars. Many would agree,[85] but not everyone. This is what makes Kevin's case so important. Assuming that Brooklyn's prosecutors offered Kevin diversion because they disagree with New York's strict gun laws, the case illustrates an increasingly prominent feature of the prosecutorial landscape.

---

79. BAZELON, *supra* note 11, at 156 (describing the priorities of the participants in a Fair and Just Prosecution convening). Fair and Just Prosecution, as explained by its executive director, is "a supportive network and concierge service for D.A.s with aspirations for reform." *Id.* at 152.

80. *Id.* at xxiv, 30.

81. *Id.* at 30.

82. *Id.* at 145.

83. *Id.* at 248-49.

84. *Id.* at xvi, xvii. Bazelon's description of the first instance when, at age 16, Kevin "got five hundred hours of community service," is vague but seems consistent with diversion since it references a charge but no adjudication. *Id.* at xvi.

85. *See, e.g.,* Paul Butler, *Prosecutors' Role in Causing — and Solving — the Problem of Mass Incarceration,* WASH. POST (Apr. 19, 2019) (reviewing EMILY BAZELON, CHARGED), https://www.washingtonpost.com/outlook/prosecutors-role-in-causing--and-solving--the-problem-of-mass-incarceration/2019/04/19/d370d844-5c93-11e9-a00e-050dc7b82693_story.html [https://perma.cc/2EK8-KA68].

The prosecutor's actions in Kevin's case frustrate the preferences of a host of other criminal justice actors. Bazelon notes that even New York City progressives favor strict application of the gun laws. Mayor Bill de Blasio spearheaded the Brooklyn gun court where Kevin's case is heard to "speed up and strengthen the prosecution of gun possession cases in New York."[86] In 2006, New York's legislature "eliminated a provision that gave judges the option of not imposing jail time on people found guilty of illegally possessing a loaded firearm."[87] The New York City Police Department (NYPD) similarly "urged zero tolerance for gun offenders and wanted to shut YCP down."[88] Offering an uncertain coda to Bazelon's reporting, a recent NYPD press release claiming to be responding to "an increase in homicides centered in Brooklyn" touts its partnership with the District Attorney's office to "work collaboratively to ensure that those who illegally carry . . . firearms will be prosecuted to the full extent of the law."[89]

The tension depicted above provides a fertile factual context to reflect on Bazelon's theme: the *benefits* of prosecutorial power. The Brooklyn prosecutors exercised the power of lenience to achieve an outcome at odds with the wishes of the Mayor, police, legislature, and the assigned judge.[90] This is where Bazelon, who throughout the book rails against the "breathtaking power" of American prosecutors,[91] seems inconsistent.

86. BAZELON, *supra* note 11, at 53. Bazelon notes that de Blasio's endorsement derived from "searching for an alternative to New York's previous [gun] policing strategy: stop-and-frisk." *Id.* at 65.

87. Michael S. Schmidt, *Main Threat to Burress Is a Sentencing Law*, N.Y. TIMES (Dec. 2, 2008), https://www.nytimes.com/2008/12/03/sports/football/03weapon.html [https://perma.cc/L9EG-QWRQ].

88. BAZELON, *supra* note 11, at 31.

89. Press Release, New York Police Department, Citywide Overall Crime Continues to Decline in February 2019 (Mar. 4, 2019), https://www1.nyc.gov/site/nypd/news/pr0304/citywide-overall-crime-continues-decline-february-2019#/0 [https://perma.cc/62Q6-GJPC].

90. *See* Bellin, *The Power of Prosecutors*, *supra* note 32, at 176 (defining power in this context as the prosecutor's "ability to achieve [a] goal when other actors (legislators, judges, police) resist"); *cf*. Julie Shaw, *Under DA Krasner, More Gun-Possession Cases Get Court Diversionary Program*, PHILA. INQUIRER (June 23, 2019), https://www.inquirer.com/news/philadelphia-district-attorney-larry-krasner-gun-possession-cases-diverted-ard-probationary-program-20190623.html [https://perma.cc/B789-TGJB] (describing similar diversion of gun cases in Philadelphia under Larry Krasner).

91. BAZELON, *supra* note 11, at xxv.

Readers, particularly those outside the progressive fold, will be left longing for a theory to reconcile the apparent inconsistency. If this is about more than just politics (my-powerful-prosecutors-are-good-your-powerful-prosecutors-are-bad), we need a principle to distinguish constructive from worrisome exercises of prosecutorial power. But first, let's consider Bazelon's second case study.

B. Noura Jackson

Noura Jackson's story starts on a horrific day in June 2005 when her mother, "a thirty-nine-year-old investment banker," is stabbed to death.[92] Jackson discovers the body in a bedroom and calls 911. Finding no signs of forced entry, police suspect Jackson of the crime.[93] Although the case is "entirely circumstantial,"[94] the police arrest Jackson and a grand jury indicts her for first-degree murder.[95]

Trial goes badly for everyone. Jackson does not testify in her own defense.[96] In fact, her attorney calls no witnesses.[97] The assigned prosecutor, Amy Weirich, violates Jackson's Fifth Amendment rights

92. *Id.* at 3-4; *see also* Emily Bazelon, *She Was Convicted of Killing Her Mother. Prosecutors Withheld the Evidence That Would Have Freed Her*, N.Y. TIMES MAG. (Aug. 1, 2017), https://www.nytimes.com/2017/08/01/magazine/she-was-convicted-of-killing-her-mother-prosecutors-withheld-the-evidence-that-would-have-freed-her.html [https://perma.cc/H2G4-UWTL].

93. *See* Glenn Ruppel & Alexa Valiente, *How A Woman Won Her Release from Prison Years After Being Convicted of Her Mother's Murder*, ABC NEWS (Mar. 23, 2017), https://abcnews.go.com/US/woman-won-release-prison-years-convicted-mothers-murder/story?id=46313117 [https://perma.cc/ME3E-ZZC5]. *See also* State v. Jackson, No. W2009-01709-CCA-R3CD, 2012 WL 6115084, at *5 (Tenn. Crim. App. Dec. 10, 2012) (quoting testimony that while the "window in a kitchen door leading to the garage was broken," "there was no forced point of entry at the residence, and the doors and windows were locked.").

94. BAZELON, *supra* note 11, at 15.

95. *See* State v. Jackson, No. W2009-01709-CCA-R3CD, 2012 WL 6115084, at *3 (Tenn. Crim. App. Dec. 10, 2012) (noting indictment).

96. Bazelon reports the conventional wisdom that "putting [Jackson] on the stand was a big gamble." BAZELON, *supra* note 11, at 115. Declining to testify was also a gamble. *See* Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395 (2018).

97. BAZELON, *supra* note 11, at 115.

during closing argument, theatrically exclaiming in front of the jury, "just tell us where you were."[98] The prosecution team fails to turn over evidence that would have impeached a prosecution witness[99] until shortly after the trial.[100]

After nine hours of deliberation, the jury finds Jackson guilty of second-degree murder.[101] The judge sentences her to nearly twenty-one years in prison.[102] The tide turns when the Tennessee Supreme Court reverses Jackson's conviction due to the prosecutors' misconduct.[103] Rather than risk a new trial, Jackson accepts a plea deal that requires her to serve another year and three months in prison.[104] In all, Jackson spends over a decade behind bars.[105]

Jackson's case presents the most basic dilemma facing the criminal justice system and its prosecutors: factual uncertainty. Jackson's trial took two weeks; "the prosecution called forty-five witnesses, and three hundred and seventy-six exhibits were introduced."[106] Bazelon argues compellingly that Jackson is innocent.[107] Not everyone agrees. Asked years later, District Attorney "Weinrich remained absolutely certain of Noura's guilt."[108] Prosecutors brought in after the appellate reversal from another office similarly refused to dismiss the case.[109] The jury that convicted Jackson

98. *See* Griffin v. California, 380 U.S. 609, 615 (1965) (holding that the Constitution "forbids . . . comment by the prosecution on the accused's silence").

99. *See* Giglio v. United States, 405 U.S. 150, 155 (1972) (holding that prosecutors must disclose material impeachment evidence).

100. BAZELON, *supra* note 11, at 119-21.

101. *Id.* at 119.

102. *Id.* at 121.

103. *Id*. at 185.

104. *Id*. at 236.

105. *See* Ruppel & Valiente, *supra* note 93 (detailing the time Jackson spent incarcerated).

106. State v. Jackson, 444 S.W.3d 554, 560 (Tenn. 2014).

107. BAZELON, *supra* note 11, at 15-16.

108. *Id.* at 16; *see also* Ruppel & Valiente, *supra* note 93.

109. *See* April Thompson, *Witnesses in Noura Jackson's Case Refused to Testify in New Trial*, NEWS CHANNEL 3 WREG MEMPHIS (May 20, 2015), https://wreg.com/2015/05/20/witnesses-in-noura-jacksons-case-refused-to-testify-in-new-trial [https://perma.cc/A6SF-GGE9] (reporting that the

thought her guilty (although without seeing all the evidence). The trial judge did too, explaining after trial: "I think Noura Jackson had a very fair trial, and she was obviously guilty."[110] The appellate judges who reviewed the case found the evidence sufficient to support the conviction, an admittedly low standard, but one designed to screen out the weakest cases.[111] One of those judges wrote that the proof of guilt "although not overwhelming, is relatively strong."[112]

The media loves cases with factual uncertainty and so does the public. Americans can experience Robert Durst (perhaps) get away with murder in HBO's documentary, *The Jinx*[113]; Steven Avery and Brendan Dassey (possibly) wrongfully imprisoned in Netflix's *Making a Murderer*;[114] and Adnan Syed's (possible) wrongful conviction in the podcast *Serial*.[115] Various iterations of the (is-it-a-)true-crime phenomenon populate the airwaves every night.[116] Jackson's case could easily join this genre.

Bazelon is right that when it comes to cases of factual uncertainty, prosecutors need guidance. It is remarkable how little thought has been given to the precise standard for prosecution in this context.[117] In a recent article, I suggest the following standard: "[A] prosecutor should only

---

new prosecutors insisted that they "got what they wanted" with the plea deal).

110. Ruppel & Valiente, *supra* note 93.

111. *See Jackson*, 444 S.W.3d at 592 ("[T]he evidence of guilt in this case was entirely circumstantial and, while sufficient to support the conviction, cannot be described as overwhelming."); State v. Jackson, No. W2009-01709-CCA-R3CD, 2012 WL 6115084, at *64 (Tenn. Crim. App. 2012) ("[T]he evidence is sufficient to support the defendant's conviction.").

112. *Jackson*, 2012 WL 6115084, at *67.

113. *The Jinx* (HBO 2015), https://www.hbo.com/the-jinx-the-life-and-deaths-of-robert-durst [https://perma.cc/YJR2-H5KJ].

114. *Making a Murderer* (Netflix 2015), https://www.netflix.com/title/80000770 [https://perma.cc/X5L2-WF7M].

115. *Serial: Season One,* THIS AMERICAN LIFE (2014), https://serialpodcast.org/season-one [https://perma.cc/EE3Q-RAUR].

116. *See, e.g.*, Bill Carter, *A Prime-Time True-Crime Spree*, N.Y. TIMES (Aug. 19, 2011), https://www.nytimes.com/2011/08/21/arts/television/true-crime-tv-on-shows-like-dateline.html [https://perma.cc/S5WA-H6PL] (chronicling television shows).

117. *See* Bellin, *Theories of Prosecution*, *supra* note 17, at 1221 (criticizing the lack of concrete ethics guidance for prosecutors).

charge a case when the prosecutor expects that the evidence introduced at trial will prove the defendant's guilt beyond a reasonable doubt."[118] But as Jackson's case illustrates, the standard is just a starting point. People will inevitably disagree about its application. If Bazelon were the prosecutor, she would apply the standard to dismiss the case against Jackson. Weirich reached the opposite conclusion.

To explain the disagreement, Bazelon suggests that Weirich is a bad prosecutor, suffering from "tunnel vision" and an office culture that "placed winning above other values."[119] But, as Bazelon notes, Weirich talks about prosecutors the same way Bazelon does. In a column about the prosecutorial role, Weirich writes: "As I tell our new assistant district attorneys at orientation, our job is to do the right thing every day for the right reason. That might mean dismissing a difficult case because the proof is simply not there . . . . [M]y job is to see that justice is done."[120]

Weirich and Bazelon appear to agree on the principle: justice. They disagree about what justice looks like in the Jackson case. This kind of disagreement is probably inevitable. It is not something that we can realistically expect progressive prosecutors to resolve. In fact, an emphasis on achieving "justice," a progressive tenet, may fuel the dangers of prosecutorial excess by subtly undercutting adherence to legal rules (like transparency requirements) in favor of loftier goals.[121]

Fortunately, there is another remedy for prosecutorial overreach: checks and balances. The criminal justice system expects prosecutors to bring bad cases. There are over 25,000 prosecutors and an almost infinite variety of cases.[122] There will always be prosecutors who get it wrong. That's why prosecutors cannot punish unilaterally.

---

118. *Id*. at 1223.

119. BAZELON, *supra* note 11, at 16-19.

120. Amy Weirich, Opinion, *The Changing Role of the District Attorney*, DAILY MEMPHIAN (Dec. 07, 2018), https://dailymemphian.com/article/1622/The-changing-role-of-the-district-attorney [https://perma.cc/DV6Z-TTTH].

121. *See* Bellin, *Theories of Prosecution, supra* note 17, at 1216-20 (highlighting dangers of the amorphous "do justice" command).

122. *Id.* at 1210 n.44 (citing Steve W. Perry & Duren Banks, Prosecutors in State Courts, 2007 - Statistical Tables, BUREAU OF JUST. STAT. 2 (DEC. 2011), https://www.bjs.gov/content/pub/pdf/psc07st.pdf [https://perma.cc/6GNZ-4RRU] ("The nearly 25,000 FTE assistant prosecutors employed in 2007 represented a 7% increase from the number reported in 2001. . . .").

The first check is legislators who need to understand that human error is an inevitable component of criminal prosecution. When it comes to criminal law, less is more.

The next check on the State's power to punish comes in the form of the system's investigators. Police generate the evidence that points to guilt or innocence. In most cases, prosecutors don't get involved until the police identify a potential target of the State's punitive powers and rule out (at least in their mind) alternative culprits.[123]

The next two checks consist of regular people. In many jurisdictions, a grand jury determines whether there is "probable cause" to charge.[124] If disagreement persists, another jury decides, at trial, whether the prosecutor has proven guilt beyond a reasonable doubt.[125] Guilty verdicts must be unanimous.[126] Throughout the proceedings, defense attorneys play a critical role in bringing out weaknesses in the prosecution's case. To ensure that the prosecutor and police follow the rules, a neutral judge presides. When the trial judge fails, there are appellate courts.

These mechanisms were present in Jackson's case. A grand jury indicted her.[127] A jury convicted her.[128] The trial judge concurred.[129] The Tennessee Supreme Court reviewed her case and reversed her conviction.

123. *See* Bellin*, The Power of Prosecutors*, *supra* note 32, at 192 (detailing the role of police).

124. *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ...."); Roger A. Fairfax, Jr., *Grand Jury Discretion and Constitutional Design,* 93 CORNELL L. REV. 703, 707 n.5 (2008) ("[A]bout half of the fifty states have some form of grand jury requirement." (citing SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 8.2 (2d ed. 2005)).

125. *See In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

126. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020).

127. *See* State v. Jackson, No. W2009-01709-CCA-R3CD, 2012 WL 6115084, at *3 (Tenn. Crim. App. Dec. 10, 2012) (noting indictment).

128. BAZELON, *supra* note 11, at 119.

129. *Id.* at 121 (denying a motion for a new trial). In Tennessee, a trial judge "shall order the entry of judgment of acquittal ... if the evidence is insufficient to sustain a conviction." Tenn. R. Crim. P. 29(b).

Tennessee's parole board considered but denied Jackson's release.[130] Tennessee's governor issued a number of pardons during the relevant period but did not grant one to Jackson.[131] Of course, Bazelon is right that the prosecutor too played an instrumental role. But all of these actors mattered. Everyone in the system is supposed to protect the factually innocent. If Jackson is innocent, her case reflects a cascade of failures across the system. It is unclear why, in this context, we should brush off these failings to focus on Weirich (or analogous prosecutors across the country). Nor is it obvious that progressive prosecutors will be less likely to push legal boundaries and overlook factual ambiguity in their own zealous pursuit of "justice."

Compare Jackson's prosecution with another example of prosecution in the face of factual uncertainty. In 2015, Baltimore's State's Attorney, progressive prosecutor Marilyn Mosby, prosecuted six police officers involved in the death of Freddie Gray.[132] Announcing these charges, Mosby "leaped onto the national stage—as heroine and lightning rod."[133] Like Jackson's case, however, the Freddie Gray prosecutions involved failures to disclose evidence[134] and a controversial effort to override the Fifth

130. *See* Kelsey Ott, *Woman Accused of Killing Her Mother Will Stay in Prison*, NEWS CHANNEL 3 WREG MEMPHIS (Aug. 12, 2015), https://wreg.com/2015/08/12/woman-accused-of-killing-her-mother-to-stay-in-prison [https://perma.cc/H4PQ-J287].

131. Adam Tamburin, *Gov. Bill Haslam Granted 11 People Clemency, But He Has Yet to Address Cyntoia Brown Case*, TENNESSEAN (Dec. 20, 2018), https://www.tennessean.com/story/news/crime/2018/12/20/cyntoia-brown-gov-bill-haslam-no-clemency-decision-tennessee/2378424002 [https://perma.cc/9UM9-48NE].

132. *See* Wil S. Hylton, *Baltimore vs. Marilyn Mosby*, N.Y. TIMES MAG. (Sept. 28, 2016), https://www.nytimes.com/2016/10/02/magazine/marilyn-mosby-freddie-gray-baltimore.html [https://perma.cc/U4ZZ-GWUA].

133. Heidi Mitchell, *Meet Marilyn Mosby: The Baltimore Prosecutor in the Eye of the Storm*, VOGUE (July 2015), https://www.vogue.com/article/marilyn-mosby-baltimore-prosecutor [https://perma.cc/AW47-E6BS].

134. *See* Safia Samee Ali, *Trial of Van Driver in Freddie Gray Case Reveals Prosecutor Violations*, NBC NEWS (June 23, 2016), https://www.nbcnews.com/storyline/baltimore-unrest/trial-van-driver-freddie-gray-case-reveals-prosecutor-violations-n596731 [https://perma.cc/8Z5Y-X57K] (detailing court rulings that prosecutors committed *Brady* violations).

Amendment protections offered to criminal defendants.[135]

Mosby's decision to pursue the Freddie Gray prosecutions encountered resistance. The prosecution tried the six officers separately.[136] The first case ended in a mistrial when the jury was unable to reach a verdict.[137] The second and third trials ended with not guilty verdicts.[138] Unable to obtain consensus from the necessary criminal justice actors, Mosby could not impose punishment. She dismissed the remaining charges.[139]

Cases that move forward despite factual uncertainty do not illustrate the unbridled power of prosecutors. They bring out the multitude of actors who must concur whenever the State imposes punishment.[140] Focusing on

135. *See* Justin Fenton, *Freddie Gray Case: Maryland High Court Says Officer Porter Must Testify Against All Five Co-Defendants*, BALT. SUN (Mar. 8, 2016), https://www.baltimoresun.com/news/crime/bs-md-ci-appeals-court-ruling-freddie-gray-20160308-story.html [https://perma.cc/265P-UASL] (quoting a law professor after the prosecution's unusual success in compelling one co-defendant to testify against another, stating that the precedent provides "'a new arrow in the quiver of prosecutors when they deal with co-defendant cases'"; "I hope . . . that the kind of unique circumstances here makes this OK in this instance, but . . . will not change how co-defendant cases are typically tried.'").

136. *See* Hylton, *supra* note 132 (chronicling cases).

137. Sheryl Gay Stolberg & Jess Bidgood, *Mistrial Declared in Case of Officer Charged in Freddie Gray's Death*, N.Y. TIMES (Dec. 15, 2015) (mistrial of Officer William G. Porter), https://www.nytimes.com/2015/12/17/us/freddie-gray-baltimore-police-trial.html [https://perma.cc/8PBU-KP5G].

138. Jess Bidgood & Timothy Williams, *Police Officer in Freddie Gray Case Is Acquitted of All Charges*, N.Y. TIMES (May 23, 2016), https://www.nytimes.com/2016/05/24/us/baltimore-officer-edward-nero-freddie-gray-court-verdict [https://perma.cc/2QJV-RBHY] (describing acquittal of Officer Edward Nero); Jess Bidgood & Sheryl Gay Stolberg, *Acquittal in Freddie Gray Case Casts Doubts About Future Trials*, N.Y. Times (June 23, 2016), https://www.nytimes.com/2016/06/24/us/verdict-freddie-gray-caesar-goodson-baltimore.html [https://perma.cc/DP2J-FFTR] (describing acquittal of Officer Caesar R. Goodson Jr.).

139. Sheryl Gay Stolberg & Jess Bidgood, *All Charges Dropped Against Baltimore Officers in Freddie Gray Case*, N.Y. TIMES (July 27, 2016), https://www.nytimes.com/2016/07/28/us/charges-dropped-against-3-remaining-officers-in-freddie-gray-case [https://perma.cc/D9B5-C3H9].

140. *See supra* Part I and note 38.

prosecutors in this context lets these other actors off the hook. There are lessons here for prosecutors. But these are old lessons. Prosecutors, no matter what their guiding philosophy, must follow the rules and should have no interest in prosecuting the innocent. Jackson needed prosecutorial competence, not progressive lenience. She also needed thorough police investigation, a stronger defense, open-minded judges and juries, and well-functioning parole and pardon systems.

II. BUILDING A NEW NARRATIVE

Bazelon uses the two stories described in the preceding Part to illustrate the power of prosecutors and the appeal of progressive prosecution. Brooklyn's progressive prosecutors did the right thing by giving Kevin a break.[141] Tennessee's "win-at-all-costs" prosecutors did the wrong thing by sending Jackson to prison despite her potential innocence.[142] To my mind, the stories illustrate different things. Kevin's story illustrates the challenges and potential of the progressive prosecution movement—a movement that can leverage the often-overlooked power of prosecutorial lenience to check the State's power to punish the factually guilty. Jackson's story says less about progressive prosecutors and nothing about lenience. It reveals the State's power to punish even the factually innocent so long as all of the criminal justice actors act in concert. In doing so, it highlights the importance of police, judges, juries, governors, and parole boards.

Declining to prosecute the innocent is not a progressive position. It is a consensus position. That's why when it comes to cases of factual uncertainty like Jackson's, the real protagonists are the investigators. If police generate sufficient evidence of guilt (or innocence), this kind of uncertainty disappears. When police fail to uncover exculpatory evidence, defense attorneys become critical. Juries too must play a role. When juries reject the prosecution's evidence in weak cases, prosecutors become reluctant to bring those cases. In fact, Brooklyn's juries may explain Kevin's lenient outcome better than Brooklyn's prosecutors. David Dorfman and Chris Iijima report that in the early 1990s, "Brooklyn juries were acquitting in gun possession cases at an average rate of 56%."[143] That's shockingly high. Dorfman and IIjima suggest that "because the

141. BAZELON, *supra* note 11, at 296.

142. *Id.* at 297.

143. David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in A New Context*, 28 U. MICH. J.L. REFORM 861, 887 (1995).

[prosecutors] know[] that Brooklyn juries will very likely acquit a defendant in a 'garden variety' gun possession case," they have little choice but to offer more attractive plea deals.[144] The prosecutors in Kevin's case would be well aware of the difficulty of convicting in his "garden variety" case. The opposite dynamic likely worked against Jackson, whose fate ultimately rested in the hands not of a Tennessee prosecutor but a Tennessee jury.

The two scenarios also highlight very different strands of prosecutorial reform: one that seeks to use prosecutors to reform the system and another that seeks to reform prosecutors themselves. The latter strand, which is at play in Jackson's case, is ancient. Prosecutors must play fair, uphold the Constitution, and carefully weigh the evidence. This is the theme of the 1935 case *Berger v. United States*, which famously commands that prosecutors, as "servants of the law," must hew closely to the rules while ensuring "that guilt shall not escape or innocence suffer."[145] As *Berger* recognized, we don't need transformative prosecutors to guard against convictions of the innocent, we just need competent prosecutors. Competent police, juries, judges, governors, and parole boards are even more important. By contrast, the strand of reform at issue in Kevin's case is new, bringing the transformative power of prosecutorial lenience out of the shadows. Distinguishing between the prosecutors' roles in these two scenarios allows a clearer vision of the places where we can expect a new wave of prosecutors to transform the criminal justice system.

What makes Kevin's case important on a larger stage is that, in contrast to Jackson's case, Kevin's factual guilt of the charged offense is clear (even if the likelihood of conviction was uncertain). Disagreement about what the prosecutor should do in Kevin's case turns on contested conceptualizations of the prosecutorial role. As Bazelon frames it, the question becomes whether Kevin "deserved," or the community benefits from, a mandatory 3.5-year sentence.[146] After all, if we accept Kevin's version, he was merely trying to help his friend avoid a gun conviction. To broaden the discussion, we could ask similar questions whenever

144. *Id.* at n.143. Dorfman and Iijima suggest that the prosecutors reacted to the high acquittal rates by "weeding-out [*sic*] the cases that may be in the least bit problematic at trial" resulting in a lower acquittal rate in subsequent years. *Id.* Still, Bazelon notes that in the first year of the gun court, one third of the trials resulted in an acquittal. BAZELON, *supra* note 11, at 136.

145. Berger v. United States, 295 U.S. 78, 88 (1935).

146. BAZELON, *supra* note 11, at xxiii.

prosecutors disagree with unpopular laws, like marijuana or shoplifting offenses, or severe mandatory or judicially-imposed sentences.

There is no consensus on the prosecutors' role in circumstances like those in Kevin's case. This is where progressive prosecution becomes a coherent concept, distinct from traditional calls for competent, thoughtful, and non-corrupt prosecution. Unlike a traditional "by-the-book" prosecutor, the new wave of prosecutors Bazelon chronicles can serve as a check on the system's severity by counteracting overly-punitive police, legislatures, judges, and juries—even in cases, like Kevin's, when the defendant's guilt is clear.

In a democratic system characterized by mass incarceration, there is a strong argument for policy-based prosecutor lenience. Too much prosecutorial power is problematic, but lenience is different. Obviously, all would be outraged if the legislature repealed the gun laws and the prosecutor nevertheless sent Kevin to prison for gun possession. That would violate the system's checks and balances. The Brooklyn prosecutors' decision to divert Kevin's case is the opposite. Like the police officer who declines to ticket a speeding motorist, letting Kevin pass through the justice system without a conviction is an example of checks and balances in operation. Contrary to the critics, this form of prosecutorial power—the power to dictate lenience—is both consistent with the system's design and faithful to traditional worries about the accumulation of prosecutor power.

When it comes to prosecutorial lenience, then, more prosecutor power is better and (contrary to traditional academic voices) the best reform *for that power* is no reform.[147] Prosecutors can already offer leniency without check. This is the power reform-minded prosecutors and their supporters can leverage unapologetically to temper the overly punitive dynamics of American criminal justice.

There remains the concern about how prosecutors dispense leniency. Prosecutors may offer leniency inequitably, unfairly, or even corruptly. This concern applies throughout the criminal justice system, to other actors such as police, parole boards, legislatures, and governors. The best answer with respect to prosecutors is that there are political limits. If a prosecutor acts too leniently, her constituents can vote her out of office. Commentators downplay the prospect that political accountability can control wayward prosecutors.[148] But this critique only resonates in the

147. *Cf.* Bellin, *Reassessing Prosecutorial Power*, *supra* note 16, at 854 (critiquing reform proposals like legislative plea bargaining guidelines as more likely to increase than decrease severity).

148. *See, e.g.,* Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 931-46 (2006); Bruce Green & Ellen

context of undue severity.[149] Voters can, and do, counteract excessive leniency. Two of the most prominent progressive prosecution victories (in Chicago and St. Louis) channeled voter dissatisfaction with incumbents' decisions *not* to vigorously pursue cases.[150] In 2018, California voters recalled a judge who imposed a lenient sentence in a sexual assault case.[151] And American politicians across the nation famously worry about "the threat of being 'Willie Horton'ed,'" i.e., targeted by negative campaign advertisements highlighting lenient criminal policy choices.[152]

Guidance regarding how prosecutors should exercise leniency in various circumstances is beyond the scope of this Essay. Here, the question is whether it is proper to offer leniency based on a policy disagreement with the legislature or other actors. An affirmative answer is critically important because it substantially expands the limits of permissible prosecutorial action in an era of mass incarceration. How exactly prosecutors should operate within those limits is a question for another piece.[153]

Yaroshefsky, *Prosecutorial Accountability 2.0,* 92 NOTRE DAME L. REV. 51, 66 (2017); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582 (2009).

149. *See* Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1281 (2005) ("[A]n opponent's charge that they are soft on crime can be devastating to their political futures because it resonates with voters."); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 530 (2001) (suggesting that voters seek "conviction and punishment of people who commit the kinds of offenses that voters fear").

150. *See* Note, *The Paradox of "Progressive Prosecution,"* 132 HARV. L. REV. 748, 754-55 (2018) (chronicling the trend in the context of police shootings).

151. *See* Maggie Astor, *California Voters Remove Judge Aaron Persky, Who Gave a 6-Month Sentence for Sexual Assault*, N.Y. TIMES (June 6, 2018), https://www.nytimes.com/2018/06/06/us/politics/judge-persky-brock-turner-recall.html [https://perma.cc/7FJZ-ANR4]; *see also* Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 329 n.161 (2008) (describing the "famous" example of "three California Supreme Court justices . . . defeated in reelection campaigns in 1986 based on a record that was decidedly hostile to the death penalty.").

152. *See* Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, MARSHALL PROJECT (May 13, 2015) (describing the phenomenon), https://www.themarshallproject.org/2015/05/13/willie-horton-revisited [https://perma.cc/RJD5-7G9K].

153. *See generally* Bellin, *Theories of Prosecution*, *supra* note 17 (discussing normative theories of prosecution).

In a time of rapidly changing perceptions of prosecutors, it is critical to find consensus on the appropriate boundaries of prosecutorial power. This is especially true when the boundaries evolving in the real world appear to be in tension with traditional academic critiques. By sketching broad but neutral boundaries, this Essay responds to powerful structural objections to prosecutor-driven reform: specifically, that (1) prosecutors are already too powerful and (2) should play a more restricted, less partisan role that does not usurp legislators, judges, or juries. The best answer to these objections is not, as one commonly hears, that all-powerful prosecutors can do whatever they or their voters want.[154] Bazelon, for example, reassures us that: "We, the people, elect state prosecutors, and that means their power is our power."[155] But in a democracy, "our" rarely means everyone. And this framing offers no limits beyond what a majority of voters in any locality can stand. I think a better answer—and one that places some limits on prosecutorial might—is that many of the actors in the American criminal justice system, including the prosecutor, possess a unilateral power to dispense lenience. When any one of those actors invokes *that power*, it is an example of the system's checks and balances in operation, not a breakdown of the rule of law.

CONCLUSION

Readers of Emily Bazelon's excellent new book, *Charged*, will find her enthusiasm for the burgeoning prosecutor-driven reform movement contagious. But contrary to the academic voices upon which she builds, the key to the movement's success is not prosecutorial omnipotence. It is the opposite. Local prosecutors are not (and should not be) benevolent dictators presiding over the criminal justice system—even if we like their politics. Instead, the movement can highlight limits on prosecutorial might.

154. *See, e.g.*, Brooklyn Defender Services, *Power of Prosecutors*, YOUTUBE (Sep. 10, 2017), https://www.youtube.com/watch?v=zrgvlx7MnqA [https://perma.cc/QJ2A-KBD8] ("What the public wants to have happen is what the District Attorney should be doing."); Katherine K. Moy et al., Stanford Criminal Justice Ctr., *Rate My District Attorney: Towards a Scorecard for Prosecutors' Offices*, STAN. L. SCH. 4 (2018), https://www-cdn.law.stanford.edu/wp-content/uploads/2018/01/Rate_My_District_Attorney__January_2018.pdf [https://perma.cc/9N3R-J6AF] (proposing ratings to reveal "whether a prosecutors' office has effectively pursued the electorate's policy priorities.").

155. BAZELON, *supra* note 11, at xxviii.

Prosecutors exercise power across two dimensions, and both are restricted. When prosecutors exercise lenience, the local electorate can enforce limits at the ballot box. When prosecutors seek to invoke the State's power to punish, police, legislatures, judges, juries, and other actors determine the prosecutor's success. As a result, progressive prosecutors and their champions can celebrate the system's checks and balances alongside a narrow form of prosecutorial power: leniency. Indeed, a reminder that prosecutorial leniency is just one of the system's *many* checks on the State's power to punish may turn out to be the most important lesson progressive prosecutors have to offer.