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Structuring prosecutorial power

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Abstract

Prosecutors play a decisive role in contemporary criminal justice. Their decisions greatly influence the output of the system, as well as the behaviour of other criminal justice institutions. By harnessing the power to filter, select and segment the work of criminal justice, prosecutors provide structure to an otherwise unbalanced field. They thus play a key structuring role. However, the prosecutors' position and the problems that emanate from it have mostly been studied in terms of their power and discretion. We contend that this approach neglects the core problems and challenges connected to the prosecutorial function in contemporary criminal justice and offer a reconstruction of the formal and informal influences that shape the behaviour of prosecutors in providing for structure.

Keywords: criminal justice; comparative criminal procedure; public prosecution; discretion; legal culture; organisational practices

Introduction

Contemporary criminal justice systems are dependent on structuring work that is not and cannot be provided by formal law. In societies where reports and arrests greatly surpass judicial processing capacity, the *administrative selection and filtering* of cases significantly contribute to the distribution of formal social control and punishment. In societies where the total number of sanctioning outcomes greatly surpasses their capacity to enforce incarcerating sanctions, criminal justice systems need to *segment* their responses. The players that decide when to charge and seek to obtain the maximum penalty in a trial, when to agree to the imposition of a lesser penalty, or when to divert the case so that it obtains non-sanctioning outcomes, thus perform a central role in providing for structure.

These functions are not performed in the same manner in an international perspective, nor are they undertaken by organisations with identical features. Diversity is the rule. Yet in most cases, an administrative or judicial agency charged with indicting and litigating for the imposition of state punishment is, at the same time, charged with both selecting and segmenting criminal cases. This is, for instance, the case with state prosecutors in the US, of the *fiscales* and *Ministerio Público* in most reformed systems in Latin America, of the Crown Prosecution Service in England and Wales, and of similar institutional roles in European jurisdictions (the *Staatsanwaltschaft* in Germany, the *Ministerio Fiscal* in Spain, or the *Ministère Public* in France). Despite the huge differences regarding questions of legal culture and institutional design, in all of these cases the prosecuting agency plays an essential role in selecting and segmenting cases. In this paper we thus make use of the concepts of prosecutors,

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prosecutorial agencies and the prosecutorial function to refer to the organisations that fulfil these functions.[1]

Contemporary literature generally acknowledges the significance of these functions by treating prosecutors as a source of nearly unrestricted power.[2] The disjunction between formal law and substantive enforcement is said to provide prosecutors with power that no other player in criminal justice, save the police, possesses.[3] Although this treatment convincingly highlights the significant influence that they exercise over the performance of criminal justice, it misleads by suggesting that they simply impose their will as they see fit.[4]

As we will argue, the power of prosecutorial agencies both emanates from and is limited by their role in providing structure to an otherwise unbalanced field.[5] Establishing regularity is essential both to their own performance and to the general functioning of the criminal justice system. Moreover, prosecutors must play this role despite the absence of straightforward institutional recipes. Statutes do not usually go beyond *granting them powers* to select or filter certain types of cases, providing little guidance on how to make those decisions. The prosecutor's institutional position is also ambiguous when compared with that of a judge with its clear-cut institutional design centred on independence, impartiality, and legal boundedness, or with the purely litigious role of defenders. Prosecutors are, at the same time, ministers of justice and adversarial parties seeking to obtain punitive outcomes.[6] They are the valve of the system, and their behaviour can affect the type and number of cases that other criminal justice actors must work on processing, significantly contributing to shaping the manner in which each type of case is treated. This is the common *structural problem of prosecutors*: modern criminal justice's practice is highly dependent on the choices and patterns of action of organisations that are subject to multiple contradictory demands, and we have few formal guides on how to evaluate them.

In this paper, we argue that prosecutorial power needs to be understood by looking at the structuring work that prosecutors provide for and the factors that influence the shape of that work. We contend that the focus on discretion and power that dominates the literature has blinded us to the significance of the structuring role. Legal and sociolegal scholarship would do well to focus on both understanding the conditions under which structure is provided and the direction that it should take if it is to make sense of how the prosecutorial function impacts on the workings and outcomes of criminal justice and the strong comparative variance. In the final part of the paper, we offer an overview of some of the most salient findings on the features that influence the shape of the structuring work of prosecutors.

[1]On the use of the concept of 'prosecutors' to refer to agencies that fulfil these two roles, see A van Aaken et al 'Do independent prosecutors deter political corruption? An empirical evaluation across seventy-eight countries' (2010) 12 American Law and Economics Review 204.

[2]M Tonry 'Prosecutors and politics in comparative perspective' (2012) 41 Crime and Justice; S Bibas 'Prosecutorial regulation versus prosecutorial accountability' (2009) 157 University of Pennsylvania Law Review 959; A Davis 'Prosecution and race: the power and privilege of discretion' (1998) 67 Fordham Law Review 13. See also D Fryer 'Race, reform, and progressive prosecution' (2020) 110 The Journal of Criminal Law and Criminology 769 at 770–771.

[3]E Luna and M Wade 'Prosecutors as judges' (2010) 1 Washington & Lee Law Review 1413; W Stuntz 'The pathological politics of criminal law' (2001) 100 Michigan Law Review 505; D Sklansky 'The problems with prosecutors' (2018) 1 Annual Review of Criminology 451; M Miller 'Domination and dissatisfaction: prosecutors as sentencers' (2004) 56 Stanford Law Review 1211; Tonry, above n 2; Bibas, above n 2.

[4]On this point, see the humorous piece by J Bellin 'Reassessing prosecutorial power through the lens of mass incarceration' (2017) 116 Michigan Law Review 835, who argues that prosecutors are at most the third or fourth most powerful players in criminal justice.

[5]The point has been made in the law and economics literature, although with regard to questions of optimal performance for deterrence purposes rather than simple functioning. See F Easterbrook 'Criminal procedure as a market system' (1983) 12 The Journal of Legal Studies 289; S Schulhofer 'Criminal justice discretion as a regulatory system' (1988) 17 The Journal of Legal Studies 43.

[6]The classic formulation can be found in *Berger v United States*, 295 US 78 (1935) and R Jackson 'The federal prosecutor' (1940) 31 Journal of Criminal Law and Criminology 3. For reviews see J Bellin 'Theories of prosecution' (2020) 108 California Law Review 1203; E Fish 'Against adversary prosecution' (2018) 103 Iowa Law Review 1419.

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The paper is structured as follows. The first section reviews the comparative engagement with the structural problem of prosecutors. It shows that despite the wide disparity of starting points in different jurisdictions, legal scholarship in the US, other common law jurisdictions and the civil law world has moved to acknowledge the growing significance of the structural problem of prosecutors. Yet they connect the structural problem – the relevance of filtering, selecting, and segmenting cases by prosecutorial agencies in contemporary criminal justice – with questions of discretion and power instead of with questions of structure. The second section provides an overview of the factors that make the constitution of structure by prosecutorial power important. It shows that the performance of prosecutors should not be seen simply as a desperate life jacket to allow the functioning of overloaded criminal justice systems by whatever means, but as an inevitable fact of criminal justice performance and a potentially beneficial type of work to establish the decent operation of criminal justice. It ends by showing that because of the wide variation in the way that these powers are exercised, we need to understand the factors that affect the use of the structuring power. Finally, the third section provides a conceptual review of the factors that influence the structuring work of criminal justice and points to the gaps in our knowledge about the effects produced by them.

1. Dealing with prosecutorial discretion and power

For decades, comparisons of the role of prosecutors were mostly centred on a dichotomous and idealised portrayal of two models. According to this line of thought, the structural problem was mainly a US affair caused by problems with the design of a system that granted too much discretion to prosecutors. While the US literature showed an almost obsessive interest in the increase in plea bargains and the standardisation of prosecutorial practices in misdemeanours, the structural problem was mostly ignored, and seen as an alien affair, by the European and common law literature. More recent literature has insisted, in contrast, that the problem is now ubiquitous to criminal justice systems dealing with exorbitant caseloads. Yet it remains bound to the original terms of discussion, centred around notions of discretion and – much more intensely in the US – power.

The structural problem of prosecutors has been a feature of research since at least the 1960s. By then, the significance of the overload of criminal cases, the standardisation of working practices on low-level crimes,[7] and the rise of plea bargaining, were already clear in US legal scholarship. Several classical pieces connected these trends with the discretion that had come to characterise the prosecutorial role.[8] In comparative terms,[9] the tendency of prosecutors to seek extreme sanctions was connected to the role of discretion in US criminal justice.[10] The counterpoint used was Germany, promoting its prosecutorial model – and more specifically, the principle of mandatory enforcement – to solve the 'moral, juridical and practical' deficiencies of the US prosecutor.[11]

By the early 2000s, interest in the structural problem of prosecutors had re-emerged, as US legal scholars focused on the crisis of mass incarceration. An important trend linked the crisis with the structural problem of prosecutors. But the boundaries of the problem were amplified, and power came to complement discretion as the dominating frames of critical analysis. The American problems

[7]A classical expression of this can be found in the President's Commission of Law Enforcement and Administration of Justice 'The challenge of crime in a free society' (1967).

[8]K Davis *Discretionary Justice: A Preliminary Inquiry* (Baton Rouge: University of Illinois Press, 1976); J Jacoby *The Prosecutor's Charging Decision: A Policy Perspective* (Washington DC: National Institute of Law Enforcement and Criminal Justice, 1977).

[9]For reviews see R Frase and T Weigend 'German criminal justice as a guide to American law reform: similar problems, better solutions?' (1995) XVIII Boston College International & Comparative Law Review 317; T Weigend 'Continental cures for American ailments: European criminal procedure as a model for law reform' (1980) 2 Crime and Justice 381. Recently Luna and Wade, above n 3.

[10]See J Langbein 'Controlling prosecutorial discretion in Germany' (1974) 41 The University of Chicago Law Review 439; J Langbein 'Land without plea bargaining: how the Germans do it' (1979) 78 Michigan Law Review 204.

[11]Frase and Weigend, above n 9; Weigend, above n 9.

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with prosecutors required being attentive to their connection with the political system. Prosecutors were tied to the politics of law and order not only because of the elected nature of the job of district attorney, but also because many of them engaged in state politics in the course of their careers.[12] Combining the traditional description of their decision-making process as 'discretional' with the new-found interest in their political lobbying work, a diagnosis emerged linking prosecutorial behaviour with the crisis of criminal justice and making them into 'the most powerful actor in criminal justice'.[13] Prosecutors are still thought of as officials with enormous power that is not checked by a set of rules restraining their decision-making reasoning.[14]

Outside of the US, research on the structural problem of prosecutors emerged later. The majority of common law jurisdictions had still been working on a mixture of private and police initiative, inherited from the nineteenth century, where the role of the prosecutor at court was assumed by independent barristers.[15] Scholarship and public debate expressed concern about the lack of control of police action and decisions, which at the end of the twentieth century led to the centralisation of prosecutorial power in public agencies.[16] Just as elsewhere, the literature since features debates about discretion on matters such as plea bargaining and decisions not to prosecute.[17] Power, as a conceptual category, is largely absent, as is the structuration of such power.

In the civil law tradition, countries like Germany and France were relatively at peace with their original introduction of a mixed system in the nineteenth century, separating the prosecution from the judiciary. Working in systems with much better national outcomes and with less flamboyant prosecutors than their US counterparts, their legal scholars tended to see prosecutors as relatively unproblematic and uninteresting figures.[18] Other countries that had maintained a fully inquisitorial procedure looked at introducing adversarial elements, attempting to better protect the interests of the defendant,

[12]W Stuntz 'The uneasy relationship between criminal procedure and criminal justice' (1997) 107 The Yale Law Journal 1; R Barkow 'Institutional design and the policing of prosecutors: lessons from administrative law' (2009) 61 Stanford Law Review 869; W Stuntz *The Collapse of American Criminal Justice* (Cambrige MA: Harvard University Press, 2010).

[13]The most straightforward causal theory on changes in prosecutorial behaviour and mass incarceration can be found in the work of J Pfaff 'The empirics of prison growth' (2008) 98 The Journal of Criminal Law and Criminology 547; J Pfaff 'Escaping from the standard story: why the conventional wisdom on prison growth is wrong, and where we can go from here' (2014) 26 Federal Sentencing Reporter 265; J Pfaff *Locked In: The True Causes of Mass Incarceration – and How to Achieve Real Reform* (New York: Basic Books, 2017). But claims about the immense power of prosecutors can be found in many more places, see above n 2. An overview on the characterisations of the power of prosecutors is provided by J Bellin 'The power of prosecutors' (2019) 94 New York University Law Review 171.

[14]Consider, for instance, the only work that to our knowledge has attempted to provide a systematic review (in an annual review) of 'the problem of prosecutors'. David Sklansky offers an overview centred on power and discretion. And, except for a small, final note on 'inertia', all remaining problems stand linked to questions of individual decision-making: Sklansky, above n 3.

[15]And still is, in some jurisdictions such as New Zealand, Ireland and in Australia, where the offices of the Director of Public Prosecutions receive cases from a myriad of investigative agencies and in turn brief court prosecutors. Contrast, however, the different history and evolution of Scotland: S Moody and J Tombs *Prosecution in the Public Interest* (Edinburgh: Scottish Academic Press, 1982) and later S Moody and J Tombs 'Alternatives to prosecution: the public interest redefined' (1993) Criminal Law Review 357.

[16]Y Ma 'Exploring the origins of public prosecution' (2008) 18 International Criminal Justice Review 2. A similar phenomenon to the creation of the Crown Prosecution Service in England led to the establishment of the Public Prosecution Service in Canada. Some level of centralisation was introduced in the jurisdictions mentioned in the previous note, even if they intervene mostly after investigations are closed.

[17]For instance, C Brook et al 'A comparative look at plea bargaining in Australia, Canada, England, New Zealand, and the United States England, New Zealand, and the United States' (2016) 57 William & Mary Law Review 1147. For England and Wales see L Soubise *Prosecutorial Discretion and Accountability: A comparative study of France and England and Wales* (Coventry: University of Warwick, 2015); C Lewis 'The evolving role of the English Crown Prosecution Service' in E Luna and M Wade (eds) *The Prosecutor in Transnational Perspective* (Oxford: Oxford University Press, 2015); J Hodgson 'The democratic accountability of prosecutors in England and Wales and France: independence, discretion and managerialism' in M Langer and D Sklanski *Prosecutors and Democracy: A Cross-National Study* (Cambridge: Cambridge University Press, 2017).

[18]S Boyne 'German prosecutors and the Rechtsstaat' in Langer and Sklanski, above n 17; A Woolley and L Soubise 'Prosecutors and justice: insights from comparative analysis' (2020) 42 Fordham International Law Journal 587; M Wade 'The Januses of justice – how prosecutors define the kind of justice done across Europe' (2008) 16 European Journal of Crime, Criminal Law and Criminal Justice 433.

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but mostly retaining the principles of mandatory prosecution and the expectations of objectivity and non-partisanship.[19] That was the case for Italy in the 1980s and many countries in Latin America in the 1990s. Dealing with an adolescent institution and still adapting to a recently changing landscape,[20] the structural problem of prosecutors was, to our knowledge, barely touched by the local literature.[21]

Interest in the problem emerged in civil law countries with the growth of discretionary prosecution through the opportunity principle, the creation of diversionary mechanisms and the regulation of negotiated settlements.[22] As legislative changes and practical arrangements came to formalise the power of prosecutors to filter, select, and segment criminal cases, this created a sense of loss, and a crisis in the continental conception of legality and mandatory enforcement.[23] Despite resistance,[24] this created a consciousness that most of the systems had either statutorily or de facto allocated significant structuration powers to prosecutors.

The worldwide demand on criminal justice systems to deal with a high number of criminal cases has led to making prosecutorial discretion – and managerial effectiveness[25] – the centre of attention, as one of the primary mechanisms used for unloading the system and managing inputs.[26] Through the frame of mandatory enforcement and objectivity, the emergence and then transformation of discretion has also come to dominate the imaginary of the civil law tradition in terms of the nature and problem of contemporary prosecutorial powers.[27] The roads diverge with its US and common law counterparts, but the destination is the same.

The problem of prosecutors has thus come to be identified with curtailing discretion and power. Normative scholars generally frame their solutions and problems in this light: how can we bring back an objective orientation to the application of law? How can we check pretextual prosecutions

[19]On the design ideas that inspired the Latin American reform process, see M Langer 'Revolution in Latin American criminal procedure: diffusion of legal ideas from the periphery' (2007) 55 The American Journal of Comparative Law 617. On the Italian case, see E Antonucci 'The evolution of the principle of mandatory prosecution in Italy. A problematic case of gradual institutional change' (2021) 66 International Journal of Law, Crime and Justice 100481, at 4–6.

[20]A Binder 'Funciones y disfunciones del Ministerio Publico Penal', *El Ministerio Público para una nueva justicia penal* (Santiago: Corporación de promoción Universitaria, Fundación Paz Ciudadana y Escuela de Derecho Universidad Diego Portales, 1994).

[21]Most recent contributions are still tracing the emergence of discretion, see D Pulecio-Boek 'The genealogy of prosecutorial discretion in Latin America: a comparative and historical analysis of the adversarial reforms in the region' (2014) 13 Richmond Journal of Global Law & Business 1 and D Tuesta 'Rethinking prosecutorial discretion: towards a moral cartography of prosecutors' (2021) 61 The British Journal of Criminology 6.

[22]Fiercely critical, B Schünemann *Gesammelte Werke Band III: Strafprozessrecht und Strafprozessreform* (Berlin: de Gruyter, 2020), especially chs 9 and 11. For a moderate account, M Langer 'From legal transplants to legal translations: the globalization of plea bargaining and the Americanization thesis in criminal procedure' (2017) 1 Comparative Law Methodology 814.

[23]K Gössel 'Überlegungen zur Bedeutung des Legalitätsprinzips im Rechtsstaatlichen Strafverfahren' in EW Hanack et al (eds) *Festschrift für Hanns Dünnebier zum 75. Geburtstag am 12. Juni 1982* (Berlin: de Gruyter, 1982); A Vitu 'Légalité ou opportunité des poursuites?' *Traité de droit criminel* (Paris: Éditions Cujas, 1989); M Rodríguez Vega 'Principios de Obligatoriedad y Discrecionalidad en el Ejercicio de la Acción Penal' (2013) 26 Revista de Derecho 181; M Caianiello 'Increasing discretionary prosecutor's powers: the pivotal role of the Italian prosecutor in the pretrial investigation phase' (2016) Oxford Handbooks Online 1; H van de Bunt and J van Gelder 'The Dutch prosecution' (2016) 41 Crime and Justice 117.

[24]E Grande 'Italian criminal justice: borrowing and resistance' (2000) 48 American Journal of Comparative Law 227; M Duce 'El Ministerio Público en la Reforma Procesal Penal en América Latina' (2005) Revista Mexicana de Justicia 65.

[25]For reviews see J McEwan 'From adversarialism to managerialism: criminal justice in transition' (2011) 31 Legal Studies 519; R Salet and J Terpstra 'Criminal justice as a production line: ASAP and the managerialization of criminal justice in the Netherlands' (2019) European Journal of Criminology; J Hodgson 'The changing prosecution role' in *The Metamorphosis of Criminal Justice* (Oxford: Oxford University Press, 2020); C Brants and A Ringnalda *Issues of Convergence: Inquisitorial Prosecution in England and Wales?* (Oisterwijk: Wolf Legal Publishers, 2011).

[26]M Wade and J Jehle *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Berlin: Springer, 2014); G Gilliéron *Public Prosecutors in the United States and Europe: A Comparative Analysis with Special Focus on Switzerland, France, and Germany* (Cham: Springer International Publishing, 2014).

[27]See for instance Antonucci, above n 19.

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and other forms of discretional, individual decision-making?[28] What principles should guide the exercise of prosecutorial power in individual criminal cases in a modern democracy?[29]

The structuring work of prosecution is simply absent here. The almost exclusive focus on individual decision-making is striking, as the distributive problems linked with the exercise of prosecutorial powers only emerge when one considers the segmenting role played by prosecutorial decision-making. Only when seeing the stratification role that those prosecutorial offices play do central and differentiated problems of performance emerge.[30] But the unidirectional focus of the discretion and power problem centred on individual decision-making hides these problems away.

2. What makes the structuration power both unavoidable and significant?

In the preceding section we have shown that even though there is widespread awareness of the significance of the functions of filtering, selecting, and segmenting in criminal justice, that significance is predominantly analysed in terms of discretion and power. The problems with prosecutors are almost exclusively studied as instances of individual decision-making, and normative recipes generally relate to the question of how to curtail them. In this section, we intend to make the case that the structuration role provided by those functions is perhaps of equal importance both to understanding the practical functioning of the system and to considering its normative implications. We begin by providing an overview of what the function of structuration means. While it is generally acknowledged that dealing with massive numbers requires functions such as filtering or selecting cases, scholars make much less reference to the qualitative structure of the working practices provided by segmenting them. In a second step, we point to the normative implications of this work.

The importance for the performance of criminal justice of the functions of administratively filtering and segmenting cases is typically thought of as a function of the relationship between the inputs and the available processing resources. In the more recent trend of European research, Jehle and colleagues have framed filtering practices as one of the tools available to deal with overloaded systems (alongside decriminalisation).[31] The perhaps dominating history of the rise of plea negotiation also associates it with caseload pressures and the growing complexity of trials.[32] The main point is easy to generalise: the loss of equilibrium between inputs and processing tools is said to demand an adaptation of the mode of performance that is more complex than the abstract idea of equal (judicial) treatment of all cases.

This common view misses some important features of the structuring work that prosecutors do, but it serves to distinguish two general forms of structuration that are at play. Filtering, selecting, and segmenting allow for both fixing the number of cases with which criminal justice effectively works – the best-known part of the story – as well as establishing different classes of cases where working practices vary fundamentally. We can call this the quantitative and qualitative structuring work of prosecutors.

[28]This common problem is highlighted by K Hawkins 'Order, rationality and silence: some reflections on criminal justice decision-making' in L Gelstrope and N Padfield (eds) *Exercising Discretion: Decision-Making in the Criminal Justice System and Beyond* (London: Routledge, 2012).

[29]As a sample of some well received proposals, see Bellin, above n 6; RA Duff 'Discretion and accountability in a democratic criminal law' in Langer and Sklanski, above n 17; Schünemann, above n 22.

[30]On legal scholarship missing the point of the normative problems implied, for instance, in low-level criminal justice, see I Kohler-Hausmann *Misdemeanorland* (Princeton: Princeton University Press, 2018).

[31]JM Jehle et al 'The public prosecutor as key-player: prosecutorial case-ending decisions' (2008) 14 European Journal on Criminal Policy and Research 161.

[32]For England and Wales, see J Baldwin and M McConville 'Plea bargaining and plea negotiation in England' (1979) 13 Law & Society Review 287. For the US, see A Alschuler 'Plea bargaining and its history' (1979) 79 Columbia Law Review 1; M Feeley 'Perspectives on plea bargaining' (1979) 13 Law & Society Review 199; J Langbein 'Understanding the short history of plea bargaining' (1979) 13 Law & Society Review 261. More recently in continental Europe, see R Rauxloh 'Formalization of plea bargaining in Germany: will the new legislation be able to square the circle?' (2010) 34 Fordham International Law Journal 296.

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Quantitative adaptation is only the most obvious role played by prosecutors. Simple filtering through all forms of dismissals in mandatory enforcement systems, or the simple work of selection in other countries, provides an adaptation for the swarm of reports and arrests that flood modern criminal justice. But it would be a mistake to conclude that structure is simply provided by keeping the numbers manageable. Even after filtering/selecting, criminal justice agencies face massive numbers, and performance under a single model is simply illusory. Plea bargaining is merely a symptom of a wider phenomenon. Only by segmenting cases and stabilising modes of interorganisational work on each class does a manageable structure really emerge.

Alexandra Natapoff has called attention to this fact by suggesting that the criminal justice structure resembles a pyramid.[33] Each layer of the pyramid is characterised by a mode of performance that progressively deviates from the complex full trial that stands at the edge. Although the central role of the pyramid metaphor is to point to the low prevalence of the adjudicative, adversarial mode of performance in contemporary US criminal justice, it is also an eloquent image with which to illustrate the qualitative need for the segmentation of criminal justice in general. An adaptative interplay between the organisations and individuals that act as judges, defenders, and prosecutors provides for stable forms of work inside each layer.[34] In this play, prosecutors possess the key tools. It is the use of filtering/selecting powers, as well as the ability to control which treatment a case should be given (diversion, plea bargain, going to trial, etc), that makes them the central players in providing for that structure. Prosecutors intermediate more than other criminal justice actors the high numbers of raw materials that serve as the input of the criminal justice system, what types of cases can be made from those materials, and what type of work is expected in each type of case.

That structuring role determines to an important extent how criminal justice behaves. Sociolegal scholarship has shown extensively the differences in the processing of mass, less serious offences, and other layers of cases that demand more resources.[35] While the former are characterised by a non-adjudicative form of performance in which decisions are taken in a matter of seconds and with a highly standardised mode of performance, complex cases can take enormous amounts of time and other resources.

It would be a mistake, however, to think that the criminal justice system provides for one layer of a fast, standardised mode of performance and a second layer of a slow, adversarial mode of performance. The point is more general and hence more open to comparative variance. We can summarise it with three statements that make up the qualitative structuration of criminal processing. First, even after filtering/selecting, the demand for processing surpasses the organisations' capacity to deal with all of the cases under the level of institutional efforts that full trials demand in contemporary practice. Second, criminal justice actors segment cases because of a myriad of factors – perceived complexity, the status associated with each case, the resources available to the defence – resulting in a potentially disordered work environment. But, third, the players adapt by developing stable working practices in each category.

Most readers might easily agree with the notion that filtering and segmentation play a significant role in the performance of criminal justice and might agree with the claim that prosecutors play a major role in that area. They could, however, pit one argument against our claim, which points to the shortcomings associated with the dominating frames of discretion and power. Instead of being able to contradict the adequacy of those frames, our argument would rather show that the problem of structuration is just another setting for those same problems to manifest themselves – prosecutors

[33]A Natapoff 'The penal pyramid' in S Dolovich and A Natapoff (eds) *The New Criminal Justice Thinking* (New York: New York University Press, 2017). See also McEwan, above n 25.

[34]We leave aside the police, who play a central role and whose behaviour may substantially affect the patterns of interorganisational work of prosecutors, defenders and judges, but who are not part of the courtroom workgroup. For an analysis of the influence that policing trends of arrests and summons may play on criminal processing, with a comparative outlook, see DH Choe 'Discretion at the pre-trial stage: a comparative study' (2014) 20 European Journal on Criminal Policy and Research 101.

[35]C Mouhanna and B Bastard 'Procureurs et substituts: L'évolution du système de production des décisions pénales' (2010) 74 Droit et société 35, at 51–52.

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are not only arbitrarily powerful because of the impact that their decisions have on individual cases; those decisions also impact on the structure of the system. This interpretation is, however, a mistake and this is precisely where discretion and power show limitations as dominating frames of analysis. Prosecutorial agencies play a major role in providing structure to the system, but they are not free to change it. Consider the world of misdemeanours or summary offences, an area usually connected to discretion. Pleas effectively take place by the minute in many different countries. But they do so because a structure has been established in which the major players can perform in a stable way by generating types of case and expected treatments for each case.[36] They can all agree on how a case ought to be treated because there is a structure there. The agents reproduce that structure and may certainly, with limits, affect it, but they are not free to change it.[37] A prosecutorial agency attempting to massively change practice – by, for example, trying to obtain higher penalties – is likely to face failure and repression from other agencies for breaking stable working practices.[38]

The structuration of criminal justice based on the exercise of filtering and segmenting powers is of foremost normative interest. As with any case of unequal allocation of resources and experiences, it raises important distributive questions. Yet it has seldom been given much attention beyond simple rejection, with a strong focus on judicial remedies to scale back segmentation through prosecutorial discretion.[39] For most commentators, the fact that structure is provided only after stratification makes up for the dubious normative situation. Under this view, equality under law demands that we treat all cases equally. The standardised world of low-level criminal justice appears to be a disgrace; we should aspire to provide for similar processing experiences for all sorts of offences and this should adjust to legalistic values. And we should research the conditions that make this possible.[40]

This discussion points to the normative significance of the phenomenon that we are referring to. In the extreme, we can think of two models of allocation of justice: a simple and a complex model. A simple model would push for the allocation of as similar resources as possible to each case. The historical demonstration of the simplicity and expediency of trials before the professionalisation of law has served to point to a mode of justice with a narrower gap between the layers of the system.[41] Contemporary criminal justice appears to have deviated from this aspiration, with a highly complex structure and an unequal use of treatments and resources among the layers of the system. There are of course professional interests and path dependencies that may help explain this evolution. But there are also normative ideas that play a role in the stratification of justice, which should be better analysed. Complex stratification is the result of many factors, including the availability of certain modes of disposition (such as diversion) that may be better suited to dealing with non-serious offences than full trial. Complexity is thus not synonymous with the establishment of a structure that leads to

[36]See the classic D Sudnow 'Normal crimes: sociological features of the penal code in a public defender office' (1965) 12 Social Problems 255. Similarly, Mouhanna and Bastard, above n 35. For how these relations are playing out in England and Wales, see L Soubise 'Prosecuting in the magistrates' courts in a time of austerity' (2017) 11 Criminal Law Review 847.

[37]On a more formal line, Fryer, above n 2, has made a similar point to criticise the assumptions of the progressive prosecutors movements that the unrestrained power of prosecutors puts them in the best position to change criminal justice practices.

[38]On retaliation and punishment for breaking interorganisational working arrangements, see C Perrow 'A framework for the comparative analysis of organizations' (1967) 32 American Sociological Review 194.

[39]CB Hessick 'The myth of common law crimes' (2019) 105 Virginia Law Review 965; D Sklansky and M Langer 'Epilogue prosecutors and democracy – themes and counterthemes' in Langer and Sklanski, above n 17; SB Baughman 'Subconstitutional checks' (2017) 92 Notre Dame Law Review 1071; L Beck 'The administrative law of criminal prosecution: the development of prosecutorial policy' (1978) 2 American University Law Review 1977; R Barkow 'Separation of powers and the criminal law' (2010) 58 Stanford Law Review 989; A Davis *Arbitrary Justice* (Oxford: Oxford University Press, 2007).

[40]B Kelker 'Die Rolle der Staatsanwaltschaft im Strafverfahren: Objektives Organ der Rechtspflege oder doch "parteiischer" Anwalt des Staates?' (2006) 118 Zeitschrift für die Gesamte Strafrechtswissenschaft; Fish, above n 6.

[41]Langbein, above n 32; Alschuler, above n 32. There is certainly controversy about the historical accuracy of Langbein's reconstruction of the evolution of plea bargains out of professionalism. See G Fisher *Plea Bargaining's Triumph* (Redwood: Stanford University Press, 2003).

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bad outcomes or a disgraceful mode of processing. But the literature lacks engagement with the question of what makes a structure adequate or inadequate.

So far, we have only referred to the fact that prosecutors play a central role in the structuration of criminal justice. We claim that this role is crucial for contemporary criminal justice and that the resultant structure substantially influences the normative evaluation of the system. This is the first contribution of our paper. But what produces one form of structuration or the other? In what follows, we mean to summarise the factors that show influence in this regard.

3. Understanding differences in structuration

In this section we analyse the factors that influence the differences in the structuration of criminal justice shown by comparative research. Our general claim is simple. Contemporary criminal justice tends to acquire a working structure by segmentation in several strata of work, with each stratum being subject to a stable and taken for granted modality of work that allows for stable performance. We define the 'modalities of work' as the expected orientation to the processing of a case in a stable and orderly fashion by organisational or interorganisational agents. It covers, among other things, the expected resources (mostly time) to be invested in each case, the amount of information used to interpret the case (individualised, standardised), and the relationship between the working agents in cases of interorganisational work. In this section, we interrogate some of the factors that the existing literature has shown to influence, at the comparative or local level, the behaviour of prosecutors in pushing for the establishment of different modalities of work.

We organise the overview around a simple conceptual model. That model starts from the formal definition of the options available to prosecutors to dispose of inputs and the influence that other, formal and non-formal factors play in determining the uses given to each form of disposition and the modalities of work deployed in conjunction with them. Subsection (a) gives an overview of the definitory function of procedural design, whilst subsections (b) and (c) refer to the influences that formal and non-formal factors play in the development of different modalities of work. By way of examples, we will introduce elements of several jurisdictions, with the aim of depicting the diversity of fashions in which the structuration materialises.

(a) The basic model and the definition of the tools available to process

Like any processing system, we can look at criminal justice as the tools available to turn inputs (reported offences) into outputs (convictions, diversions, etc). Procedural law defines the expected relationship between prosecutors and criminal justice inputs, but much more importantly it provides them with an arsenal of tools with which to dispose of inputs. These arrangements thus exercise an influence over the patterns of structuration in three different ways: by defining the constraining powers of the inputs; by defining the tools available to segment the inputs; and by influencing the relative use given to each processing tool.

Procedural law allegedly defines the constraining power that the inputs have on the behaviour of prosecutors. Prosecutors have two choices when the notice of an offence reaches the system: filtering and processing. In systems typically associated with the common law tradition, prosecutors can filter cases by simply not taking them (ie selecting), while many civil law systems traditionally operate under a definition of mandatory enforcement – the rule of law demands that all offences be equally prosecuted. In practice, however, mandatory enforcement tends to be restricted, due to the existence of specifically defined hypotheses that allow cases to be dropped (ie filtering). And the legal obligation to prosecute all cases shows limited influence on the real behaviour of prosecutors.[42] The real level of enforcement – the ratio between the total number of inputs and the total number of performative

[42]JM Jehle 'The function of public prosecution within the criminal justice system aim, approach and outcome of a European comparative study' in JM Jehle and M Wade (eds) *Coping with Overloaded Criminal Justice Systems: The Rise of Prosecutorial Power Across Europe* (Berlin: Springer, 2006).

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dispositions (diversions and sanctions) – is probably not dependent on the definition of mandatory or selective enforcement. But mandatory enforcement does at the very least push prosecutorial agencies to maintain an accountancy balance between the total inputs and the total outputs.[43]

The second source of formal influence on the prosecutorial behaviour of procedural law relates to the formal definition of the alternatives to prosecution and trial that are available to prosecutors in the face of an input. If the case is selected/not filtered, the paths towards achieving sanctioning or semi-sanctioning (whether punitive or not) outcomes also diverge in a comparative perspective.

Procedural law defines the availability of each dispositional tool and contributes to establishing their potential use in segmenting types of cases. Certain decisions can be made without control by a prosecutor;[44] others require intraorganisational revision (ie by an authority in the prosecutorial agency),[45] while the traditional mode of criminal justice decision-making requires interorganisational work with different degrees of judicial involvement.[46] An ideal-typical form of interorganisational decision-making, plea bargain stands in between, with prosecutor and defendant theoretically deciding together on the disposition.[47] Victims play a role to varying degrees, often gaining more influence in the higher levels of the penal pyramid.[48] Pre-trial prosecutorial obligations, such as granting equal access to its investigation folder or other forms of disclosure, also provide for diverging limitations on the uses of these tools.[49]

These formal definitions are important. Pure discretional action is typically better suited to managing mass demand through simple criteria, while adversarial, interorganisational work is least suited to that. Yet formal law only establishes potential uses. The real type of work that relates to each layer fixed by the system depends on the formal and non-formal factors that influence the adoption of concrete working modalities in each layer of the system. That is, most comparative systems provide for different manifestations of the basic categories of dismissals, diversions, charging, and plea bargaining. The formal regulation of the availability of each category certainly plays a role by itself in influencing the structuration of the field. But other sources that transcend the procedural realm arguably play a more relevant role.

[43]This is not to say that administrative obligations to maintain a balance are non-existent in common law countries. In England and Wales, for example, the police have the legal obligation to register all formal inputs and outputs (Police Act 1996, s 44 as amended). The Home Office also issues Counting Rules for Recorded Crime.

[44]This is the general rule for charging decisions in England and Wales, where police retain control over most out-of-court disposals. Dutch prosecutors can autonomously issue penal orders for offences punishable by up to six years' imprisonment.

[45]In England and Wales, some offences require by statute the consent of the Attorney General or the Director of Public Prosecutions. In some countries, the approval of the regional head of the prosecution office is required to stay investigations, particularly for more serious offences (eg *archivo provisional* in Chile).

[46]In Chile and Germany the conditions and requirements for all diversionary measures are controlled by courts. Drops, if not of very minor offences, are too. Victims are only substantively involved in compensation agreements. In England there is no intra-procedural control of dispositional decision-making, only the possibility of judicial or administrative review. There, prosecutors should not be involved in the sentence reduction obtained as a consequence of a guilty plea, which is quite different to the position in the US.

[47]In many countries, the arrangements that are referred to as plea bargain typically change the mode of decision-making by the court instead of implying direct decision-making by the parties. In Chile, for instance, 'plea bargains' typically implies a simplification of the procedure, with a single judge instead of a panel involved, and probably leading to a conviction because of the admission of guilt. Judicial control of decision-making is of more limited importance but does not disappear. For Germany, see L Meyer-Goßner 'Rechtsprechung durch Staatsanwaltschaft und Angeklagten? – Urteilsabsprachen im Rechtsstaat des Grundgesetzes' (2007) Neue Zeitschrift für Strafrecht 425.

[48]For the English experience with the Victim's Right to Review see M Iliadis and A Flynn 'Providing a check on prosecutorial decision-making: an analysis of the victims' right to review reform' (2018) 58 British Journal of Criminology 550. On how the position of the victim relates to the growth in ambits of discretion, see B Schünemann 'Der Ausbau der Opferstellung im Strafprozeß – Fluch oder Segen?', *Festschrift für Rainer Hamm zum 65. Geburtstag am 24. Februar 2008* (Berlin: de Gruyter, 2008) p 700.

[49]See J Turner 'Plea bargaining and disclosure in Germany and the United States: comparative lessons' (2016) 57 William & Mary Law Review 1549. In other jurisdictions, such as Canada, it has been the courts who have established disclosure duties: see Woolley and Soubise, above n 18, at 601.

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(b) Formal influences on the modalities of work

Beyond procedural law, both substantive criminal law and legal culture also influence the attitudes of prosecutors towards using the available tools of disposition in one way or the other and thus towards pushing the system to different forms of structuration.

Let us start with substantive criminal law. Nowadays, one of the most common reconstructions of the relationship between US prosecutors and mass incarceration centres on this point. According to this line of thought, prosecutors have been a driving force of mass incarceration because extreme sentencing frameworks and a wide menu of criminal offences allow them to gain leverage to obtain draconian sentences.[50] This point can be generalised. Substantive criminal law defines the boundaries of the enforcement powers of criminal justice as well as the total, formal demand of the system.[51] From the point of view of prosecutors, substantive criminal law also amounts to ammunition that they can use both in the trial and 'in the shadow of the trial'. Substantive criminal law may thus also act as leverage to be mobilised in the context of plea negotiations.[52] The distorting power of pleas depends on this ability to adopt coercive and abusive forms,[53] which is dependent on old substantive criminal law questions such as sentencing frameworks, the limits to multiple-charging, and the consequences that can emerge from a conviction for multiple charges.[54]

Harsh sentencing frameworks and ample acceptance of multiple charges may provide for a legal environment that is more open to coercive legal practices and for a practice in which several layers of work depend on coercive offers made up by the prosecutors. Yet such punitive practices also depend on the emergence of prosecutorial attitudes aimed at using the law as leverage to simply win.[55] Broad legal cultural configurations may thus play a decisive role in the behaviour of prosecutors and the emerging patterns of structuration. Providing a nuanced view of the influence of legal cultural variation on the attitudes and working orientations of prosecutors is beyond the scope of this paper. Yet a simple comparison of some findings associated with aggregated views can serve to illustrate the point.

The concept of legal culture refers here to the ideological representations of the state and law that underlie legal systems as well as the attitudes that legal actors (including prosecutors) develop regarding their legal powers.[56] The two questions commonly go together. Consider, for instance, the differences between two ideal-types of underlying representations of the law: legal statism and instrumentalism.

Legal statism refers to an imaginary associated with the law and to the attitudes that emanate from it. According to this conception, the state is an abstract entity whose identity transcends public law agencies, rather incarnating the normative aspirations associated with legitimate rules. Continental legal culture prevalently assumes this conception.[57] Actions emanating from the organisations that

[50]Pfaff, above n 13; J Pfaff 'Prosecutorial guidelines' (2017) 3 Reforming Criminal Justice 101; Barkow, above n 12.

[51]The sheer number of lower-level offences is part of this pressure. However, this is mediated by the lower limit of the criminal law, and whether there is a separate regime for contraventions or *Ordnungswidrigkeiten*, or if it is the same criminal justice system which deals with minor offences. Decriminalisation efforts and downgrading of offence severity reduce the scope of prosecutorial action and determine the alternatives available. See R Frase 'Comparative criminal justice as a guide to American law reform: how do the French do it, how can we find out, and why should we care?' (1990) 78 California Law Review 539; Jehle, above n 42.

[52]R Barkow *Prisoners of Politics* (The Belknap Press of Harvard University Press, 2019); Tonry, above n 2.

[53]M Langer 'Rethinking plea bargaining: the practice and reform of prosecutorial adjudication in American criminal procedure' (2005) 33 American Journal of Criminal Law 223.

[54]But see S Bibas 'Plea bargaining outside the shadow of trial' (2004) 117 Harvard Law Review 2462, contending that this criticism, even when right, continues the model of the 'shadows of the trial' as a rationale to judge plea bargains and discounts other forms of distortion based on prosecutorial and defence personal incentives.

[55]W Pizzi *Trials without Truth* (New York: New York University Press, 1999).

[56]We thus focus on the concept of 'internal legal culture' as defined in L Friedman *The Legal System* (New York: Russell Sage Foundation, 1975).

[57]See D Kenneth *The State Tradition in Western Europe* (Oxford: Martin Robertson, 1980). The conceptions that we expose below may seem naïve and not reflect Continental political thought in its best light. That would certainly be a

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the law designates as the state are legitimate – a *Rechtsstaat* instead of a bare exercise of coercive power – if they emerge from the law. As legitimacy is defined by subjection to a legal ideal, the legality principle and mandatory prosecution define criminal enforcement's legitimacy. Prosecutors are charged with materialising the law; they are its 'guardian',[58] they ought to understand themselves as dispassionate officers applying technical standards,[59] some of which are formulated by legal scientists who do not advance political ideas but rather attempt to establish the meaning of law itself.[60]

Under this conception of the state and the law, both the problems and solutions to prosecutorial power focus on formal legal content and, especially, on legal reasoning. Thus, it is common for the literature in countries that exhibit these fixations to focus on interpreting some statutory provisions as a normative basis for prosecutorial decision-making.[61] When prosecutors are criticised, it is because their actions are presented as literally outside of the law: incompatible with the real meaning of the statutory provisions.[62]

At the other extreme, US legal culture commonly actualises instrumental conceptions of the state and law.[63] Unlike Continental discourse, the law is typically linked with only one form of state action (courts). Authors tackling prosecutorial power rarely make use of the concept of the state, instead referring to more specific organisations to refer to the actors of criminal justice. And criticism is generally tied to the production of outcomes rather than with general normative aspirations. Whereas in the Continental conception, the institutional functions served by prosecutorial agencies simply cannot aspire to legitimacy if they are not carried out by the state – at the extreme, they simply *cannot be thought* of outside of the state – US scholarship often assumes that the question of who performs a given function is secondary to the question of how well that function is served.[64]

misunderstanding: from Lorenz von Stein to Karl Marx and Max Weber, many of the most sophisticated and influential analyses of the state have emerged from the Continental tradition. We are not concerned with Continental political thought, but rather with legal thought. In contrast to England and to the US, the legal profession and legal academia adopted a central role in the deployment of legal dominance much earlier in Continental Europe. Both remain overall committed to the idea that a well-ordered and legitimate modern order needs to overcome political factionalism and economic dominance. The objectified conceptions of the state and law express this.

[58]So famously von Savigny: 'Wächter des Gesetzes zu sein und als solche darauf zu achten, wie dem Gesetze und nur diesem Genüge geschehe', cited in Kelker, above n 40, p 392.

[59]The slightly ironic portrayal by von Liszt of the prosecutor as 'the most objective civil servant in the world' was adopted as a heartfelt motto. HC Schaefer 'Die Staatsanwaltschaft – Ein politisches Instrument?' in *Festschrift für Rainer Hamm zum 65. Geburtstag am 24. Februar 2008* (Berlin and New York: de Gruyter, 2008).

[60]Boyne, above n 18. More generally on the scientific endeavour of German criminal law: M Dubber 'The promise of German criminal law' (2005) 6 German Law Journal 1049. Further on the self- and public perception of prosecutors in Germany, J Kottkamp *Öffentlichkeitsarbeit von Staatsanwaltschaften in der Mediengesellschaft* (Wiesbaden: Springer VS, 2013).

[61]Even for the relationships between prosecutors and police, the focus is on describing the appropriate interplay of the relevant legal rules: FL Knemeyer and M Deubert 'Kritische Überlegungen zum Verhältnis Staatsanwaltschaft-Polizei/ Polizei-Staatsanwaltschaft' (1992) 3131 NJW. Central for German practice and scholarship are the *Kommentare* on the criminal procedure code (StPO) and on the constitutional law of organisation of the courts (GVG). Discussions on the extent of the concepts 'lesser culpability' or 'public interest' in §153 ff StPO are the object of papers and monographs; the question of whether there was any place for agreements between the prosecutor and the defence were studied from a normative relation between § 170 II, §153ff. § 305 StPO and §§ 1, 150 GVG. In Chile, the most relevant sources of academic commentary are undergraduate theses that usually cover the relevant provisions in a doctrinal manner. Examples abound in Arts 167, 170, 237 Criminal Procedure Code.

[62]J Eisele and C Trentmann 'Die Staatsanwaltschaft – "objektivste Behörde der Welt"?' (2019) NJW 1; Gössel, above n 23. Notable exceptions, of course, exist, for instance E Blankenburg 'Die Staatsanwaltschaft im System der Strafverfolgung' (1978) 11 Zeitschrift für Rechtspolitik 263.

[63]J Simonson 'Police reform through a power lens' (2021) 130 Yale Law Journal. Simonson provides a useful overview of the type of approaches that pervade thinking about legal institutions in the US, centred on policing: instrumental, outcome-based approaches; empirical legitimacy approaches, seeking to define the conditions under which state institutions are accepted by the public; and critical, power-based accounts. All these accounts share a realist baseline that separates them from Continental legal thought and, to an important extent, also from Britain and Ireland.

[64]On the general polemic pointing at prosecutors as drivers of mass incarceration, see B Capers 'Against prosecutors' (2020) 105 Cornell Law Review 1561. Here England and Wales shows itself again to be in an intermediate position, with

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Other common law jurisdictions stand at an intermediate point between these two extremes. In England and Wales, legal institutions are often thought as pragmatic arrangements aiming at limiting the power of the state. The prosecutorial agency defines policy and sets ethical standards aiming for a right balance between effectiveness and avoiding excesses.[65] Although these characterisations may strike a Continental lawyer as instrumentalist – indeed there is scant reference to statutory provisions or legal principles[66] – English literature lacks the US fixation on aggregated outcomes.

These broad conceptions have been linked to the structuration – in terms of the development of modalities of work – of prosecutorial power and criminal justice. Joachim Savelsberg has famously connected the Continental approach to legal knowledge – a manifestation of legalist statism – to more stability and less harshness in criminal justice.[67] In making sense of the crisis of overcriminalisation and mass criminalisation, David Sklansky and others have recently suggested that it is a cultural configuration – the instrumental orientation towards law – that is to blame for the peculiar behaviour of US criminal justice.[68] Instrumentalism would explain the harshness because prosecutors come to see the law as a means of obtaining outcomes and advancing their careers – an orientation that finds resonance in US legal education but also in the general spirit of US capitalism. In short, legal culture may provide conditions for the development of different modalities of work even when faced with similar procedural designs.

(c) Non-formal influences on the modalities of work

So far, we have pointed to legal factors that influence the extension of prosecutorial powers and the modalities by which those powers may be exercised. Non-formal influences refer to the remaining influencing factors. We can differentiate at least three types. First, real world constraints and demands also influence the structuration of prosecutorial power: prosecutors with few cases are likely to behave very differently from prosecutors that face mass demands, little time, and resource constraints.[69] We designate such factors with the concept of 'intra-systematic pressures'. Second, the organisational arrangements that prosecutorial offices adopt to cope up with work also influence the behaviour of prosecutors. Finally, the concept of 'extra-systematic pressures' refers to sources of influence that do not emanate directly from criminal justice.

As the very definition suggests, intra-systematic pressures may influence either the definition of the inputs received by prosecutors or the resources available to them. On the side of inputs, the factors that influence the demand for prosecutorial action (ie inputs) are manifold. Crime is the first such factor. It is defined by two different elements: formal criminalisation/legal definitions of crime and citizens' behaviour. The more citizen behaviour falls under the formal definitions of crime, the greater the formal intra-systematic pressures on prosecutors. More relevantly, police behaviour tends to define the real scope of the inputs that get to prosecutors (ie substantive criminalisation)[70] and thus acts as a critical intra-systematic pressure with regard to prosecutorial behaviour. If, for example, the police

some pragmatism in discussing, for example, the potential of private prosecutions: C Lewis et al 'Evaluating the case for greater use of private prosecutions in England and Wales for fraud offences' (2014) 42 International Journal of Law, Crime and Justice 3.

[65]For instance, the English Crown Prosecution Service has internally defined a principle against overloading or overcharging. On the ethical questions, see R Young and A Sanders 'The ethics of prosecution lawyers' (2004) 7 Legal Ethics 190. For Canada see Woolley and Soubise, above n 18.

[66]An eminent exception is L Campbell et al *The Criminal Process* (Oxford: Oxford University Press, 2019).

[67]J Savelsberg 'Knowledge, domination, and criminal punishment' (1994) 99 American Journal of Sociology 911.

[68]D Sklansky 'The nature and function of prosecutorial power' (2016) 106 The Journal of Criminal Law and Criminology 473; Fish, above n 6; Bellin, above n 6.

[69]Bibas, above n 54.

[70]On the concepts of formal versus substantive criminalisation see N Lacey 'Historicising criminalisation: conceptual and empirical issues' (2009) 72 The Modern Law Review 936.

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develop a strategy that seeks to massively augment arrests, this will indeed affect the behaviour of prosecutors in pushing for a different structuration of criminal justice.[71]

On the side of the modalities of work, the availability of resources to deal with the incoming inputs stays at the origin of the complex structuration of contemporary criminal justice. Yet it would be a mistake to think of resources as homogeneous instances that ought to be given to prosecutors to do their job correctly and which, in the case of scarcity, imply a general reduction of the time given to each case and a corresponding sacrifice of legalism. Peter Nardulli referred to this mistake as the 'traditional adherence to the legal man assumption'.[72] Rather, criminal justice actors redefine the meaning of both the inputs and the resources available to deal with them based on the number and types of inputs that the system receives.

The greater the number of low-level cases, the more pressure there will be towards developing forms of standardised, high-efficiency decision-making.[73] The shape of these transformations depends, however, on organisational arrangements. The literature shows the enormous differences that highly bureaucratised fields in urban settings have regarding rural or less-bureaucratised systems.[74] Thus, such organisational arrangements as unit specialisation,[75] the distribution of cases according to managerial principles (breaking the chain of production versus the distribution of labour according to the professional principle that an attorney ought to carry a case from its inception to its end), or the introduction of formalised processes and operations, may produce significant differences in the structuration of prosecutorial power.[76]

Although a couple of decades ago, a dichotomous distinction between bureaucratised and traditionalist organisations might have sufficed to study comparative variance, today most prosecutorial agencies in dense urban environments show an important level of bureaucratic development.[77] Broad concepts such as bureaucratisation and managerialism thus lack descriptive power. More empirical work may help to provide a better understanding of the different types of organisational arrangements that prosecutorial offices adopt in a comparative perspective and the patterns of criminal justice structuration that emerge from them.

[71]F Zimring *The City That Became Safe* (New York: Oxford University Press, 2011); Kohler-Hausmann, above n 30. Even if in Europe most prosecutors' offices have formal control over investigations, in fact they more passively receive cases after the police hand them over. Rather than leading express arrest policies, what is found there is de facto or de jure powers of disposition of the police: see B Elsner et al 'Police case-ending possibilities within criminal investigations' (2008) 14 European Journal on Criminal Policy and Research 191.

[72]P Nardulli 'The caseload controversy and the study of criminal courts' (1979) 70 The Journal of Criminal Law and Criminology 89, at 97, refers to this idea as 'the adherence to legal men assumption'. See also the explanation of the 'problem of resources' by M Lipsky *Street-Level Bureaucracy: The Dilemmas of the Individual in Public Services* (New York: Russell Sage Foundation, 1980) p 29.

[73]A classic contribution in this line is M Feeley *The Process Is the Punishment* (New York: Rusell Sage Foundation, 1979); J Dixon 'The organizational context of criminal sentencing' (1995) 100 American Journal of Sociology 1157; J Eisenstein and H Jacob *Felony Justice: An Organizational Analysis* (Little, Brown and Co, 1977); J Eisenstein et al *The Contours of Justice: Communities and Their Courts* (Boston: Little, Brown and Co, 1988); Feeley, above n 32. The notion of an 'assembly-line' has also permeated the English debate: see L Marsh 'Leveson's narrow pursuit of justice' (2016) 45 Common Law World Review 51.

[74]Eisenstein et al, above n 73.

[75]C Spohn 'Specialized units and vertical prosecution approaches' in RF Wright et al *The Oxford Handbook of Prosecutors and Prosecution* (Oxford: Oxford University Press, 2021).

[76]Hodgson highlights for England the trends of de-professionalisation and delegation to caseworkers, while the prosecutor has become a manager. Also, she shows how cases pass through several pairs of hands at different stages, resulting in a dissolution of responsibility: Hodgson, above n 25. Boyne points to the case assignment procedures to individual prosecutors, the documentation practices and the level of independence as features that determine the performance and the reinforcement of the principles understood to lie behind it in Germany: S Boyne *The German Prosecution Service: Guardians of the Law?* (Berlin: Springer, 2014). For France, see P Milburn 'Les Procureurs de La République: Passeurs de Justice ou Gestionnaires des "politiques pénales"?' (2010) 74 Droit et société 73.

[77]Indeed some have suggested that the current organisation of prosecutors' offices should be more adequately conceptualised as post-bureaucratic: W Simon 'The organization of prosecutorial discretion' in Langer and Sklanski, above n 17.

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A final factor discussed by the literature to explain the structuration of prosecutorial power refers to the pressures emanating from society and from the political system. Given the political saliency of crime and the fact that prosecutors are generally public officials with different links to political authorities, environmental pressures may influence, to different degrees, the exercise of the role of the prosecutor. The factors influencing the intensity of environmental pressures include the institutional ties to the political system,[78] the treatment by the media of crime and criminal justice,[79] but also the field's own understanding of knowledge as susceptible, or not, to external sources of knowledge.[80]

Extra-systematic pressures are two sides of the same coin: for them to take place, society and politics must put pressure on prosecutors to augment output or harshness, but prosecutors must be susceptible to these pressures. One side of the coin thus refers to society and the organisation of politics. Societies with higher levels of inequality, more media sensationalism, and majoritarian political systems generally appear more apt to develop populist punitive attitudes and to transfer pressure to the criminal justice agencies.[81] The other side of the coin refers to criminal justice and its susceptibility to politics. That susceptibility may be institutionally provided for (as in the case of elected prosecutors with political careers), but it also depends on cultural factors.[82]

An important line of work has thus explained the differences in criminal justice behaviour between the US and Europe based on the form of these ties. Given their dependence on electoral politics and the bridging power of instrumentalism regarding policy rationales, a body of literature shows that US criminal justice lacks the power to isolate itself from environmental pressures.[83] This line of argument is well known in local and comparative scholarship: prosecutors in the US maintain ties with the political system thanks to their designation system (chief attorneys are generally elected),[84] to the establishment of recurrent paths towards a political career,[85] and to the lobbying power of law enforcement populations.[86] Aside from this, the instrumentalist legal culture may play a bridging role in importing political consideration into the behaviour of prosecutors.[87] Scholars have even linked the emergence of progressive prosecutors and decisions not to enforce certain categories of offences with the climate of the politics of crime.[88] As scholars in this line of research typically assume a 'discretion' or 'power' frame, the literature provides only indirect knowledge on the influence of these mechanisms on the structuring work played by prosecutors.

The European and Latin American scholarship show similar concerns with power when discussing the organic independence of prosecutorial offices, either from the judiciary[89] or the executive.[90] The political use of prosecutions has been a concern since the nineteenth century,[91] and the apparent

[78]See the work of N Lacey *The Prisoner's Dilemma* (Cambridge: Cambridge University Press, 2008); N Lacey et al 'Understanding the determinants of penal policy: crime, culture, and comparative political economy' (2018) 1 Annual Review of Criminology 195; M Tonry *Punishment and Politics: Evidence and Emulation in the Making of English Crime Control Policy* (London: Routledge, 2004); M Tonry 'Determinant of penal policies' (2007) 36 Crime and Justice 1.

[79]See for instance M Bonner *Tough on Crime: The Rise of Punitive Populism in Latin America* (Pittsburgh: University of Pittsburgh Press, 2019).

[80]The classic piece is Savelsberg, above n 67.

[81]See the literature on the determinants of penal policies Tonry 'Determinant of penal policies', above n 78; Lacey et al, above n 78.

[82]This is the main line of argument in the recent anti-adversarialism/anti-instrumentalism drive in US legal scholarship. See Sklansky, above n 68; Fish, above n 6.

[83]A Davis 'Prosecutors, democracy, and race' in Langer and Sklanski, above n 17.

[84]For an excellent overview see C Hessick and M Morse 'Picking prosecutors' (2020) 105 Iowa Law Review 1537.

[85]See W Stuntz 'The political constitution of criminal justice' (2006) 119 Harvard Law Review 780; Stuntz, above n 3.

[86]See Barkow, above n 52; Stuntz, above n 3.

[87]Fish, above n 6; Bibas, above n 2.

[88]RF Wright 'Prosecutors and their state and local polities' (2020) 110 The Journal of Criminal Law and Criminology 823, at 831–833, noting the influence of the main control mechanism of general prosecutorial policies in the US elections.

[89]Such as in Italy and France, and until recently in several countries in Latin America.

[90]Such as in Germany.

[91]See CJA Mittermaier *Das Englische, Schottische und Nordamerikanische Strafverfahren: Im Zusammenhange mit den Politischen, Sittlichen und Socialen Zuständen und in den Einzelnheiten der Rechtsübung* (Erlangen: Ferdinand Enke,

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growth in their formal powers reignited the debate about the possibilities of abuse under contemporary structures. In the rest of the common law the independence sought has been from the police, while the possibility of parliamentary intrusion does not seem to greatly concern public opinion.[92] Yet, unlike the US literature, there is little research into the empirical consequences that different arrangements may have and, to our knowledge, none regarding the influence of these tropes on the structuration of criminal justice.[93]

Extra-systematic pressures may lead to the rise of new layers of structuration, even in landscapes with more effective legalistic isolation from their environment. For example, Boyne has described the transformations in the prosecution of white-collar offences in Germany as mediated by extra-systematic pressures.[94] The traditional German mentality pushes for strict application of the law, but public pressure promotes some creative interpretation of the statutes to amplify their criminalising power. In the face of this pressure, new structuration patterns have emerged. States have created specialised units for prosecuting economic crimes in an attempt to deal with the complexity associated with this layer of work. But this specialisation has resulted in the emergence of clear modes of segmentation of cases and different ritualised modalities of work associated with each stratum. Depending on the amounts at play and the severity of the offence, paralegals or prosecutors will handle the case, and the complexity determines the working relationship with the police and who will conduct the investigation. Even when faced with the intervention of judges and defenders there are 'choreographed semi-scripted dance of practices',[95] which allow for settled outcomes when in agreement with the defence.

Conclusion

The modern prosecutorial function goes beyond presenting a case in court. It is more structural and structured: filtering, selecting, and segmenting are tasks that provide shape to the actual workings of criminal justice systems, while adopting regular patterns in the internal and external interactions of the agencies involved. Prosecutors look very different in different legal systems (they are organised differently, they have different legal tools at their disposal, they sometimes even pursue different institutional goals and they certainly work within different cultures). However, they share a crucial position within the criminal justice system that goes beyond a focus on the individual decisions they make about the cases under their scrutiny.

In this paper, we claim that arguably the central task of research on prosecutors deals with understanding their structuring role and we propose a framework that allows for understanding it. Although we do not offer new empirical evidence, we systematise the existing literature, aiming to help future researchers to study the different interactions that make the structuring role of prosecutors. We hope that improved empirical research and more apposite normative proposals can be achieved by using our model for both local and comparative research.

1851) p 37, contrasting what he saw as a perilous situation in Germany and France compared to a much better one in England, and the consequent roles of prosecutors and judges across the channel.

[92]Hodgson, above n 17.

[93]A notable recent exception is S Voigt 'Prosecutors: a cross-national political perspective' in W Thompson (ed) *Oxford Research Encyclopedia of Politics* (Oxford: Oxford University Press, 2021).

[94]Boyne, above n 76, ch 6.

[95]Ibid, p 138.

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