

# PROSECUTION IN PUBLIC, PROSECUTION IN PRIVATE

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*Criminal procedure has long set a boundary between public and private in criminal enforcement: generally speaking, enforcement decisions at the post-charging stage are exposed to some degree of public view, while those at the pre-charging stage remain almost entirely secret. The allocation of public and private is, at heart, an allocation of power—and the current allocation is a relic. When private prosecutors were the mainstay of criminal enforcement, public court processes effectively constrained them. But those processes do little to constrain the spaces where enforcement power today resides: in decisions by the servants of a state-run, professionalized enforcement apparatus on whether to investigate, to charge, or to decline charges.*

*This Article challenges criminal procedure's centuries-old boundary between public and private in criminal enforcement. It argues that the justifications for the boundary are outdated and overstated, and the costs undernoticed. The public-private boundary has served to skew enforcers' incentives, impoverish insight into enforcement patterns and their causes, weaken traditional channels of accountability (judicial, electoral, and internal), and erode public trust. The Article reimagines a new boundary for our time, one that strengthens secrecy in some respects while relaxing it in others, and enables robust oversight of necessarily secret processes. More fundamentally, the Article is a call to center the public-private boundary in accounts of power in the criminal process.*

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## INTRODUCTION

Some prosecutorial decisions are subject to public scrutiny, while others are shielded from it. Criminal procedure sets the boundary between the two. This Article is about the relationship between that boundary and the allocation of institutional power in the criminal process.

Criminal procedure serves a variety of functions, among them distributing power between enforcers and targets.<sup>1</sup> The procedures

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1 See Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 88, 135 (2008) (discussing key functions of criminal procedure, among them error-reduction, legitimatization of the penal sanction, and balancing power as between the prosecution and defense).

that collectively delineate public from private in the criminal process<sup>2</sup> draw a boundary between the pre- and post-charging stages: generally speaking, enforcement at the pre-charging stage unfolds in secret, while that at the post-charging stage takes place in view of the public or, at a minimum, defense attorneys and courts. In place since the Founding, when enforcement power was mostly wielded by victims and community members, this boundary once served to constrain enforcement overreach. But changes to the structures and institutions of American criminal enforcement over the last two centuries have inverted that function. Today, criminal procedure's boundary between public and private aggrandizes enforcement power rather than constraining it.

The development has been both insidious and influential—garnering relatively little attention even as it has fundamentally redistributed power within the criminal process. This is because both participants in and observers of that process have fallen back on historical justifications for the public-private boundary, even as institutional changes have rendered those justifications largely obsolete. Pre-charging secrecy rules and norms are said to ensure investigative integrity and protect against unfounded accusations,<sup>3</sup> while post-charging publicity rights are celebrated as bulwarks against enforcement abuse.<sup>4</sup> But in today's enforcement ecosystem, this arrangement has it backwards.

Transparency in the post-charging stage constrains only the last, and arguably least consequential, of a series of enforcement actions. The more impactful earlier actions—decisions on whether to investigate, whom to target, and whether and what crimes to charge—are made in secret, free from the gaze of defense attorneys, judges, and

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2 By “procedures” I refer broadly to the mix of law (constitutional, statutory, and judge-made) and customary practices and norms that guide the criminal process. See Mona Lynch, *The Situated Actor and the Production of Punishment: Toward an Empirical Social Psychology of Criminal Procedure*, in *THE NEW CRIMINAL JUSTICE THINKING* 199, 208 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

3 See *infra* notes 57–58 and accompanying text (on grand jury secrecy); *infra* note 104–05 and accompanying text (on secrecy of declination decisions).

4 See *In re Oliver*, 333 U.S. 257, 270 (1948) (“Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.”); *Waller v. Georgia*, 467 U.S. 39, 47 (1984) (extending Sixth Amendment right to guarantee public suppression hearings, noting “[t]he public in general also has a strong interest in exposing substantial allegations of police misconduct to the salutary effects of public scrutiny”). See generally Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014) (tracing constraint of enforcement abuse theory in the Court's public trial right cases, arguing right should extend to plea hearings).

the public.<sup>5</sup> What's more, enforcers' near-exclusive control over the extent of secrecy in those earlier stages serves to protect them from public accounting more than it protects from investigative or reputational harms.<sup>6</sup> And the mechanisms that do exist to hold enforcers accountable—judicial, electoral, even internal—are handicapped by obscured visibility: public outcomes (charges filed, convictions obtained, sentences imposed) are not useful indicators in isolation from the private actions that preceded them.

This Article exposes the allocation of public and private in the criminal process as an allocation of *power*—and challenges it. The Article excavates the history behind the current public-private boundary, demonstrating how it once served to constrain enforcement power. It reveals criminal procedure's failure to adapt to changes in the enforcement power structure, demonstrating how the procedures delineating public and private no longer do the work courts, scholars, and policymakers have largely assumed them to do. It exposes the substantial yet largely unappreciated costs of this failure. Finally, the Article argues for a realignment of the boundary, one that manages the particular risks and harms of enforcement power in our time.

Unsettling assumptions about the current allocation of public and private in criminal enforcement is an urgent project. New technologies are enabling greater public visibility into previously shrouded aspects of the criminal process.<sup>7</sup> New record-keeping laws<sup>8</sup> and

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5 Magistrates oversee the issuance of individual search warrants, but have no continuing supervision over an investigation. Their role is also perfunctory, evaluating affidavits for probable cause with no consideration of broader questions, and seeing only the subset of facts prosecutors or police deem necessary to disclose for purpose of demonstrating probable cause. Defense attorneys may sometimes play a role at the pre-charging stage, but they have little power or control over the case at that point: they cannot file motions or subpoena evidence; do not have an assigned judge to whom they can direct requests or complaints; and have no ability to assess the strength of evidence, the prosecution's theory of the case, or the potential crimes prosecutors are considering unless prosecutors chose, in their discretion, to provide such information.

6 See *infra* sub-subsection II.A.1.b and II.A.2.b.

7 See David Yokum, Anita Ravishankar & Alexander Coppock, *A Randomized Control Trial Evaluating the Effects of Police Body-Worn Cameras*, 116 PROC. NAT'L. ACAD. SCI. 10329 (2019) (police-worn body cameras); Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016) (citizen cellphone video recording of police-citizen encounters).

8 See Al Baker & Emily Vasquez, *Number of People Stopped by New York Police Soars*, N.Y. TIMES (Feb. 3, 2007), <https://www.nytimes.com/2007/02/03/nyregion/03frisk.html> [<https://perma.cc/52DT-APXS>] (recounting passage of New York City Council Law in 2001 that mandated NYPD disclosure of citizen stops, and subsequent legal action by City Council and civil liberties groups to ensure NYPD compliance). The disclosures made pursuant to the 2001 Police Reporting Law ultimately paved the way for the class action in *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). See Daniel Denvir, *The Key Ingredient in Stop-and-Frisk Reform: Open Data*, BLOOMBERG CITYLAB (Aug. 24, 2015),

voluntary data initiatives<sup>9</sup> in some jurisdictions have enabled previously shrouded practices to come to light. Recent civil rights investigations by the federal government<sup>10</sup> along with civil rights claims by private parties,<sup>11</sup> have exposed unconstitutional or at least undesirable targeting and declination practices in some jurisdictions. And recent scholarship has revealed the effects of early-stage enforcement decisions on incarceration and other forms of penal control—both in terms of scope (*how many people*) and demographics (*which people*).<sup>12</sup>

Yet scholarship on secrecy and transparency in criminal procedure remains largely focused on the post-charging stage, with much of the critique leveled at the relatively secretive plea-bargaining process.<sup>13</sup> While convictions resulting from plea bargaining are more

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<https://www.citylab.com/equity/2015/08/the-missing-ingredient-in-stop-and-frisk-accountability-open-data/402026/> [https://perma.cc/6N6B-UM4A].

9 See Miller & Wright, *infra* note 14 (analyzing declination decisions voluntarily kept and published by New Orleans District Attorney Harry Connick, as well as summary data kept by prosecutors voluntarily participating in a reporting project with Vera Institute); BESIKI LUKA KUTATELADZE & NANCY R. ANDILORO, PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY—TECHNICAL REPORT (2014), <https://www.ojp.gov/pdffiles1/nij/grants/247227.pdf> [https://perma.cc/DR9U-BXGE] (analysis of racial disparities at charging and post-charging stages, based on data provided by the Manhattan District Attorney's Office). See also PROSECUTORIAL PERFORMANCE INDICATORS, <https://prosecutorialperformanceindicators.org> [https://perma.cc/2QZ9-9ZM3], a data collection partnership between academic institutions and six prosecutors' offices, which collects data on various metrics, including some charging and declination data at a general (non-offense specific) level.

10 See, e.g., U.S. DEP'T JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [https://perma.cc/YMZ4-K3FU]; Memorandum of Understanding Between the Montana Attorney General, the Missoula County Attorney's Office, Missoula County, and the United States Department of Justice (June 10, 2014), [https://www.justice.gov/sites/default/files/crt/legacy/2014/06/10/missoula\\_settle\\_6-10-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/06/10/missoula_settle_6-10-14.pdf) [https://perma.cc/Z3SH-SPCA].

11 See David Rudovsky, Opening Statement, *Stop-and-Frisk: The Power of Data and the Decision in Floyd v. City of New York*, 162 U. PA. L. REV. ONLINE 117 (2013) (discussing class action lawsuits in New York City and Philadelphia raising constitutional challenges to the cities' stop-and-frisk practices); Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987 (2021) (discussing discovery of targeting and selection practices uncovered by recent selective enforcement allegations against federal law enforcement agencies).

12 See ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING (2018); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017).

13 See, e.g., Kay L. Levine, Ronald F. Wright, Nancy J. King & Marc L. Miller, *Sharkfests and Databases: Crowdsourcing Plea Bargains*, 6 TEX. A&M L. REV. 653 (2019); Simonson, *supra* note 4; Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1 (2012); Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006). Some critique has focused more specifically on the lack of transparency of the prosecutor's case file at the adjudicative stage. See Ben Grunwald, *The*

opaque than those resulting from trial, they are nevertheless visible and publicly documented, the product of negotiation by adversaries and at least some form of judicial review. This is not to describe plea bargains as transparent, adversaries as equals, or the judicial role as significant, but rather to highlight the relative transparency and accountability generated by the plea-bargaining process as compared to that which preceded it: the decision to investigate a person; to arrest him; to charge him, and with what crimes. The relatively greater secrecy at those earlier decision points is also more concerning. While the partial opacity of plea bargaining surely influences case outcomes, it is early-stage enforcement decisions that set the parameters of the bargain. And near complete secrecy in those early-stage decisions impedes defense attorneys, judges, and the public from understanding how and why those parameters came to be.

The limited scholarship on transparency at the pre-charging stage has largely focused on the generation of rules and policies to govern the exercise of discretion, and which institutional actors are best suited to create and enforce them.<sup>14</sup> While important, these projects have bypassed a foundational issue, namely, that secrecy in early-stage enforcement decisions is itself a *policy choice*—one that profoundly influences enforcement while impeding attempts to understand and improve it. And while some reformers have recently acknowledged this,<sup>15</sup> enacted policy changes have largely focused on improving disclosures of post-charging data,<sup>16</sup> with little attention to the pre-charging stage or to the particular categories of disclosures that will

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*Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771 (2017) (reviewing the literature and offering empirical-based challenge to the critique).

14 See, e.g., Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015); John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205 (2015); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008). One exception is Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049 (2016), which focuses on how courts can and should use aggregate information about arrests, searches, and other law enforcement action to enhance judicial oversight. However, courts' information on pre-charging decisions is limited to the few that require judicial review—that is, warranted searches and arrests leading to a criminal charge. Warrantless searches are effectively exempt from judicial oversight unless subsequently challenged, and the vast majority of arrests do not result in criminal charges.

15 See Sarah Lustbader, *A New Wave of Prosecutorial Transparency*, APPEAL (June 7, 2019), <https://theappeal.org/spotlight-a-new-wave-of-prosecutorial-transparency/> [<https://perma.cc/RLD5-TM3Q>] (discussing efforts by elected prosecutors in New York City, San Francisco, and Chicago, and a recently enacted law in Connecticut, all aimed at increasing public access to prosecutorial data).

16 *Id.* These efforts mostly expand disclosures of details on charged cases; the few disclosures of declinations implemented thus far have been too generalized for meaningful analysis.

generate the greatest benefits to accountability relative to their costs. These oversights matter, because as recent work in behavioral economics and public administration has shown, “transparency” is neither a monolith nor a panacea: some forms of transparency may impede rather than enhance accountability,<sup>17</sup> while others may simply prove ineffectual.<sup>18</sup> In short, it is high time to treat where we draw the boundary between secrecy and transparency as a policy choice, one with a complicated set of costs and benefits—and to consider whether the current mapping pays its way.

This Article shows that it does not. Study of the pivotal secret aspects of the criminal process—the decision to target, the decision to decline charges, and the presentation of evidence to the grand jury—reveals two harmful and underappreciated power dynamics. One is the inequitable distribution of secrecy’s dividends. Police and prosecutors can and do utilize secrecy selectively to their benefit, while other intended beneficiaries (targets and subjects) generally cannot. The second is aggregate effects. Though secrecy is designed to protect individual cases and investigations, it collectively prevents insight into patterns of early-stage enforcement decisions across time, location, case type, and demographic group.

An analysis of transparency—or, more accurately, *partial* transparency—in the criminal process likewise reveals two important effects on enforcement oversight and, by extension, enforcement power and discretion. First, partial transparency impedes observers’ ability to detect the causes of visible (*i.e.*, end-stage) enforcement patterns. Researchers, for instance, routinely use public sentencing data to draw causal inferences about sentencing disparities,<sup>19</sup> even though that data is an artifact of earlier, nonpublic decisions about arrests and charging.<sup>20</sup> Second, partial transparency incentivizes enforcers to maximize disclosed end-stage outputs (arrests, convictions, and imposed penalties) and so steers earlier-stage

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17 See Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185 (2014); Amitai Etzioni, *The Limits of Transparency*, 74 PUB. ADMIN. REV. 687 (2014); Andrea Prat, *The Wrong Kind of Transparency*, 95 AM. ECON. REV. 862 (2005). See generally *infra* Section III.A.

18 See Yokum et al., *supra* note 7. See generally *infra* Section III.A.

19 See, e.g., U.S. SENT’G COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (2012).

20 See, e.g., Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 35–36 (2013) (assessing the causes of racial disparities in federal sentences by linking sentencing data to charging data, but cautioning that racial disparities in offenses charged may reflect disparities in earlier decisions of whether to arrest and charge—data unavailable to researchers).

decisions to that end.<sup>21</sup> And what few efforts exist to assess early-stage enforcement practices are hampered by reliance on law enforcement's self-reporting, making it difficult for overseers to assess whether data reflects actual practice or inaccurate reporting of it.<sup>22</sup>

The boundary between public and private in criminal procedure has shaped not only the exercise of enforcement power and discretion, but also public perceptions of it. One way is obvious: enforcers' control over the dissemination of information on early-stage decisionmaking allows them to control the enforcement narrative. Another is less obvious, and perhaps more pernicious. The lack of broad public visibility into the vast majority of early-stage enforcement decisions, combined with limited visibility into an isolated slice of them, fuels speculation and slowly corrodes public trust.

The Article proceeds as follows. Part I places criminal procedure's treatment of secrecy and transparency in historical perspective. It traces the origins of the public-private boundary, its erstwhile role in cultivating prosecutorial constraint, and the institutional shifts that have untethered it from that function. Part II elaborates on this dynamic, showing how the current boundaries between public and private enable and perpetuate the very power imbalances they once functioned to constrain. Part III imagines a different allocation of public and private in prosecution, one that more intentionally and thoughtfully balances protection of investigations, innocence presumption, and reputational harm with the imperatives of public knowledge and meaningful oversight. It argues, somewhat counterintuitively, not for less secrecy across the board, but instead for more targeted secrecy: greater in some respects, and less in others. Finally, it envisions ways to generate meaningful public oversight of early-stage enforcement decisions within necessary secrecy constraints.

Behind criminal procedure's "[g]atehouses and [m]ansions" (in Yale Kamisar's famed analogy to police stations and courts),<sup>23</sup> are its back rooms—the spaces where police and prosecutors determine who enters the gatehouse and mansion in the first place, and under what terms. In the middle of the last century, courts augmented criminal procedure at the gatehouse. Today, legislators and regulators must bring it to the back room.

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21 See *infra* subsection II.B.2.

22 See Ninth Report of the Independent Monitor at 1, *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (No. 08-cv-01034) (discussing police department's under-reporting of stops and pro-forma supervisory review of stops, as revealed by periodic audits); see also *infra* note 180 and accompanying text.

23 Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, from Escobedo to . . .*, in YALE KAMISAR, FRED E. INBAU & THURMAN ARNOLD, *CRIMINAL JUSTICE IN OUR TIME* (1965).



## I. EVOLUTION AND STASIS

Criminal law and enforcement have evolved substantially since the Founding; criminal procedure's allocation of secrecy and transparency has not. This Part charts this comparative evolution and stasis. It demonstrates how the public-private boundary worked effectively to curb the risks and dangers of victim and community-led criminal enforcement, but did not adapt to the new risks and dangers that arose from the shift to professionalized enforcement and the expansion of regulatory crimes.

Of course, neither criminal enforcement nor criminal procedure is a monolith: then, as now, there was much variation across jurisdictions in the sorts of crimes prosecuted and the means and manner of prosecution. But some practices and procedures were broadly applicable. This Part focuses on those, and specifically on how the public or private nature of those procedures allocated power as between enforcers and targets.

### A. *Private Prosecutors, Public Investigations*

At the Founding and for at least a half-century following, criminal enforcement was primarily victim generated.<sup>24</sup> While public prosecutors existed in some jurisdictions, they played a minimal role.<sup>25</sup> Victims, their kin, or community members (in the case of public order or morals offenses) filed complaints, arrested criminals, and prosecuted cases, occasionally with the aid of a constable or watchman to perform the arrest or private counsel to bring the case.<sup>26</sup>

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24 Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 *CRIME & DELINQ.* 568, 569–70 (1984) (describing the dominance of the private prosecutor until at least the middle of the nineteenth century, noting that references to the power and discretion of the public prosecutor first began to appear in state constitutions in the 1850s, and in judicial opinions in the 1880s).

25 *Id.* at 572 (describing dominance of private prosecution even in colonies and states with public prosecutors); see Abraham S. Goldstein, *History of the Public Prosecutor*, in 3 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1286, 1286–88 (Sanford H. Kadish ed., 1983).

26 See DAVID J. BODENHAMER, *FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY* 63 (1992); MIKE MCCONVILLE & CHESTER L. MIRSKY, *JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY* 28 (2005) (“[T]he mainspring of the criminal justice system in the first half of nineteenth century New York was the private prosecutor. It was the private prosecutor—the victim or someone acting on his or her behalf—who initiated the overwhelming majority of complaints and in whose name complaints were launched.”); ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE: PHILADELPHIA, 1800–1880*, at 38 (1989) (“During the first half of the nineteenth century, private prosecution dominated criminal justice in Philadelphia.”); *id.* at 55 (even in 1874, “the system continued to be characterized by individuals asserting their rights”); William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective*, 42

This meant that citizens primarily investigated cases and saw them through. These private prosecutors gathered evidence and readied witnesses; initiated charges before a local official (typically a justice of the peace or an alderman); and, if the official allowed the case to go forward, presented evidence before the grand jury and sought from it a true bill.<sup>27</sup> The constables or night watchmen who occasionally aided victims in the investigation—whether by executing search warrants, locating and questioning witnesses, or making arrests—did so largely at the victim’s direction.<sup>28</sup>

Criminal procedure meaningfully constrained enforcement power and discretion. Justices of the peace, alderman or magistrates evaluated victims’ initial allegations and determined whether to move them forward to a grand jury. Grand juries, in turn, evaluated the evidence brought forward by complainants, and determined whether the conduct alleged merited criminal prosecution and, if so, whether the evidence established probable cause to indict. Trial juries and trial judges then assessed, upon hearing the evidence, whether the defendant should be found guilty and, if so, the sentence warranted.

Across jurisdictions, one or more of these stages of review was robust, and with good reason. Private prosecution carried the very real risk of abuse: complainants frequently availed themselves of the criminal process to sort out personal grievances or seek negotiating leverage.<sup>29</sup> To guard against such abuse, lower-level judicial officers

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N.Y.U. L. REV. 450, 468 (1967) (offenses against property and against morals accounted for nearly eighty percent of all criminal prosecutions in Revolutionary Middlesex, Massachusetts, the former of which were prosecuted by victims and the latter by community members); Sam Bass Warner, *Investigating the Law of Arrest*, 31 J. CRIM. L. & CRIMINOLOGY 111, 111–12 (1940) (describing use of the “hue and cry” in eighteenth and early nineteenth century Britain and America, in which crime victims and their neighbors were responsible for investigating crime and locating and arresting suspects).

27 See MICHAEL STEPHEN HINDUS, PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767–1878, at 96 (1980) (South Carolina in the early- to mid-nineteenth century); MCCONVILLE & MIRSKY, *supra* note 26, at 47–48 (New York in the early nineteenth century); ROGER LANE, POLICING THE CITY: BOSTON 1822–1885, at 7–9 (1967) (Boston in the late eighteenth and early nineteenth centuries); see also William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 651–52 (1976) (describing the victim-dominated criminal justice systems in the American colonies).

28 See MCCONVILLE & MIRSKY, *supra* note 26, at 59–71.

29 See STEINBERG, *supra* note 26, at 49 (“Because the criminal law was so accessible and pliable, it was often used to influence the outcome of a private squabble. Any pair of citizens in a relationship that was potentially antagonistic might resort to the criminal law should the antagonism materialize.”); *id.* at 46 (“Defendants likewise sought to control the [criminal] process, and the best way for them to do so was to become prosecutors themselves. They did this by instituting cross-bills, in which an accused person retaliated by pressing the same charge against the original prosecutor.”); HINDUS, *supra* note 27, at 86 (observing that in antebellum South Carolina “the criminal justice system was a malleable

would resolve complaints summarily,<sup>30</sup> grand juries might regularly refuse to return indictments,<sup>31</sup> or trial juries regularly acquitted.<sup>32</sup>

These reviews were also (with the exception of grand jury deliberations) transparent. Transparency was presumed to operate as an effective constraint on unreasonable or arbitrary exercises of state power,<sup>33</sup> and early American criminal justice systems wielded it to that end. Charging decisions were announced before large public audiences. In colonial Virginia, for instance, grand jury indictments were returned in a courtroom overflowing with spectators, who listened as names of those charged, and the charges levied, were read aloud.<sup>34</sup> In early nineteenth-century Philadelphia, the magistrate's office where victims brought initial criminal complaints was, in Allen Steinberg's recounting, overflowing with spectators, "a grand, free popular theatre, with friends and neighbors as the performers."<sup>35</sup> And of course, criminal trials—then the mainstay of the adjudicative

adjunct to the other, traditional forms of authority that felt free to manipulate the legal system for personal ends"); THEODORE FERDINAND, *BOSTON'S LOWER CRIMINAL COURTS, 1814–1850*, at 49–51 (1992) (observing that between 1814 and 1850, about half of all criminal cases in Boston were essentially private disputes).

30 See STEINBERG, *supra* note 26, at 52 (describing this common practice in Philadelphia); see also HINDUS, *supra* note 27, at 89 (observing that for much of the nineteenth century, the "vast majority" of criminal cases in Massachusetts, all but the most serious, were dispatched summarily by lower-level judicial officers).

31 See STEINBERG, *supra* note 26, at 57, 63 (Philadelphia); HINDUS, *supra* note 27, at 97 (noting that in two-thirds of assault and battery cases presented before grand juries in antebellum South Carolina, the grand jury refused to return a true bill).

32 STEINBERG, *supra* note 26, at 59 ("The most important and enduring effects of private prosecution on the courts were a low conviction rate and a high proportion of cases that never reached a verdict at all," reporting an average conviction rate of twenty-two percent in Philadelphia between 1820 and 1874); HINDUS, *supra* note 27, at 91–92 (reporting acquittal rate of nearly thirty percent in South Carolina); FERDINAND, *supra* note 29, at 50 tbl.2.2 (juries found defendants not guilty in nearly one-third of cases that went to a trial in Boston between 1814 and 1850); LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 1870–1910*, at 182 tbl.5.13 (1981) (between 1880 and 1910 in Alameda County, California, less than forty percent of all jury trials resulted in guilty verdicts).

33 See WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS 249–51* (1980) (describing the importance ascribed by early Americans to governance in the public eye); BODENHAMER, *supra* note 26, at 32 (noting the public jury trial right was "especially important" to the Founding era-conception of liberty; "[t]he presence of jurors precluded secret trials . . . . It was, quite simply, the best method available of assuring justice and protecting liberty"); *id.* at 48 (noting that "[w]hat remained constant" from the Revolutionary through the Antebellum era, and imbued all criminal procedural safeguards, "was a desire to restrain governmental power").

34 See A. G. Roeber, *Authority, Law, and Custom: The Rituals of Court Day in Tidewater Virginia, 1720 to 1750*, 37 WM. & MARY Q. 29, 32, 45–46 (1980) (describing proceedings in Virginia's county courts as a "drama in which the entire county played a part").

35 STEINBERG, *supra* note 26, at 17–18.

process—were public, a feature deemed so critical to constraining state abuses it was guaranteed in the Bill of Rights and the Constitution of every state.<sup>36</sup>

In sum, the boundary between secrecy and transparency that had developed in the colonies and was embraced at the Founding (through both constitutional provisions and continued practices) effectively constrained the criminal enforcement risks of the time. Those risks were primarily of private abuse: victims or community members who might utilize the criminal process to harass or profit, or as a mechanism for settling private disputes. But those risks were soon to recede, and new risks to arise, as criminal law and enforcement in the United States underwent a sea change.

### *B. The Rise of Public Prosecutors and the Shifting of Enforcement Power*

As the nineteenth century progressed, prosecution professionalized. Police forces proliferated, first in cities and then in smaller towns.<sup>37</sup> Public prosecutors gradually took over more and more of the criminal docket, eventually staking their place as full-time, salaried ministers of the criminal process.<sup>38</sup> Criminal law changed around this time, too: from a common law focused mostly on redressing harm to individuals and securing communal norms, to a vast code regulating all manner of public and private behavior.<sup>39</sup> Prosecutors could choose from a vast array of potential charges, but lacked the capacity or inclination to pursue every potential code violation.<sup>40</sup>

These shifts gave rise to the exercise of professional enforcement discretion. Where once judicial officials and grand juries had served as the gatekeepers of the criminal process, now prosecutors served that

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36 See BODENHAMER, *supra* note 26. Cesare Beccaria, an enlightenment philosopher whose 1764 essay, *On Crimes and Punishments*, is widely considered a key influence on early American criminal justice reform, wrote that public trials were necessary to “restrain power and passions.” CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS* 22 (Henry Paolucci trans., Bobbs-Merrill Educ. Publ’g 1963) (1764). For a compelling illustration of the influence of spectators in criminal trials around the Founding, see STEVEN WILF, *LAW’S IMAGINED REPUBLIC: POPULAR POLITICS AND CRIMINAL JUSTICE IN REVOLUTIONARY AMERICA* 37–38 (2010) (describing the influence of spectators at the 1770 trial of Ebenezer Richardson in Boston).

37 See SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 49–69 (2d ed. 1998).

38 *Id.* at 69–71; BODENHAMER, *supra* note 26, at 68; NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 255–94 (2013); see also Goldstein, *supra* note 25, at 1288.

39 See Lauren M. Ouziel, *Beyond Law and Fact: Jury Evaluation of Law Enforcement*, 92 NOTRE DAME L. REV. 691, 714–15 (2016) (discussing this transition, and its effects on prosecutors and juries).

40 *Id.* at 719.

role. Public prosecutors were expected to weed out those cases that, in their professional view, lacked the requisite evidence to prevail at trial, or concerned conduct that did not merit penal sanction.<sup>41</sup> As professional prosecutors rose, then, so did the stakes of charging crimes. Complainants' allegations had been viewed skeptically by the public and the various gatekeepers of the process.<sup>42</sup> In contrast, a professional accusation of criminality carried weight and credibility.

The move from lay to professional prosecution thus precipitated a shift *in the locus of enforcement power*—from courts, where juries (grand and petit) or judges evaluated charges, determined guilt, and imposed sentence, to prosecutors, who effectively alone determined whom and what to charge. But the procedures designed to ensure the reasonable exercise of that power did not shift accordingly. Magistrates continued to evaluate complaints, and grand juries' indictments, for probable cause even as professional prosecutors ensured charging instruments routinely satisfied that standard. Charging decisions continued to be issued in open court, even as those courtrooms emptied of spectators. The public trial right endured even as trials waned and adjudication moved into the shadows of plea bargaining.

While these procedures remained necessary to a fair process,<sup>43</sup> they were no longer sufficient. The rise of professional prosecution coupled with the expansion of criminal codes vested the state with enormous discretion—and, by extension, power—in charging.<sup>44</sup> Yet no additional procedures developed to constrain charging practices. To the contrary, existing procedures remained stagnant or even weakened.<sup>45</sup> And while the rise of prosecutor elections in the mid- to late nineteenth century was thought to impose political constraints on public prosecutors,<sup>46</sup> it was not accompanied by a shift of the public-private boundary to aid electoral oversight. The result, as the next Part shows, is an outdated procedural framework that expands rather than constrains criminal enforcement power.

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41 *Id.*

42 See *supra* notes 29–32 and accompanying text.

43 See Ouziel, *supra* note 39 (arguing that the criminal jury trial has evolved, and appropriately so, to become a quasi-evaluation of law enforcement's competence and legitimacy in investigating and bringing a case).

44 See David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 488–89 (2016) (“[T]he more discretion that prosecutors have, the greater will be the concern, generally speaking, about the power they exercise and vice versa.”).

45 For instance, jury nullification became disfavored, see Ouziel, *supra* note 39, at 723–24, as did the use of grand juries to review charges, see *infra* notes 51–56 and accompanying text.

46 See Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1550–57 (2012).

## II. HOW THE CURRENT PUBLIC-PRIVATE BOUNDARY ENLARGES CRIMINAL ENFORCEMENT POWER

This Part considers how criminal procedure's allocation of secrecy and transparency protects and advances enforcement power. Section A analyzes three key aspects of the criminal process that remain shrouded in secrecy: grand jury proceedings, the decision to target, and the decision to decline prosecution. It charts the development of these secret processes in the context of changes in criminal enforcement, and considers the ways in which they operate today to protect and advance prosecutorial power and discretion.

Two key insights emerge. The first is asymmetry in secrecy's conferred dividends: police and prosecutors can and do utilize secrecy selectively to their benefit, while secrecy's primary intended beneficiaries cannot. The second is aggregate implications: though secrecy is designed to protect individual cases and investigations, it collectively prevents insight into patterns of early-stage enforcement decisions across time, location, case type, and demographic group.

Section B considers transparency. First, it identifies the ways in which partial transparency—the disclosure of selected data from the criminal process—can deceive as to the sources and nature of enforcement patterns. It then considers the ways in which transparency incentivizes the very behaviors it seeks to constrain. It concludes with a discussion of how these two harms, deceptiveness and misaligned incentives, perpetuate each other.

### *A. Secret Criminal Processes: Past and Present*

This Section analyzes three pivotal aspects of the criminal process hidden from public view: grand jury proceedings, the decision to target, and the decision to decline prosecution. It compares the historical and the contemporary, charting how the uses and purposes of secrecy in these processes have evolved over time to aggrandize enforcement power and minimize accountability.

#### 1. Grand Jury Secrecy

##### a. Historical Development

Secrecy has attended the grand jury since its earliest use, both in England and America.<sup>47</sup> In colonial times, the grand jury was

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<sup>47</sup> See SARA SUN BEALE, WILLIAM C. BRYSON, TAYLOR H. CRABTREE, JAMES E. FELMAN, MICHAEL J. ELSTON & KATHERINE EARLE YANES, *GRAND JURY LAW AND PRACTICE* § 5.2 (2d ed. 2020).

considered a bulwark against British rule; grand jury secrecy helped protect both evidence gathering and deliberation from royal interference.<sup>48</sup> Grand juries in the new republic continued to insulate the fact-finding process from state interference.<sup>49</sup> In addition to independently assessing probable cause in criminal prosecutions, state and local grand juries investigated government malfeasance, neglect, and corruption. They issued not only indictments, but also reports detailing evidence they uncovered, and recommendations for new laws or other improvements.<sup>50</sup> Secrecy was critical to all of these grand jury functions: it ensured grand juries could, without state pressure, gather evidence, engage in deliberations, and reach conclusions—even if the upshot of that process challenged or undermined state governance.

In the nineteenth century, as criminal prosecution moved from lay to professional hands and criminal law expanded in scope and complexity, the grand jury came under attack. Beginning in England and then in America, legal scholars and law reformers alike critiqued the grand jury as a relic that gave outsized power to lay citizens.<sup>51</sup> The critiques were soon adopted by judges and lawmakers, and over the course of several decades, a series of laws, constitutional amendments, and judicial rulings placed limits on the grand jury's power.<sup>52</sup> In 1884, the United States Supreme Court ruled that the Fourteenth Amendment did not incorporate the Fifth Amendment's grand jury right, allowing states to discard the institution if they chose.<sup>53</sup> Some did;<sup>54</sup> many others limited it, by curtailing the grand jury's capacity to initiate investigations, subpoena witnesses or other evidence, or consider an indictment or issue a report without the assent of a public prosecutor.<sup>55</sup>

By the twentieth century, the grand jury's powers had been significantly curtailed. With limited exceptions, grand juries in most states no longer held the reins of investigations and prosecutions.<sup>56</sup> Public prosecutors did—and they utilized the grand jury to their

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48 See RICHARD D. YOUNGER, *THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634–1941*, at 19–40 (1963); Richard M. Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455, 456–58 (1965).

49 YOUNGER, *supra* note 48, at 41–42.

50 Ronald F. Wright, *Grand Juries and Expertise in the Administrative State*, in GRAND JURY 2.0: MODERN PERSPECTIVES ON THE GRAND JURY 293, 294–96 (Roger Anthony Fairfax ed., 2011).

51 YOUNGER, *supra* note 48, at 134–48.

52 *Id.* at 148–54.

53 *Hurtado v. California*, 110 U.S. 516, 538 (1884).

54 YOUNGER, *supra* note 48, at 151–54.

55 Wright, *supra* note 50, at 298–300.

56 *Id.* Those exceptions largely involved public corruption involving prosecutors themselves. See YOUNGER, *supra* note 48, at 182–208.

advantage, by compelling the production of evidence and obtaining sworn, recorded testimony inculcating the target of their investigation. A criminal investigation that impaneled a grand jury had become no more a search for truth than one that did not: prosecutors now controlled the evidence presented, and so controlled the facts the grand jury could find.

In this new era, the secrecy rules that had powered the grand jury's lapsed role as government overseer were no longer necessary. Having effectively become an arm of the state, the grand jury hardly needed to shield itself from it. Yet rather than altering or amending grand jury secrecy rules to take account of new institutional circumstances, courts instead rebranded those rules as necessary to protect *the state's* investigation from outside interference. A 1958 United States Supreme Court case, the first to remark on the purposes served by grand jury secrecy in the modern era, described them as follows:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.<sup>57</sup>

The first through fourth listed purposes enunciated by the Court are all variations on the rationale of protecting an investigation from interference by nonstate actors. The final listed purpose invokes secrecy as a means of protecting the presumption of innocence. As compared to accusations by private prosecutors, those by a public prosecutor carried significant weight and credibility; accordingly, merely the specter of a public prosecutor's investigation presented a risk of reputational and pecuniary harm. Although not originally designed to protect uncharged persons, grand jury secrecy fit well with that purpose. Today, these justifications—protection of investigative integrity and from reputational harm—are now well-accepted by courts (both state and federal) and scholars.<sup>58</sup>

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57 United States v. Proctor & Gamble Co., 356 U.S. 677, 681 n.6 (1958) (quoting United States v. Rose, 215 F.2d 617, 628–29 (3d Cir. 1954)).

58 As the leading treatise on grand juries describes this conventional wisdom, “[t]he secrecy of grand jury proceedings is thought to promote a variety of important interests,



By the middle of the twentieth century, then, the accepted rationale for grand jury secrecy had adapted to a new institutional reality. As the next Section demonstrates, the secrecy requirement itself has not.

### b. Current Dynamics

Today, roughly half of states along with the federal system require a grand jury indictment to prosecute a serious criminal charge (typically characterized as a felony crime), and some states continue to utilize grand juries even if not required.<sup>59</sup> Across jurisdictions utilizing grand juries, secrecy is universal.<sup>60</sup>

Originally intended to constrain state power, grand jury secrecy today amplifies it. Secrecy prevents those potentially in possession of exculpatory evidence from knowing enough about the course, or even existence, of the investigation to come forward to prosecutors.<sup>61</sup> It allows the prosecution to use bare minimum methods of evidence collection and presentation (such as summary witnesses and hearsay testimony), without the inevitable critique that would attend public exposure.<sup>62</sup> It enables prosecutors to control the grand jury process—from decisions about subpoenaing witnesses and physical evidence to those about whether to bring charges and which charges to bring—without public pressure to permit greater grand jury autonomy (pressure that would surely accompany public insight into the grand jury process).<sup>63</sup> And it allows the prosecution to keep its investigatory tactics hidden from the public at large. In short, grand jury secrecy shrouds the most pivotal aspects of the public prosecutor's role—gathering evidence, identifying targets, and weighing charges—effectively insulating them from critique.

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such as avoiding embarrassment to persons who are investigated but not charged, preventing prejudicial leaks of information to potential defendants, and reducing the danger that grand jury witnesses will be threatened or importuned by persons with an interest in the outcome of the proceeding.” BEALE ET AL., *supra* note 47, § 5:1.

59 *Id.* § 1.7.

60 *See* Appendix: Grand Jury Secrecy Rules.

61 *See In re Oliver*, 333 U.S. 257, 270 n.24 (1948) (noting one of the benefits of public trials is “[they] come to the attention of key witnesses unknown to the parties. These witnesses may then voluntarily come forward and give important testimony”).

62 Most jurisdictions permit hearsay and summary testimony. *See* BEALE ET AL., *supra* note 47, §§ 9.6, 9.7 (describing practice and potential for abuses).

63 *Id.* § 4.15 (“[F]or the most part it is the prosecutor who determines what witnesses and evidence the grand jury will hear and what charges will be presented to it.”); *id.* § 6.2 (describing precise practices in different jurisdictions, noting only four states presently give the grand jury any control over the subpoena power).

Against these enormous costs, the proffered benefits of grand jury secrecy pale. In fact, upon closer inspection, many of those supposed benefits turn out to be less salutary than advertised.

Sealed grand jury proceedings do little, in practice, to prevent witness tampering, subornation of perjury, and other forms of obstruction, as grand jury witnesses in most jurisdictions are permitted to discuss the fact and substance of their testimony with anyone both before and after they have testified.<sup>64</sup> In any event, obstructive conduct is already deterred through independent penal sanctions; it is not at all clear that sealing grand jury proceedings from the public offers any marginal increase in deterrence. Nor does secrecy grant reticent witnesses durable protection, as prosecutors in many jurisdictions must disclose to the defense prospective trial witnesses and any prior statements made by them.<sup>65</sup> Though trials are rare, prosecutors can hardly promise witnesses at the pre-charging stage that the case will assuredly not reach the pre-trial witness disclosure stage.

Sealed grand jury proceedings likewise do little to protect free grand jury deliberations. So long as secrecy of deliberations is maintained, there is no need to maintain the secrecy of the pre-deliberation proceeding. Petit juries regularly deliberate freely and in secret following a fully public trial.

Similarly overstated is secrecy's touted protection of innocent targets and subjects. In practice, persons negatively affected by grand jury leaks have had little success in seeking remedial relief. Courts generally do not recognize a private right of action for violations of grand jury secrecy; and even when courts are willing to probe a leak,

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64 In thirty-two states and the federal system, witnesses before the grand jury are omitted from the secrecy constraints imposed on other grand jury participants. *See* ALASKA R. CRIM. P. 6(*l*)(1); ARK. CODE ANN. § 16-85-514 (2021); CAL. PENAL CODE § 924.2 (West 2021); DEL. SUPER. CT. R. CRIM. P. 6(e)(2); D.C. SUPER. CT. R. CRIM. P. 6(e)(2); GA. CODE ANN. §§ 15-12-67, 15-12-68 (2021); HAW. R. PENAL P. 6(e)(1); IDAHO CODE ANN. § 19-1112 (2021); 725 ILL. COMP. STAT. 5/112-6 (2021); IOWA R. CRIM. P. 2.3(4)(d); KAN. STAT. ANN. § 22-3012(b) (2019); ME. R. CRIM. P. 6(e); MASS. R. CRIM. P. 5(d); MISS. CODE ANN. § 13-7-29 (2021); MONT. CODE ANN. § 46-11-317(2) (2021); NEB. REV. STAT. § 29-1410 (2021); N.H. R. CRIM. P. 8(b)(6); N.J. CT. R. 3:6-7; N.M. STAT. ANN. § 31-6-6(A) (2021); N.Y. CRIM. PROC. LAW § 190.25(4)(a) (McKinney 2021); OHIO R. CRIM. P. 6(E); OKLA. STAT. tit. 22, § 355(C) (2021); PA. R. CRIM. P. 556.10(B)(3); R.I. SUPER. CT. R. CRIM. P. 6(e)(2); S.C. CODE ANN. § 14-7-1720(A) (2021); TENN. R. CRIM. P. 6(k); UTAH CODE ANN. § 77-10-13(7)(b) (West 2021); VT. R. CRIM. P. 6(e)(2); VA. CODE ANN. § 19.2-192 (2021); W. VA. R. CRIM. P. 6(e)(2); WIS. STAT. §§ 968.40–968.53 (2021); WYO. STAT. ANN. § 7-5-208 (2021); FED. R. CRIM. P. 6(e).

65 *See* WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE §§ 20.5(e), (f) (4th ed. 2020) (noting the federal system and about half of all states require prosecutors to disclose prospective trial witnesses, and slightly fewer than half of states require disclosure also of those witnesses' prior statements on matters that will be the subject of their testimony).

proving its source is exceedingly difficult.<sup>66</sup> What's more, prosecutors regularly expose uncharged persons through "speaking indictments," the factual details of which often leave little doubt as to the identities of unnamed persons.<sup>67</sup> And prosecutors can and do publicly reveal investigatory information presented to the grand jury, so long as the information has an independent source.<sup>68</sup>

Not only does grand jury secrecy in practice fall short of protecting subjects and targets from reputational harm, but it also can confer on prosecutors a reputational benefit. When prosecutors wish to evade accountability for investigatory or charging decisions, they can utilize the grand jury to that end—by selectively disclosing evidence presented to the grand jury,<sup>69</sup> seeking court orders to unseal

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66 See, e.g., *In re Grand Jury Investigation* (90-3-2), 748 F. Supp. 1188 (E.D. Mich. 1990) (finding no private right of action for violations of federal grand jury secrecy rule, holding violations only enforceable via criminal contempt proceeding); *Barry v. United States*, 740 F. Supp. 888 (D.D.C. 1990) (on remand of civil action against government for grand jury leaks, finding extensive evidence of leaked material but insufficient evidence that government was the source of it).

67 See Anthony S. Barkow & Beth George, *Prosecuting Political Defendants*, 44 GA. L. REV. 953, 1003–05 (2010) (describing common use of speaking indictments, and critiques of the practice). Perhaps the most recent high-profile example is the indictment of Roger Stone, which made reference to numerous unnamed, uncharged persons and organizations that were readily identified. See Indictment, *United States v. Stone*, No. 19-CR-00018 (D.D.C. filed Jan. 24, 2019); Dustin Volz, *From Organization 1 to Person 2: Who's Who in the Roger Stone Indictment*, WALL ST. J. (Jan. 26, 2019), <https://www.wsj.com/articles/from-organization-1-to-person-2-whos-who-in-the-roger-stone-indictment-11548461792> [https://perma.cc/LG8D-535E].

68 See, e.g., *United States v. Rosen*, 471 F. Supp. 2d 651, 655 (E.D. Va. 2007) ("Leaks of information from law enforcement investigations that relate to matters under grand jury investigation do not concern 'matters before the grand jury,' unless, of course, they disclose secret details about proceedings inside the grand jury room. In other words, . . . 'the disclosure of information coincidentally before the grand jury [which can] be revealed in such a manner that its revelation would not elucidate the inner workings of the grand jury is not prohibited' by Rule 6(e)." (quoting *In re Sealed Case No. 99-3091*, 192 F.3d 995, 1002 (D.C. Cir. 1999))).

69 A particularly egregious example occurred in the investigation into the police killing of Tamir Rice, a twelve-year-old black child shot by police while playing with a toy gun; during the two-month long grand jury investigation, the Cuyahoga County prosecutor repeatedly disclosed witness statements and police reports that exculpated the police officer suspects. See Richard A. Oppel Jr. & Mitch Smith, *Tamir Rice's Family Clashes with Prosecutor Over Police Killing*, N.Y. TIMES (Dec. 23, 2015), <https://www.nytimes.com/2015/12/24/us/tamir-rices-family-and-prosecutor-quarrel-over-release-of-evidence.html> [https://perma.cc/A7ET-JHAL]. A subsequent request by Rice's family to release the full grand jury proceedings—so that they and the public could have access to the entirety of the evidence considered by the grand jury rather than only that selectively disclosed by the prosecutor—was denied, notwithstanding the court's displeasure at the prosecutor's conduct. See *In re Investigation of the November 22, 2014 Shooting Death of Tamir Rice*, 109 N.E.3d 608, 616 (Ohio Ct. App. 2018) ("The fact that the office of the former prosecuting attorney disseminated selected portions of the evidence presented to the grand jury under the guise

the grand jury proceedings after having tailored them for public consumption,<sup>70</sup> or, conversely, seeking to keep the proceedings secret while minimizing their agency in the grand jury process.<sup>71</sup> That the reputational gambit is not always successful is, in part, a result of court-

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of ‘transparency’ was inappropriate.”). For a critique of the use of the grand jury in the Tamir Rice investigation, see Ric Simmons, *The Role of the Prosecutor and the Grand Jury in Police Use of Deadly Force Cases: Restoring the Grand Jury to Its Original Purpose*, 65 CLEV. ST. L. REV. 519, 528 (2017).

70 This has happened most notably in high-profile investigations of law enforcement shootings. For instance, in the investigation of Darren Wilson for the killing of Michael Brown, a review of the grand jury transcript revealed a highly unusual proceeding in which exculpatory evidence was presented, the target was not questioned aggressively, and the grand jury was not presented with proposed charges. See Julie Bosman, Campbell Robertson, Erik Eckholm & Richard A. Oppel Jr., *Amid Conflicting Accounts, Trusting Darren Wilson*, N.Y. TIMES (Nov. 25, 2014), <https://www.nytimes.com/2014/11/26/us/ferguson-grand-jury-weighed-mass-of-evidence-much-of-it-conflicting.html> [https://perma.cc/YMH5-257F]. Yet when a grand juror claimed the prosecutor’s disclosures did not fully portray the grand jury proceedings and sought court permission to speak publicly about what had transpired, her request was denied. See *Doe v. McCulloch*, 106 F. Supp. 3d 1007, 1015 (E.D. Mo. 2015), *vacated*, 835 F.3d 785, 786 (8th Cir. 2016).

71 For instance, the prosecutor in the investigation into the killing of Breonna Taylor, an unarmed innocent black woman shot to death by Lexington, Kentucky, police officers during a raid of her home, sought to foist responsibility for the absence of indictments on the grand jury, claiming it had “agreed” that the officers’ use of force was justified and charges against them unmerited. Tessa Duvall, *Two Breonna Taylor Grand Jurors Are Telling Their Story. Why That’s Important*, LOUISVILLE COURIER J. (Oct. 27, 2020), <https://www.courier-journal.com/story/news/local/breonna-taylor/2020/10/27/two-breonna-taylor-grand-jurors-telling-their-story/6051938002/> [https://perma.cc/9A5Y-CGTG]. When several grand jurors then sought court permission to reveal publicly the charges that were in fact presented to the grand jury, the prosecutor opposed their request. After receiving court permission, the grand jurors disclosed that the grand jury was not asked to consider any charges against the officers who had killed Ms. Taylor and returned the only charges presented (wanton endangerment against an officer who had shot into a neighboring apartment). *Id.* A nearly identical scenario had unfolded several years earlier in the police killing of Eric Garner, though the court in that case ultimately did not permit a full disclosure of the grand jury proceedings—allowing the prosecutor’s limited, self-serving disclosures to constitute the entirety of the public record. See *In re James v. Donovan*, 14 N.Y.S.3d 435 (N.Y. App. Div. 2015) (noting with approval earlier court’s granting prosecutor’s permission to disclose length of grand jury investigation, number of witnesses and evidentiary exhibits presented and legal principles on which grand jury was instructed, but denying media and civil rights advocates’ requests, over prosecutor’s objection, to disclose full grand jury proceedings).

ordered disclosures.<sup>72</sup> Grand jury secrecy, in short, can in theory help prosecutors as much or even more than it helps targets and subjects.<sup>73</sup>

Secret grand jury proceedings could, in certain cases, mitigate a target's flight risk. Yet for charged defendants flight risk is considered on a case-by-case basis, with conditions of release set (or pretrial detention ordered) accordingly. It is unclear why sealing grand jury proceedings should not also be imposed based on individualized risk assessment. Nor is it clear why grand jury proceedings should remain hidden from public view after the target has been charged and flight risk has been considered and mitigated through the pretrial release-detention process.

All of this is not to discount entirely secrecy's protective benefits, or to advocate for fully open grand jury proceedings akin to public trials. Rather, it is to draw attention to secrecy's tax on prosecutorial accountability and comparatively low payout on its purported justifications. Clearly some grand jury proceedings should be kept secret, at least for some time. But by maintaining indefinite secrecy as the default for all grand jury proceedings, and by giving prosecutors near exclusive control over the extent to which secrecy is maintained,

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72 Prosecutors overseeing the grand jury investigations into the killings of Michael Brown and Tamir Rice (in which the full grand jury proceedings were disclosed) both lost reelection. See Vince Grzegorek, *Embattled Prosecutor Tim McGinty Loses Democratic Primary to Mike O'Malley*, CLEVELAND SCENE (Mar. 16, 2016), <https://www.clevescene.com/scene-and-heard/archives/2016/03/16/embattled-prosecutor-tim-mcginty-loses-democratic-primary-to-mike-omalley-in-prosecutors-race> [<https://perma.cc/PVK9-4PDY>] (describing vote "as a referendum on McGinty's handling of" the Rice case, among other police use of force cases); Cleve R. Wootson Jr., *Voters Oust Prosecutor Accused of Favoring Ferguson Officer Who Killed Michael Brown*, WASH. POST (Aug. 8, 2018), <https://www.washingtonpost.com/news/post-nation/wp/2018/08/08/voters-oust-prosecutor-accused-of-favoring-ferguson-officer-who-killed-michael-brown/> [<https://perma.cc/QM3U-M7C6>] (describing primary vote as "a referendum on what happened in Ferguson"). The prosecutor who oversaw the grand jury investigation into the killing of Eric Garner (in which grand jury proceedings were not disclosed) did not run for re-election as district attorney, but instead sought, and won, his district's U.S. congressional seat; that election did not center on the Garner case. See Alexander Burns, *Donovan, Staten Island Prosecutor, Wins Congressional Seat Grimm Held*, N.Y. TIMES (May 5, 2015), <https://www.nytimes.com/2015/05/06/nyregion/daniel-donovan-elected-to-congress-from-new-york.html> [<https://perma.cc/TD23-L9Z5>]. The prosecutor in the Breonna Taylor case, Daniel Cameron, is still currently in his first term. See *Daniel Cameron*, BALLOTEDIA, [https://ballotpedia.org/Daniel\\_Cameron](https://ballotpedia.org/Daniel_Cameron) [<https://perma.cc/W8H3-A3TM>].

73 It is worth noting that, while recent prosecutorial leveraging of grand jury secrecy has arisen most visibly in police use of force investigations, it is not limited to those cases. See, e.g., *In re* 2010 Denver Cnty. Grand Jury, 296 P.3d 168, 170 (Colo. App. 2012) (investigation of police officer perjury); *In re* Grand Jury Investigation, 580 N.E.2d 868, 869 (Ct. Com. Pl. Ohio 1991) (investigation of corruption by county building inspectors); *State v. Kearney*, 263 A.2d 817 (N.J. Sup. Ct. Law Div. 1970) (multiple murders).

criminal procedure has enlarged enforcers' power and discretion by shielding them from public accountability.<sup>74</sup>

## 2. Targeting

### a. Historical Development

Prior to professionalized law enforcement, victims and community members primarily enforced penal laws, either by bringing charges on their own or through a public prosecutor.<sup>75</sup> Which criminal laws were enforced were thus a direct function of what crimes were committed and which of those crimes victims and community members wished to prosecute. William Nelson's study of Middlesex County, Massachusetts in the years before and after the Revolutionary War shows how criminal prosecutions for particular categories of crime ebbed and flowed according to both changes in the commission of certain crimes and changes in community perceptions of which crimes were worthy of prosecution.<sup>76</sup>

With the rise of professional police and prosecutors in the late nineteenth century, the decision of which crimes to investigate and charge shifted from victims and community members to salaried officials. This shift did not happen immediately; victims remained the primary drivers of felony arrests and prosecutions into the early twentieth century.<sup>77</sup> But by the Prohibition era, police and public prosecutors had become the primary enforcers of criminal laws. It was they who determined whom to investigate, whom to charge, and with what crimes. Indeed, Prohibition itself was characterized by vast geographic disparities in enforcement, in large part a function of variance in local police departments' attitudes towards liquor bans.<sup>78</sup>

In the early republic, the role of laypersons in the targeting process was a direct constraint on enforcement power: the power was invoked only if and when a victim or community invoked it. With the

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74 Part III develops how to better balance the benefits and drawbacks of grand jury secrecy.

75 See *supra* notes 24–28 and accompanying text.

76 See Nelson, *supra* note 26, at 452–59 (observing a marked decrease in prosecutions of offenses against morals in the years following the War, corresponding to the “emergence . . . of a new social and legal attitude toward the immorality that had always existed,” and fluctuations in prosecutions of theft offenses, which seemed to rise and fall in accordance with the county’s economic distress).

77 Ouziel, *supra* note 39, at 716–17 (discussing early police departments’ primary role managing public order through patrol, social welfare, and arrests for low-level public order offenses, with almost no involvement in investigation and prosecution of felony crimes).

78 Daniel Richman & Sarah A. Seo, *How Federalism Built the FBI, Sustained Local Police, and Left Out the States*, 17 STAN. J. C.R. & C.L. 421, 433–34 (2022).

shift to professional policing and prosecution, enforcement power was no longer constrained by the public's targeting preferences. And yet, there were few procedures that arose to compensate. The advent of prosecutor elections in the mid-nineteenth century<sup>79</sup> injected an element of public input into state targeting decisions. But there is a vast and important distinction between categorical priorities, typically the subject of public announcements and campaigns, and the granular decisionmaking occurring outside public view. Enforcers may declare they will focus on crimes of violence, or drug sales, or loansharking or insider trading—but which perpetrators, in which neighborhoods, or at which companies, will they pursue?

These are the decisions that steer the power and resources of the state and its criminal enforcement apparatus in one direction or another, generating cascading effects on individuals, communities, and industries. And yet, as the next Section shows, criminal procedure has developed no mechanisms to provide oversight and accountability for them.

#### b. Current Dynamics

How are targeting decisions made? Serious crimes against individual victims remain victim or eyewitness generated. A 911 call reporting a homicide or robbery, or a victim reporting a high-dollar fraud will lead to an investigation and, if sufficient evidence is gathered, an arrest and charge. The public can keep tabs on crime reports that do not result in arrests through clearance rates, which are publicly reported by most police departments.<sup>80</sup> But it cannot keep track of the investigations that do not arise from victim or witness reports.

Of these there are many. At the retail level, a police officer may observe suspicious conduct while on patrol, leading to a stop, pat down, and potentially discovery of contraband resulting in an arrest. Or a detective may utilize a paid informant who provides information about people and crimes about which the informant happens to know. At the wholesale level, law enforcement agencies may opt to focus

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79 See Abraham S. Goldstein, *Prosecution: History of the Public Prosecutor*, in 3 ENCYCLOPEDIA OF CRIME & JUSTICE 1242, 1243 (Joshua Dressler, Thomas J. Bernard, Deborah W. Denno, Richard S. Frase, John Hagan, Dan M. Kahan & Carol S. Steiker eds., 2d ed. 2002).

80 See 1 THE ENCYCLOPEDIA OF POLICE SCIENCE 182 (Jack R. Greene, Gary W. Corder, Edward R. Maguire & Peter K. Manning eds., 3d ed. 2007) (“clearance data has been systematically collected through the *Uniform Crime Reports* (UCR), permitting long-term trend analysis”). But see Shima Baradaran Baughman, *How Effective Are Police? The Problem of Clearance Rates and Criminal Accountability*, 72 ALA. L. REV. 47, 61–65 (2020) (critiquing clearance rates as too susceptible to manipulation by police departments).

enforcement on particular neighborhoods, industries, or categories of conduct<sup>81</sup>—decisions that may or may not arise from victim or witness reports. And even the distinction between retail and wholesale investigatory decisions is somewhat illusory. Given the role of informants and accomplices in investigations, decisions about individual targets have cascading enforcement effects. One investigation's target becomes the next investigation's informant, and so forth and so on—generating reactive investigatory chains that can end up narrowing enforcement resources on particular groups of offenders to the exclusion of other equally or perhaps more culpable groups. Enforcement patterns, in other words, are not necessarily the product of intentioned enforcement priorities.<sup>82</sup>

Scholars have long observed the near absence of judicial oversight of prosecutorial discretion, and its role in expanding criminal enforcement power.<sup>83</sup> But the absence of public data on targeting has played at least an equal, if not a greater, role. Publicly available targeting data is, after all, a prerequisite to judicial intervention.<sup>84</sup> The Supreme Court's discovery standard in selective prosecution claims is rightly criticized as impossible to meet<sup>85</sup>—but it is impossible only because data on enforcement selection is kept secret.

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81 See Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31 (2017) (discussing law enforcement decisions to “crack down” on certain categories of offenses); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 168–69, 174 (2015) (discussing law enforcement decisions to direct street patrol to, and utilize aggressive stop-and-frisk practices in, particular neighborhoods); Andrew Guthrie Ferguson, *Predictive Prosecution*, 51 WAKE FOREST L. REV. 705, 708–27 (2016) (discussing use by police and prosecutors of data algorithms to predict the most dangerous areas and offenders, informing decisions around where to patrol, whom to investigate, and whom and what to charge).

82 See Lauren M. Ouziel, *Steering White-Collar Enforcement*, 97 TEX. L. REV. ONLINE 44 (2019) (discussing divergence between envisioned use of federal penal laws against relatively high-level offenders and actual enforcement patterns that skew to the relatively lower level).

83 See, e.g., William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1978 (2008); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1024–26 (2006). While discretion is distinct from power, the two are closely related—particularly when it comes to the discretion to select who and what shall be the target of enforcement resources (and who and what shall not). See Sklansky, *supra* note 44, at 488–89 (“[T]he more discretion that prosecutors have, the greater will be the concern, generally speaking, about the power they exercise and vice versa.”).

84 See *United States v. Armstrong*, 517 U.S. 456, 470 (1996) (setting a Catch-22 in which, to proceed to discovery on a selective prosecution claim, a plaintiff must first show evidence of different prosecutorial treatment of similarly situated persons). The evidence required by *Armstrong* is, of course, unavailable because prosecutorial targeting and declination decisions are not made public.

85 See Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 640 (1998) (“The *Armstrong* holding and the



Consider the recent litigation over New York's stop-and-frisk practices. The allegations in the class action complaint in *Floyd v. City of New York*<sup>86</sup> were based on two antecedent public data disclosures: one by the Office of the New York Attorney General (OAG) detailing the findings of its investigation into the New York City Police Department's stop-and-frisk practices in the wake of the Amadou Diallo killing, and the other by the New York City Police Department itself, disclosing quarterly stop-and-frisk data in response to a 2001 public records law and a 2003 legal settlement of a case that was likewise founded on the results of the earlier OAG investigation.<sup>87</sup> In this respect, New York is not an anomaly—in Philadelphia<sup>88</sup> and Los Angeles,<sup>89</sup> government investigations of police departments led to disclosures of data on police-citizen interactions, which in turn fueled judicial oversight and continuing mandated data disclosures.

Judicial oversight, moreover, is only one modality for constraining enforcement power. Public opinion and political pressure are others, yet their exercise is similarly dependent on the public disclosure of enforcement selection data. In New York and Philadelphia, media and public attention generated from publicized stop-and-frisk data resulted in mayoral elections in both cities that focused heavily on the candidates' positions on patrol targeting practices—with the ultimately victorious candidates campaigning heavily on vows to reform those

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implications of its reasoning create a barrier to discovery that, for the great majority of criminal cases, is insuperable.”).

86 Complaint & Demand for Jury Trial, *Floyd v. City of New York*, No. 08 Civ. 01034 (S.D.N.Y. Jan. 31, 2008).

87 See Baker & Vasquez, *supra* note 8 (recounting passage of New York City Council Law in 2001 that mandated NYPD disclosure of citizen stops, and subsequent legal action by City Council and civil liberties groups to ensure NYPD compliance). The disclosures made pursuant to the 2001 Police Reporting Law ultimately paved the way for the class action in *Floyd v. City of New York*. See Denvir, *supra* note 8; see also Second Amended Class Action Complaint for Declaratory and Injunctive Relief and Individual Damages & Demand for Jury Trial at 24–29, *Floyd v. City of New York*, No. 08 CV 01034 (S.D.N.Y. Oct. 20, 2008) (grounding allegations of illegally race-based stop-and-frisk practices on data from OAG investigation and NYPD data disclosures).

88 The information made public by way of a federal investigation and prosecution of Philadelphia narcotics officers in the early 1990s for framing, beating, and robbing suspects led to a subsequent lawsuit by the NAACP, which in turn resulted in court-mandated and -monitored continuing police department data disclosures. See Complaint & Demand for Jury Trial at 18–21, *Bailey v. City of Philadelphia*, No. 10-cv-05952 (E.D. Pa. Nov. 4, 2010). Those disclosures ultimately gave rise to a subsequent suit against the city in 2010 for stop-and-frisk violations, the settlement of which spawned renewed police department data disclosures on stops and frisks. See Settlement Agreement, Class Certification, and Consent Decree at 3–5, *Bailey v. City of Philadelphia*, No. 10-cv-05952 (E.D. Pa. June 21, 2011).

89 See Consent Decree, *United States v. City of Los Angeles*, No. 00-11769 (C.D. Cal. June 15, 2001).

practices.<sup>90</sup> In New York, political pressure also generated immediate response by local leaders: the city council passed new police oversight legislation, and the police department ultimately reduced the use of targeting practices that resulted in high levels of street stops of minorities well before a federal court ordered it to do so.<sup>91</sup> Similarly, lawsuits challenging racial profiling in car stops in the 1990s, and the data the litigation revealed, brought greater public attention to racial disparities in car stops.<sup>92</sup> This led to a series of state laws mandating

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90 See Michael Barbaro & David W. Chen, *De Blasio Is Elected New York City Mayor in Landslide*, N.Y. TIMES (Nov. 5, 2013), <http://www.nytimes.com/2013/11/06/nyregion/de-blasio-is-elected-new-york-city-mayor.html> [<https://perma.cc/QQY3-VY24>]; Anna Orso, *Jim Kenney Wins: Here's Where the New Mayor Stands on Pot, Policing and 5 Other Topics*, BILLY PENN (Nov. 3, 2015), <https://billypenn.com/2015/11/03/jim-kenney-wins-heres-where-the-probable-new-mayor-stands-on-pot-policing-and-5-other-topics> [<https://perma.cc/44CF-JQLM>] (describing Mayor Kenney's vow to end the Philadelphia Police Department's stop-and-frisk practices as "one of the pillars of [his] campaign").

91 J. David Goodman, *City Council Votes to Increase Oversight of New York Police*, N.Y. TIMES (June 27, 2013), <http://www.nytimes.com/2013/06/27/nyregion/new-york-city-council-votes-to-increase-oversight-of-police-dept.html> [<https://perma.cc/W42J-NP77>] (reporting passage of the Community Safety Act that would, among other things, create an independent inspector general to monitor NYPD policies and practices and make it easier for plaintiffs to sue the NYPD for bias-based profiling); Wendy Ruderman, *Number of Frisks Fell in '12, Police Data Show*, N.Y. TIMES (Feb. 8, 2013), <http://www.nytimes.com/2013/02/09/nyregion/number-of-frisks-fell-in-12-police-data-show.html> [<https://perma.cc/AM9N-BEX3>] (reporting that "[a]fter criticism from a federal judge last spring and widening political protests," new police officer stop-and-frisk training was instituted, resulting in a thirty-four percent decrease in stops in the last three quarters of 2012 compared to the same period in 2011). The trial court did not enter a decision and ruling in *Floyd* until August 2013. See *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

In Philadelphia, a consent decree had little initial effect on the number of illegal stops and frisks; only after the election of a new mayor (who had campaigned heavily on eliminating illegal stop-and-frisk practices) and his appointment of a new police commissioner did the police department make marked progress. See Plaintiffs' Ninth Report to Court and Monitor on Stop and Frisk Practices: Fourth Amendment Issues at 1, 3, *Bailey v. City of Philadelphia*, No. 10-5952 (E.D. Pa. 2018), [https://www.aclupa.org/sites/default/files/field\\_documents/bailey\\_ninth\\_report\\_11-20-18\\_.pdf](https://www.aclupa.org/sites/default/files/field_documents/bailey_ninth_report_11-20-18_.pdf) [<https://perma.cc/S6PF-BKEE>] (recounting slow reductions in numbers of illegal stops and frisks, from half of all stops in the two quarters before the consent decree conducted without reasonable suspicion to approximately forty percent in the years following, and then, following the new administration's adoption of internal compliance measures in early 2016, a thirty-five percent decrease in stops overall, with a quarter of stops conducted without reasonable suspicion).

92 See David A. Harris, *Racial Profiling*, 34 CRIM. JUST. 10, 11–12 (2020); see also Frank R. Baumgartner, Leah Christiani, Derek A. Epp, Kevin Roach & Kelsey Shoub, *Racial Disparities in Traffic Stop Outcomes*, 9 DUKE F. FOR L. & SOC. CHANGE 21, 23 (2017) (discussing rising public attention to racial disparities in traffic stops in the late 1990s).

data keeping and disclosure of the race of drivers subjected to car stops and searches,<sup>93</sup> which in turn led to reforms in some jurisdictions.<sup>94</sup>

Yet jurisdictions with robust data keeping and reporting on targeting practices are outliers; the vast majority of the over 15,000 general purpose law enforcement agencies operating in the United States<sup>95</sup> have not been subject to government investigations generating data disclosures on targeting and selection, or to state legislative mandates. And even the few jurisdictions that have disclosed data as a result of government investigations or legislative mandates have only disclosed data specific to the discreet conduct under investigation or legislatively mandated.<sup>96</sup> The criteria by which law enforcement agencies target enforcement, the frequency and nature of interactions that fall short of arrest, the circumstances that determine when and what charges are filed—in almost every jurisdiction, these metrics remain invisible.

The few government investigations and private lawsuits to have generated data disclosures, moreover, focus on alleged illegal actions by police patrol officers. But patrol officers are not the only enforcers who select whom to arrest and charge, and legality is not the only measure by which law enforcement is (or should be) assessed. In recent years there has been growing scholarly and public attention to targeting and selection decisions by the broader law enforcement community—police detectives, prosecutors, and federal law enforcement agents—that, while not illegal, are nevertheless undesirable in their adverse impacts on racial minorities, the poor, and the relatively less culpable offenders within a criminal offense category.<sup>97</sup> Yet data

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93 See Baumgartner et al., *supra* note 92, at 26–28 (2017) (finding eight states, as of 2017, mandating ongoing data collection and reporting of traffic stops by driver’s race).

94 See FRANK R. BAUMGARTNER, DEREK A. EPP & KELSEY SHOUB, *SUSPECT CITIZENS: WHAT 20 MILLION TRAFFIC STOPS TELL US ABOUT POLICING AND RACE 197–205* (2018) (following adoption of mandated consent-to-search forms for all traffic stops in three North Carolina jurisdictions, observing substantially decreased consent searches in all three jurisdictions and, in study of police trust in one of those jurisdictions (data was unavailable for the others), finding significantly increased levels of community trust in police).

95 SHELLEY S. HYLAND & ELIZABETH DAVIS, *LOCAL POLICE DEPARTMENTS, 2016: PERSONNEL I* (2019).

96 In New York, Los Angeles, Chicago, and Philadelphia, for instance, police departments only disclosed data on patrol stops; in states mandating traffic stop data disclosures, see Baumgartner et al., *supra* note 92, law enforcement agencies only disclosed that data.

97 On targeting of local drug investigations, see Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1199–1203 (2012) (discussing racial impacts of Seattle Police Department’s decisions to focus drug enforcement on crack offenses in downtown neighborhoods). On targeting in the federal system, see Miriam H. Baer, *Sorting Out White-Collar Crime*, 97 TEX. L. REV. 225 (2018) (fraud offenses); Lauren M. Ouziel, *Ambition and Fruition in Federal Criminal Law: A Case Study*, 103 VA. L. REV. 1077 (2017) (drug offenses);

on targeting decisions is scant. Visible inequities in criminal justice outcomes give us just enough information to distrust a decision-making process that leads to them, but we lack the sort of granular information to evaluate precisely where and how that process goes awry, and what levers would be most effective to improve it.

This informational deficit can extend to enforcers themselves. Many police departments, for instance, now rely on algorithms to target neighborhoods and offenders for heightened enforcement, unaware of the data being fed into those algorithms and thus oblivious to the specific circumstances underlying individual and collective targeting decisions.<sup>98</sup> And in circumstances involving accomplices and informants, targeting is less a decision than a reaction to some earlier targeting decision which can itself be an artifact of an even earlier investigative event—such that by the time of an arrest or charge, the key decisionmaking that led to it is no longer accessible for internal evaluation and critique.

### 3. Declination

#### a. Historical Development

As mighty as the power to pursue the penal sanction is the power to demur. In the early republic, crime victims exercised the power to decline charges routinely, aided by excessive penalties that encouraged would-be defendants to settle accusations with a sum.<sup>99</sup> Inherent in such a system was the risk of abuse: victims effectively could extort financial settlements from persons they accused of crimes. In this respect, instruments of the state played an important constraining

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Jesse J. Norris & Hanna Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 J. CRIM. L. & CRIMINOLOGY 609, 638–46 (2015) (terrorism offenses).

98 As Andrew Guthrie Ferguson has explained:

[P]olice purchase big data technologies [from private companies] without the ability to interrogate them or even understand them. For patrol officers on the street, this means blindly following predictive policing patrols without the ability to challenge the findings or deconstruct its assumptions. For administrators, it means trusting the algorithm based on the theory (or perhaps the result), but without being able to articulate why the system works. This lack of transparency is even more problematic when applied to predictive policing of individuals. A police officer can see the result of the heightened “risk score,” but cannot really explain how the score was calculated. As more and more bits of data get inputted into a system, the more complicated it can be to visualize or explain the outputs. For all intents and purposes, the data systems are dark to the end users and the community.

Andrew Guthrie Ferguson, *Illuminating Big Data Policing*, 15 OHIO ST. J. CRIM. L. 503, 510 (2018).

99 Goldstein, *supra* note 79, at 1243.

role. Both grand juries and judges often dismissed frivolous cases, providing a measure of protection to prospective defendants who refused to pay private prosecutors to withhold charges.<sup>100</sup>

Nevertheless, the potential for abuse of the declination power was among the reasons for the shift to public prosecution and, eventually, salaried professional prosecutors.<sup>101</sup> The absence of a financial incentive in bringing and declining charges would help ameliorate abuse. But whereas once the state had constrained a potentially abusive process, now state power over declination introduced new risks: namely, corruption and sloth.<sup>102</sup> Public prosecutors could, and did, decline charges against the politically well-connected, or simply because they did not wish to expend the effort to pursue a case, however meritorious.<sup>103</sup>

Faced with these new risks, criminal procedure did not develop tools to mitigate them.<sup>104</sup> To the contrary, criminal procedure treats declination decisions just as it did when those decisions belonged entirely to victims—as a private matter of choice. Once the choice was a personal one; now it is a professional judgment to be exercised in the public interest. But with few exceptions, the public has no way of knowing if in fact its interests guide declination decisions. Indeed, it has almost no insight into these decisions at all.

Rather than seeking to ameliorate this state of public ignorance, criminal procedure has, if anything, perpetuated it. Through court decisions, prosecutorial manuals, and rules of professional conduct, criminal procedure has enshrined a narrative in which secrecy in declination decisions protects prosecutors from public pressure to charge, protects targets and subjects from reputational harm, and generally enables the fair and impartial administration of justice.<sup>105</sup>

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100 See *supra* notes 29–32 and accompanying text.

101 See Goldstein, *supra* note 79, at 1244.

102 *Id.*

103 See *id.* at 1244–45.

104 Darryl Brown has argued that two features of the U.S. system—prosecutor elections and overlapping federal and state jurisdiction for many crimes—have enabled some form of oversight into decisions not to prosecute. See Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 846–47 (2018). As Brown himself acknowledges, the inherent political and jurisdictional limitations of these features have produced a “mixed track record.” *Id.* at 914. Moreover, there is a key limitation Brown does not mention: most declinations are secret. Public visibility into declinations is a *prerequisite* to an effective electoral or federalism-based oversight strategy. The examples Brown uses of effective federal or electoral oversight all involve high-profile investigations in which the public and the Department of Justice knew local prosecutors had declined charges. *Id.* at 878–84. As discussed below, these situations are the rare exception, not the norm.

105 See Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477, 481 & nn.11–13 (2020) (discussing how justifications for secrecy in

While this narrative is compelling at the individual case level, it is a poor fit for aggregate disclosures, which would neither identify individuals nor subject prosecutors to pressure in individual cases. What's more, our current system does not always protect against disclosures of individual declinations. As the next Section shows, criminal procedure has produced neither complete secrecy nor systematized aggregate disclosures of declination decisions, but rather the worst of all worlds: an informational void punctuated by occasional, haphazard, and likely unrepresentative disclosures.

### b. Current Dynamics

Today, there are two types of actions commonly referred to as declinations, and they have very different secrecy implications. The first is a declination of initial charges: a law enforcement agent declines to initiate an arrest and file a complaint in court, or a prosecutor declines to initiate the filing of initial criminal charges in court. The second action is a *dismissal*: following an arrest or summons and an initial presentment of charges in court via a complaint (usually drafted by a law enforcement officer), a prosecutor opts to dismiss the case before the arraignment stage. Because dismissals follow publicly filed charges, they are visible to the public. Courts keep records on them,<sup>106</sup> and the press reports on them—particularly if the dismissals are pursuant to a publicly-announced categorical policy directive (for instance, prosecutors' decisions to not pursue certain low-level charges or charges against political protestors).<sup>107</sup> (A *diversion*—a prosecutorial

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declination decisions have manifested in Supreme Court decisions, DOJ charging manuals, and ABA rules of professional conduct for prosecutors).

106 See, e.g., BRIAN A. REAVES, U.S. DEP'T JUST., *FELONY DEFENDANTS IN LARGE URBAN COUNTIES*, 2009, at 2–4 (arrest charges) & 24 tbl.21 (dismissals) (2013). This periodic report on state court case processing in the largest seventy-five counties in the United States was last issued in 2009; the report compiled state court data that continues to be publicly available. *Id.*

107 See, e.g., Andrea Estes & Shelley Murphy, *Stopping Injustice or Putting the Public at Risk? Suffolk DA Rachael Rollins's Tactics Spur Pushback*, BOS. GLOBE (July 6, 2019), <https://www.bostonglobe.com/metro/2019/07/06/stopping-injustice-putting-public-risk-suffolk-rachael-rollins-tactics-spur-pushback/IFC6Rp4tVHiVhOf2t97bFI/story.html> [<https://perma.cc/YXM9-DKRB>] (reporting on Suffolk County District Attorney's public directive to prosecutors to dismiss fifteen low-level charges prior to arraignment); Shane Dixon Kavanaugh, *Multnomah County DA Declines to Prosecute 70% of Portland Protest Cases*, OREGONIAN (Oct. 7, 2020), <https://www.oregonlive.com/news/2020/10/multnomah-county-da-declines-to-prosecute-70-of-portland-protest-cases.html> [<https://perma.cc/2966-5PUN>] (reporting on Portland, Oregon, District Attorney's announcement of decision to decline to prosecute charges against most political protestors and subsequent creation of public online dashboard tracking the progress and resolution of protestor cases referred by police, including reasons given for dismissals).

decision to divert a would-be prosecution into a treatment or services program, most typically in cases involving drug possession—may take the form either of a dismissal or a declination, depending on the timing of the diversionary decision.)<sup>108</sup>

Unlike dismissals, declinations take place in the shadows. Because no public charges were ever filed, prosecutors and law enforcement agents can typically keep their decision to themselves if they choose. And most do. Less than half of prosecutors' offices in the United States report case declinations to data repositories.<sup>109</sup> Of states, only one (Florida) systematically publishes case declination data.<sup>110</sup> Of individual jurisdictions outside the federal system, less than a half dozen do.<sup>111</sup> More to the point: outside the federal system, published data on declinations almost never includes the reason (or reasons) for

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108 See MELISSA LABRIOLA, WARREN A. REICH, ROBERT C. DAVIS, PRISCILLIA HUNT, MICHAEL REMPEL & SAMANTHA CHERNEY, PROSECUTOR-LED PRETRIAL DIVERSION: CASE STUDIES IN ELEVEN JURISDICTIONS, at viii (2018), <https://www.ojp.gov/pdffiles1/nij/grants/251664.pdf> [<https://perma.cc/A6A9-G6TH>] (in study of fifteen diversion programs in eleven jurisdictions, three diverted cases before filing charges, eight did so after charges were filed, and the remainder utilized both the pre- and post-filing methods); see also Ronald F. Wright & Kay L. Levine, *Models of Prosecutor-Led Diversion Programs in the United States and Beyond*, 4 ANN. REV. CRIMINOLOGY 331, 337–38 (2021) (observing the dearth of transparency in, and oversight of, prosecutorial diversion in the United States).

109 STEVEN W. PERRY & DUREN BANKS, U.S. DEP'T OF JUST., PROSECUTORS IN STATE COURTS, 2007, at 8 tbl.10, 9 fig.3 (2011) (relying on the 2007 Census of State Court Prosecutors, forty-seven percent of all state prosecutors' offices reported declination data).

110 Measures for Justice, a private nonprofit foundation, compiles published criminal justice data for all fifty states. See *Measures*, MEASURES FOR JUSTICE, <https://measuresforjustice.org/portal/measures> [<https://perma.cc/547X-HE5Z>].

111 See *Partner Offices*, PROSECUTORIAL PERFORMANCE INDICATORS, <https://prosecutorialperformanceindicators.org/#partners> [<https://perma.cc/C9HE-TABG>]. Only nine jurisdictions participate in the Prosecutorial Performance Indicators project (described above at note 9) and not all publicize information on declinations. For instance, on the data dashboards of the nine participating jurisdictions, only Cook County, Illinois; Jacksonville, Florida; Tampa, Florida; Philadelphia, Pennsylvania; and Milwaukee, Wisconsin, publish data on declination rates. See *Time and Resource Prioritization: Capacity and Efficiency*, PROSECUTORIAL PERFORMANCE INDICATORS, <https://prosecutorialperformanceindicators.org/time-and-resource-prioritization/> [<https://perma.cc/E9ZX-XTKT>]. Of those, only Cook County provides data on declinations by offense category. See *Open Data*, COOK COUNTY STATE'S ATTORNEY, <https://www.cookcountystatesattorney.org/about/case-level-data> [<https://perma.cc/Q92F-PHUA>]. San Francisco does not participate in the Prosecutorial Performance Indicators project, but does publish generalized (non-offense-specific) declination data. See *DA Stat*, SAN FRANCISCO DISTRICT ATTORNEY, <https://sfdistrictattorney.org/policy/da-stat/> [<https://perma.cc/ERA5-HSK3>]. The Department of Justice provides detailed annual data on federal case declinations. See, e.g., UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT FISCAL YEAR 2019, at 60 tbl.14, 61 tbl.15.

declination.<sup>112</sup> Except in the rare circumstance where a prosecutor's office invites researchers to conduct a study of the office's declination practices,<sup>113</sup> or a media organization obtains access to normally secret records through burdensome records requests,<sup>114</sup> there is effectively no public insight into the reasoning that underlies the decision to refrain from filing charges. The omission is particularly glaring in jurisdictions in which prosecutors have announced policies to refrain from filing charges in certain categories of cases. While the policy pronouncements offer a useful view into how a chief prosecutor *wishes* or *intends* for line prosecutors to exercise charging discretion, the absence of offense-specific declination data makes it impossible to assess the degree of follow through and impact.<sup>115</sup>

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112 See Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123, 1130 n.32), available at <https://ssrn.com/abstract=3689242> ("We have national estimates on declination, but we do not have information on whether prosecutors declined to charge because they lacked appropriate evidence or because they felt that the crime did not warrant a charge. We also lack details on cases that prosecutors declined to charge, which could provide insight into their thinking on declination."). Department of Justice declination data includes a listing of cases declined by case type, agency, and reason. See, e.g., UNITED STATES ATTORNEYS', *supra* note 111, at 60 tbl.14, 61 tbl.15.

113 Only a handful of such studies exist. See Miller & Wright, *supra* note 14 (studying New Orleans District Attorney's Office); BRUCE FREDERICK & DON STEMEN, VERA INST. JUSTICE, *THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING* (2012) (studying two unidentified prosecutors' offices); Wayne McKenzie, Don Stemen, Derek Coursen & Elizabeth Farid, *Prosecution and Racial Justice: Using Data to Advance Fairness in Criminal Prosecution*, VERA INST. JUSTICE. (2009) (study of declination decisions and their racial impact in three counties); CASSIA SPOHN & KATHARINE TELLIS, NAT'L INST. JUSTICE, *POLICING AND PROSECUTING SEXUAL ASSAULT IN LOS ANGELES CITY AND COUNTY: A COLLABORATIVE STUDY IN PARTNERSHIP WITH THE LOS ANGELES POLICE DEPARTMENT, THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, AND THE LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE* (2012) (study of processing of sexual assault cases in Los Angeles).

114 See, e.g., Bernice Yeung, Mark Greenblatt, Mark Fahey & Emily Harris, *When It Comes to Rape, Just Because a Case Is Cleared Doesn't Mean It's Solved*, PROPUBLICA (Nov. 15, 2018) <https://www.propublica.org/article/when-it-comes-to-rape-just-because-a-case-is-cleared-does-not-mean-solved> [<https://perma.cc/8Z2C-A8G7>] ("Because exceptional clearance data is not readily accessible to the public, we read through hundreds of police reports and sent more than 100 public records requests to the largest law enforcement agencies in the country. We analyzed data for more than 70,000 rape cases, providing an unprecedented look at how America's police close them."); Eleanor Klibanoff, *Prosecution Declined*, KY. CTR. FOR INVESTIGATIVE REPORTING (Dec. 5, 2019), <https://kycir.org/2019/12/05/prosecution-declined/> [<https://perma.cc/R7PS-VK3X>] (extensive investigation of declination of rape cases in Louisville, Kentucky, utilizing police records and correspondence with prosecutors obtained through records requests).

115 For instance, the district attorneys in both Suffolk County, Massachusetts, and Philadelphia, Pennsylvania, have publicly announced declination policies for certain categories of low-level offenses, but have yet to make declination data accessible for public review. See SUFFOLK CNTY. DIST. ATT'Y, *THE RACHAEL ROLLINS POLICY MEMO* 25 (2019),



Despite the dearth of declination data, the exercise of the declination power occasionally surfaces into public view, typically in one of two ways. One occurs when a probable crime is publicly reported and police or prosecutors confirm they are investigating it; if charges are ultimately not brought, the public can surmise a prosecutor ultimately chose not to bring them. (Sometimes, prosecutors in high-profile investigations opt to proactively confirm their decision to decline charges and to give reasons for it.<sup>116</sup>) Examples include, in the federal system, the U.S. Department of Justice's decision not to bring charges arising from the events leading up to the financial crisis of 2008 (without any proactive announcement, but defended by high-ranking DOJ officials in subsequent interviews with the press),<sup>117</sup> and to decline charges against Hillary Clinton for her use of a private email server to conduct State Department business, in a now infamous public announcement by then-FBI director James Comey.<sup>118</sup> Examples from state and local prosecutors' offices include declinations of charges in cases involving public figures who were the alleged perpetrator or victim.<sup>119</sup>

The other way prosecutorial declinations become public is when previously secret declinations are outed as a result of subsequent developments. Examples of this sort of disclosure include the New York District Attorney's decisions to decline charges against the Trump family in 2012 for fraud in connection with their management of the Trump Foundation (a decision exposed by press inquiries following Donald Trump's pursuit and ultimate ascension to the presidency),

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<http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> [<https://perma.cc/W7QZ-BDME>]; *Limitations: Declination Rate Cannot Be Calculated*, Philadelphia District Attorney's Office, <https://data.philadao.com/limitations.html> [<https://perma.cc/AF5V-YPV6>]. Assessment of follow-through is particularly important given divergences that can arise between politically-accountable lead prosecutors and the career civil servants tasked with executing policy changes. See Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 555–63 (2020).

116 See Roth, *supra* note 105.

117 William D. Cohan, *How Wall Street's Bankers Stayed Out of Jail*, ATLANTIC (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/how-wall-streets-bankers-stayed-out-of-jail/399368/> [<https://perma.cc/5FTS-4BP9>].

118 Marc Landler & Eric Lichtblau, *F.B.I. Director James Comey Recommends No Charges for Hillary Clinton on Email*, N.Y. TIMES (July 5, 2016), <https://www.nytimes.com/2016/07/06/us/politics/hillary-clinton-fbi-email-comey.html> [<https://perma.cc/UJ3Y-VMH2>].

119 See, e.g., Kevin Draper, *No Charges for Cristiano Ronaldo in Las Vegas Sexual Assault Case*, N.Y. TIMES (July 22, 2019), <https://www.nytimes.com/2019/07/22/sports/no-charges-for-cristiano-ronaldo-in-las-vegas-rape-case.html> [<https://perma.cc/578R-C55C>]; James Halpin, *Prosecutors Decline Charges over Swastika Note Sent to Jewish Lawmaker*, CITIZENS VOICE (Oct. 13, 2020), [https://www.citizensvoice.com/news/prosecutors-decline-charges-over-swastika-note-sent-to-jewish-lawmaker/article\\_7db7e6f1-0789-5288-8e01-3f44cc2f2774.html](https://www.citizensvoice.com/news/prosecutors-decline-charges-over-swastika-note-sent-to-jewish-lawmaker/article_7db7e6f1-0789-5288-8e01-3f44cc2f2774.html) [<https://perma.cc/25EG-DPXN>].

and against Harvey Weinstein in 2015 for sexual assault (later exposed by reporting arising out of other sexual assault and harassment allegations that surfaced in 2017).<sup>120</sup> A notorious example from the federal system was the secret nonprosecution agreement entered into between Jeffrey Epstein and the U.S. Attorney's Office in the Southern District of Florida, which remained under seal for eight years until Epstein's victims got a court to unseal it—and did not garner public attention until the U.S. Attorney who negotiated and signed the agreement, Alex Acosta, was nominated to a position in President Trump's cabinet.<sup>121</sup> More broadly, the #MeToo movement inspired a series of victims to go public about allegations of sexual assaults that were ultimately never prosecuted.<sup>122</sup>

Examples of publicly visible enforcement declinations are the rare exception, not the rule. A common denominator in each of these examples is intense media interest: declinations were made public only because the press—and therefore the public—was paying attention to the events leading to the investigation and ultimate decision not to charge. But prosecutors likely decline tens of thousands of cases at least per year,<sup>123</sup> almost all of which occur entirely out of public view. This has important implications for accountability and public trust.

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120 Jeannie Suk Gersen, *Why Didn't the Manhattan D.A. Cyrus Vance Prosecute the Trumps or Harvey Weinstein?*, NEW YORKER (Oct. 13, 2017), <https://www.newyorker.com/news/news-desk/why-didnt-manhattan-da-cyrus-vance-prosecute-the-trumps-or-harvey-weinstein> [<https://perma.cc/NJA4-PVJD>].

121 See Marc Fisher, *Labor Nominee Acosta Cut Deal with Billionaire Guilty in Sex Abuse Case*, WASH. POST (Mar. 22, 2017), [https://www.washingtonpost.com/politics/labor-nominee-acosta-cut-deal-with-billionaire-in-sex-abuse-case-involving-40-underage-girls/2017/03/21/d33271a8-0d85-11e7-ab07-07d9f521f6b5\\_story.html](https://www.washingtonpost.com/politics/labor-nominee-acosta-cut-deal-with-billionaire-in-sex-abuse-case-involving-40-underage-girls/2017/03/21/d33271a8-0d85-11e7-ab07-07d9f521f6b5_story.html) [<https://perma.cc/7J3S-9CGR>]. Public insight into the full scope of the evidence underlying the declined charges did not come until a Miami Herald reporter decided, following Acosta's confirmation hearings, to speak to Epstein's victims. See Tiffany Hsu, *The Jeffrey Epstein Case Was Cold, Until a Miami Herald Reporter Got Accusers to Talk*, N.Y. TIMES (July 9, 2019), <https://www.nytimes.com/2019/07/09/business/media/miami-herald-epstein.html> [<https://perma.cc/2HN7-BLN7>].

122 See Gene Maddaus, *Many Accused, None Prosecuted: Why #MeToo Hasn't Led to a Single Criminal Charge in L.A.*, VARIETY (Sept. 25, 2018), <https://variety.com/2018/biz/news/metoo-legal-los-angeles-criminal-charges-1202955008/> [<https://perma.cc/EC4N-PSBF>]. These echoed episodic reports of underenforcement of sexual assault offenses—reports based on rare, isolated access to declination data. See, e.g., Spohn & Tellis, *supra* note 113, at 404; *supra* note 114. See generally Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1292–99 (reviewing the studies).

123 See Roth, *supra* note 105, at 479–80, 480 n.6 (“In an era of expansive criminal law and finite government resources, declinations constitute an ever more significant piece of the criminal justice picture, even if the precise size of that piece is unknown,” citing to selected studies estimating anywhere from four percent to fifty percent of cases referred to prosecutors are declined, varying by jurisdiction and offense classification.).

Consider the effect on the public's evaluative capacity. The small set of public declinations is subject to selection bias: only in unusual circumstances, and typically only *because* of those circumstances, do declination decisions become public. This bias skews the public "data," crippling the public's ability to gauge the quality of law enforcement decisionmaking. When selected declinations in cases of intense public interest are aired without broader context, evidence-based evaluations are effectively impossible. The public is left to speculate as to whether these declinations were merited based on the evidence, and if not, whether the breakdown is an isolated occurrence or evidence of broader dysfunction.

Secret declinations also enable enforcers to shift blame for their decisions—and for crime fluctuations more broadly—to other institutional actors. When it declined to charge banks and bank executives following the 2008 crisis, the Department of Justice placed some of the blame on Congress, arguing that the federal fraud laws placed a too-high burden for proving scienter.<sup>124</sup> (Do they? Without access to the evidence prosecutors reviewed, it is impossible to know.<sup>125</sup>) When, in 2019, homicides in Philadelphia rose sharply over the prior year, the police commissioner blamed the district attorney for bringing fewer prosecutions of firearms offenses even as the police arrested more firearms offenders; in turn, the district attorney claimed his office had pursued a higher share of cases in which a gun charge was the most serious charge, even as it declined more gun cases overall.<sup>126</sup> The entire debate, meanwhile, relied on data hidden from the public—and that appeared not even to have been fully compiled

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124 See Cohan, *supra* note 117.

125 Indeed, the absence of public evidence fueled a debate relatively light on facts and heavy on speculation, even as the debaters themselves acknowledged their informational deficits. See, e.g., Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. (Jan. 9, 2014), [https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/?lp\\_txn\\_id=1003391](https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions/?lp_txn_id=1003391) [<https://perma.cc/578Q-AC92>] (acknowledging no inside knowledge as to the evidence in any particular case, but arguing that the Department of Justice's excuses for the lack of any criminal charges "appear unconvincing"); Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 846–54 (2014) (assessing legal hurdles to proving criminal fraud in the context of events leading to the financial crisis, arguing absence of evidence in the public domain sufficient to prove guilt—"nowhere has anyone described the particular evidence that could be used in these cases to prove any individual's specific intent to defraud"—indicates such evidence did not exist).

126 Chris Palmer, *After Weekend Shootings, Philly DA Larry Krasner Defends His Office's Record on Gun Cases*, PHILA. INQUIRER (June 18, 2019), <https://www.inquirer.com/news/larry-krasner-district-attorney-philadelphia-gun-prosecutions-richard-ross-20190618.html> [<https://perma.cc/LR4B-DZ2P>].

by the enforcement agencies themselves.<sup>127</sup> This dynamic has echoed in districts throughout the country, where police departments have blamed rising violent crime on the declination decisions of self-styled progressive prosecutors, while those prosecutors in turn defend their decisions as a more targeted and effective approach to crime—all in the absence of publicly accessible data on declinations.<sup>128</sup>

As with targeting data, the absence of declination data afflicts enforcers themselves. A significant portion of prosecutors' offices do not collect data on their own selection processes. A recent study by the Urban Institute found that only about two-thirds of sampled prosecutors' offices collected data on arrests and declinations, and eighty-four percent collected data on case referrals.<sup>129</sup> In offices that do not internally track decisionmaking, then, a prosecutor seeking guidance on whether to charge, or a supervisor seeking to give guidance, lacks evidence-based institutional knowledge. "How we do it" would at most capture individual experience and anecdote rather than systematic data. Research has shown that, when it comes to declinations, a prosecutor's office's data collection practices can have profound impacts on consistency and fairness in prosecutorial decisionmaking.<sup>130</sup>

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127 *Id.* (Krasner's "office said a full set of data about gun-related prosecutions—such as the number of cases prosecuted, declined, and outcomes of those cases over a period of several years—would take more time to gather. . . . [Commissioner] Ross did not offer specifics on whether the Police Department had found definitive patterns of cases being dropped or ending with a figurative slap on the wrist. He said the department was studying gun-related cases and their progression through the criminal justice system to learn more about potential trends.").

128 See Mark Berman, *These Prosecutors Won Office Vowing to Fight the System. Now, the System Is Fighting Back*, WASH. POST (Nov. 9, 2019), [https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3da\\_story.html](https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3da_story.html) [https://perma.cc/P7M8-CNTM].

129 ROBIN OLSEN, LEIGH COURTNEY, CHLOE WARNBERG & JULIE SAMUELS, URB. INST., COLLECTING AND USING DATA FOR PROSECUTORIAL DECISIONMAKING: FINDINGS FROM 2018 NATIONAL SURVEY OF STATE PROSECUTOR'S OFFICES 6 (Sept. 2018). The study surveyed 158 prosecutors' offices, divided roughly equally in terms of district population (twenty-five offices in large districts (population greater than one million); twenty-eight in medium-large (population between 500,000–999,999); thirty-two in medium (population between 250,000–499,999); thirty-five in medium-small (population between 100,000–249,999); and thirty-eight in small (population less than 99,999). *Id.* at 4. While the smallest offices consistently had the lowest share of data collected, the highest share of collected data was distributed inconsistently across office size; for instance, medium-sized offices had the highest share of collected data on case declinations (eighty-four percent), while the largest offices had the highest share of collected data on arrest charges (seventy-seven percent). *Id.* at 7.

130 See FREDERICK & STEMEN, *supra* note 113, at 14–15 (in study of declination decisions in two offices, in which researchers interviewed prosecutors about declination reasoning,

Here, then, is the cycle. Law enforcement does not make public—nor, in many instances, are enforcers even aware of—declination decisions and patterns or the reasons for them. Isolated public disclosures of declinations in high-profile cases—typically, cases in which the decision was controversial, unpopular, or otherwise noteworthy—generate critiques to which enforcers cannot effectively respond in the absence of broader context on case selection. Public distrust grows. In turn, enforcers seek to mitigate distrust by shifting blame to other institutional actors (legislators, courts, or even other enforcement institutions) or by citing to data—invisible to the public, and in some instances unclear to enforcers themselves—they claim supports their selection decisions. Public trust ebbs further.

### B. *Transparency*

Not all decisionmaking in criminal enforcement is secret. Much, in fact, is public, particularly at the post-charging stage. But in the context of the full scope of enforcers' decisionmaking, partial transparency presents underappreciated harms.

One is deceptiveness. Public data—both at the pre- and post-charging stages—reflects and incorporates earlier, nonpublic decisions. Yet because those earlier decisions are invisible, policy makers and researchers can be deceived as to the source of undesirable outcomes—reaching conclusions, and advocating actions, that may not ultimately mitigate those outcomes and might even exacerbate them.

The other key harm of partial transparency is its deleterious effects on enforcement. Because criminal procedure's existing allocation of public and private makes visible criminal enforcement outputs rather than the processes that lead to them, it incentivizes undesirable—even unreasonable—exercises of enforcement discretion.

Subsection 1 discusses the first problem, and subsection 2 the second. Subsection 3 shows how these two harms perpetuate one another.

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finding significant within-office decisional variation that could not be explained by differences in evidential strength, case type, or other predictive factors); Miller & Wright, *supra* note 14, at 162–66 (recounting how, following a Vera Institute pilot program tracking case declinations across three prosecutors' offices, one office was able to identify the existence of racial disparities in declinations of marijuana prosecutions along with their source—evaluation of crime seriousness varying by office tenure—and to rectify those disparities by training new prosecutors to more readily decline marijuana possession drug cases).

## I. Deceptiveness

Envision criminal enforcers' decisionmaking along a timeline. At the beginning, there is the decision to target a particular geographic area or category of offense conduct. Further along the timeline is the decision to engage in investigative activity, from relatively less intrusive activities (such as consensual interviews) to the most intrusive (searches and wiretaps). Further along still is the decision to arrest an offender. After that, the decision to charge (whether to charge, and if so, with what statutory offenses). Following the charging decision comes the decision of how to resolve the case—whether by plea bargain (in effect, a decision to accept a particular sentence or sentencing range), trial or, should circumstances merit, dismissal. Finally is the sentencing stage where, in the absence of a plea bargain, enforcers decide what sentence or sentencing range to advocate.

Only the end stages of this timeline—beginning with the decision to charge—are visible to the public. (Some earlier decisions, such as searches or arrests, will become visible after a case is charged; but those decisions are only visible in charged cases, and then only in those charged cases where earlier decisions are challenged.) Crucially, the end-stage, public-facing decisions are products of the earlier, nonpublic decisions. And yet the public, policymakers, and researchers are forced to overlook the influence of those nonpublic stages of the process on the system's public outputs.

Consider, as an example, the debate around racial disparities in federal sentencing. Among American criminal court systems, the federal system offers perhaps the most comprehensive, publicly available collection of data, compiled across two branches of government.<sup>131</sup> But the very richness of this data collection obscures critical holes. Decades of research by the United States Sentencing Commission on the impact of sentencing guidelines and penal statutes on racial disparities in sentencing has failed to consider the potential causal effects of pre-charging decisions by law enforcement agents and charging decisions by prosecutors.<sup>132</sup> The absence of data on racial disparities in pre-charging and charging decisions is not evidence of absence, particularly given the dearth of data generally on these stages

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131 The Administrative Office of the U.S. Courts, the Department of Justice, and the Sentencing Commission each keep detailed records on cases and individual defendants, from filing to sentencing. In fact, the relative bounty of adjudicative data in federal criminal cases, as compared to state and local ones, has drawn a level of scholarly attention far exceeding the federal system's relative significance. See Daniel Richman, *Judging Untried Cases*, 156 U. PA. L. REV. PENNUMBRA 219, 222 (2007).

132 See Starr & Rehavi, *supra* note 20, at 49–52 (critiquing Sentencing Commission for this omission).

of the process. Yet by ignoring the potential effects of earlier-stage decisions on sentencing outcomes, the Sentencing Commission has effectively treated it this way.

Even scholars who have attempted to correct for this critical omission, by taking into account arrest and charging data, have come up against data collection constraints that severely limit causal conclusions. The most thorough empirical study on racial disparities in federal sentencing in the post-*Booker*<sup>133</sup> era sought to analyze the sentencing effects of initial charging decisions, yet was forced to omit the single offense category for which racial sentencing disparities have been most pronounced—drug offenses—because charging-stage data on drug type and quantity in federal drug cases (the most important contributing variable in drug sentencing) is unavailable.<sup>134</sup> And as the study’s authors admit, they were constrained by the absence of any data on pre-charging decisions by law enforcement agents.<sup>135</sup> Yet charging decisions in drug cases, and pre-charging decisions in all federal criminal cases, may have potentially robust causal effects on racial disparities in sentencing—some though processes imperceptible to enforcers themselves.<sup>136</sup> What’s more, given the federal system’s heavy

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133 *United States v. Booker*, 543 U.S. 220, 222 (2005), made the previously mandatory U.S. Sentencing Guidelines merely advisory, giving federal judges discretion to sentence outside the Guidelines’ recommended ranges.

134 *See* Starr & Rehavi, *supra* note 20, at 26 (“[I]n drug cases, the ambiguities [in charging data] were too extreme to resolve . . . most cases were charged under omnibus provisions (such as 21 U.S.C. § 841(b)) encompassing all drug types and quantities. We could not meaningfully code the severity of such provisions, and thus cannot assess initial charging disparities in drug cases.”). For drug cases, then, the authors were only able to analyze racial disparities in the use of mandatory-minimum-bearing charges. *Id.*

135 *Id.* at 35 & n.111.

136 *Id.* at 35. (“[R]ecorded arrest offenses will be affected by law enforcement choices. This is a key limitation of our strategy of controlling for the arrest offense. . . . Nor do our estimates capture sample selection introduced by police decisions that determine who lands in the federal criminal justice system at all.”). Recent litigation challenging racial disparities in federal drug stash house sting cases in Chicago, which carried enormously high sentencing guidelines ranges, sheds light on the ways in which racial sentencing disparities can flow from seemingly minor pre-charging decisions. *See United States v. Brown*, 299 F. Supp. 3d 976 (N.D. Ill. 2018). Because the initial targets of the sting operation themselves recruited co-participants (who comprised the vast majority of the defendants), *see id.* at 1004, the racial makeup of the participants overwhelmingly mirrored the initial target’s race—a pattern familiar to sociologists. *See, e.g.,* Thomas A. DiPrete, Andrew Gelman, Tyler McCormick, Julien Teitler & Tian Zheng, *Segregation in Social Networks Based on Acquaintanceship and Trust*, 116 AM. J. SOCIO. 1234, 1269 (2011) (studying patterns of segregation in social networks, concluding “trust networks in the United States remain highly [racially] segregated,” with study participants reporting far greater numbers of trusted persons among those in their own racial group). The initial targets, moreover, were introduced to the federal agents by confidential informants. *Brown*, 299 F. Supp. 3d at 1004. Thus, it was the selection of the *confidential informants*, a process perhaps even unconnected

reliance on local law enforcement authorities to bring cases, the blind spot goes even deeper: antecedent decisions by local enforcers (both police and prosecutors) influence federal enforcers' charging and declination decisions in ways at once profound and, to the outside observer, entirely invisible.<sup>137</sup>

Or consider the debate over the so-called "trial penalty," so named for the observed phenomenon in which a criminal defendant who goes to trial receives a harsher sentence than a similarly situated defendant who pleads guilty.<sup>138</sup> Some researchers conclude the observed phenomenon is real—that all else being equal, defendants who go to trial receive a higher sentence than those who plead guilty—and is caused by the choice to go to trial.<sup>139</sup> Others conclude the observed phenomenon is not real but instead a product of unaccounted-for variables such as case severity or evidential strength, and that absent those confounding variables the relationship between sentence severity and choice of adjudicative mechanism is actually the inverse: a defendant who pleads guilty receives a longer sentence than a similarly situated defendant who goes to trial.<sup>140</sup>

All of these studies suffer from a key limitation: sourcing sentencing differentials from sentencing data can be deceiving, because those datasets do not reflect the antecedent enforcement decisions that determined the counts of conviction. It is impossible to tell, based on sentencing data alone, whether two similarly situated cases are in fact so, or whether seeming similarities are merely artifacts

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to the stash house sting cases, that appears to have had a cascading racial effect on those cases.

137 For instance, in the stash house sting litigation discussed above, *see supra* note 136, the selection criteria for federal prosecution relied heavily on a criminal history of violent and weapons offenses, crime categories in which blacks were over-represented relative to non-blacks. *Brown*, 299 F. Supp. 3d at 1012. This overrepresentation could well reflect racial bias along any of the steps in the process that led to those convictions, a possibility the Court observed. *Id.* at 1012 n.33. In fact, for most federal cases criminal history is a key selection criterion, one that ends up replicating local enforcement patterns and exacerbating their effects.

138 See Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT'G REP. 256 (2019) (summarizing the research).

139 See, e.g., *id.* at 257; Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313, 313 (2019) (concluding trial conviction increases the odds of incarceration by two to six times and produces sentence lengths that are fifteen to sixty percent longer than a guilty plea).

140 See David S. Abrams, *Is Pleading Really a Bargain?*, 8 J. EMPIRICAL LEGAL STUD. 200, 218 (2011) (after controlling for selection effects including case type and seriousness, concluding that empirical data shows "no evidence of a 'trial penalty'" but instead "longer expected sentences from plea bargaining"); see also Douglas A. Smith, *The Plea Bargaining Controversy*, 77 J. CRIM. L. & CRIMINOLOGY 949, 966 (1986) (concluding the expected unconditional likelihood after trial is statistically indistinguishable from that after a plea bargain).



of earlier discretionary decisions—such as the decision to charge more aggressively in one case and less in another; or to offer, pre-arrest, a chance at cooperation in one case and not the other; or to negotiate, pre-filing, as to the potential charges to which a defendant will plead guilty.<sup>141</sup> Nor is it possible to assess the many factual distinctions between cases that surely impact sentencing length, yet remain invisible to outside observers. For instance, two defendants with similar criminal histories convicted of second-degree robbery may receive quite different sentences depending on the use of a weapon and the weapon type, the degree of force or threat, the characteristics of the victim, and so forth and so on—facts that, in pled cases, typically are documented (if at all) only in a pre-sentence report that remains under court seal. When researchers lack insight into critical determinants of sentence length, it is difficult to agree upon the existence, let alone causes, of observed sentencing disparities.

These examples are not offered to criticize researchers who make good faith efforts in the face of data constraints. They are instead offered to highlight the extent to which partial transparency impedes the corrective efforts of even its most sophisticated consumers. The less sophisticated consumers—the media, the public, and policy-makers—lack the capacity to appreciate the important limitations of partially transparent data, leading to facile conclusions that may misapprehend a problem's true source.

Prescriptions to reduce racial disparities in federal sentencing, for instance, have ranged from reducing judicial discretion<sup>142</sup> to reducing prosecutorial discretion,<sup>143</sup> with no attention to the role of law enforcement agents and agencies (both federal and state and local) in the targeting of suspects and offenses—despite some evidence of targeting practices that have inadvertently produced racial disparities in the few federal cases where such data has been disclosed.<sup>144</sup> Espousers of the trial penalty thesis conclude that prosecutors' plea-bargaining practices have eroded defendants' trial rights. But a defendant's choice of adjudicative mechanism may be influenced less

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141 A rare opportunity to analyze the sentencing effects of pre-filing charge bargaining was provided to researchers by the New York County District Attorney's Office, which made available for purposes of the research otherwise nonpublic pre-filing data. The resulting study found forty-one percent of defendants had charges reduced between arrest and filing, and a twelve percent reduction in the probability of incarceration based on pre-filing charge reductions. See Brian D. Johnson & Pilar Larroulet, *The "Distance Traveled": Investigating the Downstream Consequences of Charge Reductions for Disparities in Incarceration*, 36 JUST. Q. 1229, 1239, 1243 (2019).

142 See U.S. SENT'G COMM'N, *supra* note 19, at 8–9.

143 See Starr & Rehavi, *supra* note 20, at 78.

144 See Siegler & Admussen, *supra* note 11, at 1025; *supra* notes 136–37 and accompanying text (discussing *United States v. Brown*, 299 F. Supp. 3d 976 (2018)).

by plea bargaining than by earlier enforcement decisions (such as on the severity of the charge or an offer of cooperation); alternatively, sentencing differentials may be a function of real, yet invisible, differences between tried and untried cases. If so, it is far from clear that observed sentencing differentials are a problem at all, let alone one for which plea bargaining is to blame.

In short, partial transparency's deceptions have cascading effects—on the identification of a problem, its diagnosis, and prescriptions for its cure. It is the social science equivalent of offering a single answer to an indeterminate algebraic equation; without more information on the unknown variables, it is impossible to know if that answer is the correct one.<sup>145</sup>

## 2. Incentives

As Subsection 1 showed, partial transparency offers an incomplete picture of enforcement decisionmaking and its downstream effects. But the problem is not merely the incompleteness of the picture. It is also the image created by *which portions* of the total picture we see—and how the image, and enforcers' awareness of it, influences enforcement decisionmaking.

That image is a collection of enforcement outputs: how many reported crimes result in an arrest (the so-called clearance rate); how many are arrested overall, and for which crimes; how many are charged; how many are convicted, and by what means (guilty plea or trial); how many are sentenced to imprisonment, and for how long.<sup>146</sup> An output is a function of what state agents *do*: for enforcers, that means making arrests, filing charges, and securing convictions.<sup>147</sup>

Outcomes, on the other hand, are a function of what state agents *achieve*.<sup>148</sup> For criminal enforcement, achievement might be measured,

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145 HUA LOO KENG, INTRODUCTION TO NUMBER THEORY 276 (Peter Shiu trans., 1982).

146 Arrest data is compiled and reported by the FBI through the Uniform Crime Reporting Program National Incident Based Reporting System. U.S. DEP'T OF JUST., UNIFORM CRIME REPORTING PROGRAM NATIONAL INCIDENT-BASED REPORTING SYSTEM: ARRESTEES (2019). The courts of each jurisdiction in the United States keep and report basic data on criminal case processing, including charges and dispositions. Some also keep and report data on sentences imposed, as do state sentencing commissions. The Department of Justice's Bureau of Justice Statistics compiles and periodically reports aggregate state sentencing data (the most recent report, however, was in 2009). See *National Judicial Reporting Program (NJR)*, BUREAU JUST. STAT., <https://bjs.ojp.gov/data-collection/national-judicial-reporting-program-njrp#publications-0> [https://perma.cc/X99T-THH4] (Dec. 2009). Of course, because sentencings occur in open court and are recorded in the case record, sentencing data for any given case is publicly available on request.

147 See JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 113–20 (1989).

148 See *id.*

most obviously, as reductions in crime. Generally, though, we lack reliable data on crime prevalence. We have some data on reported crimes,<sup>149</sup> but we do not know the true prevalence of “victimless” crime—a large category that includes drug offenses, certain gun offenses, and many financial and other white-collar crimes. Because of this, we lack ways to measure criminal enforcement’s efficacy in a given space: absent current enforcement levels and priorities, would criminal activity be less, more, or about the same? This is the key policy question criminal enforcement presents; yet in most instances, policymakers are unequipped to answer it.

Criminal enforcement, then, is a textbook example of the dynamic behavioral economists, public administration scholars, and organization theorists have observed in a variety of contexts: we seek to measure what we value, but we come to value what we measure.<sup>150</sup> Those subject to the measure, moreover, will endeavor to meet it—even if the measure does not always align with the larger mission. Why do police focus on making arrests,<sup>151</sup> and why do prosecutors focus on charging cases for which they can obtain convictions?<sup>152</sup> For the same reason CEOs focus on stock price,<sup>153</sup> public school teachers focus on standardized test scores<sup>154</sup> and political leaders focus on Gross Domestic Product,<sup>155</sup> notwithstanding that these metrics do not necessarily align with corporate success, educational attainment, and economic wellbeing.

In criminal enforcement, the combination of public performance metrics and nonpublic decisionmaking creates an even greater

149 See FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING PROGRAM, CRIME IN THE UNITED STATES (2019) <https://ucr.fbi.gov/crime-in-the-u.s/2019/preliminary-report/home> [<https://perma.cc/FN6G-GYLR>].

150 DONELLA MEADOWS, INDICATORS AND INFORMATION SYSTEMS FOR SUSTAINABLE DEVELOPMENT 2 (1998) (“Not only do we measure what we value, we also come to value what we measure.”); see also Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENV’T L. REV. 1, 12 n.30 (2009) (collecting citations for the general principle across various fields).

151 EDITH LINN, ARREST DECISIONS: WHAT WORKS FOR THE OFFICER (2009).

152 Bibas, *supra* note 13.

153 Dan Arieli, *You Are What You Measure*, HARV. BUS. REV. (June 2010).

154 Brian A. Jacob & Steven D. Levitt, *Rotten Apples: An Investigation of the Prevalence and Predictors of Teacher Cheating*, 118 Q.J. ECON. 843 (2003).

155 JOSEPH E. STIGLITZ, AMARIYA SEN & JEAN-PAUL FITOUSSI, REPORT BY THE COMMISSION ON THE MEASUREMENT OF ECONOMIC PERFORMANCE AND SOCIAL PROGRESS 8–9 (2009) (“[O]ne of the reasons why the [2008 financial] crisis took many by surprise is that our measurement system failed us . . . . [P]erhaps had there been more awareness of the limitations of standard metrics, like GDP, there would have been less euphoria over economic performance in the years prior to the crisis . . . . But many countries lack a timely and complete set of wealth accounts—the ‘balance sheets’ of the economy—that could give a comprehensive picture of assets, debts and liabilities of the main actors in the economy.”).

accountability challenge. Consider an example discussed earlier, the declination of federal criminal charges arising from the 2008 financial crisis. Public criticism led DOJ leaders to explain their decision as a product of evidentiary insufficiency.<sup>156</sup> A public performance measure (obtaining convictions) was thus invoked to explain the declination of charges. And yet, because their decision-making process remains secret, there is no way to measure prosecutors' actual performance—in the conduct of the investigations themselves (were there missed opportunities to obtain evidence?) or the decision to decline prosecution (were convictions in fact unobtainable?).

Consider, as well, the flip side of declination, targeting. A number of studies have revealed a charging bias in favor of relatively lower-level cases within an enforcement space.<sup>157</sup> This phenomenon is explained, in part, by the public metrics by which prosecutors are measured (indictments and convictions), and the pressure to meet them by pursuing lower-hanging fruit—cases that are, generally speaking, easier to bring and easier to win.<sup>158</sup> Yet the phenomenon is also a product of what is *not* public. We can count the crimes disrupted, but not the criminal activity that continued unimpeded; we see the defendants arrested, charged, convicted, and sentenced, but not the targets of enforcement activity who evaded apprehension, or whom enforcers simply chose not to target in the first place.

The combination, then, of visible enforcement outputs (arrests, indictments, convictions, and sentences) and invisible enforcement outcomes (actual reductions of crime in a given enforcement space) incentivizes enforcers to meet visible output metrics while disincentivizing consideration of how those efforts fit within the larger mission of crime reduction. This dynamic, of partial transparency *impeding* accountability, has been observed in a variety of principal-agent contexts outside criminal enforcement, including financial

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156 See *supra* note 117 and accompanying text.

157 See, e.g., Ouziel, *supra* note 97 (federal drug enforcement); Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 904 (2016) (federal securities fraud enforcement); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1404 (1998) (federal housing and employment discrimination).

158 See Ouziel, *supra* note 97, at 1098–99 (discussing generally inverse relationship between a defendant's relative culpability and proximity to evidence of guilt).

portfolio management,<sup>159</sup> healthcare,<sup>160</sup> and public policymaking.<sup>161</sup> In each instance, public visibility into outputs coupled with invisibility into outcomes produces suboptimal agent performance.<sup>162</sup>

### 3. A Self-Perpetuating Spiral

Now consider how these two harms of partial transparency perpetuate each other. Output-based evaluative metrics incentivize enforcers to meet those metrics rather than to make enforcement choices that will improve criminal justice outcomes over the longer term. At the same time, the absence of metrics focused on the critical earlier stages of the process effectively immunizes enforcers from accountability at those key stages, further incentivizing enforcers to make early-stage decisions with an eye primarily to their later-stage result.

In practical terms, this means a law enforcement agent is incentivized to target spaces in which it is easier to access evidence, regardless of whether those spaces present the greatest criminal threats to society. It means an agent is incentivized to make arrest decisions based primarily on evidential strength rather than considerations such as the relative severity of offense conduct or the relative culpability of an offender. It means a prosecutor will make charging decisions primarily based on ability to convict rather than the importance of a case or defendant within a given criminal ecosystem and, in turn, the effects of that criminal ecosystem on society. Finally, it means that the public cannot see those decisions, probe their bases, or hold enforcers accountable for them.

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159 Josef Lakonishok, Andrei Shleifer & Robert W. Vishny, *The Structure and Performance of the Money Management Industry*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 1992, at 339–79 (Martin Neil Baily & Clifford Winston eds., 1992) (explaining underperformance of pension funds as compared to mutual funds in part by greater transparency of investment decisions by pension fund manager agents and oversight by their corporate principals).

160 David Dranove, Daniel Kessler, Mark McClellan & Mark Satterthwaite, *Is More Information Better? The Effects of “Report Cards” on Health Care Providers*, 111 J. POL. ECON. 555, 572–77 (2003) (finding “report cards” reduced positive health outcomes and increased costs for coronary bypass surgery candidates in two states where they were implemented, due in large part to their effects on doctors’ selection of patients (healthier patients and higher quantities of surgeries became favored)).

161 See, e.g., Justin Fox, *Government Transparency and Policymaking*, 131 PUB. CHOICE 23 (2007) (discussing how transparency harms accountability in situations where lawmakers have more information than constituents); Prat, *supra* note 17 (discussing same in context of agency policymaking, where career civil servants have greater information and expertise than their political overseers).

162 This dynamic is discussed in greater detail below in Section III.A.

### III. REALLOCATING SECRECY AND TRANSPARENCY

The boundary criminal procedure sets between secrecy and transparency in criminal enforcement no longer serves its original animating purpose, the constraint of unreasonable exercise of enforcement power. Today's boundary is a relic of an earlier time, in which transparency at the later stages of the criminal process effectively limited enforcement overreach. With the advent of professionalized policing and prosecution and the growth of regulatory crimes, the greatest risk of overreach now comes at the earlier stages of the criminal process—when professional enforcers determine which offenses and suspects to target, whom to charge, and with what crimes.

It is past time to redraw the boundary between secrecy and transparency in the criminal process. But how? Any new boundary must reconcile two key challenges. First is the inherent tension between secrecy and transparency in the criminal process. Some secrecy is necessary to ensure the presumption of innocence and the integrity of the investigative process. Secrecy, then, must be precisely targeted to achieve those ends, while taking care not to shield enforcers from accountability for their choices. The second key challenge is potential adverse effects of transparency on enforcers' decisionmaking. As previewed above,<sup>163</sup> not all forms of transparency generate improvements in decisionmaking or greater accountability. Sustained attention must be given to what forms of transparency will best generate positive responses.

That early-stage secrecy has persisted, despite its heavy costs, is perhaps indicative of the scope of the challenge. Calibrating transparency in the early stages of the criminal process is hard; there are no ideal solutions, only tradeoffs. This Part envisions a set of tradeoffs to improve upon the status quo, drawing on lessons from outside criminal enforcement to provide a blueprint for within it. Section A lays out those lessons and their application to criminal enforcement, and Section B considers responsive changes.

#### A. *What Type of Transparency?*

Recent work in political economy has converged on a counter-intuitive conclusion: transparency does not necessarily generate greater accountability. In certain situations, public exposure can actually corrupt the decisions of public officials, incentivizing actions that appear to be in the principal's interest but in fact are not.

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163 See *supra* notes 150–55 and 159–61.

Two circumstances typically generate this misaligned incentive structure. The first is information asymmetry.<sup>164</sup> When a principal has limited access to, or understanding of, the full scope of information at the agent's disposal, the principal is unable to evaluate the agent's performance effectively. The agent thus takes into consideration the principal's informational disadvantage when making decisions on which she will be evaluated. The agent is incentivized to make a decision that, to the underinformed principal, will appear to be the "right" decision—the decision that confirms the agent's orientation to her mission and effectiveness at advancing it—even if the decision is in fact suboptimal.<sup>165</sup>

The second circumstance is a principal's inability to assess the downstream consequences of an agent's decision.<sup>166</sup> This can occur because of a temporal delay—the consequences occur too far into the future—or because consequences are visible only when individual agent decisions are aggregated over time and place.<sup>167</sup>

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164 See Gersen & Stephenson, *supra* note 17, at 187 (observing that the "over-accountability problem"—the phenomenon in which accountability mechanisms decrease the chance an agent acts in the principal's interest—"is essentially an information problem: sometimes even a fully rational but imperfectly informed principal (e.g., the citizens) will reward 'bad' actions rather than 'good' actions by an agent"); see also Jonathan Fox, *The Uncertain Relationship Between Transparency and Accountability*, 17 DEV. PRAC. 663, 667 (2007) (observing that transparency cannot generate accountability when it is "opaque"—meaning the information disseminated "does not reveal how institutions actually behave in practice . . . in terms of how they make decisions" or "is divulged only nominally, or . . . is revealed but turns out to be unreliable").

165 Gersen and Stephenson illustrate by reference to a regulator for the Department of Transportation who must decide whether to require a particular regulation on automobile manufacturers. Assuming the Pareto optimal status is no regulation but only the agent has the expertise and information to understand why this is so, the agent is incentivized to regulate in order to demonstrate to the underinformed principal (her political overseer), that she is not captured by the automobile industry. Gersen & Stephenson, *supra* note 17, at 192. Similarly, Justin Fox posits the same dynamic with respect to elected officials attempting to demonstrate unbiased motivations to constituents: "the voter's attempt to weed out biased politicians from the pool of office holders leads reelection oriented incumbents to select policy one . . . even when they know policy one is inappropriate . . . . As a result . . . transparency weakens incumbent discipline, potentially lowering the voter's welfare vis-à-vis a situation where policy is determined behind closed doors." Fox, *supra* note 161, at 33.

166 See Prat, *supra* note 17, at 868–69 (finding that when the principal cannot observe the consequence of an agent's action, the agent is "tempted to try to fool the principal by playing the action that corresponds to the smart consequence" even if the action would in fact generate a poor consequence); see also Fox, *supra* note 164, at 667 (noting that transparency will not generate accountability if institutions' "dissemination of information . . . does not reveal . . . the results of their actions").

167 Prat offers as an example of the former situation a large-scale public project such as healthcare reform, for which effects on health outcomes may only be measurable many years (or even decades) hence. Prat, *supra* note 17, at 868–69. An example of the later is

These two harbingers of underaccountability—the principal’s informational deficit relative to the agent, and the principal’s inability to assess downstream consequences—map quite neatly onto criminal enforcement. The public (the principal) has visibility into enforcers’ (the agents’) actions in the early stages of the criminal process—the decision to arrest and to charge—but, because it lacks access to the legal and factual context of those decisions, it is at an informational disadvantage to evaluate the agent. In addition, the public cannot assess the downstream consequences of the agents’ decisions—on crime prevalence and societal well-being—because the societal effects of criminal enforcement play out over decades, a function of aggregate enforcement decisions over time and place. The effects of the broken windows approach to policing in the 1990s, for instance, or the increase in felony case filings in the early 2000s, or the charging of offenses carrying long mandatory minimum imprisonment terms only became visible to the broader public years later, after millions of individual enforcement actions.

But there is a flip side. Transparency *can* increase accountability when it is designed to reduce information asymmetry between principal and agent,<sup>168</sup> and to focus less on an agent’s actions and more on the actions’ consequences.<sup>169</sup> The political theorist Jane Mansbridge has postulated that information asymmetry is best reduced by increasing “*transparency in rationale*—in procedures, information, reasons, and the facts on which the reasons are based” while reducing “*transparency in process* (for example making all committee meetings public).”<sup>170</sup> Put differently, transparency works when the scope of information disseminated collectively elucidates rather than obscures institutional behavior, and when it focuses less on an institution’s outputs than its outcomes.

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environmental regulation, the effects of which can only be assessed if enforced uniformly across a given industry. See Fox, *supra* note 164.

168 Jonathan Fox calls this “clear transparency.” See Fox, *supra* note 164, at 667–68 (“Clear transparency refers both to information-access policies and to programmes that reveal reliable information about institutional performance . . . . Clear transparency sheds light on institutional behaviour . . . . *Clear transparency* is a form of *soft accountability*.”); see also Fox, *supra* note 161, at 35–36 (“[W]hen both lawmakers and the public know the state of the world . . . transparency necessarily has the disciplining effects anticipated by advocates of greater openness in government.”).

169 See Prat, *supra* note 17, at 868–69 (“We should expect transparency on decisions to go hand in hand with transparency on consequences. In particular, an action, or the intention to take an action, should not be revealed *before* the consequences of the action are observed.”).

170 Jane Mansbridge, *A “Selection Model” of Political Representation*, 17 J. POL. PHIL. 369, 386 (2009).



The next Section considers how these transparency goals might be accomplished in the criminal enforcement context.

### *B. Calibrating Secrecy and Transparency in Criminal Procedure*

Criminal enforcement presents a unique challenge for curing informational asymmetry between principal and agent. Protecting the presumption of innocence, preventing reputational harm, and ensuring investigative integrity require shrouding some parts of the pre-charging process from public view. But there are ways to expand the public's vision without betraying those commitments. As the counterintuitive findings on transparency and accountability suggest, the process requires relaxing secrecy in some respects while strengthening it in others. This Section illustrates by reference to the three areas discussed in Section II.A: grand jury secrecy, targeting, and declination.

#### 1. Grand Jury Secrecy

As subsection II.A.1 showed, while grand jury secrecy rules exist in theory to protect the presumption of innocence and investigative integrity, in practice they often simply serve to enlarge prosecutorial power while diminishing prosecutorial accountability. Simply opening all grand jury proceedings to public view, however, is not the answer. As some grand jury investigations into the police killings of black men have illustrated, publicizing grand jury proceedings will generate gaming behavior by prosecutors seeking to use the publicized record to defend their decisionmaking from anticipated criticism.<sup>171</sup> This, in fact, is precisely what the political economy literature teaches will happen when an agent (here, prosecutors) controls the information the public can see: more information is not necessarily reliable or useful information.<sup>172</sup>

And therein lies the problem of grand jury secrecy: prosecutors control, for the most part, when evidence heard by the grand jury is made public and when it remains secret. A more effective approach would be to remove that element of prosecutorial control. Secrecy would be mandated, with no opportunity for prosecutors to request disclosure and no ability to release any evidence presented or expected to be presented to the grand jury. At the same time, members of the public—including the media, researchers, civic society organizations, and of course targets and subjects—could petition the court for disclosure once the grand jury has either reached a decision on

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171 See *supra* note 70 and accompanying text.

172 See *supra* notes 159–62 and accompanying text.

proposed charges (i.e., has returned or not returned an indictment) or has been discharged by the court without being asked to reach a decision.

Those public requests, in turn, should be entitled to a strong presumption in favor of disclosure. Once the grand jury's work has concluded, the interest in investigative integrity is substantially diminished. So, too, the presumption of innocence; the grand jury has either determined no basis exists for filing charges or has filed charges which have been made public in any event—and for which the target remains innocent until proven guilty. And while the potential for reputational harm remains to those uncharged subjects or targets against whom evidence was gathered, that risk can be mitigated by providing those persons an opportunity to be heard on the disclosure motion. A court can then balance the various competing interests, taking into account the public importance of the investigation and the individual reputational effects of disclosure. And if disclosure is deemed worthwhile, a court can lessen its adverse effects by narrowing the scope and redacting identifying information as much as possible.

Of course a risk of gaming remains; prosecutors in high-profile cases may use the grand jury process with an eye to how it will play out following an anticipated public disclosure request. But such a scenario is preferable to the status quo, in which prosecutors effectively control when grand jury matters are made public. By strengthening secrecy requirements for prosecutors while relaxing them for others in the post-grand jury phase, criminal procedure can both mitigate informational asymmetry between enforcers and the public and reduce enforcers' ability to leverage that asymmetry to evade accountability.

## 2. Targeting and Declination

I consider these issues together because, for prescriptive purposes, they are flip sides of the same coin. What determines which crimes, and offenders, enforcers pursue and which they opt to let go? And do targeting and declination decisions maximize public benefit? In the language of political economy, the first question addresses the rationale for decisions, and the second the consequences of them—both predicates for generating accountability.<sup>173</sup> Without a system of disclosures designed to truly answer these questions, enforcers are incentivized to make choices that signal enforcement efficacy and unbiased motivations (“justice without fear or favor”), even when those choices do not maximize public benefit.

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173 See *supra* notes 168–70 and accompanying text.

Criminal procedure, then, must find ways to make visible both the rationale for and consequences of enforcers' decisions, while protecting commitment to presumption of innocence, reputational harm, and investigative integrity. Enforcers clearly cannot publicly identify targets not pursued, nor can they publicize details of investigative actions taken (or not taken). But there are other ways to ensure targeting and declination policies, as well as individual decisions, are unbiased, effective, and in the public's best interest.

First, there can be greater transparency as to the rationale for enforcers' decisions. Law enforcement agencies should be required to develop and publicize detailed criteria for critical early-stage decisions (i.e., to begin an investigation, make an arrest, and file charges). While others have suggested this idea with respect to charging decisions<sup>174</sup>—and some prosecutors in recent years have attempted to standardize charging criteria to exempt from prosecution certain lower-level crimes<sup>175</sup>—we must focus not merely on the decision to charge but also on the antecedent investigatory decisions that frame that choice. We also must identify those features of standardized criteria that will enhance transparency in practice. Federal prosecutors, for example, have the Department of Justice's Principles of Federal Prosecution,<sup>176</sup> but this hardly functions as a standardizing constraint on federal prosecutorial discretion or a means of meaningful public visibility into its exercise.<sup>177</sup> To work effectively, investigatory, arrest, and charging policies must be far more detailed, and particularized as to crime categories.

The announcements by some chief prosecutors that they will decline to prosecute certain categories of cases<sup>178</sup> is one example of a public and particularized charging policy. But categorical declinations of certain low-level offenses are far more straightforward than discretionary charging decisions in cases outside those categories—cases in which the public may have a keen interest in ascertaining the reasons charges were brought in some cases but not in (seemingly similar) others. The debate in Philadelphia about the causes of ebbing gun possession prosecutions in a District Attorney's election year is a prime example: without data on the criteria for arrests, charges, and the documented reasons for declined charges, voters are unable to

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174 See Miller & Wright, *supra* note 14.

175 See Berman, *supra* note 128.

176 See U.S. DEP'T OF JUST., PRINCIPLES OF FEDERAL PROSECUTION, 9-27.220-320 (1997) (on principles governing charging decisions); *id.* at 9-13.000 et seq. (on obtaining evidence).

177 See *supra* note 82 and accompanying text.

178 See *supra* note 115 (discussing publicly announced decisions by the District Attorneys of Suffolk County, Massachusetts, and Philadelphia County, Pennsylvania).

interpret prosecutorial trends.<sup>179</sup> We need public, particularized criteria across the full range of offenses, for both prosecutors and police.

Second, there can be greater transparency into the *aggregate* of those early-stage decisions. This could take the form of detailed data on the use of specific investigatory processes such as the issuance of subpoenas, nonsearch activities (for instance, physical surveillance or mail covers), searches, temporary detentions, and arrests. The data should include nonidentifying demographic information on targets (age, gender, race, census tract of residence) along with the categories of crime investigated. For every target ultimately charged, the pre-charging data should be made public and easily linked, for researching purposes, to already public case information. Publicizing aggregate investigative data will allow the public to better see enforcement patterns, while linking that data to charged cases would allow researchers and policymakers to accurately identify causal relationships across pre-charging decisions, adjudication and sentencing.

Examples of this sort of data collection and reporting exist, to a degree, in the few jurisdictions that have utilized third-party monitored data reporting pursuant to a judicial consent decree.<sup>180</sup> Similar mechanisms could be broadly mandated by laws rather than piecemeal through litigation—extending across investigatory practices and following those practices through to final outcomes. Indeed, we already have a useful model from the healthcare context. The National Practitioner Data Bank (NPDB) was created by Congress to leverage data disclosure as a tool to reduce medical and dental malpractice.<sup>181</sup> The NPDB serves as a clearinghouse for malpractice-related information for healthcare providers, insurers and researchers—the latter via bulk data disclosures scrubbed of personal identifiers.<sup>182</sup>

Of course (as the NPDB experience demonstrates) self-reported enforcement data can be manipulated and massaged to appear to meet substantive benchmarks, turning transparency on its head.<sup>183</sup> In

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179 See *supra* notes 126–28 and accompanying text.

180 See *supra* notes 86–91 and accompanying text.

181 For background on the functions of the NPDB and its enabling legislation, see U.S. DEP'T OF HEALTH AND HUM. SERVS., NATIONAL PRACTITIONER DATA BANK GUIDEBOOK (2018), <https://www.npdb.hrsa.gov/resources/NPDBGuidebook.pdf>.

182 See *id.*; see also *Public Use Data File*, NAT'L PRACTITIONER DATA BANK (last updated Feb. 2022), <https://www.npdb.hrsa.gov/resources/publicData.jsp> [<https://perma.cc/BZ2T-VZE8>].

183 See *supra* note 22 and accompanying text; see also Ouziel, *supra* note 97 (discussing the phenomenon in the context of federal drug enforcement); Gabriel H. Teninbaum, *Reforming the National Practitioner Data Bank to Promote Fair Med-Mal Outcomes*, 5 WM. & MARY POL'YREV. 83, 97–110 (2013) (discussing insurers' and doctors' gaming of NPDB-mandated disclosures and the government's responses). Teninbaum nevertheless concludes the

addition, aggregate data disclosures alone cannot capture the nuances, varieties, and complications of enforcement discretion. This is why standardizing and reporting early-stage decisionmaking must be accompanied by a robust system for both monitoring compliance and digging beneath the data. Scholars have long debated the relative merits of external and internal oversight for police and prosecutors.<sup>184</sup> But neither of these options would be effective at monitoring decisionmaking at the pre-charging and charging stages. External evaluation would necessarily rely upon the very self-reporting it would be tasked with auditing, and would be unable to see behind the statistics to explore more nuanced questions around enforcement decisionmaking. Internal monitoring would be hobbled by bias and capture.

There is a third way. A hybrid approach, combining elements of external and internal oversight, could mitigate against the weaknesses of each model. And in fact, there is a ready template for such a hybrid approach in the context of the federal regulatory state: executive branch inspectors general (IGs).

Since they were established by statute in 1978,<sup>185</sup> IGs have had an impressive track record at increasing transparency into agency actions and decisionmaking, even actions and decisions subject to intense secrecy constraints by law.<sup>186</sup> IGs review agency actions through regular periodic audits of agency performance and financials, inspections of specific aspects or operations of a program, agency facility or geographic region, and investigations into alleged wrongdoing.<sup>187</sup> The

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NPDB serves a valuable transparency function worth keeping, if reformed to tighten and broaden data gathering. *See id.* at 110–19.

184 *See, e.g.,* Ellen Yaroshefsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943 (2010) (reviewing options for external and internal monitoring of prosecutors' compliance with disclosure obligations); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959 (2009) (reviewing literature prescribing external regulation and critiquing it in favor of an internal regulatory approach).

185 Inspector General Act of 1978, Pub L. No. 95-452, 92 Stat. 1101 (1978) (codified as amended at 5 U.S.C. app. 2 (2018)).

186 *See* Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1059–63 (2013) (discussing how IG investigations of FBI's use of National Security Letters, CIA's interrogation methods, and DOJ's detention of 9/11 suspects vastly increased transparency into those practices). *See generally* NADIA HILLIARD, *THE ACCOUNTABILITY STATE: US FEDERAL INSPECTORS GENERAL AND THE PURSUIT OF DEMOCRATIC INTEGRITY* (2017); PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* (1993).

187 *See* BEN WILHELM, CONGRESSIONAL RESEARCH SERVICE, *STATUTORY INSPECTORS GENERAL IN THE FEDERAL GOVERNMENT: A PRIMER* 7–9 (2019).

reviews are generally initiated either at the IG's own behest, or in response to requests by Congress or any other stakeholder.<sup>188</sup>

Two key features of the IG model make it an effective vehicle for increasing transparency into areas that necessarily operate out of public view. First, IGs are embedded in the agencies they oversee,<sup>189</sup> with virtually unlimited access to the agency's records and personnel.<sup>190</sup> Agency personnel, in turn, are granted strong protections when engaging with the IG.<sup>191</sup> Second, IGs operate as an "agency within an agency"—that is, with nearly complete independence from their host agencies.<sup>192</sup> They have their own budget, and are required to alert Congress if they believe that budget is inadequate.<sup>193</sup> They independently hire their staff and manage their own resources.<sup>194</sup> They report their findings both to their host agency and to Congress and the public.<sup>195</sup> They are provided with independent counsel.<sup>196</sup> They are appointed subject to Senate confirmation, and if the President wishes to remove them he or she must inform Congress of the reasons for removal at least thirty days before removal occurs.<sup>197</sup> All of these features have helped to make IGs both independent and productive investigators across administrations.<sup>198</sup> During the Trump Administration, IGs were subject to enormous political pressure—yet these features of the model allowed them to mostly withstand it, offering Congress and the public unvarnished and often pivotal insights into agency abuses and mismanagement.<sup>199</sup>

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188 *Id.* at 7.

189 Inspector General Act of 1978, 5 U.S.C. app. 2 § 6(d) (2018).

190 *Id.* § 6(a).

191 *Id.* § 7.

192 *Id.* § 6(e)(1)(A).

193 *Id.* §§ 5(a)(21), 6(g).

194 *Id.* § 6(a)(7)–(9).

195 *Id.* §§ 4(a)(5), 4(e), 5.

196 *Id.* § 3(g).

197 *Id.* § 3(a)–(b).

198 See Robin J. Kempf & Jessica C. Cabrera, *The De Facto Independence of Federal Offices of Inspector General*, 49 AM. REV. PUB. ADMIN. 65 (2019) (in study of IG productivity over Bush II and Obama administrations, finding no variance in investigative productivity by administration, slight variance in auditing productivity across administrations, lesser productivity among IGs in cabinet as opposed to non-cabinet agencies but presidentially-appointed IGs more productive than those appointed by agency heads).

199 For instance, the Postal Service's Inspector General's report on late primary mail ballots awakened Congress and the public to mismanagement that could threaten the on-time delivery of mail ballots in the general election—and helped to stave off such delays. See Luke Broadwater, *1 Million Primary Ballots Were Mailed Late, Postal Service Watchdog Says*, N.Y. TIMES (Sept. 25, 2020), <https://www.nytimes.com/2020/09/01/us/politics/postal-service-late-ballots.html> [<https://perma.cc/L36T-AUWV>]. Even the enormous political pressure on State Department IGs investigating their agency's head, Secretary Pompeo, still did not prevent them from taking actions that enabled Congress to advance the

This hybrid model of oversight—internal access coupled with independence—has generated the right kind of transparency in government: transparency that levels the information asymmetry between agency actors and their principals. The model could be translated relatively easily into the criminal enforcement context. State legislatures could model inspector general acts after the federal statute, embedding independent inspectors general into prosecutors' offices and police departments. Those IGs could conduct regular audits and inspections of law enforcement agents' compliance with and reporting on the early-stage decision making criteria discussed above. (While a few cities and counties already have inspectors general, those offices lack a key ingredient of the federal model, namely, the embedding of inspectors general into the very same agencies they are tasked with overseeing.<sup>200</sup>)

Illustrative examples from both the local and federal criminal enforcement context provide a glimpse into how this could work. Following the decision by the Cook County State's Attorney's Office to drop all charges in a sixteen-count indictment against the actor Jussie Smollett, in connection with Smollett's having allegedly falsely reported to the police that he was the victim of a hate crime, a public uproar ensued, with critics claiming the State's Attorney had granted Smollett special, unmerited treatment.<sup>201</sup> A judge then appointed a special prosecutor to determine whether new charges against Smollett were merited and also whether the State's Attorney's Office had acted improperly in dismissing the initial charges.<sup>202</sup> Following an investigation, the special prosecutor obtained from a grand jury an indictment charging Smollett with making false police reports.<sup>203</sup> The

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investigation they had started. See Pranshu Verma & Edward Wong, *Another Inspector General Resigns Amid Questions About Pompeo*, N.Y. TIMES (Aug. 25, 2020), <https://www.nytimes.com/2020/08/05/us/politics/inspector-general-pompeo-state.html> [<https://perma.cc/378M-UGPG>].

200 See DANIEL L. FELDMAN & DAVID R. EICHENTHAL, *THE ART OF THE WATCHDOG: FIGHTING FRAUD, WASTE, ABUSE, AND CORRUPTION IN GOVERNMENT* 185–89 (2013) (“relatively few local governments have a separate IG,” observing that some local agencies have internal departments that serve “IG functions,” but lack independence from the agency).

201 Michael Tarm, *Smollett Case Could Undermine Prosecutor's Reform Efforts*, ASSOCIATED PRESS (Apr. 23, 2019), <https://apnews.com/article/a6afc4cd5f8344e2b7d0d7c15a8f2f15> [<https://perma.cc/W7NT-X25U>].

202 See Information Release, Special Prosecutor Dan K. Webb of Winston & Strawn Concludes Investigation into the Cook County State's Attorney's Office and Chicago Police Department's Handling of the Jussie Smollett Case (Aug. 17, 2020), <https://news.wttw.com/sites/default/files/article/file-attachments/Winston%20and%20Strawn%208.17.2020%20Information%20Release%20re%20Special%20Prosecution.pdf> [<https://perma.cc/A747-LSB2>].

203 *Id.*

special prosecutor also produced a public report concluding that the State's Attorney's Office had abused its discretion and likely violated professional ethics rules in its decision to dismiss the charges against Smollett, but did not violate any laws.<sup>204</sup>

The undertaking was similar to an internal investigation, with important caveats: first, the special prosecutor was not embedded within the office, but came from outside it; and second, he had the power to convene a grand jury to charge Smollett. Both of these features made the Smollett appointment more controversial, and ultimately likely less effective, than a pure inspector-general type model.<sup>205</sup> Nevertheless, the core of the exercise—vesting an overseer with access to both the evidence available to the prosecutor's office and the office's internal decision-making processes—enabled a substantive review far superior to the sort of speculative, light-on-facts debate that would otherwise have played out. The State's Attorney herself, in fact, had earlier asked the County's Inspector General to initiate an investigation into how her office handled the Smollett case.<sup>206</sup>

An example from the federal context, utilizing the IG model, is even more instructive. In response to statutory directive,<sup>207</sup> the Drug Enforcement Administration began, in 2001, to track and report its progress in disrupting and dismantling “priority targets.”<sup>208</sup> Those

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204 *Id.*

205 State's Attorney Foxx's defenders chafed at the notion that another prosecutor could effectively overrule her office's decision, and some sought to oust the judge that appointed the special prosecutor. See Alice Yin, Megan Crepeau & Gregory Pratt, *Judge Who Appointed Special Prosecutor in Jussie Smollett Case Loses Cook County Democrats' Backing*, CHI. TRIB. (Sept. 14, 2020), <https://www.chicagotribune.com/politics/ct-cook-county-democratic-party-judge-michael-toomin-smollett-foxx-20200914-psrdqrf7vey3dozlbwkj3sj5q-story.html> [<https://perma.cc/268X-4FSZ>]. A regular internal ombudsman, rather than a special prosecutor plucked to oversee and perhaps prosecute a single case, would have far more buy-in from all stakeholders.

206 Gregory Pratt, *Cook County Inspector General to Review Prosecutors' Handling of Jussie Smollett Case*, CHI. TRIB. (Apr. 12, 2019), <https://www.chicagotribune.com/politics/ct-met-kim-foxx-jussie-smollett-20190412-story.html> [<https://perma.cc/HD5D-UW2K>]; Kim Foxx, *Kim Foxx: I Welcome an Outside Review of How We Handled the Jussie Smollett Case*, CHI. TRIB. (Mar. 29, 2019), <https://www.chicagotribune.com/opinion/commentary/ct-perspec-kim-foxx-jussie-smollett-20190329-story.html> [<https://perma.cc/K927-H49K>]. The Inspector General's Office appears to have coordinated its review with the Special Prosecutor. See OIG Statement Concerning the Investigation into the Circumstances Surrounding the Smollett Prosecution (Aug. 17, 2020), [https://opendocs.cookcountylil.gov/inspector-general/public-statements/OIG\\_Statement\\_-\\_Smollett\\_Prosecution\\_8-17-20.pdf](https://opendocs.cookcountylil.gov/inspector-general/public-statements/OIG_Statement_-_Smollett_Prosecution_8-17-20.pdf) [<https://perma.cc/Z53H-A6EM>].

207 Government Performance and Results Act of 1993, P.L. 103-62, 107 Stat. 285 (1993).

208 DEP'T OF JUST., OFF. OF INSPECTOR GEN., THE DRUG ENFORCEMENT ADMINISTRATION'S IMPLEMENTATION OF THE GOVERNMENT PERFORMANCE AND RESULTS



targets were categorized according to relative position in the trafficking chain. The highest priority targets were “heads of drug or money laundering organizations, clandestine manufacturers or producers, and major transporters and distributors,”<sup>209</sup> and the second highest were entities or persons whose drug trafficking or money laundering activities were considered to have “a significant impact” on a designated regional area.<sup>210</sup> By its own reporting, the DEA was progressing spectacularly: in the decade since DEA began utilizing the tracking system and reporting its progress to DOJ overseers and to Congress, arrests of priority targets increased three-fold, and there were substantial reported increases in the number of agents working on priority cases.<sup>211</sup>

But when the IG for the Department of Justice proactively inspected the DEA’s use of the priority designation system, it revealed the emptiness of those reports. Much of the increased agent work was directed at targets of relatively lesser value, and the criteria field offices used to categorize targets as “priority” was vague and malleable.<sup>212</sup> The Inspector General’s review thus made visible—to DOJ leadership, Congress, and the public—realities about the DEA’s targeting decisions that, in the report’s absence, would have been impossible to see.

This last example is illustrative primarily to show the untapped potential of a robust inspector general model. In fact, investigations and audits of early-stage decisionmaking and reporting in federal criminal enforcement could occur far more often.<sup>213</sup> That they do not is perhaps itself evidence of the problem with secrecy and transparency in criminal procedure: because early-stage enforcement actions and decisions are invisible, those who might request inspections do not know enough even to appreciate when they are needed. Indeed, the

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ACT (2003); *see* U.S. GEN. ACCT. OFF., GAO/GGD-99-108, DRUG CONTROL: DEA’S STRATEGIES AND OPERATIONS IN THE 1990S, at 78 (1999).

209 *See* OFF. OF NAT’L DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY: PERFORMANCE REPORTING SYSTEM REPORT 29 (2015).

210 *Id.*

211 On agent designation, *see* OFF. OF INSPECTOR GEN., AUDIT OF THE DRUG ENFORCEMENT ADMINISTRATION’S PERSONNEL RESOURCE MANAGEMENT AND CASEWORK 29–43 (2011). On arrests, *see* DEA arrest data obtained pursuant to DEA FOIA request No. 16-00367-F (on file with author).

212 OFF. OF INSPECTOR GEN., *supra* note 211, at 32–33.

213 For instance, between 2010 and 2018, the DOJ’s Office of Inspector General produced a single report on federal enforcement of criminal fraud statutes. *See* OFF. OF INSPECTOR GEN., AUDIT OF THE DEPARTMENT OF JUSTICE’S EFFORTS TO ADDRESS MORTGAGE FRAUD 9–11 (2014). That report, a 2014 audit of the Department’s mortgage fraud prosecutions, revealed an overall lack of compliance with congressional directives and Main Justice’s own stated priorities, as well as systematic failure to even track its own mortgage fraud workload. *See id.* at i–iii. (All DOJ OIG reports from 1994–2019 are available at <https://oig.justice.gov/reports/all.htm> [<https://perma.cc/D3DD-4A3M>].)

special prosecutor's appointment in the Smollett case occurred only because the State's Attorney's Office had dismissed publicly filed charges.<sup>214</sup> To achieve its potential, an inspector general model must not be merely reactive but also proactive, instituting regular audits and inspections of the early, private stages of criminal enforcement, even when nothing appears amiss.

Once we envision this sort of proactive role, the full scope of possibilities emerges. Take the issue of racial disparities, perhaps the single most troubling feature of American criminal legal systems, yet one for which causal mechanisms are still not fully understood.<sup>215</sup> Legal challenges to racial disparities in criminal enforcement must prove those disparities are a product of purposeful racial discrimination.<sup>216</sup> An IG audit, by contrast, seeks not merely to ascertain the legality of enforcement practices, but also to search for the sources and causes of disparities, whatever those might be, and provide recommendations to stem them. A finding that, for instance, long-utilized and seemingly sensible practices inadvertently lead to racially disparate outcomes might be a death knell for a legal challenge;<sup>217</sup> but for an IG, it could be a starting point for rethinking those practices.<sup>218</sup>

Given the sheer number of jurisdictions and the variation across them, the feasibility of a massive data collection and compliance monitoring operation seems daunting. But it could be fairly easily accomplished by way of federal intervention. Much in the way the FBI's Uniform Crime Reporting program helped systematize crime-reporting data from across thousands of state and local jurisdictions nearly a century ago, the Department of Justice could accomplish a similar feat today. Through its spending power, Congress could make state and local law enforcement funding contingent on data reporting to a federal department (for instance, the DOJ's Bureau of Justice Statistics), which would promulgate detailed reporting criteria so as to render the data comparable across jurisdictions and usable for researchers, and would publish the data. Congress could further allocate additional funding for state and local prosecutors' offices and

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214 See *supra* note 201 and accompanying text.

215 See discussion at *supra* notes 131–37 and accompanying text.

216 See *United States v. Armstrong*, 517 U.S. 456 (1996).

217 See, e.g., *United States v. Brown*, 299 F. Supp. 3d 976 (N.D. Ill. 2018) (reluctantly dismissing defendant's claims of racial discrimination despite raw racial disparities, finding disparities the result of pre-charging decisions that were not intentionally discriminatory). (For a more detailed discussion of this case and the court's reasoning, see *supra* notes 136–37.)

218 See HILLIARD, *supra* note 186, at 128 (observing an inspector general's inquiry expands past legality, conceiving government accountability more broadly as “propriety of action”).

police departments to establish independent inspectors general; funding could vary according to office size and caseload, with large, high-docket offices and departments securing their own team of dedicated professionals and smaller, lower-docket offices and departments in a given geographic area sharing a single IG. And of course, Congress could easily mandate disclosures by federal law enforcement and increase funding for the Department of Justice's IG, enabling more proactive, and prolific, audits and investigations.

It is important to acknowledge the limits of reform. First, like any oversight mechanism, IGs are not perfect; they are simply the least imperfect option under the circumstances, and their relative effectiveness will depend on, among other things, their degree of support both within and outside their agency, as well as the methods used to appoint them.<sup>219</sup> Second, and more fundamentally, changes to secrecy and transparency in criminal procedure will not alone make criminal enforcement fully accountable. True accountability exists only when there are consequences for acting against the public interest—either electorally or through sanctions imposed by courts or other overseers.<sup>220</sup> Yet, by leveling the informational deficit of voters and overseers, these reforms create an environment in which accountability can transpire. Jeremy Bentham's description of the importance of public trials has equal purchase for the earlier stages of the criminal process: “[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.”<sup>221</sup>

## CONCLUSION

The boundary between what criminal procedure keeps secret and what it opens to public view is not adjunct to criminal enforcement; in many ways, it defines it. Enforcement dynamics take shape as they do in part because of how much, or little, the public sees of them.

Today's boundary between secrecy and transparency reflects historical rather than current enforcement dynamics. Where once

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219 See Kempf & Cabrera, *supra* note 198 (discussing importance of two-branch appointment process, along with executive branch priorities and resource allocation).

220 Jonathan Fox distinguishes between “two dimensions of accountability: on the one hand, the capacity or the right to demand answers (. . . ‘answerability’) and, on the other hand, the capacity to sanction.” Fox, *supra* note 164, at 665. Answerability, says Fox, is a form of “soft accountability,” while “hard accountability” would “involve going beyond the limits of transparency and dealing with both the nature of the governing regime and civil society’s capacity to encourage the institutions of public accountability to do their job.” *Id.* at 668–69.

221 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (London, Hunt & Clarke 1827).

public court processes effectively cured overreach and abuse by private prosecutors, today those public processes do little to constrain the spaces where enforcement power now resides: in the decisions to investigate, to charge, or to decline charges. The boundary criminal procedure sets today enlarges enforcers' power while reducing accountability, and inhibits evidence-based assessment and evaluation of the criminal process.

Redrawing the boundary requires sustained attention to two key points. First, calibration. Some secrecy in the criminal process is necessary to ensure the presumption of innocence and the integrity of the investigative process; but that secrecy must be precisely targeted so as not to shield enforcers from accountability. Second, scope. To generate accountability, transparency must encompass outcomes as opposed to just outputs, and rationales more than processes. These points counsel in favor of strengthening secrecy rules in some contexts while relaxing them in others, and ensuring robust compliance with those rules through an internal-yet-independent inspector general model.

These reforms will not themselves make enforcers accountable; ultimate accountability is left to the political process. But if that process is to mean anything, it must allow its participants and contributors—legislators, policymakers, researchers, the press and above all, voters—information, and the tools to evaluate it.

APPENDIX: GRAND JURY SECRECY RULES

|                | <b>Prosecutors</b>  | <b>Witnesses</b>                               | <b>Grand Jurors</b>  | <b>Other</b>  |
|----------------|---|--|--|---|
| <b>Alabama</b> | Prosecutes may disclose certain information in particular circumstances. ALA. CODE §§ 12-16-220, 12-16-221 (2021)   | Bound to secrecy. ALA. CODE § 12-16-215 (2021) | Bound to secrecy. ALA. CODE § 12-16-215 (2021)   | Court Reporters and Stenographers bound to secrecy. ALA. CODE § 12-16-215 (2021)  |
| <b>Alaska</b>  | Prosecutor may disclose information, other than deliberations and votes, as needed in the performance of his or her duties. ALASKA R. CRIM. P. 6(f)(1)  | N/A  | Bound to secrecy. May only disclose information when directed by the Court preliminary to or in conjunction with a judicial or administrative proceeding. ALASKA R. CRIM. P. 6(f)(1) | Judges, attorneys, interpreters, people transcribing for the deaf, law enforcement officers, court clerks, and typists all bound to the same rule as grand jurors. ALASKA R. CRIM. P. 6(f)(1) |
| <b>Arizona</b> | “A person commits unlawful grand jury disclosure if the person knowingly discloses to another the nature or substance of any grand jury testimony or any decision, result or other matter attending a grand jury proceeding, except in the proper discharge of official duties, at the discretion of the prosecutor to inform a victim of the status of the case or when permitted by the court in furtherance of justice.” ALAZ. REV. STAT. ANN. § 13-2812(A) (2021) |  |  |   |

|                   | Prosecutors   | Witnesses                               | Grand Jurors  | Other  |
|-------------------|---|---|---|--|
| <b>Arkansas</b>   | N/A   | N/A                                     | Bound to secrecy except when required to testify re: evidence or for witness impeachment. ARK. CODE ANN. § 16-85-514 (2021)                                 | N/A  |
| <b>California</b> | N/A   | N/A                                     | Bound to secrecy. CAL. PENAL CODE § 924.2 (West 2021)   | Interpreter appointed to assist a grand juror likewise bound to secrecy. CAL. PENAL CODE § 924.1(b) (West 2021)  |
| <b>Colorado</b>   | “All persons associated with a grand jury . . . should at all times be aware that . . . the proceedings of which shall be secret.” COLO. R. CRIM. P. 6.2(a) | Bound to secrecy. COLO. R. CRIM. P. 6.3 | “All persons associated with a grand jury . . . should at all times be aware that . . . the proceedings of which shall be secret.” COLO. R. CRIM. P. 6.2(a) | Counsel to witnesses bound to secrecy. COLO. R. CRIM. P. 6.2(b)<br><br>“All persons associated with a grand jury . . . should at all times be aware that . . . the proceedings of which shall be secret.” COLO. R. CRIM. P. 6.2(a) |

|                    | <b>Prosecutors</b>   | <b>Witnesses</b>  | <b>Grand Jurors</b>   | <b>Other</b>  |
|--------------------|--|---|---|---|
| <b>Connecticut</b> | Grand jury no longer required for indictment—only requires a probable cause hearing.<br>CONN. CONST. art. 1, § 8 |   |   |   |
| <b>Delaware</b>    | Bound to secrecy.<br>DEL. SUPER. CT. R. CRIM.<br>P. 6(e) (2)   | N/A   | Bound to secrecy.<br>DEL. SUPER. CT. R.<br>CRIM. P. 6(c) (2)                                | Interpreter, stenographer,<br>operator of a recording device,<br>typist—bound to secrecy.<br>DEL. SUPER. CT. R. CRIM. P.<br>6(c) (2)  |
| <b>D.C.</b>        | Bound to secrecy.<br>D.C. SUPER. CT. R. CRIM.<br>P. 6(e) (2)   | N/A   | Bound to secrecy.<br>D.C. SUPER. CT. R.<br>CRIM. P. 6(c) (2)                                | Interpreter, court reporter,<br>operator of recording device,<br>typist—bound to secrecy.<br>D.C. SUPER. CT. R. CRIM. P.<br>6(c) (2)  |
| <b>Florida</b>     | Bound to secrecy.<br>FLA. STAT. ANN.<br>§ 905.27(1) (West 2021)  | Bound to secrecy—<br>any “person<br>appearing before the<br>grand jury.”<br>FLA. STAT. ANN.<br>§ 905.27(1) (West<br>2021) | Bound to secrecy.<br>FLA. STAT. ANN.<br>§§ 905.10, 905.24,<br>905.26, 905.27 (West<br>2021) | A reporter, stenographer,<br>interpreter, or any other<br>person appearing before<br>the grand jury—bound to<br>secrecy.<br>FLA. STAT. ANN. §§ 905.24,<br>905.26, 905.27(1) (West 2021) |

|                 | <b>Prosecutors</b>  | <b>Witnesses</b>   | <b>Grand Jurors</b>   | <b>Other</b>  |
|-----------------|---|--|---|---|
| <b>Georgia</b>  | N/A   | N/A  | Bound to secrecy.<br>GA. CODE ANN. § 15-12-67<br>(2021)           | Court reporter bound to<br>secrecy.<br>GA. CODE ANN.<br>§ 15-12-83 (2021)   |
| <b>Hawaii</b>   | Bound to secrecy.<br>HAW. R. PENAL P. 6(c)(1)                     | N/A  | Bound to secrecy.<br>HAW. R. PENAL P. 6(c)(1)                     | Interpreter, reporter or<br>operator of a recording<br>device, or any typist who<br>transcribes recorded<br>testimony—bound to secrecy.<br>HAW. R. PENAL P. 6(c)(1) |
| <b>Idaho</b>    | N/A   | N/A  | Bound to secrecy.<br>IDAHO CODE ANN.<br>§ 19-1112 (2021)          | N/A   |
| <b>Illinois</b> | Bound to secrecy<br>725 ILL. COMP. STAT.<br>5/112-6               | N/A  | Bound to secrecy<br>725 ILL. COMP. STAT.<br>5/112-6               | N/A   |
| <b>Indiana</b>  | Bound to secrecy.<br>IND. CODE ANN.<br>§ 35-34-2-4(i) (West 2021) | Bound to secrecy.<br>IND. CODE ANN.<br>§ 35-34-2-4(i)<br>(West 2021) | Bound to secrecy.<br>IND. CODE ANN.<br>§ 35-34-2-4(i) (West 2021) | “[N]o person present during<br>a grand jury proceeding” may<br>disclose the substance of<br>testimony.<br>IND. CODE ANN.<br>§ 35-34-2-4(i) (West 2021)              |



|                  | <b>Prosecutors</b>   | <b>Witnesses</b>   | <b>Grand Jurors</b>  | <b>Other</b>   |
|------------------|--|--|--|--|
| <b>Iowa</b>      | N/A  | N/A  | Bound to secrecy.<br>IOWA R. CRIM. P. 2.3(4)(d)                | Clerk, assistant clerk, bailiff, and court attendant bound to secrecy.<br>IOWA R. CRIM. P. 2.3(4)(c)   |
| <b>Kansas</b>    | Bound to secrecy.<br>KAN. STAT. ANN. § 22-3012(b) (2019)       | N/A  | Bound to secrecy.<br>KAN. STAT. ANN. § 22-3012(b) (2019)       | Interpreters, attorneys, reporters, and typists bound to secrecy.<br>KAN. STAT. ANN. § 22-3012(b) (2019)   |
| <b>Kentucky</b>  | Bound to secrecy.<br>KY. R. CRIM. P. 5.24(1)                   | Bound to secrecy.<br>KY. R. CRIM. P. 5.24(1)                   | Bound to secrecy.<br>KY. R. CRIM. P. 5.24(1)                   | All people present bound to secrecy.<br>KY. R. CRIM. P. 5.24(1)  |
| <b>Louisiana</b> | Bound to secrecy.<br>LA. CODE CRIM. PROC. ANN. art. 434 (2021) | Bound to secrecy.<br>LA. CODE CRIM. PROC. ANN. art. 434 (2021) | Bound to secrecy.<br>LA. CODE CRIM. PROC. ANN. art. 434 (2021) | All people present, and all people with “confidential access to information concerning grand jury proceedings,” bound to secrecy.<br>LA. CODE CRIM. PROC. ANN. art. 434 (2021) |

|                 | <b>Prosecutors</b>  | <b>Witnesses</b>  | <b>Grand Jurors</b>   | <b>Other</b>   |
|-----------------|---|---|---|--|
| <b>Maine</b>    | Bound to secrecy.<br>ME. R. CRIM P. 6(e)  | N/A   | Bound to secrecy.<br>ME. R. CRIM P. 6(e)                                  | “[S]ecurity officer, interpreter, translator, court reporter, operator of electronic recording equipment, or any person to whom disclosure is made under this Rule”—bound to secrecy.<br>ME. R. CRIM P. 6(e) |
| <b>Maryland</b> | Not explicitly covered, but the “[p]rohibited [a]cts; [p]enalties” subtitle of the Code states, “A person may not disclose any content of a grand jury proceeding.” MD. CODE ANN., CTS. & JUD. PROC. § 8-507(a) (West 2021) | Not explicitly covered, but the “[p]rohibited [a]cts; [p]enalties” subtitle of the Code states, “A person may not disclose any content of a grand jury proceeding.” MD. CODE ANN., CTS. & JUD. PROC. § 8-507(a) (West 2021) | Bound to secrecy.<br>MD. CODE ANN., CTS. & JUD. PROC. § 8-415 (West 2021) | Bailiffs, clerks, court reporters, interpreters bound to secrecy.<br>MD. CODE ANN., CTS. & JUD. PROC. § 8-415 (West 2021)  |

|                      | <b>Prosecutors</b>  | <b>Witnesses</b>  | <b>Grand Jurors</b>   | <b>Other</b>  |
|----------------------|---|---|---|---|
| <b>Massachusetts</b> | Bound to secrecy.<br>MASS. R. CRIM. P. 5(d)                         | Unsure—"A person performing an official function in relation to the grand jury"<br>MASS. R. CRIM. P. 5(d) | Bound to secrecy.<br>MASS. R. CRIM. P. 5(d)                         | "A person performing an official function in relation to the grand jury"<br>MASS. R. CRIM. P. 5(d)                              |
| <b>Michigan</b>      | Bound to secrecy.<br>MICH. COMP. LAWS ANN. § 767.19f(1) (West 2021) | Bound to secrecy.<br>MICH. COMP. LAWS ANN. § 767.19f(1) (West 2021)                                       | Bound to secrecy.<br>MICH. COMP. LAWS ANN. § 767.19f(1) (West 2021) | "[A] person" shall not disclose grand jury content<br>MICH. COMP. LAWS ANN. § 767.19f(1) (West 2021)                            |
| <b>Minnesota</b>     | Bound to secrecy.<br>MINN. R. CRIM. P. 18.07                        | Bound to secrecy.<br>MINN. R. CRIM. P. 18.07  | Bound to secrecy.<br>MINN. R. CRIM. P. 18.07                        | Interpreters bound to secrecy.<br>MINN. R. CRIM. P. 18.07   |
| <b>Mississippi</b>   | Bound to secrecy.<br>MISS. CODE ANN. § 13-7-29(1) (2021)            | N/A   | Bound to secrecy.<br>MISS. CODE ANN. § 13-7-29(1) (2021)            | Interpreters and anyone to whom a disclosure is made under the section—bound to secrecy.<br>MISS. CODE ANN. § 13-7-29(1) (2021) |
| <b>Missouri</b>      | N/A   | N/A   | Bound to secrecy.<br>MO. REV. STAT. § 540.320 (2021)                | Stenographers and interpreters—bound to secrecy.<br>MO. REV. STAT. § 56.190; 540.150 (2021)                                     |

|                      | Prosecutors  | Witnesses  | Grand Jurors   | Other  |
|----------------------|--|--|--|--|
| <b>Montana</b>       | Bound to secrecy.<br>MONT. CODE ANN.<br>§ 46-11-317 (2021) | N/A  | Bound to secrecy.<br>MONT. CODE ANN.<br>§ 46-11-317 (2021) | Interpreters,<br>stenographers, operators<br>of recording devices,<br>typists—bound to<br>secrecy.<br>MONT. CODE ANN.<br>§ 46-11-317 (2021)                      |
| <b>Nebraska</b>      | N/A  | N/A  | Bound to secrecy.<br>NEB. REV. STAT. 29-1404<br>(2021)     | N/A  |
| <b>Nevada</b>        | Bound to secrecy.<br>NEV. REV. STAT.<br>§ 172.245 (2021)   | Bound to secrecy.<br>NEV. REV. STAT.<br>§ 172.245 (2021) | Bound to secrecy.<br>NEV. REV. STAT.<br>§ 172.245 (2021)   | Peace officers, clerks,<br>stenographers,<br>interpreters, any anyone<br>else in the grand jury<br>room—bound to secrecy.<br>NEV. REV. STAT.<br>§ 172.245 (2021) |
| <b>New Hampshire</b> | Bound to secrecy.<br>N.H. R. CRIM. P. 8(b)(6)              | N/A  | Bound to secrecy.<br>N.H. R. CRIM. P. 8(b)(6)              | Interpreter,<br>stenographer, typists—<br>bound to secrecy.<br>N.H. R. CRIM. P. 8(b)(6)  |

|                       | <b>Prosecutors</b>   | <b>Witnesses</b>   | <b>Grand Jurors</b>  | <b>Other</b>   |
|-----------------------|--|--|--|--|
| <b>New Jersey</b>     | Bound to secrecy.<br>N.J. Ct. R. 3:6-7   | N/A  | Bound to secrecy.<br>N.J. Ct. R. 3:6-7                             | “[A]ll persons other than witnesses”<br>N.J. Ct. R. 3:6-7  |
| <b>New Mexico</b>     | “[O]fficers of the court” bound to secrecy.<br>N.M. STAT. ANN. § 31-6-6 (2021) | N/A  | Bound to secrecy.<br>N.M. STAT. ANN. § 31-6-6 (2021)               | “[O]thers assigned to assist the grand jury”<br>N.M. STAT. ANN. § 31-6-6 (2021)                      |
| <b>New York</b>       | Bound to secrecy.<br>N.Y. CRIM. PROC. LAW § 190.25 (McKinney 2021)             | N/A  | Bound to secrecy.<br>N.Y. CRIM. PROC. LAW § 190.25 (McKinney 2021) | All others permitted to be present—bound to secrecy<br>N.Y. CRIM. PROC. LAW § 190.25 (McKinney 2021) |
| <b>North Carolina</b> | Bound to secrecy.<br>N.C. GEN. STAT. § 15A-623(e) (2021)                       | N/A  | Bound to secrecy.<br>N.C. GEN. STAT. § 15A-623(e) (2021)           | “[A]ll persons present” other than a witness—bound to secrecy<br>N.C. GEN. STAT. § 15A-623(e) (2021) |
| <b>North Dakota</b>   | Bound to secrecy.<br>N.D. CENT. CODE § 29-10.1-30 (2021)                       | Bound to secrecy.<br>N.D. CENT. CODE § 29-10.1-30 (2021) | Bound to secrecy.<br>N.D. CENT. CODE § 29-10.1-30 (2021)           | Interpreter, reporter, public servant—bound to secrecy<br>N.D. CENT. CODE § 29-10.1-30 (2021)        |

|                     | <b>Prosecutors</b>  | <b>Witnesses</b> | <b>Grand Jurors</b>                                       | <b>Other</b>   |
|---------------------|---|------------------|---|--|
| <b>Ohio</b>         | Bound to secrecy.<br>OHIO R. CRIM. P. 6(E)                | N/A              | Bound to secrecy.<br>OHIO R. CRIM. P. 6(E)                | Interpreter, court reporter, typist—bound to secrecy<br>OHIO R. CRIM. P. 6(E)  |
| <b>Oklahoma</b>     | Bound to secrecy.<br>OKLA. STAT. tit. 22, § 355 (2021)    | N/A              | Bound to secrecy.<br>OKLA. STAT. tit. 22, § 355 (2021)    | Interpreter, stenographer, operator of recording device, typist—bound to secrecy<br>OKLA. STAT. tit. 22, § 355 (2021)    |
| <b>Oregon</b>       | N/A   | N/A              | Bound to secrecy.<br>OR. REV. STAT. § 132.060 (2021)      | N/A  |
| <b>Pennsylvania</b> | Bound to secrecy.<br>PA. R. CRIM. P. 556.10               | N/A              | Bound to secrecy.<br>PA. R. CRIM. P. 556.10               | “No person may disclose”<br>PA. R. CRIM. P. 556.10   |
| <b>Rhode Island</b> | Bound to secrecy.<br>R.I. SUPER. CT. R. CRIM. P. 6(c) (2) | N/A              | Bound to secrecy.<br>R.I. SUPER. CT. R. CRIM. P. 6(c) (2) | Interpreter, stenographer, operator of recording device, typist—bound to secrecy<br>R.I. SUPER. CT. R. CRIM. P. 6(c) (2) |

|                       | <b>Prosecutors</b>  | <b>Witnesses</b>   | <b>Grand Jurors</b>   | <b>Other</b>   |
|-----------------------|---|--|---|--|
| <b>South Carolina</b> | Bound to secrecy.<br>S.C. CODE ANN.<br>§ 14-7-1720(A) (2021)              | N/A  | Bound to secrecy.<br>S.C. CODE ANN.<br>§ 14-7-1720(A) (2021)              | Interpreter, court reporter—bound to secrecy.<br>S.C. CODE ANN.<br>§ 14-7-1720(A) (2021)   |
| <b>South Dakota</b>   | Bound to secrecy.<br>S.D. CODIFIED LAWS<br>§ 23A-5-16 (2021)              | Bound to secrecy.<br>S.D. CODIFIED LAWS<br>§ 23A-5-16 (2021) | Bound to secrecy.<br>S.D. CODIFIED LAWS<br>§ 23A-5-16 (2021)              | Interpreter, stenographer, operator of recording device, typist—bound to secrecy<br>S.D. CODIFIED LAWS<br>§ 23A-5-16 (2021)                              |
| <b>Tennessee</b>      | N/A   | N/A  | Bound to secrecy.<br>TENN. R. CRIM. P. 6(k)                               | N/A  |
| <b>Texas</b>          | Bound to secrecy.<br>TEX. CODE CRIM. PROC.<br>ANN. art. 20.02 (West 2021) | N/A  | Bound to secrecy.<br>TEX. CODE CRIM. PROC.<br>ANN. art. 20.02 (West 2021) | Bailiff, interpreter, stenographer, person operating a recording device, typist—bound to secrecy<br>TEX. CODE CRIM. PROC.<br>ANN. art. 20.02 (West 2021) |
| <b>Utah</b>           | N/A   | N/A  | Bound to secrecy.<br>UTAH CODE ANN.<br>§ 77-10a-9 (West 2021)             | N/A  |

|                   | <b>Prosecutors</b>   | <b>Witnesses</b>   | <b>Grand Jurors</b>  | <b>Other</b>  |
|-------------------|--|--|--|---|
| <b>Vermont</b>    | Bound to secrecy.<br>VT. R. CRIM. P. 6(e)(2)               | N/A  | Bound to secrecy.<br>VT. R. CRIM. P. 6(e)(2)               | Interpreter, court reporter, operator of recording device, typist, court security officer—bound to secrecy.<br>VT. R. CRIM. P. 6(e)(2)  |
| <b>Virginia</b>   | Bound to secrecy.<br>VA. CODE ANN.<br>§ 19.2-192 (2021)    | N/A  | Bound to secrecy.<br>VA. CODE ANN.<br>§ 19.2-192 (2021)    | Special counsel, sworn investigator—bound to secrecy.<br>VA. CODE ANN.<br>§ 19.2-192 (2021)   |
| <b>Washington</b> | Bound to secrecy.<br>WASH. REV. CODE<br>§ 10.27.090 (2021) | Bound to secrecy.<br>WASH. REV. CODE<br>§ 10.27.090 (2021) | Bound to secrecy.<br>WASH. REV. CODE<br>§ 10.27.090 (2021) | Private attorney, city attorney, corporation counsel, reporter, interpreter, public servant, principal, and “other person”—bound to secrecy.<br>WASH. REV. CODE<br>§ 10.27.090 (2021) |



|                      | <b>Prosecutors</b>                                       | <b>Witnesses</b> | <b>Grand Jurors</b>                                      | <b>Other</b>  |
|----------------------|--|------------------|--|---|
| <b>West Virginia</b> | Bound to secrecy.<br>W. VA. R. CRIM. P.<br>6(e) (2)      | N/A              | Bound to secrecy.<br>W. VA. R. CRIM. P. 6(e) (2)         | Interpreter,<br>stenographer, operator<br>of recording device,<br>typist—bound to secrecy<br>W. VA. R. CRIM. P. 6(e) (2)          |
| <b>Wisconsin</b>     | N/A  | N/A              | Bound to secrecy.<br>Wis. STAT.<br>§ 968.41 (2021)       | Reporter bound to<br>secrecy.<br>Wis. STAT.<br>§ 968.43 (2021)  |
| <b>Wyoming</b>       | Bound to secrecy.<br>WYO. STAT. ANN.<br>§ 7-5-208 (2021) | N/A              | Bound to secrecy.<br>WYO. STAT. ANN.<br>§ 7-5-208 (2021) | Interpreter,<br>stenographer, operator<br>of recording device,<br>typist—bound to secrecy.<br>WYO. STAT. ANN.<br>§ 7-5-208 (2021) |

