

Meeting the demands of justice whilst coping with crushing caseloads?

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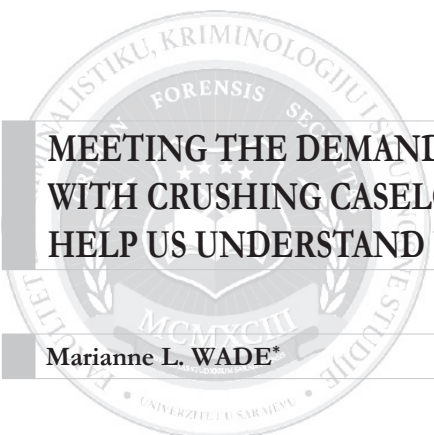
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MEETING THE DEMANDS OF JUSTICE WHILST COPING WITH CRUSHING CASELOADS? HOW SYKES AND MATZA HELP US UNDERSTAND PROSECUTORS ACROSS EUROPE

Marianne L. WADE*

Abstract

This paper examines the procedural paths taken by our criminal justice systems in dealing with crimes against humans. It highlights our dearth of knowledge in relation to prosecutors work within them despite this being key to understanding how our criminal justice systems work “producing justice” as a whole. It draws together what information is available to highlight how far systems across Europe have moved towards more negotiated forms of justice for a vast majority of cases, despite the professed abhorrence at US style plea bargaining most jurisdictions profess. Utilising Sykes and Matza’s seminal “techniques of neutralisation” as a tool, it highlights how far the proliferation of such modern criminal justice practices has gone to warp the kind of justice produced in the vast majority of cases. It highlights the efforts of prosecutors as largely principled and reasoned in nature but producing a “justice” likely not to resonate with the broader public. It therefore highlights the need for honest reflection upon what is needed from criminal justice systems and the necessity of reform in light of this to ensure our systems remain legitimate. This honest reflection is emphasised as particularly necessary as domestic systems serve as models (and the source of personnel) for transnational and international(ised) criminal justice systems.

1. INTRODUCTION

If one wishes to understand the bulk processing of cases within criminal justice systems, plenty of scholarship highlights the understanding of prosecutorial work as key.¹ In the USA, this line of study is well established.² Across Europe this is less true though studies in more recent

* Many thanks are due to Richard Young and the two anonymous reviewers for their comments on previous versions of paper

¹ Tonry, M. (2012), p. 1; for how strongly prosecutorial structures and priorities influence outcomes see also Johnson, Boerner, Wright and Miller and Caplinger (all 2012).

² see e.g. the work of Ronald Wright, Maximo Langer, and e.g. Tonry (2014).

years highlight the central influence of prosecutorial efforts there too.³ Many European jurisdictions feature a traditional abhorrence of plea-bargaining (and its functional equivalents).⁴ Prosecutors have therefore been regarded as administrators of criminal justice in the bureaucratic sense simply following the letter of the law. Academic study of them was regarded as unnecessary.⁵ Indeed offence was often taken at the suggestion research could reflect anything but prosecutors adhering to the procedural ideals of the system.⁶ Any notion of this group of steady professionals negotiating cases out of the system; i.e. away from trial, was considered untoward. Nevertheless, regardless of their varied principled foundations, criminal justice systems across the Old Continent have adopted functional equivalents to plea-bargaining. This paper discusses the impact of such practices and their implications for justice. In so doing it also aims to highlight the danger of our very considerable knowledge lacuna and the need for comprehensive research.⁷

In undertaking this task, this paper revisits the results of a study completed in 2008 at the University of Goettingen.⁸ It does so because efforts to replicate the study have proved impossible. It remains difficult to gain broad statistical understanding of prosecutorial work - and therefore the endings designated for swathes of cases being processed in criminal justice systems - across Europe. It should be highlighted that the original study was born as an investigation to elucidate the statistical patterns found in submissions to the European Sourcebook of Crime and Criminal Justice Statistics⁹ around the turn of the century. Despite the provision of full information about the legal paths open to prosecutors, the statistics recorded remained incomprehensible for many countries. They simply could not be explained by what rapporteurs explained as legally possible. The data clearly testified to huge case movement at the prosecutorial level within a large number of the criminal justice systems being examined. The law, however, provided little information as to what could be happening. The law in the books was either entirely ignorant of prosecutors filtering cases out of the system or it spoke of such tools as exceptional measures; a characterization not borne out statistically. The numbers showed prosecutors designating only small proportions of cases for the trial envisaged as the norm by the respective criminal procedure. In a large number of countries, actual practice was strongly marked by practitioners - above all prosecutors - finding ways to allow overloaded criminal justice systems to cope with crushing caseloads.

³ see. e.g. Jehle/Wade 2006, Fionda (2008), More recently King/Lord 2018, Rodgers (2017).

⁴ Thaman (2010), p. xvii and xxii. Damaska (2010) 86-90. For an explanation of the conceptual conflict involved, see Brants (2010), 181-184. See also e.g. Spain which traditionally avoided prosecutorial measures of the nature dealt with by this study see Aebi/Balcells (2008) p. 317 but note the dominant role now played by the *conformidad* (in newer, controversial form) - see Thaman (2010 Typology) 371 et seq, Vadell (2015) 20 and Bachmaier (2015) 97-101. For a summary of the principles affected see Altenhain (2010) 161 et seq.

⁵ On the shocking discovery of the reality see Thaman (2010 Typology) 387 and Deal (1982).

⁶ Albrecht, H.J. (2007); see also Boyne (2007), 255

⁷ Tonry (2012), 4 and 26 categorises the lack of research as "remarkable." For Italy see Vicoli (2015) 143.

⁸ Thanks are due to Lorena Bachmaier, Jackie Hodgson, Chris Lewis, Erika Roth, Paul Smit and Piotr Sobota for their kind assistance in updating the study's findings to the extent possible.

⁹ Council of Europe, 1999, 93 et seq. ; WODC 2003, 87 et seq., WODC 2006, 87 et seq., 2010, et seq., Heuni, 2014, 111 et seq., HEUNI 2017, 111 et seq.

Seeking not only to revisit earlier study - but to contemporarily answer the question set by the scientific committee of the European Society of Criminology: how our systems deal with crimes against humans-, this article draws upon what literature is available examining prosecutorial work across Europe. The 11 jurisdictions covered by the Goettingen study formed the basis of this endeavour but other jurisdictions are included where illuminating information is available. As will be seen, the unwitting transformation of justice the Goettingen project demonstrated prosecutorial practice as driving, has only been exacerbated in the past decade. Nevertheless there is good reason to believe that prosecutors across Europe work in strong professional cultures¹⁰ and would vigorously deny any suggestion that they do anything but advance the interests of justice. How this (self-)perception can be squared with the rather stark reality of our systems the statistics reflect is examined utilising Sykes and Matza's seminal Techniques of Neutralization. Whilst recognising that utilising a theory of delinquency to analyse agents of the law is distinctly unusual, this paper regards so doing as instructive a) to demonstrating just how far our systems as a whole have become distanced from the ideals of justice in the majority of cases processed; as well as b) to understanding how prosecutors can espouse those very ideals when their practice suggests something radically different.

2. WHAT PROSECUTORS DO

2.i. Prosecutorial Action Categorised

The Goettingen study classified prosecutorial action into 6 categories: The simple drop, public interest drop, conditional disposal, penal order, trial by "special procedure" and cases brought before court.¹¹ Many but not all jurisdictions studied¹² feature all options and there may be more than one procedural variation of any given category.¹³ The categorization nonetheless facilitates a functional comparison of prosecutorial work across Europe.¹⁴

The **simple drop** encompasses a formal prosecutorial decision to drop a case with no further consequences. This category often encompasses a large number of cases. It is, however, very much dependent upon the extent of police powers a system features.¹⁵ Where police have

¹⁰ Which do, indeed, appear to be key in ensuring that the excesses associated with criminal justice in the USA do not become established in European jurisdictions. See Luna/Wade (2010).

¹¹ For a comparative typology of many of these case-ending categories, see Thaman (2010 Typology), 331-371.

¹² Croatia, England and Wales, France, Germany, Hungary, the Netherlands, Poland, Spain, Sweden, Switzerland (Basel) and Turkey.

¹³ see Elsner et al (2008).

¹⁴ Graphical depictions and more detailed explanation of its findings can be found in Wade (2006) and Jehle et al (2008). Detailed explanations for each country, explaining all categories as applied, can be found in: See Aubusson de Cavarlay (2006), 191 et seq.; Lewis (2006), Elsner and Peters (2006), Blom and Smit (2006); Bulenda, Gruszczynska, Krempleski and Sobota (2006); Zila (2006), Turkovic (2008), Roth (2008), Aebi and Balcells (2008), Gilleron and Killias (2008), p. 340 et seq. and Hakeri (2008). Similar for Scotland see Leverik (2010), 138 et seq., Denmark, Wandall (2010), 231-232, 236-238.

¹⁵ Note for instance the effect of reforms in Spain coming into force in 2015 which allowed police to close cases in which no perpetrator has been identified and there is insufficient evidence to provide real prospects of a case being built. A 51% drop in the number of criminal cases reported - see Memoria de la Fiscalía General del Estado 2017. In Denmark, police initiate VOM - Wandall (2010), 239-240. Leverik (2010), 131 provides a statistical overview of case-endings in Scotland, including the police impact.

powers to filter out cases (as e.g. in the Netherlands¹⁶) or issue regulatory fines (as in Sweden¹⁷), prosecutorial activity will be limited. However, in many European systems, like the German¹⁸ one in which the prosecution service serves as “mistress of the investigative stage,”¹⁹ this category will include everything from cases in which perpetrators are not known, to those covered by amnesty, featuring insufficient evidence, etc. In many cases, these decisions will be made on technical grounds.²⁰ Naturally cases in which prosecutors have decided not to seek further evidence, or order further steps to attempt to identify a perpetrator, will also swell the numbers of this category. Ideally the study would have liked to highlight such latter cases as instances of prosecutorial discretion (the ever important, omnipresent, if extra-legal, power to look away) but this proved impossible on a quantitative basis.

The over-whelming dominance of the police in the British criminal justice system, means that much of the power ascribed to prosecutors across Europe sits with the police or in the alternative prosecutorial agencies (such as the Serious Fraud Office) there. The ever closer co-operation between police and Crown Prosecution Service, alongside the latter’s formal acquisition of charging powers in 2010, however, means its role is far from irrelevant.²¹ It is important to note, nevertheless, that statistically police cautions achieve some of what is discussed in this paper, whilst prosecutorial power is exercised via the less well researched mechanism of plea-bargaining there.²² Community resolutions and suspended prosecutions are categorised as policing measures in the UK whilst continental European jurisdictions would view these as key prosecutorial options.²³ Despite political rhetoric that such measures in the UK should led to tougher responses to crime, indications are that use is very much in line with prosecutorial patterns in continental Europe as criminal justice systems struggle to cope with their caseload.²⁴

The **public interest drop** covers cases in which a prosecutor decides there is a case to answer under the criminal law but concludes that pursuit of an identified perpetrator can be halted as e.g. the interests of justice do not demand a prosecution in that particular case.²⁵ Such decisions are associated with an internal record (in police and prosecution case management systems) that the suspect is presumed guilty. There is, however, no direct tangible or public effect

¹⁶ Blom and Smit (2006), 247.

¹⁷ Asp (2012), 148.

¹⁸ Elsner and Peters (2006), 224.

¹⁹ French police are subservient - see Aubusson de Cavarlay (2006), 198; as are the Polish see Bulenda, Gruszczynska, Krempleski and Sobota (2006), 273 but note also the special procedural form for petty offences p. 274. Croatian and Turkish police have no case-closing role see Turkovic (2008), 278 and Hakeri (2008), 364.

²⁰ See e.g. Zila (2006), 294; such determinations may be made by the police in Hungary, see Roth (2008), 303.

²¹ See Lewis (2012).

²² Notable exceptions include King and Lord (2016)

²³ See Ministry of Justice (2014);

²⁴ BBC (2013 Community Resolutions); Bowcottt (2014)

²⁵ Note also that the diving line between simple and public interest drops is not always clearly drawn. Thus e.g. the criteria for drops mentioned for Basel Stadt (Switzerland) are mostly technical and thus simple drops but consideration that the accused “is so strikes by the immediate consequences of the offence that an additional punishment would be inadequate” - all covered in the same procedural norm, clearly falls within the public interest criteria. Statistically these are, however, inseparable. See Gilleron and Killias (2008) p. 344.

of this decision. No formal finding of guilt,²⁶ i.e. conviction, results. The suspect dealt with in this manner usually has no means by which to insist upon their innocence.

This is the position also resulting from **conditional disposals**; this category covers cases in which, similarly, a prosecutor decides there is a case to answer by an identified suspect. Again, however, the assessment is that the case need not be brought to trial. However, the public interest/interests of justice (or whatever procedural measure is used²⁷) is viewed as demanding some action against the suspect to counter-act the wrong perpetrated. This is the kind of flexible reaction which allows prosecutors to facilitate victim perpetrator mediation, or to refer addicted offenders to treatment,²⁸ etc. Often procedural exceptions are introduced into law after discussion of such socially progressive solutions²⁹; the intimation being this is the main driver of such reform. Statistically, however, the use of this category across European jurisdictions of all legal families was overwhelmingly to require the suspect to pay a fine.³⁰ Only rarely was this money reportedly directed anywhere other than into general public coffers.³¹

An affected individual can refuse to fulfil the condition imposed via such measures and the case will then proceed to trial. Conviction is routinely associated with a harsher punishment as well as a public record of guilt (a criminal record³²) alongside the public nature of any such proceeding. Just as those refusing plea-bargains in the US experience this “trial tax,” withstanding prosecutorial power ups the stakes for defendants across Europe.³³

The **penal order** category refers to a paper based route via which a formal conviction is achieved. It involves a prosecutor filling out a standard form applying³⁴ for a punishment - in the vast majority of cases a pecuniary fine or, in a few cases, a suspended term of imprisonment - which will almost always be approved by the relevant court after cursory viewing. Notification of the conviction is then posted to the assumed criminal with details of their appeal rights. Procedures vary amongst jurisdictions but allow persons thus convicted between 8 and

²⁶ On this point see Thaman (2010 typology), 334).

²⁷ See Aubusson de Cavarlay (2006), 190; Elsner and Peters (2006), 221; the procedures described in Bulenda, Gruszczynska, Krempleski and Sobota (2006), 267 have now been reformed and expanded upon see art. 335 of the Polish Code of Criminal Procedure; Turkovic (2008), 277 and 286; Roth (2008), 299 but note that the new Hungarian Code of Criminal Procedure (in force since the 1st July 2018) expands upon the potential use of conditional disposals. See also Hakeri (2008), 361 et seq. and 367.

²⁸ Note also recent proposals to create such options across the UK as a diversionary measure - Rawlinson (2017) and Lammy (2017), 28 et seq.

²⁹ See Aubusson de Cavarlay (2006), 194-195; Roth (2008), 301. Note also that systems refusing to introduce this kind of option, such as Spain, end up with less possibilities for victims as plea-bargaining becomes dominant - see Aebi and Balcells (2008), 326. For explanation of how they stand in contrast to inquisitorial philosophy see Rogacka-Rzewnicka (2010), 288-291.

³⁰ Elsner and Peters (2006), 223; Bulenda, Gruszczynska, Krempleski and Sobota (2006), 263. See also Leverik (2010), 143. Note also the stifling affect upon use when the victim's consent is required for a conditional dismissal (Krapac 2010, 266).

³¹ See Aubusson de Cavarlay (2006), 191-195; note that in Hungary payments to the victim or for a specific purpose are required, Roth (2008), 300. King and Lord (2018), 61-63.

³² Note that a prosecutorial waiver leads to a criminal record in Sweden (Asp, 2012, 156/7).

³³ See Aprile (2014), 30, Luna and Wade (2010), 8; Luna (2005), 703; Langer (2006) 223, 225-26, Wright and Miller (2003), 1409 & 10; and Wright and Miller (2003 Screening), 30-36

³⁴ Not in Norway where it is an entirely independent prosecutorial procedure - Strandbakken (2010), 252-253.

30 days to contest their conviction. Thereafter the decision becomes final. A criminal record and enforcement of punishment ensues in the normal manner.

Trial by special procedure refers to non-paper based paths to conviction, which, however, still entail far less substantial court oversight of cases. Consequently the resulting conviction should be ascribed far more strongly to prosecutorial judgment of a case rather than to the “classic” finding of guilt by a court. A section of a normal trial may be omitted or an alternative path to procedural efficiency pursued. The challenges of quantitative research rear their head in this category also. It proved impossible to ensure that guilty plea proceedings be ascribed to this category. Because those remain a formal court decision, not usually marked as involving a special procedure, they frequently remain hidden within normal trial statistics. For this reason, prosecutorial adjudication remains unseen to a significant extent, even in the statistics. This category encompasses only more exotic forms such as the Polish prosecutor-initiated “waiver of trial” or indeed the defence-requested “voluntary submission to punishment.”

The **cases brought before the court** category reflects the cases in which prosecutors have decided that the “ideal,” public process foreseen by criminal procedure should be pursued in order to achieve the conviction and punishment of an identified suspect. As mentioned above, this category will, however, contain the cases regardless of whether this was achieved in a more efficient manner via a guilty plea³⁵ or whether a full trial ensued. It is illuminating that the countries featuring a greater proportion of cases in this category are either known to rely heavily upon guilty pleas (England and Wales)³⁶ or to feature procedures which in other European jurisdictions would count as abbreviated (such as the Netherlands with its very swift trials, strongly reliant upon the prosecutorial file).³⁷

2.ii. Prosecutorial Action Evaluated

Greatly simplified, the core conclusions of the eleven country Goettingen study were that criminal justice systems across Europe, from all legal families and even if relatively well resourced, are overloaded. Practitioners working within them had been left seeking ways to cope. The “classic” criminal justice process - the one which permeates public consciousness of how a conviction is reached - is exceptional in most jurisdictions. The reality of criminal justice in Europe demonstrates clear parallels with the US system.³⁸ Whilst it may not be plea-bargaining *strictu sensu* taking the place of the “classic” trial, diversionary measures or abbreviated court proceedings are the pre-dominant path chosen to secure a criminal justice response to suspected offending. Sometimes this is associated with a presumption, rather than a formal finding, of guilt so a suspected perpetrator avoids the full stigma of conviction. To a very significant degree, however, either diversionary measures or abbreviated court proceedings are used and the latter even impose a full conviction albeit without the drama (and potential publicity) of a full trial. This shift

³⁵ For an overview of plea bargaining law and practices in 30 Council of Europe Member States see paras. 62 et seq of the Natsvlshvili and Togonidze v Georgia judgement of the European Court of Human Rights (Appl. No. 9043/05) of 29th April 2014.

³⁶ With prosecutors now key to such scenarios - Lewis (2012) III.D and E

³⁷ For details see: Wade (2006) and (2008a) - as well as sources cited in footnote 16. See also Leverik (2010) 147 for (plea-dominated) Scotland.

³⁸ Stuntz 2004 and 2001; Langer 2006; Miller 2004

is directly associated with very significantly increased prosecutorial power. Prosecutors determine diversionary measures (sometimes flanked by similar police powers for less serious crime³⁹) whilst they factually “lead the judicial hand” in abbreviated proceedings. Even where such procedures are formally a court decision, this almost exclusively constitutes a rubber stamping of prosecutorial decision-making.⁴⁰ In this way, again a parallel to US American discussions is warranted. It has become appropriate, also across Europe, to speak of prosecutorial adjudication.⁴¹

More rarely this development creates a greater role for the defendant (or defence counsel) in such proceedings meaning their influence upon a criminal justice response is increased.⁴² This is true in negotiated proceedings (often proportionate to the strength of representation a defendant can afford⁴³) but also more significant in unusual procedural forms such as e.g. the Polish “voluntary submission to punishment.”⁴⁴ Serious concerns are raised about equality before the law, the legitimacy of criminal justice, coercive pressures upon innocent suspects to acquiesce and the more banal likelihood of mistakes as punitive decisions are taken by individuals, under time-pressure behind closed doors.⁴⁵

The Goettingen study demonstrated that criminal justice systems across Europe are only straightforward chains of procedural steps leading from arrest to trial for a small proportion of cases. Far more frequently, they comprise a series of disposal funnels as shown clearly by the following depiction of the German system:

³⁹ Dutch police can e.g. impose penal orders of up to 225 Euros - Brants (2010) 209.

⁴⁰ See Luna Wade 2010 and 2014; for detailed analysis of an example of judicial distaste for this see King and Lord (2018), 53 et seq. on the Innospec case.

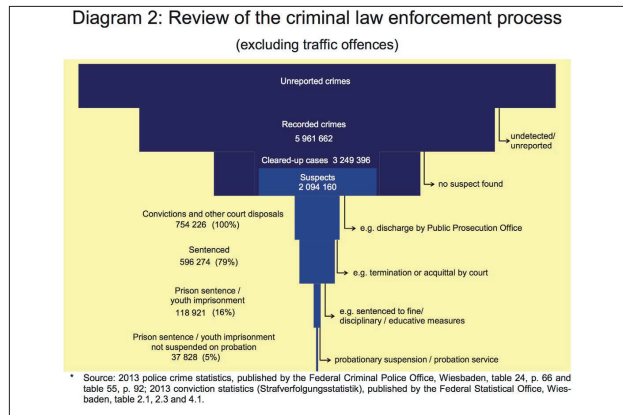
⁴¹ See Langer (2006).

⁴² On this general perception of plea bargaining see Alge (2013) section 3. For an example of potential forum shopping, see King and Lord (2018), 48. Note the UK's explicit referral to companies seeking to engage with US authorities who could offer deferred prosecution arrangements (rather than dealing with UK law enforcement) as a reason for introducing these in Britain - p. 69. On the dampening effect this can have on law enforcement activity see Sittlington and Harvey (2018), 438.

⁴³ For judicial discomfort at unduly lenient sentences resulting from serious fraud cases involving powerful defendants see Alge (2013) section 5.

⁴⁴ See Bulenda et al., 264. This form was particularly unusual because it involved defence counsel presenting to court not only the legal classification of the defendant's behaviour (i.e. the charge) but also the suggested punishment. During the period in which the Goettingen study took place, it was statistically very much in the ascendant. This demonstrated the Polish system bucking a trend and apparently assigning more power to defence counsel than to prosecutors. On the one hand, the politically desired effect was apparently to retain power within the courts rather than its transfer to prosecutors whilst the pressure of overcrowded prisons led defendants wishing to know their punishment and “get on with it” to choose this procedural form on the other. Interestingly, although this procedure has also become more broadly available (now for punishments of up to 15 years imprisonment, as opposed to 8 as it was pre-2010), a further reform of criminal procedure 2010 saw the prosecutorial application for punishment without trial (a form of prosecutorial adjudication) expanded to include guilty pleas for misdemeanours. Therewith a fall into line with broader European trends occurred with the transfer of wide-ranging powers - for less serious crimes - into prosecutorial hands. See also Rogacka-Rzewnicka (2010) 283 et seq. and Jasinski (2015). Note also, however, that defendant-driven procedural options seem to be utilised only where they provide tangible benefit for the defendant. In Croatia, e.g., procedural provision of this type offers no such advantage. As a result this measure is not used there (Krapac (2010), 275-276).

⁴⁵ See Wade (2006) 111 et seq.



Source: Jehle (2015)

This picture astonishes for a number of reasons. On the one hand, the German system features great clarity in delineating procedural forms mostly because prosecutorial discretion, adjudication, abbreviated court proceedings and full “classic” court proceedings can be differentiated cleanly in the statistics.⁴⁶ The funnel is thus more visible than it would be in many systems in which much would be subsumed by the “cases before a court” category. On the other hand this picture surprises because German law still clings firmly to a fiction of prosecutorial discretion as a procedural exception.⁴⁷ Famously for legal comparators it is also the jurisdiction regarded as sticking to its principle of mandatory prosecution.⁴⁸

In this filtering process established as the norm across Europe by the Goettingen study, prosecutors play the key practitioner role in determining what treatment cases receive.⁴⁹ In other words it is prosecutors who normally decide which action individuals experience by the state as a response to criminal acts they are suspected of having committed. No procedural code leads us to expect such dominance and popular expectations of criminal justice - as discussed below - are very different.

There is ample evidence that the tendencies the Goettingen study identified as coping mechanisms⁵⁰ have only intensified and that the trend toward prosecutorial power has, if anything, accelerated across Europe. Indeed the law has frequently followed practice and even systems traditionally adverse to any incorporation of “plea-bargaining” have capitulated to encompass

⁴⁶ cf e.g. with England and Wales and the Netherlands.

⁴⁷ see the language of the criminal procedure code, available in translation at. Paras 153 et seq are particularly relevant – I won’t keep editing these notes because it’s obvious they are still under construction.

⁴⁸ see the classic debate between Langbein and Weinreb (1978) and Goldstein and Marcus (1977) as well as German works pointing to the reality challenging the then widely accepted legal fiction e.g. Kausch (1980).

⁴⁹ Jehle et al (2008).

⁵⁰ Note that in the Netherlands the transition to a prosecutor dominated system was more strongly deliberated - see van de Bunt and van Gelder (2012), p. 119; see clear response to strain Bachmaier (2015) 103-105. For another example of coping see Westmarland et al (2018) 3,7, 10-12 detailing use of restorative justice label processes to deal with domestic violence possibly also to increase case-closure statistics. Note the need even where the system expressly steers against such Caianiello (2012) 255.

procedures one would struggle to defend against the label. Spain saw prosecutors deciding in 67% of all criminal cases registered to present charges to court in 2017. In 77% of those cases, however, a plea agreement was entered meaning that the *conformidad* proceedings is factually the primary form of case-ending used in the majority of cases.⁵¹ Germany too features a formal plea-bargaining procedure (*Absprache*)⁵² though prosecutorial drops and disposals still see far more frequent use than that path.

Poland⁵³ has continued on its path to greater efficiency and the voluntary submission to punishment proceedings (by which a defendant's lawyer not only qualifies the nature of his or her acts but also suggests the appropriate punishment - of up to 15 years imprisonment - in its application to court)⁵⁴ have gained greater scope since 2015. In practice, however, the use of these proceedings has decreased significantly in proportion to the prosecutor-led application for conviction without trial⁵⁵ which has become a penal order type procedure. Hungary saw even more recent law reform to increase the efficiency of criminal proceedings. Prosecutors already had a full palate of options available. Since 1st July 2018 these have, however, become further streamlined and a true guilty plea procedure (which allows the ending of a case at the preliminary court hearing) was introduced.⁵⁶

2.iii. Reflecting on Prosecutorial Action

The central aim of this paper is to highlight what prosecutorial practices may mean on the meta-level. Persistent practice of this nature - particularly in the convergent trend across Europe - leaves its mark upon prosecutorial working culture and the understanding of what it means to be a prosecutor. Long-term practice has rendered the exceptional coping mechanisms the norm for professionals working within our criminal justice systems.

Each criminal justice system is, however, also a sum of its parts meaning the intended exception now constitutes the system and therewith the usual reaction to crime. The Goettingen study identified prosecutors as ranking cases and selecting criminal justice system responses in order to achieve the best approximation of justice they could (as they, or indeed guidelines of Ministries overseeing their work, see it⁵⁷), in the largest number of cases, making the most of the limited resources available to them. It is evident that prosecutors - and those overseeing their work (in the administrative rather than legal sense) - feel they must respond to breaches of the criminal law in some formal manner. The mode of response is, however, determined by pragmatism borne of the situation as a whole.

How criminal justice responses are achieved has become a matter of routine to criminal justice practitioners⁵⁸ to the extent that trends are visible as to what the appropriate reaction should

⁵¹ Memoria de la Fiscalía General del Estado 2017 - with thanks to Lorena Bachmeier-Winter

⁵² See Peters, J. (2008) Die Normierung der Absprachen im Strafverfahren

⁵³ With thanks to Piotr Sobota for the provision of updated information

⁵⁴ Article 387 Code of Criminal Procedure

⁵⁵ Article 355 Code of Criminal Procedure

⁵⁶ With thanks to Erika Roth.

⁵⁷ See e.g. Wade (2009), Elsner and Peters (2006) p. 222.

⁵⁸ For a description of this analysed in the US American context see Rosset and Cressy (1976, p. 90).

be. There is a clear sense of what constitutes “the going rate”⁵⁹ for certain types of offending and offender. This can also be observed in a European trend.⁶⁰ During the Goettingen study, we as an international, inter-disciplinary research team were surprised about how much our systems factually had in common; how unified the vision of what kinds of offences and offender require what reaction by prosecutors has actually become.⁶¹ Whilst it is important to record the study recognising prosecutors as generally motivated to achieve positive social impact with the resources accessible to them,⁶² the predominant lesson of our research remains that a striving for efficiency is the core and dominant driver of system change. The tailored, individualised justice procedural codes and popular depiction lead us to expect have become exceptional. The decisive decision determining the state response to crime is usually taken by a prosecutor after a cursory look at key case characteristics.

Within this culture charge reduction and achieving “justice of sorts” has become a part of prosecutorial life and therewith criminal justice’s default setting. The UK provides an instructive example. It features a specialist agency to deal with the investigation and prosecution of the most serious frauds. This extract from its most recent annual report demonstrates the expectations it feels it has to meet:

UK SFO’s Annual Report 2016-17

“We continue to invest in **recovering the proceeds of crime** and obtained financial orders, including standalone compensation orders, totalling £25.3m, with payments received totalling £20.1m. Given the relatively **small number of trials** that we bring each year, our conviction rate can vary significantly. This year 13 defendants were convicted in seven cases, giving a conviction rate by defendant of 87% and by case of 100%. In delivering **value for money**, our outcomes this year have enabled us to achieve a **positive net financial impact** of £325m over the four years covering 2013-14 to 2016-17.” p.1

Source: Serious Fraud Office (2017 - *emphasis added*)

⁵⁹ For specific crime contexts see e.g. Sanders et al 2010, p. ; Wade (2009); note that office culture can counter-act such consensus even where legislated for, Krajewski (2012) p. 108 but also that the value attached to individual prosecutor independence in Italy may also stand against this, Ruggiero (2015) 80; on the difficulty of balancing with judicial power and constitutional principle there see Vicoli (2015) 147-151.

⁶⁰ Tonry (2012), 19 observes that many European systems have “well-established and frequently used diversion programmes” attentive to equal application and available even for even “moderately serious cases” (20).

⁶¹ See how strongly the various case-ending forms can be associated with various offences and types of offender, shown below in figure XXX. Note also the disquiet apparent in England and Wales at disposals being used differently e.g. to dispose of repeat offenders cases without imposing conditions, demonstrating agreement on this point - House of Commons Home Affairs Committee (2015) p. 5.

⁶² And indeed very significant individual efforts to e.g. increase the significance of procedures such as victim-offender mediation as a criminal justice response (see e.g. Brants (2010) 212-213) and some e.g., make specific efforts also to ensure that fines extracted from suspected perpetrators benefit organisations who support their victims (such as safe houses).

It is interesting to note that the Director of the Serious Fraud Office (SFO) also used press exposure to emphasise the expectation that those investigated must cooperate with his agency in order to benefit from the leniency of conditional disposals now available to it.⁶³ This is rational within the system setting of the SFO. However, it must be noted this is the very office charged with the criminal investigation and prosecution of the institutions responsible for the 2008 financial crisis and all the social harm it caused.⁶⁴ That their processes and public relations are steeped in the language of compliance and compromise is telling. Imagine what responses (political and in the media) equivalent language by police or a prosecution office dealing with any other category of serious criminal would attract.⁶⁵

This extreme example starkly highlights one central characteristic - and problem - of our justice systems as prosecutorial decision-making has become central. The over-whelming pressure to achieve efficiency and cost-effectiveness dictate that where criminal justice practitioners meet resistance, they compromise. Prosecutors, police officers and indeed even legislators will most likely meet resistance when investigating powerful suspects. Such pressure makes "low-hanging fruit" all the more attractive.⁶⁶ Our systems have effectively become primed to ensure full investigation and prosecution of the conduct of the powerful are very significantly hampered by our dedication to efficiency.

3. WHAT PROSECUTORS REGARD THEMSELVES AS DOING

In spite of this portrayal of the sum of what prosecutors do, there is every reason to believe they would - across Europe - take great umbrage to any suggestion they are undermining criminal justice in any way. Prosecutors are more likely to insist that they take decisions as outlined above with the express intention to preserve their criminal justice systems and the constitutional principles they operationalise. Given the reality they find themselves facing, their chosen path is the only route to preventing the collapse of this system. In interviews with prosecutors,⁶⁷ researchers repeatedly establish that prosecutorial decision-making and actions are principled in nature. When pushed as to why specific decisions are made, I have experienced prosecutors frequently looking baffled and - after some pause for thought - asserting very fundamental, constitutional principles as guiding their work. Although this point is far from empirically established, it chimes with (results from studies including participant observation alongside interviews) Boyne's conclusion that "The soul of the German prosecution service resides in the ongoing commitment of individual prosecutors to the Rechtsstaat"⁶⁸ and Hodgson's⁶⁹ finding that "the conventional 'ideals' retain a continuous force and relevance for procureurs, who describe their work (both as they understand it to be and as they would wish it to be) in these terms and whose crime control orientation is shielded by redefining it in terms of "representing the public interest."

⁶³ Ruddick 2017 Serious Fraud Office boss warns big names to play ball - or else

⁶⁴ Note also the apparent political recognition that the current situation is inadequate - see (Travis 2017).

⁶⁵ See Alge (2013) section 6.2. for such extrapolation of the logic of the BAE systems settlement.

⁶⁶ See e.g. Hallsworth (2006).

⁶⁷ Documented in e.g. Albers et al (2013), Wade (2008) and (2011).

⁶⁸ P. 271. this Rechtsstaat is, of course, associated with the principle of mandatory prosecution.

⁶⁹ 2002 p. 228 (fn 4). Note also Hodgson's surprise at this as a finding which emerged after interviews rather than an expected structural feature.

Despite the persuasiveness of such principled thinking, one need not look far to find evidence of prosecutors thinking very pragmatically on such points. Some chief prosecutors declare their systems as unable to cope⁷⁰ and when questioned about specific practices, prosecutors do also defend as necessary the decisions causing the patterns of case-endings described above. Arguments one would associate with Packer's crime control model⁷¹ are also easily found.

Nevertheless, abhorrence at US style plea-bargaining is pervasive across Europe. Practice there is regarded as coercive, taking unconscionable risks of convicting innocents and imposing hideously disproportionate punishment.⁷² The distinct prosecutorial cultures to be found across Europe highlight professional dedication to not doing this. Ultimately the use of the "classic" full trial so consistently across Europe also suggest that prosecutors do subscribe to the ideals of justice and make very considerable efforts to ensure that serious offenders - as defined by the current norms of the system - face justice in the terms described as ideal by that system. The most serious punishment - deprivation of liberty - is consistently achieved across Europe via full trial (clearly distinguishing criminal justice systems there from US American models).

Explaining human attitudes and behaviour in a one-dimensional manner would be a counter-scientific undertaking. It would be odd to expect any kind of purist professional culture particularly when forged - as are prosecutorial ones across Europe - under considerable practical pressures. As indicated above, however, there is not a sufficient basis of evidence upon which to draw conclusions about what motivates prosecutors across Europe. Indeed, if for example one accepts Packer's models of criminal process, given the dominance of crime control rhetorics, it would be odd to find prosecutors not also espousing such values. Nevertheless the due process model, encapsulating constitutional ideals, also embodies powerful arguments likely to be attractive to lawyers sworn to uphold their constitutions. And those studies available documenting prosecutorial behaviour do indeed indicate these as important. Why else do prosecutors assign those they are convinced have committed the most heinous crimes to procedures most strongly protecting their human rights? It seems plausible therefore to assume that prosecutors do also subscribe to the core or ideal values our criminal justice systems espouse. The dedication they express in interviews to constitutional values is genuine.

Given the results produced in the majority of cases by the criminal justice systems those prosecutors populate, however, the question is raised how prosecutors can demonstrate such devotion to values they must be regarded as effectively undermining with a majority of their actions? Prosecutors can thus be added to the groups of criminal justice professionals clinging to a belief in their role apparently contradicted by the reality of everyday practice.⁷³

How prosecutors see themselves is, furthermore, not only important for its own sake. Its influence reaches well beyond national criminal justice systems. The most obvious example is provided by the establishment of a European Public Prosecutor's Office (EPPO) within the

⁷⁰ - reference to "public would understand if we were able to explain"; law and policy article (reviewed)

⁷¹ Packer (1964).

⁷² Bachmeier (2010).

⁷³ See Newman (2013) on legal aid defence lawyers in the UK and Shiner (2010) on police officers believing their own "colour blindness"

framework of the European Union.⁷⁴ That amounts to the creation of a supra-national criminal justice agency at the European level. This revolutionary step is being undertaken in recognition of the failure of national systems to deal with crimes compromising the financial interests of the European Union.⁷⁵ It is justified by the serious nature of the organised crime being undertaken. Given the traditions prevalent in many EU member states, one might reasonably expect the EPPO to operate based upon a principle of mandatory prosecution. Indeed this would be consistent with the mechanisms the Goettingen study demonstrates systems resorting to in order to ensure court time can be devoted to such serious crime.

Legislative negotiations were, however, steeped in the understanding that prosecutors dealing with financial crime negotiate and do deals with those they suspect of wrong-doing.⁷⁶ Interestingly records of negotiation within the Council demonstrate that the power to facilitate a negotiated case-ending (the so-called “transaction”) was the subject of intense debate. A few member states questioned whether such a power should be granted but others insisted this power must be far greater.⁷⁷ The clear majority viewed such powers as important. The solution reached and passed into law as article 40 of the EPPO Regulation could not see EU law predetermined by domestic law any more strongly. The EPPO can now end cases in accordance with the criminal procedural options available in the member state in which a case is being dealt with.⁷⁸ The domestic norm will determine supra-national prosecutorial practice. This revolutionary office is not expected to tackle the crimes falling within its remit in a revolutionary manner. The supra-national level is learning directly from the domestic. This despite the EPPO’s very *raison d’être* being that the criminals it should be countering are well-resourced, organised and operating across transnational boundaries. Again it seems the crimes of the powerful benefit most clearly from systemic learned dedication to efficiency, especially when achieved via bargaining.⁷⁹

The central point is clear. Negotiated case endings and informal case-disposition have become so integral to criminal justice responses to crime that any idea of not giving prosecutors negotiating and discretionary powers is generally viewed as ridiculous. The dominant prosecutorial culture established across Europe overshadows our practical concept of justice to such an extent that even new systems - intended to deal with entirely different or only a very limited proportion of criminal phenomena - automatically become marked by it. Individual prosecutors too learn their trade in domestic settings, grow to understand what it is to be a prosecutor in their first role and carry those lessons with them throughout their careers.⁸⁰ This may act as a useful check on the exercise of powers, preventing extremes seen

⁷⁴ See Proposal for a COUNCIL REGULATION on the establishment of the European Public Prosecutor's Office COM/2013/0534 final - 2013/0255 (APP) resulting in Regulation (EU) 2017/1939.

⁷⁵ See European Commission (2013a).

⁷⁶ Such logic can also be found within national systems: see Mazzacuva (2014), King and Lord (2018).

⁷⁷ Justice and Home Affairs Council, 2016, 5. and annex 1.

⁷⁸ Regulation 2017/1939. See Raffaraci and Belfiore (2019).

⁷⁹ For an analysis of different defendants ability to “play the system” see Alge (2013) section 5, see also Brants (2010) 184, 205-206 for bargaining occurring due to the power of the adversary. Note also the nexus between increased discretion and degradation of equality before the law - Asp (2012) 155.

⁸⁰ Boyne (2007), Roth (2013), Thomas III (2008) and e.g. A.B.A 1992 and Sullivan et al (2007).

elsewhere;⁸¹ nevertheless they are pervasive and will also transcend the national sphere, when career trajectories do.

The volte face of international criminal justice might also be explained (at least partially) in this way. When plea-bargaining was first discussed in that context in the mid-1990s, Cassese's abhorrence to it marked the system.⁸² Less than 10 years later, as the system began dealing with an overwhelming case-load, the practice became prevalent.⁸³ Prosecutors faced with an all too familiar problem, reverted to their routine tools to solve it.

Such developments should highlight the urgency of understanding prosecutorial work. Not only is transparency concerning how criminal justice systems deal with the bulk of cases desirable. The frameworks practitioners and politicians take for granted in the "production" of criminal justice deeply mark our national criminal justice systems as well as any extensions of punitive reach. Deeper knowledge facilitating reflection upon these practices and their effects is surely all the more important, therefore, as transnational criminal justice grows in import.

4. RECONCILING PROSECUTORIAL BELIEFS AND ACTIONS

In order to illuminate how the study findings can be reconciled with continuing prosecutorial belief in traditional justice "values", this paper applies a framework developed by Gresham Sykes and David Matza. The Techniques of Neutralization⁸⁴ is a seminal criminological paper published in 1957 and will doubtlessly surprise when raised in a paper of this kind. It is, after all, sub-headed "A Theory of Delinquency" and addresses juvenile delinquency specifically.

The purpose of this paper is not to suggest that prosecutors across Europe are engaging in delinquent conduct. Rather, Sykes and Matza's framework demonstrates how behaviour seemingly challenging overarching norms can be undertaken even though the validity of those norms is, in fact, recognised and valued by the individual undertaking that action. It is a theory demonstrating how the language of exceptionalism can facilitate the undermining of a norm, without the overriding belief in the correctness of that norm ever being called into question. This paper thus conducts an examination perhaps best described as inspired by this seminal framework.

This exploration is not seeking to imply that prosecutors, in the main, are engaging in these practices for any other reason than to maximise the positive effects of their work, given the resources at their disposal. There is no intimation of individual wrong-doing. The suggestion is far more, that our systems, as a sum of all of these individual, seemingly rational and justifiable decisions, are mutating into something very different than what we as societies - including prosecutors - intend and presumably would want. Alongside explaining how prosecutors can do one thing and genuinely believe another, Sykes and Matza's scheme also highlights starkly the impact prosecutorial practices are having. As a tool, the techniques of neutralisation demonstrate how, as the exception has become the norm, the way in which the majority of

⁸¹ as suggested by Damaška (1975) see also Luna/Wade (2010), Part III.

⁸² See Morris/Scharf (1995), 652.

⁸³ See Damaška (2010), 101 et seq. Though on the issues involved see Amory-Combs (2012).

⁸⁴ Sykes and Matza (1957).

cases are dealt with by criminal justice systems has altered the very nature of what these systems as a whole achieve.⁸⁵

4.i. Sykes and Matza's "The Techniques of Neutralization"⁸⁶ and Prosecutorial Practice Analysed

Sykes and Matza fundamentally challenged the idea that all rule-breaking is grounded in an idea that the rule lacks validity for those breaking it. They challenge the notion that subcultural theory and theories of anomie - and thus rejection of the dominant social norm by groups encompassing individuals who undertake criminal behaviour - explains offending. They cite their observation of juvenile boys being questioned about delinquent behaviour very much understanding a difference between good and bad, acceptable and unacceptable behaviour. Indeed they demonstrate the boys as not only acquiescing to but agreeing with the overriding social norms they find themselves accused of breaching. Sykes and Matza highlight that these boys, however, proffer reasons why their behaviour is justified or excusable summarised in 5 "techniques of neutralization."

These are as follows:

- denial of responsibility,
- denial of injury,
- denial of victims,
- appeal to higher loyalties, and
- condemnation of condemners

These techniques allow the boys to engage in "bending" the dominant normative system-if not "breaking" it" explaining how deviance can be coupled with values aligned with dominant morality protected by laws. Sykes and Matza state: "one of the most fascinating problems about human behavior is why men violate the laws in which they believe"⁸⁷ They explain the techniques they identify as providing "*justifications for deviance.*"

This paper utilises this theory to analyse prosecutorial behaviour in European jurisdictions and generate a clear understanding of how the impacts identified by the Goettingen study and beyond are produced, despite the professionals involved making very significant efforts to uphold the dominant normative system. The deviance or breach under discussion here is not of law; but of the idealised notion of criminal justice; the 'procedural norm' framed as central by our criminal procedures (and popular depictions thereof). This idea includes, public open trials allowing for a full presentation of evidence by both sides, marked clearly by a presumption of innocence operationalised e.g. through the right to be heard. The result of any such trial is individualised justice. Condemnation occurs after a prosecutor convinces more than one person (not infrequently several lay persons or professional magistrates or a combination of the two) of the correctness of the view - and legal evaluation - she has formed of an event. Justice is then served by a response tailored specifically to the defendant and possibly responsive also to the victim.

⁸⁵ See also Ashworth and Zedner (2008) and (2015).

⁸⁶ Sykes and Matza (1957),

⁸⁷ p. 666

This paper invites the reader to step away from a strict application of Sykes and Matza's theory and consider this framework applied to prosecutors undertaking their jobs in adherence to the law. Some of the prosecutorial practices developed across Europe - and indeed now enshrined in law - demonstrate some equivalency to the factors discussed by Sykes and Matza. In striving for efficiency, prosecutors can be seen deviating from the norms there is evidence to suggest they hold dear.

4.i.a. Denial of Responsibility

Sykes and Matza identify a denial of responsibility as occurring when individuals explain their behaviour as dictated by "forces outside of the individual and beyond his control;" responsibility for delinquent acts is ascribed by the suspect e.g. to the bad neighbourhood lived in.⁸⁸ Our criminal justice systems do frequently refuse to deal with criminality and deny their responsibility to so do in many ways. Although the headline purpose of criminal justice systems is to ensure all crimes against humans are dealt with, the factual ability of criminal justice systems to cope is predicated on their denying responsibility for significant numbers of crimes.

The important point to stress here is that prosecutors work in settings always primed to deny responsibility for many crimes against humans. The material scope of criminal justice systems is established by the parameters of the criminal law. Ironically this is expanding rather than contracting across Europe, just as our systems struggle to cope.⁸⁹ A traditional way of denying responsibility is via jurisdictional rules. More recently, this is being recognised as problematic and exceptions are made to ensure e.g. that citizens who deliberately travel to less well-regulated jurisdictions can be held accountable for crimes of child abuse they perpetrate there.⁹⁰ Nevertheless a western European citizen accusing a fellow citizen e.g. of selling a counterfeit life vest to a refugee on a Turkish beach - even if that vests turns into a millstone which precipitates the death of a child wearing it when a vessel capsizes - will likely be told by the criminal justice system she might naturally turn to, that this is purely a matter for Turkish authorities. *Locus regit actum (the place governs the act)*, no matter how morally abhorrent actions may be.

This well-established and fundamental principle geared to deny responsibility poses problems for the pursuit of transnational crimes as prosecutors are fundamentally predisposed to looking mainly to criminality occurring within their borders and to limiting their professional interest to such.⁹¹ This context demonstrates all too clearly how resourceful and organised offenders can use such presumptions to ensure their crimes go undetected or at least not fully pursued and comprehensively punished.⁹² The impotence of criminal justice systems faced with schemes defrauding victims via telephone or internet scams stemming from abroad⁹³ highlight groups of victims criminal justice systems fail to secure justice for in this way. This will become a greater

⁸⁸ p. 667.

⁸⁹ see e.g. Morris (2008).

⁹⁰ See e.g. s. 72 of the British Sexual Offences Act 2003. The exceptions made to the UK's strict jurisdictional regime are summarised in Archbold (2019) 2-35-2-88 and CPS guidance available at: <https://www.cps.gov.uk/legal-guidance/jurisdiction>

⁹¹ See e.g. Wade (2009).

⁹² See e.g. European Commission 2013a.

⁹³ highlighted in Roth (2013).

challenge for our criminal justice systems as victimisation via such paths increases. It is, however, the traditional base-line of our systems.

European criminal justice systems do, however, also feature newer mechanisms by which this technique is engaged. Addressing socially harmful behaviour is increasingly a task not ascribed to criminal justice systems.⁹⁴ Where this forms part of a principled effort to decriminalise less serious behaviour, the arguments of this paper provide strong reason to support this.⁹⁵ Where, however, this is done in relation to behaviour entailing serious social harm it is problematic; threatening to undermine the very essence of criminal justice.⁹⁶ At a systematic level, criminal justice responsibility is denied via the creation of alternative systems meaning that some socially harmful behaviour is not subject to the same social stigmatisation nor faces as potentially effective and stringent regulation and punishment. The most obvious example of this is the compliance based response to the 2008 financial crisis.⁹⁷ It is telling that it was the finance ministers of EU countries who met in Brussels to discuss further regulation and not those concerned with criminal law enforcement.⁹⁸ Such a response better accommodates the crimes of the powerful particularly as circumstances change and they are able to undertake more sophisticated forms of criminality.⁹⁹ It seems reasonable to expect prosecutors to mirror such approaches, defining out crime where the fit to the traditional boundaries of their tasks is not obviously met. *"I am a prosecutor of country A, an act in country B even if perpetrated by or against one of my citizens, is not my responsibility"* - is a thought pattern to be expected. Adaptive interpretation of criminal norms in order to pave the path to prosecute behaviour which could be defined as criminal as times and modes of perpetration change is not to be expected simply because it adds to an already excessive workload.¹⁰⁰ The "neighbourhood" prosecutors work in will not allow such dynamic adaptation.

⁹⁴ Ashworth and Zedner (2008), Hunt (2014), Lacoëur (2018)

⁹⁵ Note also that despite broad efforts to "westernise" after the fall of the iron curtain, many formerly communist European countries have retained the group of less serious offences - including theft below a certain value - to be dealt with by social or community courts rather than the criminal justice system. See Bulenda et al. 259, Thaman (2010), 333.

⁹⁶ Ashworth and Zedner (2008); Hunt (2014); Wade (2009). Note also the British Government's suggestion that it will accept an EU Framework Decision on Defence Rights in Criminal Proceedings if terrorist suspects are excluded from the presumption of innocence (Discussed at EU Presidency Conference (2007)).

⁹⁷ Though note that one European jurisdiction (Belgium) long associated with resistance to prosecutorial discretion on a principled basis, did attempt to respond by criminal prosecution - only to find its efforts frustrated by a deal already reached with Dutch prosecutors. See Reuters 2013 and 2013a, Toussaint (2014). This resulted in a Belgian prosecution being barred under the *ne bis in idem* rules resulting from art. 54 of the Convention Implementing the Schengen Accord (for detail see Tchorbadjiyska (2004)). This is the logic of the EU approach to *ne bis in idem*, see Ruggiero (2015) 61. Davis (2016), 100 assesses US refusal to limit prosecution after case-disposal measures in other jurisdictions as having a chilling effect on the development of such measures.

⁹⁸ Council of the European Union (2009), 8. Note also the case of a multi-national too big to prosecute King and Lord (2018), 78 et seq.

⁹⁹ Again see the arguments behind the creation of an EPPO demonstrating the dangers of leaving an enforcement lacuna, making certain crimes attractive to highly-resourceful defendants European Commission (2013), 2.

¹⁰⁰ Consider e.g. calls for misogyny to be treated as a hate crime - Quinn (2018) - and the Grenfell fire to be viewed as murder, Norrie (2018). Of course, expansive interpretation of norms is not desirable from a rule of law point of view and is not what is being advocated here. The point is that the boundaries delineating prosecutorial responsibility can leave lacuna as social norms and factors like, e.g. mobility, change.

It is important to stress that such denial of responsibility cannot be explained only by overloading and a consequential search for efficiency. On the one hand, alternative systems are developed to avoid the procedural protections of criminal justice viewed as overly onerous by some e.g. in the counter-terrorist context.¹⁰¹ On the other hand, the failure to incorporate responsibility of very socially harmful behaviour can be viewed as accompanying the informal development of coping mechanisms as traced above. If legislative reform occurs only post-facto to establish as lawful practices developed by frontline practitioners,¹⁰² it is not outlandish to suggest that the law is developing without regard to higher principle, nor indeed with the desired oversight of the system as a whole.¹⁰³

The prosecutorial practices now dominating how cases are dealt with by criminal justice systems are stop-gap measures. Yet principled reform is what would be required for coherent action to tackle crimes against humans, particularly if regulation of the powerful is expected. Any frontline practitioner struggling to cope with their workload is likely to dismiss as absurd any (un-resourced) attempt to broaden their remit, let alone require them to become familiar with complex new substantive areas or to work increasingly combatively against well-resourced defendants.¹⁰⁴ Since legislators take reforming impetus from this group of professionals, their main concern - workload reduction - will be the transferred primary concern. Furthermore if this groups is more likely to resist being allocated such work, socially harmful behaviour perpetrated by more powerful individuals is even less likely to feature on a reform agenda to be tackled by the criminal justice system.¹⁰⁵ As the financial crisis shows, those with the political and social capital to push for criminal justice reform are unlikely to do so for white collar crime. Systems struggling to cope - whose professionals might lend any calls for reform credibility - are unlikely to be responsive to any push for an increased remit.¹⁰⁶

Our overloaded criminal justice systems and those working within them are practically forced to say that they cannot take on responsibility for matters it might well be desirable for them to. The creation of systems parallel to the criminal justice system invite stretched prosecutors to deny their responsibility for behaviour which could be covered by alternatives. Criminal justice practitioners indeed truthfully parallel the youths in Sykes and Matza's study asserting that preventing the social harm in question is a matter beyond their control.

¹⁰¹ Secretary of State for the Home Department (1998) 7.11-16.

¹⁰² As evidenced above, see also Alenhain (2010) 159.

¹⁰³ For an insight into how the pressures of practice lead the law see also Alge's (2013) account of how the plea agreement powers given to the UK SFO were not intended to facilitate plea-bargaining and how the latter received official standing within 3 years.

¹⁰⁴ See the response of prosecutors on detection of trafficking human beings reported in the EuroNEEDs study analysed in Wade (2011), 168-169.

¹⁰⁵ This is, for example the logic of negotiating case-ending powers for the EPPO.

¹⁰⁶ See e.g. a recent declaration by the Metropolitan Police that it is unable to consider treating misogyny as a hate crime - Quinn (2018); Also Thornberry, 2013.

4.i.b. Denial of Injury

The second technique highlighted is the denial of injury described by Sykes and Matza as offenders questioning “whether or not anyone has clearly been hurt by his deviance” or asserting that “behavior does not really cause any great harm despite the fact that it runs counter to law.”¹⁰⁷

Our criminal justice systems in parallel seem to converge strongly around an idea that whilst behaviour encompassed by them is all criminal, not all of it is sufficiently harmful or unjust to justify the consumption of sparse and valuable resources on a reaction. Across Europe prosecutorial practice is led by guidelines on use of diversionary powers and practice. As demonstrated by the Goettingen study results, there is clear evidence of European values in this regard.¹⁰⁸

The following diagram demonstrates the use made of the various case-ending possibilities in study countries:

Use of Case-ending Options

Option	Used
Simple drop (insufficient evidence, technical reasons)	
Drop (public interest)	1 st time offenders Petty theft, cannabis possession, less serious violent offences, minor property offences
Drop for procedural economy/efficiency reasons	Where other more weighty charges brought/heavier sanctions expected
Conditional disposal	Usually 1 st time offenders, Petty theft, cannabis possession, less serious violent, traffic and minor property offences Condition attached: fine, mediation, community service
Penal order	Recidivists Less serious violent, traffic and minor property offences To achieve: fines
Other simplified/accelerated proceedings	

Source: Wade (2006)

Where decriminalisation and discouraging punitivism drive the agenda, the coherence of prosecutorial behaviour across Europe appears rational and indeed laudable. Criminal justice systems do, however, currently claim to form a system to punish all of these crimes. As the debate surrounding proportionality of use of the European Arrest Warrant has also shown, the effect of relatively minor crimes varies according to who is victimised.¹⁰⁹ Whilst a theft of 50 Euros may not matter to some, to others it may constitute a significant loss. Furthermore, where repeat victimisation comes into play, each individual case may reasonably be disposed of, in accordance to the pattern shown above, but the overall damage done may be considerably greater.¹¹⁰ Any individual (or indeed business) so affected may feel aggrieved and let down by the criminal jus-

¹⁰⁷ Sykes and Matza (1957), p. 667.

¹⁰⁸ See also the parallels with Norway, Strandbakken (2010), 246-248, 250-251, for Denmark see Wandall (2010), 223, 236-238, Croatia - Krapac (2010), 259.

¹⁰⁹ Haggemueller (2013) 100.

¹¹⁰ Chakroborti, N. and Garland, J. (2015), 6.

tice and the state in turn. Particularly where expectations have been raised by victim-inclusive rhetoric, this sense of disappointment may erode the legitimacy of criminal justice systems.¹¹¹

Even when cases are taken forward, evidence points to prosecutors systematically reducing charges to fit them into categories allowing for less resource-intensive treatment.¹¹² Not pursuing evidence of racial motivation for instance can mean an assault qualifies for a prosecutorial drop or that a case which would require referral to a higher court, can be dealt with more quickly in a lower one. The treatment of cases recorded by the statistics is the treatment of cases as categorised as prosecutors. They may see ordinal proportionality in their designation of files and regard their professional duty as done by achieving justice of sorts. Victims may feel the justice done in their name is anything but, particularly if significant features of their injury are ignored and therewith, effectively denied. Parallel to Sykes and Matza's findings, prosecutors are signalling that they regard (at least) certain (aspects of) injury as not really causing harm sufficient to be acknowledged by criminal justice processes. The ideal of individualised, tailored justice is thus normally abandoned.

4.i.c. Denial of the Victim

The next technique does not deny the factual harm caused by a delinquent act but relativises its significance, declaring in Sykes and Matza's words that "the injury is not wrong in light of the circumstances." They explain "Insofar as the victim is physically absent, unknown, or a vague abstraction (as is often the case in delinquent acts committed against property), the awareness of the victim's existence is weakened."¹¹³

Legislation formulating prosecutors' options to utilise drops and disposals speak of these as appropriate for cases in which e.g. the defendant's guilt is minor.¹¹⁴ One of the factors impacting upon this includes a victim's behaviour.¹¹⁵ Given how prosecutors construct cases with regard to their options (as shown in 4.i.b.), it would be surprising if such construction did not sometimes also extend to denial of victimhood, e.g. by qualifying the victim as equally blameworthy and thus opening the door to the use of drops and disposals for instance.

For the purposes of this paper, this technique can be evidenced more strongly as a denial of the "relevance" of the victim. Many of the procedural options available to prosecutors - when driven by a need for efficiency - necessitate a sidelining of the factual experience of the victim. The very logic of plea bargaining or any negotiated/in any way consensual case-ending¹¹⁶ is

¹¹¹ Or prosecutors as responsible for such trends see e.g. Brants (2010) 217. Note also that such disappointment can manifest in more concrete problems for the criminal justice systems, such as victims' refusal to participate as witnesses in the future and to advise friends and family against so doing. See e.g. CPS Victim and Witness Satisfaction Survey September 2015 - Wood et al, 34 et seq.

¹¹² See e.g. Thaman (2010) xxix et seq.

¹¹³ Sykes and Matza (1957), 668.

¹¹⁴ See e.g. 153a of the German Code of Criminal Procedure available in English at https://www.gesetze-im-internet.de/englisch_stpo/.

¹¹⁵ See guidelines, e.g. BOS-Polaris - van den Bunt/van Gelder 2012, 124 and 129; Code for Crown Prosecutors (2018), 4.14.c

¹¹⁶ Which is what the discussed mechanisms are, defendants forego their right to a trial and to appeal - on the importance of this aspect, see Bachmaier (2018) 257.

that both sides will cede something. The prosecution side usually incentivises a defendant by a reduction in charges or punishment.

Charge bargaining or charge reduction¹¹⁷ in order to elicit a guilty plea ensures that the legal qualification of an act is lesser than it might be viewed at court. Either not all crimes are considered¹¹⁸, or aggravating factors are ignored, harms qualified etc. The person suffering such harms is unlikely to agree with such reductions. As outlined above, they may well be disappointed by their experience becoming side-lined and relativised as the routine of the system takes hold. Victim empowering measures provide clear indication of this; they allow victims to tell the entirety of their story and the impact of a crime, including factors not considered relevant by the law.¹¹⁹ The narrowed consideration of even those latter factors during prosecutorial decision-making contributes to a reduction of the legitimacy with which criminal justice systems are viewed.¹²⁰

Diversion proceedings (though doubtlessly positive from a victimological point of view where e.g. victim-offender mediation becomes an option) fundamentally deny the relevance of victimhood for criminal justice purposes. They intimate that the experience of victimhood by an offence is less important than other factors. Where that factor is the victim's desire to participate in mediation, or indeed to receive compensation, or see that the perpetrator seeks treatment, this should not be viewed as problematic. Given, however, that the majority of diversionary measures are used to serve the efficiency of the system, to save it money (or indeed serve to raise funds for the state), this is a very different matter.

A prosecutor's decision that e.g. the interests of justice do not demand any further action or anything beyond a fine, is a decision which sidelines and relativises the harm done to the victim in comparison to broader societal goals.¹²¹ It has nothing to do with the individualised justice usually promised in principle by criminal justice systems.

It is central to recognise that charge reduction results from rationalisation inherent to practitioners treating the content of criminal justice processes as a routine matter. Overload has primed the system to ignore individual features of crimes, victims and indeed perpetrators. Charge-bargaining is e.g. often engaged in to facilitate avoidance of courts incorporating lay participants.¹²² This demonstrates that such decisions are driven by resource considerations as procedures before such fora require greater amounts of time and indeed carry a greater risk of less controllable outcomes.¹²³ Motivation of this kind side-steps victim-related issues demonstrating criminal justice systems' denial of the relevance of the victim to the desired

¹¹⁷ On the distinct difference, see Hodgson (2012) II.A.

¹¹⁸ And note the need for such an option to be specifically legislated for in European criminal justice systems traditionally adhering to a stringent interpretation of the principle of legality, e.g. Poland see Rogacka-Rzewnicka (2010), 283.

¹¹⁹ For a description of victim participation measures, see Braun (2019), 1 et seq.

¹²⁰ On this concept in relation to corporate crime and negotiated justice, as well as the myriad of relevant perspectives see King and Lord (2018), 23-30.

¹²¹ Note the acknowledgement of this inherent in requiring prosecutors to explain such decisions to specific groups of victims in a few jurisdictions (e.g. rape victims in Britain) – Ministry of Justice (2015).

¹²² Thaman (2010), xxix et seq.

¹²³ Thaman (2010), xxx.

case outcome. The structure of options developed by prosecutors to allow them to cope with overload provide ideal categories for them to engage in the technique described by Sykes and Matza “awareness of the victim’s existence is [indeed] weakened.”

4.i.d. Condemnation of the Condemners

Sykes and Matza describe a fourth technique by which juvenile delinquents respond with hostility to an accusation of wrong-doing; those suspects emphasising that, in fact, it is the system which sees fault in them which is flawed. In this way, Sykes and Matza explain the juvenile “has changed the subject of the conversation in the dialogue between his own deviant impulses and the reactions of others; and by attacking others, the wrong-fulness of his own behavior is more easily repressed or lost to view.”¹²⁴

Raising this technique is perhaps somewhat jarring in this context. A parallel can, however, be identified if we consider a suspect, offered a conditional disposal or facing a prosecutorial drop, who wishes to insist upon his or her innocence. Despite not featuring the extremes of the United States system, European criminal justice processes increasingly demonstrate features which exert pressure to comply upon individuals made the subject of such proceedings. Even conviction by penal orders can only be appealed against for between 8 and 30 days. Surely justice would be better served by suspects being given more time to understand the letter they receive and to e.g. seek legal advice? Why is there evidence of prosecutors using public interest drops to end cases which might more obviously be qualified as simple drops? Could this be because e.g. victims can appeal against a technical decision, not however against a discretionary one?¹²⁵ The dynamics of systems reflected by such features are of efficiency. Mechanisms making it difficult and risky to withstand this, confirm this but also demonstrate clearly the disregard the system has for such individuals.

Overall as such individual decisions make up a system, what happens to those who try to insist upon classic criminal proceedings and full rights or comprehensive prosecution? As seen in the context of negotiations for the EPPO,¹²⁶ they are usually viewed as unrealistic. They are perhaps not condemned, but also not taken seriously.

Furthermore, the debate surrounding criminal justice - in turn influencing prosecutors as well as influenced by them - does demonstrate activity more fitting to the condemnation of the condemners technique. The fate of those who insist upon full procedural rights for suspected terrorists or even potential European arrest warrant detainees is to be labelled “friends of criminals.”¹²⁷ Try to imagine insisting upon recourse to normal criminal proceedings as the norm in any of our systems without being laughed out of the room as an idealist waster of resources.¹²⁸

¹²⁴ Sykes and Matza (1957), 668.

¹²⁵ Weigend (2004).

¹²⁶ See below around footnote 138.

¹²⁷ See e.g. Higgins (2018); Johnston (2005 and e.g. Downey et al (2012), 246

¹²⁸ Again, proponents of an EPPO without negotiating powers were treated as having no understanding of prosecutorial reality (even though, of course, no EU level prosecutorial reality of this kind exists yet).

In relation to the crimes of the powerful, condemnation of the condemners is also more apparent. To date the financial capital of Europe is the City of London. Although strongly under fire for their role in triggering the financial crisis of 2008, companies there are central in pushing for the “anti-regulation” stance adopted by the UK Government¹²⁹ since 2015. Those who condemn as criminal the actions of banks or property managers are labelled the enemies of business, even in the city of banks caught falsifying interest rates and in which 72 people burned to death in their homes in the horrific 2017 Grenfell tower fire.¹³⁰

At the EU level, budgetary constraints are mobilised to shut-down discussion on rights provision. Even the most liberal EU Parliamentarians capitulated in the consideration of the Commission’s Access to a Lawyer Legislation.¹³¹ This provided for access to legal counsel for defendants at a level currently not available in many member states which met fierce resistance over the question of who would pay for such provision.¹³² The hard line of budgetary concern trumps and is, however, an acceptable vehicle to condemn those who insist criminal justice systems should feature meaningful procedural rights. Interestingly the member states seemingly command no such deference when it comes to funding punitive measures at the EU level. The funding of joint investigation teams through Eurojust and Europol,¹³³ for example, has never encountered any parallel resistance.

Condemnation of those who object to mechanisms developed under the guise of efficiency is cased in neutral, often financial (actuarial) terms but it is a perceivable feature of our criminal justice systems and debates surrounding them.¹³⁴ Citing the reality of their daily lives to objectors, provides prosecutors with the ability to engage this technique.

4.i.e. Appeal to Higher Loyalties

Of the techniques offered by Sykes and Matza’s framework, the appeal to higher loyalties resonates most easily with this paper’s subject matter.

As Sykes and Matza¹³⁵ put it:

“the delinquent may see himself as caught up in a dilemma that must be resolved, unfortunately, at the cost of violating the law”

“deviation from certain norms may occur not because the norms are rejected but because other norms, held to be more pressing or involving a higher loyalty, are accorded precedence”

Where prosecutors recognise that some of their work¹³⁶ does not sit comfortably with the procedural ideals their system espouses and they attach value to, they will doubtlessly - and indeed reasonably - point to practice not as designed to undermine such principle but to

¹²⁹ See OECD (2016), UK Government Red Tape Challenge and e.g. Rigby (2015)

¹³⁰ See Bennett (2018), Wheeler (2011), for US BBC News (2017).

¹³¹ European Commission (2011).

¹³² See e.g. Ludford (2013).

¹³³ See e.g. <http://www.eurojust.europa.eu/doclibrary/JITs/jits-funding/Pages/ARCHIVE/jits-funding.aspx>

¹³⁴ Strongly echoing a technique highlighted by Simon (2008) 25-26 as used to “govern through crime.”

¹³⁵ (1957), 669.

¹³⁶ e.g. Sun-Beale (2015) 38, 50-52.

preserve the functionality of the system as a whole. Procedural ideals are anchored within higher, more theoretical levels of the law (often constitutional) and be reflected e.g. in prosecutors' oaths of office. That the nitty gritty of everyday practice does not always live up to such ideals, is hardly surprising. Nor can it always be deemed inappropriate. The ranking of cases and matching to the various procedural options available across Europe - as found by the Goettingen study - clearly demonstrates prosecutors as protective of criminal justice resources. This is particularly true of court time. They undertake such efforts not for their own sake but clearly in order to reserve such resources for the full "ideal" treatment of cases of particularly serious crime and where the liberty of the suspected offender is at stake. This is a profound difference to US American practices.¹³⁷

Criminal justice contexts are deeply marked by a higher loyalty to efficiency and cost-effectiveness than to the procedural principles laid down in codes. Only in exceptional cases are the latter regarded as factually necessary. Prosecutors and those administering their work have acted rationally as case-loads rise and resources become scarce. Within the parameters of the system, who could fault their decision-making?

The Goettingen study highlighted patterns consistent with prosecutors across Europe doing the best they can, with what they have.¹³⁸ There are clear patterns of principle from the prosecutorial vantage point. They demonstrate - in a pragmatic manner - professionals committed to the normative system and preserving it as best they can. The key point is that they are not in a position to do so in the vast majority of cases.

4.ii. Interim Conclusion

In 1957 Sykes and Matza¹³⁹ wrote "delinquent behavior, like most social behavior, is learned and ... is learned in the process of social interaction."

"“bending” the dominant normative system-if not “breaking” it-cuts across our cruder social categories and is to be traced primarily to patterns of social interaction”

In this consideration of prosecutorial work across Europe, applying this line of thought appropriately to these professionals is illuminating. Prosecutors are clearly not breaking the law¹⁴⁰ but this paper questions whether they cannot indeed be regarded, collectively, as “bending” the dominant normative system’ of our criminal justice systems?¹⁴¹ They do so to preserve their image of themselves and their work as serving an understanding of justice fundamentally forged by constitutional principles. In this way they can preserve their sense of doing highly meaningful, socially-useful work, even as the realities impacting the majority of their work chip away at its character and warp it in the manners described above. Seemingly in denial of

¹³⁷ See Luna/Wade (2010) 1496 et seq.

¹³⁸ Note expectations of more, not less such practice - e.g. Bachmaier (2018), 238. tracking this trend: Fair Trials International (2016).

¹³⁹ on pp. 664 and 669.

¹⁴⁰ Of course, it is to be acknowledged that some amongst this group will be. Where the powers highlighted above are utilised, e.g. in line with a discriminatory point of view or in accordance with corrupt practices, this is - of course - in breach of the law.

¹⁴¹ Alge (2013) section 7 e.g. views the SFO as “subverting the adversarial system”

the realities of their lived experiences, prosecutors nevertheless defend the ideals of criminal justice. Very much like Newman's use of Freud when examining defence lawyers whose daily reality contradicted the principles they honestly claimed to work for, this paper demonstrates the utility of Sykes and Matza's seminal lens for a new purpose. The perspective it lends enables us to understand the stark contrast between exasperated prosecutors and the horrified public reacting to headlines of criminal justice deals made with celebrities.¹⁴²

Readers may legitimately question whether the techniques described above are truly relevant to lawyers. Amongst such a huge group, it is certainly unlikely one explanation will prove sufficient. There is doubtlessly, furthermore, a difference between a German *Einstellung* and the Spanish *conformidad*. Nevertheless it remains plausible that highly trained, very skilled lawyers operating in these distinct professional cultures remain fundamentally committed to constitutional values. Utilised as above, Sykes and Matza provide insight into how observable practice is rendered compatible with such self-comprehension.

Even if denying the applicability of such techniques to prosecutors, readers might use them to reflect upon what our societies demand of prosecutors and other criminal justice professionals. After all, in debates surrounding criminal justice, even the most fiscally conservative - politicians, media, and public - tend to espouse strong justice values. Discourse is often marked by crime control in relation to offenders but the debate surrounding victims, treatment of the innocent, etc. bears hallmarks of cultural expectations framed by the ideal of the full trial.¹⁴³ Sykes and Matza's scheme provides illuminating insight when analysing our responses to crimes against humans as societies. Prosecutors, even if not engaging the techniques of neutralisation themselves, are at least the agents who do so on our behalf. It is elected governments which set the true parameters of criminal justice in the resources allocated to it. Public and media reaction to deals when made public, clearly signals to criminal justice professionals that we expect them to allow ourselves still to feel that we live in principled societies, with functioning justice systems worthy of the name.

5. THE INCREASING IMPORTANCE OF PROSECUTORIAL WORK AND KNOWLEDGE THEREOF

A key concern is that we do not know enough to truly enter into the debate this paper highlights we require. It remains important to emphasise the evidence of prosecutorial practice being significantly shaped by constitutional principle, the rule of law and values of admirable, public office.¹⁴⁴ Nevertheless, clear trends of considerable social impact going well beyond the efficiency gains desired are observable.¹⁴⁵

The rise of prosecutorial power across Europe has been an organic process to allow criminal justice systems to cope. They have faced a steady trend of increasing caseload (beginning to reverse in the last three years) twined with resource shortage accentuated by austerity.

¹⁴² E.g. cases against Ronaldo, BAE Systems, Rolls Royce (see Pratley 2017 and King and Lord (2018), 101 et seq), Helmut Kohl, Steffi Graf and Boris Becker.

¹⁴³ See e.g. Commissioner for Victims and Witnesses. (2010) and Victims' Commissioner (2015).

¹⁴⁴ See e.g. Boyne (2007) and Wade (2011).

¹⁴⁵ Jehle/Wade (2006), Jehle (2008) and Wade (2008).

Even prior to that response to the 2008 financial crisis, resource allocation was fundamentally marked by taxpayer's unwillingness to increase the funds available to state mechanisms. Given that the most obvious solution - decriminalisation - is politically unpalatable (and indeed more, not less, reliance upon police action and criminal justice systems across Europe seemingly desired¹⁴⁶), practitioner and particularly prosecutorial responses managing these systems seem reasonable. Indeed if legislators are forever extending the net of criminalisation¹⁴⁷, should we not be grateful to prosecutors on the other hand for ensuring procedural decriminalisation in practice?

Perhaps we should. Possibly European scholarship does not concern itself with the actions of prosecutors because the professionals who undertake these jobs work within office cultures which ensure such discretionary decisions are made in a reasonable manner.¹⁴⁸ The advent of these powers has, after all, not seen the ratcheting up of sentences and the coercive practices US American scholars concern themselves with.¹⁴⁹ There may indeed be some comfort to be taken from the apparent absence of over-charging¹⁵⁰ and lesser sentencing length.¹⁵¹ However, anyone familiar with critical criminological studies¹⁵² must surely balk at the idea that just use of power can be associated with increased, systemic discretion. There is little criminological basis to argue anything other than that discretion particularly when not properly held to account, facilitates discrimination and uneven application of the law.¹⁵³ Extensive discussion of unconscious and conscious bias for example would seem justified at this point.

The Goettingen study and what has followed here maps European jurisdictions as marching, one way or another, towards a mass production of guilty pleas with a number of dangers of increased injustice highlighted. Mechanisms marked, in all but exceptional cases, by the hallmarks of extreme actuarial justice¹⁵⁴ are the result. Systems become warped with prosecutors becoming "Erledigungsmaschinen" (literally disposal machines) identifying cases primarily as belonging to categories to be treated in a certain way.¹⁵⁵ Full attention and individualised justice as foreseen by traditional criminal procedure is lent only to the rarest, most serious cases. Everything else, all other crime and its victims, all other suspected criminals become objects of routine treatment. There is, of course, evidence that all criminal justice practitioners - even defence lawyers - become sucked into the logic of this system and what those who become entangled in it "de-

¹⁴⁶ Bauman, (1998).

¹⁴⁷ See e.g. the expansive nature of EU legislation on terrorism requiring the criminalisation of incitement and glorification offences; a significant extension into the preparatory realm - e.g. Derencinovic (2010) and Korosec (2010) and Decoeur, 2018; for the trend towards "endangerment" offences more broadly, see Sieber (2018).

¹⁴⁸ See Langbein and Weinreb (1978), Boyne (2007) and Luna and Wade (2010). On the dangerous influences of sustained culture in Poland see Krajewski (2012), 85-89, 91, 94, 108-9.

¹⁴⁹ See Langer (2006).

¹⁵⁰ See Tonry (2012), 21.

¹⁵¹ On the contribution of over-charging and sentence length to making negotiated justice coercive see Bachmaier (2018), 251 et seq.

¹⁵² And disciplines well beyond it: see in administrative law e.g. Forsyth and Hare (1997)

¹⁵³ See e.g. work on stop and search in the UK, particularly when the "restraint" of reasonable suspicion disappears - Bowling and Marks (2016), 15.

¹⁵⁴ Feeley and Simon (1994); on managerialism Leverik (2010), 154.

¹⁵⁵ Roth (2013), in the Netherlands (with computer-based support) van de Bunt and van Gelder (2012), 125-130.

serve.¹⁵⁶ As such criminal justice cultures transcend national boundaries, the urgency of comprehensively identifying and understanding these developments becomes all the more apparent. Deeper examination is, however, also required because the perspective of criminal justice practitioners is not the only one of relevance. Criminal justice systems hold political worth because their work is considered important by many in our societies.¹⁵⁷ How else is the failure to resort to decriminalisation in the circumstances outlined to be explained? Political rhetoric has furthermore specifically engaged victims,¹⁵⁸ underlining their importance and emphasising their participatory rights.¹⁵⁹ How our systems, altered as outlined, affect such promises is thus surely a further question worthy of study? It is hoped that the future will see a broader group of academics dedicated to revealing how shifts in prosecutorial practice and culture change criminal justice across Europe.

6. CONCLUSION

The point of this paper is decisively not to shame prosecutors seeking to cope in a principled manner under the circumstances in which they find themselves. It is an attempt to understand what they do and what it takes for them to currently do it. The fundamental point and challenge highlighted, is the clear tension between what “justice” should be - and systems (alongside media and dramatic representations) still communicate to the general public that it is -, and what it actually is, in the vast majority of cases. The findings examined here indicate strongly that there is clear divergence between the expectations of criminal justice practitioners and their „service users“ as to what they can reasonably achieve. The justice prosecutors expect to deliver will mostly be very different from what a victim or indeed a perpetrator might expect. The public outcries at negotiated case settlements involving celebrities are an illustration of a rejection - at the societal level - of any notion that such proceedings constitute a criminal justice norm. They highlight very clearly the differences in perception of criminal justice held by criminal justice professionals (posited to be utilizing techniques of neutralisation) and the public they serve. This dichotomy is important and dangerous because it indicates that closer examination will cause the public and therewith sections of it who come into contact with the criminal justice system - whether as victim or perpetrator¹⁶⁰ - to often not recognise the “justice” melted out to them as legitimate or indeed justice of any sort.¹⁶¹

¹⁵⁶ Summarised in e.g. Burton, Sanders and Young (2010), 243-245.

¹⁵⁷ See e.g. Baumann (1998) and Simon (2006).

¹⁵⁸ The extent of this does vary, however, note e.g. how distanced the Dutch prosecutor traditionally was from the victim as a feature of her role not being adversarial - van de Bunt and van Gelder (2012), 124 (see also Brants (2010), 194) and how much difference provision in the criminal procedure code itself makes - Asp (2012), 152.

¹⁵⁹ The importance of this development is perhaps best evidenced by the passing of supra-national legislation to give effect to victims' rights via the EU - see Council of the European Union (2001) now replaced with European Parliament (2012).

¹⁶⁰ On the notion of voluntariness of agreement see Bachmaier (2018) as well as Thaman (2010), 327 et seq. For an example of the pressures to plead guilty, see e.g. Hales (2018), 60.

¹⁶¹ For professional recognition of the evolution taking place see e.g. Lord Goldsmith (2011), on the imprecations for justice, Bachmaier (2018), 259. On how regulatory treatment downgrades the societal perception that crime has taken place, see Leverik (2010), 153, King and Lord (2018), 9, 36 and undermines legitimacy (quoting OECD and Transparency Int) 64,

The deviance of prosecutorial practice matters because justice is a concept of importance to society more broadly. The norms perceived to permeate criminal justice systems are meaningful because they are what constitutes justice as socially defined.¹⁶² It is surely unfair to ask criminal justice professionals, working at capacity, to disappoint and undermine social cohesion and peace?¹⁶³ Furthermore, if criminal justice systems' resources are being funnelled to exacerbate the differences in treatment of the more and less powerful, this cannot continue to be their designated purpose? Understanding of criminal justice systems at a meta level, facilitated by understanding of prosecutorial work and its impact would provide important reform impetus.

Ultimately the aim of this paper is thus to call for more honesty surrounding criminal justice systems.¹⁶⁴ Contrasting political declarations to be tough on crime as well as victim-oriented with the reality of what criminal justice professionals are facilitated (and encouraged¹⁶⁵) to deliver would appear a pathway designed, ultimately, to cause loss of faith in the criminal justice system by those who need it most. Honest discussion of what works when imposed by the criminal justice system is equally urgently required.¹⁶⁶ Systems fundamentally marked and altered by pragmatic adaptation (the status quo in which European systems find themselves) require critical examination at the political and societal level. This can only be prompted by better knowledge of them. Police officers and prosecutors should not be left to explain to the public that they cannot pursue swathes of activity formally falling under the criminal law. The public should be expected to understand that an unwillingness to devote resources to a system limits its scope of action.¹⁶⁷ It is not suggested that massive reinforcement of criminal justice systems is the right way forward but that if we live with factual decriminalisation, this should actually ensue.¹⁶⁸ In that way discrimination is made more difficult and a sense of individual disappointment on the part of victims¹⁶⁹ feeling "let down by the system" can be avoided.

Finally the manner in which states allocate scarce resources should surely be subject to debate befitting democracy? It should not be the coincidental product of how even the most dedicated professionals have chosen to act behind closed doors, no matter how noble their intentions. A system marked only by barely coping, the resulting pragmatism and driven by a need to become more efficient is surely not appropriate to dictate use of the "ultima ratio" of state power; particularly as times change? Criminal justice systems working thus are inflexible and

¹⁶² For an examination of the problems inherent where legal meaning diverges strongly from social meaning see Norrie (2018).

¹⁶³ Boyne (2007), 8, for instance, analyses the divergence between ideal and practice in Germany as "threaten[ing] to undercut public confidence in the law and the state itself." Note also similar fears over cautions used for serious crime in the UK - Travis (2015) and House of Commons Home Affairs Committee (2015), 5.

¹⁶⁴ On the need for openness to ensure "buy-in" to avoid delegitimising a system see King and Lord (2018), 30.

¹⁶⁵ Note, for example, that when victim offender mediation was introduced in Germany, the effort of such work was not reflected in internal, performance management systems. Thus a penal order is worth more than a VOM process in the points allocated to a case disposition for career evaluation purposes.

¹⁶⁶ See e.g. Lambe, (2017).

¹⁶⁷ See also Vadell (2015), 15.

¹⁶⁸ So also Thaman (2010 Typology) 396.

¹⁶⁹ For an example of the extent to which victims are ignored in conditional disposals, as well as their inability to in any way make themselves heard, see Corruption Watch (2017). Note also that, of course, no restoration can be made to unidentified victims.

unable to rise to new challenges. At some point, taking stock and honest debate is imperative. The UK situation demonstrates this. Faced with the complication of regulating financial professions stepped in a culture of rule-bending, let alone the vagaries of public private partnerships running social housing like Grenfell, it seems ridiculous to expect our criminal justice systems to cope. And yet belief in them will be shattered if they do not so attempt.

The duty of criminal justice systems to effectively address crimes against humans, particularly when they threaten our humanity, is surely key? Discussion at a higher, principled level is owed not only to the public placing expectations upon criminal justice systems but indeed also to the professionals who work within them and operate with the daily danger of “facing the music”¹⁷⁰ for the perceived injustice of the justice they consistently, if pragmatically, work hard to deliver.

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¹⁷⁰ See e.g. press coverage of the Metropolitan Police’s mass screening out of cases e.g. Mullin (2018) as well as Parveen (2016) on the use of cautions as a response to rape charges.

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