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The Limits of Prosecutorial Power

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COMMENTARY

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There are criminal justice actors more powerful than prosecutors.

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Criminal justice reformers seem to have found a new champion in the progressive prosecutor. A recent New York Times article profiled some of these rising stars—Andrew Warren of Tampa, Scott Colom of eastern Mississippi, Kim Foxx of Chicago, Kim Ogg of Houston, and Aramis Ayala of Orlando. The Marshall Project has also devoted a fair share of coverage to "reform-minded" prosecutors.

Their more lenient approaches to justice are cause for optimism, but those who want a fairer system should recognize that prosecutors cannot bring change alone. In fact, without the support of other, more powerful criminal justice actors, they may not be able to achieve any lasting reforms.

Case in point: Aramis Ayala, Orlando's newly elected chief prosecutor, announced recently that her office would no longer seek the death penalty — in any case. The move was met with cheers, but Ayala's effort immediately ran into trouble. Within hours, Florida Gov. Rick Scott transferred the case that prompted Ayala's announcement to another prosecutor; a judge later upheld the transfer. Then, Scott transferred 21 more of Ayala's cases.

In contrast to Ayala's unsuccessful attempt, the death penalty was effectively abolished in Illinois when then-Gov. George Ryan implemented a moratorium on executions in 2000. Although prosecutors continued to seek and obtain death sentences, not one prisoner was executed in the state as a succession of governors kept the moratorium in place. Ultimately, the Illinois legislature repealed the state's death penalty in 2011, replacing it with a sentence of life without parole.

Efforts to decriminalize small amounts of marijuana also reveal the limits of prosecutorial power. For example, earlier this year, Houston district attorney Kim Ogg stood alongside the city's mayor

and local police officials and announced that she'd dismiss any misdemeanor possession case that came across her desk. The move was considered "bold" but bolder than Ogg's decision was the decision by Houston-area police agencies to no longer make arrests for small amounts of marijuana — a law enforcement shift that could have been accomplished without Ogg.

Coverage of prosecutors opting for more lenient bail recommendations also overstates their power. Except when public safety requires detention, prosecutors can, and should, recommend that defendants be freed pending trial. But ultimately it's judges who set bail and lawmakers who legislate bail policy. In fact, Washington, D.C. has the most lenient prosecutors when it comes to bail. They never advocate for defendants to be held on bail, not because they are reformers, but because legislators abolished D.C.'s money bail system in the 1990s.

It is perhaps understandable that reform-minded prosecutors would expect that they could unilaterally enact controversial reforms. A longstanding claim among legal scholars and pundits is that prosecutors are the most powerful force in the criminal justice system. The prosecutorial dominance argument reaches an apex in John Pfaff's provocative new book, "Locked In," which blames prosecutors for mass incarceration.

Prosecutors may appear triumphant on the courthouse steps after winning a case, the face of American justice personified, but it's lawmakers who write penal codes, jurors who convict, and judges who approve plea deals and render sentences. Reformers should keep those true sources of criminal justice power in mind when they assess the terrain for policy changes.

That is not to say that prosecutors don't have any power. They can decline to prosecute cases brought to them by the police with little oversight. They also offer plea deals to defendants, an important discretionary function in a system where 95 percent of convictions result from plea-bargains, not trials. Still, any leverage they have in plea bargaining results from the danger that legislators, judges, and juries will treat a defendant harshly in the absence of a negotiated guilty plea. In short, prosecutors operate largely within the boundaries set by other actors. Their power is restricted, not absolute.

Legislatures will always be the best place to start reshaping the criminal justice system. And, as the Illinois example shows, governors can also be forces for sweeping reform. Judges too wield enormous power. Prosecutors play an important role, but relying on their case-by-case power for major criminal justice reform is a sign of desperation, not hope.

Jeffrey Bellin is a Professor at William & Mary Law School and a former prosecutor. Bellin's essay, Reassessing Prosecutorial Power Through the Lens of Mass Incarceration will be published in the University of Michigan Law Review.

An earlier version of this commentary misstated the name of the Illinois governor who implemented a moratorium on executions in 2000. It was George Ryan, not Bob Ryan.