

2017

Accounting for Prosecutors

Daniel C. Richman
Columbia Law School, drichm@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Criminal Law Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Daniel C. Richman, *Accounting for Prosecutors*, PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, MÁXIMO LANGER & DAVID ALAN SKLANSKY (EDS.), CAMBRIDGE UNIVERSITY PRESS (2017).
Available at: https://scholarship.law.columbia.edu/faculty_scholarship/1959

This Book Chapter is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact scholarshiparchive@law.columbia.edu.

Accounting for Prosecutors

by Daniel C. Richman*

I INTRODUCTION

What role should prosecutors play in promoting citizenship within a liberal democracy? And how can a liberal democracy hold its prosecutors accountable for playing that role? While these fundamental questions, regularly posed of the police,¹ are asked all too rarely of prosecutors, answering them requires a lot of framing and bracketing.

Particularly when thinking about prosecutors, we ought not assume that manifestly democratic processes – say, elections – are the best institutional design for promoting liberal democratic values. Better to follow the policing literature,² start with those values – political representativeness, a commitment to anti-subordination or (as Ian Shapiro calls it) non-domination,³ and due process of law – and then consider how prosecutors can promote them.

* Paul J. Kellner Professor of Law, Columbia Law School. Thanks to Alexandra Bowie, Shawn Boyne, Devon Carbado, Beth Colgan, Angela Davis, Sharon Dolovich, Antony Duff, Michael Farbiarz, Robert Ferguson, Michael Graetz, Remy Grosbard, Kevin Grossinger, Jackie Hodgson, Olati Johnson, David Kessler, Máximo Langer, Adriaan Lanni, Jen Laurin, Jerry Lynch, Ed Rubin, Sarah Seo, Ian Shapiro, William Simon, David Alan Sklansky, Eric Talley, Sherrod Thaxton, Loic Waquant, and attendees at the 2016 UCLA Prosecutors and Democracy Workshop and a Columbia Law School workshop.

¹ See Diarmaid Harkin, Simmel, *The Police Form and the Limits of Democratic Policing*, 55 *Brit. J. Criminol.* 730–46 (2015); see also Andy Aitchison, Jarrett Blaustein, *Policing for Democracy or Democratically Responsive Policing? Examining the Limits of Externally Driven Police Reform*,¹⁰ *Eur. J. Criminol.*, 496 (2013).

² See Trevor Jones, Tim Newburn, & David J. Smith, *Policing and the Idea of Democracy*, 36 *Brit. J. Criminol.* 182 (1996); see also Peter K. Manning, *Democratic Policing in a Changing World*, 7 (2010) (suggesting that idea that police should be “part of producing a democratic state . . . is getting the entire argument backward. It is a democratic state and culture that produce democratic policing and, and there is no evidence that the contrary can result”).

³ Ian Shapiro, *Democratic Justice* (1999); see also Ian Shapiro, *The Real World of Democratic Theory* (2011).

But first comes the challenge of avoiding parochialism when identifying what prosecutors do. Are they freewheeling political actors exercising judicially unreviewable discretion? Subordinated functionaries exercising highly scrutinized professional judgment? Prosecutors play extraordinarily varied roles across liberal democracies, linked only by some shared duty to assess the fitness of criminal cases for adjudication and to shepherd fit cases through the process. Anne van Aaken usefully sets out the basic role of a “procuracy”:

- (i) it has the competence to gather information on the behavior of criminal suspects, or to instruct the police to gather more information; (ii) on the basis of that information it has the competence to indict a suspect; (iii) during a trial it represents the interests of the public.⁴

These officials are variously housed in the executive, the judiciary, or a distinct branch of government,⁵ but functionally they occupy the space between “police” and “courts.”

This intermediary role provides a methodological point of departure. Others have focused on the police when exploring how democratic criminal justice institutions must “balance the goals of coercion and responsiveness,” protecting the citizenry while “still maintaining the core conditions of democracy.”⁶ To the extent that policing relies on the promise or threat of criminal adjudications, the work on democratic policing by David Bayley, David Alan Sklansky, Peter Manning,⁷ and others offers a valuable starting point for thinking about prosecutors. My goal here, however, is to peel off the distinctive contributions of prosecutors, distinguishing those from their subsidiary duties.

I will begin, in Part II, by considering the role prosecutors can play in constructing and sustaining democratic citizenship. This is a story about account giving and account demanding. Not only do prosecutors present narratives of criminality, but they are also uniquely positioned to hold those who exercise illegitimate power to account and to promote the accountability of other actors in the criminal justice system.

⁴ See Anne van Aaken, et al., *The Prosecution of Public Figures and the Separation of Powers. Confusion within the Executive Branch – A Conceptual Framework*, 15 *Constitutional Political Economy*, 261, 264 (2004).

⁵ Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 *Crime and Justice*, 1–33 (2012).

⁶ Amy Lerman and Vesla M. Weaver, *Arresting Citizenship: The Democratic Consequences of American Crime Control*, 61 (2014) [hereinafter Lerman & Weaver, *Arresting Citizenship*].

⁷ David H. Bayley, *Changing the Guard: Developing Democratic Police Abroad* (2005); David Alan Sklansky, *Democracy and the Police* (2008) [hereinafter Sklansky, *Democracy and the Police*]; Manning, *supra* note 2.

This vision of prosecutorial contributions comes with an expository bias, because it risks normalizing the outsized role played by prosecutors in the United States. One can counteract the bias by remembering to ask whether other state actors are better equipped, institutionally or as a matter of democratic legitimacy, to perform those functions. Yet, for better or worse (and especially because I would have it anyway), an American bias makes sense here.

To be sure, the American prosecutorial “establishment” has been the subject of extensive, and frequently well-grounded, criticism. Many, most notably Bill Stuntz,⁸ have written about the “pathological politics” that have led legislators to delegate outlandish authority to U.S. prosecutors. Most outsiders (and many insiders) find the American reliance on elected or politically connected prosecutors odd, even ridiculous – a fact that itself highlights the varied and contestable “modes” of public accountability in this area.⁹ Overshadowing all is also the extraordinary U.S. incarceration rate, which John Pfaff has convincingly shown to be driven, at least at the margins, by prosecutorial decision making.¹⁰ Yet while no one is keen to admit borrowing anything from the United States in this area, the American model of the prosecutor as the effective and discretion-exercising gatekeeper of criminal adjudications seems to be spreading internationally.¹¹ So too is interest in pursuing the kinds of crimes – ranging from domestic violence to political corruption – that, as will be seen, the police cannot easily pursue without prosecutorial assistance that pushes beyond more limited notions of the prosecutorial role.

A final justification for normalizing a maximal conception of the prosecutorial role – at least as a conversational starting point – rests on my interest in institutional alternatives: to the extent that other regimes neither assign nor license prosecutors to play a role they can play in the United States, it would be analytically useful to hear who, if anyone, plays it and the rationales for that assignment.

⁸ See William J. Stuntz, *The Collapse of American Criminal Justice* (2011); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505 (2001).

⁹ See Michael W. Dowdle, *Public Accountability: Conceptual, Historical, and Epistemic Mappings*, 1, 14, in *Public Accountability: Designs, Dilemmas and Experiences* (Michael W. Dowdle ed., 2006) [hereinafter Dowdle, *Public Accountability*].

¹⁰ John Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 *Ga. St. Univ. L. Rev.* 1 (2012); see also John Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform* (2017).

¹¹ See Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 *Wash. & Lee L. Rev.* 1413, 1531 (2010); see also Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 *Harv. Int'l L.J.* 1 (2004).

Part III turns to how a liberal democracy that relies on prosecutors to hold others accountable can ensure that prosecutors are themselves held to account. The accountability of prosecutors in a democracy certainly need not be achieved through direct elections. Indeed, one might argue that only prosecutors highly insulated from direct political responsibility can really promote democratic values. Still, notwithstanding Ed Rubin's Occam-like analysis of what "accountability" entails,¹² the breadth of my normative vision of what prosecutors should do keeps me from simply valorizing fine-grained bureaucratic control (of the sort one finds in France, Germany, and Japan – to name just three paradigmatic cases).

So then, how can I specify the optimal regime of prosecutorial accountability? I can't and don't want to. Once one recognizes the value trade-offs that must inevitably be made across institutional designs, optimality becomes elusive. A large part of the problem is that those features well suited to advancing one project won't be so well suited for advancing another. Jerry Mashaw credits Gunther Teubner with identifying the fundamental "regulatory trilemma": "We demand that regulatory institutions be simultaneously coherent (the rule of law or regularity norm), effective (a variant of the efficiency norm), and responsive (open to the influence of social demands and cultural understandings.)" Yet "virtually any attempt to reinforce one of these demands works to limit the capacity of the regulatory institution to satisfy another."¹³ This dilemma looms large when one thinks about prosecutors. But accountability remains critical. After noting the limitations of specific accountability paradigms, Part III turns to cross-cutting institutional design and legal regime considerations that might, when balanced, foster the legitimacy without which prosecutors can't, and shouldn't be allowed to, do their jobs.

II CONSTRUCTING AND SUSTAINING DEMOCRATIC CITIZENSHIP

Before considering how prosecutors can shape society, one ought to first nail down the role of criminal law – the principal instrument of prosecutorial action – in a liberal democracy. Permit me to bracket this critical question, however, not just because of limited space, but in deference to Ricardo's Law of Comparative Advantage; I'd much prefer to stand on the shoulders of

¹² Edward Rubin, *The Myth of Non-Bureaucratic Accountability and the Anti-Administrative Impulse*, 52, in Dowdle, *Public Accountability*, *supra* note 9.

¹³ Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, 115, 154, in Dowdle, *Public Accountability*, *supra* note 9.

Antony Duff, Lindsay Farmer, and others who have done exceptional work on it.¹⁴ For now, I assume that the penal statutes prosecutors enforce are within the range of possibilities in a tolerably well-functioning liberal democracy.

The focus here is, first, on the peculiar role of prosecutors in account telling and account holding, how they set the terms of effective criminalization and build narratives of criminality. Thereafter, I turn to how, in playing that role, they obtain a privileged vantage point within the criminal law enforcement system that allows them to make demands upon other institutions to promote the collective account-holding project.

A Constructing Effective Narratives of Criminality

In their distinct role as the translators of general penal provisions into particularized criminal charges, prosecutors both turn law into action and narrate the circumstances under which they hold defendants to account. Whether or not prosecutors see themselves as constructing democratic citizenship when doing so, that is a foreseeable result of their actions.

1 Turning Generalized Penal Laws into Action within the Courtroom

The mere passage of penal legislation can have a transformative expressive effect.¹⁵ Moreover, one has only to look at cities where minor drug offenses, though not necessarily charged in court, structure the rationales for police activity on the street,¹⁶ to see how criminal law can actively shape citizenship (i.e. who gets stopped and who worries that he'll be stopped) without adjudication. Yet whether because actual enforcement gives meaning to what otherwise would be empty legislative posturing, because the police eventually lose authority when the people they arrest never get charged, or simply because the formal characterization of a specific act or person as "criminal" is highly consequential, prosecutors – as adjudicative gatekeepers – potentially

¹⁴ Antony Duff, "Responsibility, Citizenship and Criminal Law, 125–50," in *Philosophical Foundations of Criminal Law* (R.A. Duff & Stuart Green, eds. 2011) [hereinafter Duff, *Responsibility, Citizenship and Criminal Law*]; Antony Duff, *Discretion and Accountability in a Democratic Criminal Law* (in this volume); Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016); see also Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 *Buff. Crim. L. Rev.* 307 (2004); Tommie Shelby, *Punishment, Condemnation, and Social Injustice* (unpublished draft) (discussing justifiable enforcement in an unjust society).

¹⁵ See Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 *Va. L. Rev.* 349 (1997).

¹⁶ See Amanda Geller, *Pot as Pretext: Marijuana, Race and the New Disorder in New York City Street Policing*, 7 *J. Emp. Legal Stud.* 591 (2010).

play an outsized role in translating criminal “law on the books” to criminal “law in action.”

Given the absence of any stable transnational definitions of precisely who the police are and what they do, I suppose a prosecutor could play a perfectly serviceable role within a liberal democracy without adding more value to case-processing than a notary adds to a real estate transaction. All the action could be within the police, with the prosecutor simply filing formal charges selected and prepared by others. But the virtually universal reliance on lawyers to perform this gatekeeping function (at least for serious offenses) highlights the non-ministerial role prosecutors are expected to play in performing the translation function. As the link between the police and the adjudicative process, prosecutors are responsible for ensuring that a defendant gets the legal process that the law has deemed his “due” and that liberal democracies value at their core.¹⁷ By proceeding against a defendant only where the evidence supports a charge and where other legal prerequisites have been met, prosecutors help ensure that the criminal law in action is faithful to the substance of legislated penal statutes and to the values underlying the larger criminal law project.

Such is the purely “professional” component of the prosecutorial contribution to the democratic order – “professional” in the narrow sense of law experts drawing on their training and experience to stitch together facts and determine whether they fit the definition of a crime.¹⁸ Beyond that is a distinctively “political” component – “political” not necessarily in the sweeping sense of “policy-making,” but in the more limited sense of playing an assigned role in a polity over and above the one a “mere” lawyer might play.

The extent and nature of that political contribution varies across systems, but inevitably entails a modulation of the penal sanctions that the legislature ostensibly mandated for provable conduct. For now, I will be open as to the nature, formality, or legitimacy of this modulation. Broad notions of “prosecutorial discretion” over what charges they need bring and against whom allow American prosecutors to effectively “define” criminal law to be well short of that ostensibly set by statute.¹⁹ Conversely, through the cases they take and the way they frame the facts, American prosecutors regularly push the law beyond

¹⁷ See Archon Fung, *Practical Reasoning About Institutions: Governance Innovations in the Development of Democratic Theories*, 2–4 (2006) (unpublished manuscript); see also Hung-En Sung, *Democracy and Criminal Justice in Cross-National Perspective: From Crime Control to Due Process*, 605 *Annals, Am. Acad. Pol. & Soc. Sci.* 311, 315 (May 2006).

¹⁸ Hung-En Sung, *supra* note 17, at 315. (“A commitment to professionalism and respect for expertise provide the foundation for an increased insulation of criminal justice operations from political interferences and populist demands.”)

¹⁹ See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *Fordham L. Rev.* 2117 (1998) [hereinafter Lynch, *Our Administrative System*]; Máximo Langer, *Rethinking Plea*

its initially assumed limits.²⁰ Elsewhere, to various degrees, one finds recognition of prosecutors' de jure or de facto ability to moderate the severity of penal consequences in the interests of efficiency, justice, or some combination of the two. Even where the "principle of legality" – as opposed to those of "opportunity" or "expediency" – is unmuted, distinctions in the zeal with which evidence is gathered and investigatory and adjudicative resources committed will exist (whether recognized or disregarded).

Whether authorized to or not,²¹ prosecutors will inevitably shape the application of criminal law to the politics they serve and – to varying extents across regimes – write their enforcement agendas into the dockets they manage. They also may (or should) take a peculiar ownership in the punitive outcomes of their work. The police who apprehend a suspect surely have views on whether and how much he should be punished – views that prosecutors are bound to take into account.²² I suspect, however, that, absent some immediate public safety issue, prosecutors, being far more involved in adjudication, take a greater interest in the *quantity* of punishment than cops, since granular issues of individual desert are more likely to have been developed in conjunction with judicial processes that follow arrest. Prosecutors' institutional proximity to the judicial process may also come with a special capacity to spearhead diversionary programs that reduce the punitive effects of police enforcement practices.²³

The mediating effect played by prosecutors can have a social valence beyond advancing enforcement preferences and modulating punishment. To the extent there is any play in the adjudicative joints, they will also be able to exacerbate or mitigate the influence of racial, social, or political inequality on criminal justice outcomes. The nature of this capability will vary, as legal or institutional factors promote or undermine "blind justice." Particularly in adversarial systems (and again my U.S. bias shows here), the

Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure, 33 *Am. J. Crim. L.* 223 (2006).

²⁰ See Daniel C. Richman, Kate Stith, & William J. Stuntz, *Defining Federal Crimes* (2014).

²¹ See Paul Marcus & Vicki Waye, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds*, Part 2, 18 *Tulane J. Int'l & Comp. Law* 335, 353 (2010) (noting that in Australia, concerns about "horse trading" in plea bargaining have spurred concerns that offenders "are not receiving their 'just deserts'").

²² See Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 *Colum. L. Rev.* 749 (2003).

²³ Mary Fan, *Street Diversion and Decarceration*, 50 *Am. Crim. L. Rev.* 165, 181 (2013) (noting that "American diversion programs, like treatment courts, have largely relied on the decision-making of non-police actors further down the criminal processing timeline – especially prosecutors," but arguing for more police initiatives in this direction); see also Bronwyn Naylor & Adam Fletcher, *A Justice Reinvestment Approach to Criminal Justice in Australia* (March 2013).

quality of publicly provided defense counsel²⁴ may have determinative, cascading effects on adjudicative outcomes. Yet, whether prosecutors take ownership of the adjudicative process or are simply critical contributors to it, their work will have distributional effects that they can either consider or ignore. Indeed, because disadvantaged groups may simultaneously be both over- and under-policed, I use the term “modulate,” rather than “moderate,” as intervention can lead across cases to both more and less punitive outcomes.²⁵

My use of “modulate” also reflects the dependency of prosecutorial activity on the work of other criminal justice components, especially the police and the courts. Perhaps one reason the scholarly literature has paid more attention to “democratic policing” than “democratic prosecuting” is that a lot of what prosecutors do is interstitial, dampening the zeal of some (units or individuals) and spurring others on.

2 Presenting Authoritative Accounts of Criminality

To maintain a transnational focus, I will not say much about how prosecutors can affect the imposition of punishment on those they bring into the adjudicative process. In the United States, of course – particularly where prosecutors have discretion over whether to bring charges with mandatory sentencing terms – their ability to shape criminal justice outcomes is at a zenith.²⁶ Even when prosecutors lack that formal power and when judges have sentencing discretion, prosecutors’ control over the information that flows to judges and the extent to which judges defer to them can have a similar effect.²⁷ Suffice it to say that prosecutors who can control or substantially affect adjudicative outcomes will have a far greater influence on criminal law in action than those who are primarily gatekeepers.

Even when they act as “mere” gatekeepers, however, one ought not minimize how prosecutors shape democratic citizenship. Gatekeeping entails not merely the decision about putting criminal defendants “in jeopardy” and to what extent; it is also a pivotal part of the process wherein the state authoritatively

²⁴ A quality that itself may depend on prosecutorial political advocacy, see *infra* text accompanying notes 121–2.

²⁵ That such modulating efforts can come from police investigators as well is illustrated by the powerful story of a few Los Angeles homicide detectives committed to making “black lives matter.” Jill Loevy, *Ghettoside* (2015). And I wouldn’t be surprised to read similar accounts of dogged cops elsewhere.

²⁶ See William J. Stuntz, “Bordenkircher v. Hayes: Plea Bargaining and the Decline of the Rule of Law,” in *Criminal Procedure Stories* (Carol Steiker, ed. 2003); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 *Am. J. Crim. L.* 223 (2006).

²⁷ See José Cabranes & Kate Stith, *Fear of Judging: Sentencing Guidelines in the Federal Courts* (1998).

announces who is, after due process, to be treated as a “criminal.” Indeed, it is through this condemnation that, as Emile Durkheim and others have pushed us to realize, a society defines itself.²⁸

Moreover, prosecutors do not silently preside over gates, for the essence of their job is to explain *how* the law has been violated. As Jerry Mashaw has noted, inherent in the adjudication process is not just the application of norms, but the creation of them.²⁹ In addition to holding people accountable in the “modulated” process already described, prosecutors model accountability through the narrative that the law requires them to tell. Indeed, the very mechanism for holding defendants to account requires the presentation of a narrative (an account) that helps construct the socio-legal environment.

To be sure, in numbers and ubiquity, the police surely loom larger than prosecutors as civic educators. As Ian Loader writes: “The police send authoritative signals to citizens about the kind of political community of which they are members, the manner in which that community is governed, and the place they occupy in its extant hierarchies.”³⁰ Yet we cannot ignore the way the adjudicative process – and not just its outcomes – teaches citizens about “the political world they inhabit.”³¹ It is not just the announcement of the charges – to which the political and institutional status of the prosecutor might lend special resonance and volume – but the manner in which the charges are proved: the evidence presented and the inferences urged.

Malcolm Thorburn has highlighted how, in contrast to criminal law theorists like H. L. A. Hart, for whom “the point of the criminal trial is simply to determine whether or not the accused deserves to be punished,” Antony Duff has put the trial center stage. For Duff, “[t]he criminal trial is a place where members of a political community come together to engage in discussion about moral wrongdoing.”³² In a trial-driven world, Duff’s dialogic account is thus particularly useful for distinguishing the distinctive contribution of prosecutors from that of the criminal law project more generally.

²⁸ See Frédéric Mégret, *Practices of Stigmatization*, 76 *J. Law & Contemp. Probs.* 287 (2013); Emile Durkheim, *Division of Labor in Society*, 40–3 (W.D. Halls, trans. 1984).

²⁹ Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, 115, 130, in Dowdle, *Public Accountability*, *supra* note 9.

³⁰ See Ian Loader, *In Search of Civic Policing: Recasting the “Peelian” Principles*, *Crim. Law & Philos.* at 2 (2014); see also Sklansky, *Democracy and the Police*, *supra* note 7.

³¹ Lerman & Weaver, *Arresting Citizenship*, *supra* note 6, at 10; see also *id.* at 111 (suggesting that “criminal justice contact rivals other more traditional politically socializing experiences and venues for civic education,” and that “this socialization, unlike other interactions with the government, cleaves custodial citizens from the broader democratic polity”).

³² Malcolm Thorburn, *Calling Antony Duff to Account*, 9 *Crim. L. & Philos.* 737, 744 (2015); see also Duff in this volume. Compare H. L. A. Hart, *Punishment and Responsibility* (1968).

Yes, I realize that in some countries (like mine), trials are rare. The truncated adjudication characteristic of plea bargaining often renders the authoritative information ostensibly promised by criminal proceedings thin and formulaic – sometimes with only a passing relationship to historical fact. A world without trials is thus one without much moral dialogue about wrongdoing. Of course in theory, the judge presiding over the plea allocutions and sentencing that replace trials could still ensure a “communicative interaction between the accused and his accusers.”³³ Indeed, in Germany, where plea agreements are becoming more prevalent,³⁴ the Federal Constitutional Court recently demanded that judges push far beyond a defendant’s plea-bargained based confession in order to determine his true culpability.³⁵ At least in the United States, though, the churn of business in busy courtrooms will likely turn the dialogues that Duff celebrates into generic scripts.³⁶

Still, when there *are* trials or sustained judicial inquiries, the condemnation sought by prosecutors and the manner in which they seek it will probably have a texture and nuance that provide an instrument for social definition going beyond the “criminal” label. Whether conducted in an accusatory system or an inquisitorial system, trials have a performative and narrative aspect.³⁷ Particularly in an adversarial system, the prosecution’s “case” ends up being a story it tells – a story that may draw on existing narrative tropes, but that inevitably reinforces, legitimates, and extends them.³⁸ What gets left out can matter as much as what is filled in, as happens, for example, when a prosecutor, for ease of proof or because the extra sentencing exposure seems unnecessary, leaves out the bias aspect of what “ought” to be understood as a hate crime.³⁹

³³ Thorburn, *supra* note 32, at 744.

³⁴ Regina E. Rauxloh, *Formalization of Plea Bargaining in Germany: Will the New Legislation Be Able to Square the Circle*, 34 *Fordham Int’l L. J.* 296, 297 (2011).

³⁵ Alexander Schemmel, Christian Corell & Natalie Richter, *Plea Bargaining in Criminal Proceedings: Changes to Criminal Defense Counsel Practice as a Result of the German Constitutional Court Verdict of 19 March 2013?*, 15 *German L.J.* 43 (2014).

³⁶ Kimberley Brownlee, *The Offender’s Part in the Dialogue, in Crime, Punishment, & Responsibility: Festschrift for Antony Duff*, 54 (R. Cruft, M. Kramer & M. Reiff, eds. 2011).

³⁷ See Greta Olson, “Narration and Narrative in Legal Discourse, sec. 2,” in *The Living Handbook of Narratology* (Peter Hühn, ed. May 2014) (“‘Narration’ in legal discourse most commonly denotes the contest of stories that transpires in adversarial or, with different actors, in inquisitorial trials.”); see also Robert P. Burns, *A Theory of the Trial* (1999); Lisa Kern Griffin, *Narrative, Truth, and Trials*, 101 *Geo. L.J.* 281 (2013).

³⁸ Defense narratives can have similar effects. See Anne M. Coughlin, *Excusing Women*, 82 *Cal. L. Rev.* 1, 6 (1994). (“The battered woman syndrome defense rests on and reaffirms [an] invidious understanding of women’s incapacity for rational self-control.”)

³⁹ Avlana Eisenberg, *Expressive Enforcement*, 61 *UCLA L. Rev.* 858, 889 (2014).

Perhaps the prosecutor will construct a narrative not just of the “crime,” but of the defendant. In common law countries, a prosecutor’s move in that direction will be in tension with liberal criminal law’s limited interest in delving the depths of personal culpability⁴⁰ and with rules of evidence designed to restrict fact-finder attention to the charged offense. At sentencing, however, broader inquiries may take center stage, and whether a prosecutor pitches the defendant as a citizen who erred or a miscreant who needs to be put away can (depending on the sentencing scheme) make all the difference.

Through trials, prosecutors can teach jurors, witnesses, and other lay (or official) participants about the fairness, or lack thereof, of the criminal justice process. Indeed, education through jury service is an oft-cited goal in Japan’s recent (albeit limited) move toward the use of juries in the most serious criminal cases. There, the idea was “to incorporate sound common sense into the deliberative process, increase public understanding of Japan’s judicial system, promote civic responsibility, and enhance the tools of democracy available to the citizenry.”⁴¹ Those attending (or merely attending to) the trial can also learn more case-specific “truths” about how the world works, lessons – about, say, who “really” is a victim and who “deserves” punishment.⁴² The extent to which prosecutors drive this “educational” process varies across systems, as does whether it amounts to a real education or dangerous self-corroboration. Regardless, over time (and perhaps with media help), such stories will take a life of their own and shape social norms.⁴³

Of course, defendants receive an education as well. As Ben Justice and Tracey Meares observe, “for an increasing number of Americans, the criminal justice system plays a powerful and pervasive role in providing a formal education in what it means to be a citizen.”⁴⁴ The lessons that prosecutors

⁴⁰ See Marie-Eve Sylvestre, *Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity, and the Logic of Practice*, 55 *McGill L. J.* 771 (2010).

⁴¹ Matthew J. Wilson, *Japan’s New Criminal Jury System: In Need of More Transparency, More Access, and More Time*, 33 *Ford. Int’l L. J.* 487, 493 (2010).

⁴² See Candida L. Saunders, *The Truth, The Half-Truth, and Nothing Like the Truth: Reconceptualizing False Allegations of Rape*, 52 *Brit. J. Criminol.* 1152 (2012) (exploring judgments of U.K. front-line law enforcement professionals as to rape allegations); see also Louise Ellison & Vanessa E. Munro, *Turning Mirrors into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials*, 49 *Brit. J. Criminol.* 363 (2009).

⁴³ For an extreme version of this larger social influence, see Adriaan Lanni’s exploration of the effect on civic norms of trial speeches at Athenian trials. *Law and Order in Ancient Athens* (2016).

⁴⁴ Benjamin Justice & Tracey Meares, *How the Criminal Justice System Educates Citizens*, 651 *Annals, Amer. Acad. Pol. & Soc. Sci.* 159, 160 (2014); see also Vesla M. Weaver & Amy Lerman, *Political Consequences of the Carceral State*, 104 *Am. Pol. Sci. Rev.* 817 (2010) (providing evidence indicating that criminal justice contact has a large, negative effect on voting, involvement in civic groups, and trust of government).

“teach” can go beyond the specific social norms implicated by the charged conduct. What a serious criminal prosecution amounts to, at least in the United States, is an effort to detach a defendant from society, not just as a physical matter, but as a political one.⁴⁵ These citizenship lessons reach, and affect the lives of, not just convicted defendants, but those around them.⁴⁶

To what extent should a democratic prosecutor self-consciously promote the range of epiphenomenal externalities that attend a criminal conviction? When American prosecutors deliberately tease apart what ostensibly looks like a bundled conviction outcome – bargaining around immigration consequences for individuals,⁴⁷ or around the collateral consequences of corporate convictions⁴⁸ – are they circumventing legislative intent, or sensitively navigating a legislative menu? Even when prosecutors purport to stay within the four corners of their adjudicative assignment, should we encourage reflection on larger audience responses, or regret it? My instinct is always on the side of self-reflection, but Duff is surely right to worry about maximal self-consciousness at the individual level.⁴⁹ For now, let us simply recognize the social consequences of the prosecutorial project, whether appreciated or not.

B Holding More than the Usual Suspects Accountable

The point of departure for the foregoing section had the prosecutor deciding how to proceed when the police have presented her with a suspect. This

⁴⁵ Duff, *Responsibility, Citizenship and Criminal Law*, *supra* note 14, at 143 (“In penal theory, some argue that those who commit crimes lose their standing as citizens, so that we can treat them in ways in which we could not treat citizens, and deny them the respect and concern that we owe to citizens; such a view finds formal legal expression in the loss of the right to vote (a central aspect of citizenship) suffered during their incarceration by those serving prison terms in Britain, and for life by convicted felons in some American states.”); see also Pamela S. Karlan, *Convictions And Doubts: Retribution, Representation, And The Debate Over Felon Disenfranchisement*, 56 *Stan. L. Rev.* 1147(2004); Loïc Wacquant, *Deadly Symbiosis*, 3 *Punishment & Society* 95, 112 (2001) (noting “convicts are subjected to ever-longer and broader post-detention forms of social control and symbolic branding that durably set them apart from the rest of the population”); Joshua Kleinfeld, *Two Cultures of Punishment*, 68 *Stan. L. Rev.* 933, 948–74 (2016) (exploring ways in which America has embraced exclusionary forms of punishment).

⁴⁶ See Traci R. Burch, *Effects of Imprisonment and Community Supervision on Neighborhood Political Participation in North Carolina*, 651 *Annals, Am. Acad. Pol. & Soc. Sci.* 184, 185 (2014). (“The criminal justice system has the power to shape not only the political participation of current and former felons but also the participation of the people who live around them because criminal justice interactions are demographically and geographically concentrated.”)

⁴⁷ See Paul T. Crane, *Charging on the Margin*, 57 *Wm. & Mary L. Rev.* 775 (2016).

⁴⁸ See Daniel Richman, *Corporate Headhunting*, 8 *Harv. L. & Pol’y Rev.* 265, 278–9 (2014) [hereinafter Richman, *Corporate Headhunting*] (arguing for experimentation with sanction decoupling).

⁴⁹ See RA Duff, this volume.

section considers how prosecutors, because of their adjudicative function, are uniquely positioned not simply to seek the accountability of those presented to them, but to push beyond the frame the police have constructed and to promote the accountability of others as well, including the police themselves.

1 Promotion of Police Accountability

The role prosecutors play in promoting citizen accountability may be complemented by their influence on the police – the primary point of contact for citizens with the criminal justice establishment – as monitors and mediators. One needs to be careful here, as there is tremendous variation across countries – and within them, at least in the United States – on this potential contribution to the rule of law and democratic accountability. Jacqueline Hodgson has explored the limited degree to which the French procureur supervises police investigations.⁵⁰ In England and Wales, it remains to be seen whether the Crown Prosecution Service (“CPS”) has the institutional capacity to push police forces to build stronger cases.⁵¹ In the United States, the lack of any hierarchy that would oblige police to attend to prosecutorial preferences (or vice versa) frequently leads to institutional disjunction, not coordination.⁵²

Still, prosecutors’ position as gatekeepers of the adjudicative process and their unique ability to deploy both technical expertise and experience as repeat players before ultimate adjudicators give them leverage to question and perhaps change police behavior (at least across those police domains that rely on the credible threat of adjudicative action). These sources of authority – whether deployed or not – exist even in the absence of the sort of institutional clout that prosecutors might gain from political independence (of the sort wielded by elected district attorneys in the United States). They draw not just on prosecutor’s special knowledge and the reputational bonding that arises out of their repeat-player status,⁵³ but on their legal training and acculturation. Intermediation, after all, is what lawyers are trained to do – between clients and courts or regulators, between clients, and across institutional cultures. As

⁵⁰ See Jacqueline S. Hodgson, *The French Prosecutor in Question*, 67 *Wash. & Lee L. Rev.* 1361, 1395–6 (2010); see also Jacqueline Hodgson, *The Police, the Prosecutor and the Juge D’Instruction: Judicial Supervision in France, Theory and Practice*, 41 *Brit. J. Criminol.* 342, 350–1 (2001).

⁵¹ See House of Commons Justice Committee, *The Crown Prosecution Service: Gatekeeper of the Criminal Justice System* (Ninth Report of Session 2008–9) at 14–5.

⁵² See Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 *Tex. L. Rev.* 2055, 2058–60 (2006) (discussing lack of coordination between police and prosecutors in New Orleans.).

⁵³ Richman, *Prosecutors and Their Agents*, *supra* note 22, at 782–3.

Sklansky has suggested, intermediation lies at the heart of the prosecutorial function.⁵⁴

Richard Mulgan explains:

Forcing people to explain what they have done is perhaps the essential component of making them accountable. In this sense, the core of accountability becomes a dialogue between accountors and account-holders ... using a shared language of justification.⁵⁵

The ability of citizens to directly hold police officers “to account” for their granular decision-making varies considerably across polities,⁵⁶ and changes with technologies (as has been seen with viral videos in the United States). Even so, the essential opacity of the criminal process substantially limits their ability to do so in even the most open democracies. Prosecutors, however, have a privileged vantage point. From there, they can force police officers to “explain what they have done” – how the arrest was effected, the investigation conducted, and the witness questioned. Even as the questions generally arise in a case-specific context, the answers (and perhaps the motivation for the questions) will often cut across cases. To be sure, the degree to which prosecutorial views – as supplemented by the views of other adjudicatory actors – are internalized by police forces may be a function of, among other things, the extent to which there is mutual dependence (what I have called “team production”⁵⁷) and the political clout of each side. But prosecutors’ potential contribution to overall criminal justice accountability ought to be recognized and extended, particularly where, as in England and Wales, the legal architecture is no impediment.⁵⁸

2 Targeting Illegitimate Exercises of Power

Further consideration of the dynamics of interaction between the police and prosecutors should push us to think, not just about how prosecutors can promote police accountability across all case types, but also about how prosecutors can foster the pursuit of one subset of criminal conduct that they are

⁵⁴ See David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 117 *J. Crim. L. & Crim.* 473, 502–04 (2017).

⁵⁵ Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* 9 (2003).

⁵⁶ See Monica den Boer & Roel Fernhout, *Policing the Police: Police Oversight Mechanisms in Europe: Toward a Comparative Overview of Ombudsmen and Their Competencies* (2008); National Democratic Institute, *Democratic Oversight of Police Forces: Mechanisms for Accountability and Community Policing* (2005).

⁵⁷ Richman, *Prosecutors and Their Agents*, *supra* note 22, at 809.

⁵⁸ See Criminal Justice Joint Inspection, *Joint Inspection of the Provision of Charging Decisions*, 25 (May 2015) (reporting that, outside of the headquarters unit dealing with “the most complex cases,” CPS prosecutors were often not giving or being asked for “early investigative advice”).

peculiarly capable of addressing – the illegitimate exercises of power that disrespect the individual autonomy at the heart of liberal democracy.

Sklansky has powerfully argued that “‘democratic policing’ should mean . . . making the police as effective as possible in combating unjustified patterns of private domination and unthreatening as possible as a tool of official domination.”⁵⁹ For their part, prosecutors can help free citizens from the subordination that is antithetical to a liberal democracy merely by avoiding illegitimate self-aggrandizement⁶⁰ and working with the police to shepherd appropriately made criminal cases through the adjudicative process. Yet prosecutors can do far more than that, and, should they rise to the challenge, can play a distinctive role in combatting illegitimate domination.

A great deal of regular police work can relieve citizens of illegitimate exercises of power. Any city dweller can tell you how the wide berth given to the menacing street tough narrows when a cop appears. Yet, some of the worst exercises of illegitimate power take more than a cop’s quick glance to be recognized as such. These are situations where a prosecutor’s slow second look can make a big difference in uncovering and pursuing these exercises.

Consider the difference between extortion and robbery. In a robbery, “the threat, the point at which the threatened act will occur, and the consent all happen around the same time. The robber says ‘your money or your life,’ and the victim, fearing immediate harm, hands over his wallet.”⁶¹ A police officer encountering this scene will quickly figure out what is happening, and if she can’t, the victim will explain. Extortion is very different. Here the bad guy may say “make regular payments to me or I will hurt you and your family.” When the victim pays, the transaction will look pretty ordinary; the police officer who encounters it will have no reason to think otherwise, and, in all too many cases, the victim won’t explain.⁶² Indeed, the worse – the more serious and the more enduring – the exercise of illegitimate power, the more “natural” the transaction will look and the less likely the victim will be to tell the police about it. Indeed, some “victims,” might not even feel victimized, like those who make payoffs to public officials – payoffs that are ultimately included in the contract price, which in turn is often paid by the state and its taxpayers.

Then there are instances of private oppression that might occasion a call to the police and a response, but that won’t make it through the adjudication process without special attention. This is the world of domestic violence, where, if a case

⁵⁹ Sklansky, *Democracy and the Police*, *supra* note 7, at 127.

⁶⁰ For a horrendous example of illegitimate prosecutorial domination, see Nancy King’s story of *Duncan v. Louisiana*, in *Criminal Procedure Stories* (Carol Steiker, ed., 2003).

⁶¹ Daniel C. Richman, Kate Stith, & William J. Stuntz, *Defining Federal Crimes* 270 (2014).

⁶² *Id.*

ever makes it to trial, the defendant's chief witness will often be the victim herself, and the prosecution's case will have to be made through evidence collected with an eye to just such an asymmetric adjudication.⁶³ Avlana Eisenberg has found similar dynamics at work in hate crime investigations, where, in the absence of prosecutorial prodding, police officers regularly avoid considering motive, looking only to physical harm.⁶⁴ It is also the world of organized crime.

Perhaps every case of domestic violence, gang intimidation, or official corruption does not threaten democracy. But impunity does. These are the offenses where the harm goes well beyond the injury suffered from specific acts, and where the exercise of illegitimate power can cripple the ability of victims and those around them to flourish as individuals and citizens. Because what makes these exercises of power particularly insidious is that their illegitimacy won't be conspicuous to outsiders, these are precisely the cases unlikely to be successfully developed and pursued without prosecutors taking the lead.

Let me not overstate the point. Can one envision that the same kind of dedicated detective work that one sees in homicide dramas (pick your country), and sometimes in real life, can build domestic violence and hate crime cases and doggedly pursue organized crime and corruption cases? Of course, especially if one considers the wide range of institutional arrangements across jurisdictions and assumes the requisite resource commitments. Police departments with hate crime units are more likely to follow through on their institutional commitment to bias cases,⁶⁵ and the same dynamics can be expected with domestic violence, and perhaps even organized crime. Still, the pressures on police forces with patrol and crime control responsibilities are infeasible, and all too often – particularly when murder has not occurred and victims are not complaining – come at the cost of the intensive police work needed to investigate crimes not in plain view.⁶⁶

These are pressures that prosecutors are well positioned to counter and compensate for. There is evidence that they can do just that, if properly

⁶³ See Andrew R. Klein, *National Institute of Justice, Practical Implications of Current Domestic Violence Research*, 43–44 (June 2009); see also Jill Theresa Messing, *Evidence-Based Prosecution of Intimate Partner Violence in the Post-Crawford Era: A Single-City Study of the Factors Leading to Prosecution*, 60 *Crime & Delinq.* 238 (2014).

⁶⁴ Avlana Eisenberg, *Expressive Enforcement*, 61 *UCLA L. Rev.* 858, 885–6 (2014).

⁶⁵ *Id.* at 885; see also Jennifer Balboni & Jack McDevitt, *Hate Crime Reporting: Understanding Police Officer Perceptions, Departmental Protocol, and the Role of the Victim: Is There Such a Thing as a "Love" Crime?*, 3 *Just. Res. & Pol'y* 1 (2001).

⁶⁶ For a sense of how the pressures to do street enforcement drain intensive investigation resources, even in homicide cases, see Loevy, *supra* note 25; Jeffrey Fagan & Daniel C. Richman, *Understanding Recent Spikes and Longer Trends in American Murders*, 117 *Colum. L. Rev.* 1235 (2017).

supported. In the United States, studies have found that a combination of “no drop” policies and a high degree of coordination between police and specialized prosecutors is the key to increasing the success of domestic violence prosecutions.⁶⁷ In England and Wales, in the face of “disappointingly mixed reports about the extent to which [police] forces and the CPS are pursuing evidence-led prosecutions” in domestic violence cases, authorities have highlighted the gap between articulated prosecutorial needs and police investigative efforts.⁶⁸ In Germany, on the other hand, where an overwhelming proportion of domestic violence cases end up dismissed, a 2004 report faulted the police for not gathering adequate evidence and prosecutors for being too prone to abide by victim inclinations to drop.⁶⁹

In domestic violence cases, prosecutors’ unique competence lies in their ability to preserve what might be unstable evidence of criminal conduct, with an eye to the demands of an especially challenging adjudicative process. In cases involving more organized criminal conduct, their unique competence lies in their deployment of the adjudicative process itself to investigate and prove criminal conduct. Again, with due recognition of my American bias, I make only a provisional claim about how organized criminal activity and particularly corruption can most productively be pursued. The claim, though, is that enforcers can go after embedded criminal activity only if they can obtain closely held private information from those with their own criminal culpability, and that the only effective “currency” is leniency in adjudicative outcomes. Prosecutors’ adjudicative role thus makes them necessary actors in this investigative process – which often will proceed in grand juries, the special province of U.S. prosecutors⁷⁰ – and their efforts will determine how high up a criminal hierarchy penal sanctions can go.

Certainly the use of deal-brokered accomplice testimony has become (for better or worse) a hallmark of U.S. organized crime and corruption prosecutions.⁷¹ Indeed, my sense is that some of the interest in “American style”

⁶⁷ Klein, *supra* note 63, at 45.

⁶⁸ HM Inspectorate of Constabulary, *Everyone’s Business: Improving the Police Response to Domestic Abuse*, 102–3 (2014). The interaction between police and prosecutors in domestic violence cases, particularly in the face of “attrition” has been the subject of sustained attention by U.K. authorities. See HM Inspectorates of Crown Prosecution Service and Constabulary, *Violence at Home: A Joint Thematic Inspection of the Investigation and Prosecution of Cases Involving Domestic Violence* (Feb. 2004).

⁶⁹ Federal Ministry for Family Affairs, *Senior Citizens, Women, and Youth, Working Together to Combat Domestic Violence: Cooperation, Intervention, Research*, at 17 (2004).

⁷⁰ See Daniel Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 *Am. Crim. L. Rev.* 339 (1999).

⁷¹ See Daniel Richman, *Cooperating Clients*, 56 *Ohio St. L. J.* 69 (1995); see also Alexandra Natapoff, *Snitching: Criminal Informants and the Erosion of American Justice* (2011).

prosecutions – in Brazil, for example – comes from a desire to replicate U.S. tactics in such cases.⁷² And Shawn Marie Boyne reports that even in Germany, where “there is still widespread denial . . . regarding the use of ‘confession agreements’ in major crime cases,” deals are regularly made and are of particular use in corruption cases.⁷³ She also notes that, even though most cases in Germany start with a police investigation whose matured fruits will only thereafter be sent to prosecutors, the very nature of economic crime and corruption cases requires considerable prosecutor–police cooperation from the start.⁷⁴

Mind you, the claim is not that prosecutors are inherently white knights questing to relieve subordination in the home or on gang turf and ready to target those who would abuse the democratic process for private ends. Nor is it that criminal law is necessarily the best vehicle for furthering these goals. Rather, I merely suggest that if criminal sanctions are going to be used, prosecutors will have to play an outsized role in the process – certainly larger than the one they play in “regular” episodic criminal cases and at least as large as that normally played by the police. In contrast to street crimes, if prosecutors are not spearheading the pursuit of, say, corruption, those cases are unlikely to happen.

3 Prosecutors and Legislative Accountability

The accountability that prosecutors can bring to the police will play out at both the retail and wholesale levels. When a prosecutor questions the legality of an arrest or the sufficiency of the evidence the police provide to support formal charges, the iterated nature of this kind of case can lead to broader policy discussions or disputes. How about other branches of government? To what extent should prosecutors be able to hold legislators’ feet to the fire on criminal justice issues?

In theory, were criminal justice outputs sufficiently valued and closely monitored by the elected officials responsible for constructing and funding the operative legal regime, a high degree of insulation from politics would not impair the democratic prosecutorial mission, and could indeed promote it. Not only is there always a risk of institutional self-dealing, but the separation of everyday politics from the administration of criminal justice can further rule-of-law values at the heart of democratic liberalism.

⁷² See Will Connors & Luciana Magalhaes, *How Brazil’s “Nine Horsemen” Cracked a Bribery Scandal*, *Wall St. J.* Apr. 6, 2015; see also OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Brazil* (Oct. 2014), at 40–1.

⁷³ Shawn Marie Boyne, *The German Prosecution Service* 138 (2013). ⁷⁴ *Id.* at 129.

When it comes to institutional self-dealing, the United States provides a dramatic object lesson. Many have noted how the federal Justice Department regularly proposes and shapes the legislative products of Congress.⁷⁵ Federal prosecutors also shape the effective scope of legislation through the cases they choose to pursue and the legal interpretations they promote through carefully chosen facts.⁷⁶ Yet more notable than the influence of one co-equal political branch on another at the federal level has been the sustained and successful efforts of local prosecutors to block and advance criminal justice measures in their statehouses. Michael Campbell, for example, has given a powerful account of how, between 1989 and 1993, Texas prosecutors blocked sentencing reform and pushed for prison expansion. He notes:

Texas prosecutors were influential because they provided an important link between state and local politics, and because prosecutors have specialized skills linked to their position as legal experts and political actors. They operated as an important interpreter of popular demands, and as a powerful voice in opposing legal changes that would limit their discretion.⁷⁷

That prosecutors – working within a plea-bargaining regime that allows them to use the threat of harsher sentences and expansive liability theories to induce defendants to give their trial rights – have endeavored to reduce judicial sentencing discretion is not particularly surprising, however regrettable.⁷⁸ More disheartening, at least from a democracy-promoting perspective, has been their opposition to (or simply tepid support for) the adequate funding for indigent defense schemes.⁷⁹ Prosecutorial involvement in the larger political process thus can come with real costs to liberal values.

⁷⁵ See Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 *Va. L. Rev.* 271 (2013); Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds – The Center Doesn't*, 117 *Yale L.J.* 1374, 1388 (2008) [hereinafter Richman, *Federal Sentencing in 2007*].

⁷⁶ Daniel Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. Rev.* 757, 762–3 (1999); see also Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 *Harv. L. Rev.* 469, 479–80 (1996).

⁷⁷ Michael C. Campbell, *Omery Alligators and Soap on a Rope: Texas Prosecutors and Punishment Reform in the Lone Star State*, 16 *Theoretical Criminol.* 289, 290 (2011); see also Jonathan Simon, *Governing through Crime* (2007) (arguing that “prosecutorial complex” has been the driving force in criminal justice governance).

⁷⁸ See R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 *Loy. U. Chi. L. J.* 981 (2014).

⁷⁹ For an insightful exploration of the political economy of indigent defense funding in the United States, see Darryl K. Brown, *Epiphenomenal Indigent Defense*, 75 *Mo. L. Rev.* 907 (2010); see also Lawrence C. Marshall, *Gideon's Paradox*, 73 *Ford. L. Rev.* 955, 961 (2004) (quoting a Georgia prosecutor “who opposed an indigent defense-funding measure on the

That said, prosecutorial insulation from the political process when those within it do not adequately attend to the health of the criminal justice system comes with a different set of costs. For a sense of these costs, one needs only to look at instances where the insulation of prosecutors has left them unable to prevent their work from being undercut, even nullified by political actors. Carlo Rossetti reports that in Italy, when a “tiny group of magistrates” brought major corruption cases, those just ended up on the long queue of cases awaiting trial, subject to legislated deadlines for disposal of cases that gave the targets of long corruption probes “de facto impunity.”⁸⁰ In England and Wales, the CPS’s lack of political clout has come with an underfunding that surely has system-wide effects.⁸¹ The abuses of lobbying power ought not blind us to the role prosecutors can play as engaged and knowledgeable reform leaders.

III ACHIEVING DEMOCRATIC FUNCTIONALITY AND ACCOUNTABILITY

Having explored some of the ways in which prosecutors can contribute to a well-functioning democracy, one can easily jump to a number of basic questions. First, to what extent do we want prosecutors to play these roles? Second, are other institutions better suited to play each role, and why? And third, what institutional design trade-offs might both serve these goals and ensure prosecutorial accountability? I can’t image any categorical answers to these questions, which all involve foundational political choices and require engagement with the entire socio-legal structure in which the criminal justice regime, and the prosecutorial establishment in particular, is enmeshed.

Yet once again, shielded by Ricardo’s law, let me go straight to the third question. And on even this, I start with critical caveats that (I hope) excuse the level of abstraction (and, again, the American bias) with which I proceed. Even as I talk generally about institutional characteristics, I’ll give scant attention to the precise institutional designs that generate them. This sweep is in part dictated by an interest in trans-jurisdictional breadth. But it is also dictated by a lack of

ground that “it was the greatest threat to the proper enforcement of the criminal laws of this state ever presented.”). For a burden-increasing proposal designed to recruit prosecutors to lobby for indigent defense funding, see Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 *Conn. L. Rev.* 85, 119 (2007).

⁸⁰ Carlo Rossetti, *The Prosecution of Political Corruption: France, Italy and the USA – A Comparative View*, 13 *Innovation* 169, 173 (2000).

⁸¹ See Owen Bowcott, *Crown Prosecution Service Chief Inspector Signals Concern over Funding: Kevin Meginty Says Cuts Can Leave Agencies Unable to Function, amid Fears Criminal Justice System Cannot Sustain Its Schedule*, *The Guardian*, Sept. 23, 2015.

correspondence between de jure and de facto features of prosecutorial regimes. When trying to take “systematic stock” of prosecutorial independence transnationally, for example, van Aaken et al. found that the correlation between de jure and de facto indicia of prosecutorial independence (i.e. tenure and formal accountability to political hierarchs vs. actual forced retirements, and changes in legal foundations for the prosecution of crimes) was “slightly negative.”⁸² Indeed, they found a slight correlation between de jure prosecutorial independence and higher levels of perceived corruption.⁸³ And they suggest that “this finding reflects reversed causality: Due to gentle pressure to fight corruption, many governments have passed fresh legislation granting their prosecutors more formal independence. Yet, formal legislation often remains unenforced.”⁸⁴

Permit me, then, to provisionally speculate in general terms about the coherence of various institutional design features with the various democracy-advancing roles that prosecutors might play. Put differently, let me return to the question of how to promote democratic accountability for prosecutors within existing structures. I’ll first note the limitations of specific accountability paradigms and then step beyond them to explore cross-cutting institutional design and legal regime considerations.

A Accountability Paradigms and Their Limitations

Mulgan has usefully set out several accountability typologies: “legal (external with high control), political (external with low control), bureaucratic (internal with high control), professional (internal with low control).”⁸⁵ Each of these, to varying extents and in varying combinations, has been extended to prosecutorial establishments. The United States is somewhat of an outlier in its reliance on fragmented authority and direct political accountability, with most liberal democracies relying on a mix of legal and bureaucratic mechanisms.

Does an embrace of the full measure of contributions that prosecutors can make to democracy necessarily imply preference for a particular kind of prosecutorial establishment and blend of accountability typologies? I’m not sure. Here, the “regulatory trilemma” identified by Teubner appears in the tradeoffs required when we balance regularity against effectiveness against responsiveness.⁸⁶ Consider the most dramatic project from Part II, the crusading prosecutor committed to curing democracy deficits by taking on

⁸² Anne van Aaken, et al., *Do Independent Prosecutors Deter Political Corruption? An Empirical Evaluation across Seventy-eight Countries*, 12 *Am. L. & Econ. Rev.* 204, 220 (2010).

⁸³ *Id.* at 223. ⁸⁴ *Id.* at 229. ⁸⁵ Mulgan, *supra* note 55, at 31.

⁸⁶ See *supra* text accompanying note 13.

entrenched interests in government or at its periphery. The stuff of legends, movies,⁸⁷ and sometimes reality. Such a figure is unlikely to step out of a bureaucracy tightly tethered – by culture, hierarchy, regulation or some combination thereof⁸⁸ – to a central authority anchored in the political status quo.⁸⁹ One would not expect grand corruption to be a central interest of this bureaucracy, and in France (to take one example) it hasn't been.⁹⁰

Move to a different project, and the analysis changes radically. Even when maximally pursued, grand corruption cases are but a small part of the prosecutorial diet. In most cases, the project of punishment modulation becomes most salient, and bureaucratic regularity has considerable appeal. Indeed, the very notion of a prosecutor playing a self-conscious democracy-promoting role may be anathema to those looking for consistency, professionalism, and compliance with positive law.

Even were we to select only for the crusading project, I'm not sure what the optimal prosecutorial arrangement would be. Rossetti attributes the zeal of the Italian judges and prosecutors who pursued corruption in the 1990s to their constitutionally secured independence, which “protects them from arbitrary interference by the executive and legislative branches.”⁹¹ DiFederico, on the other hand, questions the attribution of anticorruption zeal to the independence and low democratic accountability of Italian prosecutors, noting that prosecutors were similarly insulated during a long

⁸⁷ My favorite film example is the “examining magistrate” in Costa Gavras's *Z*. See Robert L. Waring, *Picturing Justice: Images of Law and Lawyers in the Visual Media*, *Z*, 30 *U.S.F. L. Rev.* 1077 (1995).

⁸⁸ Mirjan Damaška noted long ago that the real limits on prosecutorial discretion in Europe have come less from the external legal system but rather from internal organizational structures and norms – hierarchical, centralized supervision of the prosecutorial corps and a professional emphasis on consistent, uniform decision-making. See generally Mirjan Damaška, *Structures of Authority and Comparative Criminal Procedure*, 84 *Yale L.J.* 480, 503–4 (1975).

⁸⁹ See Anne van Aaken, et al., *supra* note 4 at 262 (noting recent scandals involving possible pressure by the executive on prosecutors pursuing corruption cases in Germany, Italy and Israel, and arguing that “[a] procuracy depending on the executive can not only lead to higher levels of crimes but can have far-reaching effects on the legitimacy as well as on the stability of the state”).

⁹⁰ See Jacqueline Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France* 80 (2005) (noting that while the “historical accountability of the *parquet* to the Minister of Justice is claimed as a form of democratic accountability,” it “also offers the potential for political interference in a way that does not guarantee, but undermines, the independence of the *parquet* and serves to protect favoured individuals from legal scrutiny”); see also Rossetti, *supra* note 80, at 174. (“In recent years French magistrates met with a number of difficulties and obstacles in cases involving the government, the public administration, and especially state-owned banks. Interference by the government prevented the magistrates from reaching the upper ranks of the government system implicated in a conspiracy to defraud the state.”)

⁹¹ Rossetti, *supra* note 80, at 169.

period of inactivity.⁹² Indeed when prosecutors are too well insulated, citizen voices against impunity – a possible wellspring of zeal and democratic commitment – will also be muted. It was just such voices, from local anti-corruption groups, that prodded local prosecutors in Indonesia into action, according to a recent World Bank study.⁹³ (This is not to say that those voices were enough. The study also tells how local Indonesian anticorruption movements had trouble sustaining public pressure as cases inched through the legal process and how they had scant influence once cases moved up to the centralized appeals process.⁹⁴)

Fear not, appreciating how public pressure can galvanize prosecutors into action does not lead me to support prosecutorial elections, even in service of the crusading project. After all, the politics that drive prosecutorial elections will usually be those in which a corrupt elite is enmeshed. Even the pursuit of sex abuse cases within a specific community can fall victim to political expediency.⁹⁵ Whether or not the prosecutor has any further political ambitions (and an important subset do), virtually all will have political affiliations that give pause to those looking for magisterial purity. Even if one assumes that the claims of partisan targeting that will inevitably attend prosecutions frequently lack foundation, the risk that both real and perceived that criminal cases will be treated as an extension of partisan warfare is real, and has become a standard American trope.⁹⁶

Indeed, I would go further and suggest that in the country where prosecutorial elections are the norm – to the understandable dismay of most domestic and comparative scholars⁹⁷ – embrace of them as instruments of democratic accountability and non-bureaucratic zeal has been at best half-hearted. Many have cogently argued that the dominant American approach offers the worst of all worlds. Because the elections are generally not seriously contested, they offer little in the way of accountability, yet the populism they inject into the process still impedes the thoughtful exercise of prosecutorial

⁹² Giuseppe Di Federico, *Prosecutorial Independence and the Democratic Requirement of Accountability in Italy: Analysis of a Deviant Case in a Comparative Perspective*, 38 *Br. J. Criminol.* 371, 383 (1998).

⁹³ Taufik Rinaldi, Marini Purnomo & Dewi Damayanti, *Fighting Corruption in Decentralized Indonesia (World Bank Case Studies on Handling Local Government Corruption)*, at 8 (May 2007).

⁹⁴ *Id.* at 8, 71.

⁹⁵ See Ray Rivera & Sharon Otterman, *For Ultra-Orthodox in Abuse Cases, Prosecutor Has Different Rules*, *NY Times*, May 10, 2012 (reporting on Brooklyn District Attorney Charles Hynes's treatment of sex abuse cases within a Jewish community).

⁹⁶ See Sanford C. Gordon, *Assessing Partisan Bias in Federal Public Corruption Prosecutions*, 103 *Am. Pol. Sci. Rev.* 534 (2009).

⁹⁷ Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 *Crime and Justice* 1 (2012).

authority.⁹⁸ But it bears remembering that the idea behind the move to popular elections – widespread in the second quarter of the nineteenth century – was more defensive than offensive: to deflect efforts of governors and legislators to use appointments for political patronage.⁹⁹ Such defensiveness is somewhat of a theme across American prosecutorial establishments. In the federal system, for instance, the relative independence of appointed U.S. attorneys from the political hierarchs in Washington has been (regularly, but not always) fostered by Congress less in the interest of controlling the districts themselves than to prevent the President and his circle from exercising such control.¹⁰⁰ Note how this theme accepts and perhaps even reinforces a regime in which prosecutorial discretion is at its apogee. Rather than rein in prosecutors – through legislative specificity, closer judicial supervision, or binding executive guidelines – the institutional design project has been more to prevent the political deployment of the office by other hubs of governmental power. And that project has been hostage to contingency and history, as we discovered when President George W. Bush tried to cull his United States attorneys.¹⁰¹

It is hardly a defense of the American embrace of direct political accountability to observe that it furthers negative goals that are different from those ostensibly targeted. But in the end, my expository goal is also negative. I have simply taken a handful of many possible democracy-promoting projects for prosecutors and suggested why it may be difficult, even with that limited focus, to figure out the optimal institutional arrangements to promote them. I've considered only the choice between a politically insulated bureaucracy and elected political hierarchs. Just think how hard the equation gets if we also consider different doctrinal approaches to prosecutorial decision-making – “principle of legality” vs. the “principle of opportunity” – or different modes of fact-finding, adversarial vs. inquisitorial. One would then have to account for path-dependent and historically contingent traditions that foster institutional cultures. And then, if the goal is really to have a tournament of systems, one would have to look at the entire array of ways that prosecutors might promote

⁹⁸ See, e.g., Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 *Ohio St. J. Crim. L.* 581, 583 (2009) (noting, of elections: “First, they do not often force an incumbent to give any public explanation at all for the priorities and practices of the office. Second, even when incumbents do face challenges, the candidates talk more about particular past cases than about the larger patterns and values reflected in local criminal justice.”); see also Russell M. Gold, *Promoting Democracy in Prosecution*, 86 *Wash L Rev* 69, 71 (2011). (“Lack of a meaningful political check on prosecutors diminishes popular sovereignty.”)

⁹⁹ See Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 *Yale L.J.* 1528 (2012).

¹⁰⁰ Richman, *Federal Criminal Law*, *supra* note 76, at 808–9.

¹⁰¹ Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 *Duke L.J.* 2087, 2105–8 (2009).

democracy, opine on the efficacy with which each system promotes each goal, and devise some global means of balancing. Perhaps someone can actually do this. I lack the data, competence, and inclination.

So where does this leave us? Even as various states reassess aspects of their legal regimes and institutional structure, path dependency limits formal change – particularly in an area where informal adaptation is usually more convenient to insiders. If we are to be attentive to ways in which liberal democracies can support prosecutors, as well as vice versa, better that we speak of the principles that ought to guide change or stability across diverse institutional arrangements, rather than celebrate or condemn particular regimes.

B Principles Cutting across Accountability Typologies

When assessing the normative promise of institutional arrangements, we should heed Andreas Schedler's reminder:

Holding power accountable does not imply determining the way it is exercised; neither does it aim at eliminating discretion through stringent bureaucratic regulation. It is a more modest project that admits that politics is a human enterprise whose elements of agency, freedom, indeterminacy, and uncertainty are ineradicable; that power cannot be subject to full control in the strict, technical sense of the word.¹⁰²

Mindful of this counsel, I will offer a few modest principles with application across diverse prosecutorial regimes. Obviously incomplete, the list is, at best, a good first step.

1 Language of Rationality and Equality

At a bare minimum, those exercising power need to be able to explain themselves – give an “account” – to someone, somehow. There are also normative constraints on what those explanations can be – one being that the language sound in rationality and equality. Any prosecutorial establishment must, as Jerry Mashaw has put it, give “operational content” to the “public reason approach” that provides legitimacy to those “modern states characterised by both democratic aspirations and a heavily administrative institutional structure.”¹⁰³ And the public reasons offered need to themselves be true to democratic values.

¹⁰² Andreas Schedler, *Conceptualizing Accountability* 14, in *The Self-Restraining State: Power and Accountability in New Democracies* (Andreas Schedler, et al. eds. 1999).

¹⁰³ Jerry L. Mashaw, *Public Reason and Administrative Legitimacy*, 11, 13 in *Public Law Adjudication in Common Law Systems: Process and Substance* 11, 13 (John Bell et al. eds., 2016).

If, like Edward Rubin, one defines accountability “as the ability of one actor to demand an explanation or justification of another actor for its actions, and to reward or punish the second actor on the basis of its performance or explanation,”¹⁰⁴ we can easily see how a highly bureaucratic system, with line actors acting at the direction of and under the hierarchal control of supervisors who themselves are similarly accountable, can limit the reasons a line prosecutor may give and formally preclude the exercise of “discretion.”¹⁰⁵ Yet the challenges of ex ante specification are endemic (though perhaps not unique) to penal systems and particularly great when the “principle of legality” requires the pursuit of every makeable case.

Canonical and bureaucratic restriction of the language of prosecutorial justification may thus drive the action underground, with mixed normative results. Consider Germany. As Shawn Boyne explains:

[A] significant part of a German prosecutor’s initial training involves one-on-one training in the art of documenting actions taken on a case file. Not only does this one-on-one training ensure that prosecutors accurately and consistently document the history of a case in the case file, the training systematically conveys the routines of organizational practice to newcomers entering the organization . . . In theory, any prosecutor could pick up another prosecutor’s file and immediately understand the case.¹⁰⁶

Such documentation may come with risks of, indeed an invitation to, disingenuity. In a plea for more candor about prosecutorial discretion in Germany and elsewhere, Erik Luna has noted that “some European systems have . . . preserved orthodox interpretations of the legality principle only by denying the existence of prosecutorial power.”¹⁰⁷ This quiet opacity has upsides; Luna suggests that “mandatory prosecution” (a principle that Germany has relaxed only for low-level or juvenile cases¹⁰⁸) – might be seen as a “necessary fiction” that “maintain[s] prosecutorial independence from the political process and [] protect[s] prosecutors from charges of arbitrary decisionmaking.”¹⁰⁹ Yet Thomas Weigend properly notes how the

¹⁰⁴ Edward Rubin, *The Myth of Non-Bureaucratic Accountability and the Anti-Administrative Impulse*, at 52, in Dowdle, *Public Accountability*, at 9.

¹⁰⁵ See also Edward L. Rubin, *Discretion and Its Discontents*, 72 *Chi.-Kent L. Rev.* 1299 (1997).

¹⁰⁶ Shawn Boyne, *Procedural Economy in Pre-Trial Procedure, Developments in Germany and the United States*, 24 *S. Cal. Interdisc. L. J.* 329, 353 (2015).

¹⁰⁷ Erik Luna, *Prosecutor King*, 1 *Stan. J. L. & Crim. Policy* 48, 81 (2014).

¹⁰⁸ Boyne, *supra* note 106, at 339. ¹⁰⁹ *Id.*

move ends up shielding the prosecutor from personal responsibility,¹¹⁰ with a consequent loss of even conversational accountability.

In such circumstances, perhaps bureaucratic accountability mechanisms can profitably be supplemented with political ones. In recognition of the democracy deficit endemic to bureaucratic hierarchies, the Venice Commission has noted the increasing use of “prosecuting councils” across Europe. It observes:

If they are composed in a balanced way, e.g. by prosecutors, lawyers and civil society, and when they are independent from other state bodies, such councils have the advantage of being able to provide valuable expert input in the appointment and disciplinary process and thus to shield them at least to some extent from political influence. Depending on their method of appointment, they can provide democratic legitimacy for the prosecution system.¹¹¹

If the characteristic fault of German prosecutors is to deny that there is any discretion to explain, that of American prosecutors – and it is probably more grievous – is to offer scant explanation for starkly discretionary decisions. Here, what can often be a substantial absence of bureaucratic accountability – particularly in county-based state systems, but to varying extents everywhere – is justified (such as it is) by reference to a political accountability far more direct than a “prosecuting council.”

To some extent, the direct (or in the federal system, indirect) electoral accountability of U.S. prosecutors can lead to public reasoning about priorities and policies. But public discourse in the United States about prosecutorial choices is limited. The limited nature can be attributed to the opacity of the plea bargaining process; a doctrinal framework that frees prosecutors from ever explaining why charges were not brought;¹¹² and a lack of legislative specificity about cases that can be brought. Yet discourse is limited even for those cases that go to trial by evidentiary rules that preclude the presentation of a great deal of information considered in the decision to charge. Moreover, as anyone familiar with the “politics of crime” in the United States knows,¹¹³ wildly swinging

¹¹⁰ Id. (citing Thomas Weigend, *A Judge by Another Name? Comparative Perspectives on the Role of the Public Prosecutor*, in *The Prosecutor in Transnational Perspective*, 391 (Erik Luna & Marianne Wade, eds., 2012)).

¹¹¹ European Commission of Democracy Through Law (Venice Commission, Report on European Standards as Regards the Independence of the Judicial System: Part II – The Prosecution Service, Study No. 494/2008 (Adopted 2010), at 34.

¹¹² See Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 *Va. L. Rev.* 939 (1997) [hereinafter Richman, *Old Chief*].

¹¹³ See Michael C. Campbell, *Are All Politics Local? A Case Study of Local Conditions in a Period of “Law and Order” Politics*, 664 *Annals, Am. Acad. Pol. & Soc. Sci.* 43 (2016);

electoral politics will often undercut the ability of prosecutors to promote reasoned local conversations (even when they are interested in doing so).¹¹⁴

Americans could, of course, ask more of prosecutors in the courtroom. Indeed, cogent arguments have long been made for empowering judges – as either a statutory or constitutional matter – to demand justifications for charging and plea bargaining decisions.¹¹⁵ Formal authority in this regard might simply complement the soft power that trial judges frequently deploy – to various extents in various jurisdictions: the ability to sternly peer from the bench, say that the prosecutor “must be joking,” and ensure that the prosecutor who “doesn’t get with the program” regrets it. Yet the general reluctance of appellate courts and legislators to give judges *de jure* authority is not just a matter of separation of power formalism, but deep-seated (however contestable) concerns about institutional competence.

Would the accountability of American prosecutors be usefully enhanced if they no longer had absolute immunity to constitutional tort suits for conduct relating to their adjudicatory decision-making?¹¹⁶ I suspect not, since only the most egregious and provably illegal conduct provides the basis for relief in suits when immunity is “qualified” – as it is for the police or for prosecutors acting in an investigative capacity.¹¹⁷ I would also want a better sense of what the noise-to-signal ratio would be, were this litigation avenue opened up. That said, egregious prosecutorial conduct has occurred with sad regularity. At the very least, placing prosecutors on equal footing with the police and dispensing with the need to distinguish between advocacy and investigative work by prosecutors would eliminate the distortions in constitutional tort law created when the interconnectiveness of prosecutorial and police activity is ignored and when those seeking relief for wrongful convictions have to focus on police conduct.¹¹⁸ Since wrongful conviction cases can spark reform outside the courts even when unsuccessful within them, it is particularly important to get the whole story across all relevant institutions.

Katherine A. Beckett & Theodore Sasson, *The Politics of Injustice: Crime and Punishment in America* (2003); Jonathan Simon, *Governing Through Crime* (2009).

¹¹⁴ See Rubin, *supra* note 12, at 57 (on deficiencies of local politics as accountability mechanism).

¹¹⁵ See Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 *Wm. & Mary L. Rev.* 101 (2016).

¹¹⁶ See *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009); Jennifer E. Laurin, *Prosecutorial Exceptionalism, Remedial Skepticism, and the Legacy of Connick v. Thompson*, in *National Police Accountability Project, Civil Rights Litigation Handbook*, 29–70 (2011).

¹¹⁷ See *Stinson v. Gauger*, 799 F.3d 833 (7th Cir. 2015).

¹¹⁸ See John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 *Va. L. Rev.* 207, 220–31 (2013).

That electoral accountability may contribute little to public reasoning and courts may lack much formal power to demand rationales does not mean that American prosecutors are not subject to other, more sustained and granular pressures to explain their actions. As a descriptive matter, there are a variety of other accountability mechanisms that demand attention and that, as a normative matter, might be strengthened – mechanisms not unique to American prosecutors but, in absence of the top-down bureaucratic dialogue seen elsewhere, are of particular importance in the United States.

My claim is not that the mesh of networked institutions in which prosecutors in the United States (and perhaps elsewhere) do their work necessarily provides low-visibility channels for reasoned justification and democratic legitimacy, but that it can. Just as prosecutors can monitor the police, so too can the police monitor prosecutors and ask them to explain their adjudicatory positions.¹¹⁹ To the extent that the police are, by structure or task, bound to the citizenry they serve, we should expect some of their accountability to carry over to prosecutors who depend on police work. Indeed, the lack of a hierarchical relationship between police and prosecutors, combined with their distinct professional cultures, might provoke more reasoned deliberation than otherwise. Sure, beat cops usually don't second-guess charging decisions, even when made by rookie (or overly jaded) prosecutors. But the iterated nature of their interaction, and their distinct chains of command, brings the possibility of a dialogue that may even enrich public debate.¹²⁰

Iterated interaction between police and prosecutors is not unique to liberal democracies. The same creative tensions presumably arise in authoritarian states, without necessarily contributing to democratic accountability. What distinguishes the interactions in a liberal democracy is the nature of the institutions involved, with the possibility that police and prosecutors there have diverse political anchors that bring a dialogic richness (perhaps with expletives) to their conversations. What also distinguishes them is that, in an open society and a media interested in crime news,¹²¹ these arguments easily spill into public discourse. Similar provocation for public reasoning may – for

¹¹⁹ See *supra* section II.B.1; Richman, *Prosecutors and Their Agents*, *supra* note 22; see also Richman, *Federal Sentencing in 2007*, *supra* note 75 (explaining how the federal system is enmeshed in local systems).

¹²⁰ See Catherine M. Coles, *Community Prosecution, Problem Solving, and Public Accountability: The Evolving Strategy of the American Prosecutor*, 17 (2000) (giving example of Indianapolis prosecutor speaking of his rivalry with police department as democratic competition for community favor).

¹²¹ For a nice taxonomy of media coverage and its limits, see Stephanos Bibas, *Prosecutorial Regulation, Prosecutorial Accountability*, 157 *U. Pa. L. Rev.* 959, 983–8 (2009).

some offenses – come from victims, should they get an adequate forum – whether formally in court (as in some continental systems) or less formally, in communities and the media.

Then there are defense lawyers. Notwithstanding the absence of strong adjudicative controls over prosecutorial decisions, one might also imagine that, in an adversary system, defense counsel might still do yeoman service in pushing prosecutors to explain, if not justify, their discretionary decisions. Indeed, Jerry Lynch has provocatively imagined a world in which plea dispositions emerge out of textured discussions that reflect a “common law” across cases.¹²²

The last two paragraphs were pretty tentative, however, as was Lynch’s insightful piece. Foundational to the accountability narratives just adumbrated are vigorous institutional players and what Mulgan called a “shared language of justification.”¹²³ This means there must be thoughtful collaboration between police and prosecutors, fora where victims and affected community can listen and speak, and well-resourced defenders. If American prosecutors are to have a claim to democratic legitimacy through this networked accountability, these mechanisms need strengthening. The German prosecutor bound by the principle of legality will justifiably be hard-pressed to explain her exercise of discretion. The American prosecutor with sweeping discretion both as a matter of law and practice lacks this excuse. Yet, all too often, she deploys lame mantras of “prosecuting to the full extent of the law.”¹²⁴

Note how a key aspect of the American accountability narrative – and this is a common thread in all adversarial systems – requires prosecutors to exert their political power to support defense institutions, especially for the indigent, who comprise a majority of criminal defendants. The same independence that insulates prosecutors from other executive and legislative actors thus finds a modicum of justification when deployed to support a countervailing source of accountability, for the legitimacy of prosecutorial power in part demands that they be able to explain themselves to their adversaries. Moreover, the sense of a joint project cutting across legal roles promotes a professional accountability that cuts across cases. As Mulgan notes, professional accountability, while potentially flowing from formal disciplinary mechanisms, can also arise from the way members of a profession are “answerable to each other through shared networks and collegial relationships.”¹²⁵

¹²² See Lynch, *Our Administrative System*, *supra* note 19. ¹²³ Mulgan, *supra* note 55, at 9.

¹²⁴ See, e.g., Richman, *Corporate Headhunting*, *supra* note 48, at 269 (discussing DOJ stance on prosecuting corporate executives).

¹²⁵ Mulgan, *supra* note 55, at 34; see also Mashaw, *Accountability and Institutional Design*, *supra* note 13, at 124–6 (discussing “social accountability”); Richman, *Old Chief*, *supra* note 112 (discussing professional basis for prosecutorial accountability).

This answerability across institutional divides is quite different from transparency. Transparency, of course, is a critical democratic norm, and calls for “the broad visibility of government decision making” have been a powerful and understandable part of recent criminal justice critiques.¹²⁶ Still, formal transparency is not an unalloyed good, particularly if it provides levers for less engaged, and perhaps overly punitive, actors to intervene in downstream decision-making. Such is the lesson of federal sentencing history between 1989 and 2007.¹²⁷ Such has also often been the experience in the United States when, to promote consistency within a jurisdiction or an office, bureaucratic promulgations have limited line prosecutor options. While transparent governance does not have an inherent punitive tendency, when coupled with punitive politics, it has ratcheting effects. When looking across systems, we would thus do well to think more about promoting a “shared language of justification” for use across a variety of institutional interactions, even those the public cannot and should not know about.

2 Scale of Accountability

Although often lost in discussions of democratic accountability, any inquiry into the relationship of prosecutors to democracy needs to consider scale. How big need the polity in whose name the prosecutor acts be? And need that polity be the same one that produces the criminal laws being enforced?

Duff gracefully explains how one “distinctive and proper purpose” of “our criminal law” is to “call someone to account,” a process that requires a “normative community to which both called and callers can be said to belong.”¹²⁸ But why can’t the community in whose name a defendant is called and the prosecutor is doing the calling be unrepresentative, even peculiar, elements of the larger polity whence come the laws themselves? Niki Lacey and David Soskice have cogently argued that local autonomy has been a key driver of over-punitiveness in the United States.¹²⁹ Still, the division

¹²⁶ See Sklansky, *Democracy and the Police*, *supra* note 7, at 91; Erik Luna, Transparent Policing, 85 *Iowa L. Rev.* 1107 (2000).

¹²⁷ Richman, *Federal Sentencing in 2007*, *supra* note 75.

¹²⁸ Duff, *Responsibility, Citizenship and Criminal Law*, *supra* note 14, at 126.

¹²⁹ Nicola Lacey & David Soskice, *Why are the Truly Disadvantaged American, When the UK is Bad Enough? A Political Economy Analysis of Local Autonomy, in Criminal Justice, Education, Residential Zoning* 29, 35 (2013) (unpublished manuscript), at 29, 35 (2013 draft) (arguing that “diffusion and localisation of democracy has been one of the most powerful institutional factors in shaping America’s distinctive patterns of crime, punishment, segregation and indeed social inequality” and that “more centralised systems avoid the negative externalities of local decision-making characteristic of the US”).

of law-making vs. law-applying authority embodied in the county-based system offers, what, in theory at least, could be a productive blending of small vs. larger community norms. Moreover, one might imagine that, however selected, a local prosecutor – anchored by the local nature of so much criminal enforcement – will provide just this blending. Perhaps at some point local variation is an affront to the norm of equal citizenship. Yet one can also embrace the inevitable variation of a loosely linked “federal” system and make that variation itself a feature of the membership that a citizen enjoys.

Even in far more centralized and bureaucratized France, Jacqueline Hodgson and Andrew Roberts tell us:

[I]t is recognised that the prosecutor’s discretion is an important part of adapting prosecution policy to local conditions and concerns – an example of the influence that certain social and systemic pressures in the broad surround can have on subjective decision-making. The aim may be to manage the flow of cases, charging some offences at a lower level so that they remain in a mid-level court and are not subjected to the lengthy instruction procedure . . . Or the aim may be to respond to local mores and expectations.¹³⁰

Yet considerations of scale – which may depend on a polity’s embrace of local “responsiveness” and tolerance for national disparities – must be balanced against “capacity.” With respect to norm generation, this will always be a contestable measure. One person’s “community” is bound to be another’s “unrepresentative pocket.” Moreover, there will be more objective, or at least exogenous, aspects to capacity that implicate the permissible scale for the administration of justice in a liberal democratic polity. Recent reports from Ferguson, Missouri,¹³¹ and elsewhere drive the lesson home. If a political unit is not big enough to supply adequately trained police and prosecutors or support a court system not constrained to self-finance, it needs to be right-sized (to draw on a current managerial trope).

The institutional design “solution” may lie in overlapping jurisdictions, with more ostensibly responsive local establishments balanced by national or sub-national (but supra-local) prosecutors whose deficiencies with respect to local knowledge and communal preferences find compensation in a perspective less tethered to local leaders and pathologies. Even as I am reluctant to valorize

¹³⁰ Jacqueline Hodgson & Andrew Roberts, *An Agenda for Empirical Research in Criminal Justice: Criminal Process and Prosecution*, at 22 (2010 draft).

¹³¹ U.S. Dep’t of Justice, Civil Rights Div., *Investigation of the Ferguson Police Department* (2015) (highlighting focus of Ferguson law enforcement on generating revenue).

the American federal system – whose floating federal “responsibilities”¹³² bring their own accountability challenges – the gains when one prosecutorial level is able to hold another’s feet to the fire are undeniable. This may play out in policy decisions – as when one prosecutor publically questions the priorities and decisions of another – or corruption cases against prosecutors themselves and their allies.

Note that the value of a second level of prosecutors is not just a matter of perspective but institutional capacity. If prosecutors are to make a sustained contribution to democracy – one that goes beyond shepherding cases through the adjudicative process – they need the capability to either investigate or cause the investigation of the crimes that don’t involve manifest disorder of the sort that attracts police attention. I hesitate to specify the institutional arrangements that would best foster prosecutorial attention to domestic violence, corruption, and other such cases that strike at the heart of individual autonomy and political functionality. One can imagine, in theory, a wide range of possibilities – including overlapping jurisdictions (Robert Cover spoke of the “complex concurrency” of the American system¹³³), dedicated police-prosecutor squads, and the like. Indeed, even though a prosecutorial office is freer to invest investigative and adjudicative resources in this critical subset of cases when it is not constrained by the principle of legality, some combination of political will and institutional accounting can perhaps obtain the same result where that principle is respected. Theory, though, has its limits, and if care is not taken, these cases can easily get slighted.

3 Information Use/Collateral Consequences

Another principle requiring translation across different prosecutorial orders goes not to which cases will be brought, but how all adjudicated cases will be received. What volume control will there be on prosecutorial articulations of criminality? Perhaps there should be an “acoustical separation” that, by dampening how prosecutors can construct citizenship, might compensate for deficiencies in their accountability?¹³⁴ This dampening could limit the

¹³² Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 *Colum. L. Rev.* 583 (2005).

¹³³ Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 *Wm. & Mary L. Rev.* 639, 646 (1981); Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in 2 *Criminal Justice 2000: Boundary Changes in Criminal Justice Organizations* 81 (2000).

¹³⁴ Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustical Separation in Criminal Law*, 97 *Harv. L. Rev.* 625 (1983).

social and political meaning of a decision to prosecute that ends in a criminal conviction.

Some aspects of this meaning are endogenous to a polity's criminal process – the definition of an offense, the mode of proof, and the nature and severity of the sentence. Affecting all will be the legitimacy of the state generally and of its authority to punish specifically.¹³⁵ Important aspects of a conviction's meaning, however, are exogenous to the adjudicative process and are subject to regulatory decisions (or non-decisions) that can substantially limit a prosecutor's power to shape the social order. A well-functioning democratic order would attend to these regulatory decisions, which optimally would reflect a polity's considered judgment both about authority already delegated to prosecutors and the degree to which it should be extended to other domains.

Americans have been coming to grips with the authority – by default or otherwise – that has been effectively given to prosecutors by laws and rules that make criminal convictions into automatic triggers for a slew of “collateral” consequences. Frequently, convicted felons in the United States will lose the ability to vote, even after they are released from prison. In Europe and elsewhere, debate rages about whether those incarcerated should lose the right even while serving their sentence. An accountability lens offers no clearer resolution of these issues than it does on the qualitatively different issue of sentence severity. Powerful arguments that it is a grievous category mistake to deprive convicted offenders of basic citizenship rights may, for some, find answer in a communitarian logic.¹³⁶ Yet an accountability lens highlights the fact that the United States, where prosecutors are the least susceptible to granular accountability for their charging decisions, is also the least attentive to the weight that other authorities give those prosecutorial interventions post-conviction.

There is no grand paradox here. The fragmentation of governmental authority in the United States and the status accorded prosecutors goes far to explain the cascading (and often personally devastating) consequences that attend an adjudicated decision to charge, with legislators and regulators quick to pile on. Indeed, a political status perspective may explain the degree to which the United States (as a fragmented collective) allows the articulations of

¹³⁵ See Shelby, *supra* note 14 (explaining how the second can (somewhat) exist in the absence or weakness of the first).

¹³⁶ See John Finnis, *Prisoners' Voting and Judges' Powers*, 13 (2015) (unpublished draft). (“Allowing serious criminals to vote during incarceration under sentence says to the law-abiding that their vote does not count very much, and says to the criminal that his own vivid defiance of the communal project of self-government (so far as that project called upon him to respect his victim) leaves his right to continued participation in that project unimpaired, entirely unimpaired.”)

its prosecutors to shape the rest of a defendant's life. That, combined perhaps with different views about the "ownership" of information about public (including criminal) processes, may explain the very different approaches to criminal records information in the United States and Europe. As James Jacobs has comprehensively shown, while "American criminal records are exceptionally public, exceptionally punitive, and exceptionally permanent,"¹³⁷ the European Union and its member states, by contrast,

treat individual criminal history information as personal data that the individual has a right not to have disclosed by government personnel or by private parties. Consequently, police records do not circulate at all, court records are not open for public examination and (except in Sweden) private firms are not permitted to sell criminal record information to employers, even if they could obtain it.¹³⁸

Still, the diversity in criminal information regimes – and in the varying degrees to which prosecutors are allowed to construct citizenships – usefully pushes us to think harder about the relationship between prosecutors' accountability and their authoritative narrative power.

IV CONCLUSION

The role of prosecutors in a liberal democracy entails standing apart from the polity, speaking for and to it, and being true to its laws and values. One might see this as an existential dilemma, but I prefer to take it as a law and institutional design challenge – a challenge that probably does not have a single optimal solution (or at least one constitutionally attainable across all jurisdictions). Above all, it is a challenge to reason: to hold people and institutions to account, and to be able to give an account of oneself.

Prosecutors in the United States have been rightfully pressed in recent years to give a better account of themselves, but so too have prosecutors in other countries. Before resorting to transplantation or even just intellectual valorization, more thought should be given to the trade-offs inherent in each set of institutions. The quiet claim here is not that any particular prosecutorial

¹³⁷ Kevin Lapp, *American Criminal Record Exceptionalism*, 14 *Ohio St. J. Crim. L.* (2016) (forthcoming) (drawing on James Jacob, *The Eternal Criminal Record* (2015), to argue that "American criminal record exceptionalism functions as an inexpensive way to sort and inflict punishment by devolving a great portion of the work to private actors and the general public").

¹³⁸ See James B. Jacobs & Elena Larrauri, *European Criminal Records and Ex-Offender Employment*, Oxford Handbooks Online.

establishment necessarily must trade off one democratic citizenship enhancing project for another. That a prosecutor has a sustained commitment to going after corruption and domestic violence should not insulate her from challenges that, for example, she is doing a poor job at modulating punitive outcomes. Still, unless we think beyond basic typologies, variations in institutional design will determine the likelihood that different projects will be pursued and with what effectiveness. As jurisdictions contemplate reform, they should therefore consider not just what is missing, but what they might lose.