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## The (Immediate) Future of Prosecution

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# THE (IMMEDIATE) FUTURE OF PROSECUTION

By Daniel Richman \*

*Even as others make cogent arguments for diminishing the work of prosecutors, work remains — cases that must be brought against a backdrop of existing economic inequality and structural racism and of an array of impoverished institutional alternatives. The (immediate) future of prosecution requires thoughtful engagement with these tragic circumstances, but it also will inevitably involve the co-production of sentences that deter and incapacitate. Across-the-board sentencing discounts based on such circumstances are no substitute for the thoughtful intermediation that only the courtroom working group — judges, prosecutors and defense counsel — can provide. The (immediate) future also requires prosecutors to do more to recognize the distinctive role they can play in combating illegitimate domination.*

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## INTRODUCTION

It seems a bit perverse to get too idealistic when considering “the future of prosecution.” After all, unless one wants to go full critique, and dismiss all crimes as purely social constructions, the precondition of the prosecution function is the highly suboptimal readiness of humans to inflict suffering on, or take grievous advantage of, others. Moreover, even if one treats crime construction and criminal acts themselves as exogenous to the prosecution

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function, optimality will be tragically bounded. One can hardly be idealistic about the decision of a prosecutor forced to determine the fate of a young Black man whose life has been marked by trauma, inequality, structural racism, and limited opportunity, but who has also robbed, shot, or killed someone else (who will often be another young Black man whose life has been similarly marked).<sup>1</sup> That society, at some level, failed both seems pretty clear.<sup>2</sup> Decent thinkers with any hope of social utility should push for reforms, or perhaps radical change, and a resource commitment commensurate with government's historical contribution to structural racism and inequality.<sup>3</sup> But the line prosecutor, as guided by the chief prosecutor (who one hopes gives clear guidance in such matters), has to figure out what happens next, right now, exercising the authority of a compromised state in order to, as philosopher Tommie Shelby puts it, "protect[] people from unjustified violence and illegitimate restrictions on their liberty."<sup>4</sup>

## I. THINKING ABOUT PUNISHMENT

Perhaps as she gets jaded, the prosecutor might be tempted to think of herself as merely a "coder" — one who processes, and to some extent gathers, information, gives it a provisional legal code, and drives an

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1. For data on perpetrator-victim race, see FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, EXPANDED HOMICIDE DATA TABLE 2 (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/expanded-homicide-data-table-2.xls> [<https://perma.cc/7KDZ-29RW>] (stating that, of 16,245 murder offenders, 4,728 were white, 6,425 were Black, and 4,752 were unknown); FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, EXPANDED HOMICIDE DATA TABLE 3 (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/expanded-homicide-data-table-3.xls> [<https://perma.cc/4RMK-9J6E>] (stating that of 13,927 murder victims, 5,787 were white, 7,484 were Black, and 234 were unknown); KEECHANT SEWELL, NEW YORK POLICE DEPARTMENT, CRIME AND ENFORCEMENT ACTIVITY IN NEW YORK CITY 1 (2021), [https://www.nyc.gov/assets/nypd/downloads/pdf/analysis\\_and\\_planning/year-end-2021-enforcement-report.pdf](https://www.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/year-end-2021-enforcement-report.pdf) [<https://perma.cc/S6HV-XBE7>] (showing that 67% murder and non-negligent manslaughter victims were Black and 61% of arrestees for murder and non-negligent manslaughter were also Black). For some of the vast literature on trauma and criminal culpability, see Micere Keels, *Developmental & Ecological Perspective on the Intergenerational Transmission of Trauma & Violence*, 151 DAEDALUS 67 (2022); David Eitle & R. Jay Turner, *Exposure to Community Violence and Young Adult Crime: The Effects of Witnessing Violence, Traumatic Victimization, and Other Stressful Life Events*, 39 J. RSCH. CRIME & DELINQ. 214 (2002); Rachael Liebert, *Trauma and Blameworthiness in the Criminal Legal System*, 18 STAN. J. C.R. & C.L. 215 (2022).

2. Tommie Shelby, *Justice, Deviance, and the Dark Ghetto*, 35 PHIL. & PUB. AFF. 126 (2007).

3. See, e.g., RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005).

4. See TOMMIE SHELBY, *DARK GHETTOS: INJUSTICE, DISSSENT, AND REFORM* 236 (2018).

adjudicative process toward an authoritative coding. That is a regrettably impoverished understanding of her job, however, which at its core turns law into action and narrates the circumstances under which a defendant is to be held to account.<sup>5</sup> This is a very specific kind of accountability, however, and she cannot be allowed to forget that the process is ultimately about whether we should consciously inflict pain on others. For what else is punishment but the legally (and perhaps morally) authorized and justified infliction of pain or, at best, the radical and harsh deprivation of liberty.

Moreover, she has to act in a tragically impoverished institutional context. Even were she to put aside retributive impulses and knotty issues of moral desert and — committed to “criminal law minimalism”<sup>6</sup> — consider only incapacitation, deterrence (both specific and general) and, dare I say, rehabilitation, she will generally have but two options: either drop the case or navigate towards the incarceration of the offender in a facility more likely to reinforce what Tommie Shelby called “gangster-hustler ethics”<sup>7</sup> than to prepare the young man for re-entry.

In theory, and increasingly in practice, diversion and other alternatives to incarceration that avoid this stark binary have been developed, and prosecutors at all levels should be pressed to push in this direction (to the extent the programs are effective).<sup>8</sup> Yet the slowness of progress in that regard suggests that, at least for now and perhaps for some time, our line prosecutor will bump against the limits of such programs, and face the binary.<sup>9</sup>

One hopes she, or at least her bosses, can use their political capital to press for a richer set of options: more alternatives to incarceration, more humane

5. See Daniel Richman, *Accounting for Prosecutors*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 40, 44 (Máximo Langer & David Sklansky eds., 2017) [hereinafter Richman, *Accounting for Prosecutors*]; Antony Duff, *Discretion and Accountability in a Democratic Criminal Law*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY, *supra* note 5, at 9–10.

6. Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. 42, 45–46 (2020).

7. Shelby, *supra* note 2, at 138; see also SHELBY, *supra* note 4, at 206.

8. See Ronald F. Wright & Kay L. Levine, *Models of Prosecutor-Led Diversion Programs in the United States and Beyond*, 4 ANN. REV. CRIMINOLOGY 331, 332 (2021); MICHELA LOWRY & ASHMINI KERODAL, CTR. FOR CT. INNOVATION, PROSECUTOR-LED DIVERSION: A NATIONAL SURVEY (2019), [https://www.innovatingjustice.org/sites/default/files/media/document/2019/prosecutor-led\\_diversion.pdf](https://www.innovatingjustice.org/sites/default/files/media/document/2019/prosecutor-led_diversion.pdf) [https://perma.cc/4RRX-74JN].

9. See generally JENNIFER A. TALLON ET AL., CTR. FOR CT. INNOVATION, THE CONTRADICTIONS OF VIOLENCE: HOW PROSECUTORS THINK ABOUT THE BIGGEST CHALLENGE TO REAL REFORM (2022), [https://www.innovatingjustice.org/sites/default/files/media/document/2022/Prosecutors\\_Violence\\_101122.pdf](https://www.innovatingjustice.org/sites/default/files/media/document/2022/Prosecutors_Violence_101122.pdf) [https://perma.cc/DSE6-4ZTQ].

correctional institutions, and even a more just society.<sup>10</sup> Only the most benighted prosecutor thinks criminal charges are the fundamental solution to any social (or political) problem. Full-throated communication of that basic fact would surely enrich policy conversations that too easily jump to criminal enforcement.<sup>11</sup> To be sure, actual prosecutorial contributions to political discourse about criminal justice matters have all too frequently concentrated on promoting prosecutorial discretion or watering down defendant protections.<sup>12</sup> And there is a very real risk that a chief prosecutor's desire to protect her own budget will keep her from lobbying for expenditures elsewhere. Yet the office that pushes past short-sighted institutional self-interest and helps mobilize support for programs targeting structural disadvantage and making prison a way-station toward re-entry will not only usefully enrich political discourse but might even narrow the chasm separating it from the communities bearing the largest costs of criminal enforcement. Communities of color alienated, even repelled, by constant assurances that the only path to public safety lies exclusively through harsh sentences and aggressive police tactics,<sup>13</sup> might well be more inclined to work with prosecutors who reject such impoverished logic. Whatever their ideological commitments, prosecutors as attentive to public safety as they are to this impoverishment have a public status that allows them to play Nixon going to China.<sup>14</sup>

Of course, the odds of political success along the latter lines are long — at least in the current (and foreseeable) fiscal climate. Early childhood interventions, high-quality preschool programs, and other social programs show considerable promise in reducing the most serious crime, with their

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10. See Richman, *Accounting for Prosecutors*, *supra* note 5, at 59 (“The abuses of lobbying power ought not blind us to the role prosecutors can play as engaged and knowledgeable reform leaders.”).

11. See Daniel Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, in *THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ* (Michael Klarman, David Skeel & Carol Steiker eds., 2012) (Mar. 27, 2010) [hereinafter Richman, *Overcriminalization*].

12. See Richman, *Accounting for Prosecutors*, *supra* note 5, at 58; Michael C. Campbell, *Ornery Alligators and Soap on a Rope: Texas Prosecutors and Punishment Reform in the Lone Star State*, 16 *THEORETICAL CRIMINOLOGY* 289, 290 (2011). See generally JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

13. See JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 3–14 (2017); MICHAEL JAVEN FORTNER, *BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* 1 (2015); Robert J. Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 *L. & SOC. REV.* 777 (1998); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054, 2080 (2017).

14. See Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 *UCLA L. REV.* 164, 233 (2022) (explaining the need to increase investment in social infrastructure).

benefits justifying their costs (for those that require such justification).<sup>15</sup> But as legal scholars Christopher Lewis and Adaner Usmani have noted:

[T]he same thing that makes these hyper-targeted social programs efficient also makes it politically infeasible for governments to fund them at scale. The more targeted the beneficiaries, the more certain we can be that introducing these programs will provoke the resentment of the near-poor and middle-class. Hence, the efficiency-feasibility paradox: untargeted social policy is politically feasible but inefficient for crime control, while hyper-targeted social policy can be efficient but is infeasible.<sup>16</sup>

Perhaps this assessment is unduly pessimistic. For the foreseeable future, however, absent only-dreamed-about societal change, “carceral logic”<sup>17</sup> will be an inescapable feature of a prosecutor’s day-to-day work (though hopefully not a chief prosecutor’s policy advocacy).

How might the future look to one who combines hope with pragmatism? One could fight the hypothetical and note — with strong empirical support — that most criminal cases are not robberies, shootings or murders. Many of those cases — particularly those misdemeanor charges generated by order maintenance policing — might be more effectively and more fairly dealt with outside the criminal process.<sup>18</sup>

Line drawing between what conduct ought to be tolerated and what merits state action; between what should be persuaded civilly and what criminally; and between which ostensibly criminal cases are suited for diversion, restorative justice, or similar non-punitive treatment can be hard. I think talk of “abolition” and “defunding” horribly misplaced — since constitutional

15. See John J. Donohue III & Peter Siegelman, *Allocating Resources Among Prisons and Social Programs in the Battle Against Crime*, 27 J. LEGAL STUD. 1, 15–22 (1998); Patrick Sharkey et al., *Community and the Crime Decline: The Causal Effect of Local Nonprofits on Violent Crime*, 82 AM. SOCIO. REV. 1214, 1234 (2017); Brandon C. Welsh et al., *Benefit-Cost Analysis of Crime Prevention Programs*, 44 CRIME & JUST. 447, 447 (2015).

16. Christopher Lewis & Adaner Usmani, *The Injustice of Under-Policing in America*, 2 AM. J.L. EQUAL. 85, 97 (2022). James Forman, Jr. powerfully tells the cautionary story of how Black leaders in Washington, D.C. pushed for a “Marshall Plan” but got only more crime control. See FORMAN, JR., *supra* note 13.

17. Christy E. Lopez, *Abolish Carceral Logic*, 17 STAN. J. C.R. & C.L. 379, 386, 389 (2022); Kate Levine, *The Progressive Love Affair with the Carceral State*, 120 MICH. L. REV. 1225, 1241 (2022).

18. See Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 974 (2020); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012). The lack of thought given to the misdemeanor process extends to data collection. See KEVIN M. SCOTT & TOM RICH, U.S. DEP’T OF JUST., DATA ON ADJUDICATION OF MISDEMEANOR OFFENSES: RESULTS FROM A FEASIBILITY STUDY 1 (2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/damorfs.pdf> [<https://perma.cc/YP9N-EUX3>] (recognizing “substantial gap” in criminal justice statistics on misdemeanors).

policing can be extremely expensive, and adjudicative fairness and reliability only enhanced by better funding of defense lawyers and prosecutors. Yet I am still sure that the domain of criminal law and the use of incarceration should be dramatically curtailed.<sup>19</sup> Certainly this curtailment focuses on misdemeanors — particularly given evidence that a presumption of non-prosecution for nonviolent misdemeanor offenses decreases the likelihood of subsequent criminal justice involvement for arrestees.<sup>20</sup> But not exclusively, as I suspect even the felony docket could use considerable pruning.

Yet, what about the young man we started with, who like more than half of those in state prisons,<sup>21</sup> has committed a “violent offense”? To be sure, that term is thrown around a bit haphazardly. But let’s not kid ourselves. A quick consideration of crime statistics — let’s start with homicides, aggravated assaults and robberies involving firearms, but no good reason to stop there — suggests (albeit not conclusively) that all too many offenders would fit in a more narrowly defined class. How can we acknowledge that structural disadvantages help shape the perpetrator’s choices while also acknowledging his agency and recognizing that the victim was similarly disadvantaged, with underprotection being one form those disadvantages have taken? How can that acknowledgement avoid taking the form of a wholesale sentencing discount that, as Lewis observes, would “exacerbate damaging and exaggerated stereotypes about the criminality of the Black urban poor”?<sup>22</sup> How can they avoid embracing a leniency that could, as law professor Daniel Fryer warns, embody a “devaluation of [B]lack victims”?<sup>23</sup> And avoid considering the need for incapacitation and deterrence demanded by a public safety logic?

I find myself unable to answer these questions categorically but believe that facing them is an inescapable part of sentencing, which by default is often the ineffable process in which personal and societal responsibility are sorted and weighed. To the (considerable) extent to which prosecutorial

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19. See Richman, *Overcriminalization*, *supra* note 11.

20. Amanda Agan et al., *Misdemeanor Prosecution*, QUART. J. ECON. (Jan. 23, 2023), <https://academic.oup.com/qje/advance-article/doi/10.1093/qje/qjad005/6998589> [<https://perma.cc/H7JQ-8VC7>].

21. See Press Release, Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2023 (Mar. 14, 2023), <https://www.prisonpolicy.org/reports/pie2023.html#:~:text=Can%20it%20really%20be%20true,when%20they%20break%20the%20law%3F> [<https://perma.cc/U2VP-UUND>].

22. Christopher Lewis, *Inequality, Incentives, Criminality, and Blame*, 22 LEGAL THEORY 153, 177 (2016).

23. Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 799 (2020).

charging and sentencing advocacy shape sentencing, prosecutors must self-consciously assume co-ownership of the process.

Such a suggestion will surely strike those familiar with the punitive role prosecutors have played in sentencing legislation and in their plea bargaining stances as troubling, even ridiculous.<sup>24</sup> But prosecutors have gotten away for far too long with offense-focused plea deals and sentencing advocacy that leave mitigating factors to defense counsel and the court (or unconsidered). Just as we expect prosecutors to exercise thoughtful judgment when deciding whether to take a case, we should demand similar judgment at sentencing. Perhaps we will eventually decide that the costs of sentencing regulation don't justify the supposed gains in horizontal equity and will return to the (bad? good?) old days of plenary judicial discretion. But until we do, and so long as plea dispositions drive sentencing, prosecutors cannot avoid sharing responsibility with judges.

Do prosecutors lack the capacity and competence to assume this responsibility? Maybe. Judges aren't particularly suited either, and yet, at least for now, these are the institutions on offer. So long as prosecutors either drive or co-determine dispositions, they will be a key part of either the problem or the solution. Diversion may be the appropriate resolution of many cases, but will often be ill-suited to our robber or shooter. We need to move away from a binary in which prosecutors holistically consider the defendant in a relatively small subset of cases — when considering diversion or other alternatives — but refuse to do so once they trigger the “normal” adjudication process.

But don't prosecutors exercise charging discretion at a stage of the case when they don't know much beyond offense-related information, and don't they frequently make plea offers without knowing much more? I suspect that is generally correct, and it presents a challenge to any proposal that they consider more than incapacitation, deterrence, and some impoverished version of retribution. Perhaps if offices tempered their commitment to pursuing the misdemeanor offenses generated by police departments (which might themselves pull back from this tool of order maintenance), there would be more institutional capacity for internal deliberation about the cases that truly need to be pursued.

Such deliberation — whether pre- or post-indictment — will be informationally challenged. At best, prosecutors will know a fair amount about the crime but won't have a sense of the defendant that goes beyond his rap sheet. Defense counsel are far better placed than prosecutors to expeditiously get beyond the case file, but absent adequate time and

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24. See generally JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017).



resources to fill out the mitigation picture, they will be hard pressed to do that.<sup>25</sup> Even when they can, the adversarial process may pose a strategic barrier to collaboration. As this essay is about prosecutors, not defense lawyers, I'll refrain from addressing the latter's role, except to say defenders who commit to the powerful program of "trauma-informed" representation suggested by law professor Miriam Gohara,<sup>26</sup> might want to think about how to qualitatively distinguish mitigation facts from the standard talk of evidentiary weakness, legal challenges, and "going rates" that makes for standard plea negotiation fare. The main point here is that the prosecutors who think about mitigating facts and circumstances as simply defense plea bargaining ploys are missing the point of the job. The rich picture of a defendant's life that the best holistic defenders can summon up need not blot out considerations of accountability and public safety, merely enrich them. And judicial sentencing proceedings ought not be the only forum in which that picture should be considered.

No question that I've been massively vague about how prosecutors are to pull these pieces together. My first excuse is that the mechanism depends on the operative sentencing regime. My second is that, whatever the regime, I'm simply asking prosecutors to be more conscious co-producers of the sentences handed out by judges. If prosecutors are already doing this regularly — which I doubt — they need to take explicit ownership of their stance and explain it to the public. At the very least, prosecutors need to be careful in assessing the significance of prior convictions, which can (but needn't) be poor indicators of sustained criminality and are often functions of residence in highly policed areas and of the "unusual disadvantage" African Americans face when seeking to re-enter the labor market after incarceration.<sup>27</sup>

Prosecutors also must take care in how they use the risk assessment scores that increasingly play a part in sentencing. A recent study found:

Providing judges with risk assessment information transformed low socio-economic status from a circumstance that reduced the likelihood of incarceration (perhaps by mitigating perceived blameworthiness) to a factor that increased the likelihood of incarceration (perhaps by increasing perceived risk).<sup>28</sup>

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25. See Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 AM. J. CRIM. L. 1, 46 (2018) (discussing the "resource-intensive" nature of this representation).

26. *Id.* at 45–46.

27. See Bruce Western & Catherine Sirois, *Racialized Re-entry: Labor Market Inequality After Incarceration*, 97 SOC. FORCES 1517, 1517 (2018).

28. Jennifer Skeem, et al., *Impact of Risk Assessment on Judges' Fairness in Sentencing Relatively Poor Defendants*, 44 L. & HUM. BEHAV. 51, 56 (2020).

Prosecutors will surely have the same tendency and need to guard against it.

For better or worse, the prosecutor's inescapable duty will be not only to hold accountable someone who has both faced and inflicted massive disadvantage but to help assign a number — a number that both looks to public safety and reckons with the causes of that disadvantage. To reduce the problem to a number that devastates the lives of that person and those around him seems absurd and demands the disruption of the causes and the expansion of the available options. That task of reduction however is the immediate future of the prosecutor, and failure to face it, in all its painful complexity, is an abdication of responsibility.

## II. COMBATTING ILLEGITIMATE DOMINATION

The moral imperative to consider the effects of structural disadvantage might emerge from institutional engagement with the purposes of criminal law — the kind of reflection often precluded by the press of business but that prosecutors need to do if they are to rise beyond doing professional coding for the polity and responding to the citizens and communities that make themselves heard. What is the overall project if it's not going to be reproducing hierarchy, inflicting pointless pain, or imposing order for its own sake. What, indeed, is the point of a prosecutor's job and, more generally, of criminal law?

I am attracted to legal theorist Vincent Chiao's capacious vision: "The criminal law promotes social cooperation under stable public institutions" by "stabilizing shared attitudes of reciprocity" and "making it rational to expect that those who cooperate will not be victimized or exploited by those who might be tempted to defect."<sup>29</sup> This framing requires him to push past narrow and contestable notions of personal harm and moral desert and insist that "the criminal law meet the same standard of political justification that applies to public institutions more generally."<sup>30</sup> I am similarly attracted to the normative content that he proposes for this "'public law' conception of criminal law": an "anti-deference" principle that requires public institutions "strive to ensure that each person is able to live as a peer among peers."<sup>31</sup>

Promoting the "the conditions of democratic equality," by protecting people's "basic rights and interests such that they can reasonably be expected to relate to each other as equals, rather than as superiors and subordinates,"<sup>32</sup>

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29. VINCENT CHIAO, *CRIMINAL LAW IN THE AGE OF THE ADMINISTRATIVE STATES* 36 (2018); see also LINDSAY FARMER, *MAKING THE MODERN CRIMINAL LAW: CRIMINALIZATION AND CIVIL ORDER* (2016).

30. CHIAO, *supra* note 29, at 57.

31. *Id.* at 72.

32. *Id.* at 86.

requires us to consider structural inequality at charging and sentencing. The principle — while not denying the need to pursue the serious offenders discussed in the last section — will often strongly counsel against the use of criminal law at all, or at least in favor of considering the social costs, both on individuals and communities, of criminal enforcement.

The same principle, however, demands that prosecutors recognize the “distinctive role” they can play “in combating illegitimate domination.”<sup>33</sup> This is the role embraced, to an extent, by what Ben Levin usefully calls “prosecutorial progressivism” — the pursuit of “crimes committed by powerful defendants (e.g., white-collar crime, political corruption, or police violence),” or “crimes that further historical inequality or subordination (e.g., intimate partner violence, sexual assault, or hate crimes).”<sup>34</sup> But illegitimate domination comes in all forms, and also includes criminal wage theft; the oppression of a housing project by armed gang members; the many forms of organized crime that extract tribute through the threat of violence, and human trafficking — all examples of domination often pursued by those who, in a larger societal sense, may not seem all that privileged.

“Radical decarcerationalists” like law professor Kate Levine, see efforts to pursue these cases as evidence that “[t]he criminal legal system remains an addictive ‘solution’ for progressives engaged in work on behalf of those denied their rights, and sometimes their humanity.”<sup>35</sup> But I see them more as a recognition that, against the same impoverished institutional backdrop that leaves prosecutors with the choice of declination, diversion or incarceration, it’s prosecution or nothing. Moreover, it is hard to imagine a more appropriate exercise of state power than to relieve a person or community from oppression by someone who would otherwise have impunity, and whose very impunity corrodes the social order.

Sure, one can easily imagine social service, regulatory, and civil enforcement agencies stepping in and providing less punitive and perhaps more effective solutions. Moreover, the inadequate development of those alternatives<sup>36</sup> surely has something to do with public expectations of penal

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33. Richman, *Accounting for Prosecutors*, *supra* note 5, at 54.

34. Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1438 (2021); *see also* Shaun Ossei-Owusu, *The New Penal Bureaucrats*, 170 U. PA. L. REV. 1389, 1426 (2022) (“People across the ideological aisle have described the label of ‘progressive prosecution’ as misleading and unhelpful.”). For a critique of “progressive punitivism” as a strategy for social justice reform, *see* Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 BUFF. L. REV. 199, 203 (2020).

35. Levine, *supra* note 17, at 1245.

36. *See* Richman, *Overcriminalization*, *supra* note 11, at 66; Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL’Y REV. 265, 273–74 (2014) (discussing absence of a sustained and adequate resource commitment to civil regulatory enforcement).

solutions that — in a vicious cycle — get reinforced whenever someone gets “locked up” for conspicuous badness. Rather than boldly announcing a crusade to “clean up” some sphere of human activity, prosecutors ought to use their status to advocate for real solutions, which are unlikely to rely simply on deterrence and incapacitation. Sure, a chief prosecutor might worry that advocating for institutional alternatives would threaten political and financial support for her office (and perhaps her own political ambitions). Yet a recalibration of public expectations about prosecutorial capacity and competence would likely redound to her benefit (particularly if reputable media sources hold her feet to the fire): Far better to be judged by your achievement of realistic goals than by your success in a “crusade” that is bound to fall far short of its rhetoric.

Still, unless we expand the governance responsibilities of prosecutors and allow their authority to creep beyond bringing or declining cases — a dangerous prospect, particularly with the underregulation of prosecutors and the limits of their core competencies<sup>37</sup> — our prosecutor will have to work within existing institutional structures as she encounters abuses of private power. Given the extraordinary coercive information-gathering tools we allow only to prosecutors, she might be the only one to encounter those abuses or understand their insidious dimensions. And much as one would wish she could use her privileged position to urge reforms outside her limited domain, salutary restrictions on how she uses coerced information and on how she uses her public office may prevent her from doing so.

Indeed, the paradox of prosecutions (and criminal enforcement generally) is that those who target illegitimate power or abuses of legitimate power are — in part because they are hewed from the same crooked timber as those they target — all too liable to abuse power themselves or be used as tools for others who would do so. How to prevent this is the challenge for all prosecutors — not just in the United States but everywhere, but particularly in the US, with our ethos of prosecutorial discretion and formal legal underregulation. I think a lot of prosecutors were attracted to the job because they hated bullies, but am also sure that many defense counsel had a not dissimilar motivation. It’s hard to do a frenetic job for middling pay without a sense of mission, and self-righteousness is an occupational hazard for both sides. Any acceptable future of prosecution requires constant clear-eyed engagement with abuses of both private and public power, and recognition that the American story is about the extraordinary permeability of the line separating the two spheres.

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37. See Lauren M. Ouziel, *The Bureaucratic Afterlife of the Controlled Substances Act*, 18 OHIO ST. J. CRIM. L. 151, 152 (2020) (noting how supply-reduction efforts have eclipsed demand reduction efforts in the narcotics area).

So what should prosecutors be doing? As I have previously noted:

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.<sup>38</sup>

How can we make sure those cases are brought? Given the press of arrests generated by police activity, the unavoidable salience of “index crimes,” and the evidentiary challenges of investigating and prosecuting misconduct that can be uncovered only with sustained effort, how does a prosecutor’s office develop the institutional stamina to pursue such cases?

Perhaps more categorical gatekeeping of the misdemeanor cases generated by police order maintenance work — and by departmental demands for street cop “activity” — would free up resources and allow a re-centering of office priorities. As law professor Alexandra Natapoff has noted, the unfortunate readiness of so many prosecutors’ offices to “rubber stamp” misdemeanor arrests — eschewing even the whiff of gatekeeping they do for felony cases — has “has permitted the racial and economic biases in policing to pass relatively unfiltered into the criminal pipeline, exacerbating the criminalization of both race and poverty, while letting the misdemeanor pipeline balloon out of proportion.”<sup>39</sup> To be sure, misdemeanor charges will regularly reflect the possible undercharging of a serious crime. Law professors Sandra Mayson and Megan Stevenson recently found that “misdemeanors that look like mini-felonies — assault/battery, theft, and DUI — make up a substantial proportion (26–55%) of the cases in [their analysis of eight diverse jurisdictions] as they do in the national-level data.”<sup>40</sup> But they also found “sizable numbers of marijuana possession and public-order cases,”<sup>41</sup> leaving considerable room for serious prosecutorial gatekeeping.

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38. Richman, *Accounting for Prosecutors*, *supra* note 5, at 57.

39. Alexandra Natapoff, *Misdemeanor Declinations: Strengthening Internal Separation of Powers Between Police and Prosecutors*, 101 TEX. L. REV. (forthcoming 2023). On the gatekeeping function, see Daniel C. Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 758 (2003); Daniel C. Richman, *Law Enforcement Organization Relationships With Prosecutors*, in THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 291, 291–308 (Ronald F. Wright ed., 2021).

40. Mayson & Stevenson, *supra* note 18, at 1021.

41. *Id.* at 1022.

Simply shifting resources within an office, however, won't by itself do the trick. An office needs to demonstrate its commitment to investing in this anti-subordination agenda to the agencies that can help bring such cases, and, perhaps more importantly, to the community it serves. Domestic violence units are an obvious example of such signaling and investment,<sup>42</sup> but an all-too isolated one. To be sure, fancy units can be empty gestures. Time will tell what commitment the Manhattan District Attorney's new "Worker Protection Unit" represents.<sup>43</sup> But one hopes they are not empty. And at the very least, they contribute to a conversation about what an anti-subordination agenda looks like, putting down markers about the kinds of cases an office seeks to make and provoking needed correction and critique from the community, since prosecutors are ill-equipped to fill out the contours of this agenda on their own.

### CONCLUSION

For the immediate future, prosecutors at all levels need to reckon with their impoverished institutional surroundings. They act in the name of the state (or "people") against those whom the state (or "people") never gave much of a chance, and for (a critical subset of) whom there are currently few realistic options besides incarceration. Even as they push against this stark binary, they must face up to their responsibilities within it, including the need to acknowledge the inescapable role structural racism and economic disadvantage played in creating the situation they face.

The same goal of promoting "democratic equality" that requires prosecutors to face up to the disadvantage and trauma of those they charge should also lead them to recognize the impoverished nature of the institutions available for targeting those who, perhaps with violence, perhaps without, would cheat, threaten, and cow others into lives of subordination. The regulatory or welfare institutions one can easily imagine as better suited to eliminate those sources of systemic disadvantage may simply not be on offer.

Prosecutors should also contribute to public policy discourse by highlighting the impoverishment of the institutions that surround them and

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42. See Wendy C. Regoeczi & Dana J. Hubbard, *The Impact of Specialized Domestic Violence Units on Case Processing*, 43 AM. J. CRIM. JUST. 570, 572 (2018). See generally PAUL C. FRIDAY ET AL., EVALUATING THE IMPACT OF A SPECIALIZED DOMESTIC VIOLENCE POLICE UNIT (2006).

43. See Press Release, Manhattan Dist. Att'y Off., D.A. Bragg Announces Creation of Office's First "Worker Protection Unit" to Combat Wage Theft, Protect New Yorkers From Unsafe Work Conditions (Feb. 16, 2023), <https://www.manhattanda.org/d-a-bragg-announces-creation-of-offices-first-worker-protection-unit-to-combat-wage-theft-protect-new-yorkers-from-unsafe-work-conditions/> [<https://perma.cc/PS6R-YPGE>].

the troubling way that impoverishment drives punitive criminal outcomes. They sure needn't worry about putting themselves out of business.