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Epilogue

Prosecutors and Democracy – Themes and Counterthemes

By Máximo Langer & David Alan Sklansky*

The essays in this collection have analyzed the relationship between prosecutors and democracy in various countries, using various methodologies, and drawing on various theoretical perspectives. They have amply demonstrated, we think, how complex it can be to tease out what democracy means for prosecutors, and what prosecutors mean for democracy. They have shown, too, how dependent that task can be on the particular social and legal contexts in which prosecutors operate. Many of the contributors have been understandably, and perhaps admirably, hesitant to generalize beyond the national settings they know best.

In this Epilogue, though, we want to take a step back and to trace some very broad patterns in the discussions that have made up this volume by articulating four competing ways to think about the relationship between prosecutors and democracy, including some that our chapters did not explore or did not analyze as such. We want to identify four competing themes, each theme corresponding to a different way in which prosecutors might be thought to be “democratic” – or, maybe more precisely, to a different kind of “democracy” that criminal prosecution can help to constitute. Prosecutors can promote *representative democracy*, by serving as an agent of the people. Prosecutors can be key figures in what can be called *legal democracy*, by serving as neutral and independent ministers of justice, advancing the rule of law. Prosecutors can be democratic by advancing the

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values that embody a given conception of democracy, such as *liberal democracy* and its values of liberty, dignity, and equality. Finally, systems of criminal prosecution can be configured to promote various conceptions of *participatory democracy*, by securing roles for the victims of crime and for members of the community more generally; the extreme version of this approach is to allow private individuals themselves to bring criminal prosecutions.

The first three of these themes – representative democracy, legal democracy, and liberal democracy – have all figured prominently and repeatedly in the chapters of this book – though without all of them being conceptualized as such. The fourth theme, participatory democracy, has been noticeable more for its absence, although it has surfaced occasionally – for example, in the discussions of the “community prosecution” movement in the United States. One thing we want to highlight in this Epilogue is how discussions drawing on these four different themes can sometimes seem like ships passing in the night. As guides for thinking about prosecutors, the four themes can be understood as rooted in different “strands” of democracy, but they also can be seen as following alternative, mutually inconsistent lodestars. They can be understood, that is to say, as themes and counterthemes.

The four themes we have identified, and the four kinds of democracy to which they correspond, are not full-fledged theories of democracy; they are not comparable to, say, democratic pluralism, or to deliberative democracy, or to the account of democratic federalism developed in *The Federalist*. They are themes and counterthemes; clusters of ideas that march under the banner of “democracy” and that, in various ways at various times, shaped political and institutional aspirations in societies around the world.

By mapping these four possible relationships between prosecutors and democracy, we hope both to highlight the ways in which the chapters of this book have been in conversation with each other and to bring out certain aspects of that conversation that have remained largely below the surface. We also will try to use our mapping to draw a particular prescriptive lesson. We think that discussions of the relationship between prosecutors and democracy have been excessively dominated by a narrow understanding of democracy as a principal-agent relationship in which prosecutors, as representatives of the people, are responsive to their wishes. A richer understanding of the sources of legitimation of prosecutors and of the relationship between prosecution and democracy, we will suggest, may help deepen our understanding of what it is distinctive about prosecutors in the United States and open possible avenues for discussion and reform in the United States and elsewhere.

I REPRESENTATIVE DEMOCRACY: PROSECUTORS AS AGENTS OF THE POPULAR WILL

Leaving aside federal prosecutors, a distinctive, if not unique, feature of prosecutors in the United States is that they are elected by the people.¹ Most heads of the local prosecution offices, typically known as district attorneys, and most state attorneys general have been selected in this manner since the nineteenth century.² This gives prosecutors in the United States a mantle of democratic legitimacy that prosecutors do not have in other countries. It enables prosecutors in the United States to speak for “the people,” as the very names given to cases – i.e., *People v. Joe Doe* – suggest.³

The legitimacy conferred by popular election is rooted in a particular kind of democracy: representative democracy. If the prosecutorial function is an aspect of self-government, the election of prosecutors enables the people to rule themselves through their representatives. As representatives of the people, prosecutors are entitled to prosecute crime and, since the head of the prosecutor office has limited terms, the people may hold them accountable in periodic elections. In this sense, local prosecutors in the United States are political figures who get at least part of their legitimacy from the same sources than other local political officials. These figures include not only the major and local council representatives, but other figures who also play a role in the criminal justice system, such as judges and police chiefs.

Despite the increasing role of prosecutors in criminal justice around the world, no other political system we are aware of has established the popular election of prosecutors in recent years. In Western Europe, Central and Eastern Europe, Latin America, and Asia, there have been changes in the way prosecutors are appointed and other reforms on the prosecutor’s office.⁴

¹ In at least one canton in Switzerland, citizens participate in the election of the head of the prosecutor’s office, but in the great majority of cantons, she is elected by parliament. See GWLADYS GILLIÉRON, PUBLIC PROSECUTORS IN THE UNITED STATES AND EUROPE: A COMPARATIVE ANALYSIS WITH SPECIAL FOCUS ON SWITZERLAND, FRANCE, AND GERMANY 179–181 (2014) (explaining that one of the systems for electing and nominating the head of the prosecutor’s office is election or nomination directly by citizens, but without clearly stating all the cantons in which citizens participate in the election and nomination of prosecutors).

² JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH OF IDENTITY 19–28 (1980); Michael J. Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528 (2012).

³ See, e.g., William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L. REV. 1325 (1993).

⁴ See, e.g., LUNA & WADE, *infra* note 136; Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617 (2007) [hereinafter *Revolution*]; Public Prosecutors Office Japan, *Prosecution Reform Initiatives in the Past Three Years* (2015), available at www.kensatsu.go.jp/content/001142803.pdf (last visited on November 22, 2016).

But none of them have included the introduction of popular elections to appoint prosecutors. That is a striking fact and one worth pondering, given the tight connection between popular election and the perceived legitimacy of prosecutors in the United States.

Part of the explanation, no doubt, is that Americans themselves – or at least American legal academics – have repeatedly expressed reservations about the practice of electing prosecutors. Commentators have picked up on this distinctive United States feature to explain other features – largely unattractive – of the American criminal justice system. In the last four decades, for example, the United States more than quadrupled its incarceration rate, becoming more punitive in this respect than any other major nation.⁵ This trend originated in the context of increasing crime levels between the 1960s and the 1980s and a politicization of crime that became an important issue in the public agenda and public discourse – including in electoral contests.⁶ In response to constructed or perceived public demands for higher punitiveness, legislators and popular ballots hardened criminal laws and prosecutors charged more serious statutes and offenses.⁷ In fact, some empirical assessments suggest that prosecutorial charging decisions were the most important implementing mechanism of the increasing levels of incarceration rates.⁸ The conventional view of prosecutorial politics in the United States over the past several decades is that there was a constructed or perceived wish by the people to harden criminal justice responses to crime, and prosecutors as representatives of the people responded to political incentives and followed this command.⁹

⁵ See, e.g., www.prisonpolicy.org/reports/overtime.html (last visited on November 29, 2016); www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last visited on October 21, 2016).

⁶ See, e.g., DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007) [hereinafter *GOVERNING THROUGH CRIME*].

⁷ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROSS: MASS INCARCERATION IN THE AGE OF COLOR-BLINDNESS* (2010); GARLAND, *supra* note 6; SIMON, *GOVERNING THROUGH CRIME* *supra* note 6; WILLIAM STUNTZ, *COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2013) [hereinafter *COLLAPSE*]; Sanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutions*, 46 AM. J. POL. SCI. 334, 335 (2002); Nicola Lacey and David Soskice, *Crime, Punishment and Segregation in the United States: The Paradox of Local Democracy*, 17 PUNISHMENT AND SOCIETY 454 (2015); William J. Stuntz, *The Pathological Politics of Criminal Justice*, 100 MICH. L. REV. 505 (2001) [hereinafter *Pathological Politics*].

⁸ John Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GEORGIA STATE UNIVERSITY LAW REVIEW 1 (2012).

⁹ See, e.g., Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, in *PROSECUTORS AND POLITICS: A COMPARATIVE PERSPECTIVE* 1 (Michael Tonry ed., 2012).

But political winds can shift. After the great recession of 2007, a political consensus started to arise on the need to reduce or slow down incarceration levels. For part of the political right, mass incarceration – especially as applied to nonviolent offenders – began to be seen as an unjustifiable tax on public budgets. For the political left, incarceration was not only too costly, but also inhumane and racially disproportionate in the burdens it imposed.¹⁰ There are signs that, once again, the criminal justice system has been responsive to these demands, with legislatures and popular ballots reducing the harshness of criminal laws and a number of prosecutor offices calling for and implementing less draconian enforcement practices.¹¹ Also, in some counties, people voted out of office prosecutors who were considered “tough on crime” and elected prosecutors who promised a less punitive approach.¹²

At a positive/descriptive level, if prosecutors are understood and understand themselves as representatives of the people who are supposed to follow people’s commands, one would expect prosecutors becoming softer on crime once perceived people’s wishes have changed. At a normative level, it could be argued that this is how democracy should work. If the public demands harsher or softer criminal justice policies at different points in time, prosecutors as agents of the people should implement people’s wishes. If people’s wishes were unwise, this would not be the responsibility of prosecutors, but of the people who can always learn and change over time.

One could question these descriptive and normative views even within the framework of representative democracy. As Newton Minow said in a different context, one should not equate the public interest with what interests the public.¹³ Under alternative views of representative democracy, even if elected by the people, prosecutors should pursue the public interest rather than simply implementing people’s wishes. This would be consistent with the view of

¹⁰ See, e.g., HADAR AVIRAM, *CHEAP ON CRIME: RECESSION ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT* (2015); MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2015); Jonathan Simon, *Beyond Tough on Crime: Towards a Better Politics of Prosecution*, in this volume [hereinafter *Better Politics of Prosecution*].

¹¹ See, e.g., Brooklyn DA Ken Thompson, *THE BROOKLYN DIST. ATTORNEY’S OFFICE*, www.brooklynnyda.org/brooklyn-da-ken-thompson/ (last visited September 15, 2016); *District Attorney Vance and John Jay College President Travis Announce Partnership to Launch New Institute for Innovation in Prosecution*, available at www.jjay.cuny.edu/news/district-attorney-vance-and-john-jay-college-president-travis-announce-partnership-launch-new (last visited September 15, 2016).

¹² See David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647 (2017) [hereinafter *Elected Prosecutors*].

¹³ Newton N. Minow, *Television and the Public Interest*, Address to the Nat’l Ass’n of Broadcasters, May 9, 1961.

representative democracy animating *The Federalist Papers*, and with the understandings of the democratic pluralists. Even if the people elect prosecutors, people would not have the information or the knowledge to make decisions on individual criminal cases. Rather, it would be prosecutors, as experts, public officials, and members of responsible elites, who would make these decisions.¹⁴

This type of alternative account of representative democracy and prosecutors can explain, to some extent, prosecutorial practice in the United States. After all, at a descriptive level, prosecutors do not even know what the people want in many cases and prosecutors have to make their own decisions based on their own understanding of the public interest. This type of alternative account may also be normatively appealing. There is a broad consensus in the United States, as well as elsewhere, that the treatment of individual defendants should be decided apolitically – through the application of neutral standards, not based on public opinion. As William Simon notes in his contribution to this volume, the case for making prosecutors publicly accountable seems strongest with regard to policies and general practices, rather than with regard to particular cases.¹⁵ Even at the level of policy and practices, though, there are advantages to having prosecutors exercise independent, professional judgment, rather than seeing themselves as agents of the popular will. The lesson of the past several decades may be, precisely, that public opinion regarding criminal justice is subject to excessive and irrational swings, and that it is easy, in particular, for politicized criminal justice to become overly draconian criminal justice.¹⁶ Experts may be better situated to balance concerns of crime control and public safety against considerations of fairness and restraint.¹⁷ In fact, professional standards on prosecutors may reflect this view.¹⁸

However, in the United States, the understanding of prosecutors as agents of the popular will has been durable and powerful. If anything, it has grown

¹⁴ See David Alan Sklansky, *Unpacking the Relationship between Prosecutors and Democracy in the United States*, in this volume [hereinafter *Unpacking*].

¹⁵ William H. Simon, *The Organization of Prosecutorial Discretion*, in this volume [hereinafter *Organization*].

¹⁶ See, e.g., FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA* (2001).

¹⁷ See, e.g., Angela J. Davis, *Prosecutors, Democracy and Race*, in this volume [hereinafter *Prosecutors*] (prosecutors should not bow to the whims of the majority in the name of accountability if their independent professional judgment demands a different outcome).

¹⁸ See, e.g., AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS COMMITTEE, *ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION*, STANDARD 3–1.2(b) (4th ed. 2015): “The prosecutor serves the public interest and should act with integrity and balanced judgement to increase public safety . . .”

stronger in recent decades, as democratic pluralism has waned in appeal¹⁹ and as a growing number of criminal justice reformers have turned to elections, rather than judicial or legislative oversight, as the most promising tool for improving how prosecutors exercise their authority.²⁰ If the criminal justice system is too punitive and unequal and does not prosecute enough police brutality – just to mention some of the possible ills of criminal justice in the United States – the perceived solution, increasingly, is persuading or educating the people about the right criminal justice policies or improving the system of election of prosecutors. One can interpret a whole set of diagnoses, proposals, and initiatives from commentators, activists, and other reformers as fitting within this framework. This is the position ultimately adopted, for example, by Angela Davis in her contribution to this volume.

The “community prosecution” movement, reviewed approvingly by William Simon in his contribution to this volume, can be understood at least in part as a way to make prosecutors more faithful agents of the popular will and more responsive to public views on how the power of the criminal justice system should be deployed.²¹ But it is far from clear how significant “community prosecution” is in the day-to-day operation of district attorneys’ offices, as opposed to the level of symbolism.²² The most powerful mechanisms for making prosecutors agents of the popular will in the United States are the elections in which district attorneys are selected and then either retained or removed from office. Much attention has been paid in recent years to the possibility of making those elections more meaningful. For instance, commentators and activists have concluded that the problems of this system include that the election of prosecutors is often not *contested* and that the incumbent is typically reelected.²³ In addition, the public often lacks information about the district attorney’s work.²⁴ Proposed solutions to these problems include higher transparency and accountability so that the people may make more informed decisions when electing prosecutors.²⁵ There have also been proposals to educate the public

¹⁹ On the retreat of democratic pluralism and how it affected ideas about police, see DAVID ALAN SKLANSKY, *POLICE AND DEMOCRACY* (2008) [hereinafter *POLICE AND DEMOCRACY*].

²⁰ See, e.g., Simon, *Better Politics of Prosecution*, *supra* note 10 (the legitimacy of prosecution in the U.S. is more political than it is legal and, as a consequence, the substantial reform of the U.S. carceral state will require democratic success).

²¹ See Simon, *Organization*, *supra* note 15. ²² See Sklansky, *Unpacking*, *supra* note 14.

²³ Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 *OHIO ST. J. CRIM. L.* 581 (2009); David Alan Sklansky, *Elected Prosecutors*, *supra* note 12.

²⁴ See Davis, *Prosecutors*, *supra* note 17 (a prosecutor’s constituents cannot hold her accountable if they don’t know what she does).

²⁵ See Davis, *Prosecutors*, *supra* note 17 (the democratic process can work, but only with more transparency in the prosecution function and the election of prosecutors who are committed

about the duties and responsibilities of prosecutors and to get the public more involved in prosecutorial elections.²⁶ The recent interest by people and media on police unnecessary killings of black men and women, together with social justice movements like Black Lives Matter, may be helping to mobilize people who have traditionally been uninterested in prosecutorial elections.²⁷ Progressive donors have supported these efforts by donating to district attorney candidates who promise to reduce punitiveness levels and advance equality.²⁸

In a few recent district attorney elections and prosecutorial initiatives, the new political climate on criminal justice, social mobilization, and renewed electoral strategies have delivered some promising results from reformers' perspectives.²⁹ However, critics have cautioned about the true promise of at least some of these trends. For instance, in her chapter for this collection, Angela Davis argues that even if elections present the best opportunity to hold prosecutors accountable, the handling of a single high-profile case will not have an impact on systemic unwarranted racial disparities. To eliminate or reduce these disparities, it is necessary that a prosecutor take affirmative and more systematic steps to remedy the problem, such as empirically identifying the office's handling of which cases produce the most important disparities and then implement policies to address them.³⁰

In his chapter, Jonathan Simon notices that prosecutors have been mostly absent from the leadership of the reform camp and warns about the power of prosecutors to resist change if they do not support it.³¹ Prosecutors do not only follow, but also importantly shape criminal justice politics.³² Simon analyzes "smart on crime" policies advanced by some prosecutors that include maximizing return on criminal justice investment, evidence-based-empiricism to deal with recidivism, and transparency about prosecutorial priorities. While

to racial justice). In a similar direction, see Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960–61 (2009); Russell Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69 (2011); Marc L. Miller & Ronald F. Wright, *Reporting for Duty: The Universal Prosecutorial Accountability Puzzle and an Experimental Transparency Alternative*, in *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 392 (Erik Luna & Marianne L. Wade eds., 2012); Wright, *supra* note 23.

²⁶ See Davis, *Prosecutors*, *supra* note 17. ²⁷ See Davis, *Prosecutors*, *supra* note 17.

²⁸ George Soros is an example. See, e.g., Sklansky, *Unpacking*, *supra* note 14.

²⁹ See, e.g., Davis, *Prosecutors*, *supra* note 17 (describing the work of John Chisholm and the electoral victories of Kim Foxx over Anita Alvarez and Michael O'Malley over Tim McGinty); Sklansky, *Unpacking*, *supra* note 14; Sklansky, *Elected Prosecutors*, *supra* note 12.

³⁰ See Davis, *Prosecutors*, *supra* note 17 (comparing the work done by district attorneys Marylin Mosby and John Chisholm).

³¹ Simon, *Better Politics of Prosecution*, *supra* note 10.

³² See also SIMON, *GOVERNING THROUGH CRIME*, *supra* note 6.

he considers “smart on crime” as an improvement over “tough on crime,” he also discusses the limits of these policies to generate a substantially better politics of prosecution. These limits would include still trusting the exercise of prosecutorial discretion to produce a sound return on the funds invested in criminal justice, not reconsidering the incapacitative value of long prison sentences for violent crime and applying smart techniques only to nonviolent crimes and unserious crimes, assuming that empirical work may replace normative choices and not be determined by them, not articulating a new set of normative expectations for prosecutors and their publics, and keeping a close alliance between prosecutors and the federal and state law enforcement machinery and its racial discrimination.³³

Simon contrasts “smart on crime” with “the prosecutorial politics of dignity” that would include “procedural justice” reforms, efforts to increase prosecutorial accountability for police racism and prison overcrowding, and efforts to humanize those who are being prosecuted and punished. Though not as easy to name and market, “the prosecutorial politics of dignity” may present a more radical departure from the politics of “tough on crime.”³⁴ So it seems especially noteworthy that some recent district attorney races have been won by candidates campaigning on platforms that drew on some of the themes Simon includes within the politics of dignity.³⁵

Despite all of this, grave doubts linger about the reform strategy of making United States prosecutors more politically accountable, and not just because, as Jonathan Simon warns, “tough on crime” politics have never really gone away and could well stage a resurgence. (Donald Trump’s successful presidential campaign in 2016 represented a fullthroated return to “law and order” rhetoric not just as appeal for stricter criminal justice policies, but as the foundation of an entire political agenda, what Simon has called “governing through crime.”³⁶) More fundamentally, as we noted earlier, there is a striking dearth of interest in other Western democracies in emulating the American practice of electing head prosecutors – even as prosecutorial power and concerns about prosecutorial power continue to grow in many of these other democracies. Part of the reason is that there are rival ideas about what “democracy” requires of prosecutors.

³³ Simon, *Better Politics of Prosecution*, *supra* note 10.

³⁴ Simon, *Better Politics of Prosecution*, *supra* note 10.

³⁵ See Sklansky, *Elected Prosecutors*, *supra* note 12.

³⁶ See, e.g., Yamiche Alcindor, *Trump Rally in Wisconsin Finds Support for the Police*, N.Y. TIMES, August 17, 2016, at A9.

II LEGAL DEMOCRACY: PROSECUTORS AS INDEPENDENT AND NEUTRAL MINISTERS OF JUSTICE

If one way prosecutors can be considered “democratic” is by representing the popular will, another quite different way is by faithfully implementing the rule of law. A few of this book’s chapters discussed this conception of prosecutors, though generally not referring to it as a democratic conception. However, when we ask whether a country is a “democracy,” or a “constitutional democracy,” often what we are asking, at least in part, is whether it honors the rule of law.³⁷ And so sometimes what democracy is thought to require of prosecutors is that they act as independent and neutral ministers of justice, applying the law evenhandedly across cases. It is consistent with this role that the prosecutor also have responsibility to design and implement criminal justice policy and to consider the public interest in the handling of cases, so long as they give content to criminal justice policy and the public interest neutrally and independently, rather than based on their own political calculations and self-preservation. As public officials of a democracy, prosecutors may still speak as representatives of the polis and be subjected to accountability.³⁸ But if they are seen as independent and neutral ministers of justice – if their principal allegiance is understood to be to the rule of law – then those accountability mechanisms are unlikely to include popular balloting.

This understanding of the relationship between prosecutors and democracy is stronger in Europe than in the United States, which is a large part of the reason that the American method of selecting head prosecutors has never caught on in Europe. But one finds this ideal – the ideal of the prosecutor as an agent of *legal* democracy – embraced and implemented in different degrees not only in Europe, but also in Latin America and elsewhere – including, as we will discuss later, in the United States.³⁹ This ideal includes three different

³⁷ See, e.g., Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16 (2002); Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307 (2001); Sandra Day O'Connor, *Remarks at the Inaugural Sandra Day O'Connor Distinguished Lecture Series*, 41 TEX. TECH. L. REV. 1169 (2007).

³⁸ Antony Duff, *Discretion and Accountability in a Democratic Criminal Law*, at 16–17, in this volume.

³⁹ DAVID HELD, *MODELS OF DEMOCRACY* 201–209 (3rd ed., 2006) uses the term “legal democracy” to refer to Friedrich Hayek’s conception of democracy that would include not only rule of law as one of its key features, but also features such as minimal state intervention in civil society and private life and a free-market society given fullest possible scope. We use the term “legal democracy” in a broader and looser way to encompass various conceptions of democracy that include rule of law as one of its components.

interrelated elements that it is analytically important to distinguish: independence, neutrality, and faithful application of the law by prosecutors.

In terms of independence, the institutional location of the office of the prosecutor is one of the ways to protect prosecutors from political interference. In order to advance this ideal, there are countries that have located the office of the prosecutor within the judiciary or as an extra branch of government different from the three traditional branches. For instance, Colombia, Costa Rica, and Italy locate the office of the prosecutor within the judiciary, while Argentina and Brazil consider it an extra branch of government.⁴⁰ In either case, the institutional location is intended to protect the independence of prosecutors from political actors. The extent to which this independence exists in practice depends on, among other factors, the strength of the country's institutional system.⁴¹ However, at least in some countries, the institutional location of the office of the prosecutors as an extra branch of government or within the judiciary seems to have contributed to the ability of prosecutors to investigate government officials and other powerful figures.⁴²

⁴⁰ See, e.g., Colombian Constitution, Article 249; Argentine Constitution, Article 120; Brazilian Constitution, Article 127.

⁴¹ See, e.g., Anne van Aaken et al., *Do Independent Prosecutors Deter Political Corruption? An Empirical Evaluation across Seventy-eight Countries*, 12 AM. L. & ECON. REV. 204, 218 (2010) (measuring *de facto* or actual independence on variables such as whether prosecutors are forced to retire or removed from office against their will, frequent changes in the legal foundations for the prosecution of crimes committed by members of government, and adequate paid for prosecutors).

⁴² See, e.g., Carlo Rossetti, *The Prosecution of Political Corruption: France, Italy and the USA – A Comparative View*, 13 INNOVATION 169 (2000). For a debate on whether Italian prosecutors are too independent, see Giuseppe Di Federico, *Prosecutorial Independence and the Democratic Requirement of Accountability in Italy*, 38 BRITISH JOURNAL OF CRIMINOLOGY 373 (1998); Carlo Guarnieri, *Prosecution in Two Civil Law Countries: France and Italy*, in *COMPARING LEGAL CULTURES* 183 (David Nelken, 1997), 183–93; David Nelken, *Can Prosecutors Be Too Independent? An Italian Case Study*, in *EUROPEAN PENOLOGY* 249 (Tom Daems, Dirk van Zyl Smit, & Sonja Snacken eds., 2013). In Colombia, despite the institutional location of the office of the prosecutor within the judiciary, there have been criticisms about lack of independence by the office of the prosecutor whose head is appointed for six years with central participation by the president of the country. See, e.g., *Politización de la Fiscalía*, El Tiempo, October 28, 2001, available at www.eltiempo.com/archivo/documento/MAM-678576 (last visited on November 23, 2016); Omar Flórez, *No a la politización de la Fiscalía*, Semana, April 25, 2004, available at www.semana.com/opinion/articulo/no-politizacion-fiscalia/65055-3 (last visited on November 23, 2016); *Sin importar quién lo puso en la Fiscalía, Iguarán fue tibio con la parapolítica*, La Silla Vacía, February 28, 2011, available at www.lasillavacia.com/historia/sin-importar-quien-lo-puso-en-la-fiscalia-iguaran-fue-tibio-con-la-parapolitica-22187 (last visited on November 23, 2016). It is also important to notice that *de jure* or formal independence (such as the institutional position of the office of the prosecutor) and *de facto* or actual independence may not correlate with each other because strong *de jure* mechanisms of independence may be a response to a history of low *de facto* independence and high levels of corruption. See van Aaken et al., *supra* note 41, 223–25, 229.

In other jurisdictions, prosecutors are members of a ministry of justice that is headed by a political appointee to whom prosecutors are accountable. This institutional structure can be interpreted as trying to strike a balance between prosecutorial independence and prosecutorial accountability to democratically elected leaders.⁴³ Varying from country to country, the independence of prosecutors from political influence is protected through limits on the instructions they may receive, the way they are appointed and removed, their professional status, and other constitutional, institutional, legal, political, and professional formal and informal norms. However, as our chapters on England, France, and Germany suggest, the degree to which independence from political incentives – including from improper protection of politically powerful or connected defendants – is achieved varies from place to place.⁴⁴

For instance, in France, prosecutors work in a hierarchical structure within the ministry of justice. As Jacqueline Hodgson and Mathilde Cohen note in their respective contributions to this volume, this structure confers legitimacy on French prosecutors by virtue of the French political tradition, which considers that the state represents the will of the people, and in which the executive “is supposed to protect citizens from excesses of unelected judges rather than judges protecting citizens from the executive, as in the Anglo-American tradition.”⁴⁵ French prosecutors are considered magistrates and are initially recruited through the same process as judges; they have civil servant status and share their offices, budgets, and staff with judges.⁴⁶ However, they do not have the same independence as judges, and they are supposed to implement governmental policies and work collectively within the internal hierarchy of prosecutors.⁴⁷ There have been many indications – including public scandals – of pressure exercised on French prosecutors by the executive branch, including the President, to protect its own patrons and supporters.⁴⁸ Consequently, reforms have been introduced

⁴³ See, e.g., Di Federico, *supra* note 42.

⁴⁴ See also, e.g., John O. Haley, *Public Prosecution in Japan*, in *OXFORD HANDBOOKS ONLINE* 6 (2015) (stating that though the procuracy in Japan is formally subject to the direction of the minister of justice, the independence of the procuracy from external influences, especially political intervention, is among its distinguishing attributes and that no political supervision is permitted over the prosecutors responsible for a particular case).

⁴⁵ Mathilde Cohen, *The French Prosecutor as Judge. The Carpenter’s Mistake?*, at 117 in this volume. See also Jacqueline S. Hodgson, *The Democratic Accountability of Prosecutors in England and Wales and France: Independence, Discretion and Managerialism*, in this volume [hereinafter *Democratic Accountability of Prosecutors*].

⁴⁶ Cohen, *supra* note 45. ⁴⁷ Cohen, *supra* note 45.

⁴⁸ See JACQUELINE S. HODGSON, *FRENCH CRIMINAL JUSTICE: A COMPARATIVE ACCOUNT OF THE INVESTIGATION AND PROSECUTION OF CRIME IN FRANCE 80–85* (2005) [hereinafter *FRENCH CRIMINAL JUSTICE*]; Hodgson, *Democratic Accountability of Prosecutors*, *supra* note

to try to limit undue political influence, such as not allowing prosecutors to receive instructions in individual cases.⁴⁹ Unions of magistrates have also been pushing for greater individual and collective prosecutorial independence from the executive.⁵⁰ In her chapter for this collection and against the background of proposals to separate French prosecutors and judges in two distinct and separate corps, Mathilde Cohen argues that the preservation of the prosecutors' self-image as magistrates and their belonging to the judiciary with the judges may be key to preserving their independence.⁵¹

In Germany, prosecutors are located in the ministries of justice of the federal and state governments and may receive orders from their superiors.⁵² However, German prosecutors are supposed to be apolitical figures, independent from judges and the police, with a duty to objectivity and beholden only to the law. German prosecutors have life tenure, and, for the most part, superiors give general instructions to prosecutors rather than instructions about how to handle individual cases.⁵³ Though at periods in German history, prosecutors equated the public interest with political ends, in recent decades, they have developed a quasi-judicial identity.⁵⁴ As Shawn Boyne explains in her contribution to this volume, the role of a German prosecutor is to be a "guardian of the law" and a pillar of the *Rechtsstaat*, according to which not only the power of the state is constrained by law, but the state must act in a lawful way.⁵⁵ Elections may change the political leadership of ministries of justice, but the leadership within the prosecution service is largely insensitive to electoral results.⁵⁶ Nevertheless, though efforts to exert political influence are not widespread, prosecutors are not immune from it through formal and informal mechanisms. Since in Germany's parliamentary system, the minister of justice responds to the legislature, parliamentary investigations, often started by an opposition party, are the main political check

45; Jacqueline S. Hodgson, *The French Prosecutor in Question*, 67 WASH. & LEE L. REV. 1361 (2010).

49 C. PR. PÉN. Article 30 (France). 50 Cohen, *supra* note 45. 51 Cohen, *supra* note 45.

52 Some commentators have considered the prosecution service as its own separate institution within the criminal justice system or as in between the executive and the judicial branches due to their duty to objectivity and other protections. But most commentators consider it located within the executive. See Shawn Boyne, *German Prosecutors and the Rechtsstaat*, in this volume [hereinafter *German Prosecutors*] (citing Ekaterina Trendafilova and Werner Röth, *Report on the public prosecution service in Germany*, in PROMOTING PROSECUTORIAL ACCOUNTABILITY, INDEPENDENCE AND EFFECTIVENESS. COMPARATIVE RESEARCH 237 (2008)).

53 Boyne, *German Prosecutors*, *supra* note 52. 54 *Id.*

55 *Id.* See also SHAWN MARIE BOYNE, THE GERMAN PROSECUTION SERVICE. GUARDIANS OF THE LAW? (2013) [hereinafter THE GERMAN PROSECUTION SERVICE].

56 Boyne, *German Prosecutors*, *supra* note 52.

over improper political influence. However, reformers have considered them insufficient and that it is necessary to introduce changes to make prosecutors not more accountable, but rather more independent such as giving regional prosecutors autonomy from their justice ministries and making government's instructions to prosecutors on individual cases more transparent.⁵⁷

In England and Wales, where the public interest is regarded as an interest separate from that of the state, a hierarchical supervisory structure under the direction of state ministers, as in France, would be considered unacceptable political interference.⁵⁸ Even if both the Attorney General and the Director of Public Prosecutions in England and Wales are politically appointed, prosecutors, as Jacqueline Hodgson notes in her contribution to this volume, have a high degree of professional autonomy.⁵⁹ The Director of Public Prosecutions "is appointed by and responsible to, the Attorney General, whose office advises the government and represents the public interest in a range of capacities. This creates a less direct line of political accountability and one which, by convention, is 'exercised very sparingly, and not used to further the narrow political interests of the government and its supporters.'"⁶⁰

Besides the institutional location of the office of the prosecutor, the prosecutors' status and the way prosecutors are recruited and removed may also advance the ideal of prosecutors as independent ministers of justice. In several countries in Europe, Latin America, and elsewhere, prosecutors are considered magistrates or civil servants who are, at least to some extent, peers of judges; are recruited right after law school, and together with judges; and are appointed, promoted, and removed by judicial councils composed by prosecutors and judges.⁶¹

⁵⁷ *Id.*

⁵⁸ Hodgson, *Democratic Accountability of Prosecutors*, *supra* note 45 (quoting Vera Langer, *Public Interest in Civil Law, Socialist Law, and Common Law Systems: The Role of the Public Prosecutor*, 36 AM. J. COMP. L. 279–280 (1988)).

⁵⁹ Hodgson, *Democratic Accountability of Prosecutors*, *supra* note 45.

⁶⁰ *Id.* (quoting Antoinette Perrodet, "The Public Prosecutor," in *European Criminal Procedures*, ed. Mireille Delmas-Marty and John Spencer (Cambridge: Cambridge University Press, 2002), 422).

⁶¹ See, e.g., CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE, Article 65 (France); EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE, EUROPEAN JUDICIAL SYSTEMS. EFFICIENCY AND QUALITY OF JUSTICE (2014); Antoinette Perrodet, *The Public Prosecutor*, in *EUROPEAN CRIMINAL PROCEDURES* 415, 422–23, 427, 430–32 (Mireille Delmas-Marty and J. R. Spencer eds., 2002); 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. www.coe.int/t/dghl/cooperation/capacitybuilding/Source/judic_reform/europeanStandards_en.pdf; CONSTITUCIÓN DE LA CIUDAD DE BUENOS AIRES, Articles 115–16 and 126. On Japan, see, e.g., Haley, *supra* note, at 5–6 (explaining the career path of Japanese prosecutors); United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, *The Criminal Justice System in Japan: Prosecution* 3, Resource Material Series No. 53 (1997) (stating that public

However, the level of independence protection that these mechanisms provide also varies from place to place. For instance, in France, prosecutors are magistrates who are recruited and trained with judges, but prosecutors belong to a different branch of the judiciary than judges, they can be transferred to another post without their agreement, and the President and the Minister of Justice have a key role in their selection and promotion.⁶² In fact, while the high council of the judiciary – an independent commission composed by judges, lawyers, and outside political appointees – has final decision-making on judges' promotions and removals, the council "has a much more limited role when it comes to prosecutors as the Ministry of Justice largely determines their career, including promotion, transfer, discipline and removal from office."⁶³ In addition, "those determining promotions are explicitly instructed to reward loyalty and conformity and to penalize independence."⁶⁴

In Germany, the Federal Prosecutor General is "nominated by the Minister of Justice, appointed by the President, and then confirmed by the Federal Legislature."⁶⁵ State prosecutors report to the ministry of justice at the Land-level and the minister of justice is chosen by the Minister-President of the Land. In "most states, the state level Minister appoints the state's regional prosecutors," while in "other states, the State Ministry of Justice works with a judicial selection committee to recommend candidates for consideration."⁶⁶ "Up until recently, the Minister of Justice could remove the General Prosecutor in four states for political reasons. However, during the past fifteen years, all of Germany's Federal States have now abolished that possibility."⁶⁷ The "Ministry of Justice sets overall prosecution priorities, allocates budget dollars, and makes the key promotion decisions within the prosecution

prosecutors in Japan have a status equivalent to that of judges, receive equal salaries according to the length of the term in office, and their independence and impartiality are also protected by law), available at www.unafei.or.jp/english/pdf/RS_No53/No53_10FP.pdf (last visited on November 22, 2016).

⁶² See, e.g., Hodgson, *Democratic Accountability of Prosecutors*, *supra* note 45; Mathilde Cohen, *supra* note 45. The European Court of Human Rights has held that French prosecutors are not judicial officers for the purposes of Article 5.3 of the European Convention on Human Rights—that establishes the right by anyone arrested for the commission of an offense to be promptly brought before a judge or other officer authorized by law to exercise judicial power—because French prosecutors are not independent from the executive. See, e.g., *Case of Medvedyev and others v. France*, European Court of Human Rights (Grand Chamber), no. 3394/03, March 29, 2010, §§123–125; *Affaire Moulin c. France*, European Court of Human Rights, no. 37104/06, November 23, 2010, §§53–60. Seminal cases in this line of cases include *Schiesser v. Switzerland*, European Court of Human Rights, no. 7710/76, December 4, 1979, and *Huber v. Switzerland*, European Court of Human Rights (Plenary), no. 12794/97, October 23, 1990.

⁶³ Cohen, *supra* note 45, at 114. ⁶⁴ *Id.* at 118.

⁶⁵ Boyne, *German Prosecutors*, *supra* note 52, at 144. ⁶⁶ *Id.* at 144. ⁶⁷ *Id.* at 144.

offices.”⁶⁸ Prosecutors have life-tenure and over the course of their careers, most prosecutors are not promoted to a supervisory level.⁶⁹ However, when they prosecute powerful figures and do not follow formal or informal suggestions to dismiss this type of case, their career may be side-tracked or they may be “promoted” to unappealing positions.⁷⁰ Prosecutors are particularly vulnerable in those state systems in which prosecutors are rotated frequently between the office of the prosecutor and the judiciary.⁷¹

Jurisdictions also express and implement in multiple ways neutrality and faithful application of the law by prosecutors, the other two elements of the ideal of prosecutors as ministers of justice. Conceptions of the criminal process may express and affect whether and to what extent prosecutors are considered and considered themselves as neutral ministers of justice. In this sense, while adversarial systems tend to consider the prosecutor as a party that is opposed to the defense, inquisitorial systems tend to consider the prosecutor as an impartial official.⁷² Several countries in Europe, Latin America, and elsewhere consider prosecutors as impartial officials who have to look equally for inculpatory and exculpatory elements of proof;⁷³ have to document all their procedural activity and do not consider the elements of proof that they gather as elements of the prosecutor, but rather of the state’s impartial investigation;⁷⁴ do not consider that they lose if the defendant is acquitted;⁷⁵ and may even appeal a conviction in favor of the defendant.⁷⁶ Scholars have debated to what extent these conceptions of the criminal process and legal and institutional rules actually shape prosecutors’ self-perception and performance as impartial or neutral officials,⁷⁷ and more qualitative empirical studies are

⁶⁸ *Id.* at 144. ⁶⁹ *Id.* ⁷⁰ *Id.* ⁷¹ *Id.*

⁷² See, e.g., 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) [hereinafter *Globalization of Plea Bargaining*].

⁷³ See, e.g., C. PR. PÉN. Articles 31 and 39–3 (France); StPO §160.2 (Germany); CÓDIGO PROCESAL PENAL DE LA REPÚBLICA DOMINICANA, Article 260 (Dominican Republic); CÓDIGO NACIONAL DE PROCEDIMIENTOS PENALES Article 129 (Mexico); CÓDIGO PROCESAL PENAL DE LA PROVINCIA DE BUENOS AIRES, Article 56 (Province of Buenos Aires, Argentina).

⁷⁴ See Máximo Langer & Kent Roach, *Rights in the Criminal Process: A Case Study of Convergence and Disclosure Rights*, in HANDBOOK ON CONSTITUTIONAL LAW 273 (Mark Tushnet et al. ed., 2013).

⁷⁵ See, e.g., Boyne, *German Prosecutors*, *supra* note 52.

⁷⁶ See, e.g., StPO §296.2; CÓDIGO PROCESAL PENAL DE LA REPÚBLICA DOMINICANA, Article 395 (Dominican Republic); CÓDIGO PROCESAL PENAL DE LA PROVINCIA DE BUENOS AIRES, Article 422 (Province of Buenos Aires, Argentina).

⁷⁷ See, e.g., John H. Langbein & Lloyd L. Weinreb, *Comparative Criminal Procedure: “Myth” and Reality*, 87 YALE L.J. 1549 (1978).

necessary on different jurisdictions. However, even critical ethnographic studies suggest that, to some extent, they do.⁷⁸

In addition, as a way to manifest and implement the ideal that prosecutors have to apply the law faithfully and evenhandedly across cases, many countries have adopted a pure legality principle or a version of the opportunity principle that formally eliminates or reduces the discretion that prosecutors have to dismiss cases, and have created also other mechanisms to make prosecutors accountable for their charging decisions.⁷⁹

Italy still formally applies the principle of mandatory prosecution without any statutory exceptions and gives to it constitutional status.⁸⁰ In Germany, the legality principle or principle of mandatory prosecution requires that the prosecutor file charges whenever there is sufficient evidence to do so, but in recent decades, the opportunity principle was introduced to deal with an increasing docket and allows the prosecutor to dismiss non-serious cases and other specific cases in situations defined by the law.⁸¹ Prosecutors “in most departments believe that they enjoy significant decision-making freedom.”⁸² However, the requirement that prosecutors document all their procedural

⁷⁸ See, e.g., BOYNE, *THE GERMAN PROSECUTION SERVICE*, *supra* note 55 (arguing that even if the ideal of “objectivity” of German prosecutors has been recently undermined and does not rest on the law, there is reason for cautious optimism about it to the degree that it is embedded in prosecutorial organizational culture); HODGSON, *FRENCH CRIMINAL JUSTICE*, *supra* note 48 (stating that the inquisitorial roots of French criminal procedure are significant for our understanding of the present day roles of legal actors, as well as the different ways in which investigations are undertaken and the rights of the accused protected, even if in practice criminal procedures are played out rather differently than in the procedural models). See also Máximo Langer, *Strength, Weakness or Both? On the Endurance of the Adversarial and Inquisitorial Systems in Comparative Criminal Procedure*, in *HANDBOOK ON COMPARATIVE CRIMINAL PROCEDURE* 519, 524–25 (Jacqueline E. Ross & Stephen C. Thaman eds., 2016). Relatedly, on the ethos of Japanese prosecutors towards accuracy and consistency, see DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE* (2002).

⁷⁹ For a brief analysis of the historical origins of the legality principle, see, e.g., Mirjan Damaška, *The Reality of Prosecutorial Discretion: Comments on a German Monograph*, 29 *AM. J. COMP. L.* 119, 125–126 (1981). For an argument within this paradigm in favor of the opportunity principle over the legality principle, see Duff, *supra* note 38, at 19–32. It is important to notice that different regulations about the degree of prosecutorial discretion not only are a way to advance in different degrees the ideal of the prosecutor as a neutral minister of justice, but may also help to strike different balances between this ideal and local demands and accountability. For instance, in France, in recent years, prosecutors have become more immersed in and intertwined with local officials and communities. The goal has been to make prosecution more sensitive to local needs, and prosecutorial discretion has been one of the ways to allow for local input. See Hodgson, *Democratic Accountability of Prosecutors*, *supra* note 45. See also Cohen, *supra* note 45. This same process has helped prosecutors gain more independence from the executive. See *Id.*

⁸⁰ COSTITUZIONE ITALIANA (Italian Constitution) Article 112. ⁸¹ STPO §§ 152–54.

⁸² Boyne, *German Prosecutors*, *supra* note 52, at 152.

activity in a file that will go to the court and an organizational culture of informal collegial controls place limits on and shape decision-making.⁸³ In addition, the alleged victim may lodge a complaint against a prosecutor's decision to dismiss a case; the complaint triggers review within the office of the prosecutor and may be taken to the courts.⁸⁴

In Latin America, as part of the wave of adversarial reforms in the region, most countries have replaced or complemented the principle of mandatory prosecution with an opportunity principle that gives prosecutors the power not to file charges even if there is evidence that an offense has been committed, if situations defined by the law are present.⁸⁵ The arguments for the introduction of the opportunity principle have included enabling the criminal justice system to concentrate on the most serious cases and providing non-punitive responses to the less serious offenses.⁸⁶ But at least in theory (there are no empirical studies on the issue), the opportunity principle still cabins prosecutorial discretion and calls for an equal application of the law by prosecutors in serious cases.

In France, prosecutors have broad discretion on the initial charging decision, protecting individual prosecutorial decisions from review.⁸⁷ However, prosecutors are under legal duty to give reasons when they decide not to prosecute.⁸⁸ In addition, if the prosecutor decides not to prosecute, the complainant may ask that the decision be reviewed by a superior within the office of the prosecutor.⁸⁹ Furthermore, if the victim of crime or another entity initiates a criminal process by presenting a civil suit before the investigating judge, the prosecutor does not have discretion to dismiss the case.⁹⁰ Also, even in cases without a civil party, if a prosecutor decides to formally initiate a criminal process before an investigating judge, the courts have the final say on whether the case should be dismissed based on the available elements of proof.

In England and Wales, the Director of Public Prosecutions has issued guidance to structure prosecutorial decisions on dispositions and charging,

⁸³ *Id.* ⁸⁴ STPO § 172.

⁸⁵ See, e.g., CÓDIGO PROCESAL PENAL DE LA REPÚBLICA DOMINICANA, Articles 30 and 34 (Dominican Republic); CÓDIGO NACIONAL DE PROCEDIMIENTOS PENALES Article 256 (Mexico); CÓDIGO PROCESAL PENAL DE LA PROVINCIA DE BUENOS AIRES, Article 56bis (Province of Buenos Aires, Argentina).

⁸⁶ Langer, *Revolution*, *supra* note 4.

⁸⁷ C. PR. PÉN. Articles 40–1 (France); Hodgson, *Democratic Accountability of Prosecutors*, *supra* note 45.

⁸⁸ C. PR. PÉN. Articles 40–2 (France). One potential problem with prosecutors publishing their reasons for dismissal is that it can expose those about whom decisions are made to public prejudice. See Duff, *supra* note 38.

⁸⁹ C. PR. PÉN. Articles 40–3 (France). ⁹⁰ C. PR. PÉN. Articles 80 and 86 (France).

investigations, and about case law and how to deal with specific offenses.⁹¹ Many of these guidelines are preceded by public consultation (which creates prosecutorial accountability to the public) and the guidelines are to be implemented uniformly through local Crown Prosecution offices.⁹² Legal guidance has also implied that prosecutors “are required to justify their decisions and their application of specific criteria through detailed record keeping that is subject to later review.”⁹³ Except in serious, complex, and sensitive cases, no single Crown Prosecutor is responsible for a case that passes through numerous sets of hands.⁹⁴ In the case of the charging decision, the *Code for Crown Prosecutors* establishes a full code test that includes an evidential test that requires that “there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge” (para. 4.4) and a public interest test for whose application the *Code for Crown Prosecutors* lists considerations that prosecutors should take into account (para. 4.12).⁹⁵ In addition, the victim may ask for a review of the decision not to prosecute.⁹⁶

Also in terms of procedural regulations, there has been a global trend towards the adoption of plea bargaining and other consensual mechanisms. This is relevant in this context because commentators in the United States have considered that plea bargaining may enhance prosecutorial discretion and may undermine the ideal of a faithful application of the law by creating incentives for prosecutors to overcharge, not to disclose exculpatory evidence to the defense, and to have an instrumental relationship with the law more generally, in order to obtain guilty pleas.⁹⁷ However, in many jurisdictions, these mechanisms still present substantial differences with plea bargaining in the United States because they do not apply to the most serious crimes, they are not used for investigatory purposes, the defendant has a right to access the prosecutor’s file or judicial dossier before pleading guilty or otherwise agreeing with the application of the consensual mechanism, only sentencing bargaining is allowed, there is a fixed sentencing reduction for the use of consensual mechanisms, or penalty enhancements against the defendant for going to trial

⁹¹ See Hodgson, *Democratic Accountability of Prosecutors*, *supra* note 45. ⁹² *Id.*

⁹³ *Id.* at 21. ⁹⁴ *Id.*

⁹⁵ For an analysis of these two tests and mechanisms to make prosecutors accountable for their decisions, see Duff, *supra* note 38.

⁹⁶ See, e.g., CROWN PROSECUTION SERVICE, VICTIMS’ RIGHT TO REVIEW GUIDANCE, www.cps.gov.uk/publications/docs/vrr_guidance_2016.pdf; *R v. Christopher Killick* [2011] EWCA Crim 1608.

⁹⁷ See, e.g., BROWN, *infra* note 106; Albert Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

are not as substantial or are not under prosecutors' control like in the United States.⁹⁸

The ideal of the prosecutor as a neutral and independent minister of justice can be undermined not only from political incentives and influence, but also from efficiency and managerial pressures. In many places, these pressures have not only increased the power of prosecutors to deal with criminal cases with a wide range of diversionary and adjudicatory tools, but also redefined the role of the prosecutor as an administrator and manager of the caseload. These managerial pressures may lead prosecutors to prioritize keeping the criminal docket under control and to standardize their decisions, rather than to ensure that justice is done in each individual case, to use efficiency and managerial instead of justice criteria to make decisions over cases, and may lead to less accountable and transparent ways to dispose of criminal cases.⁹⁹

It should also be noticed that though efficiency pressures to dispose of criminal cases faster and out of court have increased the power of prosecutors and affected their role in many jurisdictions, not all jurisdictions have reacted equally, even within the same country.¹⁰⁰ For instance, while in some jurisdictions, these pressures may lead to a dismissal of cases that would have been prosecuted, in other places, they may lead to a processing of cases that would have been dismissed, thus creating a net-widening effect of the criminal justice system.¹⁰¹

⁹⁸ See generally Langer, *Globalization of Plea Bargaining*, *supra* note 72. It is also important to notice that in some countries, the introduction of broader prosecutorial discretion and consensual mechanisms related to plea bargaining have not given prosecutors more power to obtain criminal convictions. For instance, in Germany, efficiency pressures and a less punitive criminal justice system seem to have resulted in prosecutors dismissing many cases, rather than using the potential trial punishment as leverage to obtain convictions through consensual mechanisms. Boyne, *German Prosecutors*, *supra* note 52.

⁹⁹ See, e.g., ANTOINE GARAPON ET AL., *LA PRUDENCE ET L'AUTORITÉ: L'OFFICE DU JUGE AU XXIE SIÈCLE* (2013); Malcolm M. Feeley and Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *CRIMINOLOGY* 449 (1992). Among our chapters on these trends, see Hodgson, *Democratic Accountability of Prosecutors*, *supra* note 45 (describing the comparison between two French court regions by Laura Aubert, *Systématisation pénale et alternatives aux poursuites en France: une politique pénale en trompe-l'œil*, 74 *DRIT ET SOCIÉTÉ* 17 (2010)).

¹⁰⁰ On these efficiency pressures, see, e.g., Hodgson, *Democratic Accountability of Prosecutors*, *supra* note 45.

¹⁰¹ Boyne, *German Prosecutors*, *supra* note 52 (describing criticisms of German prosecutors for their proclivity to dismiss charges or defer prosecution and under-prosecute certain type of cases and describing high variation in dismissal rates in minor crime cases in different German states); Hodgson, *Democratic Accountability of Prosecutors*, *supra* note 45.

The ideal of the prosecutor as an apolitical and impartial agent of the law is weaker in the United States than in other countries. At the local level, as we have seen, the head of the office of the prosecutor is generally elected by the people. Even if, as we will see, there are elements in the United States that reflect a conception of prosecutors as apolitical and neutral agents of the law, the very system of popular election of prosecutors reflects, in itself, a competing, and at times predominant, normative ideal on prosecutors that is in tension with the ideal of prosecutors as neutral agents of the law and that seems to have actual effects in criminal justice practices – as we discussed in the prior section.

At the federal level, the Department of Justice is part of the executive branch and the Attorney General, and the 93 U.S. Attorneys are appointed by the President with consent by the Senate and they can be removed by the President.¹⁰² Assistant U.S. Attorneys are appointed and may be removed by the Attorney General.¹⁰³ In this sense, the formal protections of federal prosecutors' independence are substantially weaker than in many other countries.¹⁰⁴ However, it is important to note that institutional and political checks and traditions, among other factors, seem to provide more independence to federal prosecutors in the United States than in many other countries.¹⁰⁵

The ideal of the prosecutor as a minister of justice is weaker regarding its two other elements of prosecutors as neutral and faithful agents of the law. Both at the federal and state/local levels, prosecutors are not considered magistrates or judges, do not have life tenure, often see themselves as an opponent to the defense in an adversarial criminal process, and do not have a duty to look for both inculpatory and exculpatory evidence.¹⁰⁶ Also at the federal and state/local levels, prosecutors have broad discretion at the charging decision. They are not required to articulate their grounds to dismiss charges

¹⁰² 28 U.S. Code § 541. U.S. Attorneys are appointed for a period of four years.

¹⁰³ 28 U.S. Code § 542.

¹⁰⁴ See, e.g., Van Aaken et al., *supra* note 41, at 220 and 237–38 (the United States ranks 64 out of 78 countries in terms of *de jure* independence).

¹⁰⁵ Van Aaken et al., *supra* note 41, at 220 and 237–38 (the United Kingdom and the United States jointly rank 18 out of 76 countries in *de facto* independence). For analysis on the independence of federal prosecutors in the United States, see, e.g., Sanford C. Gordon, *Assessing Partisan Bias in Federal Public Corruption Prosecutions*, 103 *AMERICAN POLITICAL SCIENCE REVIEW* 534 (2009); Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 *DUKE L.J.* 2087 (2009) [hereinafter *Political Control*].

¹⁰⁶ See, e.g., DARRYL K. BROWN, *FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW* (2016) [HEREINAFTER *FREE MARKET CRIMINAL JUSTICE*].

and their decision may not be circumvented by victims and is unreviewable by the courts.¹⁰⁷ Many offices of the prosecutor have guidelines, but these guidelines are not always made available to the public, are not preceded by public consultation, and are not generally enforceable before the courts.¹⁰⁸ And the extensive practice of plea bargaining creates incentives for local, state, and federal prosecutors to overcharge and undercharge, withhold evidence to the defense, and have an instrumental relationship to the law more generally.¹⁰⁹ The United States legal system prides itself as being “adversarial” rather than “inquisitorial,” and “anti-inquisitorialism” – the use of the Continental legal system as a kind of negative polestar against which the American system is defined – is a pervasive and persistent theme in the constitutional law of American criminal procedure.¹¹⁰ And the neutral minister of justice, working within a hierarchical bureaucracy, is often understood as epitomizing the kind of “inquisitorial” process that the American legal system rejects.¹¹¹ Though we need many more single-jurisdiction and comparative studies on how these regulations and adversarial legal identity actually affect the self-perception and work by prosecutors, the available scholarship suggests that they not only express or signify a normative ideal that is

¹⁰⁷ See, e.g., *Linda R.S. v. Richard D. and Texas et al.*, 410 U.S. 714 (1973); *Leeke v. Timmerman*, 454 U.S. 83 (1981); *United States v. Armstrong*, 517 U.S. 456 (1996).

¹⁰⁸ Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 *UCLA L.R.* 1 (1971); Ellen Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 *CORNELL J. L. & PUB. POL’Y* 167, 177 (2004) (courts will not use their supervisory powers to enforce a DOJ guideline if the sole basis for the argument is that a federal prosecutor violated internal policy); Jane Patrick Hanlon & Eric Reilley Lewis, *The Federal Criminal Investigation Process*, in JAMES T. O’REILLEY ET AL., *PUNISHING CORPORATE CRIME* 67, 78–84 (2009).

¹⁰⁹ See, e.g., BROWN, *supra* note 106; Alschuler, *supra* note 97. The extensive practice of guilty pleas and plea agreements also substantially reduces the importance of the trial by jury as a mechanism of democratic accountability of prosecutors to the people.

¹¹⁰ David Alan Sklansky, *Anti-Inquisitorialism*, 122 *HARV. L. REV.* 1634 (2009).

¹¹¹ Nonetheless, there are also persistent elements of what looks like “inquisitorial” process in the American criminal justice system, and the most pronounced of those elements involve prosecutors. The broad deference granted to prosecutors and the vast discretion they exercise, particularly in negotiating plea bargains, can be understood as a stripped-down, American version of inquisitorialism—or, as Jennifer Laurin describes, “quasi-inquisitorialism.” See Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 *NOTRE DAME L. REV.* 783 (2014). See also Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 *AM. J. CRIM. L.* 223, 248–56 (2006) [hereinafter *Rethinking Plea Bargaining*] (characterizing this system of prosecutorial *de facto* adjudication as a specific hybrid between adversarial and inquisitorial conceptions of the criminal process and other elements that do not fit into either of these conceptions). It is stripped down, in large part, by eliminating many of the bureaucratic and professional controls that European countries have placed on prosecutorial power. *Id.* at 256–66.

in tension with the prosecutor as a neutral minister of justice, but also have an effect on how prosecutors see themselves and operate.¹¹²

There is a long tradition of academic commentary in the United States of criticizing broad prosecutorial discretion and the extensive use of plea bargaining as dangers to the rule of law.¹¹³ These criticisms have often relied on comparative examples of legal systems like France, Germany, and Italy.¹¹⁴ Criticisms of prosecutorial discretion in the United States started in the 1960s, at a time in which there was widespread criticism of police discretion, later followed by criticism of judges' sentencing discretion, both inspired in rule of law concerns.¹¹⁵ However, the relative small impact of these criticisms in the decisions by the courts and the work by Congress and other legislatures is another indication that the ideal of prosecutors as neutral or impartial agents of the law is weaker in the United States than in other places.

Starting with the Warren Court, courts tried to cabin police discretion through constitutional rules. Congress and state legislatures tried to cabin judges' sentencing discretion through sentencing guidelines, mandatory minima, and other sentencing restrictions. Regardless of how one evaluates the outcomes of these reforms to cabin police and judges' discretion, there is no question that these were serious and encompassing reforms.

In contrast, there have been no serious attempts to cabin prosecutorial discretion and plea bargaining or to otherwise restrain prosecutorial power.¹¹⁶

¹¹² See, e.g., BROWN, *supra* note 106; WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH (1999).

¹¹³ See e.g., ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007); KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969) [HEREINAFTER DISCRETIONARY JUSTICE]; PIZZI, *supra* note 112; ABRAMS, *supra* note 108; JAMES VORENBERG, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

¹¹⁴ See, e.g., See, e.g., BROWN, *supra* note 106; DAVIS, DISCRETIONARY JUSTICE, *supra* note 113; WAYNE R. LAFAYE, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 643 (1970); JOHN H. LANGBEIN, *Land without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979); LANGBEIN & WEINREB, *supra* note 77.

¹¹⁵ See, e.g., DAVIS, DISCRETIONARY JUSTICE, *supra* note 113; MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); U.S. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS (1973).

¹¹⁶ An exception was the ban of plea bargaining adopted in Alaska in 1975 that was formally in place until 1993. For a history and evaluation of this ban, see Teresa White Carns & Dr. John Kruse, *A Re-Evaluation of Alaska's Plea Bargaining Ban*, 8 ALASKA L. REV. 27 (1991). Also, some restrictions were applied to plea bargaining as part of the victims' rights movement such as the adoption of Proposition 8 in 1982 that prohibited plea bargaining in "serious felony" cases in California. For an early evaluation of the effects of this proposition, see California Department of Justice, Candace McCoy & Robert Tillman, *Controlling Felony Plea Bargaining in California: The Impact of the "Victims' Bill of Rights"* (1986), *California Agencies*, Paper 232, available at www.digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1229&context=caldocs_agencies (last visited on November 23, 2016).

In the case of the police, there were concerns in the 1940s, 1950s and 1960s from the perspective of democratic pluralism as the then-prevailing theory of democracy in the United States about the police's "authoritarian mentality" and being a discrete and unified group, alienated from mainstream society.¹¹⁷ There were no similar concerns regarding prosecutors as a group, given that prosecutors were educated and part of the local, state, and national elites that democratic pluralism celebrated as leaders of American democracy.¹¹⁸ In addition, while the police acted before adversary checks started, prosecutors acted after adversary proceedings had been put in motion.¹¹⁹

Thus, while the Warren Court set a wide range of constitutional limits on police arrests, searches, seizures, and interrogations, it set few direct constitutional limits on prosecutorial power.¹²⁰ There were Warren Court cases that strengthened the right to counsel, the right to trial by jury, and other features associated with adversary process that could be interpreted as indirectly setting checks on prosecutorial power,¹²¹ but these decisions did not strongly embrace or advance the ideal of prosecutors as neutral agents of the law. The Burger Court gave for the first time the Supreme Court's blessing to the practice of plea bargaining in the *Brady* trilogy and later upheld heavy-handed use of plea proposals,¹²² and rejected a selective prosecution claim.¹²³ The Rehnquist Court also rejected selective prosecution claims and passed on opportunities to regulate plea bargaining.¹²⁴ It also declined to hold unconstitutional statutes that strengthened prosecutorial leverage in plea negotiations.¹²⁵ The Roberts Court has set some limits to guilty pleas and plea bargaining by strengthening the constitutional duties by defense counsel in this setting.¹²⁶ But these cases are not as much about limiting prosecutorial power or embracing a conception of prosecutors as neutral agents of the law as

¹¹⁷ DAVID ALAN SKLANSKY, *POLICE AND DEMOCRACY*, *supra* note 19, AT 39–43.

¹¹⁸ Sklansky, *Unpacking*, *supra* note 14.

¹¹⁹ See, e.g., *Massiah v. United States*, 377 U.S. 201 (1964); *Kirby v. Illinois*, 406 U.S. 682 (1972).

¹²⁰ See, e.g., *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Jackson*, 390 U.S. 570 (1968); *Griffin v. California*, 380 U.S. 609 (1965).

¹²¹ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

¹²² *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). But see *Santobello v. New York*, 404 U.S. 257 (1971).

¹²³ *Wayte v. United States*, 470 U.S. 598 (1985).

¹²⁴ *McCleskey v. Kemp*, 481 U.S. 279 (1987); *United States v. Armstrong*, 517 U.S. 456 (1996); *United States v. Bass*, 536 U.S. 862 (2002); *United States v. Ruiz*, 536 U.S. 622 (2002).

¹²⁵ *Harmelin v. Michigan*, 501 U.S. 957 (1991). But see *Roper v. Simmons*, 543 U.S. 551 (2005), in the final term of the Rehnquist Court.

¹²⁶ *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Laffler v. Cooper*, 132 S.Ct. 1376 (2012); *Missouri v. Frye*, 132 S.Ct. 1399 (2012).

about effective assistance of counsel and enabling better informed guilty pleas. In fact, in the context of failure to disclose exculpatory evidence, the Roberts Court passed on holding prosecutors accountable.¹²⁷ In addition, the limits the Roberts Court has set on excessive punishment and mass incarceration have focused on excluding some defendants from certain types of punishment and on limiting prison overcrowding, rather than on restricting the exercise of prosecutorial discretion that may be one of the sources of punishment levels and of overcrowding.¹²⁸

In the case of limiting judges' sentencing discretion, Congress and state legislatures passed sentencing guidelines. At Congress, conservatives and liberals reached an agreement on the guidelines because while conservatives wanted "truth in sentencing" and higher punishments, liberals were concerned with racial sentencing disparities.¹²⁹ But in the political climate of the 1980s, 1990s, and early 2000s, there did not seem to be political room for legislatures restraining prosecutors' power without being perceived as soft on crime. If anything, legislatures had the incentives to set harsher criminal laws and then leave discretion to prosecutors to apply them, in fact increasing prosecutors' power while leaving their discretion intact.¹³⁰

One way of understanding the absence of meaningful judicial supervision of prosecutors in the United States is that prosecutors are viewed as advocates rather than agents of the law; the Supreme Court has not seen fit to regulate prosecutors, because it does not expect any greater neutrality from them than from defense counsel. But as Jennifer Laurin points out, the judicial deference can also be understood as reflecting an understanding that prosecutors *are* more than "mere advocates" – that they are neutral and professional, and can be relied upon to ensure that justice is done.¹³¹ In fact, the Supreme Court has described the United States Attorney – the key official overseeing federal prosecution – as a representative "not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the

¹²⁷ *Connick v. Thompson*, 563 U.S. 51 (2011).

¹²⁸ See *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Brown v. Plata*, 131 S. Ct. 1910 (2011); JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA (2014).

¹²⁹ See, e.g., KATE STITH AND JOSÉ CABRANES, *FEAR OF JUDGING. SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

¹³⁰ STUNTZ, *COLLAPSE*, *supra* note 7; Stuntz, *Pathological Politics*, *supra* note 7.

¹³¹ See Laurin, *supra* note 111.

law. . . .”¹³² Prosecutorial standards in the United States have referred to the prosecutor as not only a zealous advocate, but an “administrator of justice” and “an officer of the court” whose primary duty “is to seek justice within the bounds of the law, not merely to convict.”¹³³ And the independent judgment of prosecutors – particularly but not exclusively at the federal level – is frequently touted as an important value; witness the tradition of relative independence of appointed United States Attorneys,¹³⁴ the self-removal by the politically appointed Attorney General of the United States from making decisions in some politically sensitive cases, and the appointment of special prosecutors to deal with politically sensitive cases at the federal and state levels.

As elsewhere, prosecutors in the United States are mediating figures that bridge key conceptual and organizational divides between adversarial and inquisitorial forms of procedure, between law and discretion and between the police and the courts.¹³⁵ As mediating figures, prosecutors work at the intersection of conflicting ideals about them, including the ideal of the prosecutor as an elected representative of the people versus prosecutor as an agent of the law. But there is no doubt that the ideal of the prosecutor as an agent of the law does not capture the normative ideals about prosecutors and the practice and self-perception of prosecutors in the United States to the same extent as in other places.¹³⁶

Now that the punitive tide has been ebbing to a certain extent in the United States and that concerns about equality in the criminal justice system have come back with renewed force,¹³⁷ one of the questions is whether there is more

¹³² *Berger v. United States*, 295 U.S. 78, 88 (1935).

¹³³ AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS COMMITTEE, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, STANDARD 3-1.2(b) and (c) (4th ed. 2015).

¹³⁴ Daniel Richman, *Political Control*, *supra* note 105; Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1202–03 (2013).

¹³⁵ Sklansky, *Unpacking*, *supra* note 14. See also, David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473 (2017).

¹³⁶ See, e.g., PROSECUTORS AND POLITICS: A COMPARATIVE PERSPECTIVE (Michael Tonry ed. 2012); THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE (Eric Luna & Marianne Wade eds. 2012).

¹³⁷ Recent empirical studies on prosecutorial decisions have found persistent disparities based on race. See, e.g., Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795 (2012); Sonja Starr & Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320 (2014); Sherod Thaxton, *Disciplining Death: Assessing and Ameliorating Arbitrariness in Capital Charging*, 48 ARIZONA STATE LAW JOURNAL (forthcoming 2017); *Prosecutor's Guide for Advancing Racial Equity*, VERA INST. OF JUST., www.vera.org/sites/default/files/resources/downloads/prosecutors-advancing-racial-equity.pdf (last visited September 16, 2016).

room for reforms or practices that advance the rule of law ideal of consistent, equal, unpoliticized application of the law by prosecutors. Even if contemporary prosecutors in the United States remained more sensitive to politics than to law,¹³⁸ there could be reforms that could advance this rule of law ideal in the United States.

III LIBERAL DEMOCRACY: PROSECUTORS AS DEFENDERS OF LIBERTY, DIGNITY, AND EQUALITY

Another perspective about the relationship between prosecutors and democracy, that several contributions to this volume assumed, but did not always make explicit, is that prosecutors, however they are selected and supervised and regardless of whether their legitimacy is more legal or political, should respect and advance “democratic values.”¹³⁹ The content of these democratic values would depend on what conception of democracy one embraces.¹⁴⁰ In this regard, this book’s chapters, consistently with a substantial part of public discourse in the United States and Western Europe, have embraced liberal democracy values that would include not only or even primarily the rule of law, but also, and more importantly, liberty, dignity, and equality.¹⁴¹ From this perspective, what democracy requires of prosecutors is, first and foremost, that they treat suspects and defendants with dignity and respect, that they scrupulously comply with both the letter and the spirit of constitutional limitations on the penal power, that they work to ensure that no individuals or groups are beyond the reach of the law, and that everyone receives the equal protection of the law and equal access to justice and public office.

In the United States, constitutional law includes many of the rights of criminal suspects and criminal defendants also recognized in international human rights instruments and conventions. These constitutional rights set limits to the work done by criminal justice public officials, including prosecutors. When these rights are not respected, courts are supposed to enforce them. But there is no doubt that courts underenforce many substantive criminal law and criminal procedure rights, by design or necessity. In certain areas, there are separation of powers and epistemological considerations that prevent courts

¹³⁸ Simon, *Better Politics of Prosecution*, *supra* note 10.

¹³⁹ See Ingrid V. Eagly, *Prosecuting Immigrants in a Democracy*, in this volume [hereinafter *Prosecuting Immigrants*]; Daniel Richman, *Accounting for Prosecutors* in this volume [hereinafter *Accounting*]; Cohen, *supra* note 45.

¹⁴⁰ For a description of some of the main alternatives in this respect, see HELD, *supra* note 39.

¹⁴¹ See, e.g., Sharon Dolovich, *Legitimate Punishment in a Liberal Democracy*, 7 BUFF. CRIM. L. REV. 304, 313–14 (2004).

from second-guessing the prosecutor's and office of the prosecutor's decisions. The charging decision is an example; prosecutors have the constitutional power to execute the laws and have knowledge about the whole caseload that puts them in a better epistemological situation to make decisions on individual cases.¹⁴² Another example is discovery, because while prosecutors know all the elements of proof available in their investigation, judges have more scattered knowledge about the case and the supporting evidence. Courts sometimes underenforce criminal law and procedure rights because they assume that prosecutors are subjected to professional discipline rules that are often not enforced.¹⁴³ In other settings, courts underenforce rights due to weaknesses in the U.S. adversary system in which, as a general rule, courts may decide upon a rights violation only if one of the parties raises it.¹⁴⁴ Partly because of the underfunding of indigent defense, defense attorneys often do not raise sound rights violations.

Judicial underenforcement has arguably become a more serious issue in the last few decades since prosecutors have increased their power in the criminal justice system due to, among other factors, an increase of sentences and of the number and types of criminal offenses. This increased power, combined with the practice of guilty pleas, plea agreements, and deferred prosecution agreements, have enabled prosecutors to be *de facto* adjudicators of a large portion of criminal cases in the United States either by prosecutors alone or in conjunction with the defense.¹⁴⁵

In this context, some commentators have called for larger judicial enforcement of rights and other external limitations and constraints on prosecutors.¹⁴⁶ But other scholars have called on prosecutors and their offices to embrace their obligation to advance democratic values; these scholars have argued that prosecutors in the United States should collectively take responsibility for ensuring that constitutional values are protected even when – or especially when – effective judicial oversight is lacking.¹⁴⁷ How this requirement

¹⁴² See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996).

¹⁴³ Sklansky, *Unpacking*, *supra* note 14. ¹⁴⁴ Sklansky, *Anti-Inquisitorialism*, *supra* note 110.

¹⁴⁵ Langer, *Rethinking Plea Bargaining*, *supra* note 111; Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998).

¹⁴⁶ See, e.g., DAVIS, *DISCRETIONARY JUSTICE*, *supra* note 113; Abrams, *supra* note 108; William J. Stuntz, *Bordenkircher v. Hayes: Plea Bargaining and the Decline of the Rule of Law*, in *CRIMINAL PROCEDURE STORIES* 351 (Carol S. Steiker ed., 2006).

¹⁴⁷ See Richman, *Accounting*, *supra* note 139, at 9: "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." See also, e.g., Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 *U.C. DAVIS L. REV.* 1591 (2014); Eric S. Fish, *Prosecutorial Constitutionalism*, 90 *S. CAL. L. REV.* 237 (2017).

translates into an institutional context in which prosecutors have pressing needs, are typically elected, and act within an adversarial process has to be discussed in context-specific ways. But the articulation of the ideal may in itself open room for the discussion of these issues. In the context of the United States, this will require leadership from head prosecutors – district attorneys and United States Attorneys – but it may also require structural changes within prosecutors’ offices.¹⁴⁸

Jonathan Simon’s call in this volume for a prosecutorial politics of dignity can be understood, in part, as a call for prosecutors, whether elected or appointed, to commit themselves to the advancement of liberal democracy – and, more particularly, to respect for and protection of the human dignity of criminal suspects and criminal defendants. That obligation can be rooted both in human rights and in the citizen’s right to equal concern and respect.¹⁴⁹ Regarding human dignity, groups of people who have been dehumanized by criminal justice policies in the United States include those who commit certain criminal offenses, prisoners, and undocumented immigrants. The “tough on crime” Text has included abstractions such as the “sexual predator,” the “violent gang member,” and the “dangerous felon” that dehumanize people who commit and are imprisoned for the commission of crime. In this regard, one can contrast United States with Western Europe, where those who commit crimes and are incarcerated still tend to be considered members of society and the political community, at the very least after their release.¹⁵⁰ Regardless of how they are appointed and whether their legitimacy is more legal or political, there is a straightforward argument that democratic prosecutors should advance these ideals.¹⁵¹

Antony Duff argues in his chapter that democratic values include not only “equal concern and respect,” but also the “eyeball test” as a test of civic recognition, under which “... republican citizens must be willing, as well as able, to look at each other in the eye – to recognise each other as participants in the civic enterprise. That is one way in which we display equal concern and respect for each other: in our willingness to look each other in the eye, with a look not of threat or fear, but of recognition of fellowship.”¹⁵² Duff maintains that prosecutors are also citizens, subject to the same demands and

¹⁴⁸ See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *STAN. L. REV.* 869 (2009); Fish, *supra* note 147; Langer, *Rethinking Plea Bargaining*, *supra* note 111.

¹⁴⁹ Duff, *supra* note 38, at 5 “Respect concerns such values as dignity, autonomy, privacy.”

¹⁵⁰ On this contrast, see JAMES Q. WHITMAN, *HARSH JUSTICE* (2003).

¹⁵¹ Simon, *Better Politics of Prosecution*, *supra* note 10. ¹⁵² Duff, *supra* note 38, at 12.

duties of democratic citizenship as all their fellows, and consequently have to treat defendants as fellow citizens.¹⁵³

Duff argues that criminal law in a democracy is the law of the citizens of that polity; it is part of the duties that citizens have to each other. What, then, about a prosecutor's treatment of non-citizens – people who are sometimes thought to be formally outside or on the periphery of the political community? Duff answers that "... a decent republic will be welcoming to would-be citizens rather than treating them with exclusionary distrust; and non-citizens within a polity's jurisdiction should be treated as guests, a distinctive normative position that requires concern, respect and recognition – and equal treatment by the criminal justice system."¹⁵⁴ In her chapter, Ingrid Eagly gives a different answer, arguing that the core democratic values that guide criminal law – such as individual liberty, dignity, and bodily integrity, and respect for human rights – must apply equally to the citizens and noncitizens that are subject to its power.¹⁵⁵ In fact, the enjoyment of substantive criminal law and criminal procedure rights in the United States has traditionally not been subjected to citizenship requirements. In other words, non-U.S.-citizen defendants have enjoyed the same substantive criminal law and criminal procedure rights as citizen defendants. However, as Eagly points out, changes in the last few years in immigration policy and its enforcement have blurred the line between criminal justice and the immigration system and made non-citizen defendants more vulnerable to criminal prosecutions and convictions in the United States.¹⁵⁶

More broadly, prosecutors can advance democratic values not just by *restraint* – by respecting the *limits* placed on their authority by concerns for liberty, dignity, and equality – but also in more affirmative ways, through the criminal charges that they bring and take to trial. Democratic values may require from prosecutors not only to not prosecute defendants on impermissible or arbitrary grounds, but also the duty to prosecute those who commit serious offenses to enforce equality and protect individuals and groups. Under the Equal Protection Clause of the U.S. Constitution, defendants have a right not to be prosecuted on the basis of impermissible criteria such as ethnicity, gender, and race.¹⁵⁷ Antony Duff points out that if "we ask what could justify a policy of focusing prosecutorial resources on crimes of racial hatred, or on domestic violence, or on police conduct towards members of particular racial groups, the most plausible answer is that such policies can serve the rule of law principle of equality before the law by focusing on kinds of crime that have too

¹⁵³ *Id.* ¹⁵⁴ *Id.* at 12. ¹⁵⁵ Eagly, *Prosecuting Immigrants*, *supra* note 139. ¹⁵⁶ *Id.*

¹⁵⁷ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Wayte v. United States*, 470 U.S. 598 (1985); *United States v. Armstrong*, 517 U.S. 456 (1996); *United States v. Bass*, 536 U.S. 862 (2002).

often been ignored, and that are typically committed by the more powerful against members of civically vulnerable groups.”¹⁵⁸ Equality before the law would then mean, among other things, that there are no people who are above the law and may commit crimes with impunity. Prosecuting crime is thus a way to enforce equality as a value.

Relatedly, international human rights law recognizes, among others, a right to judicial and State protection.¹⁵⁹ For instance, Article 1.1 of the American Convention on Human Rights establishes that the States Parties to the Convention “... undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.” The Inter-American Court of Human Rights has held that this article imposes to public authorities a duty to investigate and punish human rights violations and that this is an obligation of means, not of results.¹⁶⁰ The European Court of Human Rights has also held that States Parties of the European Convention have to enact criminal-law provisions to punish serious human rights violations through adequate penalties and to establish criminal-law machinery and enforce criminal-law provisions as well as to prosecute where the outcome of the investigation warrants it.¹⁶¹

There is important variation among countries on the extent to which they accept and fulfill this duty to prosecute. In Germany, critics have argued that prosecutors underenforce criminal law and have not prosecuted enough

¹⁵⁸ Duff, *supra* note 38, at 29.

¹⁵⁹ See, e.g., American Convention on Human Rights, Articles 1, 8 and 25; European Convention on Human Rights, Articles 2, 3, 4, 5 §1 and 8.

¹⁶⁰ See, e.g., Inter-American Court of Human Rights (IACtHR), Case of *Velásquez Rodríguez v. Honduras*, Judgment of July 29 of 1988; IACtHR, Case of *Garibaldi v. Brazil*, Judgment of September 23 of 2009; IACtHR, Case of *Anzualdo Castro v. Peru*, Judgment of September 22 of 2009; IACtHR, Case *Pueblo Bello Massacre v. Colombia*, Judgment of January 31 of 2006.

¹⁶¹ See, e.g., Judge Ksenija Turković, *International and National Courts Confronting Large-scale Violations of Human Rights*, in *OPENING OF THE JUDICIAL YEAR – SEMINAR 1, 2* (January 29, 2016)(citing *Osman v. the United Kingdom*, October 28, 1998, § 115, *Reports of Judgments and Decisions* 1998-VIII; *Mastromatteo v. Italy* [GC], no. 37703/97, §§ 67 and 89, ECHR 2002-VIII; and *Menson v. the United Kingdom* (dec.), no. 47916/99, ECHR 2003-V; *Hugh Jordan v. the United Kingdom*, no 24746/94, §§ 105–09, May 4, 2001; *Douglas-Williams v. the United Kingdom* (dec.), no. 56413/00, January 8, 2002; *Esmukhambetov and Others v. Russia*, no. 23445/03, §§ 115–18, March 29, 2011; and *Umarova and Others v. Russia*, no. 25654/08, §§ 84–88, July 31, 2012; *mutatis mutandis*, *Öneryıldız v. Turkey* [GC], no. 48939/99, § 96, ECHR 2004-XII; *Okkaly v. Turkey*, no. 52067/99, § 65, ECHR 2006-XII (extracts); and *Türkmen v. Turkey*, no. 43124/98, § 51, December 19, 2006), available at www.echr.coe.int/Documents/Speech_20160129_Turkovic_JY_ENG.pdf.

Holocaust perpetrators, hate crimes, crimes against women, and corporate crime.¹⁶² In the United States, neither the law nor the courts have established a prosecutor's duty to prosecute. Courts have not interpreted the U.S. or State Constitutions as requiring such a duty either under equal protection before the law or the right to judicial or state protection.¹⁶³ In fact, if anything, one of the distinctive features of U.S. law is that prosecutors have almost unlimited discretion not to prosecute. However, the moral intuitions and political claims that underlie this international human rights duty to prosecute serious crimes have been present in the United States. This may be the case behind many of the complaints for the non-prosecution by district attorneys or federal prosecutors of cases as different as the use of waterboarding and other techniques to interrogate suspects of terrorism, police officers who unnecessarily kill black men and women, corruption among public officials, Wall Street traders' victimization of unsophisticated or vulnerable clients, and domestic violence, to mention just a few possible examples. This is echoed by Daniel Richman, who notes in his contribution to this volume the many ways in which prosecutors hold private citizens as well as the police accountable for their actions. In this context, it is also worth emphasizing that the issue of whether a jurisdiction formally acknowledges a duty to prosecute serious crimes is different from the issue of whether and to what degree it actually prosecutes these crimes. The latter is an issue that comparative law and other comparative literatures have explored inadequately, and it would be crucial in determining to what extent prosecution in a given jurisdiction is democratic in the sense explored in this section.¹⁶⁴

Democratic values may have implications not just for the cases that prosecutors bring and for how they bring those cases, but also for the composition of prosecutors' offices. This isn't just because the demographics of prosecutorial personnel – how diverse they are, and how representative of the polities they serve – can have implications for how evenhandedly they administer justice. One of the values of democracy since ancient Greece is the right to participate

¹⁶² See, e.g., BOYNE, THE GERMAN PROSECUTION SERVICE, *supra* note 55, at 119–145; Boyne, *German Prosecutors*, *supra* note 52.

¹⁶³ On how the original understanding of the Equal Protection Clause in the United States included protection by authorities through criminal prosecutions and on how it was later abandoned, see STUNTZ, COLLAPSE, *supra* note 7, at 99–122.

¹⁶⁴ For comparative studies of prosecutions against powerful defendants, see e.g., Langer, *The Diplomacy*, *infra* note 179; van Aaken et al, *supra* note 41. Federalism and the possibility that the same conduct is prosecuted by federal and state prosecutors may be important to explain how this issue actually works in the United States. See, e.g., Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259 (2000).

in public office. Every citizen, as a member of the polis, should then have an equal opportunity to get a position as a prosecutor as long as she is qualified for the job. Diversity in public office may not only advance this right, but also communicate to the people that this right is actually effective in a given political community.

Relatedly, in her chapter, Mathilde Cohen argues that “representative democracy should be extended to include the demographic representation of citizens in key public offices” and defends the notion of “representative bureaucracy” that “suggests that a public workforce representative of the people in terms of race, ethnicity, gender, and sexual orientation, but also socio-economic status, regional origin, abilities and disabilities, helps ensure that the interests of all groups are considered in decision-making processes.”¹⁶⁵

As with the previous ideals, this one exists also in the United States and is reflected in recent prosecutorial standards: “In selecting personnel, the prosecutor’s office should also consider the diverse interests and makeup of the community it serves, and seek to recruit, hire, promote and retain a diverse group of prosecutors and staff that reflect that community.”¹⁶⁶ French judges and prosecutors have also acknowledged the issue in relation to gender, geographic, and socio-economic inequality, but not regarding racial and ethnic diversity.¹⁶⁷

However, as essays in this volume have shown, offices of the prosecutor in France and the United States are short of this ideal; minorities are underrepresented in these offices.¹⁶⁸ In the case of France, advancing this value may be particularly challenging given the French “universalist” tradition that denies the reality of race and ethnicity and generally prohibits, even on constitutional grounds, to collect statistics on these categories.¹⁶⁹ In order to live up to these democratic values, offices of the prosecutor around the world should keep statistics on this issue, make them available, and implement policies when they find themselves short of this ideal. Single-jurisdiction and comparative law studies should also explore further how offices of the prosecutors are composed in different jurisdictions and identify offices that could serve as models in the embracing and implementation of this ideal.

¹⁶⁵ Cohen, *supra* note 45, at 124.

¹⁶⁶ AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS COMMITTEE, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, STANDARD 3-2.2(A) (4th ed. 2015).

¹⁶⁷ Cohen, *supra* note 45.

¹⁶⁸ *Id.*; Sklansky, *Unpacking*, *supra* note 14 (citing statistics on underrepresentation of Latinos in California and of African-American and Latinos at the federal level).

¹⁶⁹ Cohen, *supra* note 45.

IV PARTICIPATORY DEMOCRACY: THE ROLE OF THE CITIZEN IN PROSECUTION

The “community prosecution” movement, which we discussed earlier, can be understood as not just a way to strengthen *representative democracy* in prosecutor’s offices, but also a way to strengthen *participatory democracy*, by making community members active partners in prosecutors’ work. At least as a thought experiment, though, it is worth contemplating the argument for going further: for allowing victims and other private individuals to bring criminal cases. This book’s chapters did not explore this possible relationship between prosecutors and democracy. However, if democracy entails self-rule by the people and prosecution of offenses is a key component of ruling a society, why shouldn’t any citizen be able to prosecute crime? In Ancient Athens, while the victim (or his family) could bring suit in “private cases,” any adult male citizen could initiate action in “public cases.”¹⁷⁰ In the eighteenth century, Montesquieu considered that prosecution by any citizen was one of the features that characterized republics.¹⁷¹ And private prosecution used to be a familiar feature of criminal justice in the United Kingdom – and also, albeit subject to greater limitations, in the United States.¹⁷²

We do not live in an era of direct democracies and well-functioning states around the world have a developed system of public prosecution. However, many states still do allow for the participation of private individuals and private entities in the prosecution of crime. This participation comes in many forms. Some states allow any citizen or legal entity to prosecute crime in conjunction with or instead of public prosecutors.¹⁷³ Other states allow for non-governmental organizations to be a party in criminal

¹⁷⁰ See, e.g., ADRIAAN LANNI, *LAW AND ORDER IN ANCIENT ATHENS* 10, 49–55 (2016) (explaining that in “private cases,” the victim (or his family in the case of murder) brought suit, while in “public cases,” any adult male citizen was permitted to initiate an action).

¹⁷¹ MONTESQUIEU, *THE SPIRIT OF THE LAWS* 81 (Anne M. Cohler, Basia Carolyn Miller, & Harold Samuel Stone trans. and ed., 1989): “In Rome . . . (and) in many other cities . . . citizens were permitted to accuse one another. This was established in the spirit of the republic, where each citizen should have boundless zeal for the public good, and where it is assumed that each citizen has all the rights of the homeland in his hands.”

¹⁷² See, e.g., LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 29–30 (1993).

¹⁷³ See, e.g., CONSTITUCIÓN ESPAÑOLA [C.E.] Article 125 (regulating the right of any citizen to prosecute crime as a people’s prosecutor and the right to participate in the administration of justice through jury service, subjected to the requirements established by law); LEY DE ENJUICIAMIENTO CRIMINAL [L.E. CRIM.] [CODE OF CRIMINAL PROCEDURE] Articles 101, 270 (Spain) (any citizen may be a people’s prosecutor); S.T.C. No. 34/94, January 31, 1994; S.T.C. No. 1047/2007, December 17, 2007; S.T.C. No. 54/2008, April 8, 2007 (Spain); Prosecution of Offences Act, 1985, c. 23, §6(1) (England) (any person may institute or conduct

proceedings regarding cases related to the goal or expertise of the organization.¹⁷⁴ Many states allow the victim of crime to be a party in the criminal process as either a civil party or a private prosecutor.¹⁷⁵ The procedural powers of these private participants in the criminal process vary, ranging from being able to act with full or almost full prosecutorial powers during pretrial, trial and appeal, to being a companion of the public prosecutor who remains in control of the case – in other words, they range from different degrees of private control of the prosecution to different degrees of private participation in the prosecution.¹⁷⁶

The historical origins of private prosecutors also vary. In some states, giving prosecutorial powers to private individuals was a way to make up for weak public prosecution systems.¹⁷⁷ In other places, giving prosecutorial powers to private individuals and entities has been a mechanism to advance democratic ideals in the criminal process.¹⁷⁸

Regardless of their historical origins, giving private individuals and entities prosecutorial powers can be interpreted as a way to implement democratic ideals such as people's participation in the administration of criminal justice and bringing accountability to the criminal justice system.

any criminal proceedings); *Jones v. Whalley*, [2006] UKHL 41; *R (on the application of Gujra) v. Crown Prosecution Service* [2012] UKSC 52.

¹⁷⁴ See, e.g., C. PR. PÉN. Articles 2–1 to 2–23 (France) (describing entities that may become civil parties in criminal proceedings on specific crimes); CÓDIGO PROCESAL PENAL DE LA REPÚBLICA DOMINICANA, Article 85 (Dominican Republic).

¹⁷⁵ See, e.g., C. PR. PÉN. Article 2 (France); STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE §395 and §403 (Germany); CÓDIGO NACIONAL DE PROCEDIMIENTOS PENALES Article 109. XV (Mexico). For descriptions of the rights of victims to participate in criminal trials on certain criminal offenses in Japan, see, e.g., Toshihiro Kawaide, *Victim's Participation in the Criminal Trial in Japan*, available at www.sota.j.u-tokyo.ac.jp/info/Papers/kawaide.pdf (last visited on November 22, 2016); Setsuo Miyazawa, *Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives*, 2014 *INTERNATIONAL JOURNAL OF LAW, CRIME AND JUSTICE* 1, 4–5.

¹⁷⁶ See, e.g., on this issue in Argentina, Del'Olio, CSJN (July 11, 2006); Juri, CSJN (December 27, 2006); Quiroga, CSJN (December 23, 2004); Sandoval, CSJN (August 31, 2010); and Santillán, CSJN (August 13, 1998).

¹⁷⁷ See, e.g., JOHN H. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE. ENGLAND, GERMANY, FRANCE* (1974).

¹⁷⁸ See, e.g., ASTRID LILIANA SÁNCHEZ-MEJÍA, (UN)PROTECTING CRIME AND HUMAN RIGHTS VICTIMS: THE ADVERSARIAL CRIMINAL PROCEDURE REFORM IN COLOMBIA (forthcoming 2017) (on file with the authors) (describing the expansion of victims' rights in the criminal process in Colombia, partly inspired by the new democratic Constitution of 1991 and international human rights); Langer, *Revolution*, *supra* note 4 (describing the expansion of victims' rights in criminal procedure reforms to democratize the administration of criminal justice in Latin America).

In fact, in Latin America and elsewhere, the role of private prosecutors have been crucial in avoiding the dismissal of charges or leading to trial and conviction cases that advance democratic values, but that public prosecutors may be reluctant to prosecute, such as human rights crimes committed by the military and public officials, and shootings and extra judicial executions by the police.¹⁷⁹

There are, of course, serious criticisms that can be and have been advanced against private criminal prosecutions. First, private prosecutions may contribute to excessive levels of punitiveness and, more broadly, may subvert the public interest that public prosecutors are supposed to pursue.¹⁸⁰ Private prosecutors may also undermine due process or equality of arms between prosecution and defense if the defendant has to confront two prosecutors instead of one.¹⁸¹ Private prosecutions may also undermine equality before the law because, unless the state is capable and willing to provide for legal assistance to victims, only those who can afford an attorney may be able to become private prosecutors.

In contemporary United States, public prosecutors have had the prosecutorial monopoly on whether a case has to be prosecuted, whether it should be disposed by a plea agreement or a trial, on the presentation of the inculpatory case at trial, and on appeals against interlocutory decisions that favor the defendant.¹⁸² The

¹⁷⁹ See DANIEL M. BRINKS, *INEQUALITY AND THE RULE OF LAW: THE JUDICIAL RESPONSE TO POLICE VIOLENCE IN LATIN AMERICA* (2008); Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1 (2011); Veronica Michel & Kathryn Sikkink, *Human Rights Prosecutions and the Participation Rights of Victims in Latin America*, 47 LAW & SOC. REV. 873 (2013).

¹⁸⁰ On the contribution and use of victims' rights discourse and movements for higher punitiveness levels, see, e.g., GARLAND, *supra* note 6; SIMON, *supra* note 6.

¹⁸¹ See, e.g., Colombian Constitutional Court, Judgment C-209 of 2007, Justice Manuel José Cepeda; Daniel R. Pastor, *Una Ponencia Garantista acerca de la Acusación Particular en los Delitos de Acción Pública*, in XXV CONGRESO NACIONAL DE DERECHO PROCESAL 959 (2009). For a critical analysis of the decision by the Colombian Constitutional Court, see SÁNCHEZ-MEJÍA, *supra* note 178.

¹⁸² Some jurisdictions in the United States do allow private prosecutions, at least for certain offenses. See, e.g., *Robertson v. U.S. ex rel. Watson*, 130 S.Ct. 2184 (2010) (dismissed without majority opinion) (discussing private prosecution of criminal contempt in Washington D.C.); *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) (federal courts possess inherent authority to appoint a private attorney to prosecute contempt). However, the law allowing for, and especially the practice of, private prosecutions are exceptional and marginal in the United States. See, e.g., Roger A. Faifax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 423–24 (2009) (calling the idea of the privately-retained prosecutor largely a historical one, while explaining that a small number of jurisdictions still permit victims to press criminal proceedings); Michael Edmund O'Neill, *Private Vengeance and the Public Good*, 12 U. PA J. CONST. L. 659, 661, 683 (2010) (private prosecutions remain common in present-day England even as they have all but withered away in the United States where although several states continue to allow private

“community prosecution” movement has impacted United States prosecutors more at the level of symbolism than at the level of the day-to-day operation of prosecutors’ offices. Laypeople do play a role in the prosecution of crime through the grand jury that has among its functions, in many states and in the federal system, screening the prosecutor’s charges to decide whether an indictment should be issued against a defendant. The grand jury also has investigating powers. But the grand jury may not make the prosecutorial decision on whether the case should be decided through a plea agreement or a trial, litigate pretrial motions, present the case at trial, or appeal against the court’s decisions.

In recent decades, there have been strong victims’-rights movements in the United States. These victims’-rights movements have been characterized as a central part of the “tough on crime” political climate that predominated in the United States until the late 2000s, since they included in their agenda calls for higher punitiveness levels.¹⁸³ These U.S. movements and their rhetoric influenced and provided a point of reference and support to “tough on crime” victims’-rights agendas in other parts of the world.¹⁸⁴ These U.S. victims’-rights movements have also included a call for larger participation of the victim of crime in the criminal process. These demands have translated in actual legislation that have given to victims of crime the right to be heard by the prosecutor of the case, at the plea hearing, and at sentencing, among other procedural rights.¹⁸⁵

But these rights pale in comparison to private prosecutions in many other countries because they do not include the right to file charges, to argue in court about pretrial motions, to decide whether the case should go to trial, to present a full case at trial, and to appeal. In this sense, even if the victims’-rights movements

prosecutions, most jurisdictions have either disallowed privately managed prosecutions completely or severely limited the role a private prosecutor may play); Andrew Sidman, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L. REV. 754, 765–66 (1976) (stating that a majority of American states and two federal courts that considered the question ruled that privately employed prosecutors may assist the state prosecutor’s in conducting criminal proceedings, but the lack of recent cases upholding the use of private prosecutors in several jurisdictions may be an indication that the practice, although technically valid, is no longer employed in those states).

¹⁸³ See, e.g., MARKUS DIRK DUBBER, *VICTIMS IN THE WAR ON CRIME* (2002); GARLAND, *supra* note 6; SIMON, *supra* note 6.

¹⁸⁴ See, e.g., SALLY ENGLE MERRY, *GENDER VIOLENCE: A CULTURAL PERSPECTIVE* (2011); JOHN PRATT, *PENAL POPULISM* (2007); KENT ROACH, *DUE PROCESS AND VICTIMS’ RIGHTS: THE NEW LAW AND POLITICS OF CRIMINAL JUSTICE* (1999).

¹⁸⁵ See, e.g., 18 U.S.C. § 3771. See also AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE STANDARDS COMMITTEE, *ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION STANDARD 3-3.4(1)* (4th ed. 2015). For discussion of possible ways for criminal justice professionals to inform and to consult crime victims in the United States, see STEPHANOS BIBAS, *THE MACHINERY OF JUSTICE* 150–53 (2012).

in the United States have been so culturally powerful and influential, they have not translated in as strong participatory rights of the crime victim and other private actors in a prosecutorial role in the criminal process as in other jurisdictions.

This may be good news since broader participatory rights for victims in the criminal process of the United States may contribute to making the already most punitive criminal justice system in the world even more punitive. It could mean that more democracy, in this case in the form of participatory democracy, is not necessarily a positive development. Without leaving these concerns aside, comparative experience would suggest two possible lessons to keep in mind in case victims' participatory rights in the criminal process further expand in the United States.¹⁸⁶

The first point is that though criminal justice in the United States is over-punitive across the board, it may have problematic pockets of impunity that undermine the democratic values that nobody is beyond the law and of equal judicial protection. Police shootings could be one of these pockets.¹⁸⁷ If these pockets exist, larger victim's participation in the criminal process in these cases may be a positive development. If this were the case, one of the challenges here would be whether there would be a way of allowing for victim's or NGOs' larger participation in this type of criminal cases, while avoiding a slippery slope of victims' or NGOs' participatory procedural rights moving to cases in which there is no impunity and there is too much punishment.

The second point is that victims' participation in the criminal process can be conceived of in non-punitive terms. In fact, one of the main victims'-rights agendas behind recent reforms around the world have aimed at giving a non-punitive response to criminal cases through mediation, alternative dispute mechanisms, etc.¹⁸⁸ If this set of ideas could become a stronger or larger part of

¹⁸⁶ Recent amendments on the prosecution of sex-related offenses in the military justice system in the United States might be characterized as further expanding victim's participatory rights. See, e.g., 10 U.S.C. § 806b; 10 U.S.C. § 1044e (special victims' counsel for victims of sex-related offenses); *LRM v. Kastenberg*, 72 M.J. 364 (2013); Major John C. Olson Jr., *Discovery for Three at a Table Set for Two: An Alteration of Rule for Courts-Martial 701 to Accommodate the Practical and Philosophical Realities of the Victim as a Limited Third Party*, 2015-NOV Army Law. 30; Walter B. Huffman and Richard D. Rosen, *Military Law: Criminal Justice & Administrative Process* §7:56 (March 2016 update). However, these reforms can also be characterized as mainly implementing in the military justice system reforms that had already been adopted in the federal criminal justice system. See *EV v. United States*, 75 M.J. 331 (2016); Major Troy K. Stabenow, *Throwing the Baby out with the Bathwater: Congressional Efforts to Empower Victims Threaten the Integrity of the Military Justice System*, 27 FEDERAL SENTENCING REPORTER, 2015 WL 1417307 (2015).

¹⁸⁷ For a brief proposal in this direction, see Federico S. Efron, *The Role of the Complainant Victim in the Criminal Procedure* (2015) (on file with the authors).

¹⁸⁸ See, e.g., BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION (2002).

victim's rights movements in the United States, or included as part of the reform program of "smart on crime" or similar reform labels, larger participation by crime victims in the criminal process might reduce punitiveness levels, rather than increase them.

V CONCLUSION

Representative democracy, legal democracy, liberal democracy, and participatory democracy – as we have employed those terms in this Epilogue – are not rival "theories" of democracy. Nor do we mean to suggest that these are layers or facets of democracy, each of which is essential to "true" democracy. Instead, what we have tried to suggest is that there are at least four separate clusters of ideas associated with the concept of democracy, and that each of those clusters of ideas has implications for prosecutors working in a democratic society. Further, we have tried to suggest that those implications are sufficiently strong and sufficiently rich that pursuing them is a useful – indeed, essential – exercise for anyone interested in coming to grips with the organization and exercise of prosecutorial power in modern criminal justice systems.

What we have tried to show in this Epilogue, thus, is part of what we hope and believe this entire book has demonstrated. The relationship between prosecutors and democracy, in the United States and elsewhere around the globe, is complex and important. It is worth trying to disentangle and to understand; indeed, that is or should be a critical part of any serious effort to reform prosecutors' offices. Moreover, despite the wide variations in the ways that different nations organize, supervise, and regulate prosecutors, and the equally wide variations in the legal and political cultures in which those prosecutors operate, there are benefits to carrying out this inquiry cross-nationally – or at least keeping a comparative perspective when studying or discussing the prosecutors in any particular country. The United States is far from being the only country grappling with the growing power and importance of prosecutors. Prosecutors increasingly seem to be the key players in criminal justice systems elsewhere as well, including Europe and Latin America. The contributions to this volume have not suggested that any country has hit upon a solution to all the problems presented by prosecutorial power, let alone a solution that could be readily exported. But we think this book does vindicate the claims we made in the introduction: that the relationship between prosecutors and democracy is complex and important, and that a comparative perspective can be helpful in making greater and more productive sense of that relationship.