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How Do Prosecutors "Send a Message"?

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How Do Prosecutors “Send a Message”?

Steven Arrigg Koh*

The recent indictments of former President Trump are stirring national debate about their effects on American society. Commentators speculate on the cases’ impact outside of the courtroom — on the 2024 election, on political polarization, and on the future of American democracy. Such cases originated in the prosecutor’s office, begging the question of if, when, and how prosecutors should consider the societal effects of the cases they bring.

Indeed, prosecutors often publicly claim that they “send a message” when they indict a defendant. What, exactly, does this mean? Often, their assumption is that such messaging goes in one direction: indictment — and subsequent criminal process — will communicate to the general public a message of accountability regarding certain proscribed conduct. Using the context of socially prominent cases and foreign affairs prosecutions, this Article argues that prosecutors are comparatively ill-suited to consider such prosecutorial messaging because they lack relative capacity to appreciate societal response, or the divergent ways communities will make sense of criminal cases. This Article explains the mechanism of societal response as

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social meaning. It concludes by calling for democratization and decriminalization in criminal law.

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INTRODUCTION

“The message . . . should be clear to every culpable individual who remains in the shadows, hoping to evade our investigation: You will not wait us out.”

— Attorney General Loretta Lynch¹

“I make decisions in this office based on the facts and the law. The law is completely nonpartisan. That’s how decisions are made in every case.”

— Fulton County District Attorney Fani Willis, *Georgia v. Trump et al.*²

“So many people look at this case and they see what they want to see.”

— Prosecutor Thomas Binger, *Wisconsin v. Rittenhouse*³

The recent indictments of former President Trump are stirring national debate about their effects on American society.⁴

¹ Loretta E. Lynch, U.S. Att’y Gen., Remarks at Press Conference Announcing Law Enforcement Action Related to FIFA (Dec. 3, 2015), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-law> [<https://perma.cc/LCE9-HRAR>].

² Fani Willis, Fulton Cnty Dist. Att’y, Press Conference (Aug. 14, 2023), <https://www.imago-images.com/st/0301781680> [<https://perma.cc/E66V-8TDW>].

³ Julie Bosman, *Six Key Moments that Shaped the Trial of Kyle Rittenhouse*, N.Y. TIMES (Nov. 19, 2021), <https://www.nytimes.com/2021/11/14/us/kyle-rittenhouse-trial-takeaways.html> [<https://perma.cc/9Y2X-UGDB>].

⁴ Indictment, *Georgia v. Trump*, No. 1 (Fulton Super. Ct. Aug. 14, 2023), <https://www.scribd.com/document/665036274/Trump-Indictment-Georgia-081423#fullscreen=1> [<https://perma.cc/32PW-CX79>]; Indictment, *New York v. Trump* (N.Y. Sup. Ct.), <https://manhattanda.org/wp-content/uploads/2023/04/Donald-J.-Trump-Indictment.pdf> [<https://perma.cc/Y96K-V4JY>]; Indictment, *United States v. Trump*, No. 1 (D.D.C. Aug. 1, 2023), https://www.justice.gov/storage/US_v_Trump_23_cr_257.pdf [<https://perma.cc/V2UK-ZK53>]; Indictment, *United States v. Trump*, No. 3 (S.D. Fla. June 8, 2023), <https://storage.courtlistener.com/recap/gov.uscourts.flsd.648653/gov.uscourts.flsd.648653.3.o.pdf> [<https://perma.cc/V2JN-ZX8K>]. See also generally Ken Bensinger & Sheera Frenkel, *After Mar-a-Lago Search, Talk of “Civil War” is Flaring Online*, N.Y. TIMES (Oct. 6, 2022), <https://www.nytimes.com/2022/10/05/us/politics/civil-war-social-media-trump.html> [<https://perma.cc/JHR2-6PSG>] (“Soon after the F.B.I. searched Donald J. Trump’s home in Florida for classified documents, online researchers zeroed in on a worrying trend. Posts on Twitter that mentioned ‘civil war’

Commentators speculate on the cases' impact outside of the courtroom — on the 2024 federal election, on political polarization, and on the future of American democracy and solidarity. Such cases originated in the prosecutor's office, and thus were borne of an individualistic criminal justice paradigm — wherein one or more individuals engages in wrongful conduct, targeting state investigation, prosecution, and punishment around formal notions of retribution and deterrence. But the societal effects of the Trump prosecutions also beg the question of if, when, and how prosecutors should consider the societal effects of the cases they bring.

Indeed, prosecutors often publicly claim that their cases “send a message.” This claim arises often in prosecutors' public statements at the moment of indictment, which they then reinvoke throughout the subsequent criminal process, including at conviction and sentencing. For example, when unsealing the indictment against FIFA officials in 2015, Attorney General Loretta Lynch stated: “the message . . . should be clear to every culpable individual who remains in the shadows, hoping to evade our investigation: You will not wait us out.”⁵ Prosecutors in the 2022 Michigan Governor Gretchen Whitmer kidnapping prosecution claimed the case “should send a message that people who want to do this are not patriots, they are insurrectionists bent on treason and they should be deterred from doing that.”⁶ In the 2022 case, *United States v. Ghislaine Maxwell*, prosecutors called for a judge to “send the message that no one is above the law and no one is rich or powerful enough [not] to be held accountable.”⁷

But what, exactly, does such *prosecutorial messaging* mean? Often, prosecutors' assumption is that such messaging goes in one direction: indictment — and subsequent criminal process — will communicate to the general public a message of accountability regarding certain

had soared nearly 3,000 percent in just a few hours as Mr. Trump's supporters blasted the action as a provocation.”).

⁵ Lynch, *supra* note 1.

⁶ Robert Snell, *Second Whitmer Kidnap Plotter Sentenced to Prison*, DETROIT NEWS (Oct. 6, 2022), <https://www.detroitnews.com/story/news/local/michigan/2022/10/06/whitmer-kidnap-plotter-sentenced-to-prison/69543937007/> [<https://perma.cc/2C52-2WKF>].

⁷ *Prosecutors Say Ghislaine Maxwell Should Be Sentenced to ‘Send A Message’*, WORLD NATION NEWS (June 28, 2022), <https://worldnationnews.com/prosecutors-say-ghislaine-maxwell-should-be-sentenced-to-send-a-message/> [<https://perma.cc/E2CN-RHEU>].

proscribed conduct. But the notion gives rise to complex questions. First, descriptively, do prosecutors possess skills or awareness to gauge societal response? It is not immediately clear how good prosecutors — who are more used to making determinations about charging decisions, suppression hearings, trials, and sentencing — are at gauging broader societal effects of their prosecutorial decisions. If so, who do we consider the prosecutor’s “constituency” to be in this context? For example, in announcing the indictments in the death of Freddie Gray, Baltimore State’s Attorney Marilyn Mosby explicitly referenced the deaths of Michael Brown and Eric Garner as well as the nationwide call for “No Justice, No Peace” — possibly a public acknowledgment of the nationwide impact her case would have, as those did.⁸ More normatively, should prosecutors consider the anticipated societal response to an indictment?

Prosecutorial messaging — defined herein as encompassing both prosecutors’ narrower, subjective beliefs about the societal effects of their cases and the broader social reality of such effects — is under-defined in law and policy — rendering unresolved the question of when and how prosecutors should “send a message.”⁹ As every first-year law student knows, general deterrence theory asserts that punishment of an individual wrongdoer may disincentivize others from perpetrating the same offense. But this assumes a simple transmission from the courtroom to the general public wherein lay individuals are reminded of criminal prohibitions and continually put on notice when they learn of another prosecution relating to some prohibited conduct.¹⁰ The best-

⁸ See, e.g., Jonathan Capehart, *Marilyn Mosby’s Amazing Press Conference*, WASH. POST (May 1, 2015, 12:50 PM EDT), <https://www.washingtonpost.com/blogs/post-partisan/wp/2015/05/01/marilyn-mosbys-amazing-press-conference/> [https://perma.cc/TU6M-G8AF]; Lisa Respers France, *Social Media Hail Prosecutor Marilyn Mosby in Handling of Freddie Gray Case*, CNN (May 1, 2015), <https://www.cnn.com/2015/05/01/us/marilyn-mosby-freddie-gray-social-reaction-feat/index.html> [https://perma.cc/9MQK-U5KQ].

⁹ RICHARD MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 11 (2014) (“Commentators say that legal change will ‘send a message’ of some sort . . .”).

¹⁰ Dan Kahan has argued that social influence and social meaning both play a part in an individual’s decisions to commit crimes. Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350 (1997). According to Dan Kahan, the law can shape the *perception* that individuals in a community have of others and of crime. *Id.*

known policy example of prosecutorial messaging is the DOJ norm that it will not indict sixty days before a national election when the indictment could materially affect such election — a consideration wholly rooted not in evidentiary sufficiency, but out of an awareness that the DOJ cannot adequately anticipate societal response and knock-on electoral effects. More generally, in the 1985 case *Wayte v. United States*, the Supreme Court identified a non-inclusive list of four factors governing the decision to prosecute: “the strength of the case, [its] general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan.”¹¹ However, the Court emphasized that “the decision to prosecute is particularly ill-suited to judicial review” and that, after sufficient showing of probable cause, “the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor’s] discretion.”¹² In sum, prosecutorial messaging is governed neither by substantial positive law nor robust policy.

Few scholars have squarely addressed prosecutorial messaging.¹³ This is likely because it falls between two areas of legal scholarly thought. First, much ink has been spilled on prosecutorial discretion in American common law, with the majority calling for curtailing discretion,

at 350–51. Therefore, “a community is more likely to *be* law-abiding when its members *perceive* that it is.” *Id.* at 395 (emphasis added).

¹¹ *Wayte v. United States*, 470 U.S. 598, 607 (1985).

¹² *Id.* (citing *United States v. Goodwin*, 457 U. S. 368, 380 n.11 (1982)); accord *Marshall v. Jerrico, Inc.*, 446 U. S. 238, 248 (1980).

¹³ As will be discussed further in Parts II and III below, some scholars have addressed expressiveness of criminal justice, discussed prosecutorial priorities as turning solely on evidentiary considerations, or considered expressiveness of law enforcement more generally. See RICHARD MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 11 (2014); Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2084 (2017); Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1220 (2020) (“Any theory about prosecutorial behavior should begin with charging.”); Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 397–423 (1965); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996); Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1504 (2016).

increasing declination, or outright nullification.¹⁴ Second, indictment itself relates to age-old theories of punishment, which primarily turn on retribution and deterrence.¹⁵ Such theories justify general state

¹⁴ See, e.g., Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 370 (2010) (defending the need for prosecutorial discretion in the administration of justice and proposing ways to ensure that prosecutorial discretion is used judiciously, e.g., by publishing better statistics about initial charges, final charges, and recommended sentences); Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1245 (2011) (explaining justifications for prosecutorial nullification as a “distinct species of prosecutorial discretion” and proposing some potential mechanisms for regulating prosecutorial nullification); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980) (discussing how prosecutorial discretion is largely unchecked by any formal, external constraints or regulatory mechanisms, leaving unresolved questions about what behavior should be prosecuted and by what jurisdictional authority); Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 589 (2019) (arguing that the public should and can engage in more rigorous scrutiny of prosecutorial discretion, despite two main challenges facing such scrutiny: (i) vague public and professional expectations about how prosecutors should use their power, and (ii) the difficulty of knowing what decision-making process a prosecutor used and what considerations he/she took into account in particular instances); W. Kerrel Murray, *Popular Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 179 (2021) (providing a political theoretical justification for prosecutorial nullification for more systematic nullification than discrete jury nullification) [hereinafter *Popular Prosecutorial Nullification*]; Brian M. Murray, *Unstitching Scarlet Letters: Prosecutorial Discretion and Expungement*, 86 FORDHAM L. REV. 2821, 2822 (2018) (offering a framework for exercising prosecutorial discretion in the context of expungement of nonconviction and conviction information); Andrew E. Taslitz, *Judging Jena’s D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 396 (2009) (advocating for a Medical Model of community-healing, which requires prosecutors to “at least consider the third-party effects of her decisions” rather than the purely adversarial prosecutorial approach undertaken by Reed Walters, the prosecutor in the Jena Six case).

¹⁵ See, e.g., JOSHUA DRESSLER & STEPHEN P. GARVEY, *Chapter 2: Principles of Punishment*, in CRIMINAL LAW: CASES AND MATERIALS 31-90 (8th ed. 2019) (discussing theories of punishment as well as utilitarian and retributive justifications for punishment); SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, *Chapter 2: The Justification of Punishment*, in CRIMINAL LAW AND ITS PROCESSES (10th ed. 2017) (highlighting the realm of different justifications for punishment); CYNTHIA LEE & ANGELA P. HARRIS, *Justifications for Punishment*, in CRIMINAL LAW: CASES AND MATERIALS 6-37 (4th ed. 2019) (analyzing different cases and justifications for punishment); Jacob Bronsther, *The Corrective Justice Theory of Punishment*, 107 VA. L. REV. 227 (2021) (arguing that deterrent punishment is justified because it allows a defendant to fulfill his duty of

authority to deprive all persons of life or liberty, but fail to granularly guide prosecutors on when to bring an individual case.¹⁶ Prosecutorial messaging overlaps with — but materially differs from — such issues. Indeed, as two scholars have recently noted, “Most agree that prosecutorial discretion is an inevitable aspect of the criminal justice system, but there is little consensus on how prosecutors should prioritize competing concerns.”¹⁷

This Article complicates prosecutors’ assumption that messaging goes in one direction: indictment — and subsequent criminal process — will communicate to the general public a message of accountability regarding certain proscribed conduct. Specifically, it argues that prosecutors are comparatively ill-suited to gauging *societal response* — the divergent, fragmented ways that various communities interpret prosecutorial messaging. This Article uses the context of socially prominent cases and cross-border prosecution to illustrate the complexities of prosecutorial messaging. As I have argued previously, foreign affairs prosecutions are U.S. criminal cases with some nexus to a foreign country, encompassing foreign apprehension, evidence gathering, and criminal conduct, as well as cases that implicate foreign nations’ criminal justice interests.¹⁸ And U.S. extraterritorial law

repair to society); Michael S. Moore, *Justifying Retributivism*, 27 ISR. L. REV. 15, 15 (1993) (discussing how retributivism is “the only proper theory of punishment”).

¹⁶ Kleinfeld, *supra* note 13 at 1497 (describing punishment justification as the central question in criminal law theory). Other theories focus on the communicative aspects of punishment, as opposed to of indictment and the criminal process itself. *See, e.g.*, R.A. DUFF, *Punishment as Communication*, in OXFORD HANDBOOK OF PUNISHMENT THEORY AND PHILOSOPHY (Jesper Ryberg ed., forthcoming) (claiming that “the distinctive justifying aim of criminal punishment is to achieve a two-way communication between policy and offender”).

¹⁷ Bruce Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 808 (2020) (“Prosecutors tend to make decisions in an impressionistic way, weighing multiple interests that may be in tension, such as the interests in truth-seeking, legality, deterrence, retribution, proportionality, equality, efficiency, and economy.”).

¹⁸ Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340, 340 (2019) [hereinafter *Foreign Affairs*].

enforcement policy is the product of U.S. policy choices governing when and how to enforce criminal law outside of American borders.¹⁹

Part I describes prosecutorial messaging, showing how prosecutorial practices and policies often conceptualize such messaging. Part II complicates this picture, showing how the societal response to such messaging can foster divergent societal effects, including collective trauma for historically marginalized communities, societal polarization, influence on national elections, and disruption of foreign relations. It will also show that this dynamic is under-specified doctrinally, philosophically, publicly, and temporally. Part III explains the mechanism of societal response, applying psychological and sociological theory to criminal process. Part IV argues that — counterintuitively — the best solution for rectifying prosecutorial messaging lies with structural criminal justice reform.

This Article thus contributes to several scholarly discourses. First, this Article contributes to the literature on prosecutors as mediating figures,²⁰ drivers of mass incarceration,²¹ nullifiers of criminal prosecution,²² and cross-jurisdictional actors that may complicate foreign relations.²³ Second, it informs perspectives on *under-enforcement* of criminal law and collective trauma, particularly for victims from historically marginalized communities such as black Americans and women.²⁴ Third, it contributes to scholarship on alternative mechanisms of criminal accountability, such as restorative

¹⁹ See Steven Arrigg Koh, *The Criminalization of Foreign Relations*, 40 FORDHAM L. REV. 737, 740 (2021) [hereinafter *Criminalization of Foreign Relations*].

²⁰ David A. Sklansky, *Criminology: The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 473 (2016).

²¹ JOHN PFAFF, LOCKED IN 133 (2017) (“[P]rosecutors [are] the most powerful actors in the criminal justice system. While the police determine who ‘enters’ the criminal justice process, prosecutors have complete control over which cases they file and which ones they dismiss.”).

²² Fairfax, *supra* note 14; Murray, *Popular Prosecutorial Nullification*, *supra* note 14.

²³ Koh, *Foreign Affairs*, *supra* note 18; Steven Arrigg Koh, *Othring Across Borders*, 70 DUKE L.J. ONLINE 171 (2021) [hereinafter *Othring Across Borders*]; Koh, *Criminalization of Foreign Relations*, *supra* note 19.

²⁴ See Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 SOCIO. THEORY 335, 336 (2016).

justice.²⁵ Finally, this Article adds a new justification for dismantling contemporary mass incarceration, responsive to calls for

²⁵ GERRY JOHNSTONE & DANIEL W. VAN NESS, *THE HANDBOOK OF RESTORATIVE JUSTICE* (2007); Thalia Gonzalez, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147 (2020); Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFF. L. REV. 635 (2021); Leo T. Sorokin & Jeffrey S. Stein, *Restorative Federal Criminal Procedure*, 119 MICH. L. REV. 1315 (2021) (Book Review).

democratization of criminal justice,²⁶ proposals to decriminalize certain conduct,²⁷ or reform prosecutorial decision making.²⁸

²⁶ See, e.g., Joshua Kleinfeld, Laura I. Appleman, Richard A. Bierschbach, Kenworthy Bilz, Josh Bowers, John Braithwaite, Robert P. Burns, R A Duff, Albert W. Dzur, Thomas F. Geraghty, Adriaan Lanni, Marah Stith McLeod, Janice Nadler, Anthony O’Rourke, Paul H. Robinson, Jonathan Simon, Jocelyn Simonson, Tom R. Tyler & Ekow N. Yankah, *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1696 (2017) (providing policy suggestions toward democratizing criminal justice); John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 711 (2020) (discussing pitfalls of calls for the democratization of criminal justice); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1613 (2017) (“[I]t is from the voices of those who have been most harmed by the punitive nature of our criminal justice system that we can hear the most profound reimaginings of how the system might be truly responsive to local demands for justice and equality.”); Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 297 (2019) (“Envisioning the public intervening on both sides of individual criminal cases requires resetting our assumptions about *who* counts as democratic subjects in the administration of criminal law and *how* democratic participation happens in individual cases.”)

²⁷ See, e.g., Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE. L.J. 2176, 2203 (2013) (arguing that “legalizing or decriminalizing drugs” would help reduce incarceration and racial disparities); Fred A. Johnson, *State Law — Uniform Alcoholism and Intoxication Treatment Act*, WASH. REV. CODE CH. 70.96A (1974) — *Decriminalization of Alcoholism — Alcoholism as a Defense to Criminal Liability*, 50 WASH. L. REV. 755 (1975) (arguing that intoxication should not “completely exculpate any person classified as an alcoholic by a medical expert” from criminal liability); John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 41 (2013) (arguing that lawmakers should transfer “certain kinds of undesirable low-level conduct out of the criminal context altogether”); Seth Lemings, *The De-Criminalization of Homelessness*, 10 U.C. IRVINE L. REV. 287, 287 (2019) (recommending strategies for decriminalizing homelessness in Santa Ana, California and in Orange County, California); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1069-77 (2015) (discussing the benefits of decriminalization for defendants, for the state, and for the criminal justice system); Jenny M. Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 332 (2011) (discussing the potential benefits of moving certain low-level offense, such as marijuana possession and driving on a suspended license, out of the criminal justice system altogether).

²⁸ See, e.g., Jeff Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 211-12 (2019) (arguing that reforms which focus on prosecutors who “rule the system” overlook other important actors in the criminal justice system who constitute “the most promising sources of lasting reform,” such as police officers, judges, legislators, governors, and parole boards); Bibas, *supra* note 14 (defending the need for prosecutorial discretion in the administration of justice and proposing ways to ensure that prosecutorial discretion

Before proceeding, I note that prosecution is a diverse and varied phenomenon.²⁹ It is thus difficult to generalize across governmental authority (federal vs. state), the nature of the offices (appointed vs. elected), the geographic region, the nature of the charges, etc. This Article thus proceeds by reference to socially prominent cases and foreign affairs prosecutions, which are more likely to be at the top of what Alexandra Natapoff has called the “penal pyramid” — cases of federal offenses, serious cases, and well-resourced defendants.³⁰ Such cases “command more law for political and institutional reasons”: the public expects serious treatment of such cases, prosecutors and defense attorneys devote more resources to them, and litigation is more common.³¹ But the analysis below also includes other contexts to illustrate the complexity of prosecutorial messaging.

I. MESSAGING FROM THE PROSECUTOR’S OFFICE

Prosecutorial messaging includes both prosecutors’ narrower, subjective beliefs about the societal effects of their cases and the

is used judiciously, e.g., by publishing better statistics about initial charges, final charges, and recommended sentences); Frase, *supra* note 14 (proposing that prosecutorial offices adopt a “reasons-and-review” procedure whereby the reasons for each declination of prosecution are reduced to writing and reviewed by supervising prosecutors, as a way to establish clear patterns of office prosecution policy state-wide and nationwide); Samuel J. Levine, *The Potential Utility of Disciplinary Regulation as a Remedy for Abuses of Prosecutorial Discretion*, 12 DUKE J. CONST. L. & PUB. POL’Y 1, 3 (2016) (arguing that, contrary to many scholars’ view, courts have the potential to serve as a check against abuses of prosecutorial discretion by “interpreting current rules and adopting enhanced rules regulating the charging decision”); Taslitz, *supra* note 14, at 396 (2009) (advocating for a Medical Model of community-healing, which requires prosecutors to “at least consider the third-party effects of her decisions” rather than the purely adversarial prosecutorial approach undertaken by Reed Walters, the prosecutor in the Jena Six case).

²⁹ See Alexandra Natapoff, *The Penal Pyramid*, in THE NEW CRIMINAL JUSTICE THINKING 71-98 (2017) (“[T]he penal system can be thought of as a pyramid in which law itself functions very differently at the elite top than it does at the sprawling bottom.”).

³⁰ *Id.* at 73 (noting the examples of Bears Stearns hedge fund managers, the Duke lacrosse team, and O.J. Simpson). In her contention, the bottom of the pyramid includes petty offenses and cases in the thousands, wherein institutional practices and inequalitarian social relations drive case outcomes. *Id.*

³¹ *Id.* at 80.

broader social reality of such effects. This Part explains the former: how prosecutors may conceptualize the societal effects of their cases, overlooking their deeper social meaning. It will first describe how, formally, prosecutors consider how they “send a message.” Second, it will contextualize such messaging in the broader context of prosecutorial decision making.

A. *Categorizing Prosecutorial Messaging*

From the perspective of the prosecutor’s office, messaging breaks down into two categories. As a descriptive matter, first, prosecutors sometimes explicitly invoke the language of messaging when making public statements about a criminal case. In such moments, prosecutors state their intended message. As noted above, Attorney General Lynch made such comments when announcing charges against defendants in the FIFA case in 2015.³² Second, in other instances prosecutors may not explicitly invoke such language, but privately agree that a certain case will send a particular message.

Prosecutorial policies implicitly and explicitly recognize such prosecutorial messaging. The best-known example is the DOJ policy not to indict before a national election. Under this policy, which has remained “remarkably similar across administrations,”³³ “federal prosecutors and agents may never make a decision regarding an investigation or prosecution, or select the timing of investigative steps or criminal charges, for the purpose of affecting any election, or for the purpose of giving an advantage or disadvantage to any candidate or political party.”³⁴ While no further codified rules guide this policy, the DOJ has traditionally followed the “60-day rule.” This rule forbids federal prosecutors from taking “overt investigative steps”³⁵ within sixty days of an upcoming election. However, the “60-day rule” is not a codified or written rule or regulation, but rather a general agency

³² Lynch, *supra* note 1.

³³ See Off. Att’y. Gen., Election Year Sensitivities 1 (2008); Memorandum from the Off. of the Att’y. Gen. on Election Year Sensitivities to all Dept. Emps. 1 (Mar. 9, 2012) (on file with author); Off. Att’y. Gen., Election Year Sensitivities 1 (2016).

³⁴ U.S. Dep’t of Just., Just. Manual § 9-27.260 (2023).

³⁵ See sources cited *supra* note 33.

practice.³⁶ Such a policy has nothing to do with the underlying merits of the case: even in cases where prosecutors are confident that they can prove guilt beyond a reasonable doubt, they will still wait until after an election to charge a suspect. Moreover, such policy does not prohibit overt federal investigative steps taken *without* the purpose of affecting an upcoming election — even though such steps might raise that perception and thus complicate how prosecutors “send a message” with an indictment.³⁷ Another example arises when the DOJ contemplates federal prosecution and weighs the risk of jury nullification.³⁸ As a general rule, the likelihood of jury acquittal due to the overwhelming popularity of a defendant does not prohibit the DOJ from prosecuting “an extremely popular political figure.”³⁹ In the specific case of prosecuting when there was a prior state or local prosecution, the DOJ can conclude that the prior prosecution failed to vindicate a substantial federal interest if there was “jury nullification in clear disregard of the evidence or the law.”⁴⁰

Other prosecutorial policies implicitly recognize such messaging when considering policies on diversion and declination. In the Rachael Rollins Policy Memo, the progressive Massachusetts District Attorney

³⁶ See Charlie Savage, *As Midterms Near, Election Rule Raises Dilemma for Trump Inquiries*, N.Y. TIMES (Sept. 4, 2022), <https://www.nytimes.com/2022/09/04/us/trump-investigations-midterm-elections.html> [<https://perma.cc/8EVX-ZWBM>].

³⁷ *Id.*

³⁸ U.S. Dep’t of Just., Just. Manual § 9-2.031(D). While there is a *presumption* that the prior prosecution has vindicated the relevant federal interest, that presumption can be overcome if a conviction was not achieved due to “jury nullification in clear disregard of the evidence or the law.” *Id.*

³⁹ U.S. Dep’t of Just., Just. Manual § 9-27.220 (2018) (“Where the law and the facts create a sound, prosecutable case, the likelihood of an acquittal due to unpopularity of some aspect of the prosecution or because of the overwhelming popularity of the defendant or his/her cause is not a factor prohibiting prosecution. For example, in a civil rights case or a case involving an extremely popular political figure, it might be clear that the evidence of guilt — viewed objectively by an unbiased factfinder — would be sufficient to obtain and sustain a conviction, yet the prosecutor might reasonably doubt, based on the circumstances, that the jury would convict. In such a case, despite his/her negative assessment of the likelihood of a guilty verdict (based on factors extraneous to an objective view of the law and the facts), the prosecutor may properly conclude that it is necessary and appropriate to commence or recommend prosecution and allow the criminal process to operate in accordance with the principles set forth here.”).

⁴⁰ U.S. Dep’t of Just., Just. Manual § 9-2.031.

stated that diversion and declination seek to first “reduce the footprint of the criminal justice system where it served no public safety interest, and second, to allocate more of our prosecution resources to the serious offenses that harm people, families, and the community as a whole.”⁴¹ The Memo also identifies fifteen “low-level, non-violent” charges that are best addressed through diversion and declination, because these offenses are often driven by poverty, mental health issues, and other social problems rather than by “specific malicious intent.”⁴²

Foreign jurisdictions may recognize prosecutorial messaging more robustly. In Canada, a “well-accepted principle of law” is that a prosecutor should indict only when evidence sufficiently supports a charge and “the prosecution would best serve the public interest.”⁴³ Crown counsel considers public interest only when satisfied that the evidentiary foundation to support a charge has been met.⁴⁴ At each stage of the prosecution, Crown counsel must re-assess the public interest, and “must continuously consider the public interest in light of relevant and emerging developments.”⁴⁵ Specifically, Crown counsel must take into account the “impact of the alleged offence on communities or individuals,” the “prevalence and impact of the alleged offence in the

⁴¹ SUFFOLK CNTY. DIST. ATT’Y, THE RACHAEL ROLLINS POLICY MEMO 25 (2019), <https://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> [<https://perma.cc/J5F9-CEX8>].

⁴² *Id.* at 26.

⁴³ CANADA, PUBLIC PROSECUTION SERVICE OF CANADA DESKBOOK § 2.3. DECISION TO PROSECUTE, <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p2/cho3.html> (last updated Mar. 7, 2023) [<https://perma.cc/56NV-A5KU>]. (“It is a well-accepted principle of law in Canada and throughout the Commonwealth that a prosecution should be undertaken only where the requisite evidence exists and a prosecution would best serve the public interest. It has never been the rule that a prosecution will occur solely on the basis that there is sufficient evidence to support a charge.”) [hereinafter DECISION TO PROSECUTE]. For scholarship on the notion of “public interest” in the Canadian prosecutorial policy, see M. Deborah MacNair, *Government Lawyers and the Elusive Concept of Public Interest: a Canadian Perspective*, in PUBLIC SENTINELS: A COMPARATIVE STUDY OF AUSTRALIAN SOLICITORS-GENERAL 249 (2014); Deborah M. MacNair, *In the Name of the Public Good: “Public Interest” as a Legal Standard*, 10 CANADIAN CRIM. L. REV. 175 (2006); Julian V. Roberts, *Public Confidence in Criminal Justice in Canada: A Comparative and Contextual Analysis*, 49 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 153 (2007).

⁴⁴ CANADA, DECISION TO PROSECUTE, *supra* note 43.

⁴⁵ *Id.*

community,” and in the case of indigenous victims, whether “the impact of the alleged offence contributes to the ongoing trauma and disproportionate victimization already experienced by Indigenous persons and communities.”⁴⁶

The sum total of such policies demonstrates a partial prosecutorial awareness — recognized in codified and un-codified policies, and yet under-specified — that prosecutors have some broader responsibility to the polity. In this demi-recognition, prosecutors are not government actors involved in orthodox governance, and yet their decisions affect trust and engagement with the government, not to mention civil society. Until now, scholars have conceptualized aspects of prosecutors’ broader role in civil society. Ekow Yankah has articulated a republican theory of criminal law, which rests on the notion that human beings are deeply social and political creatures, and that “criminal law represents a reciprocal duty that flows between a citizen and their civic community.”⁴⁷ Under this conception, crimes are considered threats to our ability to live together in a community where each individual has equal standing.⁴⁸ Bruce Green and Rebecca Roiphe have offered a fiduciary theory of prosecution, which views prosecutors as “fiduciaries who represent the public but are appointed or elected to pursue a particular abstract public interest, the interest in justice.”⁴⁹ Under the fiduciary theory, prosecutors should prioritize “intrinsic” criminal justice considerations, such as “avoiding wrongful convictions, treating people proportionally and equally, and using the process to incapacitate dangerous individuals, deter future offenses, and secure retribution and restitution for victims.”⁵⁰ Finally, David Sklansky has described

⁴⁶ *Id.*

⁴⁷ Ekow Yankah, *Republican Responsibility in Criminal Law*, 9 CRIM. L. & PHIL. 457, 465 (2015).

⁴⁸ *See id.* From this conception, crimes make the communal project of living together difficult, if not impossible, because a community that allows one to be raped, attacked without reprisal, or have one’s home entered without permission could not secure conditions necessary for peaceful cohabitating. *Id.*

⁴⁹ Green & Roiphe, *supra* note 17, at 809.

⁵⁰ *Id.* By contrast, “extrinsic public interests” are foreign policy implications of a particular prosecution or its intersection with immigration policy. And while prosecutors may not disregard public preferences in reaching their decisions whether to indict, prosecutors must implement principally those public preferences that are

prosecutors as “mediating” figures who bridge the gap between adversarial and inquisitorial justice, between the police and the courts, and between law and discretion.⁵¹ Due to their “dual role as an advocate for the government and as an administrator of justice,” prosecutors are difficult to categorize within the adversarial/inquisitorial framework.⁵² While working closely with the police to secure criminal convictions, prosecutors also decide which cases to pursue and which to drop, acting as a “judge before the judge.”⁵³ And prosecutors constantly mediate between law and discretion, as they are expected to “be accountable both to the people and to their laws.”⁵⁴

B. *The Realities of Prosecutorial Decision Making*

Prosecutors’ partial awareness arises in the deeper procedural reality of how they pursue cases.⁵⁵ At the state and local levels, charging decisions are highly ad hoc. Prosecutors respond in real time to facts as they emerge on the ground. In the vast majority of cases, the issue is really about police, not prosecutors. Every year, police engage in over

“discern[i]ble in the Constitution, other laws, and legal traditions, including the norms and traditions governing criminal prosecution.” *Id.* at 838.

⁵¹ Sklansky, *supra* note 20, at 507.

⁵² *Id.* at 500.

⁵³ *Id.* at 504.

⁵⁴ *Id.* at 505.

⁵⁵ Of course, this question is not solely relevant to the question of whether to indict; it also goes to the heart of the question as to the seriousness of the charges. As is well known, in recent years prosecutors have taken greater liberties with undercharging for certain offenses, on the ground that a less serious charge will have less serious knock-on effects in the life of the individual offender. For example, during the Obama Administration, Attorney General Eric Holder released a memo stating that prosecutors “should ordinarily charge the most serious offense[s]” but that this determination “must always be made in the context of ‘an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purpose of the Federal criminal code, and maximize the impact of Federal resources on crime.’” Moreover, the memo directs prosecutors to consider if there is “an adequate non-criminal alternative to prosecution.” Memorandum from the Off. of the Att’y Gen. on the Department Policy on Charging and Sentencing to all Fed. Prosecutors 2 (May 19, 2010). The decision to prosecute with more severe charges is a difference in degree, rather a difference in kind, from the charging decision itself.

ten million arrests.⁵⁶ Prosecutors are just in this slipstream of cases flowing toward them.⁵⁷ Thus, in many situations, prosecutors charge because of the inevitability of the process. Many district attorney offices lack any formal codification of when and how to charge. For example, neither the Manhattan District Attorney's Office in New York nor the Middlesex District Attorney's Office in Massachusetts has any codified guidance regarding when to indict.

Meanwhile, U.S. Attorney Offices have more discretion given complementary federal jurisdiction.⁵⁸ The U.S. Attorney's Manual provides that a federal prosecutor should indict if (1) she believes that the person's conduct constitutes a federal offense, (2) the admissible evidence is sufficient to convict, and (3) the prosecution serves a substantial federal interest.⁵⁹ The manual also provides that a federal prosecutor should decline if the suspect will be prosecuted in another jurisdiction or if a non-criminal alternative to prosecution exists.⁶⁰ In reality, federal prosecutors are similarly responsive to federal law enforcement exigencies, though more often federal investigations involve longer-term and larger-scale investigations. Daniel Richman has described the "negotiated boundary" between federal criminal law enforcers and state/local law enforcement, dictated by federal jurisdiction, the agendas of presidential administrations, and pressures from local authorities.⁶¹

⁵⁶ Rebecca Neusteter & Megan O'Toole, *Every Three Seconds*, VERA INST. OF JUST., <https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/overview> (last visited July 11, 2023) [<https://perma.cc/Q8RG-T9MQ>] ("More than 10 million arrests are made each year in the United States.").

⁵⁷ See Bellin, *supra* note 13, at 1220-21 ("Charging at the state and local level typically has two components. First, a prosecutor must determine whether to accept a case initiated by the police. Second, the prosecutor must determine the precise charge (or charges).").

⁵⁸ See DANIEL C. RICHMAN, KATE STITH & WILLIAM J. STUNTZ, *DEFINING FEDERAL CRIMES* 13 (2d ed. 2018); see also Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, 2 CRIM JUST. 81, 102 (2000) ("[I]t is inevitable that [f]ederal enforcers will exercise enormous discretion.").

⁵⁹ U.S. Dep't of Just., U.S. Att'ys' Manual § 9-27.220 (2017).

⁶⁰ *Id.*

⁶¹ RICHMAN ET AL., *supra* note 58, at 9-12.

Finally, prosecutors have even more discretion when cases are of global concern. Foreign corrupt practices, for example, have less nexus to the United States and may be left to other national jurisdictions to prosecute.⁶² And international prosecutors have even broader discretion in who they may indict, given international institutions turn on various regimes of jurisdiction and admissibility that often leave prosecutors with the ability to indict both high- and low-level officials in many national territories.⁶³

As is well known, the contemporary cumulative effect of such prosecutorial decision making may lead to systemic biases of over- and under-enforcement in U.S. criminal law enforcement. Our era of mass incarceration is rightly conceived of as prosecuting too many people, too often, for too much conduct. The question of disproportionate impact on certain communities — especially communities of color — persistently calls into question the effectiveness of this system. As is well documented, people of color — especially black and brown Americans — are disproportionately harassed by the police,⁶⁴ arrested,⁶⁵

⁶² See generally KEVIN E. DAVIS, *BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY* (2019) (describing the regulation of transnational bribery).

⁶³ See generally Matthew R. Brubacher, *Prosecutorial Discretion Within the International Criminal Court*, 2 J. INT’L CRIM. JUST. 71 (2004) (discussing the ability of Prosecutors to exercise discretion in international criminal investigations); Jens David Ohlin, *Peace, Security, and Prosecutorial Discretion*, in *THE EMERGING PRACTICE INTERNATIONAL CRIMINAL COURT* 183-208 (2008) (discussing problems of prosecutorial discretion at the International Criminal Court).

⁶⁴ See, e.g., PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017) (reviewing the extent to which the U.S. criminal justice system is institutionally constructed to control African American men); Devon Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125 (2017) (discussing the use of Fourth Amendment jurisprudence to empower police to take violent actions against the Black community.); Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182 (2017) (reviewing the use of current Supreme Court seizure doctrine as justification for police violence).

⁶⁵ See, e.g., BUTLER, *supra* note 64 (reviewing the extent to which the U.S. criminal justice system is institutionally constructed to control African American men).

prosecuted,⁶⁶ and sentenced at higher incarceration rates⁶⁷ and the death penalty.⁶⁸ At the same time, a related critique is *under* enforcement: individuals who are white, wealthy, or otherwise powerful are less likely to be held accountable for their crimes.⁶⁹ And the U.S. criminal justice system systematically fails to provide accountability for police violence,⁷⁰ individuals who have perpetrated sexual assault,⁷¹ and those who have engaged in anti-Asian violence.⁷²

II. HEARING THE MESSAGE: SOCIETAL RESPONSE

Having considered the prosecutorial perspective on messaging, let us now complicate our understanding of this phenomenon. This Part will describe *societal response* — the divergent, fragmented ways that various communities interpret prosecutorial decision making. It will consider

⁶⁶ See, e.g., ELIZABETH HINTON, LESHAE HENDERSON, & CINDY REED, AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM (2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<https://perma.cc/TW3D-JYH5>] (examining the over-representation of Black Americans in the criminal justice system).

⁶⁷ See, e.g., BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006) (exploring recent trends in mass incarceration).

⁶⁸ See, e.g., *Race and the Death Penalty*, ACLU (Feb. 26, 2021), <https://www.aclu.org/other/race-and-death-penalty> [<https://perma.cc/V5U3-2SEH>] (examining the disproportionate rate of the death penalty on people of color in the United States).

⁶⁹ See, e.g., Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715 (2006) (discussing the role of legal underenforcement in the evaluation of race and the criminal system); Christian E. Weller, Akua Amaning & Rebecca Vallas, *America's Broken Criminal Legal System Contributes to Wealth Inequality*, CAP (Dec. 13, 2022), <https://www.americanprogress.org/article/americas-broken-criminal-legal-system-contributes-to-wealth-inequality/> [<https://perma.cc/5WB4-366M>] (highlighting that “families of color affected by incarceration face more significant negative economic consequences than white families affected by incarceration”).

⁷⁰ See Carbado, *supra* note 64, at 127.

⁷¹ See generally Kari Hong, *A New Mens Rea for Rape: More Convictions and Less Punishment*, 55 *AM. CRIM. L. REV.* 259, 259 (2018) (discussing the problems of contemporary prosecutions of sexual assault).

⁷² See generally Angela R. Gover, Shannon B. Harper & Lynn Langton, *Anti-Asian Hate Crime During the COVID-19 Pandemic: Exploring the Reproduction of Inequality*, 45 *AM. J. CRIM. JUSTICE*, 647 (2020) (discussing hate crimes against Asians during COVID-19).

the stakes of such response, as well as an explanatory account for why prosecutors may underestimate it.

A. *Stakes of Societal Response*

What are the stakes of prosecutorial messaging? The message may trigger varied societal responses that prosecutorial offices fail to anticipate.

First, prosecutorial messaging — either by deciding to prosecute or failing to do so — may foster collective trauma, particularly in historically marginalized American communities. As noted above, the U.S. criminal justice system suffers from problems of both over- and under-enforcement. As is well documented, people of color — especially black and brown Americans — are disproportionately prosecuted. Angela Onwuachi-Willig has noted that the *failure* to prosecute such crimes may lead to collective trauma in instances where public or official government entities reaffirm inequities for historically or systematically subordinated groups.⁷³ This arises when an established history or accumulation of the routine harm exists, media attention brings widespread attention to the occurrence of such harm, and public discourse occurs about the routine harm’s meaning.⁷⁴ For example, the failure to convict the two white men accused of killing Emmett Till in 1955 constituted a recurring reaffirmation by public or official government entities.⁷⁵ The same delay in or failure to either indict or convict may also apply to the cases of Ahmaud Arbery, Michael Brown, Trayvon Martin, and Tamir Rice.

Relatedly, a failure to prosecute may exacerbate alienation in society and estrangement from government institutions. For example, the failure to prosecute banks in the wake of the 2008 financial crisis gave rise to questions of whether such banks were “too big to jail,” with prosecutors compromising with corporations instead of prosecuting

⁷³ Onwuachi-Willig, *supra* note 24, at 336; *see also* Trevor George Gardner, *Rethinking Racial Equity in Criminal Procedure*, 171 U. PA. L. REV. (forthcoming 2023) (acknowledging that racial proportionality in criminal procedure often falls in tension with the African American security and democratic interests in penal administration).

⁷⁴ Onwuachi-Willig, *supra* note 24, at 346.

⁷⁵ *Id.* at 341.

them. Brandon Garrett has shown that prosecutors fail to prosecute the most serious corporate crimes, opting instead to settle with little transparency.⁷⁶ The knock-on effects of such decisions have fostered collective disillusionment leading to the Occupy Movement of 2011, marshaling the slogan “we are the 99%.”

Second, prosecutorial messaging may foster greater political polarization.⁷⁷ When prosecutors bring socially prominent cases, such cases may heighten division between communities given our contemporary media environment. Consider *Wisconsin v. Rittenhouse*. Video and drone footage of the incidents left little doubt as to the facts: Kyle Rittenhouse, a 17-year-old white teenager, was on the streets of Kenosha, Wisconsin on the night of August 25, 2020, carrying a military-style semiautomatic rifle during protests against the police shooting of Jacob Blake. During close physical altercations with three other white men, Rittenhouse shot and killed two white men and injured another. And yet the competing popular and media narratives about the trial wildly diverged. According to liberal narratives in the *New York Times*

⁷⁶ BRANDON L. GARRETT, *TOO BIG TO JAIL* 19–44 (2014).

⁷⁷ See generally Steven Arrigg Koh, *Prosecution and Polarization*, 50 *FORDHAM URB. L.J.* 1117 (2022–2023) (invited symposium contribution) (describing a prosecution-polarization dynamic, wherein criminal cases foster polarization domestically and internationally).

The most extreme occurs in international criminal trials. For example, the trial of former President Slobodan Milosevic — which was piped directly into the former Yugoslavia over television and in which Milosevic acted as his own defense counsel — ultimately led to more support for him in the region by the time the trial ended, as opposed to less. Tim Judah, *Serbia Backs Milosevic in Trial by TV*, *GUARDIAN* (Mar. 2, 2002, 8:23 PM EST), <https://www.theguardian.com/world/2002/mar/03/warcrimes.balkans> [<https://perma.cc/5HVC-8CUC>]. Furthermore, the tribunal was criticized on all ends for either not going far enough (in the views of the Bosnian Muslims or Croatians) or for disproportionately prosecuting Serbians (in their view). Michael P. Scharf, *A Critique of the Yugoslavia War Crimes Tribunal*, 25 *DENV. J. INT'L L. & POL'Y* 305, 310–11 (1997); Marko Milanovic, *ICTY Due to Render Mladic Trial Judgment*, *EJIL:TALK!* (Nov. 21, 2017), <https://www.ejiltalk.org/icty-due-to-render-mladic-trial-judgment/> [<https://perma.cc/SZ95-MEBU>]. One 2011 survey of the Serbian population commissioned by the Belgrade Centre for Human Rights found that 55% of ethnic Serbs thought that former Bosnian Serb General Ratko Mladić was not guilty of any atrocity crimes, only 17% thought him guilty, and 28% did not know or did not want to give their opinion. Milanovic, *supra* (citing ISPOS STRATEGIC MARKETING, *ATTITUDES TOWARDS WAR CRIMES, THE ICTY, AND THE NATIONAL JUDICIARY* 64 (2011)).

and CNN, Rittenhouse was “basically [a] conventional conservative suburbanite”⁷⁸ and “the epitome of White privilege in America.”⁷⁹ The judge, meanwhile, was described as being “old school”⁸⁰ and “berat[ing] the lead prosecutor.”⁸¹ When Rittenhouse was later acquitted, the verdict was seen as “devastating”⁸² and as “proof that it is reasonable to believe that the fear of Black people can absolve a white person of any crime.”⁸³ Meanwhile, conservative media consistently criticized the mainstream media as spreading lies and falsehoods about Kyle Rittenhouse,⁸⁴ even tying the case to then-candidate Senator Joe Biden’s campaign ad and suggesting Rittenhouse may sue Senator Biden for

⁷⁸ Charles Homans, *Kyle Rittenhouse and the New Era of Political Violence*, N.Y. TIMES (Nov. 19, 2021), <https://www.nytimes.com/2021/10/26/magazine/kyle-rittenhouse-kenosha-wisconsin.html> [<https://perma.cc/2454-KJX9>].

⁷⁹ Peniel E. Joseph, *What Kyle Rittenhouse’s Tears Reveal About America*, CNN (Nov. 12, 2021, 10:20 AM EST), <https://www.cnn.com/2021/11/12/opinions/kyle-rittenhouse-crying-ahmaud-arbery-killed-joseph/index.html> [<https://perma.cc/5Q6H-MXLA>].

⁸⁰ Amir Vera, *Judge Bruce Schroeder’s Reputation as a Tough Jurist Comes Through in Rittenhouse Trial*, CNN (Nov. 11, 2021, 12:33 PM EST), <https://www.cnn.com/2021/11/10/us/kenosha-judge-bruce-schroeder-kyle-rittenhouse-trial/index.html> [<https://perma.cc/MR7Z-T23C>].

⁸¹ Nicholas Bogel-Burroughs, *In Scrutinized Kyle Rittenhouse Trial, It’s the Judge Commanding Attention*, N.Y. TIMES (Nov. 15, 2021), <https://www.nytimes.com/2021/11/11/us/kyle-rittenhouse-judge-bruce-schroeder.html> [<https://perma.cc/2CVY-NYPR>].

⁸² Gabriela Miranda & Christopher Kuhagen, *Kyle Rittenhouse Verdict Reactions: From “Justice System Broken” to “Justice System Worked,”* USA TODAY (Nov. 19, 2021, 7:01 PM EST), <https://www.usatoday.com/story/news/nation/2021/11/19/kyle-rittenhouse-reaction-not-guilty-verdict/8686103002/> [<https://perma.cc/MB5K-8R4C>].

⁸³ Michael Harriot, *Kyle Rittenhouse Wasn’t Convicted Because, in America, White Reasoning Rules*, GUARDIAN (Nov. 20, 2021, 1:00 AM EST), <https://www.theguardian.com/us-news/2021/nov/19/kyle-rittenhouse-conviction-america-white-privilege> [<https://perma.cc/ZQY9-GURK>]; see also James Hohmann, *Kyle Rittenhouse Was Found Not Guilty. That Doesn’t Mean He’s Morally Innocent*, WASH. POST (Nov. 19, 2021), <https://www.washingtonpost.com/opinions/2021/11/19/kyle-rittenhouse-verdict-opinion-not-innocent-shootings/> [<https://perma.cc/3BFC-8WDJ>] (“What’s scariest about Friday’s verdict is that it will embolden other Billy Joes and Gaiges and Kyles to take their guns to town. In doing so, they’ll put themselves — and all of us — at risk.”).

⁸⁴ E.g., David Rutz, *False Media Reporting that Rittenhouse Transported Rifle “Across State Lines” Leads to Corrections, Mockery*, FOX NEWS (Nov. 23, 2021, 4:24 PM EST), <https://www.foxnews.com/media/false-media-reporting-rittenhouse-state-lines> [<https://perma.cc/4CW7-9YFW>].

libel.⁸⁵ For this side, the acquittal was viewed as a vindication for Rittenhouse and a cause for celebration.⁸⁶

Third, prosecutorial messaging may affect national elections. As noted above, the DOJ has the most explicit norm prohibiting prosecution sixty days before an election. But when this norm is violated, prosecutors may lose control of the messaging. The most obvious example of this occurred in 2016, when FBI Director James Comey sent a letter in October of that year to Congress notifying them that he “learned of the existence of emails that appear to be pertinent to the investigation” into Democratic candidate Hillary Clinton’s use of a private e-mail server when she served as Secretary of State in the Obama Administration.⁸⁷ While some debate exists, statistical analysis shows that the ensuing societal response likely cost Clinton the U.S. presidential election.⁸⁸

Fourth, prosecutorial messaging may complicate foreign relations. In many instances, prosecutors may bring a foreign affairs prosecution — a case with some nexus to a foreign country — that inflames sentiment in the country implicated by the prosecution, often the country from where the defendant hails. Consider, for example, the recent Meng Wanzhou case. In January 2019, the U.S. Attorney’s Office for the Eastern District of New York indicted Meng on charges of violating export controls and U.S. sanctions related to Iran and other countries.⁸⁹

⁸⁵ Stephanie Pagonis, *Kyle Rittenhouse to Sue Biden, Campaign for Libel, Attorney Says*, FOX NEWS (Sept. 30, 2020, 4:07 PM EDT), <https://www.foxnews.com/us/kyle-rittenhouses-attorney-sue-joe-biden-campaign-libel> [https://perma.cc/D7P5-JUYC].

⁸⁶ Meridith McGraw, *The Lionization of Kyle Rittenhouse by the Right*, POLITICO (Nov. 19, 2021, 3:14 PM EST), <https://www.politico.com/news/2021/11/19/the-lionization-of-kyle-rittenhouse-by-the-right-523054> [https://perma.cc/3HCU-Y8QQ]; Skylar Woodhouse, *Rittenhouse Verdict Sparks Split Reactions, Fears of Vigilantism*, BLOOMBERG (Nov. 19, 2021), <https://www.bloomberg.com/news/articles/2021-11-19/rittenhouse-verdict-sparks-split-reactions-fears-of-vigilantism#xj4y7vzkg> [https://perma.cc/LW9C-SR7W].

⁸⁷ Nate Silver, *The Comey Letter Probably Cost Clinton the Election*, FIFTYTHREEEIGHT (May 3, 2017), <https://fivethirtyeight.com/features/the-comey-letter-probably-cost-clinton-the-election/> [https://perma.cc/B3DW-DK7K].

⁸⁸ *Id.*

⁸⁹ Press Release, U.S. Dep’t of Just. Off. of Pub. Affs., Chinese Telecommunications Conglomerate Huawei and Huawei CFO Wanzhou Meng Charged with Financial Fraud (Jan. 28, 2019), <https://www.justice.gov/opa/pr/chinese-telecommunications-conglomerate-huawei-and-huawei-cfo-wanzhou-meng-charged-financial> [https://perma.cc/48X6-B77A].

The U.S. government then requested that the Canadian government arrest Meng, and subsequently moved to extradite her. President Trump claimed he might interfere in the criminal case to gain leverage over the Chinese in trade negotiations. The inferred message to the Chinese government and general public was that the United States had turned its criminal justice system on the Chinese more generally. After the arrest, China retaliated by prosecuting and detaining Canadian nationals Michael Spavor and Michael Kovrig. And a book by a French national decrying criminal legal extraterritoriality, *The American Trap*, shot to the top of the Chinese best-seller list.⁹⁰

B. Prosecutors’ Untrained Eye

Prosecutors often fail to appreciate such societal response due to an untrained eye. I break down this lack of training in four regards: doctrinally, philosophically, publicly, and temporally.

1. Doctrine: Prosecutorial Discretion and Evidentiary Sufficiency

The first cause of the untrained eye is doctrinal. As noted above, the Supreme Court has squarely left this indictment question in the hands of the executive branch. In the 1985 case *Wayte v. United States*, the Supreme Court identified a non-inclusive list of four factors governing the decision to prosecute — evidentiary strength, deterrence value, executive enforcement priorities, and executive enforcement policy — but emphasized that the decision to indict “rests entirely in [the

⁹⁰ Koh, *Criminalization of Foreign Relations*, *supra* note 19, at 763; Koh, *Foreign Affairs*, *supra* note 18, at 343; Koh, *Othring Across Borders*, *supra* note 23 (exploring how race incentivizes political and prosecutorial actors to promote domestic solidarity through prosecution of foreign defendants and sanctions on non-white International Criminal Court actors); Steven Arrigg Koh, *The Huawei DPA: A Prologue to the Global Arrest Game?*, JUST SEC. (Oct. 8, 2021), <https://www.justsecurity.org/78493/the-huawei-dpa-a-prologue-to-the-global-arrest-game/> [<https://perma.cc/985X-78J6>]. The trilateral standoff was ultimately resolved when Meng entered into a deferred prosecution agreement with the Eastern District of New York. Press Release, U.S. Att’y’s Off. E. Dist. of New York, Huawei CFO Wanzhou Meng Admits to Misleading Global Financial Institution (Sept. 24, 2021), <https://www.justice.gov/usao-edny/pr/huawei-cfo-wanzhou-meng-admits-misleading-global-financial-institution> [<https://perma.cc/2HKK-9BK2>].

prosecutor's] discretion."⁹¹ Otherwise, the Court has only broadly articulated what David Luban has called the "seek justice not victory formula," wherein prosecutorial duty is bound up in the sovereign's obligation to govern impartially and whose prosecutorial interest "is not that it shall win a case, but that justice shall be done."⁹² As a result, "there is little consensus on how prosecutors should prioritize competing concerns."⁹³

Often, evidentiary sufficiency is the obvious threshold consideration for indictment. Formally, the Constitution requires — at most — probable cause to initiate a criminal case. The Due Process Clause plays no role at all, and the Fourth Amendment requires only probable cause when the defendant is seized in some way.⁹⁴ Meanwhile, the ABA Standards for the Prosecution Function — generally incorporated in some form in every state's rules of professional responsibility⁹⁵ — states in Rule 4.3:

⁹¹ *Wayte v. United States*, 470 U.S. 598, 607 (1985) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

⁹² *Berger v. United States*, 295 U.S. 78, 88 (1935); David Luban, *The Conscience of a Prosecutor*, 45 VAL. U. L. REV. 1, 15-17 (2010) (describing a sovereignty theory and a power theory in furtherance of this formula); see also Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 614 (1999).

⁹³ Green & Roiphe, *supra* note 17, at 808 ("Prosecutors tend to make decisions in an impressionistic way, weighing multiple interests that may be in tension, such as the interests in truth-seeking, legality, deterrence, retribution, proportionality, equality, efficiency, and economy.").

⁹⁴ *Albright v. Oliver*, 510 U.S. 266, 281-86 (1994) (Kennedy, J., concurring); *Clark v. Thompson*, 850 Fed. App'x. 203, 210 (5th Cir. 2021).

⁹⁵ See, e.g., CAL. RULES OF PROFESSIONAL CONDUCT R. 5-110 (2017) ("The prosecutor in a criminal case shall: (A) Not institute or continue to prosecute a charge that the prosecutor knows is not supported by probable cause[.]"); MASS. RULES OF PROFESSIONAL CONDUCT R. 3.8 (2016) ("The prosecutor in a criminal case shall: (a) refrain from prosecuting where the prosecutor lacks a good faith belief that probable cause to support the charge exists, and refrain from threatening to prosecute a charge where the prosecutor lacks a good faith belief that probable cause to support the charge exists or can be developed through subsequent investigation[.]"); N.Y. RULES OF PROFESSIONAL CONDUCT R. 3.8 (2017) ("A prosecutor or other government lawyer shall not institute, cause to be instituted or maintain a criminal charge when the prosecutor or other government lawyer knows or it is obvious that the charge is not supported by probable cause.").

(a) A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.⁹⁶

Three things are noteworthy in this standard. First, it only requires the prosecutor to have a reasonable belief, not any higher standard of certainty. Second, the prosecutor must believe that the charge is supported by probable cause and, then, supports a conviction beyond a reasonable doubt. Third, the language also says that the decision to charge be “in the interests of justice,” but this term is not defined.

Unifying all these standards is evidentiary sufficiency. Formally speaking, relatively little dispute exists regarding this particular element: it is relatively uncontroversial that a case may not proceed in court absent a sufficient evidentiary showing. Jeffrey Bellin, for example, has argued that prosecutors should indict only when they believe that the jury *should* (legally speaking) convict the defendant given the evidence introduced at trial.⁹⁷ In other words, prosecutors should not indict based on their subjective notions of justice and community interest, but rather based on the applicable laws.⁹⁸ The theory underlying such a formal condition is the idea of individual desert. Flowing primarily from a retributivist perspective, the notion is that individuals who have engaged in wrongdoing must be punished for such misconduct. Evidentiary sufficiency is necessary to prove this link.

Moving from formalism to realism, evidentiary sufficiency dovetails with mass incarceration in two regards. First, prosecutors may manipulate evidence to generate sufficiency, often intersecting with race and other marginalized communities. The Central Park Five is one vivid example.⁹⁹ And police officers like Jon Burge in Chicago are known

⁹⁶ CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION r. 3-4.3 (AM. BAR ASS’N 2017).

⁹⁷ Bellin, *supra* note 13, at 1223; *see also* Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1254-58 (2011) (listing as reasons for prosecutorial declination evidentiary sufficiency, law enforcement purposes, systemic costs, and victims).

⁹⁸ Bellin, *supra* note 13, at 1223.

⁹⁹ *See Central Park Five: The True Story Behind when They See Us*, BBC (June 12, 2019), <https://www.bbc.com/news/newsbeat-48609693> [<https://perma.cc/E3W2-MJ88>]; Jill

to have tortured more than 100 suspects, mostly black men, from 1972 to 1991.¹⁰⁰ This was also the case in well-known historical examples of the Scottsboro boys and *Brown v. Mississippi*, 297 U.S. 278 (1936).¹⁰¹ Second, the problem of overcriminalization renders evidentiary sufficiency as a gateway to robust prosecution beyond moral desert. As legal scholars have extensively chronicled in recent years, mass incarceration has led to too many people being prosecuted, too often, for too much conduct. Two powerful forces propel this encroachment of criminal justice: overzealous prosecutors and “tough on crime” legislators.¹⁰² Drug use, for example, is treated as a crime control rather

Filipovic, *The Painful Lessons of the Central Park Five and the Jogger Rape Case*, GUARDIAN (Oct. 5, 2012, 5:32 PM EDT), <https://www.theguardian.com/commentisfree/2012/oct/05/central-park-five-rape-case> [<https://perma.cc/9QUS-6NQN>].

¹⁰⁰ Associated Press, *Ex-Chicago Police Commander Linked to Torture of More Than 100 Suspects Dies*, GUARDIAN (Sept. 19, 2018, 8:47 PM EDT), <https://www.theguardian.com/us-news/2018/sep/19/128eorge128-cop-jon-burge-torture-dies#:~:text=Burge%20led%20a%20%20midnight%20crew,guns%20shoved%20in%20their%20mouths> [<https://perma.cc/R62A-684R>]. For recent accounts of police accused of framing various suspects for crimes, see, for example, Dana Kozlov & Marissa Parra, *7 Murder Convictions Linked to Disgraced CPD Det. Reynaldo Guevara Thrown Out*, CBS NEWS (Aug. 9, 2022, 6:10 PM), <https://www.cbsnews.com/128eorge128/news/eight-murder-convictions-vacated-chicago-police-detective-reynaldo-guevara-cook-county-states-attorney-kim-foxx/> [<https://perma.cc/F4A3-UA64>] (reporting on seven counts of Guevara framing citizens, coercing false confessions, and manufacturing evidence); Vanessa Romo, *Ex-Florida Police Chief Sentenced to 3 Years for Framing Black Men and Teen*, NPR (Nov. 28, 2018, 7:01 PM EST), <https://www.npr.org/2018/11/28/671716640/ex-florida-police-chief-sentenced-to-3-years-for-framing-black-men-and-teen> [<https://perma.cc/F6GJ-76JA>] (discussing how ex-police chief Raimundo Atesiano framed Black people for burglaries and car thefts and encouraged other officers to arrest citizens without legal bases to manipulate stagnant crime rates).

¹⁰¹ *Powell v. Alabama*, 287 U.S. 45, 51-52 (1932).

¹⁰² See, e.g., BUTLER, *supra* note 64 (exploring why the justice system over polices Black men and why current policies to reform law enforcement fail to make lasting change); DAVID GARLAND, *THE CULTURE OF CONTROL* (2001) (examining how policies of crime and punishment have changed U.S. attitudes on crime and criminal justice); DOUGLAS HUSAK, *OVERCRIMINALIZATION* (2007) (discussing the American tendency to criminalize too much and punish too many); JONATHAN SIMON, *GOVERNING THROUGH CRIME* (2007) (examining how the collapse of the New Deal approach to governance created an encroaching justice system); Darryl K. Brown, *Criminal Law's Unfortunate Triumph Over Administrative Law*, 7 J.L., ECON. & POL'Y 657, 658 (2011) (“Overcriminalization is the term that captures the normative claim that governments create too many crimes and criminalize things that properly should not be crimes.”);

than a health issue. As one scholar has vividly noted, if each area of law were a different country, criminal law would be an expansionist power that is shrinking neighboring nations’ territory.¹⁰³

2. Publicity: The Challenge of Media Coverage

Second, prosecutors have an untrained eye for anticipating and managing the publicity that indictment and prosecutorial messaging engender.¹⁰⁴ As is well known, the vast majority of cases in the U.S. criminal justice system result in guilty pleas, never proceeding to trial. In such instances, the press engages in less overt and sustained media coverage. This is one reason why sophisticated (often, corporate) civil litigants settle instead of risking trial — they know that extended public trials risk damaging their reputation.¹⁰⁵

Ellen S. Podgor, *The Dichotomy Between Overcriminalization and Underregulation*, 70 AM. U. L. REV. 1061, 1065 (2021) (“[I]n looking at overcriminalization, one needs to look at two separate tiers of this issue: 1) the growing number of federal statutes that allow for increased prosecutions; and 2) the increased discretion provided to prosecutors in enforcement practices that results in heightened prosecution and incarceration.”); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) (“The definition of crimes and defenses plays a different and much smaller role in the allocation of criminal punishment than we usually suppose. In general, the role it plays is to empower prosecutors, who are the criminal justice system’s real lawmakers.”).

¹⁰³ Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1372 (2017).

¹⁰⁴ A related publicity problem is time horizon. In certain cases, prosecutors may conclude that it is clearly in the public interest to prosecute for the long-term societal effect, even if it will have deleterious societal consequences in the short term. While this is the most difficult to conceptualize, it is also the product of an untrained eye. Consider the situation in which to prosecute would render dramatic polarization and problems within the society. Prosecutors may have a disincentive to bring the particular case but also be mindful of the medium-to-long-term goals that need to be achieved when bringing the case.

¹⁰⁵ See Mark Herrmann & Kim Kumiega, *On Trial in the Courts of Law and Public Opinion: The Tension Between Legal and Public Relations Advice*, 28 LITIG. 29, 29 (2002) (discussing the risks that a corporation faces with pending litigation: potential liability, potential stain on the corporation’s reputation, or both). *But see* F. Joseph Warin & Julie Rapoport Schenker, *Refusing to Settle: Why Public Companies Go to Trial in Federal Criminal Cases*, 52 AM. CRIM. L. REV. 517, 518 (2015) (explaining why some public companies go to trial in federal criminal cases despite the “reputational injury from prolonged proceedings”).

But indictment may ripen into a socially prominent criminal trial. While these cases may be few, they may disproportionately become a lightning rod for public debate, even defining an era. Consider, for example, the cases of the Lindbergh kidnapping,¹⁰⁶ Charles Manson,¹⁰⁷ the Rodney King police officers,¹⁰⁸ or O.J. Simpson.¹⁰⁹ Today, such cases are filtered through our contemporary media environment, which refracts meaning through the fragmented traditional media, cable news, and social media narratives.¹¹⁰

Take *State v. Chauvin*, in which the state of Minnesota prosecuted Derek Chauvin, the police officer who killed George Floyd in

¹⁰⁶ Sam Blackman, *60 Years Later, Doubt Clings to Lindbergh Baby Kidnapping Case: Crime: The Trial of Bruno Richard Hauptmann Gripped America in the '30s. His Widow Still Insists that He Was Framed*, L.A. TIMES (Feb. 9, 1992, 12:00 AM PST), <https://www.latimes.com/archives/la-xpm-1992-02-09-mn-3355-story.html> [<https://perma.cc/8W6H-9F4R>] (discussing various conflicting accounts of and public reactions to the Hauptmann trial).

¹⁰⁷ Steven V. Roberts, *Problem of a Fair Trial for Manson*, N.Y. TIMES (Aug. 9, 1970), <https://www.nytimes.com/1970/08/09/archives/problem-of-a-fair-trial-for-manson.html> [<https://perma.cc/98WU-MLUZ>] (discussing how Manson was depicted in mainstream media as a “glamorous” but feared public figure, and as a “culture hero” in underground press); Aja Romano, *The Manson Family Murders, and Their Complicated Legacy, Explained*, VOX (Aug. 7, 2019, 1:25 PM EDT), <https://www.vox.com/2019/8/7/20695284/charles-manson-family-what-is-helter-skelter-explained> [<https://perma.cc/8298-X7YR>] (“The Tate-LaBianca murders, a.k.a. the Manson Family murders, profoundly shook America’s perception of itself. They upended ideas of safety, security, and innocence, and effectively sounded the death knell of ’60s counterculture, ushering in a new decade of darkly psychosexual, conspiracy-laced cultural exploration of America’s seedy underbelly.”).

¹⁰⁸ Anjali Sastry Krbecek & Karen Grigsby Bates, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2017, 1:21 PM EST), <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riot> [<https://perma.cc/2G7T-TG4Q>] (describing how public outrage at the acquittal of four Los Angeles police officers who savagely beat Rodney King spurred a five-day riot in Los Angeles).

¹⁰⁹ *The O.J. Verdict — The Trial’s Significance and Lasting Impact*, PBS: FRONTLINE, <https://www.pbs.org/wgbh/pages/frontline/oj/themes/impact.html> (last visited July 5, 2023) [<https://perma.cc/87RM-W6XU>] (compiling the views of various close observers on the significance of the O.J. Simpson trial).

¹¹⁰ See generally Steven Arrigg Koh “Cancel Culture” and Criminal Justice, 74 HASTINGS L.J. 79 (2022) (exploring cancel culture as a normative system functioning over social media).

Minneapolis on May 25, 2020. The case gripped the nation over several weeks and refracted a tremendous amount of public discourse about the nature of policing, race, and inequities in the criminal justice system. When Chauvin was convicted in April 2021, the majority of Americans supported the verdict given the horrific video of the killing, which had gone viral on social media.¹¹¹ And yet the trial also revealed something more pernicious: *Chauvin* further polarized the American public. Praise of the verdict was not universal. Conservative outlets Fox News and the Daily Wire honed in on the criminal legal causation arguments, covertly or even overtly signaling that the case was wrongly decided.¹¹² For some, the pushback was situated within the Blue Lives Matter movement, symbolized by an American flag with a blue line to show solidarity with police, but which others view as symbolizing opposition to the racial justice movement and/or a symbol of white supremacy.¹¹³ In the end, the case fostered some resistance to the national conversation on race, policing, and communities of color.

When such cases reach levels of high publicity, prosecutors often maintain a prosecutorial messaging posture suited to the courtroom, not the public square. They emphasize evidentiary sufficiency above all else. Prosecutors’ courtroom oration is designed for arguments

¹¹¹ See Tim Arango & Shaila Dewan, *How to Find an Impartial Jury over George Floyd’s Death*, N.Y. TIMES (Apr. 21, 2021), <https://www.nytimes.com/2021/03/07/us/131xperi-floyd-derek-chauvin-jurors.html> [https://perma.cc/Z4TR-R85V]; Tom Jones, *The Derek Chauvin Verdict: How Did the Media Do with Coverage?*, POYNTER (Apr. 21, 2021), <https://www.poynter.org/newsletters/2021/the-derek-chauvin-verdict-how-did-the-media-do-with-coverage/> [https://perma.cc/X5US-SUPG].

¹¹² See Ian Haworth, *4 Crucial Details in the Derek Chauvin Trial that the Media Are Ignoring*, DAILY WIRE (Apr. 19, 2021), <https://www.dailywire.com/news/4-crucial-details-in-the-derek-chauvin-trial-that-the-media-are-ignoring> [https://perma.cc/UW6F-S4WQ]; Stephanie Pagonis, *Chauvin Trial: Medical Examiner who Performed Autopsy Says Police Pressure Was More than Floyd “Could Take,”* FOX NEWS (Apr. 9, 2021, 10:35 PM EDT), <https://www.foxnews.com/us/chauvin-trial-medical-examiner-autopsy-george-floyd> [https://perma.cc/2F4Y-GLX9]. While causation was of course litigated, its use in conservative media appeared largely pretextual, as a way to defend Chauvin more generally.

¹¹³ Janelle Griffith, *Police Chief Bans “Thin Blue Line” Imagery: Says It’s Been “Co-opted” by Extremists*, NBC (Jan. 29, 2021, 2:09 PM PST), <https://www.nbcnews.com/news/us-news/police-chief-bans-thin-blue-line-imagery-says-it-s-n1256217> [https://perma.cc/9LPT-PXKR].

regarding motions and presentation to juries. At most, they may speak at a press conference about unsealing an indictment or their views on the outcome in a given case. For example, as noted above, Fulton County District Attorney Fani Willis stated at a press conference announcing the indictment in *Georgia v. Trump et al.*: “I make decisions in this office based on the facts and the law. The law is completely nonpartisan. That’s how decisions are made in every case.”¹¹⁴ But in doing so, they are still mainly speaking in the language of criminal law, describing cases in the language of evidentiary sufficiency, retribution, and deterrence. Prosecutors may anticipate that the public forum allows for them to show that they have done their due diligence, armed with the evidence to prove a case beyond a reasonable doubt. But the public may suspect either that evidence has been fabricated or tainted, allege procedural irregularities, or decry selective prosecution. The societal response may or may not correspond to the realities of the case.¹¹⁵

3. Philosophical-Structural: Collective Conceptualization in a Modern Era of Legal Individualism

Prosecutors proceed one defendant at a time.¹¹⁶ Formally, they make individual determinations about criminal responsibility in each case, focusing on the individual guilt of each defendant. But then the community to which that individual belongs will feel solidarity with the individual. Prosecutors have no way of gauging such relationships and are often caught off guard. Former Deputy Attorney General and FBI Director James Comey, for example, exhibited this when disapproving

¹¹⁴ Willis, *supra* note 2.

¹¹⁵ Guilty pleas are perceived as suspect because of the perception of coerciveness, displacing the procedural regularity of a public trial. And yet prosecutors were not professionalized until the early 20th century, and plea bargaining arises at same time. In reality, three categories of defendants go to trial. First, some proceed to trial to reduce their sentencing exposure. Second, some defendants are poorly counseled, and/or wrongly believe they may win at trial. The final category of cases are actually triable.

¹¹⁶ Gardner, *supra* note 73 (manuscript at 24) (“Criminal punishment . . . [is] thus premised on the culpability of the individual, while this culpability is itself premised on the principle of agency.”).

of the term “mass incarceration” on the ground that prosecutors proceed on a case-by-case basis.¹¹⁷

The problem is structural because law in modern society foregrounds the individual. Political theorists and sociologists such as Alexis de Tocqueville, Émile Durkheim, Eugen Ehrlich, and Roger Cotterrell have long noted that contemporary Western democracies have prioritized binary conceptualizations of the state and the individual, often to the detriment of the “middle tier” of communities. Indeed, the “triumph” of individualism in Western law has rendered “autonomous organizations based on solidarity, such as communities . . . largely invisible to the law [and] insignificant for many purposes as between the individual and the state.”¹¹⁸ In this contemporary legal conception, “individuals are the makers of their own destiny” and “bear responsibility for the acts or omissions attributed to them.”¹¹⁹ In so doing, legal individualism often dismisses the socio-cultural factors that drive human action.¹²⁰

Given this contemporary legal reality, it is thus unsurprising that criminal law emphasizes individual criminal responsibility — and undervalues societal response. Domestically, even as far back as the early Republic era, there has been a focus on individual criminality, with just two out of one hundred and fifty being convicted in the aftermath of the Whiskey Rebellion.¹²¹ American history is rooted in individual notions of criminality for the offender to finally justify punishment, even if stereotypes and racial factors may target groups broadly for prosecution.¹²² While a few modern criminal law scholars have narrowly addressed group criminality, such as exploring concepts of “hidden

¹¹⁷ Michael S. Schmidt, *James B. Comey, Unlike Other F.B.I. Directors, Takes on Controversial Issues*, N.Y. TIMES (Oct. 29, 2015), <https://www.nytimes.com/2015/10/30/us/politics/james-b-comey-fbi-director-says-focus-on-brutality-brings-less-police-enforcement.html> [<https://perma.cc/Z5KA-4NSK>].

¹¹⁸ ROGER COTTERRELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION* 131 (2d ed. 1992).

¹¹⁹ *Id.* at 119.

¹²⁰ *Id.*

¹²¹ See Peter Kotowski, *Whiskey Rebellion*, GEORGE WASHINGTON’S MOUNT VERNON, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/whiskey-rebellion/> (last visited July 9, 2023) [<https://perma.cc/73U7-64EZ>].

¹²² See KRISTOFER ALLERFELDT, *CRIME AND THE RISE OF MODERN AMERICA: A HISTORY FROM 1865–1941*, at 64 (2011).

mens rea” for family in witness tampering in domestic violence contexts,¹²³ others have noted the difficulty of even describing group behavior.¹²⁴ Indeed, as Ekow Yankah has noted, the dominant, liberal retributivist conception of criminal punishment is “based on a view of isolated individuals crashing into each other.”¹²⁵

A clear example of this individualism is in the DOJ U.S. Attorney’s Manual, which gestures in the direction of societal awareness but only advances individuality:

The manner in which federal prosecutors exercise their decision-making authority has far-reaching implications, both in terms of justice and effectiveness in law enforcement and in terms of the consequences for individual citizens. A determination to prosecute represents a policy judgment that *the fundamental interests of society require the application of federal criminal law* to a particular set of circumstances — recognizing both that serious violations of federal law must be prosecuted, and that prosecution entails *profound consequences for the accused, crime victims, and their families* whether or not a conviction ultimately results.¹²⁶

Notice here the two italicized phrases. On the one hand, the language emphasizes *societal* interests, but subsequently only articulates them in terms of individual victims, defendants, and relations. Compare this language to the Canadian policies, which emphasize “[t]he prevalence and impact of the alleged offence in the community,” the “consideration of the impact of the alleged offence and prosecution on the local community,” and in the case of indigenous victims, whether “the impact of the alleged offence contributes to the [victims’] ongoing trauma and disproportionate victimization.”¹²⁷ By contrast, the U.S. Attorneys

¹²³ Megan Cantwell, *Witness Intimidation by Extended Family Members in Domestic Violence: Issues and Solutions*, UCLA CTR. STUDY WOMEN 1, 1 (2010) (reviewing the possibility of a ‘hidden mens rea requirement that allows selective prosecution of only certain group criminality i.e. when family closes in witness tampering).

¹²⁴ Alfred Hakkert, Anton van Wijk, Henk Ferwerda & Ton Ejiken, *Group Criminality*, in *EUROGANG PARADOX* 221, 222 (1998).

¹²⁵ Yankah, *supra* note 47, at 461.

¹²⁶ U.S. Dep’t of Just., Just. Manual § 9-27.001 (2018).

¹²⁷ *Id.*; CANADA, DECISION TO PROSECUTE, *supra* note 43.

Manual lacks any deeper, collective conceptualization of societal effects. This is similarly the case given the “substantial federal interest” prong of the U.S. Attorneys Manual: most factors fall under the retributivist prong (nature and seriousness of the offense, defendant culpability, willingness to cooperate, etc.) while only briefly touching on deterrent effect.¹²⁸

Conversely, scholars have reviewed the challenge of calibrating individual responsibility for group criminality in the international criminal law context.¹²⁹ Indeed, international scholars have discussed the role, and failures, of group criminality in international conspiracies, underscoring how individuals may lack the knowledge or other factors to make them sufficiently complicit.¹³⁰ Scholars have explored how group criminality provides a justification for international courts to exercise jurisdiction, while other scholarship has considered how difficult it is to incorporate this justification cognizably for the individual offenders themselves.¹³¹ Still other international law scholarship has discussed attempts to extend liability to the corporate context using theories of group criminality.¹³²

¹²⁸ U.S. Dep’t of Just., Just. Manual § 9-27.230 (2023) (“Deterrence of criminal conduct, whether it be criminal activity generally or a specific type of criminal conduct, is one of the primary goals of the criminal law. This purpose should be kept in mind, particularly when deciding whether a prosecution is warranted for an offense that appears to be relatively minor; some offenses, although seemingly not of great importance by themselves, if commonly committed would have a substantial cumulative impact on the community.”).

¹²⁹ See, e.g., Mark A. Summers, *The Problem of Risk in International Criminal Law*, 13 WASH. U. GLOB. STUD. L. REV. 667, 667 (2014) (discussing the viability of potential liability schemes for international crimes, such as “enterprise liability” and leader liability).

¹³⁰ See Aaron Fichtelberg, *Conspiracy and International Criminal Law*, 17 CRIM. L.F. 149, 158 (2006).

¹³¹ See Adil Ahmad Haque, *Group Violence and Group Vengeance: Toward a Retributivist Theory of International Criminal Law*, 9 BUFF. CRIM. L. REV. 273, 306 (2005) (describing how group criminality can be an underlying reason for foreign and international courts to exercise jurisdiction); Summers, *supra* note 129, at 667 (writing that “[c]alibrating individual responsibility for group criminality is one of the most difficult challenges international criminal law faces”).

¹³² See Carsten Stahn, *Liberals vs Romantics: Challenges of an Emerging Corporate International Criminal Law*, 50 CASE W. RES. J. INT’L L. 91, 110 (2018) (discussing how German Courts have considered corporate group liability).

III. THE MECHANISM OF SOCIETAL RESPONSE

Societal response complicates prosecutors' vision of prosecutorial messaging. This Part explains the mechanism of such societal response.

A. *An Explanatory Analogy*

Let us develop the mechanism of societal response by way of explanatory analogy.

Consider the experience of a law student. By the time a second-year law student has finished with Criminal Procedure, she may be more comfortable with the notion that "charges against a factually guilty defendant may be dropped because of a Fourth Amendment violation (e.g., the police searched and obtained evidence in the defendant's home without a warrant)." While she may not have entered law school with this view, she now as a 2L believes this because she, her professor, and her fellow students have, repeatedly, studied and affirmed the importance of robust criminal procedural rights as axiomatic in U.S. constitutional law and, more generally, in any system with the rule of law. During school break, while home at the dinner table with non-lawyer family members, she may suddenly find herself the "odd man out" for holding such a view; her family members may be appalled that she supports a defendant being "let out on a technicality." The division is heightened when, over the school vacation, news breaks of a case in which this very fact pattern occurs. She and her family see the same objective case from two different subjective realities: she thinks that the deeper rule of law principles have been upheld, while her family thinks "a criminal has gotten away with crime."

Why does the law student's view of the criminal dismissal diverge from that of her family? On one telling of it, she has "changed her mind" about the role of criminal procedure in safeguarding defendants' rights. Or her family may even think she has been "brainwashed by law school."

The better understanding of the situation is not as simply one law student individualistically "changing her mind" or "learning the law," but instead as being *socialized* into a particular set of norms regarding how American law is conceptualized and practiced. Students learn through social interaction with law school faculty, staff, and students. Slowly, a student internalizes such norms and holds views in a law

student community that may differ from her family or the general public. And when she later reads in the news that some high-profile defendant has been released from custody due to prosecutorial misconduct, her view and those of her law school community see this as normatively desirable, in contrast to others in the public at large. In sum, the same criminal case objectively exists, but the received message diverges between the two communities.

B. *An Applied Theory of Societal Response*

The law student analogy above exemplifies the necessity of advancing a richer understanding of societal response. What prosecutors fail to grasp — philosophically, publicly, and temporally — is that the criminal trial gains meaning only once internalized within a given community’s pre-existing beliefs. In other words, it is not that the criminal trial simply, objectively expresses certain norms; the criminal trial takes on meaning only once it “touches down” within a given community, and thus within the individual person’s mind. Indictment and criminal process do have an existence unto themselves — at trial, for example, legal actors (prosecutors, defense attorneys) make legal arguments over multiple days of hearings, introducing forms of evidence (documentary, testimonial) before decision makers (juries, judges). And yet the *social meaning* of such actions varies in the observer’s mind.

1. Social Meaning

What do we do with this insight? We may turn to the social sciences concerned with subjective human meaning, also known as the *interpretivist* approach. These theories best situate the individual — and the individual’s thinking — within a cultural framework, part of a broader trend in the social sciences in recent decades to analyze human remembering and thinking not as individualized cognitive processing but as embedded in integrated “networks of social practices, material artifacts, and other people.”¹³³ According to this view:

¹³³ See ROBERT FARR, *THE ROOTS OF MODERN SOCIAL PSYCHOLOGY* 129 (1996); Steven Arrigg Koh, *From “Stigma” and “Coping” to Social Repositioning: A New Perspective on HIV/Aids, Identity, and Human Rights* [hereinafter *A New Perspective on HIV/Aids*], in *SYMBOLIC TRANSFORMATIONS: THE MIND IN MOVEMENT THROUGH CULTURE AND SOCIETY*

Humans live in a world that is constantly changing and only ever partially known. In constructing symbols, they form and transform their field of experience in order to act in the face of life's tensions and indeterminacies. This experiential perspective differs radically from more mainstream approaches . . . which tend to conceptualize mind as a device like a computer that processes, encodes, stores and retrieves information found 'out there' in the world.¹³⁴

This means that individuals are not themselves impartial observers and deciders of facts as they see them. Instead of "knowing what they see," they "see what they know."¹³⁵

Legal scholarship has at times invoked this interpretive approach. For example, scholars have deployed such theories in constitutional interpretation,¹³⁶ statutory interpretation,¹³⁷ criminal law,¹³⁸ and

286 (Brady Wagoner ed., 2010) (referring to social representations as an important critique of the individualistic American social-psychological paradigm); BRADY WAGONER, *THE CONSTRUCTIVE MIND: BARTLETT'S PSYCHOLOGY IN RECONSTRUCTION* 204 (2017) ("Researchers are beginning to look beyond what is happening within the cranium, and are considering resources of remembering and thinking as *distributed* across brain, body, and world.") [hereinafter *THE CONSTRUCTIVE MIND: BARTLETT'S PSYCHOLOGY*].

¹³⁴ Brady Wagoner, *Opening and Closing Symbolic Transformation*, in *SYMBOLIC TRANSFORMATIONS: THE MIND IN MOVEMENT THROUGH CULTURE AND SOCIETY*, *supra* note 133, at 330.

¹³⁵ Koh, *A New Perspective on HIV/Aids*, *supra* note 133, at 285-87. In this sense, I reaffirm that criminal justice is "culture-bearing," a site of cultural negotiation of the concepts of "wrongdoing and community, social order and violence, identity, the power of the state, and the terms of collective ethical life." Joshua Kleinfeld, *Two Cultures of Punishment*, 68 *STAN. L. REV.* 933, 940 (2016).

¹³⁶ See, e.g., Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *HARV. L. REV.* 1189 (1987) (drawing on an interpretive account of the normative structure of constitutional practice to address how different kinds of argumentation fit together in constitutional argument, interpretation, and debate).

¹³⁷ See, e.g., William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 *COLUM. L. REV.* 609, 621 (1990) ("A truly historical consciousness recognizes that one's prejudgments, products of one's very existence in the world, very much affect one's understanding of a text.").

¹³⁸ See, e.g., Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 *STAN. L. REV.* 871 (1989) ("No version of interpretivism . . . can make good its claim have escaped from metaphysics.")

intellectual property.¹³⁹ Meanwhile, theorists of legal cynicism have described anomie towards police and other actors.¹⁴⁰

Social science and other theoretical approaches to social meaning are vast and thus beyond the scope of this Article.¹⁴¹ For present purposes, we may invoke the specific interpretivist approach of *social representations*,¹⁴² which I have previously applied to human rights.¹⁴³ In this view, which transcends the dominant individualistic paradigm of psychology,¹⁴⁴ “[n]obody’s mind is free from the effects of the prior

¹³⁹ See Jessica Silbey, *The Politics of Law and Film Study: An Introduction to the Symposium on Legal Outsiders in American Film*, 62 SUFFOLK L. REV. 755, 755 (2009) (“The cultural turn in law takes as a premise that law and culture are inextricably intertwined.”); Anupam Chander & Madhavi Sunder, Book Note, *Copyright’s Cultural Turn*, 91 TEX. L. REV. 1397, 1405 (2013) (“We identify here two central insights of the cultural turn in intellectual property scholarship: the relationship between cultural products and the self, and the relationship between culture and human development, which we might characterize as the relationship between goods and a good life.”). Broadly speaking, this comes from the “cultural turn,” which emerged in philosophy, sociology, and the social sciences since the 1970s. It shifts the focus of analysis from a positivist, essentialist conception of study to one that is more focused on subjective meaning and interpretation. This interpretive account emphasizes how individuals inhabit social and cultural spaces through narratives, symbols, and codes.

¹⁴⁰ David Kirk & Mauri Matsuda, *Legal Cynicism, Collective Efficacy, and the Ecology of Arrest*, 49 CRIMINOLOGY 1, 5 (2011); Robert Sampson & Dawn Jeglum Bartusch, *Legal Cynicism and (Subcultural?) Tolerance of Deviance: The Neighborhood Context of Racial Differences*, 32 LAW & SOC’Y REV. 777, 777 (1998).

¹⁴¹ Another approach, deriving from the Durkheimian tradition, is cultural sociology. See generally Jeffrey C. Alexander & Philip Smith, *The Strong Program in Cultural Sociology*, in JEFFREY C. ALEXANDER, *THE MEANINGS OF SOCIAL LIFE* 11, 12 (2003) (“To believe in the possibility of a cultural sociology is to subscribe to the idea that every action, no matter how instrumental, reflexive, or coerced vis-à-vis its external environments . . . is embedded to some extent in a horizon of affect and meaning.”). Future criminal legal research could apply relevant cultural sociological theories related to the civil sphere and criminal justice. See JEFFREY C. ALEXANDER, *THE CIVIL SPHERE*, 13–50, 53 (2006) (placing solidarity at the center of a cultural sociological analysis of civil society); PHILIP SMITH, *PUNISHMENT AND CULTURE passim* (2008) (arguing that punishment is a rebuilding of solidarity via an act of imaginative reordering or expiation to reinforcing moral boundaries).

¹⁴² This theory is underutilized in legal scholarship. But see Koh, *A New Perspective on HIV/Aids*, *supra* note 133, at 284 (2010).

¹⁴³ *Id.* at 285–87.

¹⁴⁴ WAGONER, *THE CONSTRUCTIVE MIND: BARTLETT’S PSYCHOLOGY*, *supra* note 133, at 201 (noting that social representations counterbalance the individualistic focus that has

conditioning which is imposed by his representations, language and culture.”¹⁴⁵ Social representations theory is closely related to central ideas in sociological theory, particularly Émile Durkheim’s conception of collective representations and the collective consciousness. According to Durkheim, collective consciousness constitutes “[t]he totality of beliefs and sentiments common to the average members of a society forms a determinate system with a life of its own.”¹⁴⁶ Related, collective representations constitute “ideas, beliefs, and values elaborated by a collectivity and that are not reducible to individual constituents.”¹⁴⁷

Simply put, from this sociological perspective, ideas precede people and exist in a given society before a person is even born. Returning to the law student analogy: ideas in a law school may include legal doctrine (e.g., the 1L curriculum), legal theories (e.g., critical race theory, or law and economics), or views about legal education (e.g., the positives or negatives of the Socratic method). Once a person is born into or enters such a society, she internalizes such beliefs, which ultimately “link[] successive generations to one another.”¹⁴⁸ Additionally, Durkheim advanced a conception of *anomie*, “a sense that the very fabric of the social world is in chaos — a sense of social estrangement, meaninglessness, and powerlessness, often a result of structural

dominated social psychology); In recent history, the dominant frame of psychology has been one of “mind as machine,” confining human cognition to the realm of physiology and observable behavior. WAGONER, *SYMBOLIC TRANSFORMATIONS: THE MIND IN MOVEMENT THROUGH CULTURE AND SOCIETY*, *supra* note 133, at 19. This has come at the neglect of research into how individuals experience the world and make meaning of it. *Id.*

¹⁴⁵ SERGE MOSCOVICI, *SOCIAL REPRESENTATIONS: ESSAYS IN SOCIAL PSYCHOLOGY* 23 (1984).

¹⁴⁶ Émile Durkheim, *From Mechanical to Organic Solidarity*, in *SOCIOLOGY* 25 (Anthony Giddens & Philip W. Sutton, eds., 2010).

¹⁴⁷ *Collective Representations*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095624310> [<https://perma.cc/4V8A-Y7LH>] (last visited Oct. 19, 2022) (citing ÉMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* (1912)).

¹⁴⁸ Durkheim, *supra* note 146.

instability and social change.”¹⁴⁹ In legal scholarship, Monica Bell has best engaged this concept to describe how black American communities feel legal estrangement from the police, thus complicating the dominant contemporary American reform narrative that better procedural justice will resolve the perception of police illegitimacy in such communities.¹⁵⁰ For example, some black Americans in Baltimore hold the social representation that both network news and social media are untrustworthy because they advance problematic racial tropes.¹⁵¹ In so doing, Bell builds to a theory of legal estrangement, rooted in procedural injustice, vicarious marginalization, and structural exclusion.¹⁵² This Article expands upon this work, given that social representations theory makes two critical contributions. First, it shows how *every* community has distinct representations of criminal process; such representations exist and persist regardless of the degree to which a community is marginalized. Second, social representations theory adds a more dynamic, interpersonal element to this notion, wherein a wide variety of representations exist in a society, dynamically changing over time due to the nature of social interaction.

Furthermore, social representations theory informs how individuals and communities receive and interpret new information. Returning to the law student analogy: an affirmative, pre-existing belief in Fourth Amendment rights changes the way a law student then perceives breaking news about criminal charges being dropped on such ground in a new, headline-grabbing case. Our pre-existing beliefs — which constitute the sum total of human viewpoint — lead us to “conventionalize the objects, persons and events we encounter.”¹⁵³ Such pre-existing views give new perceived events a definite form, so that we “locate them in a given category and gradually establish them as a model of a certain type, distinct and shared by a group of people.”¹⁵⁴ Social

¹⁴⁹ Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2084 (2017) (citing the work of Robert Merton, Robert Sampson, and Dawn Jeglum Bartusch, each of whom further refined the concept of Durkheimian anomie).

¹⁵⁰ *Id.* at 2054.

¹⁵¹ *Id.* at 2111.

¹⁵² *Id.* at 2067-68.

¹⁵³ MOSCOVICI, *supra* note 145, at 22.

¹⁵⁴ *Id.* at 22.

representations do so in two ways. First, they “anchor” strange or new ideas, reducing them to familiar contextual categories and images. Second, they “objectify” abstract concepts, turning them into something concrete in the physical world.¹⁵⁵ In other words:

Our past experiences and ideas are not dead experiences or dead ideas, but continue to be active, to change and to infiltrate our present experience and ideas. In many respects, the past is more real than the present. The peculiar power and clarity of [social representations] derives from the success with which they control the reality of today through that of yesterday and the continuity which this presupposes.¹⁵⁶

Indeed, from this perspective, a person is not equally open to receiving all impressions.¹⁵⁷ A person’s “active orientation” vis-à-vis the world is a function of the person’s attitude, interests, personal history, and group membership.¹⁵⁸ Their social life is “made meaningful by cultural narratives and imaginaries of actors, events and activities.”¹⁵⁹

Social representations are more easily grasped by applying the concept to political polarization and other topical issues. Individuals on both sides of the aisle act as if the other side is “deluded” and just needs to wake up to the reality of what is all around them. Everything that individuals perceive politically and culturally seems to validate their worldview. Take individuals who are supporters of Donald Trump, for example. They may have seen their communities hollowed out by free trade, they watch and read conservative media, and their peers share the same views. Of course, this issue is not exclusive to the political right: every community has its pre-existing representations. The left wing, for example, cannot credit the Trump Administration with the speedy creation of the COVID-19 vaccine because to do so would contradict

¹⁵⁵ *Id.* at 42-54.

¹⁵⁶ *Id.* at 24.

¹⁵⁷ WAGONER, *THE CONSTRUCTIVE MIND: BARTLETT’S PSYCHOLOGY*, *supra* note 133, at 192-93.

¹⁵⁸ *Id.*

¹⁵⁹ Dorothy Holland, *Symbolic Worlds in Time/Spaces of Practice: Identities and Transformations*, in *SYMBOLIC TRANSFORMATIONS: THE MIND IN MOVEMENT THROUGH CULTURE AND SOCIETY*, *supra* note 133, at 269.

existing representations of Trump and his administration as utterly inept in every regard. Similarly, many in the United States are mystified as to why Iraqis and Afghans have not simply “embraced freedom” — when in reality, the representations of the United States in such countries are mired in tremendously complex and, often, critical history.¹⁶⁰ And, of course, many in the United States wonder why certain communities of color are more suspicious of the police or vaccines — overlooking such communities’ representations of federal, state, and local governments as historically suspect players on both fronts.¹⁶¹

2. The Intuitive View

While social representations theory may sound obvious, it undermines a deeply held view that individuals may be rationally persuaded of objective factual truth through criminal process. Let us

¹⁶⁰ See generally THOMAS J. BARFIELD, *AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY* (2010) (describing the historic struggles and political volatility in Afghanistan, and how the United States invasion after 9/11 made the United States falsely believe that they had changed the narrative); DAVID LOYN, *BUTCHER AND BOLT: TWO HUNDRED YEARS OF FOREIGN FAILURE IN AFGHANISTAN* (2008) (highlighting the different personalities involved in how people view Afghanistan); FAID MUHAMMAD, *THE HISTORY OF AFGHANISTAN* (R. D. McChesney and M. M. Khorrami The Sirāj al-tawārikh trans. & eds., 2012) (detailing the history of Afghanistan); EDWARD SAID, *ORIENTALISM* (1978) (describing the evolution of Western conceptions of the East and considering the way in which such conceptions have influenced interstate relations); STEPHEN TANNER, *AFGHANISTAN: A MILITARY HISTORY FROM ALEXANDER THE GREAT TO THE WAR AGAINST THE TALIBAN* (2009) (recounting the military history of Afghanistan). For example, President Bush’s statement in 2001 that the war on terrorism was a “crusade” touched a nerve in the Middle East due to the long history of European invasion of the Middle East on religious grounds. Peter Waldman & Hugh Popestaff, *‘Crusade’ Reference Reinforces Fears War on Terrorism is Against Muslims*, WALL ST. J. (Sept. 21, 2001, 12:01 AM EST), <https://www.wsj.com/articles/SB1001020294332922160> [<https://perma.cc/K4H6-85AT>].

¹⁶¹ See generally BUTLER, *supra* note 64 (noting that the criminal justice system justifies the disproportionate imprisonment of Black communities by instilling fear in the media); Peter Jamison, *Anti-Vaccination Leaders Fuel Black Mistrust of Medical Establishment as Covid-19 Kills People of Color*, WASH. POST (July 17, 2020, 6:40 PM EDT), <https://www.washingtonpost.com/dc-md-va/2020/07/17/black-anti-vaccine-coronavirus-tuskegee-syphilis/> [<https://perma.cc/4C7D-LTKG>] (describing Black individuals’ hesitancy to receive the coronavirus vaccine because they didn’t want to be “guinea pigs,” as they had been in past experiments by the U.S. government, such as the Tuskegee syphilis study).

take a moment to consider this mainstream view, which I will call simply the *intuitive view*.

The intuitive view is very much the opposite of social representations theory. While we may pay lip service to our unconscious biases, if most of us are honest with ourselves, we think of ourselves as basically open to a wide variety of viewpoints and perspectives. Furthermore, we consider ourselves willing to change opinions if we are rationally persuaded that another viewpoint is more meritorious. But the problem with the intuitive view is that it assumes certain viewpoints align with some neutral norm, whereas others do not. In fact, all viewpoints are so deeply embedded in constructed frameworks that no single “true” perception of an objective is achievable. Just as Kimberlé Crenshaw has noted that “perspectivelessness” does not exist — and thus law school teaching should have an awareness of all student and faculty perspectives¹⁶² — so too does the criminal trial never exist in a place of “perspectivelessness.” Every individual viewing a criminal case will bring their worldview towards the subject matter.

The intuitive view has a darker side. Given that each person and community think of themselves as rational and open, they then perceive that the other side cannot “wake up and see what’s right in front of them.” From this perspective, one side is “rational,” and the other is “irrational.” One side is “deluded,” and the other is not. The implication is that with more knowledge the other side will “get it.” It is a mystery to many of us why the other side continues to labor under political, cultural, or religious delusion. And while this has always been an aspect of political and popular discourse, this is exacerbated in a time of social media. Historically, we have always lived within relatively closed social networks. But now such networks, moved online, effortlessly exchange information and viewpoints that are then quickly confirmed, leading to individual groups to engage in more and more drastic interpretations of events around them. Our broader public discourse has then come to resemble our online discourse: we post loudly in a way designed chiefly for our own self-curated audience, with little tolerance for dissent. We

¹⁶² See Kimberlé Williams Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. 1, 1-12 (1988).

lack a common meeting space for balanced discussion; we are just broadcasting to our tribe.

C. Application to Criminal Process

Now let us apply social representations theory to prosecutorial messaging and unpack societal response. As noted above, in a given community, social representations have a life of their own — giving meaning to each other.¹⁶³ Included in any given community are perceptions of wrongdoing, the function of the government, and the integrity of the criminal process. Thus, when a prosecutor indicts and initiates criminal process in socially prominent cases, the community internalizes it within a pre-existing framework of meaning. Depending on the representations within a given community, such meaning is constructed in ways that may widely diverge. And because the nature of criminal adjudication is to determine whether a given defendant is guilty or innocent, inevitably one community will internalize a given verdict as a vindication of its worldview, while the other side will view the verdict as inherently wrong — leading to influence on national elections, societal polarization, disruption of foreign relations, or the fostering of collective trauma. This is especially the case in the 2020s: the proliferation of media sources, including “new media” on YouTube and social media discourse, has meant that views of any criminal case have proliferated — consider debates about the prosecution of January

¹⁶³ MOSCOVICI, *supra* note 145, at 27.

6th Capitol rioters,¹⁶⁴ the U.S. extradition of Julian Assange,¹⁶⁵ and even the prosecution of Derek Chauvin for the killing of George Floyd.¹⁶⁶

¹⁶⁴ See, e.g., YUNKANG YANG, RIGHT-WING MEDIA'S COVERAGE OF THE ATTACK ON THE US CAPITOL ON JANUARY 6, at 2-9 (2022), <https://iddp.gwu.edu/sites/g/files/zaxdzs5791/files/downloads/Coverage%20of%20the%20attack%20on%20Jan.%206th%3B%20Yang.pdf> [<https://perma.cc/CSX8-PNJM>] (examining how 12 major right-wing media outlets covered the attack on the U.S. Capitol on January 6, 2021); Patrick J. Buchanan, *Who Really Imperils the Republic?*, THE IMAGINATIVE CONSERVATIVE (Mar. 5, 2021), <https://theimaginativeconservative.org/2021/03/who-really-imperils-republic-pat-buchanan.html> [<https://perma.cc/WB4G-KDP2>] (arguing that it is hyperbole to describe the Capitol Riot as an act of domestic terrorism); Elie Mystal, *The Confederacy Finally Stormed the Capitol*, NATION (Jan. 6, 2021), <https://www.thenation.com/article/politics/capitol-protest-trump/> [<https://perma.cc/B786-H4B4>] (“And then, because the rioters were white, they were allowed to walk away. But just imagine if they had been Black.”); Jeremy Stahl, *The Jan. 6 Defendants are Getting off Easy*, SLATE (Jan. 6, 2022, 2:40 PM), <https://slate.com/news-and-politics/2022/01/jan-6-capitol-riot-criminal-prosecutions-status.html> [<https://perma.cc/44DS-K86J>] (stating that the disproportionately high rate of pretrial releases granted to Capitol Riot defendants “lays bare some of the most profound and enduring inequalities at the heart of our criminal justice system”).

¹⁶⁵ See, e.g., *Why Julian Assange Should Be Extradited*, ECONOMIST (Apr. 17, 2019), https://www.economist.com/leaders/2019/04/17/why-julian-assange-should-be-extradited?utm_medium=cpc.adword.pd&utm_source=google&ppccampaignID=18151738051&ppcadID=&utm_campaign=a.22brand_pmax&utm_content=conversion.direct-response.anonymous&gclid=CjwKCAjwwL6aBhBLEiwADycBIC6p05ZSi7BZ-ku_Ud-jUGyu6RMzzPaLSSLgoZA6__j-6oXmNFjk2BoCGv4QAvD_BwE&gclsrc=aw.ds [<https://perma.cc/Z6N3-LWH6>] (“The WikiLeaks co-founder is accused of hacking, not leaking, and that is a serious crime.”); see also *The Guardian View on Julian Assange’s Extradition: A Bad Day for Journalism*, GUARDIAN (June 17, 2022, 12:34 PM EDT), <https://www.theguardian.com/commentisfree/2022/jun/17/the-guardian-view-on-julian-assanges-extradition-a-bad-day-for-journalism> [<https://perma.cc/A6TX-P34K>] (“Priti Patel could have turned down the American request. By not doing so she dealt a blow to press freedom.”); *Julian Assange is Not a Free-Press Hero. And He Is Long Overdue for Personal Accountability*, WASH. POST (Apr. 11, 2019, 6:45 PM EDT), https://www.washingtonpost.com/opinions/julian-assange-is-not-a-free-press-hero-and-he-is-long-overdue-for-personal-accountability/2019/04/11/90f901ba-5c86-11e9-842d-7d3ed7eb3957_story.html [<https://perma.cc/V7A6-LT2C>] (“If the [United Kingdom, the United States, and Sweden] handle it properly, Mr. Assange’s case could conclude as a victory for the rule of law, not the defeat for civil liberties of which his defenders mistakenly warn.”).

¹⁶⁶ See, e.g., Erin Aubry Kaplan, *The Power of the Muted Reaction to Derek Chauvin’s Sentencing*, POLITICO (June 26, 2021, 4:13 PM EDT), <https://www.politico.com/news/magazine/2021/06/26/derek-chauvin-sentencing-496428> [<https://perma.cc/9UW7-UMT6>] (“For most of American history, police officers were rarely charged, let alone sentenced, for brutality against Black people. This time at least, justice was not denied.”); Hannah Rose & Blyth Crawford, *“Today It’s Chauvin, Tomorrow It’ll Be Another*

Such realities complicate sanguine scholarly calls for criminal trials. In recent years, scholars such as Jocelyn Simonsen, Paul Butler, and Andrew Crespo have rightly called for a restoration of the public trial to promote more equitable criminal law enforcement in an age of mass incarceration, including through defendant collective action.¹⁶⁷ While the normative goal of rectifying power imbalance in the plea-bargaining stage is salutary, the public trial presents the distinct problem of triggering fragmented societal response, potentially exacerbating polarization and alienation. This problem echoes the recent work of Jamal Greene, who has recently identified a problem with the contemporary conception of rights as “trumps,” wherein rights adjudication is framed as a zero-sum competition between rights holders and those without any legitimate claims, ending in degradation of “our relationship to the law and to each other.”¹⁶⁸ In other words, the individualized nature of contemporary rights adjudication overlooks the broader solidarity that distinct communities feel with opposing litigants, thus corroding our civil sphere when one side simply “wins”

White Man”: Far-Right Reactions to the Conviction of Derek Chauvin, INT’L CTR. STUDY RADICALISATION (Apr. 21, 2021), <https://icsr.info/2021/04/21/today-its-chauvin-tomorrow-itll-be-another-white-man-far-right-reactions-to-the-conviction-of-derek-chauvin/> [<https://perma.cc/73BW-MZB8>] (analyzing the rhetoric and reactions of online far-right communities concerning Derek Chauvin’s conviction); Alex Shepard, *The Right-Wing Media’s Shameful Defense of Derek Chauvin*, NEW REPUBLIC (Apr. 21, 2021), <https://newrepublic.com/article/162138/right-wing-medias-shameful-defense-derek-chauvin> [<https://perma.cc/5CUR-BT6G>] (detailing how some right-wing media and commentators reacted to Derek Chauvin’s charge and trial).

¹⁶⁷ See generally Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEGAL STUD. 627 (2004) (recommending the encouragement of trials); Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999 (2022) (discussing the Achilles’ heel of the American penal system); Jocelyn Simonson, *The Place of “the People” in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019) (detailing a new approach to criminal procedure that values human participation).

¹⁶⁸ JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSIONS WITH RIGHTS IS TEARING AMERICA APART*, at xxxii (Houghton Mifflin Harcourt 2021); Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 30-37 (2018); see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xi (Harvard Univ. Press 1978); ROBERT TSAI, *PRACTICAL EQUALITY: FORGING JUSTICE IN A DIVIDED NATION* 14-15 (W.W. Norton & Co. 2019) (advocating for a pragmatic approach, sometimes drawing on second-best solutions, in the name of equality).

and the other simply “loses.” Criminal adjudication does something similar: it publicly and prominently pits the state against an individual defendant and communities who feel solidarity with such defendant. As Martha Minow has recently noted, law constructs adversarial processes, decreasing the likelihood of forgiveness, emphasizing opposing arguments, and sharpening conflict in a legal process that collides with religious, cultural, and other social norms that may support forgiveness.¹⁶⁹

Finally, the above analysis shows how societal response implicitly animates several areas of criminal procedure and institutional policy. The grand jury requirement “hard wires” community views into the threshold decision of indictment.¹⁷⁰ Later, jury decision making — acquittal, conviction, and even jury nullification — provides another mechanism for lay participation.¹⁷¹ And state and local jurisdictions vary in the election of prosecutors, from popular elections to political appointments.¹⁷² However, they may represent the majority that has elected them, often leaving certain groups marginalized and unfairly targeted. This may also impact democratic participation in the elucidation of a criminal code, which may have some alignment between criminalization and conduct that the masses are concerned to be moral, harmful, or both. Finally, courts have addressed the issue most clearly in the jury verdict context, but results vary across jurisdictions.¹⁷³ North Carolina courts permit prosecutors to urge jurors to use their verdict to send a message to the community about which kinds of behavior will not

¹⁶⁹ MARTHA MINOW, *WHEN SHOULD LAW FORGIVE?* 29 (W.W. Norton & Co. 2020).

¹⁷⁰ *Charging*, U.S. DEP’T JUST., OFFS. OF THE U.S. ATT’YS, <https://www.justice.gov/usao/justice-101/charging> (last visited Jan. 28, 2023) [<https://perma.cc/UJT8-S5Q9>].

¹⁷¹ *Id.*; see also *Trial*, U.S. DEP’T OF JUST. OFFS. OF THE U.S. ATT’YS, <https://www.justice.gov/usao/justice-101/trial> (last visited Jan. 28, 2023) [<https://perma.cc/RM4Q-9FR5>].

¹⁷² CARISSA BYRNE HESSICK, *NATIONAL STUDY OF PROSECUTOR ELECTIONS* 9 (2020), <https://law.unc.edu/wp-content/uploads/2020/01/National-Study-Prosecutor-Elections-2020.pdf> [<https://perma.cc/LF87-F5TG>] (providing a nationwide study of prosecutor elections).

¹⁷³ James Joseph Duane, *What Message Are We Sending to Criminal Jurors when We Ask Them to “Send a Message” with Their Verdict?*, 22 AM. J. CRIM. L. 565, 568 n.8 (1995) (documenting cases where prosecutors and courts permitted or denied encouraging jury to send a message).

be tolerated,¹⁷⁴ while Florida courts have found errors where the prosecutor makes this kind of appeal to the jury.¹⁷⁵ At sentencing, some courts have held it is improper for prosecutors to ask jurors to use the death penalty to send a message to society.¹⁷⁶ Meanwhile, other judges explicitly use sentences to send messages to their communities.¹⁷⁷

IV. HONING THE MESSAGE: REFORMS IN AMERICAN CRIMINAL LAW AND POLICY

If prosecutorial messaging is a more complex phenomenon than prosecutors anticipate due to societal response, what does this mean for criminal prosecution moving forward?

I have argued previously that the DOJ must have greater internal coordination regarding foreign affairs prosecutions in order to mitigate the inadvertent foreign relations effects of such cases.¹⁷⁸ This Part extends this analysis, arguing that, counterintuitively, the best way to reform prosecutorial messaging has little to do with prosecutors themselves. Prosecutors are not — nor should be — suited, skill-wise, to fully appreciate or incorporate societal response into their decision making. Thus, this Part will recognize the need for prosecutor-level reforms but ultimately calls for greater democratic engagement and reduction of criminalized conduct.

A. Prosecutorial Policies

Every prosecutorial office is composed of prosecutors in two roles. First, “line” prosecutors make daily decisions regarding individual cases — the foot soldiers of prosecutorial offices. Second, other actors — section chiefs, District Attorneys, U.S. Attorneys — oversee line prosecutors, making more policy-oriented decisions about institutional

¹⁷⁴ *Id.* (citing *State v. Moseley*, 449 S.E.2d 412, 442-43 (N.C. 1994)).

¹⁷⁵ *Id.* (citing *Bertolotti v. State*, 475 So.2d 130, 133 (Fla. 1985)).

¹⁷⁶ *Id.* (citing *State v. Rose*, 548 A.2d 1058, 1092-93 (N.J. 1988)).

¹⁷⁷ *Id.* (citing *United States v. McDavid*, 41 F.3d 841, 843 (2d Cir. 1995) (stating that the federal district judge announced at sentencing that “this Court has to send a message out that this is not going to be tolerated”)).

¹⁷⁸ Koh, *Foreign Affairs*, *supra* note 18, at 391-401; Koh, *Criminalization of Foreign Relations*, *supra* note 19, at 772-81.

prosecutorial priorities. Let us consider how each role may address prosecutorial messaging.

1. Individual Line Prosecutors

At the level of the individual line prosecutor, a few superficially palatable suggestions might emerge. One is to disregard the issue: criminal justice should focus on “getting it legally right” in each trial and let the broader societal chips fall where they may. Another is to broadcast more robustly the goals of criminal justice and the reasons for it. For example, the *Rittenhouse* prosecutors could have spoken more candidly in a language outside the courtroom to engage the social representations of the masses. And a final one is to change the medium by which such information is conveyed. For example, institutions could wage a broader public relations campaign that enlists traditional media outlets to convey the narrative of criminal justice.

While such communication may improve the effectiveness of prosecutorial messaging, such proposals will have limited effect because they adopt the intuitive view — the aforementioned “thin” conception in which individuals are “deluded” and must “wake up” to the reality of criminal justice. Given this reality of representations, to change the view of an individual from that population is not simply a matter of “convincing them that they are wrong” or — worse yet — ostentatiously arguing on social media that they are unintelligent.

Furthermore, line prosecutors possess a skill set best suited to the individual case. Making determinations about charging decisions, suppression hearings, trials, and sentencing are the central function of prosecutors. They are not well suited to gauging broader societal trends and forces, nor anticipating the deeper effects of their prosecutorial decisions.

2. Leadership

The limited skills of the line prosecutor thus lead to the question of prosecutorial leadership. As noted above, in Canada, prosecutorial decision makers continuously revisit the societal utility of a prosecution. This has a central benefit of aligning criminal justice and societal interests, allowing for some higher criminal authority to

coordinate prosecutorial priorities. To some degree, this already happens within the American system, even though it is uncoded. For example, during the Obama Administration, Attorney General Eric Holder issued a 2013 memo calling for prosecutors to decline to charge individuals as having quantities of drugs that would trigger mandatory minimum sentences in instances where non-violent drug offenders lacked significant criminal histories.¹⁷⁹ This flexibility in prosecutorial policies reflects an institutional willingness to change, given where democratically elected leadership believes the general public to be.

However, the more democratic control there is over prosecutorial decision making, the greater the risk of overt politicization of the prosecutorial system. For example, the Trump Administration exemplified this risk when it interfered in the 2020 Roger Stone case, and President Trump claimed that he may personally become involved in the Meng Wanzhou case.¹⁸⁰ At the extreme, complete democratic control over the criminal justice system undermines its autonomy and authority. Thus, as I have also argued previously, the structural solution is to have greater coordination within prosecutorial offices (e.g., the DOJ Criminal Division), but maintain some arms-length distance from political actors (e.g., the U.S. President). This likely finds the right balance between “runaway” line prosecutors stumbling into complex societal questions and overt political control of criminal prosecution.¹⁸¹

Such leadership may be able to systematically engage in prosecutorial messaging. By way of analogy, consider the COVID-19 vaccine. Of course, Americans must get vaccinated to immunize the population and stave off future variants. And yet little of the mainstream media coverage grapples with the fundamental question of *why* individuals fail

¹⁷⁹ Memorandum from Att’y Gen. Eric Holder to the U.S. Att’ys & Assistant Att’y Gen. for the Crim. Div. (Aug. 12, 2013) (on file with author).

¹⁸⁰ Steven Overly, *Trump Says Huawei Charges on the Table in China Trade Talks*, POLITICO (Feb. 22, 2019, 8:27 PM EST), <https://www.politico.com/story/2019/02/22/trump-huawei-china-trade-talks-1206627> [<https://perma.cc/8GZC-4KCR>]. Meng’s lawyers used such arguments in Canadian court to challenge her extraditability. See Ian Young, *Huawei Executive’s Extradition Is No “Garden-Variety” Case Because of Donald Trump, Her Lawyer Says*, S. CHINA MORNING POST (Sept. 30, 2020, 9:11 PM), <https://www.scmp.com/news/china/society/article/3103763/huawei-executives-extradition-no-garden-variety-case-because> [<https://perma.cc/3NF5-YJNJ>].

¹⁸¹ See Koh, *Criminalization of Foreign Relations*, *supra* note 19, at 772-87.

to vaccinate. What exactly animates such hesitation? What counterarguments address such hesitation? How could this be made more persuasive? A better communications strategy must start by answering these questions and then determining what counterarguments might be most intelligible to the other side. Let's say that some conservatives are hesitant to be vaccinated because the Biden White House is spearheading the vaccination effort. Instead of just presenting statistics and facts about vaccination rates, for example, the government and other mainstream sources could remind conservative voters that President Trump oversaw the vaccine's development, and he, along with Melania Trump, were vaccinated in January 2021.¹⁸²

B. A New Justification for Criminal Justice Reform

Even with the above-described prescriptions in place for line prosecutors and prosecutorial leadership, prosecution will inevitably communicate messages that vary widely by community, raising the prospect of undesirable societal effects. Inevitably, criminal prosecution antagonistically structures the relationship between state and citizen, giving rise to "zero-sum" adjudication. Especially in a large, pluralist democracy such as the United States, individuals and populations will make meaning of criminal process in fragmented ways.

Thus, the better approach is deeper, structural criminal justice reforms. Such reforms fall into three categories: *democratization*, *decriminalization*, and *abolition*. These three reform dimensions align with many democratically oriented and abolitionist prescriptions scholars have advanced in recent years. While such prescriptions typically center on individual desert or disproportionate impact on certain populations, this Section provides an additional justification for such prescriptions rooted in societal response.

¹⁸² Jim Acosta & Caroline Kelly, *Donald and Melania Trump Received Covid Vaccine at the White House in January*, CNN (Mar. 1, 2021, 5:04 PM EST) <https://edition.cnn.com/2021/03/01/politics/trump-melania-vaccinated-white-house/index.html> [<https://perma.cc/SL3R-SAQ8>].

1. Democratization

As an initial matter, the reality of societal response bolsters calls for greater *democratization* of criminal justice. In recent years, criminal law scholars have called for a return to local control of police and prosecutors. Such proposals include community views of justice, the revival of the jury, and community-legislature links.¹⁸³ These reforms are often, correctly, framed in terms of individual desert and disproportionate impact on marginalized communities. Other scholars have shown that democratization would better align with community norms and curb the excessiveness of criminal punishments such as three-strikes laws.¹⁸⁴

Democratization better aligns criminal justice with the social representations in a given community. If prosecutors have discretion and are making charging decisions that inevitably send a message to a given community, prosecutors hailing from such a community will better anticipate the societal response to their prosecutorial messaging. This means that individual jurisdictions will vary in their approach to prosecution given the exigencies and views of a given local population. Such a rationale overlaps with that of Bell, who has called for “a more aggressive infusion of deliberative participation in policing” to redress legal estrangement.¹⁸⁵ The same may be said of prosecutors, who should hail from the local community.

These democratization trends are playing out in criminal jurisdictions inside and outside the United States. For example, progressive prosecutors have been both embraced and rejected by their local jurisdictions, showing an evolving local viewpoint on criminal justice.¹⁸⁶

¹⁸³ KLEINFELD ET AL., *supra* note 26, at 1697, 1699.

¹⁸⁴ E.g., Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565, 1574 (2017).

¹⁸⁵ Bell, *supra* note 13, at 2143.

¹⁸⁶ E.g., Marco della Cava, *New, More Progressive Prosecutors are Angering Police, Who Warn Approach Will Lead to Chaos*, USA TODAY (Feb. 10, 2020, 11:50 AM EST), <https://www.usatoday.com/story/news/nation/2020/02/08/criminal-justice-police-progressive-prosecutors-battle-over-reform/4660796002/> [<https://perma.cc/86H5-EKWV>]; see also Shelley Murphy, *Trailblazers Celebrate as Rachael Rollins is Formally Sworn in as US Attorney*, BOS. GLOBE (Apr. 23, 2022, 3:07 AM), <https://www.bostonglobe.com/2022/04/22/metro/trailblazers-celebrate-rachael-rollins-is-formally-sworn-us-attorney/> [<https://perma.cc/TAM4-2RD6>]; Li Zhou, *Why Some Voters are*

Oftentimes, such prosecutors have adopted robust progressive policies in favor of declination and diversion, particularly of misdemeanor offenses and victimless crimes.¹⁸⁷ Traditionally, declination and diversion have been a “black box” of prosecutorial decision making.¹⁸⁸ But in recent years, some prosecutors have been more mindful of actively and transparently promoting policies to shrink the footprint of criminal justice. A 2018 report shows that today’s prosecutor-led diversion programs focus on “immediate benefits to defendants, such as avoiding the collateral consequences of a criminal record and on gaining resource efficiencies by routing cases away from the traditional court process.”¹⁸⁹

As the world contemplates prosecution of war crimes in Ukraine, it is also worth emphasizing that international criminal tribunals have similarly evolved toward democratization. Specifically, the trend has moved away from the “pure” international criminal tribunal model — for example, the U.N. International Criminal Tribunal for the former Yugoslavia sitting in The Hague as a stand-alone institution — and more toward a “hybrid” model, such as the Extraordinary Chamber for Cambodia, which sits in Phnom Penh and has a mixed bench of

Trying to Recall San Francisco’s Progressive DA, VOX (June 8, 2022, 9:45 AM EDT), <https://www.vox.com/2022/6/7/23158234/chesa-boudin-san-francisco-recall-progressive-prosecutor> [<https://perma.cc/D755-92VU>].

¹⁸⁷ Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 742 (2020) (discussing and evaluating some progressive prosecutors’ practice of declining to prosecute certain low-level offenses); Darcy Covert, *The False Hope of the Progressive-Prosecutor Movement*, ATLANTIC (June 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/06/myth-progressive-prosecutor-justice-reform/619141/> [<https://perma.cc/6Y6S-9SQT>] (discussing some common policies of certain “progressive prosecutors” declining to prosecute some low-level offenses, developing diversion programs, and “replacing hard-line assistants with reform-minded outsiders”).

¹⁸⁸ Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1597 (2010) (“If one were to poll the public (or even the local legal community) about the typical level of declination for felonies in the prosecutor’s office, how accurate would the results be?”).

¹⁸⁹ MELISSA LABRIOLA, WARREN A. REICH, ROBERT C. DAVIS, PRISCILLIA HUNT, MICHAEL REMPEL & SAMANTHA CHERNEY, *PROSECUTOR-LED PRETRIAL DIVERSION: CASE STUDIES IN ELEVEN JURISDICTIONS*, at xi (2018), <https://www.ojp.gov/pdffiles1/nij/grants/251664.pdf> [<https://perma.cc/72L6-422E>].

international and local judges.¹⁹⁰ Even more recently, investigative mechanisms dealing with Iraq, Syria, and Myanmar are also building a factual record that may present a basis for prosecution by local authorities after the relevant conflicts have ceased. Such questions of democratization of criminal fora will be of greater relevance when the time comes to prosecute war crimes in Ukraine.

2. Decriminalization and the Standard of Mutual Intelligibility

But more fundamentally, the reality of societal response bolsters the broader call for *decriminalization*, such that other forms of governance and accountability mechanisms should take better hold.

Decriminalization emphasizes less punitive, alternative mechanisms of regulation instead of prosecution. It pushes back against the recent U.S. history of criminalization, wherein criminal law “crowds out” more sensible forms of policy regulation.¹⁹¹ Indeed, scholars have criticized overcriminalization of public health policy¹⁹² immigration policy,¹⁹³

¹⁹⁰ OLGA MARTIN-ORTEGA & JOHANNA HERMAN, HYBRID TRIBUNALS & THE RULE OF LAW: NOTES FROM BOSNIA & HERZEGOVINA & CAMBODIA 4 (2010), https://ciaotest.cc.columbia.edu/wps/chrc%20/0019630/f_0019630_16753.pdf [<https://perma.cc/HX6G-KHB8>]; Harry Hobbs, *Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy*, 16 CHI. J. INT’L L. 482, 498–512 (2016).

¹⁹¹ BUTLER, *supra* note 64; DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (Oxford Univ. Press 2001); SIMON, *supra* note 102; Brown, *supra* note 102, at 658.

¹⁹² E.g., J. Kelly Strader, *Criminalization as a Policy Response to a Public Health Crisis*, 27 J. MARSHALL L. REV. 435, 436 (1994); see also Zita Lazzarini, Carol L. Galletly, Eric Mykhalovskiy, Dini Harsono, Elaine O’Keefe, Merrill Singer & Robert J. Levine, *Criminalization of HIV Transmission and Exposure: Research and Policy Agenda*, 103 AM J. PUB. HEALTH 1350, 1350 (2013) (“More than half of US jurisdictions have laws criminalizing knowing exposure to or transmission of HIV, yet little evidence supports these laws’ effectiveness in reducing HIV incidence. These laws may undermine prevention efforts outlined in the US National HIV/AIDS Strategy, in which the United States has invested substantial federal funds.”).

¹⁹³ E.g., Rubén G. Rumbaut, Katie Dingeman & Anthony Robles, *Immigration and Crime and the Criminalization of Immigration*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK OF MIGRATION STUDIES 472–82 (Steven J. Gold & Stephanie J. Nawyn eds., Routledge 2d ed. 2019); Liam Brennan, *Sessions Is Criminalizing Immigration Violations. That Upends Centuries of History*, WASH. POST (May 10, 2018, 3:28 PM EDT), <https://www.washingtonpost.com/news/posteverything/wp/2018/05/10/sessions-is->

poverty,¹⁹⁴ homelessness,¹⁹⁵ and women's health,¹⁹⁶ not to mention areas that should not be subject to regulation at all, such as race¹⁹⁷ and sexual orientation.¹⁹⁸ Relatedly, scholars also bemoan overcriminalization of drug possession, wherein draconian sentencing laws have led to mass incarceration¹⁹⁹ and, recently, triggered reform proposals.²⁰⁰

criminalizing-immigration-violations-that-upends-centuries-of-history/?utm_term=.c25fbodo413e [https://perma.cc/LCV9-FHVR].

¹⁹⁴ E.g., Peter B. Edelman, *Criminalization of Poverty: Much More to Do*, 69 DUKE L.J. 114, 114 (2020); Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 643 (2009) ("map[ping] the criminalization of welfare").

¹⁹⁵ E.g., ALLARD K. LOWENSTEIN, "FORCED INTO BREAKING THE LAW" THE CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT 2 (2016), https://law.yale.edu/system/files/area/center/schell/criminalization_of_homelessness_report_for_web_full_report.pdf [https://perma.cc/NT29-BWWM] ("Laws that restrict behaviors in which people experiencing homelessness must engage to survive, as well as the practices used to enforce these laws, constitute what this report refers to as 'making homelessness a crime' or 'the criminalization of homelessness.'").

¹⁹⁶ E.g., William Wan, *Amid New Talk of Criminalizing Abortion, Research Shows the Dangers of Making It Illegal for Women*, WASH. POST (Apr. 5, 2018, 3:01 PM EDT), https://www.washingtonpost.com/news/to-your-health/wp/2018/04/05/amid-new-talk-of-criminalizing-abortion-research-shows-dangers-for-women/?utm_term=.e4cb94a3efa1 [https://perma.cc/FWJ6-GHJZ] (surveying recent state attempts to criminalize abortion).

¹⁹⁷ E.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 4 (2010); Angela Y. Davis, *Race and Criminalization: Black Americans and the Punishment Industry*, in *THE HOUSE THAT RACE BUILT* 264-78 (Wahneema Lubiano ed., 1997) (discussing the structural character of racism in the U.S. criminal justice system).

¹⁹⁸ E.g., Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1806 (1993) (criticizing a case in which the Supreme Court upheld the constitutionality of a Georgia "sodomy" law); see also William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. ILL. L. REV. 631, 643-46 (1999) (same).

¹⁹⁹ Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 909 (1962) ("One kind of systematic nonenforcement by the police is produced by criminal statutes which seem deliberately to over-criminalize, in the sense of encompassing conduct not the target of legislative concern, in order to assure that suitable suspects will be prevented from escaping through legal loopholes as the result of the inability of the prosecution to prove acts which bring the defendants within the scope of the prohibited conduct."); see also Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381, 1388 (2018) ("The U.S. criminal justice system is a colossus, its reach unprecedented by both global and historical measures.").

²⁰⁰ E.g., Nicholas Fandos, *Senate Passes Bipartisan Criminal Justice Bill*, N.Y. TIMES (Dec. 18, 2018), <https://www.nytimes.com/2018/12/18/us/politics/senate-criminal-justice-bill.html?module=inline> [https://perma.cc/5VT8-MPUN] (discussing the First Step Act).

The promising alternative to domestic criminal adjudication is initiatives aimed at community engagement and robust interaction with the views within a given community. As social representations theory has shown us, “instead of denying conventions and prejudices, this strategy would enable us to recognize that representations constitute, for us, a type of reality.”²⁰¹ One such example is the initiative of Countering Violent Extremism, which brings a variety of stakeholders — including social workers, faith-based organizations, and communities — to bear on challenging the worldview of certain individuals.²⁰² While I recognize that the U.S. government may be laboring under its own problematic representations of religion and terrorism,²⁰³ it is preferable for the United States to robustly engage with the worldview of individuals who have engaged in violent conduct that would qualify as terrorism under federal criminal law.

Around which principle might decriminalization proceed? The standard I briefly introduce below is one of *mutual intelligibility*. Mutual intelligibility is rooted in the notion that a minimum core of conduct is worthy of criminal sanction, thus partially mitigating societal response. A smaller criminal justice system could draw from Paul Robinson’s articulation of criminal law’s “core principles,” supported empirically as having cross-cultural validity and purchase in criminal legal systems worldwide. The core principles are that: (1) wrongdoing deserves punishment; (2) wrongdoing includes physical aggression, assisting another person to commit a crime, and does not include necessity; (3) blameless conduct should be protected from criminal liability; and (4) the extent of liability and punishment should be proportionate to the wrongdoing.²⁰⁴ This builds upon his earlier theory that criminal law

²⁰¹ MOSCOVICI, *supra* note 145, at 23.

²⁰² RTI INT’L, COUNTERING VIOLENT EXTREMISM (CVE) — DEVELOPING A RESEARCH ROADMAP: STAKEHOLDER RECRUITMENT AND ENGAGEMENT PLAN 2 (2015), https://www.dhs.gov/sites/default/files/publications/OPSR_TP_CVE-Developing-Research-Roadmap_Stakeholder-Recruitment-Engagement-Plan_201512-508.pdf [<https://perma.cc/P5RL-ER8N>].

²⁰³ E.g., Amna Akbar, *National Security’s Broken Windows*, 62 UCLA L. REV. 834, 840 (2015).

²⁰⁴ Paul H. Robinson, *Criminal Law’s Core Principles*, 14 WASH. U. JURIS. REV. 153, 164-218 (2021); cf. Steven Arrigg Koh, *Core Criminal Procedure*, 105 MINN. L. REV. 251 (2020)

emerges from fundamentally social, evolutionary origins wherein human group cohesion depended on human groups accepting rules that protected group members and, as necessary, meted out punishment for violating such rules.²⁰⁵ This tracks Brian Tamanaha's recent genealogical view of law, which situates law as a social inevitability from tribal human origins, then developed with greater sophistication in chiefdoms, early states, empires, and modern states, as social complexity has increased.²⁰⁶

Robinson rightly notes that this cross-cultural core underscores the availability of restorative justice mechanisms, which emphasize offender-victim mediation.²⁰⁷ Because "the method of punishment is *not* a core principle," societies and communities may vary in how they administer a justice system.²⁰⁸ Thus, variety in sanction — community service, fine, incarceration — is available so long as it accords broadly with community norms.²⁰⁹

Should this occur, conduct triggering criminal sanction would have greater mutual intelligibility given that the conduct itself appears more flagrant across communities. For example, while the prosecution of Derek Chauvin created the inevitable polarization described above, the flagrant conduct triggered greater community consensus for prosecution than, say, prosecution for possession of relatively minor amounts of narcotics.

(identifying a cross-cultural core of criminal procedural rights in domestic, transnational, and international criminal law).

²⁰⁵ See generally Paul H. Robinson, Robert Kurzban & Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633 (2007) (concluding that shared institutions of justice are "more likely a specific evolved human mechanism for acquiring these core intuitions").

²⁰⁶ See, e.g., BRIAN Z. TAMANAHA, A REALISTIC THEORY OF LAW 82-117 (John Berger ed., 2017).

²⁰⁷ Robinson, *supra* note 204, at 203-05.

²⁰⁸ *Id.* at 204.

²⁰⁹ *Id.* at 205. He also notes that international criminal law is not destined to fail due to deep cultural contingency in criminal codes; and yet it will have most moral credibility when it aligns itself with the core principles. *Id.* at 211-12.

3. The Abolitionist Horizon

Finally, how might a deeper understanding of the indictment question and prosecutorial messaging contribute to the abolitionist movement? As is well known, criminal legal scholarship may be broadly bifurcated into two schools. Reformists argue in favor of incremental criminal justice reforms to improve the function of the contemporary U.S. criminal justice system. For example, in policing, they argue for de-escalation training to reduce police violence.²¹⁰ Abolitionists, mindful of racial and class disparities in the criminal justice system, call for a complete reconceptualization of law enforcement, including abandoning state-sponsored violence in favor of community enforcement. For example, some currently envision an “abolitionist horizon,” wherein police are removed from the architecture of the American political economy.²¹¹ Others, in recent years, have developed a vision of prison abolition.²¹² And others have conceptualized a more robust version of restorative justice, which considers institutions of accountability outside of orthodox, adversarial, prosecutorial process.²¹³

Prosecutorial messaging and societal response provide a qualified justification for abolitionism. The aforementioned nature of criminal prosecution — an adversarial, antagonistic relationship between the state and the defendant — triggers inevitable societal problems. In a future where criminal sanction is all but eliminated, the societal

²¹⁰ E.g., Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 669 (2018); see also Steven Arrigg Koh, *Policing & the Problem of Physical Restraint*, 64 B.C. L. REV. 309 (2023) (exploring the trend of police department hand-to-hand trainings).

²¹¹ Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1787 (2020).

²¹² See generally Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013 (2022) (offering an alternative proposal to this approach).

²¹³ GERRY JOHNSTONE & DANIEL W. VAN NESS, *THE HANDBOOK OF RESTORATIVE JUSTICE* 1 (2007); Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147, 1148 (2020); Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFF. L. REV. 635, 637 (2021); Leo T. Sorokin & Jeffrey S. Stein, Book Review, *Restorative Federal Criminal Procedure*, 119 MICH. L. REV. 1315, 1327 (2021). While such scholars may not all label themselves abolitionists, they are part of a broader intellectual movement reconceptualizing mechanisms of accountability.

response to such cases may very well decrease. Thus, this provides a deeper justification for abolition not around individual desert, but on mitigating the effects of prosecution on society more generally.

However, this is a *qualified* justification for two reasons. First, as noted above, Onwuachi-Willig has noted that collective trauma often arises when a state systematically fails to promote accountability for crimes perpetrated against members of historically marginalized communities, such as in the case of Emmett Till, Ahmaud Arbery, Michael Brown, Trayvon Martin, and Tamir Rice.²¹⁴ Thus, it could well be that the inevitability of societal response will always call for some prosecutorial response. Second, the justification is qualified due to the problem of inevitability of violent crime in society, suggesting that criminal justice must always play a broader societal role. While the origins and nature of violence are contested in legal and other disciplines of scholarship,²¹⁵ even the most hopeful conceptions of the future imagine some form of inevitable violence necessitating community response. For example, in an Afrofuturist conception, Bennett Capers has argued that “much economic crime and even violent crime is traceable to frustrations from wealth inequality, legislation and norm building to redistribute wealth and de-fetishize unadulterated capitalism will have already removed the major incentive for much of this type of crime.”²¹⁶ But he has also recognized that “some crime will persist” and that “changes in police training will also likely impact police-citizen interactions.”²¹⁷ And Paul Robinson has recently canvassed historical examples of “no punishment”

²¹⁴ Onwuachi-Willig, *supra* note 24, at 353.

²¹⁵ Abolitionists have also advanced a theory of violence rooted in the “racialized political, economic, militarist, and environmental roots and manifestations of violence.” Allegra McLeod, *An Abolitionist Critique of Violence*, 89 U. CHI L. REV. 525, 527 (2022); *see also* HANNAH ARENDT, ON VIOLENCE 8-9 (1970); ELIZABETH FRAZER & KIMBERLY HUTCHINGS, VIOLENCE AND POLITICAL THEORY 1 (2020) (historically surveying political theorists’ accounts of the nature of violence); DAVID ALAN SKLANSKY, A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE 16 (2021); Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 604 (2011).

²¹⁶ I. Bennet Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 101, 137 (2019).

²¹⁷ *Id.* at 146.

communities that eventually had to enforce formal rules in the wake of harmful misconduct.²¹⁸

CONCLUSION

As the recent indictments of former President Trump demonstrate, prosecutorial messaging is a more complicated phenomenon than prosecutors often anticipate. Due to the varied messages that communities interpret, prosecutorial indictment and subsequent criminal process risk influencing elections, polarizing society, disrupting foreign relations, or fostering collective trauma. Social representations theory helps us to understand the complexities of such societal response, given it emphasizes how public information about criminal cases is incorporated into a “thick” set of collective beliefs that constitute communal social meaning. This social reality provides a new justification for democratization and decriminalization of criminal justice reforms, while also informing conceptualization of the abolitionist horizon.

²¹⁸ See Robinson, *supra* note 204, at 170-71 (chronicling attempts at doing so).