

# Speaking of Prosecutors: Deceptively Descriptive on the Surface with a Heavy Normative Undertow

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PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY  
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## I. INTRODUCTION

The American mass incarceration crisis and the collateral consequences that flow from it are long standing and well documented,<sup>1</sup> but the United States has only lately begun grappling with its international leadership in political penal punitiveness. Going back to William Stuntz's groundbreaking discussion of the *Pathological Politics of Criminal Law* in the United States,<sup>2</sup> both the scholarly literature and the popular dialogue surrounding mass incarceration have largely focused on the role of legislatures or the police in driving the incarceration crisis, ignoring the role that prosecutorial politics and power have played in it or alluding to it only in passing.<sup>3</sup> It is for this reason that Maximo Langer and David Alan Sklansky's edited volume, *Prosecutors and Democracy*,<sup>4</sup> which contains comparative perspectives about the respective roles that prosecutors and democracy have in shaping one another, is so timely.

I have previously written about the conflicts of interest that conviction-based performance measures in American prosecutors' offices create, by incentivizing prosecutorial overcharging, a leading—but often unexplored—

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<sup>1</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); John Pfaff, *The Durability of Prison Populations*, 2010 U. CHI. LEGAL F. 73.

<sup>2</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

<sup>3</sup> See John Pfaff, *The Micro and Macro Causes of Prison Growth* 28 GA. ST. L. REV. 1239, 1242 (2012) (explaining that studies of mass incarceration tend to focus on the role of macro developments and complex social phenomena at the state and national level while ignoring “the fact that it appears county prosecutors bear the largest responsibility.”); Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, THE ATLANTIC (May 18, 2016), <https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/> (last visited Nov. 29, 2018) (explaining that, until recently, mass incarceration was blamed on macro-level explanations like socio-economic factors or sentencing guidelines while ignoring the role of growing prosecutorial power); see, e.g., JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); Brett Dignam, *Learning to Counter Mass Incarceration*, 48 CONN. L. REV. 1217 (2016); Eisha Jain, *Capitalizing on Criminal Justice*, 67 DUKE L.J. 1381 (2018); Jonathan Simon, *Consuming Obsessions: Housing, Homicide, and Mass Incarceration Since 1950*, 2010 U. CHI. LEGAL F. 165; Jonathan Simon, *The New Overcrowding*, 48 CONN. L. REV. 1191 (2016).

<sup>4</sup> PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY (MAXIMO LANGER & DAVID ALAN SKLANSKY, eds. 2017) [hereinafter “PROSECUTORS & DEMOCRACY”].

contributor to mass incarceration in the United States.<sup>5</sup> Recent media coverage of the so-far stalled attempts at national criminal-justice reform have hinted at the role that prosecutors have played in the dysfunctional politics of crime in the United States.<sup>6</sup> That is why it is so exciting to see a comparative scholarly perspective on prosecutorial accountability at this moment in time.

While dedicated to the role of prosecutors in international contexts more broadly, much of the sprawling collection of book chapters sheds light on both the role of prosecutors in driving dysfunctional penal policies and their insulation from accountability for that role in the United States. While the collection is framed as a comparative study and appears, on its surface, to be a descriptive comparison of various prosecutorial models of accountability, taken together, many of the chapters read more like a collective critique of the dysfunctional politics of American prosecution. As David Sklansky notes in his final chapter of the collection: “Europe relies on hierarchical oversight to guide prosecutors and to keep them in check. Americans prize local democratic control, so we [attempt to] do with elections what Europeans do with multi-tiered bureaucracy.” (Pp. 278–79.) He describes the resulting contrasting views on the role of prosecutors in the United States and Europe, with the traditional American prosecutorial archetype being an adversary, working closely with the police, and exercising a great deal discretion and the traditional European prosecutorial archetype being an inquisitor or adjudicator, and officer of the court, and an agent of the law. (P. 287.)

## II. INDIVIDUAL CONTRIBUTIONS

### A. *International Perspectives*

In her chapter, entitled “The Democratic Accountability of Prosecutors in England and Wales and France,” Jacqueline Hodgson describes and contrasts the different accountability measures governing prosecutors in England and Wales and France, respectively. She notes that, in France, *le procureur* (the public prosecutor) is not elected and has a hybrid role, as a judicial officer who implements government policy. (Pp. 85, 98.) Hodgson identifies a threat to prosecution and democracy in France from the executive branch and, in particular, political meddling via executive control over prosecution, which historically extended to instructions in individual cases. (P. 101.) She notes that, historically, instructions in individual cases enabled governments to protect favored individuals from scrutiny, by steering cases away from the *juge d’instruction* and under the authority of the *procureur*, undermining the independence of the *procureur*. (P. 101.)

In her description of prosecutors in England and Wales, Hodgson notes that the Director of Public Prosecutions (“DPP”), like the French *procureur*, is also an unelected official, but, unlike the *procureur*, does not sit within a political or

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<sup>5</sup> See Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors’ Offices*, 22 CORNELL J.L. & PUB. POL’Y 53 (2012); see generally Pfaff, *supra* note 3.

<sup>6</sup> See Lantigua-Williams, *supra* note 3.

judicial hierarchy. (P. 98.) Therefore, crown prosecutors in England and Wales are not under the direct authority of the Minister of Justice. (P. 102.) Instead, the DPP is appointed by and responsible to the Attorney General, whose office advises the government and represents the public interest, which is conventionally defined narrowly so as to exclude the political interests of the government. (P. 87.) Hodgson notes that this creates a less direct line of political accountability, which gives prosecutors in England and Wales a high degree of professional autonomy. (Pp. 87, 98.) Instead, the accountability of Crown Prosecutors comes from the range of legal guidance and “plethora of policy guidance” that they must follow with regard to charging decisions and the public’s participation in the development of DPP policies. (Pp. 89, 105.)

In her chapter, entitled “The French Prosecutor as Judge,” Mathilde Cohen picks up the theme of the hybrid nature of French prosecutors as members of the judiciary who nonetheless report to the executive branch. (Pp. 115.) She notes that, like their American counterparts, French prosecutors have no real obligation to justify their exercises of prosecutorial discretion.<sup>7</sup> She also notes that, possibly unlike some of their American counterparts, French prosecutors identify themselves as “impartial accusers” and “advocates of the law” who disinterestedly apply criminal statutes for the ‘public good,’” (P. 111.) who “insist that they are not a typical party to the criminal trial . . .” (P. 128.)

Like Hodgson, Cohen notes the historical entitlement of the Minister of Justice to define national penal policies and to give written instructions in individual cases, including the *de jure* power to order the prosecution of a given person and the *de facto* power to discontinue the prosecution of a political ally. (Pp. 117–18) Nonetheless, Cohen argues that, in practice, French prosecutors have developed several approaches to counteracting hierarchical and political pressures, including by way of decentralization, unionization, and their identification with the judiciary. She claims that the structural and professional bonds between judges and prosecutors, along with their overlapping areas of competence, operate as checks on their discretion and a powerful motivation for prosecutors to be independent decision makers. (Pp. 130–31.) As a result, prosecutors’ unions have been active in pushing for greater prosecutorial independence, at both the individual and collective level, including demands for insulating the transfer and promotion systems from political interference by the executive branch. (Pp. 135–36.) They also have more discretion in how they prosecute crimes, which includes a more diverse range of penal responses, including the growing use of alternative dispute resolutions. (P. 134.)

In her chapter, entitled “German Prosecutors and the Rechtsstaat,” Shawn Boyne explores the structure and role of the German prosecutorial service and mines them for broader lessons about the relationship between prosecutorial independence and democratic accountability. She notes that “in contrast to the current robust criticism concerning prosecutorial overreaching in the U.S., the

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<sup>7</sup> See *id.* at 120. French prosecutors are under a legal duty to explain their decisions to their supervisors in only three circumstances, when they: decline to prosecute or terminate prosecution; seek or extend a suspect’s pretrial detention; and propose charges in the “most serious” cases. *Id.* In the first two situations (declination and pretrial detention), their reasons are “purely boilerplate,” in that they “check boxes on fill-out forms.” *Id.* at 120–21.

German prosecution service is not under fire for over-prosecuting cases.” (P. 140.) According to Boyne, “German prosecutors do not measure their success in convictions and long sentences.” (P. 167.) Instead, as unelected bureaucrats with life tenure and a statutory mandate to be beholden only to the law, whose offices are independent of both the police and the judiciary, German prosecutors are apolitical and function relatively free from political influence. (Pp. 141–42.) As a result: “Unlike American prosecutors, who may define their individual success . . . in terms of ‘winning’ trials and ‘putting the defendant away,’” most German prosecutors “are not invested in ‘winning’ a case.” (P. 145.)

Boyne notes that the *die Generalstaatsanwalte* (the General Public Prosecutors, who are the top regional prosecutors throughout Germany) are directly accountable to the Ministry of Justice and bound to follow the orders of their superiors, and the Minister is politically accountable to Parliament. (Pp. 141–42, 149, 151, 157.) She concedes that the ministry’s control function could constitute “questionable political interference,” but notes that, unlike in France, prosecutors’ superiors cannot generally order them to handle individual cases in specific manners, but rather can only issue general instructions that apply to categories of routine types of cases. (Pp. 141–42, 149, 151, 157, 159.) In fact, in Germany, these instructions are not even mandatory, but rather “an informal suggestion.” (P. 159.) Because of these structural guarantees of independence, Boyne claims that most members of the German prosecution service “are fiercely independent and seek to serve the law, rather than politics.” (P. 143.) She credits organizational culture, and in particular “informal collegial controls,” (P. 154.) with nurturing prosecutors’ relative independence in Germany, along with their commitment to *Rechtsstaat*, the requirement that the State act in a lawful way. (Pp. 145–46, 154.) She describes German prosecutors as “protected civil servants who are embedded in a collegial culture that fosters a norm of non-partisanship and impartiality.” (P. 159.) That culture dictates that German prosecutors be guardians of the law and pillars of the *Rechtsstaat*. (P. 146.) She also credits Parliamentary oversight with being a check against cases of partisan interference in prosecutorial decision making. (P. 159.)

While descriptive on the surface, taken together, Hodgson’s, Cohen’s, and Boyne’s chapters strongly suggest that removing prosecutors from the instructional hierarchy of elected politicians, or at least limiting the nature and scope of their interference with the exercises of prosecutorial discretion, is the best way to breed a culture of prosecutorial professionalism.

### B. Domestic Perspectives

The book opens theoretically with Antony Duff’s chapter, entitled “Discretion and Accountability in a Democratic Criminal Law,” in which he explores the concern that arises from unaccountable prosecutorial discretion and the appropriate role of prosecutors in a democracy and, in the process, takes aim at prosecutorial overcharging. (Pp. 9–32.) Duff asserts that equal concern and respect for all members of the polity are democratic requirements. (P. 13.) He argues that the enactment of overbroad criminal offenses gives prosecutors “a dangerous power to coerce citizens” whose conduct minimally satisfies the definition of the offense. (P. 23.) He deduces, therefore, that, in addition to

applying an evidential test, prosecutors should also apply a public interest test in deciding whether to prosecute individual offenders and that this test should include consideration of proportionality and the seriousness of the defendant's actual conduct in relation to the conduct at which the penal statute is aimed and the costs of prosecution and punishment on the defendant. (Pp. 20–26, 29–30.) He notes: “No one can seriously hold that we must prosecute and punish *all* those who commit public wrongs, whatever the cost . . .” (Pp. 25.) In this sense, the consideration of proportionality that he advocates is one that asks “not only whether a kind of conduct constitutes a public wrong that [legislators] therefore have reason to criminalise, but whether it is a wrong of such a kind that that reason is a *good enough* reason.” (P. 25.) Duff also discusses the concept of mercy, “as something distinct from justice,” which is an additional reason for prosecutors not to prosecute certain cases. (P. 26.)

Similarly, in his chapter, entitled “Accounting for Prosecutors,” Dan Richman identifies several ways that legal actors can address both overcharging and the collateral consequences of criminal convictions by exploring the power that prosecutorial discretion gives American prosecutors to effectively define the criminal law more narrowly than the outer limits of penal statutes. (Pp. 45, 73.) He notes that this power also gives prosecutors the ability to force police officers to account for their actions. (P. 53.) He also describes the “soft power” that judges have to admonish prosecutorial charging and plea bargaining, even though the separation of powers generally prohibits formal review of these decisions. (P. 67.) He concludes that the system would benefit from the promotion of a “shared language of justification” for discretionary decisions in the criminal-justice system. (P. 70.)

Later, the edited collection moves in a more applied direction. In his chapter, entitled “The Organization of Prosecutorial Discretion,” William Simon traces the salient elements of prosecutorial discretion in the United States, comparing the regulation of prosecutors' decision making with the regulation of professional decision making in other fields. He notes a trend in American prosecution away from “informal standards associated with professionalism” toward more specific, presumptive rules. (Pp. 184.) He also documents the rarity of peer review in American prosecution, noting the possibility (but absence) of intensive qualitative discussions of individual cases akin to mortality/morbidity reviews of adverse events in medicine. (P. 187.) Simon discusses performance measurement, contrasting good performance metrics, which are linked to ongoing assessments of relevant practices and produce systemic information that can guide reform, with poor performance metrics, which are incomplete and focus on rewards and sanctions, using the “teaching to the test” phenomenon in education as an example. (P. 189.) Finally, Simon links his observations about prosecutorial discretion to the concept of democracy, proposing an alternative conception of accountability embedded in the notion of stakeholder democracy in lieu of a narrower conception of democracy that emphasizes only electoral politics. (P. 193.)

In her chapter, entitled “Prosecutors, Democracy, and Race,” Angela Davis's critique of the American system of prosecutorial elections is more explicit, although her piece challenges Americans to make lemonade out of this lemon, by calling on them to use their electoral system better to address

persistence racial bias in the criminal-justice system. (P. 195.) Davis begins by noting two things that are relevant to her normative thesis: first, that racial disparities are more often the result of unconscious biases than intentional discrimination (P. 205.); and, second, that prosecutors make the most important decisions in the criminal process in the exercise of their charging and plea bargaining (and, therefore, sentencing) discretion and that they do so with “very little accountability to the people they serve.” (P. 195.) Taken together, the result of these two observations is that prosecutors’ implicit racial biases result in racial disparities in their charging and plea-bargaining decisions. (P. 205.) Therefore, due to the dominant role that prosecutors play in the criminal process, the biases in their decisions often produce and perpetuate systemic failures like unwarranted racial disparities, mass incarceration, and police killings of unarmed people of color. (Pp. 195, 202.)

Nonetheless, Davis’s chapter is rather hopeful. She argues that, despite the widespread use of prosecutorial elections at the state and local levels in the United States, the electoral system has not proven to be an effective mechanism of accountability for prosecutors, especially when it comes to racial disparities, due to the lack of transparency in prosecutorial elections, the frequency of incumbents running without opposition, and the popularity of “tough on crime” platforms. (Pp. 195, 207–209.) She claims that the electoral system, despite its flaws, provides an effective opportunity to hold prosecutors accountable and tackle the racial disparities in the American criminal-justice system through the election of prosecutors who are committed to racial justice. (Pp. 224–25.) She also claims that the response to prosecutors’ failure to bring charges arising out of a number of recent, high-profile police killings of unarmed black men—like the killing of Eric Garner by Staten Island police officers and the killing of Michael Brown in Ferguson, Missouri—has sparked widespread protests, invigorated the Black Lives Matter social-justice movement, and may change the lack of attention that the electorate ordinarily pays to prosecutorial elections and the important role that prosecutors play in determining whether people of color are treated fairly in the criminal-justice system. (Pp. 210–13.)

Davis contrasts the case studies of Robert McCulloch’s poor handling of the Brown case in Ferguson and Marilyn Mosby’s better handling of the Freddie Gray case in Baltimore, Maryland with John Chisholm, the District Attorney in Milwaukee, Wisconsin’s long-term commitment to racial justice to demonstrate that a prosecutor’s handling of a single high-profile case will not have an impact on racial disparities in the criminal-justice system.<sup>8</sup> Based on the lessons drawn from these case studies, Davis concludes that the democratic election of prosecutors can only serve to eliminate racial disparities with more transparency in the prosecution function and the election of prosecutors who are committed to racial justice and that a prosecutor’s commitment to racial justice can only be

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<sup>8</sup> See *id.* at 210–24. McCulloch has been widely criticized for his anemic and inadequate legal instructions to the grand jury investigating the Brown shooting and his denigration of victims of other police shootings in the media. See *id.* at 215. Chisholm, on the other hand, agreed to participate in the Vera’s Institute’s Prosecution and Racial Justice Program, which involved the collection and analysis of data to determine the impact of prosecutors’ discretionary decisions on criminal-justice disparities. See *id.* at 223.

demonstrated by a pledge to take affirmative steps to remedy disparities. (Pp. 196, 210, 222.)

In her chapter, entitled “Prosecuting Immigrants in a Democracy,” Ingrid Eagly also explicitly critiques American prosecutors who rely on the tools of the immigration system to buttress the criminal prosecutions of non-citizen defendants. (P. 236.) She begins by describing the expansive control that American prosecutors have over not only criminal cases, but also immigration outcomes for non-citizen defendants. (P. 239.) She notes the power of prosecutors to trigger the deportation of noncitizens through the pursuit and negotiation of pretextual criminal charges and the exclusion of noncitizens from alternatives to imprisonment, in a system in which deportation is increasingly a prosecutorial goal rather than a collateral consequence of conviction, even when the evidence is insufficient to sustain the underlying criminal charges. (Pp. 233–34, 237–38.) She also describes the parallel system of federal prisons for non-citizen inmates, which are run exclusively by for-profit corporations and are designed with particularly high percentages of extreme isolation cells. (P. 238.)

These descriptions underlie Eagly’s normative questions about how the criminal law in a democratic society ought to treat noncitizens. (P. 228.) She argues that the blurring of immigration and criminal enforcement through the exposure of immigrants to enhanced criminal punishments and the use of prosecutorial immigration powers to bypass the normal protections of criminal procedure have distorted the prosecutorial function and core procedural safeguards, fostered unequal treatment based on citizenship status, and resulted in systematically greater punishments for immigrants compared to citizens. (Pp. 233–37.) She advocates three specific reforms: (1) written prosecutorial policies to ensure the consistent consideration of immigration consequences during plea bargaining and encourage the practice of allowing non-citizens to plead around immigration consequences; (2) judicial oversight of deportation consequences by criminal sentencing judges; and (3) increased public-defender resources to enable the provision of effective and comprehensive legal representation for non-citizens clients. (Pp. 240–47.) She concludes by urging the decoupling of criminal prosecution from punitive reliance on the immigration system and the rejection of formal rules of citizenship as the mechanism for delineating the scope of substantive law and procedural protections in the criminal-justice system. (P. 249.)

Perhaps no chapter in the edited collection calls more clearly for reform of American prosecutorial politics than Jonathan Simon’s chapter, entitled “Beyond Tough on Crime: Towards a Better Politics of Prosecution,” in which Simon picks up on many of the themes in Davis’s chapter with regard to the challenges facing policing, courts, and correctional institutions in light of the severity of the American carceral state, including mass incarceration, punitive policing, and the resulting crisis in legitimacy that has emerged in the past two decades. (Pp. 251, 253, 258.) Simon argues that the relative invisibility of prosecutorial operations, in which the public aware only of the local prosecutor’s “conviction rate,” has fostered the maintenance of racial hierarchies and close alignment with the police while nonetheless enabling prosecutors’ absence from the visible leadership on criminal-justice reform. (Pp. 250, 254, 256–57, 261, 271.) He explains how the politics of prosecution include influencing how

citizens in the carceral state imagine crime and the penal system, based on a presumption of dangerousness, prosecutors' "experiential knowledge of the criminal class," (P. 260.) and promoting a specific set of normative expectations about what political institutions can do to foster public safety by maximizing imprisonment and over-punishing people of color who do not pose a significant risk to public safety, while simultaneously espousing a color-blind vision of equality. (Pp. 254, 257–58, 260, 271.)

Simon then explores two alternative types of politics of prosecution and evaluates them normatively. First, he describes the new "smart on crime" politics of many putative reform prosecutors. (P. 264.) He argues that, while a few individual elected prosecutors and former Attorneys General have become identified with the cause of criminal-justice reform, and while self-described reform prosecutors have won elections, most have not been willing to go so far as to confront the true legitimacy crisis of mass incarceration. (Pp. 251, 253.) He describes the prosecutorial politics of "smart on crime" as being based primarily on "the language of dollars and results" (P. 271)—i.e., ideas about budget deficits, economic efficiency, empiricism (evidence-based practices, with a focus on recidivism), and managerial effectiveness, such as maximizing public "return on investment." (Pp. 259–61, 271.) He argues that proper scale of the carceral state is primarily a normative and political judgment, not an empirical one. (P. 261–62.) He also argues that recidivism rates are themselves fundamentally normative, based largely on subjective decisions like whether and when to "violate" and reincarcerate probationers and parolees for mere technical violations of their conditions of release. (P. 262.) He critiques the politics of "smart on crime" as an insignificant break with the politics of "tough on crime" because "smart on crime" prosecutors stop short of applying their calls for reducing incarceration and enhancing reentry programs to long prison sentences for serious, violent crimes, the greatest driver of the human and financial costs of the carceral state. (P. 260–65.) He also critiques the "smart on crime" prosecution movement for failing to engage meaningfully with its public audience, change its normative commitments to the public-safety model, shift its primary emphasis away from its espoused ability to pick out the dangerous class of criminals, sever its close alliance with the racially discriminatory police machinery, or address its own "culture of misconduct." (Pp. 262–63, 265.)

By way of contrast, Simon describes a second emerging model of prosecutorial reform, based on "the language of dignity and empathy," (P. 271.) which he calls the "politics of dignity" (P. 266) and describes as a more radical departure from the politics of "tough on crime." (P. 265–266, 271.) This model includes efforts to force institutional changes by signaling different normative expectations for the carceral state, including reforming racial and procedural justice, increasing prosecutorial accountability for police racism and mass incarceration, reforming the basic police mission to deemphasize aggressive confrontation through pretextual stops, advancing the causes of human dignity, respect, equality, and redemption, and humanizing, destigmatizing, and restoring the prosecuted and punished. (Pp. 265–70.) He notes that many of these prosecutors are people of color who openly cite the over-policing and punishment of communities of color as their motivation for reform and make racial justice an explicit value for their offices. (P. 267.) Examples of these new



prosecutorial politics of dignity include nomenclature reforms in the Office of Justice Programs at the United States Department of Justice during the Obama administration and by prosecutors Marilyn Mosby in Baltimore and George Gascon in San Francisco. (Pp. 269–70.) Simon concludes, perhaps cynically, that the vast majority of prosecutors appear to be banking on the reform movement fading away, without political risk to themselves, without any significant political or legal limitations on their prosecutorial power or a revision of their normative expectations. (P. 271.)

The collection ends with a chapter by Sklansky, entitled “Unpacking the Relationship Between Prosecutors and Democracy in the United States,” in which he describes different conceptions of the prosecutor’s role and issues a call to think seriously about the challenges that the growing emphasis on prosecutorial power and flexibility poses for accountability, noting, in particular, that “racial diversity among prosecutors matters . . . .” (Pp. 286, 294–95.) He notes the longstanding critique of American prosecutors as “overly aggressive in pursuing criminal convictions and seeking to impose harsh punishment—except when law enforcement officials engage in wrongdoing, when prosecutors . . . are insufficiently aggressive.” (P. 278.) He observes that the overcriminalization critique has gained momentum over the past two decades, as public awareness over mass incarceration, wrongful convictions, prosecutorial misconduct, and police impunity has risen. (P. 278.) He summarizes this sentiment simply: “Politics drives [American] prosecutors to excessive zeal (except when fellow law enforcement personnel are accused of crimes), and prosecutors drive politics to paranoia and a ‘culture of control.’” (P. 278.) He concurs with the critique advanced elsewhere in the collection that prosecutorial elections in the United States do not currently serve a meaningful accountability function, describing prosecutorial elections as “a distraction, with little impact on the choices prosecutors make.” (P. 280–81.)

Sklansky agrees with Davis’s optimistic take on the way forward, advocating a participatory model of democracy and suggesting that “local elections *could* be a valuable mechanism for making criminal justice more responsive to community concerns and more reflective of community values” (P. 281.) if they came with greater transparency. (Pp. 281, 283–84.) His suggestions for bolstering transparency and “harness[ing] the power of democratic oversight,” (P. 281.) include imposing restraints on prosecutorial discretion through bureaucratic guidelines, supervisory oversight, and standardized procedures for review of adverse charging decisions, empowering community members through the use of “neighborhood prosecution” models, and developing a data-driven ranking system or “report card” for prosecutorial performance. (Pp. 281–82, 298.)

## III. CONCLUSION

The study of prosecutorial discretion and accountability is a sprawling and well-canvassed field and a challenging one in which to find fresh, original contributions. There is a wide variation in the way that different countries organize and regulate their prosecutors and in the national legal cultures in which those prosecutors operate, and the contributors to this collection explore democratic values that affect the prosecution function around the democratic world. In doing so, they focus on themes that bear on the role of prosecutors in shaping criminal-justice systems at the macro level: discretion, supervision, oversight, accountability. One of the themes of the edited collection is the tension between prosecutorial independence and accountability, which has already been explored extensively in the literature of criminal-law theory.<sup>9</sup>

What the insights in this collection of essays contribute to this discussion is in their sometimes explicit and sometimes unspoken links to the tough-on-crime electoral politics of American prosecution, a particularly salient topic at this moment in time. None of the book chapters explicitly discusses the fact the United States is alone in the developed world in electing most of its prosecutors (and mostly in partisan elections in which the incumbent runs unopposed for reelection)<sup>10</sup>—probably because this fact is well known to any student of comparative criminal law. Nonetheless, recognizing the dark side of “accountability” efforts, particularly when accountability comes in the form of electoral politics or hierarchical prosecutorial decision making, is an important first step to unpacking the magnitude and quality of prosecutors’ contributions to deeply punitive American carceral state.

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<sup>9</sup> See, e.g., Giuseppe di Federico, *Prosecutorial Independence and the Democratic Requirement of Accountability in Italy*, 38 BRIT. J. CRIMINOLOGY 373 (1998).

<sup>10</sup> See Lantigua-Williams, *supra* note 3.