

# Fordham Urban Law Journal

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Volume 50  
Number 5 *50th Anniversary Symposium: The  
Future of Prosecution*

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Article 7

2023

## Prosecution and Polarization

Steven Arrigg Koh

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### Recommended Citation

Steven Arrigg Koh, *Prosecution and Polarization*, 50 Fordham Urb. L.J. 1117 (2023).  
Available at: <https://ir.lawnet.fordham.edu/ulj/vol50/iss5/7>

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## PROSECUTION AND POLARIZATION

*Steven Arrigg Koh\**

*Domestically and internationally, two prominent contemporary discourses arise in law and society. First, we live in a time of tremendous uncertainty about the nature and function of criminal justice. In the United States, we chronicle mass incarceration, while the international community weighs war crimes prosecutions in Ukraine. Second, we live in a time of polarization, both at home and abroad. Cultural and political division is elevated domestically, while the international community debates fragmentation in a multipolar world.*

*This symposium contribution to the Fordham Urban Law Journal's "Future of Prosecution" symposium asks: what does it mean to prosecute in a time of polarization? This contribution describes a prosecution-polarization dynamic, wherein criminal cases may foster polarization domestically and internationally. In making this argument, this symposium contribution will survey theories of philosophy, psychology, and sociology that show the complexity of social meaning. It argues that this dynamic thus complicates scholarly notions that criminal justice should do reparative work. Domestically, some scholars argue that criminal justice should restore harmed victims or reconstruct torn community norms after a moral breach. Internationally, scholars contend that criminal tribunals should effect transitional justice, promoting accountability for atrocity crimes — genocide, crimes against humanity, and war crimes — in order to heal post-conflict societies. And yet, often, indictment and prosecution have the opposite effect, fostering polarization and alienation.*

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## INTRODUCTION

Domestically and internationally, two prominent contemporary discourses arise in law and society. First, we live in a time of tremendous uncertainty about the nature and function of criminal justice. In the United States, we chronicle mass incarceration and policing,<sup>1</sup> while the international community now weighs prosecution of war crimes in Ukraine.<sup>2</sup> Second, we live in a time of polarization, both at home and abroad. Cultural and political division is higher than in recent decades domestically and in foreign jurisdictions, while the international community debates fragmentation in a multipolar world.<sup>3</sup>

This contribution to the *Fordham Urban Law Journal*'s "Future of Prosecution" Symposium asks: what does it mean to prosecute in a time of polarization? This contribution describes a *prosecution-polarization dynamic*, wherein criminal cases may foster polarization domestically and internationally.

The prosecution-polarization dynamic complicates scholars' notion that criminal justice should do reparative work. Domestically, some scholars argue that criminal justice should restore harmed victims or reconstruct torn community norms after a moral breach. Internationally, other scholars contend that criminal tribunals should effect transitional justice, promoting accountability for atrocity crimes — genocide, crimes against humanity, and

1. See generally, e.g., PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017); Daniel C. Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, in *THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ* (Michael J. Klarman, David A. Skeel, Jr. & Carol Steiker eds., 2012); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007).

2. See Erika Kinetz, *How Would Those Accused of Ukraine War Crimes Be Prosecuted?*, PBS (Mar. 25, 2022), <https://www.pbs.org/wgbh/frontline/article/what-are-war-crimes-russia-ukraine/> [https://perma.cc/ABC3-QBZB].

3. See Stephen M. Walt, *America is Too Scared of the Multipolar World*, FOREIGN POL'Y (Mar. 7, 2023, 5:18 AM), <https://foreignpolicy.com/2023/03/07/america-is-too-scared-of-the-multipolar-world/> [https://perma.cc/S2TC-WCEP].

war crimes — in order to heal post-conflict societies. And yet, often, indictment and prosecution have the opposite effect, fostering polarization and alienation. In making this argument, this symposium contribution will briefly survey theories of philosophy, psychology, and sociology that show the complexity of social meaning. Prescriptively, it will argue that this dynamic should caution domestic and international institutional actors to be more circumspect about criminal justice as a policy modality.

I have previously explored aspects of this phenomenon in my scholarship on foreign affairs prosecutions and the criminalization of foreign relations. Specifically, I have argued that the autonomous action of U.S. prosecutors may trigger foreign relations consequences when such cases implicate foreign countries.<sup>4</sup> But such unintended consequences are not restricted to the cross-border context; they also apply domestically and internationally.<sup>5</sup> Meanwhile, in the domestic context, scholars such as Monica C. Bell and Joshua Kleinfeld have emphasized anomie and alienation in their theories of legal estrangement and reconstructivism,<sup>6</sup> while Jamal Greene has analogously shown how the structure of constitutional litigation undesirably sets up cycles of winners and losers.<sup>7</sup> And international criminal justice scholars moot expressivism as a theory of international criminal justice.<sup>8</sup> This symposium contribution expands on such insights to consider how the nature and structure of criminal prosecution may foster polarization at home and abroad.

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4. See generally Steven Arrigg Koh, *The Criminalization of Foreign Relations*, 90 *FORDHAM L. REV.* 737 (2021) [hereinafter Koh, *The Criminalization of Foreign Relations*]; Steven Arrigg Koh, *Othering Across Borders*, 70 *DUKE L.J. ONLINE* 161 (2021); Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 *N.Y.U. L. REV.* 340 (2019).

5. See generally Steven Arrigg Koh, *How Do Prosecutors “Send a Message”?*, 57 *U.C. DAVIS L. REV.* (forthcoming 2023) [hereinafter Koh, *How Do Prosecutors “Send a Message”?*].

6. See Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 *HARV. L. REV.* 1485, 1495 (2016); see generally Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 *YALE L.J.* 2054 (2017).

7. See JAMAL GREENE, *HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART* xxxii (2021); see generally Jamal Greene, *Foreword: Rights as Trumps?*, 132 *HARV. L. REV.* 28 (2018); see also RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977).

8. See generally, e.g., CARSTEN STAHN, *JUSTICE AS MESSAGE: EXPRESSIVIST FOUNDATIONS OF INTERNATIONAL CRIMINAL JUSTICE* (2020); Antony Duff, *Authority and Responsibility in International Criminal Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 589, 593 (Samantha Besson & John Tasioulas eds., 2010); David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 569, 575–76 (Samantha Besson & John Tasioulas eds., 2010).

Part I defines polarization and describes the prosecution-polarization dynamic across three stages.<sup>9</sup> Part II briefly surveys how philosophy, psychology, and sociology explain the social meaning animating this phenomenon.<sup>10</sup> Part III considers how such consequence bolsters arguments for democratization and decriminalization.<sup>11</sup>

Before proceeding further, I wish to clarify two points. First, causation is difficult to pinpoint precisely. Polarization may drive criminal justice, criminal justice may foster polarization, and they may often function independently as sociolegal phenomena. As such, I recognize three conceptualizations of law and culture: one in which culture creates law, one in which law influences culture, and one in which law functions as its own cultural system.<sup>12</sup> This symposium contribution allows for all three possibilities, recognizing the necessity of empirical work in this space. Second, this symposium contribution purposely engages in macroscopic, comparative analysis of three tiers of criminal justice: domestic, transnational, and international. Each system is distinct, and thus an innumerable number of differences can and should add analytical subtlety. But it is conceptually useful to consider — across many contexts — the nature and limits of a penal system of retrospective accountability backed by deprivation of liberty.

## I. THE PROSECUTION-POLARIZATION DYNAMIC

As an initial matter, this Part will briefly define polarization and then describe, in broad strokes, the prosecution-polarization dynamic, or process by which prosecution may foster polarization.

### A. Defining Polarization

What do I mean by polarization? Definitions vary across literatures.<sup>13</sup> For present purposes, we may conceive of polarization as “the act of dividing

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9. *See infra* Part I.

10. *See infra* Part II.

11. *See infra* Part III.

12. *See* Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 841 (2011) (discussing three major approaches to the connection between law and culture).

13. *See, e.g.*, Boris Shor, *How U.S. State Legislatures Are Polarized and Getting More Polarized (in 2 Graphs)*, WASH. POST: MONKEY CAGE (Jan. 14, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/01/14/how-u-s-state-legislatures-are-polarized-and-getting-more-polarized-in-2-graphs/> [<https://perma.cc/N79A-KL3Z>] (“Polarization is defined as the average ideological distance between the median Democrat and Republican in the state legislature. Larger numbers indicate more division.”); David E. Pozen et al., *A Computational Analysis of Constitutional Polarization*, 105 CORNELL

something, especially something that contains different people or opinions, into two completely opposing groups.”<sup>14</sup> Within this definition lie three critical concepts. First, *division* of groups of people. Second, relational *opposition*, wherein the groups assume an adversarial posture vis-à-vis one another. Third, inherent in such opposition is the solidarity felt *within* each particular group. In other words, polarization is characterized by a “push-pull” dynamic.<sup>15</sup>

Polarization is at historically high levels. Differing cultural views have become increasingly important in shaping Americans’ party preferences and political identities. Politics is not “a vehicle through which we might resolve divisive cultural issues,” but is rather fueled by culture wars.<sup>16</sup> Politically, both elected Democrats and Republicans are more ideologically cohesive: only about two dozen moderate Democrats and Republicans are left on Capitol Hill; by contrast, in 1971–72, more than 160 were moderate.<sup>17</sup> And both parties have moved further away from the ideological center since the early 1970s.<sup>18</sup> Media fragmentation may be a factor in such polarization. While causation is difficult to pinpoint precisely, the proliferation of print, cable, online, and social media has coincided with a rise in diverse — and often, contradictory — viewpoints about virtually every aspect of American life.<sup>19</sup> In 2023, many online content creators literally wait for the next big news event before immediately providing an opinion-oriented take from their partisan vantage point. From COVID-19 vaccines to the war in Ukraine and the upcoming 2024 election, the instantaneous generation of fragmented narratives is often dizzying. This media environment has also engulfed

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L. REV. 1, 7 (2019) (defining constitutional polarization as the divergence in the way that “major political blocs in the United States” think and talk about the Constitution).

14. *Polarization*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/polarization> [https://perma.cc/JZM7-RWPY] (last visited Apr. 12, 2023).

15. Joshua Kleinfeld has noted the push-pull dynamic of solidarity and alienation in his normative theory of criminal law reconstructivism. See Kleinfeld, *supra* note 6, at 1495 (“The country . . . can’t function well with . . . alienation, and if this diagnosis is right — if alienation is at the core of America’s crime/race problem — then solidarity is the right medicine. Solidarity is alienation’s obverse.”).

16. Zach Stanton, *How The “Culture War” Could Break Democracy*, POLITICO (May 20, 2021), <https://www.politico.com/news/magazine/2021/05/20/culture-war-politics-2021-democracy-analysis-489900> [https://perma.cc/P4KT-UUFP].

17. Drew Desilver, *The Polarization in Today’s Congress has Roots that Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), <https://www.pewresearch.org/short-reads/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/> [https://perma.cc/P2W3-EK4J].

18. *Id.*

19. Steven Arrigg Koh, “Cancel Culture” and Criminal Justice, 74 HASTINGS L.J. 79, 87–90 (2022) (discussing how cancel culture constitutes public shaming through the new medium of social media).

public opinion on legal topics, such as the nature of Constitutional protections and the legitimacy of the U.S. Supreme Court. New York University's Center for Business and Human Rights — in a review of over 50 social science studies and interviews with over 40 academics, policy experts, activists, and current and former industry people — suggested that platforms like Facebook, YouTube, and Twitter exacerbate political polarization.<sup>20</sup> However, it also concluded that such platforms are not the root cause of such polarization.<sup>21</sup>

In foreign and international fora, we may observe distinct but overlapping discourses. Countries such as South Korea, Brazil, and the United Kingdom face internal division over domestic and international policy.<sup>22</sup> Meanwhile, the international legal community is facing Third World scholarly critiques at the same time it grapples with populism and multipolar fragmentation. Regarding criminal justice specifically, various countries debate the nature and function of criminal justice, with countries varying in their commitment to and capacity for rule of law.<sup>23</sup> And the international community is engaging in debates regarding the efficacy of prosecution as an effective sanction, particularly at a time of both Third World critiques and global populism.<sup>24</sup> In this context, some scholars have advanced an expressivist conceptualization of international criminal justice, emphasizing its communicative effects.<sup>25</sup>

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20. See PAUL M. BARRETT ET AL., FUELING THE FIRE: HOW SOCIAL MEDIA INTENSIFIES U.S. POLITICAL POLARIZATION — AND WHAT CAN BE DONE ABOUT IT 1–29 (2021).

21. See *id.* at 4.

22. See Jong Eun Lee, *South Korea's New President Faces Deeply Divided Politics*, E. ASIA F. (May 5, 2022), <https://www.easiaforum.org/2022/05/05/continuity-and-change-in-south-korean-politics/> [<https://perma.cc/VA54-B3J5>]; Anthony Faiola & Gabriela Sá Pessoa, *The Cannibal vs. The Satanist: Toxic Politics is Poisoning Brazil*, WASH. POST (Oct. 28, 2022), <https://www.washingtonpost.com/world/2022/10/28/brazil-election-lula-bolsonaro/> [<https://perma.cc/Z37P-L82F>]; Luke McGee, *Britain Weathered Political Turmoil in 2022. But Brexit Remains The Elephant in The Room*, CNN (Dec. 27, 2022), <https://www.cnn.com/2022/12/27/europe/brexit-2023-intl-analysis-cmd-gbr/index.html> [<https://perma.cc/8JHN-C9HL>].

23. See, e.g., CHARLES B. FIELDS & RICHTER H. MOORE, COMPARATIVE CRIMINAL JUSTICE: TRADITIONAL AND NONTRADITIONAL SYSTEMS OF LAW AND CONTROL (2005) (containing 33 articles from various countries for a comparative discussion of different criminal justice systems in the world).

24. See, e.g., Makau W. Mutua, *What is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31, 32 (2000); ROUTLEDGE HANDBOOK OF GLOBAL POPULISM (Carlos de la Torre ed., 2018); Stephen Collinson, *Trump-Style Populism Rises in US and Europe as Putin Assaults World Order*, CNN (Apr. 12, 2022), <https://www.cnn.com/2022/04/12/politics/rise-of-extremism-us-and-europe/index.html> [<https://perma.cc/HPY2-D7MW>].

25. See generally, e.g., STAHN, *supra* note 8.

### B. Three Stages of Polarization

How might criminal prosecution exacerbate polarization? Let us describe this problem, playing out in a prosecution-polarization dynamic through three stages.<sup>26</sup>

First, criminal justice actors affirmatively decide to initiate a criminal case. 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.<sup>27</sup> Meanwhile, U.S. Attorneys' Offices have more discretion given complementary federal jurisdiction.<sup>28</sup> Federal prosecutors are similarly responsive to federal law enforcement exigencies, though more often federal investigations involve longer-term and larger-scale investigations. As Dan Richman has described, a "negotiated boundary" exists between federal criminal law enforcers and state/local law enforcement, dictated by federal jurisdiction, the agendas of presidential administrations, and pressures from local authorities.<sup>29</sup> The U.S. Attorneys' 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.<sup>30</sup> Internationally, prosecutors initiate cases in rare, limited circumstances. As a threshold matter, the international community must have decided to establish an international tribunal. Then, international investigators must become satisfied that they can prove their case beyond a reasonable doubt in an international forum. Finally, the various levers of jurisdiction and admissibility must be satisfied, with cases being diverted to local

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26. As noted above, a chicken-and-egg dynamic exists with criminal justice and polarization, wherein law and culture are inextricably interrelated. But for analytical clarity, this symposium contribution picks up the story of post-indictment polarization at the moment of initiation of criminal charges.

27. Every year, police engage in over seven million arrests. Prosecutors are in this slipstream of cases flowing toward them. Thus, in many situations, prosecutors charge because of the inevitability of the process. *See generally* Steven Arrigg Koh, *Policing & the Problem of Physical Restraint*, 64 B.C. L. REV. 309 (2023) (describing the phenomenon of arrests and the problem of physical restraint in policing).

28. *See* DANIEL C. RICHMAN ET AL., *DEFINING FEDERAL CRIMES* 13 (2d ed. 2018) ("[I]t is inevitable that federal enforcers will exercise enormous discretion."); *see generally* Daniel C. Richman & Sarah Seo, *How Federalism Built the FBI, Sustained Local Police, and Left Out the States*, 17 STAN. J. C.R. & C.L. 421 (2022).

29. *See* RICHMAN ET AL., *supra* note 28, at 9–12.

30. U.S. DEP'T OF JUST., *UNITED STATES ATTORNEYS' MANUAL* § 9-27.220 (2017).



jurisdictions in cases where such jurisdictions are able and willing to prosecute.<sup>31</sup>

Second, once prosecutors indict and/or law enforcement arrests, such decision is refracted through various communication channels, including peer-to-peer, traditional and cable news, online/social media, and press releases. In this way, communities create a sense of *social meaning* of such prosecutorial information, often within their own framework of beliefs about the nature of society itself.<sup>32</sup> As such, they may hold diverse representations of the function of criminal justice itself, with views varying from distrust of “the intent, effectiveness, and equity of the criminal justice system”<sup>33</sup> to belief that the criminal justice system is “essentially color blind.”<sup>34</sup> In foreign and international jurisdictions, perceptions of legitimacy, public confidence, and willingness to cooperate vary wildly, turning broadly on police tactics, majority-minority identification, and the partisanship of criminal justice actors.<sup>35</sup>

Third, this process exacerbates polarization. Various constituencies feel further alienated from one another due to the perceived “win” or “loss” in adversarial criminal process. In this way, criminal process echoes what Jamal Greene has recently identified as 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 a degradation of “our relationship to the law and to each other.”<sup>36</sup> Criminal prosecution does something similar, publicly and prominently pitting the state in an antagonistic relationship vis-à-vis an individual defendant and, therefore, the communities who feel solidarity with such defendant.

31. See, e.g., INT’L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT 31 (2020), <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf> [<https://perma.cc/5DVG-DSZ4>].

32. Koh, *How Do Prosecutors “Send a Message”?*, *supra* note 5.

33. NANCY LA VIGNE ET AL., URB. INST., HOW DO PEOPLE IN HIGH-CRIME, LOW-INCOME COMMUNITIES VIEW THE POLICE? 1 (2017), [https://www.urban.org/sites/default/files/publication/88476/how\\_do\\_people\\_in\\_high-crime\\_view\\_the\\_police.pdf](https://www.urban.org/sites/default/files/publication/88476/how_do_people_in_high-crime_view_the_police.pdf) [<https://perma.cc/2XY9-HWPN>].

34. John Sides, *White People Believe the Justice System Is Color Blind. Black People Really Don’t*, WASH. POST (July 22, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/07/22/white-people-believe-the-justice-system-is-color-blind-black-people-really-dont/> [<https://perma.cc/X5R7-EBUE>].

35. See generally LEGITIMACY AND CRIMINAL JUSTICE: INTERNATIONAL PERSPECTIVES (Tom R. Tyler ed., 2007).

36. See GREENE, HOW RIGHTS WENT WRONG, *supra* note 7, at xxxii; see generally Greene, *Foreword, Rights as Trumps?*, *supra* note 7; see also DWORKIN, *supra* note 7, at xi.

To understand this dynamic, consider *State of Wisconsin v. Rittenhouse*.<sup>37</sup> 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* and *CNN*, Rittenhouse was “basically [a] conventional conservative suburbanite[.]”<sup>38</sup> and “the epitome of White privilege in America.”<sup>39</sup> The judge, meanwhile, was described as being “old school”<sup>40</sup> and “berat[ing] the lead prosecutor.”<sup>41</sup> When Rittenhouse was later acquitted, the verdict was seen as “devastating”<sup>42</sup> and “proof that it is reasonable to believe that the fear of Black people can absolve a white person of any crime.”<sup>43</sup> Meanwhile, conservative media consistently criticized the mainstream media as

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37. See generally Criminal Complaint, *State of Wisconsin v. Rittenhouse*, No. 2020CF000983 (Aug. 27, 2020) (No. 2), <https://www.documentcloud.org/documents/7047765-Kyle-Rittenhouse-Criminal-Complaint> [<https://perma.cc/K8A5-6FMC>].

38. Charles Homan, *Kyle Rittenhouse and the New Era of Political Violence*, N.Y. TIMES (Oct. 26, 2021), <https://www.nytimes.com/2021/10/26/magazine/kyle-rittenhouse-kenosha-wisconsin.html> [<https://perma.cc/L7YM-6LP5>].

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

40. Amir Vera, *Judge Bruce Schroeder’s Reputation as a Tough Jurist Comes Through in Rittenhouse Trial*, CNN (Nov. 11, 2021), <https://www.cnn.com/2021/11/10/us/kenosha-judge-bruce-schroeder-kyle-rittenhouse-trial/index.html> [<https://perma.cc/7XJP-ZUBM>].

41. 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/3M4S-TZZG>].

42. Gabriela Miranda & Christopher Kuhagen, *Kyle Rittenhouse Verdict Reactions: From “Justice System Broken” to “Justice System Worked,”* USA TODAY (Nov. 19, 2021, 4:07 PM), <https://www.usatoday.com/story/news/nation/2021/11/19/kyle-rittenhouse-reaction-not-guilty-verdict/8686103002/> [<https://perma.cc/4WDU-D96F>].

43. Michael Harriot, *Kyle Rittenhouse Wasn’t Convicted Because in America, White Reasoning Rules*, GUARDIAN (Nov. 20, 2021), <https://www.theguardian.com/us-news/2021/nov/19/kyle-rittenhouse-conviction-america-white-privilege> [<https://perma.cc/8Z6K-D5H5>]; see also James Hohmann, *Kyle Rittenhouse Was Found Not Guilty. That Doesn’t Mean He’s Morally Innocent*, WASH. POST (Nov. 19, 2021, 6:42 PM), <https://www.washingtonpost.com/opinions/2021/11/19/kyle-rittenhouse-verdict-opinion-not-innocent-shootings/> [<https://perma.cc/6MQP-Q8MT>] (“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.”).

spreading lies and falsehoods about Rittenhouse,<sup>44</sup> even tying the case to then-Senator Joe Biden's Presidential campaign ad and suggesting Rittenhouse may sue then-Senator Biden for libel.<sup>45</sup> For this side, the acquittal was viewed as a vindication for Rittenhouse and a cause for celebration.<sup>46</sup>

Even in cases where most Americans believe a prosecution to be proper, polarization may arise. Take *State v. Chauvin*, in which the state of Minnesota prosecuted Derek Chauvin, the police officer who killed George Floyd in Minneapolis on May 25, 2020.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup>

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44. See David Rutz, *False Media Reporting that Rittenhouse Transported Rifle "Across State Lines" Leads to Corrections, Mockery*, FOX NEWS (Nov. 23, 2021, 4:24 PM), <https://www.foxnews.com/media/false-media-reporting-rittenhouse-state-lines> [<https://perma.cc/KRC6-229K>].

45. See Stephanie Pagonis, *Kyle Rittenhouse to Sue Biden, Campaign for Libel, Attorney Says*, FOX NEWS (Sept. 30, 2020, 4:07 PM), <https://www.foxnews.com/us/kyle-rittenhouses-attorney-sue-joe-biden-campaign-libel> [<https://perma.cc/FGS7-UV9M>].

46. See Meredith McGraw, *The Lionization of Kyle Rittenhouse by the Right*, POLITICO (Nov. 19, 2021, 3:14 PM), <https://www.politico.com/news/2021/11/19/the-lionization-of-kyle-rittenhouse-by-the-right-523054> [<https://perma.cc/RYP4-PPWL>]; Skylar Woohouse, *Rittenhouse Verdict Sparks Split Reactions, Fears of Vigilantism*, BLOOMBERG (Nov. 19, 2021 5:41 PM), <https://www.bloomberg.com/news/articles/2021-11-19/rittenhouse-verdict-sparks-split-reactions-fears-of-vigilantism#xj4y7vzkg> [<https://perma.cc/WMS8-DQSM>].

47. See generally 989 N.W.2d 1 (Minn. Ct. App. 2023).

48. See Tim Arango & Shaila Dewan, *How to Find an Impartial Jury Over George Floyd's Death*, N.Y. TIMES (Mar. 7, 2021), <https://www.nytimes.com/2021/03/07/us/george-floyd-derek-chauvin-jurors.html> [<https://perma.cc/J9CS-P5TG>]; 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/6Q2H-KAAP>].

49. See Stephanie Pagonis, *Chauvin Trial: Medical Examiner Performed Autopsy Says Police Pressure Was More than Floyd 'Could Take'*, FOX NEWS (Apr. 9, 2021), <https://www.foxnews.com/us/chauvin-trial-medical-examiner-autopsy-george-floyd> [<https://perma.cc/E3J7-Y9ZE>]; 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/T9RP-FJM7>]. While causation was of course litigated, its use in conservative media appeared largely pretextual, as a way to defend Chauvin more generally.

This also occurs at the international level. Take the U.N. International Criminal Tribunal for the former Yugoslavia, which was established in the 1990s to promote accountability for war crimes in the region during the breakup of Yugoslavia. A leading theory was that this tribunal would promote reconciliation; in fact, often the tribunal had the opposite effect. For example, the trial of President Slobodan Milosevic — which was piped directly into the former Yugoslavia over live television and in which Milosevic acted as his own defense counsel — ultimately *increased* support for him in the region by the time the trial ended.<sup>50</sup> Furthermore, the tribunal has been criticized by all three major groups for either not going far enough to prosecute (in the views of the Bosnian Muslims or Croats) or for disproportionately prosecuting Serbs (in their view).<sup>51</sup> 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 Mladic 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.<sup>52</sup> And *The Economist* has recently noted that, today, every sub-community in the former Yugoslavia still holds the narrative that its political and military leaders were on the morally correct side of the conflict.<sup>53</sup>

## II. THEORIZING SOCIAL MEANING AND PROSECUTION

The prosecution-polarization dynamic described above complicates the scholarly notion that criminal law should do reparative work. We may consider such views alongside theories of social meaning.

In one widely-held conception,<sup>54</sup> criminal law functions as a system of collective condemnation. In his classic article, *The Aims of the Criminal Law*, Henry Hart distinguished criminal law from a civil sanction by the weight of community condemnation that accompanies and justifies the

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50. See Tim Judah Belgrade, *Serbia Backs Milosevic in Trial by TV*, *GUARDIAN* (Mar. 2, 2002), <https://www.theguardian.com/world/2002/mar/03/warcrimes.balkans> [https://perma.cc/2YK4-BKLM].

51. See Michael P. Scharf, *A Critique of the Yugoslavia War Crimes Tribunal*, 25 *DENV. J. INT'L & POL'Y* 305, 310–11 (1997).

52. See 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/9RTH-YJEV].

53. See Vukovar, *The War in Ukraine Has Awakened Memories in the Balkans*, *ECONOMIST* (Oct. 6, 2022), <https://www.economist.com/europe/2022/10/06/the-war-in-ukraine-has-awakened-memories-in-the-balkans> [https://perma.cc/KU78-34T8].

54. See Joel Feinberg, *The Expressive Function of Punishment*, 49 *Monist* 397, 401 (1965) (“That the expression of the community’s condemnation is an essential ingredient in legal punishment is widely acknowledged by legal writers.”).

punishment attached to crimes.<sup>55</sup> Hart goes on to describe crime as “conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.”<sup>56</sup>

Such emphasis on community norms pervades much of criminal law theory, which has also more recently emphasized the restoration of harmed victims.<sup>57</sup> In another emerging view, criminal justice serves a distinctive role by reconstructing its social order’s moral basis in the wake of an attack on its ethical life.<sup>58</sup> From this viewpoint, crime is a communicative attack on social solidarity, and prosecution is normative reconstruction.<sup>59</sup> For transitional justice theorists, international tribunals may promote reconciliation in the wake of armed conflict. Such scholars and policymakers argue that “there can be no peace without justice,” thus necessitating prosecutorial bodies like the post-World-War-II International Military Tribunal at Nuremberg and the U.N. International Criminal Tribunals for the former Yugoslavia and Rwanda.<sup>60</sup>

Such theories sometimes assume a unity of collective conceptualization. In reality, social meaning is highly fragmented.<sup>61</sup> Notice that the polarization definition offered above — “the act of dividing something, especially something that contains different people or opinions, into two completely opposing groups” — turns on the nature of *individual people* forming *divergent opinions* about certain events. In other words, criminal process does have an existence unto itself — legal actors (prosecutors, defense attorneys) make legal decisions and/or arguments over the course of multiple

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55. See Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 405 (1958).

56. *Id.*

57. See Adriaan Lanni, *Taking Restorative Justice Seriously*, 69 BUFF. L. REV. 635, 636 (2021) (arguing that restorative justice can be expanded to reduce mass incarceration “without significant adverse impacts on due process, racial equity, and proportionality”); see generally Thalia González, *The State of Restorative Justice in American Criminal Law*, 2020 WIS. L. REV. 1147 (2020).

58. See Kleinfeld, *supra* note 6, at 1489.

59. See *id.* at 1486, 1488–97.

60. For discussions on transitional justice as a general enterprise, see generally Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003) (discussing the evolution of the concept of transitional justice); Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 763–65 (2004) (arguing that “legal and political transitions lie on a continuum, of which regime transitions are merely an endpoint” and that transitional justice measures are not suspect “on either moral or institutional grounds”); ROSEMARY NAGY, TRANSITIONAL JUSTICE (Melissa S. Williams & Jon Elster eds., 2012) (compiling various essays on the theory and practice of transitional justice).

61. See STAHN, *supra* note 8, at 125 (“Expressivist justifications tend to imply that legal actions can be translated into a coherent set of messages. But there is often no mutual understanding of speaker and hearer. What is expressed may differ from the content that is intended to be communicated.”).

days of hearings, introducing forms of evidence (documentary, testimonial) before decisionmakers (juries, judges). And yet the *social meaning* of such actions varies in the mind of the observer.

Various threads of philosophy, psychology, and sociology model such fragmentation of social meaning. First, philosophically, social meaning reaffirms a long-standing distinction in philosophy between theories of truth. A correspondence theory of truth holds that statements are true when they correspond with the way the world “really” is. Many philosophers find this theory unsatisfactory, opting instead for a coherence theory that emphasizes that beliefs about truth fall into a larger, interlocking set of propositions that individuals hold; or, relatedly, a pragmatic theory wherein beliefs are useful in real-world application.<sup>62</sup> As British philosopher Simon Blackburn has noted, the latter two camps use “the common metaphor of the web of belief, a loose structure that hangs together, but with each part testable and potentially vulnerable to alteration or dismissal in the light of the evolution of the whole system.”<sup>63</sup> On this account, it would be foolish for us to expect others to empty their minds of beliefs; we must start *in medias res* with the universe of interlocking beliefs that others hold.<sup>64</sup> This insight tracks the classic formulation of anthropologist Clifford Geertz, that “man is an animal suspended in webs of significance he himself has spun.”<sup>65</sup>

Psychologically, the most relevant theory is that of social representations.<sup>66</sup> In this view, which transcends the dominant individualistic paradigm of psychology,<sup>67</sup> “nobody’s mind is free from the effects of the prior conditioning which is imposed by his representations, language and culture.”<sup>68</sup> Social representations theory informs how individuals and communities receive and interpret new information. Our

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62. See SIMON BLACKBURN, ON TRUTH 15–20 (2018).

63. *Id.* at 48.

64. *See id.*

65. CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 5 (1973).

66. This theory is underutilized in legal scholarship. *But see* Steven Arrigg Koh, *From Stigma and Coping to Social Repositioning: A New Perspective on HIV/AIDS, Identity and Human Rights*, in SYMBOLIC TRANSFORMATION: THE MIND IN MOVEMENT THROUGH CULTURE AND SOCIETY 284 (Brady Wagoner ed., 2010).

67. BRADY WAGONER, THE CONSTRUCTIVE MIND: BARTLETT’S PSYCHOLOGY IN RECONSTRUCTION 201 (2017) (noting that social representations counterbalances the individualistic focus that has 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. BRADY WAGONER, SYMBOLIC TRANSFORMATIONS: THE MIND IN MOVEMENT THROUGH CULTURE AND SOCIETY 19 (2010). This has come at the neglect of research into how individuals experience the world and make meaning of it.

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

pre-existing beliefs — which constitute the sum total of human viewpoint — lead us to “conventionalize the objects, persons and events we encounter.”<sup>69</sup> Such pre-existing views give new perceived events a definite form, so that we “look at them in a given category and gradually establish them as a model of a certain type, distinct and shared by a group of people.”<sup>70</sup> Indeed, from this perspective, a person is not equally open to receiving all impressions.<sup>71</sup> A person’s “active orientation” vis-à-vis the world is a function of the person’s attitude, interests, personal history, and group membership.<sup>72</sup> Their social life is “made meaningful by cultural narratives and imaginaries of actors, events and activities.”<sup>73</sup>

Finally, sociology also grasps this social reality. From this vantage point, polarization may play out through two classic sociological conceptualizations: alienation and solidarity. The essence of polarization is the fostering of both. On the one hand, alienation means the feeling among members of a community that the (criminal) law does not belong to them.<sup>74</sup> On the other hand, solidarity means the alignment of normative ideas, “pragmatic agreement, mutual intelligibility, and fellow feelings” among members of a community.<sup>75</sup> Emile Durkheim is most famous for exploring solidarity in the transition to modernity, with an emphasis on the contemporary nature of organic solidarity, in which greater division of labour leads to mutual interdependence.<sup>76</sup> He contrasted this with mechanical solidarity, or the common values and beliefs that constitute a collective conscience that fosters cooperation.<sup>77</sup>

Cultural sociology, in particular, informs this analysis, emphasizing criminal law’s overall effect on the civil sphere. In this conception, democracy is conceptualized discursively, as a meta-language defining

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69. *Id.* at 22.

70. *Id.*

71. See WAGONER, *supra* note 67, at 192–93.

72. *Id.*

73. Dorothy Holland, *Symbolic Worlds in Time/Spaces of Practice: Identities and Transformations*, in *SYMBOLIC TRANSFORMATIONS: THE MIND IN MOVEMENT THROUGH CULTURE AND SOCIETY* 269 (Brady Wagoner ed., 2010).

74. Kleinfeld, *supra* note 6, at 1496 (“Criminal law fails its solidaristic social function, becomes oppressive and undemocratic, and destabilizes politics when the members of a community feel it does not belong to them.”). For a discussion on Durkheim’s theory of “anomie,” see ÉMILE DURKHEIM, *SELECTED WRITINGS* 172–88 (1972).

75. Kleinfeld, *supra* note 6, at 1492–95.

76. *Mechanical and Organic Solidarity*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/topic/mechanical-and-organic-solidarity> [<https://perma.cc/SL67-58LY>] (last visited Mar. 19, 2023).

77. *Id.*

motives, relations, and institutions that may be civil and anticivil.<sup>78</sup> And yet this discursive democratic task is particularly challenging in our contemporary era, wherein “both American conservatives and liberals avidly adhere to the same discourse of civil society, each side continuously pitting sacred rationality, honesty, and independence against polluted irrationality, deception, and dependence.”<sup>79</sup> This symposium contribution builds on this insight by showing that social representations constitute the shifting, varied terrain of such civil discourse across time.

Such accounts explain how domestic prosecutions exacerbate polarization: criminal process touches down within communities *in medias res*, finding a thick conception of social meaning. Given the density of such social conceptions, any new information about criminal process further confirms such a worldview. 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.<sup>80</sup> 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.<sup>81</sup> In so doing, Bell builds to a theory of legal estrangement, rooted in procedural injustice, vicarious marginalization, and structural exclusion.<sup>82</sup> My argument builds on Bell’s theory: *every* community has distinct representations of criminal process. Such representations exist and persist over time, leading to both solidarity and alienation.

Such accounts explain how international criminal justice may also exacerbate polarization. Take the case of the Special Tribunal for Lebanon (STL), established by the United Nations in 2009 primarily to prosecute perpetrators of the assassination of former Lebanese Prime Minister Rafic Hariri. Being of Lebanese descent, I have long been familiar with the fragmented national narratives there. The school history curriculum ends at the outset of the Civil War (1975–90) because no consensus exists regarding the facts of the war and, thus, how the history should be taught to students in the country.<sup>83</sup> Furthermore, ongoing tensions revolve around religion and

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78. See Jeffrey Alexander, *Nine Theses on The Civil Sphere*, in SOLIDARITY, JUSTICE, AND INCORPORATION: THINKING THROUGH THE CIVIL SPHERE 172, 182–83 (Peter Kivisto & Giuseppe Sciortino eds., 2015).

79. *Id.*

80. See Bell, *supra* note 6, at 2054.

81. See *id.* at 2111–12.

82. See *id.* at 2054, 2067–68.

83. See Rima Maktabi, *Lebanon’s Missing History: Why School Books Ignore the Past*, CNN (June 8, 2012), <https://www.cnn.com/2012/06/08/world/meast/lebanon-civil-war-history> [<https://perma.cc/EES9-TABZ>].



politics, which are then reified further in political debates. Any new information that emerges, as a result, is filtered through this complex web of fragmented identity and narrative.<sup>84</sup> More specifically, Sunni Muslims largely support the STL, because it vindicates a worldview in which former Prime Minister Hariri — also Sunni Muslim — was wrongly executed by Hezbollah, Syria, and/or Iran. In this conception, the Tribunal is ‘doing justice.’ And the representations of Saudi Arabia, the United States, and other Western nations funding the Tribunal — while mixed — are more positive due to the ongoing alliances between Sunni Muslim countries and the United States. But from the perspective of many Shia Muslims in Lebanon, the representations are of greater historical marginalization within Lebanon and, even more broadly, persecution for being a religious minority. As a result, there is tremendous solidarity within the Shia Muslim community in Lebanon, led in part by Hezbollah within Lebanon, Syria, and Iran. Views of the Tribunal are thus one of suspicion, yet another example of Western- and Sunni-led persecution.

### III. JUSTIFYING DEMOCRATIZATION AND DECRIMINALIZATION

Criminal justice may exacerbate polarization. What does this mean for criminal prosecution moving forward? Answers are not easy, given, as Bell notes, little scholarship has addressed the question of how best to promote social solidarity over estrangement.<sup>85</sup> Furthermore, criminal law and policy as a sanction is a complex and varied question across jurisdictions. For purposes of this symposium contribution, I add to such conceptualizations that the prosecution-polarization dynamic should caution domestic and international institutional actors to be more circumspect about criminal justice as a policy modality. More broadly, this bolsters calls for democratization and decriminalization in criminal justice.

Criminal law is one of many forms of state power, emphasizing retrospective accountability for past misconduct, backed by deprivation of liberty. This is thus a pillar of rule of law, wherein punishment emphasizes moral desert, deterrence, and/or expressivism. As such, it may serve as a punitive substitute for more sensible regulation.<sup>86</sup> Transnationally, criminal

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84. I was struck by a similar feeling when I was visiting Bosnia while working for the International Criminal Tribunal for the Former Yugoslavia: each community has tremendous solidarity within itself, but is polarized from the other and therefore internalizes any new information through an existing system of social representations.

85. *Supra* Bell, *supra* note 6, at 2126 (“How can police reform dismantle legal estrangement? There is little scholarship that tackles this question in even a cursory way.”).

86. *See generally* Dan Richman, *Overcriminalization for Lack of Better Options: A Celebration of Bill Stuntz*, in *THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ* 64 (Michael J. Klarman, David A. Skeel, Jr. & Carol Steiker eds., 2012).

justice constitutes a relatively coercive form of statecraft, more so than diplomacy but less so than state use of force.<sup>87</sup> And internationally, it is a more penal form of international law than, say, human rights regimes, which rely on weaker forms of enforcement through human rights committees.<sup>88</sup>

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, including community views of justice, the revival of the jury, and community-legislature links.<sup>89</sup> Such 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.<sup>90</sup>

Democratization better aligns criminal justice with a community's social norms and thus may mitigate the prosecution-polarization dynamic. 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 the aforementioned work of Bell, who has called for "a more aggressive infusion of deliberative participation in policing" to redress legal estrangement.<sup>91</sup> 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. Domestically, for example, progressive prosecutors have been both embraced and rejected by their local jurisdictions, showing an evolving local viewpoint on criminal justice.<sup>92</sup>

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87. See Koh, *The Criminalization of Foreign Relations*, *supra* note 4, at 737. The six traditional foreign policy modalities are diplomacy, cooperation and association agreements, trade, economic sanctions, military force, and the use of foreign aid. *Id.* at 739.

88. See, e.g., Thomas Buergenthal, *The U.N. Human Rights Committee*, in MAX PLANCK YEARBOOK UNITED NATIONS LAW 341(2001).

89. See Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693 (2017).

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

91. Bell, *supra* note 6, at 2143.

92. See Marco della Cava, *New, More Progressive Prosecutors are Angering Police, Who Warn Approach Will Lead to Chaos*, USA TODAY (Feb. 10, 2020), <https://www.usatoday.com/story/news/nation/2020/02/08/criminal-justice-police-progressive-prosecutors-battle-over-reform/4660796002/> [<https://perma.cc/7AM4-X7QQ>]; Li Zhou, *Why Some Voters are Trying to Recall San Francisco's Progressive DA*, VOX (June 8, 2022), <https://www.vox.com/2022/6/7/23158234/chesa-boudin-san-francisco-recall->

Oftentimes, such prosecutors have adopted robust progressive policies in favor of declination and diversion, particularly of misdemeanor offenses and victimless crimes.<sup>93</sup> Traditionally, declination and diversion have been a “black box” of prosecutorial decision-making.<sup>94</sup> 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.”<sup>95</sup> In the Rachael Rollins Policy Memo, the progressive Massachusetts District Attorney 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.”<sup>96</sup> 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.”<sup>97</sup> Such policies have been criticized by both the left and right.<sup>98</sup>

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progressive-prosecutor [https://perma.cc/8B7M-W2K4]; Shelley Murphy, *Trailblazers Celebrate as Rachael Rollins is Formally Sworn in as US Attorney*, BOS. GLOBE (Apr. 23, 2022), <https://www.bostonglobe.com/2022/04/22/metro/trailblazers-celebrate-rachael-rollins-is-formally-sworn-us-attorney/> [https://perma.cc/7MMS-8XJB].

93. See 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/Q4JL-FJK2] (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”); Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719 (2020) (discussing and evaluating some progressive prosecutors’ practice of declining to prosecute certain low-level offenses).

94. 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?”).

95. MELISSA LABRIOLA ET AL., PROSECUTOR-LED PRETRIAL DIVERSION: CASE STUDIES IN ELEVEN JURISDICTIONS (2018), <https://www.ojp.gov/pdffiles1/nij/grants/251664.pdf> [https://perma.cc/MMG2-GS6M].

96. THE RACHAEL ROLLINS POLICY MEMO 25 (2019), <https://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> [https://perma.cc/YG6B-HRFD].

97. *Id.*

98. FELIX OWUSU, PRESUMPTIVE DECLINATION AND DIVERSION IN SUFFOLK COUNTY, MA (2022), <https://www.hks.harvard.edu/sites/default/files/Taubman/RIGB/Presumptive%20Declination%20and%20Diversion%20in%20Suffolk%20County%2C%20MA.pdf>

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 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 international and local judges.<sup>99</sup> 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.<sup>100</sup>

Furthermore, the prosecution-polarization dynamic bolsters the 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. Given the inevitability of polarization, criminal justice should be more narrowly attuned to accountability for conduct that is truly worthy of criminal sanction.

Around which principle might decriminalization proceed? The standard I articulate 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 polarized societal response. A smaller criminal justice system could draw from University of Pennsylvania Law Professor 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

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[<https://perma.cc/MR4L-F34U>]; Charles “Cully” Stimson & Zack Smith, *Meet Rachael Rollins, the Rogue Prosecutor Whose Policies are Wreaking Havoc in Boston*, HERITAGE FOUND. (Nov. 12, 2020), <https://www.heritage.org/crime-and-justice/commentary/meet-rachael-rollins-the-rogue-prosecutor-whose-policies-are-wreaking> [<https://perma.cc/XQJ5-RLC8>].

99. Olga Martin-Ortega & Johanna Herman, *Hybrid Tribunals & the Rule of Law: Notes from Bosnia & Herzegovina & Cambodia* 4 (JAD-PbP Working Paper No. 7, 2010); Harry Hobbs, *Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy*, 16 CHI. J. INT’L L. 482, 498–504 (2016).

100. Transnationally, scholarship is least developed but the same principles should apply. While there are benefits to the United States extraditing and prosecuting individuals who have violated U.S. criminal laws, the better approach is for foreign countries to prosecute such individuals in their home country. This is more likely to convey legitimacy to a given national community and decrease the likelihood of exacerbating misperception of U.S. motives in these cases. See Koh, *How Do Prosecutors “Send a Message”?*, *supra* note 5.

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.<sup>101</sup> This builds upon his earlier theory that criminal law 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.<sup>102</sup> 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.<sup>103</sup> Robinson rightly notes that this cross-cultural core underscores the availability of restorative justice mechanisms, which emphasize offender-victim mediation.<sup>104</sup> Because the method of punishment is *not* a core principle, societies and communities may vary in how they administer a justice system.<sup>105</sup> Thus, variety in sanction — community service, fine, incarceration — is available so long as it accords broadly with community norms.<sup>106</sup>

Should such decriminalization occur, conduct triggering criminal sanction would have greater mutual intelligibility because that the conduct itself appears more flagrant across varied 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. Future scholarship can begin to articulate and apply a standard for mutual intelligibility with more granularity, considering the spectrum of crimes, conduct, and cases alongside their societal effects. In so doing, such research should consider international criminal law as the narrowest core of mutual intelligibility, given international tribunals prosecute only large-scale atrocity crimes.

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101. See generally Paul H. Robinson, *Criminal Law's Core Principles*, 14 WASH. U. L. REV. 153 (2021); Steven Arrigg Koh, *Core Criminal Procedure*, 105 MINN. L. REV. 251 (2020) (identifying a cross-cultural core of criminal procedural rights in domestic, transnational, and international criminal law).

102. See generally Paul H. Robinson et al., *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633 (2007).

103. See, e.g., BRIAN Z. TAMANAHA, *A REALISTIC THEORY OF LAW* 82–117 (2017).

104. See Robinson, *supra* note 101, at 203–05.

105. See *id.*

106. See *id.* 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.*

**CONCLUSION**

Criminal law may foster polarization in contemporary society through a prosecution-polarization dynamic. Once criminal legal actors initiate prosecution against a defendant, the social meaning of such action is refracted through various communicative channels, thus deepening both solidarity and alienation within and across groups. The inevitability of such dynamic complicates reparative theories of criminal law and should make domestic and international criminal legal policymakers more circumspect about criminal justice policymaking. The dynamic also bolsters calls for democratization and decriminalization.