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Discretion and Accountability in a Democratic Criminal Law

Antony Duff*

INTRODUCTION

What kind of practice of prosecution is appropriate to a democratic polity's criminal law? What should the role of prosecutor be in such a system of criminal law?

Such questions beg important prior questions: they assume that democratic polities would not only maintain distinctive systems of criminal law, but would so structure the criminal law as to have a recognisable role of 'prosecutor'. To justify such assumptions, we would need an account of democracy, of the kind of criminal law that would be appropriate to a democratic polity, and of the institutional structure of such a criminal law, but the most I will be able to do here is gesture towards the shape such an account should take.

Another preliminary problem is that of parochialism. This is a pervasive danger for legal theorising: it is too easy to offer an account of what 'criminal law' is, or ought to be, as if this holds good universally for all times in all places – when what one is actually doing is offering a local account of criminal law in a particular kind of polity at a particular time in its history.¹ That danger becomes more acute the more specific the account becomes as to the criminal law's institutional structures and roles; why should we expect just one kind of institutional structure, and just one set of roles, to be suitable for every kind of polity? One can talk of 'prosecutors' in a range of systems, but the

* I'm grateful to the editors of this volume, to participants in the workshop on *Prosecutors and Democracy* at UCLA, and especially to Mathilde Cohen (my commentator at that workshop) for helpful comments on an earlier version of this chapter.

¹ See, e.g., Nicola Lacey, 'In Search of the Responsible Subject: History, Philosophy and Criminal Law Theory', *Modern Law Review* 64 (2001): 350; Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford: Oxford University Press, 2016).

label refers to quite different specific roles in different systems – not just as between ‘adversarial’ and ‘inquisitorial’ systems, but within each type of system.²

I hope to bypass some of these problems of parochialism by focusing on what must be a central prosecutorial function in any system: for whatever else a ‘prosecutor’ might do (for instance, in investigating crime, in gathering evidence, in sentencing), it must at least be her job to prosecute – to present the case against the accused person. In adversarial systems, this is paradigmatically done in court at a criminal trial, and it is on that kind of ‘prosecution’ that I will focus in what follows. It is of course true that, even in notionally adversarial systems, very few criminal cases are decided by a contested trial: the vast majority of cases that go to court are settled by guilty pleas (often on the basis of plea bargains), with little or no formal presentation of the case, and prosecutors can dispose of many cases without going to court at all, for instance by imposing a ‘prosecutor fine’.³ In more inquisitorial systems, the criminal trial also plays a less distinctive role within the criminal process. However, I will argue later that central to a democracy’s criminal law should be a process through which those accused of criminal offences are called to answer the accusation; that process need not always involve a formal trial, but it is exemplified most clearly by the criminal trial. Although my discussion will focus on adversarial criminal trials, I therefore hope that the values and goals to which I will appeal also find a home in more inquisitorial systems, and in other ways of dealing with criminal cases, even if their precise institutional manifestations and operations are different.⁴

² See Michael Tonry (ed.), *Prosecutors and Politics: A Comparative Perspective Crime and Justice: A Review of Research*, vol. 41; Chicago: University of Chicago Press, 2012); Máximo Langer, ‘Strength, Weakness or Both? On the Endurance of the Adversarial-Inquisitorial Systems in Comparative Criminal Procedure’, in *Research Handbook on Comparative Criminal Procedure*, ed. J Ross and S Thaman (Northampton, MA: Edward Elgar, 2016); also the papers in this volume by Shawn Boyne, Mathilde Cohen, Angela Davis, and Jacqueline Hodgson. As an illustration of the very different understandings of prosecutorial roles in different systems, prosecutors in Germany are standardly described as ‘second judges’ (see Boyne in this volume, 141), and it is natural for Americans to talk of a prosecutor’s ‘constituents’ (see Davis in this volume, 207): such ways of talking about prosecutors will strike English ears as very odd – even improper.

³ See Peter Duff, ‘The Prosecutor Fine’, *Oxford Journal of Legal Studies* 14 (1994): 565; also, more generally, Andrew J Ashworth and Mike Redmayne, *The Criminal Process*, 4th ed. (Oxford: Oxford University Press, 2010), ch. 6.

⁴ I would add that, though I cannot discuss the problems of plea bargaining here, it is also important that the case against the defendant is formally presented in court even when a plea bargain has averted the need for a contested trial: see, e.g., Darryl Brown, ‘Reforming the Judge’s Role in Plea Bargaining’, in *The Future of Criminal Law?*, ed. M Dempsey et al. (Minneapolis: Robina Institute of Criminal Law and Criminal Justice, 2014), 75.

In what follows, I will (in s. 1) sketch a conception of the kind of criminal law that could be appropriate to a democratic polity – to a republic of equal citizens; that account will give the criminal trial a central role. I will then, in s. 2, discuss the prosecutorial function of the prosecutor in such a system – a role that centrally involves deciding whether, and with what, to charge the person who is accused of committing a crime, and (if the decision is to charge) presenting the case against the accused. In ss. 3–4, I will turn to a central question about that prosecutorial function, concerning the kind of discretion that a prosecutor should (or cannot but) have in making such decisions, and how it should be exercised. Finally, in s. 5, I will discuss the ways in which that discretion can be made appropriately accountable – and the particular issues about accountability that arise in polities that are marred by serious social injustice.

1 A CRIMINAL LAW FOR CITIZENS⁵

There is no space here to spell out a detailed account of a democratic republic; I can say that the conception on which I rely is of a participatory, deliberative democracy that takes an inclusionary attitude towards its members (although the account I will offer of a prosecutor's role should also be congenial to other conceptions of democracy), but that is just to mention a set of slogans, each of which requires unpacking. However, I can highlight some presently relevant features by commenting briefly on two slogans: 'equal concern and respect', and 'the eyeball test'.

Equal concern and respect are central to Dworkin's account of liberalism. His concern is with what governments owe their citizens – a government must 'treat all those in its charge as equals, that is, as entitled to its equal concern and respect';⁶ but that is also what citizens owe each other. In our private lives – as members of families, as friends – we do not owe the same concern and respect to all: what I owe my children or my friends is different from and typically more than what I owe others. In our mutual dealings as citizens, however, we owe each other equal concern and respect. This is what should guide our conduct in the public, civic realm, in which we interact not as friends or family members, but as citizens. The content and scope of that civic realm is a matter for democratic deliberation, and different polities will develop different conceptions. It is the realm in which we live with each other as citizens; it includes

⁵ In what follows, I draw on work that Sandra Marshall and I have been doing on civic roles and the criminal law: see especially 'Civic Punishment', in *Democratic Theory and Mass Incarceration*, ed. A Dzur, I Loader, R Sparks (Oxford: Oxford University Press, 2016) 33.

⁶ Ronald Dworkin, *A Matter of Principle* (Oxford: Oxford University Press, 1986), 190.

public goods, spaces and services, and public or civic activities, notably those that constitute our ‘public discourse’, in which citizens discuss the terms of their shared civic life. Concern is a matter of welfare, although polities will take different views about what sorts of welfare should be provided publicly by the polity, or privately by individuals. Respect concerns such values as dignity, autonomy, and privacy; it is exemplified by the way in which citizens engage in public debate – their willingness to listen to each other as equal participants in the enterprise of self-governance, and in the limits set on the ways in which citizens, and the government, intrude into individuals’ lives. That concern and respect is equal, because citizens should recognise each other as equal participants in the civic enterprise. In their private lives, they may be partial to friends, family, or other intimates, but when acting in the public realm as citizens, they must see and treat each other as equals.

This leads us to the ‘eyeball test’ as a test of civic recognition. As Pettit explains it, it is a one-way test of republican freedom as non-domination: free citizens ‘can look others in the eye without reason for the fear or deference that a power of interference might inspire’.⁷ But it should be a two-way test: republican citizens must be willing, as well as able, to look each other in the eye – to recognise each other as participants in the civic enterprise. That is one way in which we display equal concern and respect for each other: in our willingness to look each other in the eye, with a look not of threat or fear, but of recognition of fellowship.

It might be objected that it is a mistake thus to emphasise citizenship, since so many of those who suffer the law’s coercive attentions are not citizens: that we should instead follow Ingrid Eagly in arguing that ‘democratic principles should be applied to all defendants, according to universal membership rules that do not delineate between citizens and noncitizens’.⁸ All I can say here is, first, that an account of criminal law must answer the question of whose law it is – and that in a democracy, the answer must be that it is the law of the citizens of that polity. Second, however, a decent republic will be welcoming to would-be citizens rather than treating them with exclusionary distrust; and non-citizens within a polity’s jurisdiction should be treated as guests, a distinctive normative position that requires concern, respect, and recognition – and equal treatment by the criminal justice system.⁹

⁷ Philip Pettit, *On the People’s Terms* (Cambridge: Cambridge University Press, 2012), 84.

⁸ In this volume, 248–9; see also Lucia Zedner, ‘Is the Criminal Law only for Citizens?’, in *The Borders of Punishment*, ed. K F Aas and M Bosworth (Oxford: Oxford University Press, 2013), 40.

⁹ See Antony Duff, ‘Relational Reasons and the Criminal Law’, *Oxford Studies in Legal Philosophy* 2 (2013), 175, at 189–91, 207–8.

Another objection is that such slogans as ‘equal concern and respect’ and ‘looking each other in the eye’ do not mark out a truly democratic conception of equal citizenship. ‘Equal concern and respect’ are typically afforded, not to every member of the polity, but only to the members of favoured, socially advantaged groups. The eyeball test reflects a particular, and culturally biased, conception of how equal recognition is expressed.¹⁰ As far as equal concern and respect are concerned, the objection is misdirected. The slogan expresses an aspiration – one of which the actual social and political structures of contemporary democracies fall well short: but the failure to accord equal concern and respect to *all* members of the polity (which is a failure to treat them as full members of the polity) marks a failure not of that democratic slogan, but of the polities that fail to live up to it. Such failures, as we will see in s. 5, have significant implications for criminal justice and the criminal process, which cannot simply ignore them in the attempt to do equal (criminal) justice to all; but at this stage, our concern is with the slogan as partly defining what a democratic polity should aspire to be(come). As for the eyeball test, what matters is that members of the polity be ready to recognise each other as equals and as fellows. The social and material forms through which such recognition can be expressed will vary between different cultures. In those in which it can be displayed in a willingness to look each other in the eye (and denied by a refusal to do so), the eyeball test is a useful democratic slogan. If, in other cultures, that is not a way of expressing a recognition of others as one’s equal fellows, other slogans will be appropriate.

Democratic citizens owe each other equal concern and respect, and equal recognition as fellow members of the polity. Now prosecutors, like other officials, are also citizens: ‘citizens in uniform’.¹¹ That is to say, although they hold a distinctive official role, which gives them a specified type of authority over other citizens (as well as specified duties towards them), they are also still citizens, subject to the same demands and duties of democratic citizenship as all their fellows. We must therefore ask whether, and how, they can satisfy such requirements of democratic citizenship in their work. How can they treat those with whom they have to deal, in particular those accused of crimes, with the equal concern and respect due to all citizens? Can they, as they prosecute a defendant, look him in the eye, and enable him to look them

¹⁰ Thanks to Mathilde Cohen for pressing this kind of objection.

¹¹ See John Gardner, ‘Criminals in Uniform’, in *The Constitution of the Criminal Law*, ed. R A Duff et al. (Oxford: Oxford University Press, 2013), 97; applying Albert V Dicey, *An Introduction to the Study of the Law of the Constitution*, 6th ed. (London: Macmillan, 1902), 189–90.

in the eye, as an equal member of the polity? Can their treatment of him display a recognition of his status as a fellow citizen?

There are actually two sets of questions here. One set concerns the role of prosecutors in a tolerably just polity, in which those with whom a prosecutor deals are generally treated with the appropriate concern and respect by their fellows and by officials. The other set concerns the role of prosecutors in polities more like our own, in which these requirements are not met in relation to many suspects or defendants. I'll focus initially on the first set, since it is useful to ground normative theorising in an account of criminal law in a just polity; but I will say something about the second set in s. 5. (I will also, in s. 4, comment on some more ambitious questions that might be asked about the relationship between prosecutors and democracy.)

The role that prosecutors could play in a democratic republic depends on the role that the criminal law should play in such a polity. Again, I can here only sketch a conception of a democratic criminal law – a law for citizens.¹² An initial gesture towards that conception is found in the idea of criminal law as common law:¹³ not common law as opposed to statutory law, but law that is common in the sense that it is our shared law, not one imposed on us by a separate sovereign. But what would make a law a genuinely common law? We can begin to answer that question by sketching two central functions of criminal law as thus understood.

First, in its substantive mode, the criminal law defines a set of public wrongs (and also the conditions under which people will be held liable for committing such wrongs). Criminal law is concerned with wrongs: with kinds of conduct that are not merely harmful or undesirable, but that merit censure as wrongs. It is not, however, concerned with every kind of wrong,¹⁴ but only with wrongs that are properly described as 'public'. What makes a wrong 'public' is not that it directly harms or otherwise impacts on 'the public', as distinct from an individual victim, but that it properly concerns 'the public', i.e. members of the polity, in virtue of their citizenship; it is a wrong that is our collective business, since it falls within the 'public' realm that constitutes our civic life.¹⁵ If we ask why we should have legal institution

¹² This is *not* to apply Jakobs' notorious distinction between 'citizen' and 'enemy' criminal law (see Günther Jakobs, 'Kriminalisierung im Vorfeld einer Rechtsgutsverletzung', *Zeitschrift für die gesamte Strafrechtswissenschaft* 97 (1985), 751).

¹³ See Roger Cotterrell, *Law's Community* (Oxford: Oxford University Press, 1995), ch. 11.

¹⁴ Contrast Michael Moore, *Placing Blame* (Oxford: Oxford University Press, 1997), ch. 1.

¹⁵ See Sandra Marshall and Antony Duff, 'Criminalization and Sharing Wrongs', *Canadian Journal of Law and Jurisprudence* 11 (1998), 7; Antony Duff, 'Towards a Modest Legal Moralism', *Criminal Law and Philosophy* 7 (2014), 217.

that focuses in this way on wrongs, rather than, for instance, focusing our collective concern on individual or social harms,¹⁶ the simple answer is that this is part of what is involved in taking seriously the values by which a polity defines itself, and taking each other seriously as responsible agents who are bound by those values: we take such formal notice of violations of them.

For, second, in its procedural and penal modes, criminal law provides for an appropriate response to such wrongs. Theorists of criminal law often focus on punishment as central to the criminal law's response to crime (understandably, in societies as punitive as our own). However, in a democracy that treats its citizens as responsible members of the polity, the criminal trial is an important part of the response to (alleged) crime. If we ask how a polity's members would appropriately respond to wrongs that they commit, the answer is not just that they would seek to prevent further such wrongs, or to inflict retributive burdens on those who commit them, by imposing punishment, but that they would seek to call those who commit them to public account. In doing so, they do justice to the victims of such wrongs: we show a recognition of the wrong that another has suffered by seeking to call to account the person who committed the wrong.¹⁷ They also do justice to those who have committed such wrongs: calling another to account for his wrongdoing is one way in which we display our recognition of him as a responsible fellow member of a normative community.

That is why the criminal trial is central to the criminal law of a democratic republic, not just as an instrumental link between crime and punishment, but as the formal process through which a polity paradigmatically calls alleged wrongdoers to public account, to answer to their fellow citizens. A defendant is called, initially, to answer *to* a charge of criminal wrongdoing, which he does (in adversarial trials) by pleading 'Guilty' or 'Not Guilty'. If the prosecution proves, or if he admits, that he committed the crime charged, he is called to answer *for* that crime: he can do this either by admitting his guilt, and accepting the censure expressed in a conviction; or by offering a defence that admits responsibility for the crime, but then seeks to block the usual inference from responsibility to liability.¹⁸ (To say that the defendant is called to answer is to say that in a tolerably just polity, he has a *civic* duty to answer – to answer to the charge, and for his criminal conduct if it is proved; he owes

¹⁶ As is advocated by 'social harm' theorists (Paddy Hillyard et al., *Criminal Obsessions: Why Harm Matters More Than Crime* (London: Crime and Society Foundation, 2005); see Nils Christie, 'Conflicts as Property', *British Journal of Criminology* 17 (1977), 1.

¹⁷ Which is not of course to say that this is *all* that we owe the victims of crime.

¹⁸ See further Antony Duff, Lindsay Farmer, Sandra Marshall, and Victor Tadros, *The Trial on Trial* (3): *Towards a Normative Theory of the Criminal Trial* (Oxford: Hart, 2007); Antony Duff, *Answering for Crime* (Oxford: Hart, 2007).

this to his fellow citizens, as a member of the polity whose law is supposed to be his law. That is not to say, however, that he has or should have a *legal* duty thus to answer: there are very good reasons, to do with the need to protect accused persons from the oppressive power of the legal system, and to allow dissenters to express their dissent by refusing to take part in their trial, by leaving defendants the legal freedom to remain silent in court.)

Two points should be noted about this conception of criminal law. First, it captures both the traditional '*mala in se*' (crimes consisting in conduct whose wrongfulness is independent of the law), and the so-called '*mala prohibita*' that constitute the majority of contemporary offences – crimes consisting in conduct that is wrongful only because it is a violation of a legal regulation. The latter count as public wrongs if and when they violate a regulation that the perpetrator had a civic obligation to obey. Second, the question of what should count as a public wrong – what should count as a public concern, and what kinds of 'public' conduct should be counted as wrongs – is a matter for democratic deliberation. In criminalizing a type of conduct, the legislature declares it to be a public wrong; citizens (and theorists) might of course disagree with that declaration, and a crucial challenge for any democracy is to work out ways of dealing justly with such disagreement.

2 THE PROSECUTOR'S ROLE

On the view of the criminal law and the criminal trial sketched above, a prosecutor plays an important democratic role. Her role is not simply that of a state functionary administering the law; it is to act and speak for the polity in calling to account those accused of committing public wrongs. More precisely, her role is to decide whether to call suspected wrongdoers to such public account, and to call them if they should be called. Whatever else 'prosecutors' may do, this is central to their civic role.¹⁹ The most salient way in which they discharge that civic role is in deciding whether to charge a suspected person, and (if they charge him) in bringing him to a criminal trial, in which he is a defendant formally and publicly accused of a specified crime: either an uncontested trial in which he enters an honest and voluntary plea of 'Guilty',²⁰ or a contested trial, in which they must attempt to prove his guilt. (As I noted earlier,

¹⁹ A further question that I cannot discuss here is whether only those formally employed as criminal prosecutors should prosecute; or should others (police; officials of various kinds of inspectorate; even private individuals) have the power to bring prosecutions?

²⁰ The proper aims of the trial are served by a 'Guilty' plea only if that plea is voluntary and honest; one problem with our current systems of plea bargaining is that they lead to pleas that are neither voluntary nor honest.

prosecutors can also often dispose of (minor) cases in which a suspected person admits his guilt without going to trial, for instance by imposing a ‘prosecutor fine’, or by authorising a ‘conditional caution’:²¹ in such cases, we can say that the prosecutor is still calling the defendant to public account, in the sense that he is held accountable by a public officer of the law, acting in our collective name – an officer who must herself also be publicly accountable.)

The labelling of criminal cases in adversarial systems is thus symbolically significant. In polities that retain traces of their non-democratic history, the case might be listed as ‘*Regina v. D*’: the defendant is called to answer by and to his sovereign. More apposite, for democratic republics, is ‘*People v. D*’, or ‘*Commonwealth v. D*’, which make it explicit that the prosecutor speaks and acts in the name of the polity and its members. (‘*State v. D*’ is less appropriate: it encourages a view of criminal law not as our law, but as a law imposed on us by ‘the state’. That is too often how the law is, reasonably, perceived by those on whom it is imposed, but it marks a serious failing in the preconditions of the law’s legitimacy.)

How then should prosecutors discharge this central prosecutorial function of deciding who should be formally accused of what, and presenting the case against the accused person in court?

One further background principle of a democratic republic must be mentioned here – the presumption of innocence (PoI). In its most familiar form, the PoI bears directly only on the criminal trial: the court must convict a defendant only given proof of his guilt. This might seem to bear indirectly on the prosecutor’s role: a prudent prosecutor will not take a case to court unless she thinks she has a good chance of being able to prove it – why waste resources on cases that are doomed to fail? This would be right if the prosecutor’s role was to secure convictions, so that an acquittal marked a *failure*. That is how the role is often understood, by prosecutors and by others – which is at odds with the idea that the prosecutor should be a ‘minister of justice’;²² but it is not how the role should be understood in a democratic polity. A prosecutor who sees the criminal trial as I have suggested it should be seen, as a process of calling to account, and who sees those with whom she deals as fellow citizens to whom she owes equal concern and respect (rather than as criminals who have lost their civic standing),²³ will not see her role simply as that of securing convictions within whatever side-constraints the demands of

²¹ See n. 3 above; Ashworth and Redmayne, *The Criminal Process*, 168, 178–80.

²² See Richard Young and Andrew Sanders, ‘The Ethics of Prosecution Lawyers’, *Legal Ethics* 7 (2004) 190, at 195–6; Ashworth and Redmayne, *The Criminal Process*, p. 65.

²³ Compare Ashworth and Redmayne, *The Criminal Process*, p. 77, on the ‘toe-rag theory’.

justice might set. Her task is to call to account for alleged criminal wrongs those whom the polity has good reason thus to call: but what could constitute such a ‘good reason’?

The good reason will have to do with the likelihood that this person committed a criminal wrong, but a broader version of the PoI requires that likelihood to be a high one. This broader version applies to our civic dealings with each other as citizens and to officials’ dealings with their fellow citizens. It reflects a conception of ‘civic trust’ as an essential feature of a viable polity: the idea that we should, in our civic dealings, regard and treat each other as innocent (of past criminal wrongdoing or of intended future wrongdoing) until the other gives us good reason to treat him as non-innocent.²⁴ What counts as good reason, for what kinds of different treatment (what can defeat the presumption, to what effect), will vary from context to context; we must focus here on the prosecutor, and her decisions about whether (and on what charge) to prosecute. She must begin by treating those with whom she has to deal as innocents, and should pursue a criminal charge only if that presumption is defeated: but what can defeat it? We cannot say, as we can say of the PoI within the trial, that only proof (beyond reasonable doubt) of his guilt can defeat it: it is for the court, not the prosecutor, to determine whether guilt has been proved to the requisite standard. We can say, though, that she should pursue a charge only if she has sufficient, admissible evidence that the person committed the crime to constitute at least a case to answer: evidence sufficient for the court to conclude that he did commit the offence, unless he offers counter-evidence that creates a reasonable doubt.

Being put on trial is in many ways burdensome. Some of the burdens are material, some psychological; even if adequate legal aid is available, there are (for both guilty and innocent) unavoidable costs in time and energy, and the psychological burdens of a trial and of anxiety about its outcome.²⁵ There is also the moral burden of being formally accused of a criminal wrong. Prosecutors must be slow to impose such burdens on anyone until there is sufficient evidence that he committed the crime to justify doing so. If there is such evidence, it becomes legitimate to require the suspected person to answer in the appropriate forum. The prosecutor can look him in the eye as she charges him, as a fellow citizen who should be ready to answer for himself; she can still claim to accord him the concern and respect due to him as a citizen.

²⁴ See Dale Nance, ‘Civility and the Burden of Proof’, *Harvard Journal of Law & Public Policy* 17 (1994), 647; Antony Duff, ‘Who Must Presume Whom to be Innocent of What?’ *Netherlands Journal of Legal Philosophy* 42 (2013), 170, at 174–5, 180–2.

²⁵ See further Jonathan Rogers, ‘Restructuring the Exercise of Prosecutorial Discretion in England’, *Oxford Journal of Legal Studies* 26 (2006), 775, at 788–93.