The French Prosecutor as Judge. The Carpenter’s Mistake?

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INTRODUCTION

On the eve of the opening of a new Paris courthouse in 2017, a controversy rages in French legal circles. Will the French judiciary repeat the “carpenter’s mistake” yet again? This expression refers to the traditional spatial arrangement whereby French prosecutors are seated on a raised platform at the level of judges, well above the ground level where the defense and the victim’s lawyers stand.

If a courtroom’s physical organization is a sign system through which a society conveys a conception of the relationship between judges, prosecutors, defendants, and others involved in the justice system, then the “carpenter’s mistake” is suggestive of French prosecutors’ peculiar position. Their location in the courtroom is a physical reflection of their institutional status. The French judicial function is defined more broadly than in the United States, encompassing two types of “magistrats”: the prosecutors and the judges.¹ Statutorily as well as sociologically, prosecutors are judges, having attended the same national school for the judiciary, enjoying the same civil servant status, sharing the same office spaces, budget, and staff, and being able to transfer back and forth throughout their career between judgships and prosecutorial posts.² How does this unusual institutional design impact the relationship between prosecutors and democracy?

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² See Richard Vogler, CRIMINAL PROCEDE in France, in COMPARATIVE CRIMINAL PROCEDURE, section 6.2.1, 62 (John Hatchard, Barbara Huber, & Richard Vogler, eds, 1996). In practice, however, the majority of high-level prosecutors spend almost their entire career working as prosecutors rather than judges. See FLORENCE AUDIER ET AL., LE MÉTIER DE PROCUREUR DE
In France as elsewhere, prosecutors and their offices are seldom conceived as agents of democracy. A distinct theoretical framework is missing to conceptualize the prosecutorial function in democratic states committed to the rule of law. What makes prosecutors democratically legitimate (or not)? Can old and new democratic theories help break down the different dimensions along which prosecutors could be held democratically accountable? Beyond the broad commitment to rule by the majority, democratic theory involves a number of notions in theoretical tension concerning the proper function and scope of power, equality, freedom, justice, and interests. To evaluate French prosecutors’ democratic pedigree, I do not commit to any particular conception of democracy. Rather I pick and choose between various conceptions of democracy which seem most pertinent to prosecutors’ position in the democratic state. These include liberal democracy, classical separation of powers doctrine, deliberative democracy, and critical race theory. Based on these democratic paradigms, I examine four ways in which prosecutors could be viewed as democratic actors: via selection through a popular or autonomous process, separation of powers principles, deliberative decision-making norms, or representation through diversity. These four categories do not exhaust the field, as other possibilities exist, such as participatory democracy, which may call for the intervention of actors others than prosecutors in prosecutions, minimalist conceptions of democracy, whereby prosecutors’ powers should be reduced significantly, or democracy as general will, in which the prosecutor’s job would be to foster the common good.

My hypothesis is that in the French context, prosecutors’ professional status and identity as judges determines, to a great extent, whether and how they can be considered democratic figures. As members of the judiciary, they share in a number of the French bench’s democratic shortcomings – bureaucratic recruitment, minimal reason-giving, and insufficient diversity, to name but a few. The institutional factors that distinguish prosecutors from judges, most significantly the pervasive role of the executive in prosecutors’ transfers and promotions as well as governmental interventions in prosecutorial decisions challenge the notion of a democratic prosecutor. At the same time, prosecutors’ self-image as judges may to some extent preserve their independence. Having gone through the same curriculum and training and seeing judges as colleagues create a common professional ethos. Prosecutors’ occupational ideology casts

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them as “impartial accusers”\(^4\) or “advocates of the law”\(^5\) who disinterestedly apply criminal statutes for the “public good”\(^6\) rather than parties responsible for presenting the case against individuals suspected of breaking the law. Identifying as judges who enjoy more functional and decisional independence motivates prosecutors to achieve greater external autonomy from the executive branch and internal autonomy from their own rigid hierarchy.

In terms of methodology, I engage with the theme of prosecutors and democracy using a particular case study – France – combining democratic theory with original qualitative data. Qualitative research methods proved essential to exploring the hypothesis that French prosecutors’ professional identity impinges upon their democratic pedigree. The contours of their occupational subculture are neither discernible in black letter law nor in the doctrine. They can only be drawn by collecting prosecutors and judges’ own representations of their job and its democratic meaning for the society they live in. In that sense, the chapter looks at empirical answers to theoretical questions not usually treated as having empirical answers.\(^7\) It assumes that hard questions of democratic theory have practical counterparts which role-agents must solve for themselves within the confines of their particular institutions.

The heart of the data consists in court observations and semi-structured interviews with magistrats and other professionals gravitating around the judiciary. From September 2015 to June 2016, I conducted courtroom observations during public hearings as well behind the scenes in back offices.\(^8\) The courtroom observational data spans over 40 hearings held in four urban locations. I carried out 37 interviews: 26 with magistrats and 9 with other legal actors, be they working in law enforcement, applicants to the judiciary and the professors teaching them, or defense attorneys.\(^9\) Among the 26 magistrats, 14 had served as

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\(^4\) Interview with 13, Chief Prosecutor (2015).

\(^5\) Interview with 2, Senior Prosecutor (2016).

\(^6\) Interview with 12, Senior Judge (2015).


\(^8\) Prosecutors were involved in a range of activities, including: talking to the police over the phone, conducting police custody renewal hearings, arraignments, staff meetings to strategize about the day’s difficult cases, etc.

\(^9\) The interviews typically lasted 45–120 minutes, during which I took detailed notes. Some of them were recorded and transcribed. All the interviews were conducted in French and later translated by me. The interviews covered a wide variety of topics, including the judges and prosecutors’ own backgrounds and professional developments, the process by which they had attained their current post, their vision of the prosecutor’s office and its relation with judges, on the one hand, and the executive power, on the other hand, budgetary constraints, the routine of their work, the relationship between law and politics, and issues of ethics and discipline.
judges for their entire career, 6 as prosecutors only, 5 as both judges and prosecutors, and one was still a trainee-magistrat wishing to embark on the prosecutorial track. Enlisted the initial couple participants through existing contacts I had within the French legal community. Other participants were recruited using a snowball technique. Within the constraint of snowball sampling, I strived to select a sample of magistrats representative of the current French judiciary in terms of prosecutors versus judges.

The chapter has five Parts. After reviewing in Part I French prosecutors’ selection and promotion mechanisms, Part II examines the question of separation of powers in the criminal justice system. Part III turns to prosecutors’ deliberative practices and Part IV reflects on their lack of diversity as a failure in representative democracy. Part V concludes that despite the various democratic critiques which can be formulated against the prosecutor’s office, French prosecutors engage in de facto forms of independence.

I BUREAUCRATIC SELECTION AND POLITICAL PROMOTIONS

A nation’s system for selecting prosecutors is demonstrative of its vision of democratic governance. In most democratic countries, prosecutors’ democratic pedigree stems from a recruitment and promotion process that aspires to democratic legitimacy, not only ab initio, but also throughout their tenure. Two selection methods are typically favored: popular elections and independent appointment commissions which aim at insulating the functions of appointment, promotion, and discipline from partisan politics. The underlying idea is that in a country where citizens enjoy political liberties, if elections are free and participation is widespread – or if the appointment mechanism is transparent and gives a voice to civil society – then public officials such as prosecutors will be more likely to act in the best interest of the people. Selection procedures which allow for appraisal of incumbents’ performance, holding them accountable for the results of their past actions, e.g., through retention elections or re-appointment, also appear more democratic than lifetime tenure. At the same time, accountability based on re-election and re-appointment could conflict with prosecutors’ independence. Can

To maintain confidentiality, I do not include information that would identify the interviewees personally as the source of a comment, such as their title and the name and location of their court.

See generally Pranee Liamputtong, Qualitative Research Methods (2009).

In 2014, 33.04 percent of the 7,726 members of the judiciary served as prosecutors while 66.96 percent served as judges. See Conseil Supérieur de la Magistrature, Rapport d’activité 2014 25 (2014).
one be a truly independent prosecutor if one fears being fired or demoted? The hope is that such procedures incentivize prosecutors to apply the criminal law according to public priorities and values even if in practice, they have been shown to be unreliable democratic guarantees.\(^{13}\)

If selection were a litmus test for democratic pedigree, French prosecutors would fare poorly given the bureaucratic nature of their recruitment and the politicization of their transfers and promotions. They are neither democratically elected nor appointed through a non-partisan commission. Initial recruitment is identical to judges’; aspirants are typically selected in their early twenties through competitive examinations for admission to the Judiciary School, the École nationale de la magistrature (“ENM”). The entrance exam consists in anonymous written essays followed by a series of oral tests. The magistrats I talked to viewed the exam as eliminating political considerations and personal favoritism, in line with the egalitarian aspirations of the French Republic. An appellate judge described it as a “republican exam . . . a recruitment procedure which gives satisfaction because it has a republican legitimacy based on competence.”\(^{14}\) Yet, as I argue elsewhere, this purportedly meritocratic and unbiased selection mechanism results in massive class and race inequities, as it implies familiarity with a typically white middle-class culture and comportment.\(^{15}\) Once admitted into the Judiciary School, trainee-magistrats receive a generalist instruction in the many functions of the judiciary, which include prosecutorial positions as well as generalist and specialized judgeships. Upon graduation, the new magistrats choose their first assignment as a judge or prosecutor based on availability as well as on their school ranking. From their initial post, they can later transfer to prosecutorial position or to a judgeship and vice versa.

The selection of prosecutors is removed from partisan politics, but transfers, promotions, and removals are not.\(^{16}\) There is a split between judges and prosecutors. Judges manage their own affairs through the High Council of the Judiciary (Conseil supérieur de la magistrature or “CSM”), an independent

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\(^{13}\) The election of prosecutors in the U.S., in particular, has been the subject of numerous critiques. See, e.g., Ronald F. Wright, *How Prosecutors Fail Us*, 6 OHIO ST. J. CRIM. LAW 581 (2006).

\(^{14}\) Interview with 7, Court of Appeals Judge (2016).


\(^{16}\) Tenure in the French context means that magistrats cannot be removed from office except for gross abuse of their authority.
commission composed of judges, lawyers, and outside political appointees, which has final decision-making on judicial promotions and removals. By contrast, the Council’s role is much more limited when it comes to prosecutors as the Ministry of Justice largely determines their career, including promotion, transfer, discipline, and removal from office, which has led the European Court of Human Rights, in a series of cases, to criticize French prosecutors’ subordination to the executive.\footnote{ECHR, Medvedyev v. France, N° 3394/05, March 29, 2010; ECHR, Medvedyev v. France, N° 3394/05, March 29, 2010; ECHR, Moulin v. France, N° 37104/06, November 23, 2010.} High-level prosecutors are appointed directly by the French cabinet (Conseil des ministres) with no Council involvement whatsoever.\footnote{The High Council of the Judiciary does play a role when it comes to lower-level prosecutorial positions by giving non-binding advice on the Ministry of Justice’s nominees.}

As a retired chief prosecutor explained, “for very important positions, the Ministers decide . . . I’d even add, for very, very, important positions, occasionally the Ministry of Justice calls the Élysée [i.e., the French white house] saying ‘the Paris chief prosecutor must be appointed, we’d like X, what do you think?’”\footnote{Interview with 1, retired Chief Prosecutor (2015).}

Does this subordination to political authorities pose a threat to the democratic character of the prosecutor’s office? Can prosecutors who are dependent in some way upon the person who appoints them be relied upon to deliver independent decisions? Further empirical research is needed to answer this question. To be sure, current transfer and promotion mechanisms perpetuate the risk of “telephone justice,” whereby Ministry bureaucrats orally instruct prosecutors on what to prosecute and how – a practice theoretically outlawed, but which may not have totally disappeared, as an appellate court chief judge reports,

in principle, it should no longer occur, but it’s certain that the Minister of Justice, via intermediaries, continues to follow sensitive cases. So she’ll be informed of what is going on . . . One way for the prosecutor’s office to resist is to pass on the information or not pass on the information, waiting for the decision to be made so as to report an already-made decision. That can be a way to escape orders.\footnote{Interview with 6, Appellate Court Chief Judge (2015).}

This brief presentation of transfers and promotions raises the next question: if French prosecutors are neither selected nor promoted through democratic procedures, is their independence preserved through other mechanisms, such as separation of powers?

\footnote{Interview with 1, retired Chief Prosecutor (2015).}
II SEPARATION OF POWERS

Separation of powers between executive, legislative, and judicial bodies is meant to guarantee individual freedom and prevent abuse of power. Should those making investigative, charging, and advocacy decisions be separated from those who make adjudicative decisions? Prosecutors usually belong to the executive, not the judicial, branch, but French prosecutors stand in a bizarre institutional configuration. They are officially members of the judiciary, but report to the executive branch.

A Prosecutors and the Judicial Branch

Does the fact that French prosecutors and judges are colleagues within the same organization pose the risk of commingling the functions of investigation and adjudication? Judges and prosecutors not only share the same professional status, but also the same office spaces, support staff, and budget. Far from being spatially segregated within court buildings, their offices are often adjacent. In a few courts, prosecutors have their own floors, but more often than not, their offices are integrated with judges’. A retired prosecutor summed up the situation quoting the following adage: “single corps, single courthouse,” before adding that prosecutors and judges working on related issues are sometimes purposefully assigned neighboring offices to facilitate contact. For example, a single building may bring together all the court members working on criminal cases: prosecutors, investigative magistrates, and judges presiding over criminal trials. The two groups interact on a daily basis behind closed doors, inevitably discussing cases. The chief judge of a large appellate court who visited several foreign courts shared her comparative insights, “in Hungary, there was such a separation that the prosecutor could not speak with the presiding judge in the corridor because one may have feared some sort of collusion between them. They absolutely did not discuss outside of the public hearing. As for us, it’s the exact opposite. We talk all the time. We each assume our responsibility and may reach different decisions, but there’s a constant open dialogue.”

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21 Interview with 1, retired Chief Prosecutor (2015).
22 The investigative magistrates (juges d'instruction) are specialized judges tasked with conducting the investigative hearings preceding major criminal trials. They only intervene for the investigation of the gravest crimes, that is, in 1.28 percent of prosecutable offenses. See Ministère de la Justice, Les chiffres-clés de la justice 14 (2015).
23 Interview with 6, Appellate Court Chief Judge (2015).
For the longest time, this proximity had a symbolic translation in the hearing ritual as prosecutors and judges used to enter and exit the courtroom from same door, a practice now abandoned because it gave the appearance of improper intertwining. While the outward exhibition of judges and prosecutors’ union was effaced, its practical and decisional manifestations were not. Judges and prosecutors share the same finances, which can create tensions and impinge on case management. Every French court is governed by a dyad composed of a chief judge and chief prosecutor who must jointly agree on resource allocations. This diarchy leads to conflicts ranging from the mundane to the serious. A senior judge who served as a chief judge confided:

what is very problematic is that a chief judge manages his tribunal with a chief prosecutor. All decisions must be taken jointly. For example, you buy three computers; you give one to the judges, one to the prosecutors, but who gets the third one? … If there aren’t enough judges, another question is whether we’ll cancel civil or criminal hearings. Will the administrative staff support prosecutors or judges?24

Agreeing on the number and type of hearings to apportion to criminal prosecutions is particularly troubling from a separation of powers standpoint. By negotiating this allocation with their prosecutorial counterparts, chief judges become involved in shaping prosecutorial choices. One of prosecutors’ prerogatives is to screen complaints and sort out cases for types of prosecution, from fully-fledged criminal trials to expedited trials to a variety of alternative dispute resolution processes. When a chief judge decides to ration criminal hearings (or to provide more of them), she indirectly encourages certain prosecutorial policies. As a recently retired appellate court chief judge explained,

The prosecution’s position … tends to be: “I need more hearings. I prosecute a lot and these prosecutions deserve to be examined through hearings, rather than ADR” … And the position of judges is to say: “I can’t grant you as many hearings as you request because I have other imperatives and my imperatives are to process civil cases, family cases, small claims, social security, labor disputes, etc. … Besides, perhaps you, the prosecutor’s office, ought to diversify your prosecutorial arsenal.”25

The issue of hearing allocation is particularly contentious. Perhaps because of their professional identity as judges, prosecutors remain attached to traditional trials even though expedited trials and alternative dispute resolution are gaining ground. In 2014, of the 1.3 million offenses deemed prosecutable, 4.7

percent were processed through guilty pleas on the model of plea bargaining, 12 percent through penal orders (ordonnance pénale), 5.3 percent through settlements (compositions pénales), and 38.2 percent were resolved through other alternative dispute resolution mechanisms such as warnings, mediation, court-mandated courses, and treatment programs. Membership in the judiciary, therefore, has profound implications for prosecutorial autonomy, limiting prosecutors’ control over the type of actions they can choose, and pushing them toward ADR as a way to save resources for civil proceedings. But prosecutors must also contend with another meddling influence in their decision-making: the executive branch.

B Prosecutors and the Executive Branch

1 External Hierarchy

According to the French Constitution, the head of the executive branch, the President of the Republic, is the guarantor of the justice system’s independence. In the French republican ideology, the executive is supposed to protect citizens from excesses of unelected judges rather than judges protecting citizens from the executive, as in the Anglo-American tradition. This is a post-Revolutionary legacy. Of all the institutions of the Old Regime, the multitudinous courts that existed before 1789 with overlapping jurisdictions and quasi-legislative powers were among the most disparaged. By contrast, the judiciary established by the revolutionaries was characterized by its centralization and subordination to other branches of the government. Old Regime prosecutors, who had enjoyed some degree of freedom from the king, were abolished and replaced under Napoléon by a docile corps of bureaucrats. Ever since, the structure of the prosecutor’s office remained highly hierarchical. All prosecutors are accountable to the Minister of Justice as well as to their immediate superiors.

The subordinated network of prosecutors is tasked with carrying out governmental policies. In traditional French statist and centralized fashion, the Ministry of Justice defines priorities of nationwide applicability known as “penal policies” (politique pénale) accompanied by quantified objectives. These guidelines trickle down the prosecutorial structure via circulars as well as yearly meetings with supervisors relaying the directions locally. Until 2013, the Minister of Justice was entitled to give written instructions in individual

26 See Ministère de la Justice, supra note 22, at 14.
27 Fr. Const. Article 64.
29 See Code de Procedure Penal [C. pr. pén.] Article 30 (Fr.).
cases such as ordering the prosecution of a given person. In theory, the discontinuation of a prosecution could not be ordered, but in practice, demands to close cases of political allies were frequent. According to sociologists Philip Milburn and Christian Mouhanna, sanctions for the failure to follow ministerial instructions take various forms, from being summoned to the Ministry for disregarding national orientations, to improvised inspections following a high-profile prosecution, to the transfer of refractory prosecutors. In addition, the professional misconduct charge of “insubordination” can result in discipline and sanctions.

Giving and following instructions is such an entrenched characteristic of the prosecutors’ office that it turns up in the performance evaluation system. Junior prosecutors are dependent upon senior prosecutors in a career system in which high-level prosecutors evaluate and grade lower-level prosecutors every other year. Evaluations and grade become part of prosecutors’ individual files, which are the basis for future transfers, promotions, or disciplines. Evaluators use a standardized performance appraisal form. Submission and compliance are explicitly valued and serve as measures of professional achievement. To evaluate prosecutors with managerial responsibilities, central criteria include the “capacity to conduct penal policies” and “to be part of the statutory hierarchical relationship.” Reciprocally, line prosecutors are evaluated based on their “capacity to implement penal policies” and “to be part of the statutory hierarchical relationship.” In short, those determining promotions are explicitly instructed to reward loyalty and conformity and to penalize independence.

2 Internal Hierarchy
The strong internal hierarchy among prosecutors reinforces their external subordination to the executive branch. The prosecutors I interviewed insisted that a defining feature of their professional identity is the collective nature of

32 Few prosecutors have been disciplined merely for failing to follow hierarchical orders, the charge being often associated with other types of misconduct. But see July 16, 2004 Avis Motif in Conseil Supérieur de la Magistrature, Rapport Annuel 2003–2004 178–82 (2004) (reprimanding a deputy prosecutor for preventing his superior from “controlling” his requisitions and for himself refusing to exercise his hierarchical control over line prosecutors). See also decree of December 22, 1958, Article 45 (providing that sanctions for misconduct include reprimand, reassignment to a different position, withdrawal from certain functions, demotion, compulsory retirement, and removal).
33 These criteria are laid out in an internal document distributed to all high-level judges and prosecutors who evaluate their junior colleagues.
the job, contrasted to the solitary work of judges. Asked about the defining feature of his time in the prosecutor’s office, a former prosecutor turned judge replied, “first of all, my experience of the prosecutor’s office is an experience of collective life one does not find in judgeships.”

Group decision-making in a highly stratified system, however, may reinforce pressure toward conformity. As I was able to see for myself, the default day-to-day work of handling ongoing investigations takes place in an open space office layout. Prosecutors overhear one another talking to the police over the phone and making on the spot investigative or prosecutorial decisions. They constantly chat with one another, commenting on their investigations and asking for feedback. Supervisors present in the room inform superiors immediately if any unusual or sensitive investigation comes up.

For instance, during my observations, a juvenile case generated frenzy in the office. A couple of weeks after the November 2015 Paris attacks, a teenager wrote on President François Hollande’s Facebook page that he wanted to “exterminate all French Jews.” The line prosecutor who received the case turned to colleagues for guidance. They agreed that the statement constituted the crimes of “apology of terrorism,” “incitement to racial hate,” and “death threats.” Since the attacks, the state of emergency was placed and the Ministry of Justice had ordered zero tolerance on terror threats, leading the supervisor present in the room to conclude that charges should be brought as soon as possible. They group was unsure of the victim’s identity, however. Was it the French state? The Jewish community? This hesitation prompted the supervisor to call the chief prosecutor’s aide on her cell phone for directions.

A functional equivalent of the executive branch’s right to order prosecutions is the chief prosecutors’ right to substitute prosecutors working on a specific case. Trial courts’ chief prosecutors (the “procureurs de la République”) have full discretion to organize their office as they see fit, moving line prosecutors around from post to post and reclaiming or re-allocating cases at any time.

As a former prosecutor quoted above recounted, “I have seen chief prosecutors repossess a case . . . The chief prosecutor said ‘no I don’t agree with you, hand over the file. I will make the charging decision.’” Each procureur de la République is assisted by deputy and line prosecutors who have little room to exercise independent judgment, hence, perhaps, their official title, “substitutes of the prosecutor” (substituts du procureur). The substituts are interchangeable pawns acting in the name of the chief prosecutor rather than in their own. The

34 Interview with 12, Senior Judge (2015).
35 CODE DE L’ORGANISATION JUDICIAIRE, Article R.311–35.
36 Interview with 12, Senior Judge (2015).
threat of constant mutability discourages them from expressing their personal convictions when they are contrary to their superiors’ instructions.

After having examined prosecutors’ position from a separation of powers perspective, the next Part turns to their deliberative practices.

III DELIBERATION

Deliberative democracy is a contested concept, but at its core is the idea that decisions made by state authorities must be justified by reasons, or at least contestable. This ensures that citizens are treated not merely as passive subjects to be ruled, but as autonomous agents who take part in the governance of their own society, directly or through their representatives.37 Do prosecutorial decisions meet these conditions?

A Reason-giving

French prosecutors, like their American counterparts, have very limited obligations to give reasons. Most strikingly, they do not need to justify the decision to prosecute by bringing formal charges or by orienting a case toward ADR.

In only three circumstances are prosecutors under a legal duty to give reasons: 1) when they decide not to prosecute;38 2) when they extend a suspect’s police custody or request the pre-trial detention of a suspect;39 and 3) for the most serious crimes, when they respond to the investigative magistrate’s conclusions and propose a set of charges.40 In the first couple scenarios, reason-giving is purely boilerplate; prosecutors check boxes on fill-out forms such as “insufficient evidence,” “amnesty,” or “irregular procedure” when closing a case. When prolonging custody or requesting pre-trial detention, pre-printed reasons include the need for the police to continue investigating, ensuring the presence of the suspect at arraignment, preventing the destruction of evidence, etc. Though formulaic, these reasons are a step forward; boxes to be checked are more informative than no boxes to be checked. The third form of reason-giving, reserved to the few serious cases deferred to a juge d’instruction,41 presents prosecutors with the only sustained justificatory obligation in their professional life. After the juge d’instruction completes her investigation, the prosecutor drafts a detailed memo, ranging from 4 to 800 pages depending

38 C. pr. pén. Article 40–2.
40 C. pr. pén. Article 175.
41 See supra note 22.
on the complexity of the case, reviewing the evidence and recommending whether or not to charge, what to charge, and whether to send the case to the tribunal correctionnel, composed of professional judges only, or to the cour d'assises, where professional judges sit with lay assessors.

These three reason-giving requirements are primarily addressed to colleagues and superiors rather than the public, the accused, and the victims. One would expect that the decision to drop a case was justified for the benefit of the victim, who is often the person soliciting law enforcement. Yet, prosecutors can choose not to by checking the apposite box on the pre-filled form: “do not give notice to the victim.” More surprising yet, the alleged perpetrator does not receive a copy of the decision to close a case. One of the defense attorneys I interviewed complained that the only way for the accused to find out why the case was dropped is to “go to the Renseignements [the internal intelligence agency] and request a copy . . . It’s totally archaic.”42 Archaic or not, the question which interests us is whether the need to resort to the secret services is a sign of democratic failure. Though neither available to the public, the accused, nor the victim, these reasons have the merit of existing. They may prove efficacious internally, be it as precedents for future cases, arguments for political action, or record for review purposes.

Rather than a tool for external accountability toward parties and the public, the pre-printed reason-giving form functions principally as an internal accountability mechanism. One of the Ministry of Justice’s proclaimed goals is for prosecutors to provide a “penal response” to all prosecutable offenses. As a result, prosecutors use the form to justify to their supervisors the termination of prosecutions (which occurred in 11.5 percent of the cases in 2014).43 Similarly, the duty to justify the prolongation of police custody as well as pre-trial detention operates as an internal rather than external accountability mechanism. I observed five police custody prolongation hearings conducted over videoconference.44 In all instances, the prosecutors neither introduced themselves nor explained the purpose of the hearing and the custody when interrogating the suspects, leading to confusion as to their role and identity. One of the suspects concluded the hearing by saying, “Thank you, Mr. Judge,” betraying the mistaken assumption that he was talking to a judge. Two other suspects consistently addressed the prosecutor as “Chief,” suggesting awareness that they were speaking to a higher authority of sorts, but raising doubt as to whether they were informed of the nature of the hearing. The recipient of the boilerplate statement of reasons in the form of checked boxes is

43 MINISTÈRE DE LA JUSTICE, supra note 22 at 14.
neither the detained individual nor the public (the form is not a public document), but rather the specialized judge responsible for decisions on release and detention (juge de la liberté et de la détention).

The third form of mandatory reason-giving benefits parties more directly, given that both the defendant and the victim (represented as a “civil party”) obtain a copy of the prosecution’s memo. Yet, the prosecutor’s argument is aimed at persuading the juge d’instruction rather than explaining the charges to the accused or the public (in fact the document is not publicly available and I was only able to familiarize myself with its content and format by asking my research subjects for copies). The prosecutor’s hope, when drafting this type of memo, is that the juge d’instruction will agree on whether to charge, what to charge, whether to charge in a tribunal correctionnel or in a cour d’assises, whether to allow defendants to enter diversion programs, etc. This memo too represents an internal form of accountability, which leaves out parties and the general public.

The only form of reason-giving geared toward external accountability is found at trial. Prosecutors’ statements at trial are public and provide some measure of justification for prosecutions. Their explanatory power, however, varies considerably from trial to trial and prosecutor to prosecutor, depending on a host of factors, from the specifics of the case to the individual style of prosecutors. As one interviewee remarked,

The caricature of the prosecutor is the guy seated through the entire hearing who brusquely stands up when his turn comes to say just four words before sitting down again: “Application of the law,” that is, I will leave the case to the judges’ appreciation. For repetitive cases such as driving offenses, it is very common. It’s also more prevalent among senior prosecutors. At the beginning young prosecutors strive to argue, but they soon find out that it’s a waste of time for recurrent cases.46

In addition to engaging in these different forms of reason-giving, prosecutors’ decisions present varying degrees of contestability.

B. Contestability

As a complement or alternative to reasoned deliberation, some theorists have proposed that the contestability of public decisions allows citizens to maintain a democratic government.47 The idea is that unreviewable power and absolute

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45 C. PR. PÉN. ARTICLE 2 (in all criminal proceedings, those injured as a result of a criminal act may intervene by interposing a claim for civil relief, becoming known as “civil parties”).
46 Interview with 1, retired Chief Prosecutor (2015).
discretion are incompatible with democracy outside of the most dire of emergencies. If citizens have the ability to challenge public decisions, however, they keep public officials in check, preventing them from slipping into the arbitrary power and from advancing their own interests or those of the powerful. Are prosecutorial decisions contestable? Few legal checks exist to police prosecutorial decisions ex ante, judges generally lacking the power to monitor and control the work of prosecutors before charging decisions are made. 48 French rules of evidence are far less constraining than Anglo-American rules, providing prosecutors with more leeway in their handling of the investigation and their rapport with the police. 49 It is the criminal process triggered by prosecutors’ indictments that determines whether the decision to prosecute was warranted based on the evidence. 

By contrast, the decision not to prosecute is open to pre-trial review. The process is non-judicial, resembling a superior audit. The Code de procédure pénale provides that, “any person who denounced the facts” can appeal the decision to close the case to one of the 36 chief prosecutors (procureurs généraux). 50 According to a former chief prosecutor, “the chief prosecutor requests the file, reexamines it, and sometimes in these situations he instructs the line prosecutor who closed the case to prosecute, saying ‘I disagree with your closure decision’ . . . In general the line prosecutor anticipates this and prosecutes even before the appeal has been examined.” 51 Preemptive correction by subordinates without any finding that they have erred or committed a fault is symptomatic of the hierarchical nature of the system. Subordinates have all the incentives to adjust decisions of their own initiative to avoid conflict and maintain a good working relationship with their supervisors. Who benefits from this limited right to contest prosecution terminations? All the actors who share in the prosecutorial function due to their capacity to trigger criminal proceedings, that is, the victims, but also the various authorities who initiate cases: the police, administrative agencies, social workers, and NGOs. There is no equivalent right for the accused to contest charging decisions, despite the plausibility of scenarios in which political forces push indictments in cases lacking legal or factual merits.

The French case illustrates the distance between the deliberative democracy ideal and the prosecutorial function as it manifests itself in many democratic states, divorced from the values of citizen participation and generally

48 By contrast, investigative judges’ (juge d’instruction) decisions are subject to review by a special judicial panel known as the chambre de l’instruction.
49 C. PR. PEN. ARTICLE 427 (stating the principle of freedom of proof or evidence by all means in criminal law).
50 C. PR. PEN. ARTICLE 40.3. 51 Interview with 1, retired Chief Prosecutor (2015).
unconcerned with reason-giving and contestability. Could a more diverse corps of prosecutors generate more responsive, community-oriented prosecutorial roles? As the next Part argues, another angle to assess the relationship between prosecutors and democracy is the idea of representative bureaucracy.

IV DIVERSITY

Theoretical discussions of representative democracy have traditionally focused on the formal procedures of authorization and accountability within nation states, that is, on what Hanna Pitkin calls “formalistic representation.” However, such a focus is not satisfactory in diverse societies where segments of the population are systematically underrepresented in positions of power and overrepresented among those accused in the criminal justice system. The concept of representative bureaucracy can be mobilized to assess the relationship between prosecutors and democracy. The notion of representative democracy should be extended to include the demographic representation of citizens in key public offices. Representative bureaucracy suggests that a public workforce representative of the people in terms of race, ethnicity, gender, and sexual orientation, but also socio-economic status, regional origin, abilities and disabilities, helps ensure that the interests of all groups are considered in decision-making processes. Are more diverse prosecutorial offices less susceptible to bias? Social scientists are divided on the issue, but there is strong evidence indicating that they are. One way in which prosecutors could be agents of democracy, therefore, would be by engaging in both passive and active representation whereby they would not only more closely match the population on various dimensions of diversity, but also be attuned to the rights and needs of those they “look like” or represent.

France is a heterogeneous society characterized by widespread diversity along multiple axes. However, prosecutors and judges are a homogeneous group. Drawn from the elite stratum of society concentrated in the Paris region, they are strikingly under-representative of racial, ethnic, and sexual minorities.

52 Hanna Fenichel Pitkin, The Concept of Representation 11, 89 (1967).
53 See DONALD KINGSLEY, REPRESENTATIVE BUREAUCRACY: AN INTERPRETATION OF THE BRITISH CIVIL SERVICE (1944) (articulating the notion of a representative bureaucracy in the context of the British civil service during the Second World War).
55 Another complementary approach would be to train prosecutors along the lines of what Angela Davis has proposed in the U.S. context. See Angela J. Davis, In Search of Racial Justice: The Role of the Prosecutor, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821 (2013).
as well as low-income citizens and rural regions. Women dominate the French judiciary overall, but men remain overrepresented among prosecutors. About 63.05 percent of the combined judges/prosecutors are female,\(^{56}\) but only 39 percent of prosecutors are female, versus 56 percent of judges.\(^{57}\) The (real or imaginary) gendering of judgeships and prosecutorial posts explains this discrepancy. Working as a prosecutor is harder on those with caregiving responsibilities, who tend to be female, as the job calls for long, often unpredictable hours, constant availability over the phone when on-call, as well as night and weekend shifts. The hierarchized and collective nature of the day-to-day work, defined by constant interactions with the police, foster a masculinized professional ethos. Throughout my research, I was struck by the gendered language used by research subjects. Time after time, they used feminine-coded adjectives to describe judicial assignments as “solitary,” “bureaucratic,” or “passive,” in contrast to prosecutors’ work, which was depicted as “collegial,” “dynamic,” and “active.” Practical constraints as well as cultural constructions collude to perpetuate a gender imbalance among prosecutors.

Ascertaining the racial and ethnic background of judges, prosecutors, and defendants is an arduous task in the French context as no official data on race and ethnicity are collected.\(^{58}\) In the supposedly “universalist” French tradition, not only the state, but also French social scientists tend to deny the reality of race and ethnicity.\(^{59}\) The collection of so-called “ethnic statistics” is generally prohibited, perpetuating the invisibility of minorities and obscuring the reality of systemic discrimination and other forms of oppression.\(^{60}\) The biographical directory of French judges and prosecutors (“annuaire de la magistrature”) includes their name, date and place of birth, educational background, professional background prior to entering the judiciary, if any, and a chronological list of posts occupied. Nothing is known about their race or ethnicity. This façade of color-blindness covers a deep hypocrisy, however. Journalists and activists have

\(^{56}\) CONSEIL SUPÉRIEUR DE LA MAGISTRATURE, supra note 12, at 28.

\(^{57}\) Cécile Petit, État des lieux des femmes dans la magistrature (2004) (unpublished paper), available at www.administrationmoderne.com/pdf/activites/comptrendu/cr_fmagistrature.pdf. See also AUDIER ET AL., supra note 2, at 44 (reporting that about 46 percent of male graduates of the Judiciary School land a prosecutor position right after graduating, compared to 38 percent of females).


\(^{59}\) See Cécile Laborde, The Culture(s) of the Republic: Nationalism and Multiculturalism in French Republican Thought, 29 POL. THEORY 716 (2000) (describing French republicanism’s “ethical universalism,” which is committed to cultural nationalism and hostile to multiculturalism).

\(^{60}\) The French census includes data about nationality and country of birth, but not race and ethnicity.
long denounced the police and secret services’ collection of racial and ethnic data on certain categories of offenders. The judiciary’s own database of offenders, “Cassiopeée,” contains a number of race-neutral data – name, place of birth, nationality, language, dialect, name of parents, domicile – which taken together give prosecutors an inkling of suspects’ likely racial identification.

By most accounts, there are enormous disparities between the race, ethnicity, and social class of criminal defendants and prisoners, on the one hand, and that of judges and prosecutors, on the other hand. Based on my fieldwork, it appears that judges and prosecutors are overwhelmingly middle-class whites of Christian backgrounds. A retired chief prosecutor with intimate knowledge and experience of the justice system estimated that on the 7,726-member corps of judges and prosecutors, “not more than twenty” are black. Asked about diversity in her court, the chief judge of a large appellate court responded, “there are no foreigners,” before correcting herself, “they [the judges and prosecutors] are French.” As I explain elsewhere, many of the magistrats I interviewed lumped together race, ethnicity, and nationality, betraying the assumption that Frenchness is inseparable from whiteness. Several magistrats noted that among the younger generations, a few “beur” (i.e., a colloquial term to designate French born people of North African descent) could be found. By contrast, Maghrebi, black, or Eastern European males from working-class and underprivileged backgrounds make up the majority of the accused, a fact reflected in the prison population. In his 2015 study of a prison in the suburbs of Paris, anthropologist Didier Fassin was able to “visualize the astonishing presence of minorities.” According to him, black and Arab men represented two-thirds of the prisoners’ population, closer to three-quarters of those below the age of 30. Other researchers have documented the fact that minorities and second-generation immigrants are more likely to be confined than whites and those of French descent.

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62 Interview with 1, retired Chief Prosecutor (2015).


64 See Cohen, supra note 15.


66 Id.

67 Sociologist Farhad Khosrokhavar, using parents’ nationality as a proxy, found that those who had parents born in the Maghreb made up 39.9 percent of prisoners aged 18–24 and 35.4...
Judiciaries of similarly situated societies such as England have identified the lack of diversity in the judicial ranks as a major social justice problem undermining public confidence in the justice system. French judges and prosecutors are more reticent to acknowledge the problem. While gender and socio-economic inequalities are no longer taboo, racial discrimination and oppression goes unmentioned. In 2008, the Judiciary School created a special preparatory course (the “classes préparatoires Égalité des chances”) to foster a “diverse recruitment” into the judiciary, by which it means socio-economic and geographic diversity. Applicants must either prove financial hardship or reside in urban areas defined by the government as high-priority targets due to economic impoverishment, violence, and unemployment. The stated goal is not to foster racial and ethnic diversity; as a prep course professor noted, it would be “impossible, it’s against the French Constitution...because of the way in which we interpret the anti-discrimination principle in the Constitution we can’t have ethnic statistics, etc.” Though minorities are underrepresented and whites overrepresented among French prosecutors, neither the idea of representative bureaucracy nor the benefits of diversifying prosecutor’s offices are on the agenda. So long as the judiciary will solely be interested in fostering socio-economic, geographic, and gender diversity, it will perpetuate a formalistic notion of representative democracy, which blithely ignores unwarranted racial, ethnic, as well as sexual orientation disparities in public institutions.

To summarize the chapter so far, the French prosecutor’s office’s design and functioning appears misaligned with a variety of goals which democratic theorists have assigned to a democratic state, from bureaucratic recruitment, to opaque transfer and promotion mechanisms, to erratic separation of powers, to sparse reason-giving, to lack of diversity. There may be nothing specific to the French case in that prosecutorial agencies elsewhere may share many of these shortcomings. Yet, as the next and final Part argues, what is specific about the French case is that prosecutors have found a variety of methods to
resist the hierarchical structure in which they are embedded, by relying in part on their status of *magistrats* akin judges.

## V DE FACTO INDEPENDENCE?

On the ground, prosecutors have developed several approaches to counteract hierarchical and political pressures, including peer-mediated corrections, specialization, and unionization.

### A Peer Review

The French judiciary represents somewhat of an anomaly from a theory of organizations perspective. Bureaucracies are generally assumed to be goal-driven organizations whose members are tasked with common aims. Contrary to that view, the French judiciary includes within the same structure two sets of bureaucrats functionally pitted against one another: judges and prosecutors. Prosecutors are not only embedded in teams of prosecutors, but also in broader teams including judges. Their discretion is therefore not only bounded by rules of criminal procedure, but also by these two sets of colleagues. The missions of judges and prosecutors are distinct and, to a large extent, antagonistic. Prosecutors are advocates, indicting and prosecuting, while judges are supposed to be disinterested adjudicators. Avoiding an entangling alliance between the two functions seems essential to the democratic functioning of the justice system. Yet in practice, entanglement itself – in the form of joint membership in a unified professional body – may act both as a check on prosecutorial discretion and an impetus for prosecutorial independence.

How does belonging to the same corps promote independence? A few of the prosecutors I interviewed emphasized that going through the same training and professional experiences as judges acculturates them into judicial ethics, which they come to identify with. As a high-level prosecutor explained, “just by investigating, regardless of whether or not we will end up indicting, we infringe upon individual liberties, we infringe upon people’s reputations, we create a host of constraints, and we must do so with an extremely rigorous ethics, and I believe that that of judges isn’t the worst.”

Prosecutors see themselves as sharing a judges’ distinctive professional ethos in that they are first and foremost public servants tasked with protecting the general interest, not advocates. They insist that they are not a typical party to the criminal trial,

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71 Interview with 15, Senior Prosecutor (2015).
but a “very peculiar party.” As another high-level prosecutor declared, “what is asked from the prosecutors is that no consideration other than the necessity to defend the general interest and prosecute crimes interfere with their decision. That’s impartiality.” This judicial posture is a powerful tool for individual prosecutors to resist internal and external interference in their decision-making. When asked about whether his supervisors or the Ministry bureaucrats intervened in his cases, a judge who had served as a prosecutor answered negatively, “I was coming from a judgeship. Perhaps it’s a question of character. When I made a decision, the decision was made.”

Belonging to the same corps as judges also not only fosters independence, but it may also limit prosecutorial discretion through internal norms of collegiality and peer review. As discussed above, prosecutors’ decisions are not technically subject to judicial review, but professional membership in the judiciary creates an institutional check on discretion. Prosecutors and judges belong to the same state-sanctioned elite; they studied together, transfer from one position to the other, eat lunch together, and are sometimes coupled, all factors driving them to get along. A former judge who never served as a prosecutor pointed out that “being in the same building, one is constrained to take into account what the other will say. It’s very different from what I observed abroad where the prosecutor is an external partner. Our institutional positioning is very different.”

Another judge, who served as a prosecutor, recalls his trial experience: “You are there to show your colleague on the bench what you would do if you were in his shoes. And it’s extremely helpful for a judge. He needs this.” The two groups trust one another quasi-ininstinctively, being controlled by the same powerful educational and institutional norms. At the same time, their professional goals often conflict so they must make conscious efforts to avoid dissatisfying the other camp. For example, prosecutors engage in self-censuring behaviors such as refraining from prosecuting cases that lack sufficient factual basis, investigating and paying attention to both inculpatory and exculpatory evidence, and volunteering to share information with the defense during the pre-trial phase as a showing of good faith.

72 Interview with 15, Chief Prosecutor (2015).  
73 Interview with 12, Senior Judge (2015).  
74 Supra Part III.B.  
75 To obtain assignments in the same court, a common strategy for married or partnered magistrats is for one to serve as a judge and the other as a prosecutor, given the unlikelihood of securing two judgeships at the same time.  
76 Interview with 5, retired Chief Judge (2015).  
77 Interview with 12, Senior Judge (2015).  
78 According to one of the defense attorneys I interviewed, the prosecution has no duty to share its file with the defense during the pre-trial phase, but often does so as to “look good.”
Having served as a judge earlier on in one’s career, prosecutors say, helps one to anticipate when a case will hold up to judicial scrutiny and when to engage in preventative rectification. I witnessed a colorful illustration of this self-censorship. Over several days, the police called the prosecutor’s office I was observing about a dentist accusing a former patient of harassment and death threats. The alleged perpetrator was held in custody for 48 hours. What evidence did the police gather during that time? Flowers, chocolates, and text messages (“I’ve been loving you for two years” or “I want to take you out to dinner”). Finally, upon learning that the suspect, a Russian citizen with very little French, could not have been meaningfully interrogated without an interpreter, one of the prosecutors on call ordered his immediate release, ironizing: “Sending flowers, of course, is a form of violence. We’ll look good, I can tell you. These are shitty procedures.”

After hanging up the phone, furious, he exclaimed that his “colleagues” – the judges – would laugh at him and his office if charges were brought.

The familial and professional bond between judges and prosecutors operate as checks on discretion in a Goffmanian sense. Prosecutors do not attempt moves that may lead to losing face in front of colleagues. Tellingly, few things irritate prosecutors more than being rebuked by judges who never served as prosecutors, and therefore, they claim, lack the ability to identify with their perspective. The same prosecutor who dropped the spurned lover’s case became enraged, a couple hours later, when the judge on call that day for authorizing pre-trial detention (juge des libertés et de la détention) released three suspects. He wanted them in custody so that they could be tried through an expedited proceeding the next day. Upon hearing of their release, he burst out: “See, that’s what happens when we have incompetent civil judges on call as juge des libertés et de la détention. To be sure they never served as prosecutors or they would know better. If X [one of the suspects, a repeat DUI offender] kills a child tomorrow, I’ll call the media to tell them it’s the judge’s fault!”

As this acting out suggests, judges and prosecutors, though officially colleagues, are also in competitive relationships. Implicit in the disgruntled prosecutor’s charge was the reality that the justice system is often the target of media and political attacks, with judges and prosecutors attempting to pass the buck to one another. Their rivalry can be beneficial, however, fostering prosecutorial

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80 See Erving Goffman, On Face-Work, in Social Theory: The Multicultural Readings 338 (Charles Lemert, ed., 2010, [1955]) (laying out some of the ways in which people present a face or image of the self in social relationships).
independence and accountability. Prosecutors do not have the monopoly on prosecutions. The most serious crimes are in principle investigated and prosecuted by investigative magistrates (the *juges d'instruction*), who represent a significant check on prosecutorial discretion. Should a prosecutor’s office try to sweep a case under the rug, e.g., because it implicates public officials, well-known figures, or the police, or is likely to have a high media impact, the victims and a number of NGOs\(^81\) can initiate criminal proceedings by referring the case directly to the *juge d'instruction*, bypassing the prosecutor’s office altogether.\(^82\) This eventuality is dreaded as a source of great embarrassment for prosecutors whose lack of independence would be exposed for the bench and the general public to witness. The overlapping competence between *juges d'instruction* and prosecutors, therefore, acts as a powerful motivation for the latter to strive to be independent decision-makers, lest they be ridiculed in the profession and in the media.

### B Policy-making and Specialization

Localism and specialization may further *de facto* independence in the hyper-centralized and hierarchized French context where requests for information emanating from the Ministry of Justice or high-level prosecutors are frequent.

1 Bottom-up Policy-making

Prosecutorial discretion varies depending on the size of a court. In small courts relying on fewer than five prosecutors, the head prosecutor intervenes in the majority of the cases. In medium to large courts, line prosecutors enjoy broader responsibilities and more leeway; only in sensitive or very serious cases will supervisors be involved from the beginning, leaving room for local policy-making as well as decision-making free of political interference to develop.\(^83\) Localism has democratic effects in that it produces greater independence from the executive and introduces an element of citizens’ participation in the criminal justice system, but it may also have undemocratic consequences in increasing prosecutorial discretion.

Localism facilitates participatory democracy through community involvement in the justice system. A high-level prosecutor who spent most of his career lobbying for greater prosecutorial independence through decentralization and local initiatives explained that since the 1990s, penal policies increasingly

\(^{81}\) Such as anti-racist organizations, violence against women groups, victims’ association, anti-drug groups, child protection groups, etc.

\(^{82}\) C. PR. PÉN. Article 85.  

\(^{83}\) See Audier et al., *supra* note 2 at 130.
developed bottom-up. Through local partnerships with a range of actors, including the préfets (the state’s representative at the local level), the police, educators, and social workers, prosecutors expanded their role far beyond the sole prosecution of cases. They increasingly enlist public actors as well as the civil society in the definition and implementation of penal priorities. Partnerships such as “contrats de ville” or the “maisons de justice et du droit” were established to foster cooperation between judges, prosecutors, elected officials, and social workers with the goal to prevent crimes, develop ADR, and assist victims by offering free legal clinics. According to this pro-decentralization prosecutor, the introduction of “real-time” processing of delinquency (the so-called traitement en temps réel or “TTR”) strengthened prosecutors’ supervision of the police, all the while affording them a deeper grasp of the realities of crime. Prosecutors now process every single case signaled by the police through a telephone monitoring system. They direct investigations and order, renew, or revoke suspects’ custody, deciding whether or not to prosecute in real time as the information flows in through telephone communications. As a judge argued, these constant interactions with investigators and offenders made prosecutors prized experts on the nation’s social problems, systematically consulted by legislators and other agencies for major reform projects.

The flipside of this accrued independence is the potential broadening of prosecutorial discretion. The traitement en temps réel system operates as an emancipatory mechanism from the Ministry of Justice and the procureurs généraux, allowing line prosecutors to develop the expertise and fine-grained knowledge of their fieldwork necessary to generate independent penal policies. At the same time, it resulted in widening disparities between different prosecutor’s offices and among prosecutors within each office. It expanded prosecutions to behaviors previously not taken to court – petty offenses such as traveling on public transportation without a valid ticket, smoking pot, or congregating in a building’s communal parts. The police officer I interviewed believes that prosecutors now enjoy too much individual discretion, even though he and his colleagues use this excess to their advantage. When they need to secure prosecutorial authorization for an action, their first step is to find out which prosecutors are on call. Depending on the answer, they delay or accelerate the investigation so as to connect with those prosecutors perceived as more accommodating, rather than “the bougie, squeamish female prosecutors who do not understand the realities on the ground” – a characterization which reflects the enduring masculine coding of the prosecutorial function, as discussed above.

To counterbalance the broadened discretion brought about by real-time processing, a supervising prosecutor explained that when she was appointed, her first priority was to push for more uniformity in prosecutorial responses to police investigations. She wanted to avoid the precise situation described by the police officer whereby some prosecutors gain a reputation for leniency while others are shunned as fastidious and difficult to deal with. Her strategy to check line prosecutors’ discretion while setting clearer boundaries with the police was to establish clear recommendations for prosecutorial response to offenses. She consulted with the entire staff, compiling charts and tables indicating the orientation to adopt for all standards categories of offenses and offender profiles. The new guidelines were shared with the police as well as youth organizations, social workers, and other local actors. While non-binding, they represent an effort to balance independent and local decision-making with bounded discretion.

2. Caseloads and Specialization

In 2014, 4,621,486 criminal cases were processed by the French criminal justice system, of which over three million were closed due to the lack of identifiable perpetrator or for insufficient charges or evidence. Still, 1,327,980 were disposed of, be it through trial, ADR, or dismissal after an initial proceeding had begun. That same year, there were 1,919 prosecutors working in the country. On average, each prosecutor was responsible for processing 728 cases in addition to the hundreds of cases dismissed yearly.

Criminal caseloads are so high that they necessitate the *de facto* specialization of prosecutors, resulting in relative spheres of autonomy from the executive. With the exception of prosecutors assigned to the generalist department of real-time case processing and for those in supervisory positions or in offices so small that everyone is a generalist, prosecutors specialize based on offense categories or, more rarely, territory. Mid-size offices include separate prosecutorial departments for areas such as juvenile delinquency, organized crime, economic and financial crimes, and drugs. The largest offices include hyper-specialized divisions in matters such as terrorism, maritime pollution, tax fraud, or public health. Geographic specialization is becoming the norm in large urban areas where some prosecutors concentrate on a particular neighborhood. They become the point person for that district, responsible for investigating and

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87 Interview with 22, Chief Prosecutor (2016).
88 MINISTÈRE DE LA JUSTICE, supra note 22, at 14.
89 Id.
91 Id.
prosecuting offenses committed there, as well as coordinating the office’s interactions with elected officials and civil society representatives.

Similar to bottom-up policy-making, caseloads and specialization are ambiguous in terms of democratic effects; while creating areas of decision-making free from political and hierarchical interferences, they yield new opportunities for prosecutorial discretion. Line prosecutors increasingly play a triage and filtering role. Their basic job is to sort out criminal complaints into three piles: those for which formal charges will be brought through a trial proceeding, those which will be dealt with through ADR, and those which will be dropped. This classification is informed by the nationwide “politique pénale” dictated by the Ministry, but prosecutors enjoy a significant margin of discretion. The French prosecutorial tradition is based on the so-called principle of “opportunité des poursuites” (discretionary prosecution), rather than the legality principle. This implies that prosecution itself may be subordinated to considerations of expediency. But in practice, since the revival of the punitive model in the 1990s combined with the victims’ rights movement, prosecutors are encouraged to bring charges for all prosecutable offenses. The major change, however, is that the range of penal responses has diversified with the growing use of mediation (médiation), settlement (composition), expedited adjudication without hearing (ordonnance), and the introduction of a plea-bargaining-like procedure (comparution sur reconnaissance préalable de culpabilité or CRPC) in 2004. Prosecutors enjoy less discretion than before as to whether or not to prosecute, but more discretion as to how to prosecute.

This discretion is all the more insulated from accountability that caseloads are high (there aren’t enough resources to oversee decisions with such a volume of cases) and prosecutors are specialized (monitoring is harder when decisions involve content expertise). Greater independence may come at the expense of increased discretion in the case of localism and specialization. As the next section argues, a final factor in French prosecutors’ structural independence is unionization.

C Unionization

Do unions foster prosecutors’ autonomy from their internal hierarchy as well as from other branches of government or do they compromise their independence by officializing their politicization? Unions are powerful forces in the French judiciary, with nearly two fifth of judges and prosecutors unionized. The magistrats can choose among several unions, including the leading Union syndicale des magistrats, a center-right organization first established
in 1945, the left-wing Syndicat de la magistrature, created in 1968 as an instrument of anti-elitism and hierarchism at a time when the French judiciary was a highly conservative force, and Force Ouvrière Magistrats, a Trotskyist group founded in 1990. Here again, prosecutors’ status as judges may be an advantage from a democracy perspective. As a judge and union member herself explained, “young prosecutors aren’t always comfortable with the idea of joining a union; they worry that it may conflict with their duty of loyalty toward the hierarchy.” But many unionize while still at the Judiciary School or when they occupy a judicial post, i.e., before their appointment as a prosecutor. Still others make the leap inspired by their colleagues on the bench. In her view, if the two sets of professionals were split, prosecutors would be far less likely to unionize.

Unions cater to both judges’ and prosecutors’ interests, but they have been particularly active in pushing for greater prosecutorial independence both at the individual and collective level. At the individual level, unions assist judges and prosecutors threatened with discipline by their hierarchy. Though this assistance role is not specific to prosecutors, it is particularly crucial given prosecutors’ unique vulnerability to being disciplined for insubordination. The Syndicat de la magistrature lobbied for years for the magistrats to acquire broader rights in disciplinary proceedings. Thanks to the union’s battle, the magistrats accused of professional misconduct are now entitled a copy of their file during the pre-trial phase. But they continue to be deprived of the right to counsel during the initial investigation. As a former manager of the Ministry of Justice’s division in charge of investigating accusations of judicial and prosecutorial misconduct (Inspection générale des services judiciaires) told me, “if judges and prosecutors obtained these guarantees, all civil servants would need to be treated the same, which would be unmanageable.” In his view, judges and prosecutors are no different than other civil servants such as teachers, police officers, doctors, nurses, or secretarial staff. He dismissed the argument that they should be entitled to special due process guarantees in virtue of the democratic need for prosecutorial independence from the executive.

Though the Syndicat de la magistrature lost the right to counsel battle, according to another judge, who belongs to a union, “a number of magistrats unionized during the Sarkozy era to protect themselves.” They hoped that
membership would shield them from media fire or investigation should they make a decision unpopular with the executive. According to her, the unions’ protective effect is not “clear” in practice, but membership nonetheless provides a number of benefits, in particular the rare opportunity for prosecutors to meet and discuss issues of common interest. As a conservative high-level prosecutor conceded, not himself a union member and who admitted to feeling queasy about unions, “we need to regroup.”

Unions engage in the public debate in multiple ways, from commenting on bills pertaining to the prosecutor’s office and criminal procedure, to organizing yearly congresses addressing a variety of themes (ranging, in the past few years, from compulsory mental health care to “jihadist terrorism”), to issuing reports and press releases. To illustrate, a few days after the November 2015 Paris attacks, the leftist Syndicat de la magistrature published a press release protesting the government’s use of the state of emergency to stifle civil liberties.

Unions have been particularly vocal in claiming greater independence for prosecutors. A recurrent demand is the insulation of the transfer and promotion system from the executive branch. In 2010, the Syndicat de la magistrature published a detailed report denouncing the government’s political appointment of high-level prosecutors close to the presidential camp. The report also condemned the dismissal and forced transfer of prosecutors who had either refused to follow executive orders or criticized governmental policies.

In sum, though unions may introduce elements of partisan politics in the judiciary, they represent an important outlet for prosecutors to meet and discuss the nature of their office within the democratic state. Notably, through unionization, prosecutors have obtained additional guarantees of independence.

CONCLUSION

The new courthouse, which will open in the northwest of Paris, will perpetuate the “carpenter’s mistake.” Despite the protestations of the Paris bar, prosecutors will remain at the same level as the judges’ bench, above the

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97 Interview with 8, Senior Prosecutor (2015).
98 Syndicat de la magistrature, La situation du ministère public français (Feb. 23, 2010).
99 For instance, a former President Sarkozy disciple, Philippe Courroye, was appointed chief prosecutor of the Nanterre tribunal despite the High Council of the Judiciary’s negative advice.
100 Thus in 2009, Marc Robert, the Riom chief prosecutor, was transferred to the Cour de cassation after having voiced concerns regarding the suppression of a local trial court and the proposed reform of the juges d’instruction. Robert was also lobbying for a more independent status for prosecutors.
table reserved for defense attorneys. Is the carpenter’s “mistake” truly a mistake, however? As this chapter has shown, this symbolism is descriptively accurate in its representation of prosecutor-judges’ relationships. Is it normatively correct as well? Prosecutors’ status as judges has advantages and disadvantages from a democratic theory perspective. By self-identifying first and foremost as generalist magistrats susceptible to serve both as judges and prosecutors, prosecutors secure a measure of independence from the executive and embed themselves in peer accountability. At the same time, judges and prosecutors’ common status poses a separation of powers issue, raising the specter of a criminal justice system united to secure as many convictions as possible at the expense of defendants.

The professional status of prosecutors as magistrats is a profoundly divisive issue within the French judiciary. In the past decades, there have been calls for splitting the corps into two distinct and autonomous agencies. But opponents fear that separation would result in a prosecutor’s office being wholly subservient to the executive. This debate and its figurative manifestation as a carpentry dilemma reveal the instability of prosecutors’ professional self-definition. French prosecutors aspire to a democratic role in the state as independent public servants disinterestedly serving the law. Yet, their growing awareness of alternative institutional designs for prosecutorial offices, combined with skyrocketing caseloads amid budget cuts and unfilled prosecutorial vacancies, puts them at odds with this self-presentation. The corps is in a state of perpetual soul-searching, as evidenced by the close to yearly reports commissioned by the Ministry of Justice on criminal justice reform. Until there is real political will to overhaul the system, carpenters will remain unemployed in courtrooms.