

Summer 2020

## Prosecutorial Declination Statements

Jessica A. Roth

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### Recommended Citation

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# PROSECUTORIAL DECLINATION STATEMENTS

JESSICA A. ROTH\*

*This Article examines how prosecutors convey to various audiences their decisions not to charge in discrete cases. Although prosecutors regularly issue public statements about their declinations—and anecdotal evidence suggests that declination statements are on the rise—there is an absence of literature discussing the interests that such statements serve, the risks that they pose, and how such statements are consistent with the prosecutorial function. Prosecutors also operate in this space without clear ground rules set by law, policies, or professional standards. This Article attempts to fill that void. First, it theorizes the interests potentially advanced by such statements—characterized as signaling, accountability, and history-keeping—and their drawbacks. Next, it describes the current landscape of prosecutorial policies and practices on declination statements and shows how prosecutors would benefit from a more express framework of analysis. Finally, it offers such a framework to assist prosecutors in deciding when and how to issue declination statements. That framework suggests that prosecutors should only issue public declination statements when doing so significantly furthers one or more of the interests identified herein, where the risks posed by such statements are minimized, and where their value cannot be realized through other available means, including other types of statements.*

INTRODUCTION ..... 479

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\* Professor of Law and Co-Director of the Jacob Burns Center for Ethics in the Practice of Law, Benjamin N. Cardozo School of Law. The author was an Assistant United States Attorney in the Southern District of New York from 2002–09 and served as the Reporter for the ABA Criminal Justice Standards on Fair Trial and Public Discourse (4th ed. 2016). All views expressed are the author’s own. Thanks to Kate Levine, Max Minzner, Deborah Pearlstein, Daniel Richman, Rebecca Roiphe, David Sklansky, and Ronald Wright for helpful comments on earlier drafts of this Article, and to participants in the 2018 Criminal Justice Ethics Schmooze and the 2018 CrimFest where this project was presented as a work in progress. Thanks also to Michael Freyberg, Lindsay Weinstein, and Josh Ontell for excellent research assistance.

## I. THEORIZING PROSECUTORIAL DECLINATION

STATEMENTS.....	487
A. What is a Declination?.....	487
B. The Interests Served by Declination Statements .....	490
1. Signaling .....	490
a. Closure.....	491
b. Respect .....	493
c. Nudges.....	493
d. Public Pedagogy about the Criminal Law .....	496
e. Public Pedagogy about the Prosecutorial Role... ..	499
2. Accountability .....	500
a. Internal Accountability to Precommitments.....	501
b. Accountability to the Public .....	502
c. Accountability to Other Institutions .....	504
d. Accountability of Other Institutions.....	506
e. Declination Data for Context.....	507
3. History-Keeping.....	508
C. The Risks Posed by Declination Statements.....	513
1. Law Enforcement Risks .....	513
2. Risk of Error.....	514
3. Risk of Reputational Harm.....	515
4. Political Risk.....	518
5. Drain on Prosecutorial Resources .....	519

## II. THE CURRENT LANDSCAPE REGARDING DECLINATION

STATEMENTS.....	519
A. Academic Literature .....	520
B. Professional Guidance .....	521
1. Model Rules .....	521
2. Federal Guidelines .....	522
3. National Standards .....	527
C. Policy and Practice .....	529
1. Office Policies.....	529
2. Typology of Declination Statements in Practice.....	531
a. Private, Sparse .....	532
b. Private, Detailed.....	532
c. Public, Sparse .....	533
d. Public, Detailed .....	534
e. Tone.....	535

III. THE THEORY APPLIED TO PRACTICE: A SUGGESTED  
FRAMEWORK FOR PROSECUTORIAL DECLINATION

STATEMENTS.....	537
-----------------	-----

A. Default to Private Declination Statements.....	537
B. Sometimes Move to Public, Sparse .....	539
C. Rarely Move to Public, Detailed .....	541
D. Consider Alternatives .....	544
1. Data and Reports .....	544
2. De-Identified Case Summaries.....	545
3. Other Fact-Finding Institutions .....	545
CONCLUSION.....	549

## INTRODUCTION

One of the most important aspects of the prosecutorial function is the prosecutor’s discretion not to pursue criminal charges in discrete cases. The exercise of negative discretion—i.e., the choice not to charge, even where the evidence might be sufficient—is a necessary feature of our system, and a reason why good judgment and common sense are so valuable as prosecutorial traits.<sup>1</sup> Outside of a few core offenses, it is not credible to claim that prosecutors charge every provable case brought to their attention.<sup>2</sup> Prosecutorial discretion mitigates “the rigors of the penal system,”<sup>3</sup> by “blunting the edges”<sup>4</sup> of overly harsh or broad laws. In an era of expansive criminal law and finite government resources, declinations constitute an ever

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<sup>1</sup> See, e.g., Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 370 (2010) (“Even in a world of unlimited resources and sane criminal codes, discretion would be essential to doing justice. Justice requires not only rules but also fine-grained moral evaluations and distinctions.”); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1662–63 (2010) (the notion that prosecutors should rigidly apply the criminal law is “both untenable and unattractive” and almost universally rejected in “case law and commentary”); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 745 (2014) (“the breadth and depth of substantive [criminal] law . . . presumes a regime in which executive officials exercise discretion to moderate the rigors of statutory prohibitions, thereby creating a law on the ground that more closely approximates popular preferences than the law on the books.”); see also A.B.A., CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, r. 3-1.2(b) (“The prosecutor serves the public interest and should act with integrity and balanced judgment to increase public safety both by pursuing appropriate criminal charges of appropriate severity, and by exercising discretion not to pursue criminal charges in appropriate circumstances.”).

<sup>2</sup> See Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 600, 605 (2005).

<sup>3</sup> *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 386 (2004).

<sup>4</sup> David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 506 (2016).

more significant piece of the criminal justice picture,<sup>5</sup> even if the precise size of that piece is unknown.<sup>6</sup>

Yet, the question of how and to what extent prosecutors should be held accountable for their exercise of negative discretion has not received sufficient attention. Historically, prosecutors rarely accounted for their declination decisions.<sup>7</sup> This was consistent with the overall lack of prosecutorial accountability and transparency,<sup>8</sup> which for many years went largely unchallenged. Unlike when they file charges,<sup>9</sup> prosecutors generally

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<sup>5</sup> As Dan Markel observed, “the scope of prosecutorial declinations is often underappreciated.” Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1439 n.57 (2004).

<sup>6</sup> See BESIKI LUKA KUTATELADZE & NANCY R. ANDILORO, PROSECUTION AND RACIAL JUSTICE IN NEW YORK COUNTY—TECHNICAL REPORT, VERA INSTITUTE OF JUSTICE vi–vii (2014); see also Eric Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 795 (2012) (estimating “[a]s a rule of thumb, 25%–50% of all cases referred to prosecutors are declined for prosecution”). Rates vary depending on the jurisdiction and the type of case, and federal declination rates are generally higher. See Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 75 (2002). In the Vera Institute study of the Manhattan District Attorney’s office, investigators found that approximately 6% of felony cases, 4% of misdemeanor cases, and 11% of violations were declined for prosecution when initially presented to prosecutors by police. Dismissal rates for felonies and misdemeanors were considerably higher at subsequent stages of the criminal process, up to 36% of felonies and 18% of misdemeanors, excluding cases adjourned in contemplation of dismissal. Dismissals in cases involving domestic violence were particularly high. See KUTATELADZE & ANDILORO, *supra*.

<sup>7</sup> See, e.g., Luna, *supra* note 6, at 797–801 (bemoaning the “covert” and “opaque” nature of prosecutorial declinations, which have “hidden” the prosecutor’s decision-making process “from the general population and those individuals subject to its strictures”); Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, The Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 393 (2008) (“[H]istorically, [declination] decisions have been made with little or no legal oversight.”).

<sup>8</sup> See generally ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 5 (2007) (observing that prosecutors’ charging decisions “are totally discretionary and virtually unreviewable. Prosecutors make the most important of [their] discretionary decisions behind closed doors and answer only to other prosecutors.”); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006) (same); Stephanos Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*, 157 U. PENN. L. REV. 959 (2009) (discussing lack of checks on prosecutorial power).

<sup>9</sup> See FED. R. CRIM. P. 7(c)(1) (requiring an indictment or information to be a written statement); FED. R. CRIM. P. 6(f) (requiring the grand jury to return the indictment to a magistrate judge “in open court”); FED. R. CRIM. P. 6(e)(4) (stating that the magistrate “may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial”); N.Y. CRIM. PROC. LAW § 200.10 (2018) (defining an indictment as “a written accusation by a grand jury, filed with a superior court, charging a person, or two or more persons jointly, with the commission of a crime . . .”).

are under no legal duty to make public their declinations.<sup>10</sup> But prosecutors also had particular reasons to keep mum about declination decisions, including their duty as “ministers of justice”<sup>11</sup> to protect the privacy interests of those who had been under investigation, as well as witnesses and victims.<sup>12</sup> Other interests, too, explained the reticence to go public with such decisions, including protecting ongoing investigations<sup>13</sup> and prosecutors’ prospective ability to exercise mercy without fear of political reprisal.<sup>14</sup> Today, for these same reasons, it is still true that prosecutors generally do not explain individual declination decisions, at least to a public audience. Most of the time, when an investigation is closed without the filing of charges,

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<sup>10</sup> As Ronald Wright and Marc Miller have observed, declinations may be viewed as “the height of prosecutorial discretion . . . prosecutors do not have to state their reasons in open court or in any other setting outside their own offices. Indeed, in some jurisdictions the prosecutors may not have to record their reasons anywhere or explain their reasons to anyone, even to themselves.” Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 133 (2008); see also Vincent Chiao, *Ex Ante Fairness in Criminal Law and Procedure*, 15 NEW CRIM. L. REV. 277, 280 (2012) (prosecutors generally are not “required to state reasons for pursuing some [cases] while declining others.”). Indeed, even statutes conferring rights on crime victims do not require that prosecutors disclose to victims a decision to decline to charge. See, e.g., 18 U.S.C. § 3771(a) (2015) (conferring upon crime victims various rights, including to be kept informed of any public court proceedings and to be heard at such hearings, and to be kept informed of any plea bargain or deferred prosecution agreement). A small number of jurisdictions require prosecutors to file a brief court document when they decline a charge in a case initiated by police. See *infra*, note 198.

<sup>11</sup> The American Bar Association describes the prosecutor as “a minister of justice,” who accordingly has responsibilities that go beyond those of an ordinary advocate. See MODEL CODE OF PROF’L CONDUCT, r. 3.8 cmt. 1 (2018) [hereinafter A.B.A., Rule 3.8]. These responsibilities include “specific obligations to see that the defendant is accorded procedural justice [and] that guilt is decided upon the basis of sufficient evidence.” *Id.* As Justice George Sutherland famously wrote of the prosecutor’s special role, the prosecutor is “the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>12</sup> As then Assistant Attorney General Philip Heymann told a Congressional Committee in 1980, the Department of Justice “as an agency following the rule of law . . . [has] no business broadcasting our ‘suspicions’ or ‘hunches’ about guilt.” MARC L. MILLER & RONALD F. WRIGHT, *CRIMINAL PROCEDURES: PROSECUTION AND ADJUDICATION* 144 (3d ed. 2007); see also U.S. DEP’T OF JUSTICE, *JUSTICE MANUAL* at § 1-7.100 - General Need for Confidentiality [hereinafter DOJ, *JUSTICE MANUAL*] (“Disseminating non-public, sensitive information about DOJ matters could violate . . . privacy rights,” “put a witness or law enforcement officer in danger,” or “unfairly damage the reputation of a person.”).

<sup>13</sup> See DOJ, *JUSTICE MANUAL*, *supra* note 12, at § 1-7.100 (dissemination of non-public information also could “jeopardize an investigation or case”).

<sup>14</sup> See Daniel C. Richman, *Accounting for Prosecutors*, in *PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY* 40, 48 (Maximo Langer & David Sklansky eds., 2017).

prosecutors do not account for that decision in a way that is accessible to the public.<sup>15</sup>

But occasionally prosecutors deviate from this norm, and anecdotal evidence suggests that such occasions are increasing.<sup>16</sup> These gestures toward transparency are invariably fraught. For example, then-FBI Director James Comey's now infamous July 2016 press conference announcing his decision not to recommend charges against Hillary Clinton for her use of a personal email server while serving as Secretary of State generated considerable controversy—especially his characterization of her behavior as “extremely careless.”<sup>17</sup> Similarly, Manhattan District Attorney Cyrus Vance was widely criticized for his 2017 letter announcing his decision not to seek charges against New York City Mayor Bill de Blasio for fundraising-related activity, in which he nevertheless characterized the conduct as inconsistent with the spirit of the law.<sup>18</sup> In 2019, Special Counsel Robert Mueller's report regarding his investigation of coordination between Donald Trump's 2016 Presidential Campaign and Russian officials and related matters<sup>19</sup> predictably satisfied no one, including those who thought Mueller was too conservative in his legal and factual conclusions.<sup>20</sup> But the President's

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<sup>15</sup> See William K. Rashbaum, *No Charges, but Harsh Criticism for de Blasio's Fund-Raising*, N.Y. TIMES, Mar. 17, 2017, at A1 (noting that “prosecutors rarely announce the conclusion of such inquiries when no charges are filed”).

<sup>16</sup> See Benjamin Weiser, *Should Prosecutors Chastise Those They Don't Charge?*, N.Y. TIMES (Mar. 24, 2017), <https://www.nytimes.com/2017/03/24/nyregion/bill-de-blasio-campaign-finance.html> [<https://perma.cc/V53W-D2XQ>] (noting the “apparent trend” that prosecutors around the country “seem to have become more willing to speak publicly about the decision on their part not to file charges in high-profile cases”).

<sup>17</sup> See Press Release, FBI Nat'l Press Office, Statement by FBI Director James B. Comey on the Investigation of Secretary Hillary Clinton's Use of a Personal E-Mail System (July 5, 2016) [hereinafter *Comey Statement*] (on file with Journal and author) (characterizing Hillary Clinton's conduct as “extremely careless” and opining that the “security culture of the State Department . . . was generally lacking in the kind of care for classified information found elsewhere in the government.”).

<sup>18</sup> See Letter from Cyrus R. Vance, Jr., Manhattan District Att'y to Risa L. Sugarman, Re: Jan. 2016 Referral Pursuant to Election Law § 3-104(5)(B) (Mar. 16, 2017) [hereinafter *Vance Letter*] (on file with Journal and author) (noting that, while actions “do not make out a provable violation of the Election Law's criminal provisions,” they appeared to be “contrary to the intent and spirit of the law” and constituted “an end run around the direct candidate contribution limits.”).

<sup>19</sup> See SPECIAL COUNSEL ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (March 2019) (hereinafter *MUELLER REPORT*).

<sup>20</sup> See, e.g., Bob Bauer, *The Failures of the Mueller Report's Campaign Finance Analysis*, JUST SECURITY (May 3, 2019), <https://www.justsecurity.org/63920/the-failures-of-the-mueller-report-campaign-finance-analysis/> [<https://perma.cc/6TLW-8XGB>] (criticizing Mueller

supporters also criticized the Mueller Report, which in their opinion unfairly and inappropriately made explicit that it did not exonerate the President, and because it detailed the evidence and arguments to support not only obstruction of justice but also possible violations of campaign finance laws.<sup>21</sup>

Given the risks associated with such statements,<sup>22</sup> one might ask why prosecutors ever would make them. But the risks of *not* publicly announcing declinations and their rationales are daunting, too. For example, Manhattan District Attorney Cyrus Vance was criticized when it emerged that he had declined to prosecute President Trump's adult children for real estate transactions that had drawn scrutiny<sup>23</sup> and that he had declined to prosecute entertainment mogul Harvey Weinstein for alleged sexual misconduct<sup>24</sup> without announcing those decisions publicly. To be sure, much of the criticism in these cases (and in those discussed above—involving Clinton, de Blasio, and Trump) was based on substantive disagreement with the declination decisions themselves—i.e., critics believed the targets should have been charged. But the fact that the prosecutor was perceived to be hiding the reasons for those decisions contributed to suspicions about their

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Report's analysis of campaign finance law); Jack Goldsmith, *The Mueller Report's Weak Statutory Interpretation Analysis*, LAWFARE (May 11, 2019), <https://www.lawfareblog.com/mueller-reports-weak-statutory-interpretation-analysis> [<https://perma.cc/4L84-JWAJ>] (criticizing Mueller's interpretation of obstruction of justice statutes); Josh Kovensky, *In Deciding on Trump Obstruction, Mueller Faced 'Uncharted' Territory*, TALKING POINTS MEMO (May 31, 2019), <https://talkingpointsmemo.com/muckraker/trump-obstruction-why-did-mueller-hedge> [<https://perma.cc/7N73-Z7PG>] (quoting constitutional law professor Rick Pildes as criticizing Mueller for "abdicating his core responsibility" when he failed to reach a conclusion as to whether the President committed a crime).

<sup>21</sup> See, e.g., Letter from Emmet T. Flood, Special Counsel to the Pres., to Att'y Gen. William P. Barr 2 (April 19, 2019), [hereinafter Flood Letter] (on file with Journal and author) (asserting that the "Special Counsel and his staff failed in their duty to act as prosecutors *and only as prosecutors*" by inter alia declaring in the Report that they could not exonerate the President, and by transmitting "a 182-page discussion of raw evidentiary material combined with . . . inconclusive observations on the arguable legal significance of the gathered content") (emphasis in original).

<sup>22</sup> See *supra* notes 12–14, and accompanying text.

<sup>23</sup> See Vivian Wang & James C. McKinley Jr., *Cuomo Orders Review of Decision Not to Prosecute Weinstein in 2015*, N.Y. TIMES (Mar. 20, 2018), <https://www.nytimes.com/2018/03/19/nyregion/cy-vance-harvey-weinstein-cuomo.html> [<https://perma.cc/WFK2-A38B>].

<sup>24</sup> See Jesse Eisinger et al., *Ivanka and Donald Trump, Jr. Were Close to Being Charged with Felony Fraud*, PROPUBLICA (Oct. 4, 2017), <https://www.propublica.org/article/ivanka-donald-trump-jr-close-to-being-charged-felony-fraud> [<https://perma.cc/4VMM-9NUC>]; Mike McIntire, *Donald Trump Settled a Real Estate Lawsuit, and a Criminal Case Was Closed*, N.Y. TIMES (Apr. 5, 2016), <https://www.nytimes.com/2016/04/06/us/politics/donald-trump-soho-settlement.html> [<https://perma.cc/78HJ-W2KC>].

legitimacy.<sup>25</sup> The 2019 controversy over the decision by Cook County State’s Attorney Kimberly Foxx to drop charges against actor Jussie Smollett for his false report of a hate crime highlights the dangers of a prosecutor providing insufficient reasons—or insufficiently persuasive ones—to justify the exercise of negative discretion. In that case, the mayor and the police chief of Chicago immediately excoriated the prosecutor’s decision to drop charges, and the Cook County Circuit Court Judge appointed a special prosecutor to investigate the case.<sup>26</sup>

These examples highlight the tightrope that prosecutors walk in deciding whether and how to announce a declination decision. These examples hail from high-profile cases, but they reveal the interests that prosecutors are implicitly seeking to balance even in the less extraordinary cases handled by prosecutors around the country every day. Yet there is no literature expressly articulating those interests, how they should be balanced, or exploring why it is consistent with the prosecutorial role for prosecutors ever to make public their declination decisions. This Article attempts to fill that void.

Part I begins that project by theorizing three, sometimes overlapping, types of interests that statements about declination can serve: signaling, accountability, and history-keeping. The first category of such interests is described as signaling. For example, a declination statement can signal closure or the need to pursue other avenues of relief to those most immediately affected by the declination—including targets, victims, and witnesses. To the larger public, declination statements can signal prosecutors’ interpretation of the criminal law, and the reasons why certain prosecutions, even if possible, may not be wise. Relatedly, declination statements can convey aspects of the prosecutorial role that may not otherwise be apparent, such as the reality that a critical part of the prosecutor’s job is to set priorities and exercise judgment about which cases

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<sup>25</sup> For example, when first asked about the declination in the Trump case, the Manhattan District Attorney’s Office initially said that “it could not provide information on a ‘criminal investigation which does not result in an arrest of prosecution.’” McIntire, *supra* note 24. Vance later agreed to be interviewed about the decision in an apparent effort to quell the controversy. See Eisinger, *supra* note 24 (quoting Vance as explaining that “[t]his started as a civil case . . . . It was settled as a civil case with a statement by the purchasers of luxury properties that they weren’t victims. And, at the end of the day, I felt if we were not going to charge criminally, we should leave it as a civil case in the posture in which it came to us.”).

<sup>26</sup> See Julie Bosman & Sapan Deb, *Jussie Smollett’s Charges Are Dropped, Angering Mayor and Police*, N.Y. TIMES (Mar. 26, 2019), <https://www.nytimes.com/2019/03/26/arts/television/jussie-smollett-charges-dropped.html> [<https://perma.cc/8KLU-WQN8>]; Robert Chiarito & Julia Jacobs, *Jussie Smollett Case To Be Investigated by Special Prosecutor*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/arts/television/jussie-smollett-special-prosecutor.html> [<https://perma.cc/32F7-35MD>].

should be resolved outside the criminal justice system. Absent express attention to declinations, the public may default to an understanding of prosecution that consists solely of charges and convictions. To legislative bodies and prosecutors' law enforcement partners, declinations can send messages about the need to fix laws and practices.

Second, declination statements serve accountability interests by forcing prosecutors to articulate their reasoning and by providing a mechanism for comparing like cases. So, too, declination statements can help the public hold prosecutors accountable for their judgments. Particularly where there is concern that certain types of people receive preferential treatment based on their wealth, status, or relationship to the prosecutors involved (and where is that *not* a concern?), declination statements may be critical to a prosecutor's perceived legitimacy. Such statements also can help other institutional actors—such as legislators, governors, and law enforcement agencies—hold prosecutors accountable for how they exercise their discretion. Conversely, through their declinations, prosecutors also can hold their fellow institutional actors accountable for their failure to heed prior messages about the need for legislative reforms, increased resources, or greater care in the conduct of investigations.

Third, declinations can serve history-keeping interests when they provide a vehicle for relaying a narrative of past events, much as an indictment and trial would have if charges were filed. When prosecutors exercise their discretion not to charge, there usually is no other means available for others to learn the information obtained by prosecutors in the course of their investigation. Sometimes, there may be no other mechanism for the public to learn the facts at all. In the context of complex investigations involving public figures or particularly salient events, that represents a significant loss to the historical record. These history-keeping interests explain in part why many prosecutors have issued lengthy declination statements in recent years in on-duty shootings by police officers. To be sure, these statements further significant accountability interests by enabling outsiders to evaluate prosecutors' decisions not to charge as well as the actions of police. Nevertheless, the value of such statements also lies in the extent to which they reconstruct past events, often traumatic ones, so that the public can understand what happened. Even if the target of such an investigation were deceased, or a prosecutor and police chief were about to step down, such statements would serve important public interests. Finally, Part I concludes with a review of the risks presented by declination statements. Those risks include potential harm to the privacy and reputational interests of suspects, victims, and witnesses, and the endangerment of ongoing law enforcement operations.

Part II continues the project by highlighting how prosecutors operate in this space with little guidance from academic scholarship or professional policies and guidelines. Although much academic literature in recent decades has focused on the power of prosecutors, little attention has been paid to how prosecutors should communicate with the public about their exercise of negative discretion. In part, this reflects a larger hole in the literature—what Jeffrey Bellin has aptly described as the absence of a coherent normative theory of the prosecutor’s role.<sup>27</sup> Without a prior understanding of what it is we expect and want from prosecutors, it is difficult to assess whether prosecutors are fulfilling their function well, including appropriately conveying declinations. Prosecutors also do not find sufficient guidance in the usual sources of professional standards. For example, the Justice Manual (formerly the United States Attorney’s Manual), which sets baseline policy for all Offices of the United States Attorneys, generally counsels against public declination statements, but recognizes that there may be circumstances in which a statement would be warranted—without a thorough discussion of what those circumstances might be.<sup>28</sup> The National District Attorney Association Standards, which provides guidance for state prosecutors, also does not address the subject.<sup>29</sup> Other traditional sources of professional standards are similarly lacking. Drawing upon information gathered through outreach to the country’s largest prosecutorial offices, the remainder of Part II describes how—in the absence of national standards—prosecutors are generally making decisions about declination statements on the ground. After analyzing the patterns that emerge, this Part suggests a typology of prosecutors’ declination statements plotted along two axes: one reflecting the relative publicity of a statement and the other reflecting a statement’s level of detail.

Finally, Part III builds on the prior discussion to offer a framework to help prosecutors navigate this difficult terrain, taking into account the extent to which different types of declination statements fulfill the interests and present the risks identified in Part I. It suggests that prosecutors should issue declination statements when doing so significantly furthers one or more of the interests identified in Part I, where the risks posed by such statements are

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<sup>27</sup> See Jeffrey Bellin, *Theories of Prosecution*, 108 CAL. L. REV. \_\_ (forthcoming 2020) (discussing the absence of “concrete normative principle” of what prosecutors should do).

<sup>28</sup> See DOJ, JUSTICE MANUAL, *supra* note 12, at §§ 1-7.100–7.400 (providing a presumption that “non-public, sensitive information obtained in connection with work” may not be disclosed outside of DOJ “other than as necessary to fulfill DOJ official duties” and citing unfair “damage to the reputation of a person” as one of the reasons for the policy).

<sup>29</sup> See NAT’L DIST. ATTORNEY’S ASS’N, NATIONAL PROSECUTION STANDARDS (3d ed. 2009).

minimized, and where their value cannot be realized through other available means given relative institutional competencies. That framework ultimately counsels in most circumstances against detailed public declination statements that identify a particular individual, but encourages prosecutors to make more extensive use of other kinds of statements about declinations—such as de-identified case summaries, aggregate reports, and narrative accounts of the prosecutor’s exercise of discretion—that could achieve many of the same interests, often more effectively, and pose fewer risks.

## I. THEORIZING PROSECUTORIAL DECLINATION STATEMENTS

This Part begins the project of constructing a framework to guide prosecutors in issuing declination statements by conceptualizing the interests that such statements serve. First, it offers an operational definition of declinations for the purposes of this Article. Second, it breaks down the interests served by statements about declinations into three categories: signaling, accountability, and history-keeping. Third, it reviews the risks posed by declination statements.

### A. WHAT IS A DECLINATION?

For purposes of this Article, a declination is a decision by a prosecutor not to pursue criminal charges in a discrete case, largely as a matter of the exercise of prosecutorial discretion and judgment.<sup>30</sup> It does not include

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<sup>30</sup> This definition includes cases where the prosecutor ultimately determines that the evidence is insufficient on one or more elements as well as some instances of what Roger Fairfax characterizes as “prosecutorial nullification;” cases where the prosecutor has sufficient evidence to convict “but declines prosecution . . . because of the belief that the application of [the relevant] law to a particular defendant or in a particular context would be unwise or unfair.” Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1252 (2011). As a point of comparison, the Department of Justice defines a declination for purposes of its Foreign Corrupt Practices Act (FCPA) Corporate Enforcement Policy as “a case that would have been prosecuted or criminally resolved except for the company’s voluntary disclosure, full cooperation, remediation, and payment of disgorgement, forfeiture, and/or restitution. If a case would have been declined in the absence of such circumstances, it is not a declination pursuant to this Policy.” DOJ, JUSTICE MANUAL, *supra* note 12, at § 9-47.120 (2018); *see also* Speech by Acting Principal Deputy Assistant Att’y Gen. Trevor McFadden (Apr. 18, 2017), <https://www.justice.gov/opa/speech/acting-principal-deputy-assistant-attorney-general-trevor-n-mcfadden-speaks-anti> [<https://perma.cc/Z4B4-XY9A>] (explaining that a declination for purposes of the FCPA Enforcement Policy “does not include the many cases we routinely decline for various reasons including insufficient evidence of corporate criminal misconduct”). As one scholar has observed, “[t]o use the term ‘declination’ anytime a company is under FCPA scrutiny (perhaps because of something as simple as a media report or a business competitor’s complaint), but there is no enforcement action is like saying the police ‘declined’ to charge a sober driver with drunk driving when passing through a field

instances where law enforcement agents never brought a matter to the attention of prosecutors.<sup>31</sup> A declination could occur before any charges are filed, or in some circumstances after charges have been filed when the prosecutor subsequently decides to withdraw them.<sup>32</sup> Declination does not occur in cases where prosecutors pursue lesser charges than the harshest ones supported by the facts,<sup>33</sup> offer non-prosecution or deferred prosecution agreements,<sup>34</sup> or agree to a diversionary program in lieu of the more traditional criminal justice process. Although there is a good argument for including these other kinds of dispositions in that they raise many of the same issues as outright declinations, they also are sufficiently distinct as a category to leave out of the current project. Among other reasons, these other dispositions are at least slightly more visible than declinations because they often result in a court filing or are otherwise made public, often are negotiated with defense counsel, and typically involve prosecutors maintaining leverage over a defendant as a condition of the disposition.

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sobriety checkpoint.” Mike Koehler, *DOJ Defines “Declination” in Its FCPA Corporate Enforcement Policy*, FCPA PROFESSOR (Dec. 7, 2017), <http://fcpaprofessor.com/doj-defines-declination-fcpa-corporate-enforcement-policy/> [<https://perma.cc/68PC-WKL8>].

<sup>31</sup> See, e.g., Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 191–92 (2019) (discussing power of police relative to prosecutors, including by refusing to investigate or bring case to prosecutor); Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 589 (1960).

<sup>32</sup> See, e.g., Cook County State’s Att’y, Statement on Dismissal of Charges for Jussie Smollett (Mar. 26, 2019); Recommendation for Dismissal, *People v. Dominique Strauss-Kahn*, No. 02526/2011, 2011 WL 3659989 (N.Y. Sup. Ct. Aug. 22, 2011) (recommendation for Dismissal filed by New York Country District Attorney Cyrus Vance, explaining motion to dismiss sexual assault charges after indictment) [hereinafter Strauss-Kahn Dismissal].

<sup>33</sup> See Luna, *supra* note 6, at 796 (noting that when a prosecutor plea-bargains, “the prosecutor is refusing to apply the most serious crime and the toughest punishment otherwise applicable to a given defendant[,]” a species of “prosecutorial decriminalization”).

<sup>34</sup> As Cindy R. Alexander & Yoon-Ho Alex Lee have explained succinctly in the context of corporate resolutions, an “NPA is an agreement between the prosecutor and the company, without any direct judicial supervision, in which the prosecutor agrees not to prosecute in return for cooperation and other concessions. In some instances, an agreement between the prosecutor and the company may take the form of a deferred prosecution agreement (DPA). A DPA is filed with a court; the prosecutor offers to defer any prosecution until a certain date and to drop the case if the company fulfills some obligations by that date . . . . [N]either the NPA nor the DPA entails the corporate defendant pleading guilty . . . .” Cindy R. Alexander & Yoon-Ho Alex Lee, *Non-Prosecution of Corporations: Toward A Model of Cooperation and Leniency*, 96 N.C. L. REV. 859, 862 (2018).

Also excluded from this definition are ex ante decisions about entire categories of cases that the prosecutor will not pursue<sup>35</sup> or the factors that will influence the decision whether to pursue charges in an individual case.<sup>36</sup> To be sure, these are related aspects of the exercise of prosecutorial discretion. Moreover, the decision to decline prosecution in a discrete case may be determined in whole or in part by reference to such ex ante policies.

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<sup>35</sup> See, e.g., *District Attorney Vance to End the Prosecution of Marijuana Possession and Smoking Cases*, N.Y. CTY. DIST. ATTORNEY'S OFFICE (May 15, 2018), <https://www.manhattanada.org/district-attorney-vance-to-end-the-prosecution-of-marijuana-possession-and-smoking-cases/> [<https://perma.cc/8ZDF-5L48>]; Stephanie Clifford & Joseph Goldstein, *Brooklyn Prosecutor Limits When He'll Target Marijuana*, N.Y. TIMES (July 8, 2014), <https://www.nytimes.com/2014/07/09/nyregion/brooklyn-district-attorney-to-stop-prosecuting-low-level-marijuana-cases.html> [<https://perma.cc/XK7S-G4XF>] (describing announcement by then Brooklyn District Attorney Kenneth P. Thompson that his office would no longer prosecute most low-level marijuana cases); Jim Salter, *St. Louis to End Prosecution of Low-Level Marijuana Crimes*, SEATTLE TIMES (June 13, 2018), <https://www.seattletimes.com/nation-world/st-louis-to-end-prosecution-of-low-level-marijuana-crimes/> [<https://perma.cc/2A6J-GTY P>] (describing decision by St. Louis Circuit Attorney Kim Gardner not to pursue cases involving possession of small amounts of marijuana, and decision by Philadelphia District Attorney Larry Krasner that his office would no longer prosecute such cases); see also Memorandum from James M. Cole, Deputy Att'y Gen. to All U.S. Att'ys (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/V6FR-FVGX>] (setting forth DOJ policy under President Barack Obama of generally not pursuing marijuana possession and sale offenses in states where such conduct was legalized); Memorandum from David W. Ogden, Deputy Att'y Gen. to Selected U.S. Att'ys (Oct. 19, 2009), <https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states> [<https://perma.cc/MF4Z-8NZ3>].

<sup>36</sup> The Department of Justice has issued such policies for a variety of white-collar enforcement areas. See, e.g., DOJ, JUSTICE MANUAL, *supra* note 12, at § 9-47.120 (2018) (FCPA Division policy); U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY (Aug. 10, 1993) (Antitrust Division policy). Such policies are less common for other types of crime and at the state level. As Darryl Brown has written,

The Department of Justice maintains sets of prosecution policy statements—specific to substantive areas such as health care fraud, intellectual property crime, and corporate crime generally—that identify appropriate grounds for charging, declination, or sentencing leniency. The Department's most general guidelines for criminal prosecution, found in the U.S. Attorneys' Manual, list only traditional criteria such as deterrent effects, offender culpability, and the seriousness of the offense, along with practical concerns such as availability of admissible proof, cooperating witnesses, and prosecution by other jurisdictions. That document, in other words, reads as it should according to traditional criminal law theory . . . . The common thread of examples so far is that . . . they involve white-collar crime and federal practice. One is hard-pressed to find comparable examples in the prosecution policies that guide enforcement of traditional street-crime laws. State prosecutors tend to have few written charging policies . . . .

Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383, 1386, 1392–93 (2002). In some states, the legislature has enacted statutes codifying the factors that prosecutors should consider in deciding whether to decline a case. See, e.g., WASH. REV. CODE § 9.94A.411(1) (2017) (listing reasons why a prosecuting attorney “may decline to prosecute, even though technically sufficient evidence to prosecute exists.”).

However, while there is considerable overlap between the issues raised by such policies and the ex post decision to charge a particular individual in a particular case, these two different types of prosecutorial decisions are different enough to warrant separate analysis. The intent of this limitation is to focus on those cases where the decision not to charge was not a categorical one; such decisions are the most revealing of prosecutors' thought processes and priorities because they are preceded by an assessment of the evidence against the available charges and defenses, the norms of practice, or the equities of a particular situation. Further, the ex ante policies excluded from this definition of declinations herein have received some attention in scholarly literature and in court decisions,<sup>37</sup> whereas the declinations that are the focus of this Article largely have been overlooked.

## B. THE INTERESTS SERVED BY DECLINATION STATEMENTS

This section elaborates on the three categories of interests that declination statements can serve: signaling, accountability, and history-keeping. These interests sometimes overlap, and a single declination statement may serve all three. Nevertheless, there is value in delineating and discussing them separately, to later help build and apply a framework guiding prosecutors' declination statements.

### 1. Signaling

First, declination statements can advance signaling interests, communicating important messages to various audiences. There are at least five forms of signaling: (1) closure to those most immediately affected by a declination decision; (2) respect to prosecutors' fellow institutional actors such as law enforcement agencies and legislators; (3) nudges about the need for reforms; (4) educational signals to the public about the criminal law; and (5) signals about the prosecutorial role.

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<sup>37</sup> Analysis of such ex ante policies has generally occurred in the context of agency non-enforcement rather than prosecutorial non-enforcement. *See, e.g.*, *Texas v. United States*, 809 F.3d 134, 166–69 (2016) (discussing DAPA's nonenforcement policy); *see also* Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013); Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633 (2011); Aaron L. Nielson, *How Agencies Choose Whether to Enforce the Law*, 93 NOTRE DAME L. REV. 1517 (2018); Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937 (2017). *But see* *Feinberg v. Commissioner of Internal Revenue*, 808 F.3d 813, 814–16 (10th Cir. 2015) (discussing the DOJ's policy of declining certain marijuana prosecutions); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 757–59 (2014) (discussing the DOJ's policy of declining certain marijuana prosecutions).

## a. Closure

To begin, declination statements convey closure to the two most important parties in potential criminal prosecutions: victims and potential targets of prosecution. Victims benefit from knowing that a decision has been made, even if they disagree with it. Rather than remaining in limbo, pending the resolution of a possible criminal case, they can move on with their lives. That closure alone is valuable, but it also can liberate victims to pursue other avenues of redress that may be available such as civil suits,<sup>38</sup> legislative or executive oversight hearings, or journalistic exposure.<sup>39</sup> During the pendency of a criminal investigation, witnesses, including victims, often are discouraged from pursuing such remedies out of concern that they will compromise the criminal case.<sup>40</sup> Once the prosecutor has declined to bring charges, those concerns dissipate.

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<sup>38</sup> In the vast majority of United States jurisdictions, victims and interested members of the public cannot pursue criminal charges on their own; prosecutors, in effect, hold a monopoly over the invocation of criminal process. A few states still allow private parties to initiate a case, but such cases rarely proceed if prosecutors are unwilling to pursue them. See Darryl K. Brown, *Criminal Enforcement Redundancy: Oversight of Decisions Not to Prosecute*, 103 MINN. L. REV. 843, 867–70 (2018) (tracing the United States’ evolution from a system of private law enforcement, with cases brought by victims or their kin, to a system of public prosecution); Lauren M. Ouziel, *Beyond Law and Fact: Jury Evaluation of Law Enforcement*, 92 NOTRE DAME L. REV. 691, 718–19 (2016) (tracing the United States’ evolution from a system of private law enforcement, with cases brought by victims or their kin, to a system of public prosecution). However, crime victims may be able to pursue civil remedies against the perpetrators of crime and third parties. See, e.g., Tom Lininger, *Is It Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1568–79 (2008) (discussing rise in civil suits for sexual assault and the advantages of such suits over criminal prosecutions).

<sup>39</sup> For example, revelations of Alexander Acosta’s decision when he served as a United States Attorney in Florida not to pursue charges against Jeffrey Epstein for sexual assault prompted Congress to demand his testimony and briefings from the Department of Justice about the case. See Kimberly Kindy et al., *Acosta Defends Wealthy Sex Offender Jeffrey Epstein’s Plea Deal, Says Epstein Would’ve Had No Jail Time if his Office Had Not Intervened*, WASH. POST (July 10, 2019), [https://www.washingtonpost.com/politics/labor-sec-retary-to-hold-news-conference-to-defend-himself-amid-outcry-over-handling-of-epstein-plea-deal/2019/07/10/b136b9a4-a321-11e9-b7b4-95e30869bd15\\_story.html](https://www.washingtonpost.com/politics/labor-sec-retary-to-hold-news-conference-to-defend-himself-amid-outcry-over-handling-of-epstein-plea-deal/2019/07/10/b136b9a4-a321-11e9-b7b4-95e30869bd15_story.html) [<https://perma.cc/4ZH2-T7FQ>]. The full scope of Epstein’s criminal conduct was the subject of extensive investigative reporting by the Miami Herald. See Julie K. Brown, *How a Future Trump Cabinet Member Gave A Serial Sex Abuser the Deal of a Lifetime*, MIAMI HERALD (Nov. 28, 2018), <https://www.miamiherald.com/news/local/article220097825.html> [<https://perma.cc/VG48-GQAJ>] (part of series of articles by Julie Brown collectively entitled “Perversion of Justice” published by the Miami Herald on Nov. 28, 2018 about the Epstein case).

<sup>40</sup> See, e.g., *Clifford v. Trump*, No. 18-cv-02217, 2018 WL 3435419, at \*2 (C.D.C.A. Apr. 27, 2018) (citing *United States v. Kordel*, 397 U.S. 1, 10 n. 27 (1970)) (describing practice of staying civil cases during pendency of parallel criminal case); *Aviva Life & Annuity Co. v. Davis*, No. 12-cv-00603, 2014 WL 12366406, at \*11 (S.D. Iowa July 29, 2014) (granting

Similarly, a declination statement offers closure to targets who were aware they were under investigation. If someone had been publicly identified during the course of the investigation, a statement also offers that target the opportunity to resuscitate their reputation, or at least attempt to do so. For that reason, it is not uncommon for targets to seek a declination statement.<sup>41</sup> Their reputations may never be fully restored, but the stigma may be lessened by the announcement of the declination. There may also be very practical negative consequences that flow from the investigation which can be ameliorated only when a declination is made public. For example, a politician will face an uphill battle running for reelection while under investigation.<sup>42</sup> Private actors similarly may find that their employment prospects will not recover until a declination is announced. Corporate entities may find that their stock price suffers, that they are unable to contract with government agencies, or that they are at a disadvantage in attracting talent or business partners until the cloud of an investigation has been lifted.<sup>43</sup>

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Manhattan District Attorney's motion to stay parallel civil proceedings brought by victim); *Capak v. Epps*, No. 18-cv-4325, 2018 WL 6726553, at \*2 (S.D.N.Y. Dec. 21, 2018) (describing practice of staying civil cases during pendency of parallel criminal case).

<sup>41</sup> For example, the attorney for New York Governor Andrew Cuomo praised the announcement by then-United States Attorney Preet Bharara that his office would not be filing charges against the Governor for interference with the Moreland Commission established to investigate corruption, stating, "We were always confident there was no illegality here, and we appreciate the U.S. attorney clarifying this for the public record." Weiser, *supra* note 16. Another defense attorney opined that, in cases that had received extensive publicity, "it is not only appropriate, it is absolutely necessary [that the target] be publicly cleared" when prosecutors decline to bring charges. *Id.*

<sup>42</sup> Then-Acting United States Attorney for the Southern District of New York, Joon Kim, acknowledged this reality when he publicly announced his office's decision not to charge Mayor Bill de Blasio so as to not "unduly influence the upcoming campaign and mayoral election." *Acting U.S. Attorney Joon H. Kim Statement On The Investigation Into City Hall Fundraising*, U.S. DEP'T OF JUSTICE (Mar. 16, 2017), <https://www.justice.gov/usao-sdny/pr/acting-us-attorney-joon-h-kim-statement-investigation-city-hall-fundraising> [<https://perma.cc/3GUY-PJBZ>]. The Department of Justice's so-called "60 day" rule—a policy against announcing charging decisions within 60 days of an election that could influence that election—also reflects this dynamic. U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., *A REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION* 17 (June 2018).

<sup>43</sup> See Pamela H. Bucy, *Trends in Corporate Criminal Prosecutions*, 44 AM. CRIM. L. REV. 1287, 1288–89 (2007) (listing examples of stock declines due to investigation announcements and discussing other corporate ramifications); U.S. Chamber Institute for Legal Reform, *Seeking Clarity in How and When the Department of Justice Declines to Prosecute* 5 (Oct. 2012) (noting the "chilling effect of pending investigations" on a "company's financial reporting, ability to secure credit, undertake capital initiatives, retain and recruit talent and a host of other everyday elements necessary to business success").

### b. Respect

Through declination statements, prosecutors also can signal respect to the other institutional actors that are their partners in the complex undertaking of law enforcement and governance. For example, the police and other investigative agencies that routinely refer cases to prosecutors often will be interested in whether the prosecutor proceeded with the filing of charges.<sup>44</sup> Absent a declination statement, those agencies may not otherwise find out that a prosecutor has declined to pursue the case. Thus, providing that information helps preserve those interagency relationships, upon which prosecutors depend.<sup>45</sup> Similarly, when the legislature<sup>46</sup> or another agency refers a case to the prosecutor, informing that entity of the prosecutor's decision may be critical to institutional comity.<sup>47</sup>

### c. Nudges

When prosecutors offer the reasons for the declination—especially when those reasons are grounded in insufficient evidence, or problems with law enforcement agencies' conduct of the investigation, such as an unlawful search—the statements also can serve a pedagogical function and signal the need for corrective action by those agencies.<sup>48</sup> As discussed further below

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<sup>44</sup> See, e.g., Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 758–67 (2003) (discussing dynamic between federal prosecutors and agents).

<sup>45</sup> *Id.*; see also Irene Oritseweyinmi Joe, *The Prosecutor's Client Problem*, 98 B.U. L. REV. 885, 899 (2018) (noting the “close and symbiotic relationship” between prosecutors and the police who initiate “both the criminal process and the prosecutor's involvement” in the majority of cases).

<sup>46</sup> Recent examples include Congress's referral of then-IRS Commissioner Lois Lerner to the Department of Justice for possible prosecution for civil rights violations and other crimes arising from the IRS's processing of tax-exempt applications in a manner that disproportionality impacted certain groups based on political affiliation. See Letter from Peter J. Kadzik, Assistant Att'y Gen., Dep't. of Justice, to Hon. Bob Goodlatte & Hon. John Conyers, Jr., U.S. House of Representatives Comm. on the Judiciary (Oct. 23, 2015).

<sup>47</sup> See Sklansky, *supra* note 4, at 484 (noting that much of prosecutors' influence stems from “their air of authority and their ongoing relationships” with other institutional actors, including legislators); see also Richman, *supra* note 44, at 755–94 (2003) (on prosecutors' soft influence).

<sup>48</sup> See also VENTURA CTY. DIST. ATT'Y OFF., LEGAL POLICIES MANUAL 158 (Rev. Nov. 2, 2018) (on file with author). See generally Adam Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. 1525 (2018) (discussing ways in which prosecutors could use case dismissals as “teachable moments” for police); Eric L. Nelson, *The Relationship Between Individual Police Officers Work Habits and the Stated Reasons Prosecutors Reject Their Domestic Violence Investigations*, SAGE OPEN, October–December 2013, at 8 (finding that prosecutorial feedback helped police improve their evidence collection practices in domestic abuse cases).

in Section I(B)(2)(d), prosecutors can hold their law enforcement partners accountable by declining to prosecute cases on account of police misconduct or ineptitude. However, declination statements also provide an opportunity to educate police and other law enforcement partners, especially when they explain how investigatory failures led to the prosecutor's decision.

Prosecutors also can signal to legislators the limitations of existing laws through their declination statements. For example, a prosecutor might cite the narrow definition of bribery or the specific requirements of campaign finance laws in explaining a decision not to file charges in cases involving alleged public corruption.<sup>49</sup> Or, as frequently occurs in cases involving alleged sexual assault, the prosecutor may cite a legal rationale, such as the expiration of the statute of limitations, as a primary reason for declining to file charges.<sup>50</sup> Such statements provide the legislature with useful

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<sup>49</sup> For example, Manhattan District Attorney Vance's letter explaining his decision not to charge New York City Mayor Bill de Blasio recommended several changes to the state's election laws to cover the conduct uncovered in his investigation. See Vance Letter, *supra* note 18, at 9–10; see also Chelsea Brentzel, "Immoral but not Criminal" – Lead Prosecutor in Bentley Probe Explains Decision Not to Bring Charges, WHNT NEWS 19 (Apr. 4, 2018), <https://whnt.com/news/politics/immoral-but-not-criminal-lead-prosecutor-in-bentley-probe-explains-decision-not-to-bring-charges/> [<https://perma.cc/PU3F-GEAJ>] (Alabama special prosecutor on decision not to charge former Governor relating to his use of state funds in connection with relationship with top aide, offering that "lawmakers need to know there are holes in the state law that hindered the investigation. 'Unfortunately our hands were tied, and we could not go forward because of laws, or lack of laws.'"); Brendan Krisel, *Cabbie Who Forced Cyclist Into Path Of Truck Not Charged: Police*, PATCH (Sept. 6, 2018), <https://patch.com/new-york/upper-west-side-nyc/da-declined-prosecute-cabbie-who-caused-fatal-uws-crash-cops> [<https://perma.cc/WEA5-ZU8E>] (announcement by Manhattan DA Cyrus Vance regarding decision not to prosecute cab driver for cyclist's death included statement that his office had "determined that New York law does not provide criminal liability for drivers whose illegal standing contributes to a fatality in instances where no contact is made between the illegally standing vehicle and the victim. We would strongly support legislation to address this gap in the law"); Beth LeBlanc, *Prosecutor: No Charges for Lawmaker Who Brought Gun to Airport*, DETROIT NEWS (Aug. 6, 2018), <https://www.detroitnews.com/story/news/local/michigan/2018/08/06/michigan-lawmaker-no-criminal-charges-bringing-gun-airport/913110002/> [<https://perma.cc/HCM7-J63L>] (statement by Emmet County, Michigan Prosecutor that state legislator could not be charged due to state law's incorporation by reference of a deleted provision of federal law, noting that "[o]ur legislature needs to address this by adding a definition within our own statutes").

<sup>50</sup> See, e.g., *LA Prosecutors Decline Sex Abuse Charges Against CBS CEO Les Moonves*, WGN9 (Aug. 1, 2018), <https://wgntv.com/news/la-prosecutors-decline-sex-abuse-charges-against-cbs-ceo-les-moonves/> [<https://perma.cc/W597-N5GG>]; Sarah Mervosh, *Prosecutors Decline to Charge Kevin Spacey, Steven Seagal Due to Statute of Limitations*, N.Y. TIMES (Sept. 4, 2018), <https://www.nytimes.com/2018/09/04/us/charges-kevin-spacey-seagal-ander-son.html> [<https://perma.cc/A32C-BE33>]; Tilly Pearce, *American Horror Story's Dylan McDermott Avoid Prosecution in Sexual Assault Case*, METRO (Sept. 8, 2018), <https://metro.com>

information for deciding whether legislative reform is needed. In some instances, prosecutors go one step further and suggest particular legislative fixes to address the legal impediments they have identified.<sup>51</sup>

In addition, declination statements offer the opportunity for prosecutors to frame future actions that can be taken by other entities. For example, a statement that primarily cites the high burden of proof in criminal cases may signal to civil enforcement agencies and private actors that a civil suit or other action would be worthwhile.<sup>52</sup> Conversely, a statement citing problems with the credibility of key witnesses may send the opposite signal.<sup>53</sup> Where a legislative panel or executive actor has indicated an interest in a particular matter, a declination statement also can forestall or shape the focus of those entities' investigations or oversight hearings.<sup>54</sup>

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co.uk/2018/09/08/american-horror-stories-dylan-mcdermott-avoids-prosecution-in-sexual-assault-case-7925942/ [https://perma.cc/XKD7-TVM9]; Robert Tait, *LA Prosecutors Decline to Press Charges Against Bill Cosby*, TELEGRAPH (Jan. 7, 2016), <https://www.telegraph.co.uk/news/worldnews/northamerica/usa/12087875/LA-prosecutors-decline-to-press-charges-against-Bill-Cosby.html> [https://perma.cc/7WJ7-GVT5].

<sup>51</sup> In one recent case, the District Attorney for Nassau County who was assigned the investigation of former New York Attorney General Eric Schneiderman for sexual abuse cited the narrow definitions of existing sexual assault provisions and their statutes of limitations as reasons for her declination. She also drafted and transmitted to the state legislature a proposed bill to enact the needed reforms she had identified. See Alan Feuer, *Schneiderman Will Not Face Criminal Charges in Abuse Complaints*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/nyregion/eric-schneiderman-abuse-charges.html> [https://perma.cc/3T9X-VTRZ]; see also Vance Letter, *supra* note 18.

<sup>52</sup> A number of the statements issued by the Cook County State's Attorney's Office in recent years in police shooting cases explicitly note this distinction but do not opine on whether the lower standard of proof could be met. See, e.g., COOK CTY. STATE'S ATT'Y, POLICE INVOLVED DEATH DECISION MEMO 3 (Jan. 19, 2018). Similarly, Manhattan District Attorney Vance's letter on Mayor de Blasio emphasized that the District Attorney's determination was limited to whether criminal charges could be brought, given the proof beyond a reasonable doubt standard. He explicitly stated, "[t]his determination does not foreclose the BOE or others from pursuing any civil or regulatory actions that they might determine might be warranted by these facts." See Vance Letter, *supra* note 18; see also MISSOURI ETHICS COMM'N, LETTER TO ERIC GREITENS RE: MEC NO. 18-0014-I (Aug. 17, 2018) (explaining that charges against Governor Greitens were declined in spite of the fact that the Missouri Ethics Commission found "reasonable grounds to believe that a violation of criminal law had occurred").

<sup>53</sup> Statements about the credibility of witnesses may be particularly important to private enforcement actors, such as corporate boards and professional associations, which have the authority to discipline an individual for misconduct not rising to the level of criminality, or not provable beyond a reasonable doubt.

<sup>54</sup> On Congress's authority to investigate and demand information from the Department of Justice regarding both open and closed investigations, see MORTON ROSENBERG, CONG. RESEARCH SERV., INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY (1995) [hereinafter INVESTIGATIVE OVERSIGHT];

d. Public Pedagogy about the Criminal Law

Declination statements also provide an opportunity for prosecutors to educate the public about the content of criminal law. Through more traditional means like charging instruments and trials, prosecutors routinely walk the public, grand juries, and juries through the findings necessary to convict a person of a crime. As Daniel Richman has observed, prosecutors do not “silently preside over [the] gates” to the courthouse; “the essence of their job is to explain how the law has been violated.”<sup>55</sup> This function is also served when a prosecutor explains in a declination statement that the evidence does not establish a necessary element of a crime, or that it supports an affirmative defense. Through these statements, the public learns about these aspects of the law that may be unfamiliar—and likely in language that is more accessible than that available in court opinions, charging documents, and even statutes themselves.<sup>56</sup> For example, many of the declination statements issued in police shooting cases include a discussion of the law of self-defense and the government’s burden in disproving such a claim.<sup>57</sup> The same is true of the more procedural aspects of the law, like the burden of

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MORTON ROSENBERG, CONG. RESEARCH SERV., LEGAL AND HISTORICAL SUBSTANTIALITY OF FORMER ATTORNEY GENERAL CIVILETTI’S VIEWS AS TO THE SCOPE AND REACH OF CONGRESS’S AUTHORITY TO CONDUCT OVERSIGHT IN THE DEPARTMENT OF JUSTICE, *reprinted in* EPA’S CRIMINAL ENFORCEMENT PROGRAM: HEARING BEFORE THE SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMMITTEE ON ENERGY AND COMMERCE 12–23 (1993). For an example of a declination decision conveyed to Congress following a referral—and likely aware of the strong possibility that Congressional oversight hearings would follow, scrutinizing that decision—see Letter from Peter J. Kadzik, Assistant Att’y Gen., Dep’t. of Justice, to Hon. Bob Goodlatte & Hon. John Conyers, Jr., U.S. House of Representatives Comm. on the Judiciary (Oct. 23, 2015).

<sup>55</sup> See Richman, *supra* note 14.

<sup>56</sup> As Richard Zabel, the former Deputy United States Attorney in the Southern District of New York, once said of the value of prosecutors’ public statements, “The purpose of a quote is to be quoted and draw attention to the case . . . Laypeople can’t read a complaint.” Jacob Gershman, *Federal Judge Chides Bharara for ‘Tabloid’ Press Operation*, WALL STREET J. L. BLOG (Oct. 16, 2013), <https://blogs.wsj.com/law/2013/10/16/federal-judge-chides-bharara-for-tabloid-press-operation/> [<https://perma.cc/HYV5-R5Y3>].

<sup>57</sup> See, e.g., JACKIE LACEY, LOS ANGELES CTY. DIST. ATT’Y, OFFICER INVOLVED SHOOTING OF JUAN BARILLAS (Jan. 8, 2019); see also *Federal Officials Close Review of Fatal Shooting of Kionte Spencer*, U.S. DEP’T OF JUSTICE (Nov. 4, 2016), <https://www.justice.gov/usao-wdva/pr/federal-officials-close-review-fatal-shooting-kionte-spencer> [<https://perma.cc/G8R Y-E7MH>] (relatively long statement that discusses the facts and applicable legal standard for the civil rights laws at issue, involving police shooting of man with BB gun). As one attorney said in reaction to a declination statement issued by then-United States Attorney Preet Bharara explaining the decision not to bring federal civil rights charges against an officer for a fatal shooting, “it just spoke in terms of how high the bar is for a federal civil rights indictment,” which “was helpful in clarifying the guidelines for prosecuting such cases.” Weiser, *supra* note 16.

proof beyond a reasonable doubt or the statute of limitations, which prosecutors often cite in their rationale for declining to bring charges in sexual assault cases.<sup>58</sup> The more specific the prosecutor's explanation is for the declination, the greater the pedagogical value of the statement.<sup>59</sup>

Declination statements also convey something that is not available in statutes or judicial opinions—namely, the prosecutors' interpretation of the law, what might be called the “common law” of prosecutorial decision-making.<sup>60</sup> This is subtly distinct from the foregoing point, but it is important. As Eric Luna observed, prosecutors do not merely enforce the law: they “legislate criminal law, setting the penal code's effective scope” through their discretionary enforcement decisions.<sup>61</sup> Of course, this interpretive power is exercised unofficially—in the sense that, unlike administrative agencies, prosecutors do not have formal authority to interpret the statutes they enforce.<sup>62</sup> But it is no less real.<sup>63</sup>

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<sup>58</sup> See *supra* note 50.

<sup>59</sup> See Nirej Sekhon, *The Pedagogical Prosecutor*, 44 SETON HALL L. REV. 1, 6 (2014) (noting that prosecutors' public statements about declinations can promote “more intensive public engagement with criminal-justice policy”); *id.* at 44–45 (arguing that declination decisions in self-defense cases in particular should include case narratives providing information that “would usefully inform public discussion” about self-defense laws).

<sup>60</sup> As Daniel Richman has noted, “[b]road notions of ‘prosecutorial discretion’ over what charges they need to bring and against whom allow American prosecutors to effectively ‘define’ criminal law to be well short of that ostensibly set by statute” but “[c]onversely, through the cases they take and the way they frame the facts, American prosecutors regularly push the law beyond its initially assumed limits.” Richman, *supra* note 14, at 45–46.

<sup>61</sup> Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VIRGINIA L. REV. 965, 992 (2019) (noting that prosecutors “largely determine the scope of modern criminal law”); see also Erik Luna, *Prosecutor King*, 1 STAN. J. CRIM. L. & POL'Y 48, 57 (2014).

<sup>62</sup> See Max Minzner, *Should Agencies Enforce?*, 99 MINN. L. REV. 2113, 2115–16 (2015). Some scholars have argued that prosecutors should have such authority. See, e.g., Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 488–92 (1996).

<sup>63</sup> For example, when James Comey announced that, in his opinion, no reasonable prosecutor would charge Hillary Clinton for violating the statutes regarding the handling of classified information, he was invoking this common law. See *Text of F.B.I. Director's Remarks on Investigation into Hillary Clinton's Email Use*, N.Y. TIMES (July 5, 2016), <https://www.nytimes.com/2016/07/06/us/transcript-james-comey-hillary-clinton-emails.html> [<https://perma.cc/XBL6-HJ2Z>] (“In looking back at our investigations into mishandling or removal of classified information, we cannot find a case that would support bringing criminal charges on these facts.”). So too, when then-United States Attorney for the Southern District of New York, Michael Garcia, announced that former New York Governor, Eliot Spitzer, would not be charged for various federal crimes relating to his hiring of prostitutes, he invoked that common law. See Danny Hakim & William K. Rashbaum, *No Federal Prostitution Charges for Spitzer*, N.Y. TIMES (Nov. 6, 2018), <https://www.nytimes.com/2008/11/07/nyregion/07spitzer.html> [<https://perma.cc/M94D-KTE6>] (quoting Michael Garcia's statement that Spitzer

Criminal justice insiders—including defense attorneys who have been around the block many times in cases involving the same potential charges or defenses—often have access to this prosecutorial “common law.” For example, based upon their own experience, they may know of prior instances when a prosecutor did not think charges were worth pursuing and can draw upon that knowledge in advising clients and negotiating with prosecutors, including persuading them not to press charges.<sup>64</sup> But outsiders—including the public at large, especially those who cannot afford to have high-priced lawyers advise them—will not have access to that same common law. Even lawyers who are repeat players may only be able to draw upon their own experience if they lack the time, money, or connections necessary to pool information with other lawyers. Opacity thus puts at a comparative disadvantage those without access to system insiders, who may then see worse outcomes should they get ensnared in the criminal justice system because their lawyers lack access to these common law “precedents.” They also are at a relative disadvantage before they ever come into contact with the criminal justice system, when they are deciding how to conduct themselves in light of a criminal statute, because they lack information about how prosecutors *actually* apply the law (usually more narrowly than the law is written).<sup>65</sup> Making a corpus of declination statements publicly available thus serves a democratizing function,<sup>66</sup> leveling the playing field between actors and competitors (including in the corporate sphere) with differing resources. It also would provide the public with vital information about the meaning of the criminal law in practice—a good in and of itself if we value an informed citizenry. It also would equip the public to more effectively

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would not be charged, in part, on account of longstanding policies of the Department of Justice and of the Southern District of New York). Although Garcia’s statement did not explicitly discuss the content of those policies, they are policies reflected in the Justice Manual against charging individuals who are customers of prostitutes, as opposed to those engaged in the business of promoting prostitution. *Id.*

<sup>64</sup> See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2131–34 (1998) (describing process by which defense counsel appeal to prosecutors’ sense of “horizontal equity among similarly-situated persons”).

<sup>65</sup> See Darryl K. Brown, *Democracy and Decriminalization*, 86 *TEX. L. REV.* 223, 226 (2007) (discussing how prosecutors “greatly limit the effective scope of criminal law”).

<sup>66</sup> In the realm of corporate criminal enforcement, such a corpus exists in the form of “the record of disclosed, detailed settlements that tell a story about who got what for doing what.” Samuel L. Buell, *Why Do Prosecutors Say Anything? The Case of Corporate Crime*, 96 *N. C. L. REV.* 823, 835 (2018). Some scholars like Brandon Garrett have painstakingly assembled these resources. See Brandon L. Garrett & Jon Ashley, *Corporate Prosecution Registry*, DUKE UNIV. SCH. OF LAW & UNIV. OF VA. SCH. OF LAW, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/index.html> [<https://perma.cc/3GJD-B43E>].

demand changes in how the criminal law is interpreted if the status quo is deemed unsatisfactory.<sup>67</sup>

e. Public Pedagogy about the Prosecutorial Role

Finally, the public announcement of declinations surfaces the centrality of negative discretion in the prosecutorial function. In a world of expansive criminal law and limited resources, not every prosecutable case can or should be charged.<sup>68</sup> Where prosecutors deem the evidence of a crime sufficient to convict, they often file charges and seek convictions. But, not always. Sometimes the exercise of negative discretion is the product of categorical choices made *ex ante* based on policy priorities, but sometimes it reflects a judgment that an individual prosecution is not worth pursuing because it is not ultimately in the interest of justice.<sup>69</sup> For example, a case may be adequately prosecuted in another jurisdiction.<sup>70</sup> The impact on victims may be too much to put them through.<sup>71</sup> Or the prosecutor may decide that the

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<sup>67</sup> See generally STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 31–34 (2012) (exploring differences in access to information between criminal justice insiders and outsiders); Hessick, *supra* note 61, at 996 (noting that because “the public rarely learns about the cases a prosecutor does not litigate,” prosecutors’ decisions about “the scope of modern criminal law . . . are not visible to the public”).

<sup>68</sup> For a classic treatment of criminal law’s breadth and depth, at both the state and federal law, see Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L. J. 979 (1995). See also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001). As Stephen Smith has written, “[f]rom across the political spectrum, there is wide consensus that overcriminalization is a serious problem.” Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 537 (2012).

<sup>69</sup> For example, the state of Washington authorizes prosecutors to decline prosecution in a variety of circumstances even where sufficient evidence exists to convict, including when “prosecution would serve no public purpose.” WASH. REV. CODE § 13.40.077 (2011).

<sup>70</sup> See, e.g., Doug Schneider, *Wisconsin DA Says He Has No Plans to File Charges Related to Jayme Closs’ 88-Day Captivity*, USA TODAY (Jan. 26, 2019), <https://www.usatoday.com/story/news/nation/2019/01/26/jayme-closs-case-da-has-no-plan-file-more-charges/2692969002/> [<https://perma.cc/KF9N-GVDF>] (describing statement by Douglas County, Wisconsin District Attorney that he would not file additional charges against suspect already charged in neighboring county, citing “consideration of multiple factors, including the existence of other charges and victim-related concerns.”); see also § 13.40.077(d)–(e) (authorizing prosecutors to decline prosecution where individual is already confined on another charge, or another charge is pending in another jurisdiction, and conviction on the additional charge would not yield significant additional prison time or serve any significant purpose such as deterrence).

<sup>71</sup> See, e.g., § 13.40.077(1)(i) (victim request may provide reason to decline prosecution, if freely made); Fairfax, Jr., *supra* note 30, at 1258 (noting that “[a] prosecutor might decline a meritorious criminal case because the potential harm to the victim resulting from the

defendant has suffered enough through other means, or is deserving of leniency.<sup>72</sup>

Unless prosecutors acknowledge declinations of all types, the public is unlikely to appreciate the significance of declinations to the prosecutorial role and instead will view prosecutors strictly in terms of charges and convictions.<sup>73</sup> Prosecutors who talk about declinations educate the public about this crucial, often overlooked, aspect of their role. Moreover, by initiating conversations about declinations, prosecutors communicate something about the importance that they attach to this part of their mission. Thus, communications about declinations, particularly those where discretion is at its zenith because the evidence is sufficient to charge, serve a pedagogical purpose. They also help ensure that prosecutors are held accountable for how they conceive of and execute this critical component of their authority.

## 2. *Accountability*

Declination statements promote the accountability of prosecutors and other institutional actors in a variety of ways. They help prosecutors hold themselves accountable for their own precommitments,<sup>74</sup> make it possible for

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prosecution might outweigh the benefit to the victim and society.”); Melinda Henneberger, *Connecticut Prosecutor Won't File Charges Against Woody Allen*, N.Y. TIMES (Sept. 25, 1993), <https://www.nytimes.com/1993/09/25/nyregion/connecticut-prosecutor-won-t-file-charges-against-woody-allen.html> [<https://perma.cc/R9KC-MH36>] (suggesting that proceeding with prosecution of Woody Allen would not be in the victim's best interest); Schneider, *supra* note 70 (discussing impact on victim as additional reason not to pursue prosecution).

<sup>72</sup> See, e.g., Cook County State's Att'y, *supra* note 32 (stating that dismissal of charges was “a just disposition and appropriate resolution to this case,” citing “Mr. Smollett's volunteer service in the community and agreement to forfeit his bond” and suggesting that the outcome would be the same for any other defendant in similar circumstances); see also Bowers, *supra* note 1, at 1682 (positing that prosecution may not be warranted against a mother who negligently kills her own child on the grounds that she “has already suffered substantially—if not enough—from the mere fact of her child's death”).

<sup>73</sup> See, e.g., Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. 771, 776 (2017) (noting that “prosecutors and those who observe them still often rely on crude measures of their performance, i.e., crime rates and conviction rates . . . [which] overlook important questions about how prosecutors exercise their discretion”).

<sup>74</sup> As Richard Markovitz has explained, “[w]hen precommitment theorists state that ‘an individual has made a precommitment,’ they mean that he has chosen in the present to do something (or not to do something) in order to alter the way in which he will respond to particular situations in the future.” Richard S. Markovitz, *Precommitment Analysis and Societal Moral Identity*, 81 TEX. L. REV. 1877, 1878 (2003); see also Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1752–54 (2003) (describing the idea of precommitment as “self-

external actors to hold prosecutors accountable, and also provide a means by which prosecutors can hold accountable other institutional actors.

a. Internal Accountability to Precommitments

First, the process of constructing declination statements, even if only for the prosecutor's own use initially, can help prosecutors hold themselves internally accountable to their precommitments, such as a stated commitment to counteract implicit racial bias or to prioritize certain kinds of cases.<sup>75</sup> The discipline of grounding one's decisions in relevant facts and acceptable reasons can help ensure that those decisions "are not made arbitrarily, or based on speculation, suspicion, or irrelevant information."<sup>76</sup> Thus, there is intrinsic value in reason-giving.<sup>77</sup> A prosecutor may form an initial opinion of the proper outcome in a case, only to find that it does not survive reasoned analysis. In the context of judicial opinions, this is often referred to "as the 'it won't write' phenomenon."<sup>78</sup> Writing for potential public consumption provides an additional level of discipline and constraint.<sup>79</sup> Knowing that her reasoning may be critically evaluated by different audiences and compared to other like cases, a prosecutor is incentivized to imagine those external evaluations in advance. The result is likely to be an even more thorough and thoughtfully reached decision, one less prone to the influence of biases—

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binding," a process whereby "a person acts at one point in time in order to ensure that at some later time he will perform an act that he could but would not have performed without that prior act").

<sup>75</sup> See, e.g., David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 26 (2017) (explaining that a "growing number of chief prosecutors have won office by pledging a more balanced approach to criminal justice — more attentive to racial disparities, the risk of wrongful conviction, the problem of police violence, and the failures and terrible costs of mass incarceration.").

<sup>76</sup> Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 512 (2015).

<sup>77</sup> See Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1285 (2009) ("[A]n authoritative decision maker has a responsibility to herself to reach a decision that she finds acceptable in light of her knowledge of the relevant facts and circumstances.").

<sup>78</sup> Cohen, *supra* note 76, at 511; see also Richard Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1447 (1995); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1375 (1995).

<sup>79</sup> See Andrew E. Taslitz & Stephen E. Henderson, *Reforming the Grand Jury to Protect Privacy in Third Party Records*, 64 AM. U. L. REV. 195, 219–20 (2014) ("Social science demonstrates that actors believing they will be held accountable are more likely to work carefully and less likely to engage in error, and thus are more likely to make sound decisions and less likely to make irrational or ill-informed ones.").

although not necessarily free of bias altogether.<sup>80</sup> Further, keeping a corpus of declination statements can help prosecutors create and maintain institutional memory for themselves and their successors about how they exercised their negative discretion.

b. Accountability to the Public

Declination statements also promote prosecutors' accountability to the public they serve.<sup>81</sup> Absent a declination statement, the public can eventually surmise that a prosecutor had declined to press charges with respect to a given matter, but that decision would be hard to pin down and might surface too late for there to be any meaningful accountability for it. For example, Manhattan District Attorney Vance's decision not to pursue sexual assault allegations against Harvey Weinstein in 2015<sup>82</sup> and not to pursue fraud allegations against Ivanka and Donald Trump Jr. in 2012<sup>83</sup> came to light only years later as the result of investigative reporting. In the vast majority of United States jurisdictions where chief District Attorneys and Attorneys General are elected every few years,<sup>84</sup> this is a particularly important point.<sup>85</sup>

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<sup>80</sup> Cohen, *supra* note 76, at 513. For a review of the social science literature debating the effect of public accountability on a decision-maker's reasoning process, see *id.* at 513 n.176 and sources cited therein. At the end of the day, the brain is so complex that it is difficult for decisionmakers to control their reasoning process; indeed, the laudable effects of accountability may be offset by others that are "perverse." *Id.* (citing Robert J. MacCoun, *Psychological Constraints on Transparency in Legal and Government Decision Making*, 12 SWISS POL. SCI. REV. 112 (2006)); see also Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1285 (2008). Given the contested nature of the social science literature in this area, I am hesitant to make too strong a claim in this regard.

<sup>81</sup> Other scholars also have pointed to the accountability benefits of prosecutors publicly explaining their declinations. See, e.g., Fairfax, *supra* note 30, at 1277 (noting that public declination statements could "better inform the public (including potential voters) and, perhaps, oversight committees"); *id.* at 1277 n.139 (citing sources). Fairfax was particularly concerned about prosecutorial accounting for what he described as nullification, i.e. the refusal to prosecute because of disagreement with the laws. See *generally id.*

<sup>82</sup> See Wang & McKinley Jr., *supra* note 23.

<sup>83</sup> See Eisinger et al., *supra* note 24; McIntire, *supra* note 24.

<sup>84</sup> See Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 598–99 (2014) (describing method of selection of chief prosecutors).

<sup>85</sup> I do not want to overstate the likelihood that voters will hold prosecutors accountable for one, or even a bundle, of declination decisions. There is a well-developed political science literature debating "whether voters use elections as opportunities to sanction incumbents for their prior decisions, as opposed to selecting the best available representative for an upcoming term." Staszewski, *supra* note 77, at 1269; see also Anthony C. Thompson, *It Takes A Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 353 (2002) (on low voter turnout for prosecutorial elections in neighborhoods with high crime rates). On prosecutors being re-

Put together with other data, including about charges filed and convictions obtained, information about declinations can provide voters with a much richer picture of prosecutors' work than is currently available in most jurisdictions.<sup>86</sup>

However, even appointed prosecutors such as the Attorneys General of a few states and the United States Attorneys in the ninety-seven federal districts can be subject to indirect political pressure. Unpopular declination decisions could be raised as a campaign issue for the elected official who appointed the prosecutor and the elected legislators with oversight authority.<sup>87</sup> Unelected prosecutors also care, to varying degrees, about their public image<sup>88</sup> and popularity.<sup>89</sup> Some may aspire to higher political office;

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elected, see, e.g., Bibas, *supra* note 8, at 961 (“District Attorneys’ electoral contests are rarely measured assessments of a prosecutor’s overall performance. At best, campaign issues boil down to boasts about conviction rates, a few high-profile cases, and maybe a scandal. The advantages of incumbency . . . are also huge.”); *id.* at 984 (discussing low voter turnout for prosecutorial elections and voters’ reliance on “memorable but unrepresentative stories”); Wright, *supra* note 84, at 600–05; Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582–83 (2009); Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1606 (2010). In the case of Manhattan District Attorney Vance, his declination decisions in the Weinstein and Trump cases surfaced too late for them to impact his 2013 reelection but before his 2017 election campaign, which he won. However, there are also counterexamples of prosecutors who were defeated after widely publicized decisions in which they declined to prosecute police. See, e.g., Ed Krayewski, *Prosecutors in Chicago, Cleveland Lose Re-Election Bids After Police Abuse Controversies*, REASON (Mar. 6, 2016), <https://reason.com/2016/03/16/prosecutors-in-chicago-cleveland-lose-re/> [https://perma.cc/3HTN-6TDL].

<sup>86</sup> See, e.g., *supra* note 8, at 989 (discussing the lack of information available to help voters monitor prosecutors).

<sup>87</sup> See Frances Robles, *Prosecutors’ Softer Line Leads to Rigid Backlash*, N.Y. TIMES, Mar. 31, 2017, at A10 (discussing measures considered by Florida legislators to cut off funding from Orlando prosecutor who announced she would not pursue the death penalty, and Governor’s removal of her from pending case).

<sup>88</sup> See Buell, *supra* note 66, at 838–39 (discussing various career advancement goals that may drive federal prosecutors’ public statements about cases).

<sup>89</sup> For that reason, even an un-elected prosecutor might defer the announcement of a controversial declination until the eve of her departure. For example, in 2002, then-United States Attorney for the Southern District of New York Mary Jo White waited until the day before she stepped down from her post to leave for private practice to announce that she was declining to file charges against New Jersey Senator Robert Torricelli after a four-year, well-publicized public corruption investigation. See David Kocieniewski & Tim Golden, *Charges Ruled Out as U.S. Concludes Torricelli Inquiry*, N.Y. TIMES (Jan. 4, 2002), <https://www.nytimes.com/2002/01/04/nyregion/charges-ruled-out-as-us-concludes-torricelli-inquiry.html> [https://perma.cc/7YYC-FXPA]. Ms. White stated that her office had concluded its “exhaustive investigation” without seeking an indictment and would refer information developed to the Senate Ethics Committee. *Id.* She declined to provide further detail about her reasoning. *Id.* In

others may simply have internalized their role as servants of the geographic communities they represent.<sup>90</sup> Either way, public expressions of dissatisfaction with how the prosecutor has exercised declination authority could impact how the prosecutor exercises that discretion going forward.

c. Accountability to Other Institutions

Declination statements also enhance prosecutors' accountability to the law enforcement agencies with whom they work regularly. As noted in Section I(B)(1)(b), such statements can signal prosecutors' respect, promote institutional comity, and provide a mechanism for conveying messages about how law enforcement agents could do better. But they also provide a means for agencies to check that *prosecutors* are in fact doing the work that the agencies understand to be their collective project. Law enforcement agencies can hold prosecutors accountable through a variety of methods, including taking future cases to other offices<sup>91</sup> and airing their grievances with the press or other institutions.<sup>92</sup> Most likely, they can use their own soft authority with

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2008, then-United States Attorney for the Southern District of New York Michael J. Garcia waited until he was about to leave for private practice to announce that his office had decided not to file charges against Elliot Spitzer after it had become public that Spitzer, while the Governor of New York, had arranged for women to travel interstate for the purpose of engaging in acts of prostitution with him. See Hakim & Rashbaum, *supra* note 63. The media also can impose pressure on prosecutors. See Bibas, *supra* note 8, at 983–88.

<sup>90</sup> As Sam Buell has written, even appointed prosecutors “seem to share an abiding and reasonable belief that because their ‘client’ is the public, the client has a right to know what the prosecutor is doing and should, in some general sense, approve of and support the prosecutor’s work.” Buell, *supra* note 66, at 840.

<sup>91</sup> See Richman, *supra* note 44, at 759–62.

<sup>92</sup> See, e.g., John Bresnahan, *FBI Whistleblower: Violations Occurred During Ted Stevens’ Probe & Trial*, POLITICO (Dec. 22, 2008), <https://www.politico.com/blogs/politico-now/2008/12/fbi-whistleblower-violations-occurred-during-ted-stevens-probe-trial-014962> [<https://perma.cc/9VN7-4QZL>] (describing an FBI agent’s whistleblower complaint to a federal district court judge alleging DOJ prosecutorial misconduct prior to, and during, former senator Ted Stevens’ trial); Jeannie Suk Gersen, *Why Didn’t the Manhattan D.A. Cyrus Vance Prosecute the Trumps or Harvey Weinstein?*, THE NEW YORKER (Oct. 13, 2017), <https://www.newyorker.com/news/news-desk/why-didnt-manhattan-da-cyrus-vance-prosecute-the-trump-s-or-harvey-weinstein> [<https://perma.cc/3M6H-TC7A>] (quoting an N.Y.P.D. statement expressing disagreement with the Manhattan District Attorney’s insufficient evidence determination following the Harvey Weinstein investigation); Ted Oberg, *Critics Complain Harris County DA Not Tough Enough on Crime*, ABC 13 (Dec. 27, 2018), <https://abc13.com/3089352/> [<https://perma.cc/8XL5-DW7X>] (detailing multiple police complaints about the Harris County District Attorney’s decisions not to prosecute); Ali Watkins, *Police Officials and Prosecutor Feud Over Case About Beating*, N.Y. TIMES, Jan. 12, 2019, at A16 (describing statement on Twitter by the N.Y.P.D. Police Commissioner decrying Manhattan District Attorney’s declination of charges against men beaten by police

prosecutors, and the capital built through decades of working together, to raise concerns directly with prosecutors whose decisions do not comport with prior understandings and standards.

Similarly, declination statements facilitate prosecutorial accountability to other government institutions. Legislative committees may have oversight authority<sup>93</sup> and budgetary responsibility for the prosecutors' office.<sup>94</sup> Executive branch actors may have oversight and even removal authority over prosecutors.<sup>95</sup> In exercising those powers, information about prosecutors' declination decisions can be just as useful as information about prosecutors' decisions to charge. Similarly, prosecutors with overlapping jurisdiction can hold each other accountable through the aggressive assertion of jurisdiction.<sup>96</sup> For example, a federal prosecutor who brings a case declined by a local prosecutor may do so in part to express disapproval of the latter's decision, and may be less deferential in future cases that both prosecutors have an interest in charging.<sup>97</sup>

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during chaotic arrest). As Dan Richman has observed, "iterated interaction between police and prosecutors is not unique to liberal democracies," but in an "open society and a media interested in crime news, the arguments easily spill into public discourse." Richman, *supra* note 44, at 751–52.

<sup>93</sup> See *supra* notes 39 and 54; see also Press Release, Sheldon Whitehouse, United States Senator for Rhode Island, Senators Whitehouse, Hassan Press Justice Department for 2006 Purdue Pharma Prosecution Memo (Sept. 9, 2019) (detailing request by Senators for information about case related to Purdue Pharma's role in the opioid crisis), <https://www.whitehouse.senate.gov/news/release/senators-whitehouse-hassan-press-justice-department-for-2006-purdue-pharma-prosecution-memo> [<https://perma.cc/3686-AKK9>].

<sup>94</sup> See Robles, *supra* note 87.

<sup>95</sup> In some states, such as New York, the Governor has the authority to remove an elected District Attorney from office. See ARK. CONST. art. XV, § 3; N.J. CONST. art. 5, § 4, para. 5; N.Y. CONST. art. XIII, § 13(a); PA. CONST. art. VI, § 7; WIS. CONST. art. 6, § 4, para. 4; see also Eric R. Daleo, Note, *The Scope and Limits of the New Jersey Governor's Authority to Remove the Attorney General and Others "For Cause,"* 39 RUTGERS L. J. 393 (2008); Wang & McKinley Jr., *supra* note 23 (discussing review by New York Attorney General's Office of Manhattan District Attorney's Office ordered by the Governor); Michael Gormley, *Governor Has Little-Used Power to Remove Elected Official*, NEWSDAY (May 12, 2016), <https://www.newsday.com/news/region-state/governor-has-power-to-remove-an-elected-official-but-it-s-rarely-used-1.11793506> [<https://perma.cc/3T9M-3JS4>] (describing New York Governor Andrew Cuomo's constitutional removal power).

<sup>96</sup> See Brown, *supra* note 38, at 884 ("[R]edundant federal-state authority has evolved into a means—unusual even among federal nation-states—to second-guess and effectively trump state prosecutors' declination decisions.").

<sup>97</sup> See, e.g., Statement by United States Attorney William M. McSwain on the Shooting of Six Philadelphia Police Officers (Aug. 15, 2019), <https://www.justice.gov/usao-edpa/pr/statement-united-states-attorney-william-m-mcswain-shooting-six-philadelphia-police> [<https://perma.cc/GA6U-YXLR>] (statement by United States Attorney for the Eastern District of

#### d. Accountability of Other Institutions

In addition to promoting prosecutorial accountability, declination statements can be a tool for holding law enforcement agencies and legislatures accountable for their official actions.<sup>98</sup> As noted above,<sup>99</sup> prosecutors can use their declinations to call attention to the limitations of existing laws and legislators' failure to remedy them.<sup>100</sup> So too, declination statements can bring internal and external pressure to bear on law enforcement agencies, to the extent that their actions (or inaction) are perceived as undermining worthwhile prosecutions.<sup>101</sup> Thus, for example, if the police are regularly engaging in unlawful searches,<sup>102</sup> prosecutors can call attention to those practices and how they make it difficult, or in some cases impossible, for prosecutors to bring charges. Similarly, if police consistently are failing to investigate cases adequately, such that prosecutors lack sufficient evidence to proceed, calling out those failures can prompt corrective action.<sup>103</sup> Likewise, if a prosecutor becomes aware of racially

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Pennsylvania criticizing Philadelphia's elected district attorney Larry Krasner, saying, "My Office is doing all that we can. We have prosecuted 70% more violent crime cases this year than we did last year, in response to the District Attorney's lawlessness.")

<sup>98</sup> See Richman, *supra* note 14, at 41 (noting that prosecutors enjoy a privileged position "to promote the accountability of other actors in the criminal justice system").

<sup>99</sup> See *supra* notes 51–53 and accompanying text.

<sup>100</sup> See, e.g., Kylie McGivern, *Prosecutors Call Florida's 'Stand Your Ground' Law Unconstitutional*, ABC ACTION NEWS (Oct. 31, 2018), <https://www.abcactionnews.com/news/state/prosecutors-call-florida-s-stand-your-ground-law-unconstitutional> [<https://perma.cc/7TET-WBU4>] (quoting a statement of the Hillsborough County State Attorney, which described the new version of Florida's stand your ground law as an "ill-conceived solution . . . that predictably created confusion and gridlock in [the] courts, which is now wasting taxpayer resources and delaying justice for victims"); David Ovalle, *Florida's Stand Your Ground law is Unconstitutional, Miami's Top Prosecutor Tells High Court*, TAMPA BAY TIMES (Oct. 30, 2018), [https://www.tampabay.com/news/publicsafety/Florida-s-Stand-Your-Ground-law-is-unconstitutional-Miami-s-top-prosecutor-tells-high-court\\_173107373/](https://www.tampabay.com/news/publicsafety/Florida-s-Stand-Your-Ground-law-is-unconstitutional-Miami-s-top-prosecutor-tells-high-court_173107373/) [<https://perma.cc/76M5-S72R>] (describing the Miami-Dade State Attorney's, and other Miami prosecutors', negative stance toward a recently enacted law shifting the burden of proof to the prosecution to disprove a defendant's claim of self-defense).

<sup>101</sup> See Sheryl Gay Stolberg & Jess Bidgood, *Prosecutors Say Baltimore Police Mishandled Freddie Gray Case*, N.Y. TIMES (July 28, 2016), <http://www.nytimes.com/2016/07/29/us/freddie-gray-baltimore.html> [<https://perma.cc/TL5Z-HWP7>] (describing the Baltimore State Attorney's blaming of the Baltimore Police Department for failing to adequately investigate the death of Freddie Gray, resulting in the inability to effectively prosecute the charged officers).

<sup>102</sup> See Miller & Wright, *supra* note 10, at 137–41, 166.

<sup>103</sup> See, e.g., Memorandum to Grant County Sheriff from Jim Carpenter, Grant County District Attorney (Jan. 29, 2015), <https://www.documentcloud.org/documents/2852371-KOITZSCH-DA-Dismissal.html> [<https://perma.cc/355U-GZNG>] (explaining decision not to

discriminatory practices by police, she can call attention to that practice in order to change it.<sup>104</sup>

e. Declination Data for Context

For all of the foregoing purposes, declination statements that provide context for the prosecutors' decision are likely to promote accountability better than those that merely announce a decision not to charge. Absent that context, any assessment of the prosecutor's action may be unreliable. In any given case, it is possible that any reasonable prosecutor would have declined to charge because the evidence was so lacking or the mitigating circumstances so compelling. But no one outside the prosecutor's office will know that unless the prosecution explains his or her reasoning.<sup>105</sup> As Kate Levine has observed regarding prosecutors' decisions not to charge police officers for on-duty shootings, any individual decision not to prosecute may well be justified, but that reality will not be known to either "the public nor other systems actors"<sup>106</sup> if the decision is made "behind closed doors."<sup>107</sup> Thus, declination statements can provide the information necessary to hold prosecutors *meaningfully* accountable, including as measured against the prosecutors' own previously-stated commitments.<sup>108</sup> When it comes to public accountability, even a few politically salient declination statements

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charge in case involving dispute among close friends, pointing to the lack of any record of certain witness interviews and offering "While your policies may differ, [law enforcement] investigations of relatives and close friends will be reviewed with a skeptical eye . . . . [T]he matter should be reviewed using objective criteria before making any arrest.").

<sup>104</sup> See Miller & Wright, *supra* note 10, at 166.

<sup>105</sup> For example, the lawyer for the family of Trayvon Martin, who was killed by George Zimmerman in Florida in 2012, called the public statement by the DOJ explaining its decision not to file federal criminal charges "inadequate," but noted that at least it gave 'some insight' into how the decision had been reached." He stated, "My feeling is that people deserve answers." Weiser, *supra* note 16.

<sup>106</sup> Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1482 (2016).

<sup>107</sup> *Id.*

<sup>108</sup> On the value of reason-giving in promoting government accountability more generally, see Staszewski, *supra* note 77, at 1281-82; see also Jon Elster, *Deliberation and Constitution Making*, in DELIBERATIVE DEMOCRACY (Jon Elster ed., 1998); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); Jane Schacter, *Ely and the Idea of Democracy*, 57 STAN. L. REV. 737 (2004); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

may better promote accountability than more formal mechanisms of review.<sup>109</sup>

One caveat here is that this function is dependent upon the prosecutor accurately portraying her reasons for the declination.<sup>110</sup> If the real reason is not considered publicly acceptable, the prosecutor may deliberately or unconsciously<sup>111</sup> set forth other reasons that are, thus depriving the public of the information necessary to reliably assess the prosecutor's decision. For this reason, a critical mass of data about declinations, even if they are not all detailed, also is important for accountability purposes. Where there is more data, patterns emerge.<sup>112</sup> For example, a prosecutor who repeatedly declines to press charges in sexual assault cases, or against police officers for on-duty shootings, will be evaluated differently from a prosecutor who declines rarely. But no one will know how frequently the prosecutor is declining such cases unless enough of the relevant decisions are available to assess.

### 3. History-Keeping

In cases involving particularly complex investigations or high-profile events, declinations also can serve history-keeping interests. History-

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<sup>109</sup> See Catherine Y. Kim, *Immigration Separation of Powers and the President's Power to Preempt*, 90 NOTRE DAME L. REV. 691, 729 (2014) (discussing the accountability dividends of "politically salient announcements by high-level officials"). In fact, to the extent that prosecutorial elections are influenced by an incumbent's past decisions, "[d]iscussion of practice tends to focus on a few high-profile cases" rather than general patterns. See William H. Simon, *The Organization of Prosecutorial Discretion*, in PROSECUTORS AND DEMOCRACY, *supra* note 14, at 18; see also Wright, *How Prosecutor Elections Fail Us*, *supra* note 85, at 602.

<sup>110</sup> See Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1095 (2010) (noting that accountability is compromised when public officials disclose "insincere and misleading justifications" for their decisions); see also Fairfax, *supra* note 30, at 1280 (noting the ease with which prosecutors could come up with "pretextual declination rationales" and how difficult it would be for outsiders to identify them); Staszewski, *supra* note 77, at 1279.

<sup>111</sup> The problem of inaccurate reason giving, of course, is not unique to prosecutors. Human beings in general are often unreliable relators of their own reasons, and not because they necessarily intend to deceive. Many scholars have discussed this problem in the context of judicial opinion-writing. See, e.g., Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1318–19, 1319 n.32 (1995) ("Many omissions of candor, after all, are not conscious ploys on the part of judges, but rather the product of either less-than-thorough or genuinely self-deceptive analysis.").

<sup>112</sup> As Miller and Wright have written, "[A]n explanation for a single case might reveal less than the patterns of government decision-making. Patterns can reveal both intentional and unintentional bias, and the probable grounds for judgment. Patterns [. . .] may also be useful in spotting 'outlier' cases that appear to make sense on their own terms but are harder to explain in a larger information-rich context." Miller & Wright, *supra* note 10, at 184 (footnotes omitted).

keeping is distinct from signaling and accountability in that it focuses on the documentation of historical facts for its own sake. The Mueller Report—to the extent that it included hundreds of pages of findings about Russian interference in the 2016 presidential election and communications between Trump associates and foreign actors—fulfilled this kind of history-keeping function.<sup>113</sup> As did the Department of Justice’s (DOJ) report about the 2014 shooting death of Michael Brown in Ferguson, Missouri by police officer Darren Wilson.<sup>114</sup>

When a case is charged, this history-keeping function can be fulfilled through the recitation of facts in charging documents and the presentation of evidence and arguments at trial. Indeed, the loss of that opportunity to publicly reconstruct past events is one of the many reasons to lament the decline in criminal trials as guilty pleas have become the norm.<sup>115</sup> However, even where a case does not proceed to trial, that narrative can be relayed in complaints and indictments.<sup>116</sup> Additional details can be brought out through

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<sup>113</sup> President Trump’s lawyers ridiculed this aspect of the Mueller Report, characterizing it as “a prosecutorial curiosity – part ‘truth commission’ report and part law school exam paper.” Flood Letter, *supra* note 21.

<sup>114</sup> See, e.g., DEP’T OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON (Mar. 4, 2015) (eighty-six page single-spaced report detailing evidence uncovered during Department of Justice’s investigation, discussing applicable law, and explaining why facts failed to meet legal requirements to charge).

<sup>115</sup> See BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006 (2009), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=2152> [<https://perma.cc/G5CA-QTFM>] (finding that 94% of felony offenders sentenced in 2006 pleaded guilty); CSP INTERACTIVE TOOL, NATIONAL CENTER FOR STATE COURTS, [http://popup.ncsc.org/CSP/CSP\\_Intro.aspx](http://popup.ncsc.org/CSP/CSP_Intro.aspx) [<https://perma.cc/883J-MEJ9>] (demonstrating each state’s guilty plea rate to be above 90% in 2017); U.S. DEP’T OF JUSTICE U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT, FISCAL YEAR 2017, Table 2A (2017), <https://www.justice.gov/usao/page/file/1081801/download> [<https://perma.cc/P4VC-Y7X6>] (stating that 65,309 dispositions of “guilty” were reached in federal district courts in fiscal year 2017, with 2,123 occurring after trial; therefore, about 97% of such guilty dispositions were reached prior to trial); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> [<https://perma.cc/Q2GP-8J8D>] (For state courts, “it is a rare state where plea bargains do not . . . account for the resolution of at least 95 percent of the felony cases that are not dismissed . . .”).

<sup>116</sup> So-called “speaking” complaints or indictments that provide an extensive narrative account of the prosecutor’s view of the facts are not without controversy. See, e.g., Buell, *supra* note 66, at 825 (discussing speaking indictments or informations that have become common in corporate prosecutions, explaining which “speak loudly, often, and at length, about what [DOJ] is doing and why”); *id.* (noting that defense attorneys usually would prefer that prosecutors keep their “court filings terse”); Jeffrey Toobin, *The Showman: How U.S. Attorney Preet Bharara Struck Fear into Wall Street and Albany*, NEW YORKER (May 2, 2016), <https://>

plea proceedings and at sentencing.<sup>117</sup> But when no charges are filed, the criminal justice system generally does not provide a means for the public to learn the facts that the prosecutor uncovered during the investigation.<sup>118</sup> Only a small number of jurisdictions permit the issuance of investigative grand jury reports to make public the findings of an investigation that does

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[www.newyorker.com/magazine/2016/05/09/the-man-who-terrifies-wall-street](http://www.newyorker.com/magazine/2016/05/09/the-man-who-terrifies-wall-street) [<https://perma.cc/ZY4Z-FWVL>] (quoting defense attorney Henry Mazurek’s criticism of speaking complaints filed in the Southern District of New York as “unnerving and disturbing and fundamentally unfair”). However, prosecutors have defended such instruments as offering the best opportunity, in a world in which most charged cases do not go to trial, to educate the public about the events that transpired and why they constitute a crime. *See, e.g., id.* (quoting former Deputy U.S. Attorney for the Southern District of New York Richard Zabel, who explained the value of speaking complaints, like those filed against New York Assembly Speaker Sheldon Silver, in explaining to the public why something is a crime). In some cases, prosecutors file lengthy speaking indictments even when there is no reasonable prospect that the defendants will be brought to court to face the charges—as with the thirteen Russian nationals charged by Special Counsel Robert Mueller with conspiracy to defraud the United States for their attempt to interfere in the 2016 United States Presidential election. As some have noted, the chief value of those indictments was to inform the public about what had occurred, as uncovered through the Special Counsel’s investigation. Amelia Thomson-DeVeaux & Perry Bacon Jr., *What If We Already Have the Mueller Report?*, FIVETHIRTYEIGHT (Dec. 5, 2018), <https://fivethirtyeight.com/features/what-if-we-already-have-the-mueller-report/> [<https://perma.cc/YV7K-VFGB>] (“Mueller has been writing a public ‘report’ over the past 15 months, through the indictments and charging documents that his office has issued. Many of the indictments, describing what Mueller and his team have found, are more detailed than required.”).

<sup>117</sup> In many guilty plea proceedings, the government and the defendant make a presentation about the factual basis for the plea. Indeed, in federal court, the judge must find there is an adequate factual basis for the plea before accepting it. *See* FED. R. CRIM. P. 11(b). In corporate prosecutions, even those resolved by a deferred prosecution agreement or non-prosecution agreement prosecutors often require defendant corporations to agree to a lengthy statement of facts. *See* Buell, *supra* note 66, at 856 (discussing evolution of “speaking settlements” and encouraging their use so that “the facts become a lasting and indisputable record of the case”).

<sup>118</sup> Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2216 (2014) (stating that the public’s right to information regarding individual criminal cases “does not extend . . . to pre-arrest investigations”); Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 262 (2019) (stating that our criminal court system “keep[s] individual cases against defendants free of public interference, except in the rare case of a jury trial”) (emphasis in original).

not lead to criminal charges.<sup>119</sup> Unlike other executive branch agencies<sup>120</sup> or legislatures, prosecutors do not have general authority to hold investigative hearings or issue reports based upon their findings.<sup>121</sup> And although freedom of information laws often provide a mechanism for the public and members of the press to obtain, upon request, information in police and prosecutors' files once an investigation is over, prosecutors' memoranda reconstructing events often are protected from disclosure under exemptions for work product or protecting the deliberative process.<sup>122</sup>

This constitutes a significant loss from the perspective of history-keeping. Prosecutors may have the best access to the evidence while it is fresh.<sup>123</sup> They also are specialists in investigations, who are often uniquely competent to construct a narrative of what occurred given their familiarity

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<sup>119</sup> See, e.g., Richard H. Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?*, 55 COLUM. L. REV. 1103, 1110–14 (1955) (surveying which jurisdictions permit grand jury reports). For examples of recent grand jury reports, see N.Y. CTY. DIST. ATT'Y, REPORT OF THE GRAND JURY OF THE SUPREME COURT OF THE STATE OF NEW YORK (Dec. 13, 2018) (documenting widespread fraud in the conveyance of residential real estate in New York); OFFICE OF THE ATT'Y GEN., COMMONWEALTH OF P.A., REPORT I OF THE 40TH STATEWIDE INVESTIGATING GRAND JURY (July 27, 2018) (documenting widespread sex abuse by clergy in Pennsylvania).

<sup>120</sup> For example, the National Transportation Safety Bureau (NTSB) and the Equal Employment Opportunity Commission (EEOC) are authorized to issue investigative reports. See 49 U.S.C. §§ 1101–1155 (2018) (authorizing NTSB to issue reports based upon their investigations of accidents); 29 C.F.R. § 1614 (2010) (authorizing the same for EEOC).

<sup>121</sup> Special Counsel Robert Mueller was required under the Department of Justice Regulations governing his appointment to issue a final report to the Attorney General explaining his prosecution and declination decisions, but it was not clear before he issued his report that it would include such extensive factual findings. See 28 C.F.R. §§ 600.1–600.09 (2020). By contrast, under the Independent Counsel Law that expired prior to Mueller's appointment, Independent Counsels were required to issue a report "fully and completely" describing the Counsel's work. See Independent Counsel Reauthorization Act of 1994, Pub. L. 103-270, 108 Stat. 732. In the ordinary course, prosecutors do not have any express authority to issue such reports. For example, the Department of Justice's Civil Rights Division states that it generally "does not publicly announce investigations or investigative findings." *When Does the Division Announce Investigations?*, DEP'T OF JUSTICE, CIVIL RIGHTS DIVISION (last updated Oct. 18, 2018), <https://www.justice.gov/crt/when-does-division-announce-investigations> [perma.cc/CQ5T-P25H]. Further complicating the picture, to the extent that prosecutors acquire information through use of the Grand Jury, they are legally constrained from disclosing that information absent an indictment. See, e.g., FED. R. CRIM. P. 6(d)–(e); N.Y. CRIM. PROC. LAW § 190.25(4)(a).

<sup>122</sup> See, e.g., *Worldnetdaily.Com, v. U.S. Dep't of Justice*, 215 F.Supp.3d 81 (D.D.C. 2016).

<sup>123</sup> See, e.g., MUELLER REPORT, *supra* note 19, at Vol. II (explaining that one rationale for the Special Counsel's ongoing investigation, even after the Office determined that it would not charge or even accuse a sitting President, was to collect and preserve evidence while it was fresh and available).

with the available facts, even as compared to other institutions that also have subpoena power.<sup>124</sup> To be sure, prosecutors are imperfect and are susceptible to the same cognitive biases as other humans,<sup>125</sup> so the accuracy of any report that has not been subjected to external review or an adversarial process must be viewed with those limitations in mind.<sup>126</sup> Nevertheless, when prosecutors acting in good faith decide upon a version of events after a thorough investigation, there is reason to think that summary is valuable and can have a high degree of accuracy. And although this is not universally the case, prosecutors' reconstructions of events are often credited because of the privileged status they enjoy in our society as truth-tellers.<sup>127</sup>

As discussed above, one rationale for issuing detailed declination statements is to provide accountability for the prosecutor's decision not to press charges. But even when there is no one left to hold accountable—for example, if the targets of an investigation were deceased, or the prosecutor

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<sup>124</sup> See, e.g., Minzner, *supra* note 62, at 2133–34 (discussing some of the advantages of prosecutors over employees at administrative agencies, such as their greater expertise in working with informants); see also Richman, *supra* note 14, at 55–56 (noting that prosecutors are uniquely positioned to “preserve what might be unstable evidence of criminal conduct”).

<sup>125</sup> See Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. & LIBERTY 512, 516–20 (2007); Kay L. Levine & Ronald F. Wright, *Prosecutor Risk, Maturation, and Wrongful Conviction Practice*, 42 LAW & SOC. INQUIRY 648 (2017); Jessica A. Roth, *Informant Witnesses and the Risk of Wrongful Convictions*, 53 AM. CRIM. L. REV. 737, 774–77 (2016).

<sup>126</sup> See Flood Letter, *supra* note 21 (complaining that the Mueller Report was “laden with factual information that has never been subjected to adversarial testing or independent analysis”). By contrast, in cases that proceed to trial, a jury serves as the final check on the accuracy of prosecutors' allegations, and witnesses are subjected to cross-examination, which has long been hailed as the “greatest legal engine ever invented for the discovery of truth.” See 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 1367 (James H. Chadbourne rev. 1974). But even before trial, the system provides external checks in cases where charges are filed: criminal complaints are sworn, subjecting the affiant to penalty of perjury, and must be approved by a neutral magistrate judge, who can catch inconsistencies or patently implausible assertions. Indictments must be approved by a Grand Jury. These checks may be of questionable rigor. See, e.g., Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 261 (1995). However, their very existence may cause prosecutors to evaluate their cases more carefully. See *id.* at 278 (suggesting that the screening function of the Grand Jury actually takes place largely in the prosecutor's office, as prosecutors decide whether to present the case to the Grand Jury).

<sup>127</sup> See also Matthew Haag, *Police Report in Killing of Black Security Guard Is Criticized as Rushed*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/us/security-guard-shot-by-cops-jemel-roberson.html> [<https://perma.cc/4BNG-KWP4>] (describing negative public reaction to preliminary findings exonerating police officer, announced by Illinois State Police, three days after deadly encounter); see, e.g., Bennett Gershman, *The Prosecutor's Duty of Silence*, 79 ALB. L. REV. 1183, 1215 (2015) (observing that the prosecutor traditionally has enjoyed the status in our culture as the “special guardian and protector of the truth”).

were on her way out of office—the public often will want to know the truth about culturally and politically salient events.<sup>128</sup> Absent an authoritative statement from a trusted source, the public is left uncomfortably in the dark; even worse, they are left to speculate about blame, potentially fueling resentment and disharmony.<sup>129</sup> Reporting “what happened” is important for the mechanisms of democratic accountability to function, particularly when the targets of an investigation hold public office. But it is also important for democratic self-understanding and reconciliation more broadly, as well as for communities’ ability to chart the path forward.<sup>130</sup>

### C. THE RISKS POSED BY DECLINATION STATEMENTS

Although declination statements can serve many interests, they also pose risks. That is why historically they have been rare, and why the norm of silence continues to prevail. As will be discussed in Part III, it is also why public declination statements—to the extent they identify a particular individual—should remain rare.

#### 1. Law Enforcement Risks

To begin, prosecutors often will be reluctant to issue a declination statement for law enforcement reasons. Even if the prosecutor has decided not to charge a particular individual, the investigation may be ongoing as to others and a declination statement as to that individual could undermine the rest of the investigation by bringing it to public attention.<sup>131</sup> This reasoning is the same as the traditional justification for grand jury secrecy.<sup>132</sup> In some

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<sup>128</sup> As James Comey has argued, “[i]n critical matters of national importance, a straightforward report of what facts have been learned and how judgment has been exercised may be the only way to advance the public interest.” James Comey, *Republicans Are Wrong. Transparency is Possible in the Mueller Investigation*, WASH. POST (Mar. 4, 2019), [https://www.washingtonpost.com/opinions/james-comey-republicans-are-wrong-transparency-is-possible-in-the-mueller-investigation/2019/03/04/f7e95f38-3ebc-11e9-a0d3-1210e58a94cf\\_story.html](https://www.washingtonpost.com/opinions/james-comey-republicans-are-wrong-transparency-is-possible-in-the-mueller-investigation/2019/03/04/f7e95f38-3ebc-11e9-a0d3-1210e58a94cf_story.html) [<https://perma.cc/VRK4-8HW7>].

<sup>129</sup> See Haag, *supra* note 127 (noting public dissatisfaction with report issued by Illinois State Police regarding police shooting within days after the event, where findings were characterized as “rushed” and police did not explain basis for their findings).

<sup>130</sup> See, e.g., PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS (2002) (examining major truth commissions around the world); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); Phillip Tahmindjis, *The Role and Value of Truth and Reconciliation Commissions*, 27 INT’L LEGAL PRAC. 133, 134–35 (2002).

<sup>131</sup> See *infra* note 138.

<sup>132</sup> See, e.g., *Douglas Oil v. Petrol Stops Northwest*, 441 U.S. 211, 218–19 (1979); *Pittsburgh Plate Glass v. United States*, 360 U.S. 395, 399 (1959); *United States v. Proctor & Gamble*, 356 U.S. 677, 681 n.6 (1958).

cases, declinations could compromise methods and sources that prosecutors prefer to keep secret—e.g., by necessarily revealing that someone close to a target was cooperating with law enforcement. Prosecutors also might be reluctant to announce a declination because their view of the case might change and they are concerned about being bound by their earlier decision—if not in law, then in perception.<sup>133</sup> Secrecy also maximizes deterrence of future wrongful conduct, since uncertainty as to prosecutors’ priorities and application of the criminal law may lead potential wrongdoers to err on the side of caution.<sup>134</sup>

## 2. Risk of Error

In addition, any information that is disclosed might be wrong or could subsequently become refuted by further investigation.<sup>135</sup> Leaving false information in the public realm disserves any of the interests advanced by declination statements. It also is inconsistent with the prosecutor’s role as a minister of justice<sup>136</sup> and undermines the prosecutor’s credibility, if the error is later discovered. Additionally, having to correct prior statements could undermine the prosecutor’s credibility if the prosecutor is seen as unreliable and inconsistent. Subsequent updates may confuse the public and lead to a self-reinforcing cycle of public statements as events change. For this reason,

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<sup>133</sup> See Sklansky, *supra* note 4, at 519 (noting the “persistent worries about publicly-announced charging criteria being turned into ‘litigation weapons’”).

<sup>134</sup> See *id.* at 518–19 (noting concern that “if prosecutors made their charging criteria public, they would no longer be able to soften the edges of the law without significantly undermining deterrence”); see also Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, at 1154–59 (2016) (discussing concerns that greater transparency in enforcement priorities could reduce deterrence); Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 297 (1980) (expressing concern that, if prosecutors publicize which cases they deem unworthy of prosecution, such publication could “reduce the legitimate deterrent and moralizing effects of the criminal law”); *supra* notes 62–65 and sources cited therein (discussing the informationally asymmetry between insiders who have access to prosecutors’ previous declination decisions based on personal experience or pooled resources, and outsiders who do not).

<sup>135</sup> For example, James Comey’s initial representation that the Hillary Clinton email investigation was closed was rendered incorrect by the subsequent discovery of additional emails on a laptop computer used by her close associate. The FBI then re-opened the investigation, prompting Comey to so apprise Congress. See *infra* note 185; see also Eric Lichtblau et al., *F.B.I. Chief James Comey Is in Political Crossfire Again Over Emails*, N.Y. TIMES (Oct. 28, 2016), <https://www.nytimes.com/2016/10/29/us/politics/fbi-clinton-emails-james-comey.html> [<https://perma.cc/QKW7-XLPN>] (describing Comey’s October 28, 2016, letter to Congress revealing that the FBI was reviewing new emails related to the investigation found in the course of an unrelated investigation).

<sup>136</sup> See A.B.A., Rule 3.8, *supra* note 11.

Daniel Richman observed that the prosecutor's "safest move is always to never say anything and let the target twist in the wind."<sup>137</sup>

### 3. Risk of Reputational Harm

Declination statements also pose significant risks to the privacy and reputational interests of witnesses and those who were under investigation. These concerns also animate the traditional reasons for grand jury secrecy,<sup>138</sup> in addition to the norm against public statements about declinations. Grounding the decision in a specific legal requirement that cannot be overcome, such as the statute of limitations or the prosecutor's inability to prove a particular element, may seem innocuous enough and serves some of the signaling and accountability interests discussed herein. But such a statement might imply that the evidence otherwise was sufficient to charge. And, depending on the case, even such discrete explanations can quickly invite further inquiries and lead to a call for further explication: precisely what the evidence was, how it was insufficient, were specific witnesses not credible, etc.

Once that door is open, prosecutors are on uncertain ground. Prosecutors' public statements regarding witness credibility and personal beliefs about a target's guilt or moral culpability are not permitted when charges are filed for a number of reasons, including their potential to unfairly prejudice a future jury.<sup>139</sup> When no charges are filed, the risk to a fair trial may be absent but the risks to the target's reputation are accentuated. Without the public forum provided by the criminal process, a target has no means to clear his or her name or correct mistakes of fact. That is why grand jury reports have fallen out of favor in the federal system,<sup>140</sup> and the DOJ long ago adopted a policy against naming unindicted co-conspirators.<sup>141</sup>

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<sup>137</sup> Weiser, *supra* note 16 (quoting Daniel Richman).

<sup>138</sup> See *United States v. Briggs*, 514 F.2d 794, 802 (5th Cir. 1992) (noting danger of naming unindicted co-conspirators who will have "no forum in which the vindicate themselves").

<sup>139</sup> See 28 C.F.R. § 50.2 (2020); MODEL RULES OF PROF'L CONDUCT § 3.6 (2015). Statements about prosecutors' personal opinions also typically run afoul of rules prohibiting lawyers from serving as both advocates and witnesses in the same case.

<sup>140</sup> See 18 U.S.C. § 3333 (2020) and accompanying notes; see also DOJ, JUSTICE MANUAL, *supra* note 12, at § 159.

<sup>141</sup> See DOJ, JUSTICE MANUAL, *supra* note 12, at § 9-27.760 – Limitations on Identifying Uncharged Third-Parties Publicly (citing the "privacy and reputational interests of uncharged third parties" are reason not to identify them in plea hearings, sentencing memoranda, and other governmental pleadings); DOJ, JUSTICE MANUAL, *supra* note 12, at § 9-11.130 – Limitations on Naming Persons Unindicted Co-Conspirators ("In the absence of some

Even in jurisdictions that still authorize grand juries to issue investigative reports, individuals' names are often redacted to protect privacy and reputational interests before the reports are released to the public—as, for example, when the Pennsylvania Supreme Court in 2018 ordered priests' names to be redacted from a grand jury report about sexual abuse within the Catholic Church.<sup>142</sup> The value of protecting individuals' privacy and reputational interests also explains why those portions of prosecutors' public declination statements characterizing a target's conduct as wrongful, or opining about witness credibility, have proven so particularly controversial.<sup>143</sup> As one commentator has observed, "The DOJ's publication of declinations with even moderately detailed factual statements creates reputational damage."<sup>144</sup> Even high-profile targets who have a more visible

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significant justification, federal prosecutors generally should not identify unindicted co-conspirators in conspiracy indictments"); *see also* *United States v. Briggs*, 514 F.2d 794, 802 (5th Cir. 1992) (noting danger of naming unindicted co-conspirators who will have "no forum in which to vindicate themselves"). Similarly, courts also have long upheld exemption from Freedom of Information Act Requests for information that would confirm whether an individual had been a subject of investigation to protect their privacy. *See, e.g., Massey v. F.B.I.*, 3 F.3d 620, 624 (2d Cir. 1993) ("[I]ndividuals have substantial privacy interests in information that either confirms or suggests that they have been subject to criminal investigations or proceedings.").

<sup>142</sup> *See In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560, 573 (Pa. 2018) (quoting *Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pa.*, 923 A.2d 389, 395 n.7 (Pa. 2007)) (noting that the Pennsylvania Constitution places "reputational interests on the highest plane, that is, on the same level as those pertaining to life, liberty, and property" and affording targets named in the report the opportunity to be heard prior to publication); *see also In re Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712 (Pa. 2018) (ordering names of eleven priests permanently redacted from Grand Jury Report).

<sup>143</sup> For example, James Comey's characterization of Hillary Clinton's conduct as "extremely careless" was widely criticized. *See infra* note 187. So too was the public statement by a Connecticut prosecutor who declined to prosecute Woody Allen but publicly stated that he believed he had enough evidence to charge him. *See Henneberger, supra* note 71 (quoting legal ethics expert Stephen Gillers' statement in reaction to the prosecutor's public statements that, "You don't declare the man guilty and then say you're not going to prosecute, leaving him to defend himself in the press . . . I can't overemphasize how remarkable this is."); Weiser, *supra* note 16 (quoting Gillers' statement that "a prosecutor has two choices: indict or shut up") (quoting law professor Rebecca Roiphe, who called prosecutors' increasingly common public commentary on cases without filing charges "extremely problematic"); *see also* Richard Perez-Pena, *Woody Allen Asks Connecticut to Discipline Prosecutor*, N.Y. TIMES (Oct. 14, 1993), <https://www.nytimes.com/1993/10/14/nyregion/woody-allen-asks-connecticut-to-discipline-prosecutor.html> [<https://perma.cc/FR4Y-4BTQ>] (quoting former Assistant United States Attorney for the Southern District of New York, and now Second Circuit Judge, Hon. Gerard E. Lynch, as saying "It's always inappropriate for a prosecutor to say anything about a case in which no charges are brought . . . [a]nd to say, 'We think the guy is guilty' is outrageous.").

<sup>144</sup> Gideon Mark, *The Yates Memorandum*, 51 U.C. DAVIS L. REV. 1589, 1649 (2018).

platform from which to rebut the prosecutor's statements than the average person still may be unable to fully mitigate the harm caused by prosecutors' express or implied assertions of misconduct.<sup>145</sup>

Notably, executive actors *other* than prosecutors can issue public statements that shame targets as a means of providing accountability (as well as specific and general deterrence) and are explicitly authorized to do so. For example, the SEC has the authority under its governing statutes to issue a letter detailing misconduct, including the identities of those specifically involved in it, when it has decided against an enforcement action but thinks publicity of the facts uncovered during its investigation would be in the public interest.<sup>146</sup> Prosecutors can charge-bargain, defer prosecution, and make use of diversionary programs as means of achieving what they deem to be a just outcome. However, shaming through public statements, uncoupled from any other official action, is not a generally accepted option in the prosecutor's toolkit.<sup>147</sup>

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<sup>145</sup> As former Labor Secretary Raymond Donovan famously said following his acquittal on state fraud charges, "Which office do I go to to get my reputation back?" Selwyn Taab, *Donovan Cleared of Fraud Charges by Jury in Bronx*, N.Y. TIMES (May 26, 1987), <https://www.nytimes.com/1987/05/26/nyregion/donovan-cleared-of-fraud-charges-by-jury-in-bronx.html> [<https://perma.cc/2M4C-G5GG>]. A person who has never been charged stands in a different position than a person who is in fact indicted. Nevertheless, the lack of a public forum in which to seek an acquittal in some ways puts the person in the former position at a disadvantage in repairing their reputation. It is for this reason that prosecutorial standards discourage declination statements that imply guilt. See A.B.A., CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, 3-1.10(c). It is also why Special Counsel Mueller decided not to make a prosecutorial decision about whether President Trump committed obstruction of justice. He wrote in his report that "fairness concerns" dictated such restraint, where Department of Justice policy precluded him from filing criminal charges against a sitting President. In that situation, Mueller concluded, it would be unfair to accuse someone of a crime when that person would have no opportunity "for public name-clearing before an impartial adjudicator." MUELLER REPORT, *supra* note 19, at Vol. II.

<sup>146</sup> See Securities Exchange Act of 1934 § 21(a), 15 U.S.C. § 78u(a)(1) (2015). See generally Neal Perlman, *Section 21(A) Reports: Formalizing a Functional Release Valve at the Securities Exchange Commission*, 69 N.Y.U. ANN. SURV. AM. L. 887 (2014) (discussing history and purposes of Section 21(a) reports). These reports are available on the SEC's website, see *Reports of Investigations*, SEC (last updated Oct. 16, 2018), <https://www.sec.gov/litigation/investreports.shtml> [<https://perma.cc/2CEY-UDM6>].

<sup>147</sup> As former Acting U.S. Attorney for the Southern District of New York, Joon Kim observed in an interview following his departure, "Prosecutors don't ask and we do not answer the questions: *Is this conduct appropriate? Was this conduct ethical? Was this conduct something we'd like to see or condone or promote in leaders?* We don't ask and we don't answer those questions as prosecutors. Prosecution is a blunt tool – you either prosecute someone or you don't. And the fact that you don't prosecute someone doesn't mean that everything is hunky-dory." Cristian Farisa, *Preet Bharara's Former Deputy on His Old Boss's Firing and the Michael Cohen Case*, INTELLIGENCER (Apr. 29, 2018), <https://nymag.com/inte>

#### 4. *Political Risk*

Moreover, where the prosecutor's reason for declining charges is based on factors such as the allocation of resources, prior practice, or the exercise of mercy, greater transparency may undermine prosecutors' ability to perform another important aspect of their role—mitigating “the rigors of the penal system.”<sup>148</sup> As David Sklansky explains, prosecutors' discretion in charging allows the system “to fudge on its commitments”<sup>149</sup> by “blunting the edges”<sup>150</sup> of overly harsh or broad laws. That is, prosecutors exercise their negative discretion so that society need not bear the costs—both economic and social—of a regime of full enforcement. Our criminal justice system relies on prosecutors to play this mitigating function. But traditionally, that function has been exercised in private. Too much transparency can provide “levers for less engaged, and perhaps overly punitive, actors to intervene in downstream decision-making.”<sup>151</sup> For example, politicians could pass more punitive laws or strip funding or authority from prosecutors whom they perceive as too lenient. Individuals aggrieved by the prosecutor's decision could seek to bring public pressure to bear on prosecutors to change course.<sup>152</sup> Thus, the risks to prosecutors'

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lligencer/2018/04/joon-kim-on-following-preet-and-the-michael-cohen-case.html [https://perma.cc/X5HF-QPKE] (emphasis in original).

<sup>148</sup> *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 386 (2004).

<sup>149</sup> *See Bowers, supra* note 1, at 1662–63 (explaining that the notion that prosecutors should rigidly apply the criminal law “is both untenable and unattractive” and almost universally rejected “in case law and commentary”—rather, the prosecutor's job in part is “to individualize justice,” through the “exercise discretion and common sense”); *see also Sklansky, supra* note 4, at 506.

<sup>150</sup> Sklansky, *supra* note 4, at 506.

<sup>151</sup> *See Richman, supra* note 14, at 70.

<sup>152</sup> For example, United States Attorney for the Eastern District of Pennsylvania William McSwain issued a public statement in 2019 fiercely criticizing progressive District Attorney Larry Krasner and calling for accountability for Krasner's lack of “robust enforcement” of the criminal law. McSwain accused Krasner of “promoting “a new culture of disrespect for law enforcement,” saying “we don't have . . . robust enforcement by the District Attorney. Instead . . . we have diversionary programs for gun offenses, the routine downgrading of charges for violent crime, and entire sections of the criminal code that are being ignored . . . It is now time for the District Attorney and his enablers to stop making excuses for criminals.” Statement by United States Attorney William M. McSwain on the Shooting of Six Philadelphia Police Officers (Aug. 15, 2019), <https://www.justice.gov/usao-edpa/pr/statement-united-states-attorney-william-m-mcswain-shooting-six-philadelphia-police> [https://perma.cc/S9TS-RXWN].

beneficial mediating role<sup>153</sup> must be factored into any overall assessment of the benefits of greater public reason-giving by prosecutors.

There also is a risk that greater transparency about the reasons for declinations may be a one-way ratchet and will increase expectations that prosecutors will provide such disclosure in the ordinary course. Succumbing to that pressure in cases where prosecutors are concerned about revealing their true reasons for declination, perhaps for fear of political reprisal, increases the risk that prosecutors will give insincere reasons—which would undermine most interests served by declination statements.<sup>154</sup> On the other hand, refusing to provide reasons in such cases may be met with frustration and distrust, all the more so if detailed statements become more common.

### 5. *Drain on Prosecutorial Resources*

Finally, there is a risk that the more time prosecutors spend on declination statements, the less time they will spend on their other responsibilities, including investigating and prosecuting crime. After all, prosecutorial resources are finite. So, it is reasonable to ask whether the benefits of prosecutorial declinations outweigh the burdens they necessarily impose on the day-to-day administration of prosecutorial offices and their overall efficiency.<sup>155</sup>

## II. THE CURRENT LANDSCAPE REGARDING DECLINATION STATEMENTS

Currently, prosecutors must navigate the benefits and risks of declination statements without significant guidance. Academic literature has largely overlooked this aspect of the prosecutorial role, as have most national professional rules and standards. This Part analyzes these various sources. First, it discusses the academic literature. Second, it turns to the model rules

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<sup>153</sup> See Barkow, *supra* note 134, at 1158 (noting that, given the politics of criminal justice, greater transparency in charging criteria and priorities might cause agencies to adopt policies that are harsher than they otherwise would); see also Sklansky, *supra* note 4, at 40; Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409 (2003); Wright & Miller, *supra* note 6.

<sup>154</sup> See *supra* Part I(B). Insincerity does not entirely vitiate declination statements' value, however. As Glen Staszewski has observed, "it would be preferable if public citizens regularly provided genuine reasons for their positions, but insincerity does not eliminate our ability to evaluate the merits of their choices or the explanations that they have provided to justify them. On the contrary, insincere explanations are more likely to be vulnerable to criticism." Staszewski, *supra* note 77, at 1289.

<sup>155</sup> Fairfax, Jr., *supra* note 30, at 1277 (noting that imposing a requirement on prosecutors that they explain all of their declinations "has the potential to be overly burdensome and unworkable," and that it would not be advisable to impose such a requirement as it would "impede [prosecutors'] ability to prosecute the many cases they choose to pursue").

of professional conduct, federal guidelines, and national standards like those issued by the American Bar Association's Criminal Justice Section and the National Association of District Attorneys. Having exposed the lack of guidance available to prosecutors from these sources, this Part then surveys prosecutors' individual policies and practices regarding declination statements, based upon outreach to some of the nation's largest prosecutorial offices. Finally, this Part offers a typography of declination statements varying along two axes. The final section of this Article, Part III, will use the typography in providing guidance to prosecutors going forward.

#### A. ACADEMIC LITERATURE

Although the literature about prosecutorial discretion is vast, only a relatively small portion of it has been devoted to prosecutors' decisions *not* to charge. And none of it has focused on how prosecutors should convey their declination decisions to various audiences. Thus, for example, some scholars have written about prosecutors' duty not to decline cases involving certain kinds of crimes, such as domestic violence or police misconduct, even where convictions may be difficult.<sup>156</sup> Others have explored the legitimacy of prosecutors' authority to decline prosecution in the face of sufficient evidence,<sup>157</sup> or challenged our criminal justice system's entrustment of such decisions to prosecutors as opposed to some other actor.<sup>158</sup> Much of the seminal prior work on declinations has been empirical in nature, aimed at discerning how often prosecutors decline to prosecute, in what kinds of cases, and for what reasons. Thus, for example, for their 2008 article, *The Black Box*, Marc Miller and Ron Wright examined data compiled by prosecutors in four cities to determine what constraints, if any, appeared to guide prosecutors' exercise of discretion not to charge.<sup>159</sup> Other scholars have analyzed federal prosecutors' declination decisions to discern patterns and trends.<sup>160</sup> All of this prior work supports one of the principal claims of this

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<sup>156</sup> See, e.g., Tamara Rice Lave, *The Prosecutor's Duty to 'Imperfect' Rape Victims*, 49 TEX. TECH L. REV. 219 (2016); Rebecca Roiphe, *The Duty to Charge in Police Use of Excessive Force Cases*, 65 CLEV. ST. L. REV. 503 (2017).

<sup>157</sup> See, e.g., Fairfax, Jr., *supra* note 30.

<sup>158</sup> See, e.g., Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1362–65 (2008); Bowers, *supra* note 1.

<sup>159</sup> See Miller & Wright, *supra* note 10. The authors determined that declinations in fact revealed “an internal legal order at work,” reflecting internal office policies and social norms and the “influence of substantive and procedural legal doctrines.” *Id.* at 130–31; see also Bowers, *supra* note 1 (analyzing declination data for New York and Iowa).

<sup>160</sup> Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246 (1980); see, e.g., Michael Edmund

Article, namely that keeping records of prosecutors' declination decisions is critical to holding prosecutors accountable—precisely so that, at a minimum, future researchers can analyze these records and report their findings. But the prior literature does not fully explore the other interests (beyond prosecutorial accountability) that information about declinations can serve.<sup>161</sup> Nor does it consider public statements about declinations on a case-by-case basis, the particular risks associated with such statements, and when, if ever, such statements may be warranted.

## B. PROFESSIONAL GUIDANCE

### 1. Model Rules

The rules governing lawyers and most professional standards do not adequately address declination statements. For example, although most states have adopted a rule of professional conduct on trial publicity analogous to the ABA's Model Rule of Professional Conduct 3.6,<sup>162</sup> that rule addresses statements made in the context of pending trials or other adjudicative proceedings—not those made where no charges are filed. Similarly, Model Rule 3.8(f), which fewer states have adopted, cautions prosecutors to refrain from making public statements “that have a substantial likelihood of heightening public *condemnation* of an accused.”<sup>163</sup> But by using the term “accused,” the Rule implicitly restricts its scope to contexts in which charges have been filed. The Rule also allows for statements “necessary to inform the public of the nature and extent of the prosecutor's action,” and to “serve a legitimate law enforcement purpose,”<sup>164</sup> without providing guidance as to how prosecutors might balance those interests against the mandate to protect an accused or target from unnecessary condemnation.

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O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L. REV. 221 (2003).

<sup>161</sup> Miller and Wright recognize some of the other interests that information about declinations can serve, such as illuminating the norms or priorities of particular prosecutorial offices and prompting changes in police practices or legal rules. See Miller & Wright, *supra* note 10, at 165–66, 196. The present Article builds on Wright and Miller's important work and also identifies other interests served by declination statements.

<sup>162</sup> MODEL RULES OF PROF'L CONDUCT § 3.6 (2015) (providing that a lawyer who is participating in a matter “shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter”).

<sup>163</sup> *Id.* at § 3.8(f).

<sup>164</sup> *Id.*

## 2. Federal Guidelines

At the federal level, the Justice Manual (JM) provides instruction for United States Attorneys on some limited issues related to declination statements. For example, it provides that all declinations handled by the Fraud Section's Foreign Corrupt Practices Act (FCPA) Unit will be public,<sup>165</sup> although it does not discuss the content or form of such declinations.<sup>166</sup> For other types of criminal cases, the guidance is even less clear. This absence is particularly striking given that federal criminal prosecution is even more discretionary than state prosecution.<sup>167</sup> This is especially so because there is almost always overlapping state jurisdiction for any potential crime investigated by federal authorities, whereas the converse is not true.<sup>168</sup> The JM directs federal prosecutors to document in their files declinations for cases referred directly by an agency<sup>169</sup> and provides that a United States Attorney has the discretion to privately notify an individual previously deemed a target than his or her target status had ended.<sup>170</sup> But it does not

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<sup>165</sup> See DOJ, JUSTICE MANUAL, *supra* note 12, at § 9-47.120 (“Declinations awarded under the FCPA Corporate Enforcement Policy will be made public.”). The DOJ Antitrust Division has made public a model “leniency letter.” See ANTITRUST DIV., U.S. DEP’T OF JUSTICE, MODEL LENIENCY LETTER, <https://www.justice.gov/sites/default/files/atr/legacy/2014/05/13/239524.pdf> [<https://perma.cc/6NLA-4JDE>] [hereinafter DOJ, MODEL LENIENCY LETTER].

<sup>166</sup> The Unit’s website has links to approximately 10 declination letters written between 2016 and 2018, all of which are one to three pages long and are written to counsel for the companies that received the declinations. Each of the letters sets forth a brief summary of the Department’s factual findings and then explains the decision to close the case without charges, tracking the factors set forth in the Unit’s Pilot Program (announced in April 2016) such as the company’s efforts consistent with them, such as prompt voluntary self-disclosure, fulsome cooperation with the Government including identification of individual wrongdoers, improved compliance programs, and remediation. Some appear to be more like deferred or non-prosecution agreements, in that they also contain signatures by defense counsel and an agreement to take certain additional actions.

<sup>167</sup> See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 765 (1999).

<sup>168</sup> See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 682 (2014) (“[B]ecause states continue to hold primary law enforcement responsibility within our federal system, federal prosecutors often can ignore the offense altogether, thus leaving the decision whether to prosecute with state officials.”); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors and the Exercise of Discretion*, 117 YALE L.J. 1420, 1423 (2008) (noting that “most conduct that violates federal law also violates state law”).

<sup>169</sup> See DOJ, JUSTICE MANUAL, *supra* note 12, at § 9-2.020.

<sup>170</sup> See *id.* at § 9-11.155 (providing that a prosecutor may notify “an individual, who has been the target of a grand jury investigation, that the individual is no longer considered to be a target.”). The policy provides some guidance about when such notification may be appropriate, such as when the target previously had been notified that he or she was a target; when the relevant investigation has been discontinued without an indictment against the target;

address when such statements should be released to the public, or other means of communicating the declination decision more broadly<sup>171</sup>—the hardest questions to confront. Although the JM may be interpreted as presumptively directing prosecutors *not* to publicly disclose that a particular individual or entity was under investigation when no charges are filed (in non-FCPA cases), it also suggests that there may be circumstances in which an overriding interest would warrant such disclosure; but this suggestion comes without any discussion of what those circumstances might be.<sup>172</sup>

The most comprehensive policy on declination statements in a publicly available document issued by the DOJ can be found in the Antitrust Division's "Issuance of Public Statements Upon Closing of Investigations."<sup>173</sup> Pursuant to that policy, which is not incorporated into the JM, the Division will consider issuing a public statement about the closing of a matter without initiating an enforcement action when the DOJ previously had publicly confirmed the investigation<sup>174</sup> and when the matter was the

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or when the evidence conclusively establishes that the individual's target status had ended. *Id.* The policy further provides that a United States Attorney may decline to provide such notification for any "appropriate" reason, including, for example, a potential negative impact on "the integrity of the investigation or the grand jury process;" and that the United States Attorney needed not provide any explanation for declining such a request. *Id.* Moreover, if the United States Attorney decides to make the notification to the former target, "the language of the notification may be tailored to the particular case," and "may be drafted to preclude the target from using the notification as a 'clean bill of health' or testimonial." *Id.* Finally, the delivery of such a notification to a target or the target's attorney does not preclude the United States Attorney or Grand Jury from reinstating the investigation without notification to the target if the circumstances warrant such action. *Id.*

<sup>171</sup> Only when charges are withdrawn after already having been filed does the Manual address the notion of a public explanation, recommending that prosecutors explain in a court filing the reasons for the dismissal when the case is "of considerable public interest or importance." DOJ, JUSTICE MANUAL, *supra* note 12, at § 9-2.050. Then, the Justice Manual counsels that "a written motion for leave to dismiss should be filed explaining fully the reason for the request," and that "the importance of the case is not to be measured simply by the punishment prescribed for the offense." *Id.*

<sup>172</sup> See DOJ, JUSTICE MANUAL, *supra* note 12, at §§ 1-7.100–7.400 (providing a presumption that "non-public, sensitive information obtained in connection with work" may not be disclosed outside of DOJ "other than as necessary to fulfill DOJ official duties" and citing unfair "damage to the reputation of a person" as one of the reasons for the policy). The exception noted is for when the public needs to be reassured that "the appropriate law enforcement agency is investigating a matter, or where release of information is necessary to protect the public safety." *Id.* This public safety exception is typically cited as justification for an announcement that a suspect is at large and is considered an ongoing threat, even though the investigation is ongoing.

<sup>173</sup> See *Issuance of Public Statements Upon Closing of Investigations*, U.S. DEP'T OF JUSTICE (last updated June 25, 2015), <https://www.justice.gov/atr/issuance-public-statements-upon-closing-investigations> [<https://perma.cc/JA2M-YG8N>].

<sup>174</sup> *Id.*

subject of “substantial publicity.”<sup>175</sup> The more publicity the matter received, “the more likely it is that the Division will issue a statement.”<sup>176</sup> In deciding whether to issue a statement, the Division “will evaluate the value to the public in receiving information regarding the reasons for non-enforcement (including public trust in the Department’s enforcement, and the value of the analysis for other enforcers, businesses and consumers).”<sup>177</sup> As for the content of the statement, the guidance provides that “[n]o confidential or privileged information will be disclosed, including information regarding internal deliberations or confidential investigative techniques.”<sup>178</sup> Also, no other “non-public evidence or information will be disclosed that is protected by law” and “[n]o disparaging characterizations of individuals or organizations will be included in the statement.”<sup>179</sup> The policy also provides that any “parties to the investigation” will be given prior notice that a statement will be released, and that the statement “will include a disclaimer” making clear that “enforcement decisions are made on a case by case basis and that the analysis and conclusions discussed in the statement are not binding on the Department in future matters.”<sup>180</sup>

The DOJ Antitrust Division’s guidance is remarkable for its relative level of detail—but also for its limited reach. Federal criminal law enforcement constitutes a narrow slice of the overall criminal justice picture in the United States,<sup>181</sup> and criminal antitrust cases represent a tiny fraction of that narrow slice.<sup>182</sup> While it is true that “antitrust analysis is complex”<sup>183</sup> and has potential national and international economic effects—reasons cited in the Antitrust Division’s policy preamble for issuing statements in this area—there are many other areas of federal criminal law that are complex, or where considerable public benefits would accrue from transparency in

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> As one measure of the relative footprint of the federal criminal justice system relative to that of the states, at the end of 2017, federal prisoners represented 12% of the total of the U.S. prison population, whereas individuals serving state prison sentences accounted for 88% of the total. See JENNIFER BRONSON & ANN CARSON, U.S. DEPT’ OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2017 at 3 (Apr. 2019).

<sup>182</sup> *Compare Criminal Enforcement Trends Charts*, U.S. DEP’T OF JUSTICE (last updated Mar. 12, 2018), <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts> [<https://perma.cc/W6CR-2G83>] (stating that twenty-four criminal antitrust cases were filed in 2017), with U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ ANNUAL STATISTICAL REPORT, FISCAL YEAR 2017 (2017) (stating that 53,899 criminal cases were filed in fiscal year 2017).

<sup>183</sup> See *Issuance of Public Statements Upon Closing of Investigations*, *supra* note 173.

declination decisions. Moreover, it is telling that all of the closing statements posted on the DOJ Antitrust Division's website pursuant to this guidance (approximately one to four per year since 2003) appear to be issued by the civil enforcement arm of the Antitrust Division, rather than its criminal unit.<sup>184</sup>

The controversy over then-FBI Director James Comey's July 2016 press conference regarding the closure of the Hillary Clinton investigation confirms the absence of generally applicable guidance for federal declination statements. As he recounted in his 2018 memoir, despite his decades of experience as a federal prosecutor, including as United States Attorney for the Southern District of New York and Deputy Attorney General at the DOJ, the FBI Director was uncertain as to what kind of public statement was permissible once the investigation was over.<sup>185</sup> Both current and former DOJ

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<sup>184</sup> The criminal unit maintains a separate "leniency program" whereby individuals and corporations who have violated the criminal antitrust laws can avoid prosecution if they self-report and provide assistance in the prosecution of others. Corporations can only obtain leniency if they are "first in the door" for a particular antitrust conspiracy. DEP'T OF JUSTICE, FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS (Jan. 26, 2017) [hereinafter LENIENCY FAQ]. If the Department of Justice approves a candidate for leniency pursuant to the program, it will issue a leniency letter confirming that fact and setting forth its terms. Although the Antitrust Division has published model leniency letters on its website, see DOJ, MODEL LENIENCY LETTER, *supra* note 165, it does not make publicly available individual leniency letters since it treats the recipients as confidential informants. See LENIENCY FAQ at 28. These kinds of leniency arrangements are more akin to traditional cooperation agreements than declinations.

<sup>185</sup> Comey wrote in his 2018 memoir that when the end was in sight of one of the most high-profile and consequential investigations in modern memory, he asked his staff to research "any policy or other limitations around making such a statement; and the wisdom and mechanics of presenting it," including whether the statement should be made standing next to the Attorney General, or take the form of a written report to Congress. JAMES COMEY, A HIGHER LOYALTY 175 (2018). That decision was rendered even more complex by the fact that the Attorney General, Loretta Lynch, had announced that she would defer to the recommendation of the FBI and the career prosecutors on the case, in light of concerns about the appearance of a conflict of interest presented by Lynch's status as a political appointee and her private meeting on a plane with former President Bill Clinton in June 2016. See Mark Landler et al., *Loretta Lynch to Accept F.B.I. Recommendations in Clinton Email Inquiry*, N.Y. TIMES (July 1, 2016), <https://www.nytimes.com/2016/07/02/us/politics/loretta-lynch-hillary-clinton-email-server.html> [<https://perma.cc/R2UF-UCDL>]. Lynch's top deputies at the Department of Justice similarly had announced they would defer to the FBI and the career prosecutors' recommendation. Comey ultimately held a press conference without any other DOJ officials present on July 5, 2016, at which he announced that the FBI was recommending that no charges be filed. In his prepared statement and at the press conference, Comey characterized Secretary Clinton's handling of her email containing classified information as "extremely careless." See Mark Landler & Eric Lichtblau, *F.B.I. Director James Comey Recommends No Charges for Hillary Clinton on Email*, N.Y. TIMES (July 5, 2016), <https://w>

officials roundly criticized Comey's chosen course of action—i.e., a press conference at which he characterized Clinton's conduct as “extremely careless” but opined that no reasonable prosecutor would bring criminal charges for her mishandling of classified information.<sup>186</sup> However, his critics overwhelmingly cited the “norms” and “traditions” of the DOJ, rather than explicit rules or policy statements, as the basis for their objections.<sup>187</sup>

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ww.nytimes.com/2016/07/06/us/politics/hillary-clinton-fbi-email-comey.html [https://perma.cc/M3C3-UFQ3]. On July 6, 2016, Attorney General Loretta Lynch announced that she was accepting that recommendation. See Michael D. Shear, *Attorney General Accepts Recommendation Not to Charge Hillary Clinton*, N.Y. TIMES (July 6, 2016), https://www.nytimes.com/2016/07/07/us/politics/hillary-clinton-loretta-lynch.html [https://perma.cc/M523-9TV8]. On July 7, 2016, Comey testified before the House Oversight and Government Reform Committee, providing more detail about his decision. After his testimony, lawmakers requested access to the FBI Report. See Sarah Westwood, *FBI to Congress: File FOIA Request for Clinton Email Files*, WASHINGTON EXAM'R (Sept. 12, 2016), https://www.washingtonexaminer.com/fbi-to-congress-file-foia-request-for-clinton-email-files [https://perma.cc/WQ3A-DSH4]. On September 2, 2016, in response to numerous FOIA requests, the FBI released its (redacted) report on the Clinton investigation, which contained summaries of witness interviews and emails provided by the State Department. See *FBI Releases Documents in Hillary Clinton E-Mail Investigation*, FBI (Sept. 2, 2016), https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-documents-in-hillary-clinton-e-mail-investigation [https://perma.cc/K2AQ-ZT68]; see also Tal Kopan & Evan Perez, *FBI Releases Hillary Clinton Email Report*, CNN (Sept. 2, 2016), https://www.cnn.com/2016/09/02/politics/hillary-clinton-fbi-interview-notes/index.html [https://perma.cc/S69L-UJLK]; FBI, FBI: THE VAULT, CLINTON E-MAIL INVESTIGATION (July 2016), https://vault.fbi.gov/hillary-r.-clinton/Hillary%20R.%20Clinton%20Part%2001%20of%2027/view [https://perma.cc/5V5T-D7L3]. On September 23, 2016, the FBI released 200 pages of notes from its investigation. On October 28, 2016, Comey sent a letter to congress revealing that the FBI was reviewing new emails related to the investigation found in the course of an unrelated investigation; and on November 6, 2016 sent another letter to lawmakers informing them that the agency had not changed its opinion. The Department of Justice Inspector General later issued its own report about the FBI's handling of the Clinton email investigation. See *infra* notes 188–89.

<sup>186</sup> See *supra* note 185.

<sup>187</sup> See, e.g., Memorandum from Rod J. Rosenstein, Deputy Att'y Gen., for the Att'y Gen. (May 9, 2017) (on file with Journal and author) (memorandum by the Deputy Attorney General initially cited by President Trump in support of his decision to fire Comey, repeatedly citing “traditions” and “principles” of the FBI and the Department of Justice, rather than law or policy, that the FBI director transgressed); Jamie Gorelick & Larry Thompson, *James Comey is Damaging Our Democracy*, WASH. POST (Oct. 29, 2016), https://www.washingtonpost.com/opinions/james-comey-is-damaging-our-democracy/2016/10/29/894d0f5e-9e49-11e6-a0ed-ab0774c1eaa5\_story.html [https://perma.cc/KG3A-PXMM] (op-ed by two former Deputy Attorneys General citing “long standing and well-established traditions limiting disclosure of ongoing investigations to the public and even to Congress”). To be sure, much of the criticism of Comey focused on two additional issues. The first was the fact that he bypassed the Attorney General and Deputy Attorney General to make the announcement himself, despite DOJ policy requiring approval of high-level Department of Justice officials for public statements—even though the Attorney General and her deputy had announced that

Additionally, the DOJ Inspector General who reviewed the FBI's handling of the Clinton investigation concluded that Comey's public announcement "clearly and dramatically" departed from FBI and DOJ norms.<sup>188</sup> The Inspector General recommended that, going forward, the DOJ and the FBI consider adopting a policy about employees "discussing the conduct of uncharged individuals in public statements,"<sup>189</sup> in effect acknowledging that no such policy existed at the time.

### 3. National Standards

National standards issued by professional associations like the American Bar Association are not particularly helpful in this area, either. For example, the ABA's Criminal Justice Standards on the Prosecutorial Function offer an incomplete discussion of declination statements. They provide that a "prosecutor may make a public statement explaining why criminal charges have been declined or dismissed, but must take care not to imply guilt or otherwise prejudice the interests of victims, witnesses or subjects of an investigation."<sup>190</sup> Missing are more detailed criteria for deciding when a public statement is warranted, what factors to weigh when considering issuing such a statement, and how best to avoid implying guilt or otherwise causing prejudice. Nor do the Prosecution Function Standards address other options available to prosecutors to accomplish these ends.

Another set of standards, the ABA's Criminal Justice Standards on Fair Trial and Public Discourse, provides more fulsome guidance. The Fair Trial Standards counsel that prosecutors and other lawyers participating in criminal matters should not make public statements that have a substantial likelihood of "unnecessarily heightening public condemnation"—not just of an accused, but of any individual "publicly identified in the context of a

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they would accept the recommendation of the FBI and the career prosecutors. *See supra* note 185. The second issue was the proximity of the announcement to the upcoming Presidential election, which critics contended ignored a long-standing DOJ memorandum about actions close to an election, despite the fact that the memo applied only to investigations of election-related crimes. *See* ERIC HOLDER, ATTORNEY GEN. MEMORANDUM TO ALL DEPARTMENT EMPLOYEES, ELECTION YEAR SENSITIVITIES (Mar. 9, 2012). In any event, none of the criticism cited any clear policy that Comey's statements violated had he been the prosecutor in this situation and had there been no election year sensitivities.

<sup>188</sup> OFFICE OF THE INSPECTOR GEN., DEP'T OF JUSTICE, A REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION 497 (June 2018).

<sup>189</sup> *Id.*

<sup>190</sup> *See* A.B.A., CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, 3-1.10(c).

criminal investigation.”<sup>191</sup> The Fair Trial Standards then identify subject areas that pose a particularly high risk, such as statements conveying a prosecutor’s personal opinion about an individual’s guilt, innocence, reputation, or character—or statements about the credibility of witnesses, including victims.<sup>192</sup> However, these Standards also state that “a transparent and open criminal justice system is of critical importance in our democracy,” and that those involved in that system “have a duty to promote respect for and confidence in the criminal justice system,” as well as to ensure that criminal cases are conducted fairly.<sup>193</sup> To that end, they recognize that a prosecutor may make public statements “necessary to inform the public of the nature and extent of the prosecutor’s action,” including “the existence of an investigation in progress” and its general length and scope.<sup>194</sup> Thus, the Fair Trial Standards are more detailed than those on the Prosecution Function generally, but still do not fully address when the interests in transparency and confidence in the criminal justice system warrant release of a declination statement.

The National District Attorney Association (NDAA) Standards, which are a general resource for state prosecutors, are similarly incomplete in addressing declination statements. They provide that “[w]here permitted by law, a prosecutor’s office should retain a record of the reasons for declining a prosecution,” and that “[t]he prosecutor should promptly respond to inquiries from those who are directly affected by a declination of charges.”<sup>195</sup> But they do not address how declination reasons should be recorded, who is sufficiently “affected” by a declination decision to warrant a response, or how those responses should be provided and what they should include. However, they do counsel that victims of particularly serious crimes should be notified, when feasible, of the rejection of a case by the prosecutor.<sup>196</sup> Like the DOJ’s Justice Manual, the NDAA Standards suggest that prosecutors inform individuals who previously had been notified that they

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<sup>191</sup> A.B.A., *CRIMINAL JUSTICE STANDARDS, FAIR TRIAL AND PUBLIC DISCOURSE* 8-2.1(a)(ii) (4th ed. 2013).

<sup>192</sup> *Id.* at 8-2.2(a).

<sup>193</sup> *Id.* at 8-1.1(b).

<sup>194</sup> *Id.* at 8-2.2(b).

<sup>195</sup> NAT’L DIST. ATTORNEY’S ASS’N, *NATIONAL PROSECUTION STANDARDS* 4-1.7, 4-1.8 (3d. 2009).

<sup>196</sup> *See id.* at 2-9.1.

were targets of a grand jury that the investigation is over, but they do not address questions about public release of information about declinations.<sup>197</sup>

### C. POLICY AND PRACTICE

#### 1. Office Policies

In the absence of guidance from national organizations about declination statements, most prosecutors' offices are navigating this difficult terrain on their own, with different levels of intentionality. Inquiries to some of the largest state prosecutors' offices in the country revealed only a handful of policies addressing declination statements,<sup>198</sup> the vast majority of which addressed only certain categories of cases (most commonly, police shootings).<sup>199</sup> For example, the New Jersey Office of the Attorney General

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<sup>197</sup> *Id.* at Standard 3-3.8., Termination of Target Status (“If a person has previously been notified or made aware that he or she was the target of a grand jury investigation and the prosecutor elects not to seek an indictment or the grand jury fails to return a true bill and no further investigation against the target is contemplated, the prosecutor should notify the person he or she is no longer a target, unless doing so is inconsistent with the effective enforcement of the criminal law.”).

<sup>198</sup> In connection with this Article, we reached out to the 102 largest prosecutorial offices in the United States, as measured by number of full-time prosecutors employed. Thirty-six responded. Out of those thirty-six, most stated that, to the extent they had a policy, it was unwritten and informal, although most contemplated that there were circumstances in which public statements were appropriate. Among the factors cited were the type of case, the level of media attention or public inquiry, or whether the accused was a police officer. Only one of the offices stated that their policy was not to issue a statement about declinations in any kind of case. Response from the Dep't of the Prosecuting Attorney of Honolulu, Nov. 28, 2018, citing HAW. REV. STAT. §§ 846-1, 846-9 (2012). Fifteen of the thirty-six offices that responded to inquiries for this Article stated that they do not have a policy regarding, or decide on a case-by-case basis, whether to issue a declination statement at all, and what to include in it. Inquiries to state District Attorney Organizations similarly pointed to an absence of policies on declination statements. Of the twenty-two such organizations that responded to our inquiries, all stated that they did not issue such policies to their members, even on a recommended basis, and were unaware of the existence of such policies at member offices. Offices in Florida and Massachusetts cited state laws requiring them to file documents with the clerk of court whenever they declined to prosecute cases initiated by police. These documents, known variously as “No Informations” or “No Prosecutions” are typically very brief and provide a one-sentence explanation for the decision, such as the defendant's completion of a diversion program or insufficient evidence to prove the charges beyond a reasonable doubt. These documents are available pursuant to the states' open records laws, but inquirers must be able to provide the docket number or defendant's name. *See* FLA. STAT. § 119.021; MASS. GEN. LAWS 4 § 7(26).

<sup>199</sup> In response to our inquiries, twelve offices responded that it was their policy to make a public statement about the declination of charges against a police officer, regardless of whether they had such a policy for other types of cases. Two of those offices responded that

has authority over all criminal justice matters in the state, but has only promulgated a policy regarding public statements when charges are not filed for police use of force cases.<sup>200</sup> It requires that the county prosecutor or the Department of Criminal Justice “issue a public statement setting forth findings of the investigation and findings regarding justification for use of force” any time a case is not presented to a grand jury or the grand jury declines to indict.<sup>201</sup> Similarly, the State’s Attorney for Baltimore City has adopted a policy of posting case summaries on its website explaining the legal and factual rationale for all declinations in cases involving police use of force.<sup>202</sup>

In contrast, the Ventura County District Attorney’s Office in California has issued a more broadly applicable policy about declination statements. It provides that a written “news release” may be appropriate to announce the rejection of charges “in a murder or other high-profile case;”<sup>203</sup> “the conclusion of an investigation regarding an officer-involved shooting, in custody, death, use of force, or other official misconduct;”<sup>204</sup> where charges were rejected against “a peace officer or public official for felony conduct, moral turpitude offense, or offense related to the performance of official duties;”<sup>205</sup> and where “the identity of the participants and nature of the information is such that the case already has been covered by the news media,

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they will *only* make a declination statement in cases involving police. In Colorado, District Attorneys are required by state law to make a public statement for officer-involved shootings. See COLO. REV. STAT. § 20-1-114. One progressive prosecutor organization, the Association of Prosecuting Attorneys, recommends that prosecutors provide transparency in all cases where they decline to charge an officer in cases involving police use of force. See ASS’N OF PROSECUTING ATTORNEYS, 21ST CENTURY PROSECUTION STANDARDS (2017), <https://sfdistrictattorney.org/sites/default/files/Document/APA%27s%2021st%20Century%20Principles%20of%20Prosecution-Officer%20Use%20of%20Force%20Cases%20.pdf> [<https://perma.cc/GWM2-DANZ>].

<sup>200</sup> See DIV. OF CRIMINAL JUSTICE, N.J. OFFICE OF THE ATT’Y GEN., UNIFORM STATEWIDE PROCEDURES AND PRACTICES FOR INVESTIGATING AND REVIEWING POLICE USE-OF-FORCE INCIDENTS 12 (Post-Closure Public Statement).

<sup>201</sup> *Id.*

<sup>202</sup> See Office of the State’s Attorney for Baltimore City, Police Use of Force Declination Reports, <https://www.stateattorney.org/policy-legislative-affairs/policy/police-use-of-force-declination-reports> [<https://perma.cc/D3YA-MVV5>]. The Baltimore office did not respond to our inquiries, but this policy is available on its website. The website notes that the Office is the only one in Maryland that follows recommendation of the Association of Prosecuting Attorney’s (APA) 21st Century Prosecution Standards to communicate directly with the public when declining to charge an officer-involved shooting. *Id.*

<sup>203</sup> See VENTURA CTY. DIST. ATTORNEY’S OFFICE, *supra* note 48, at 72–73.

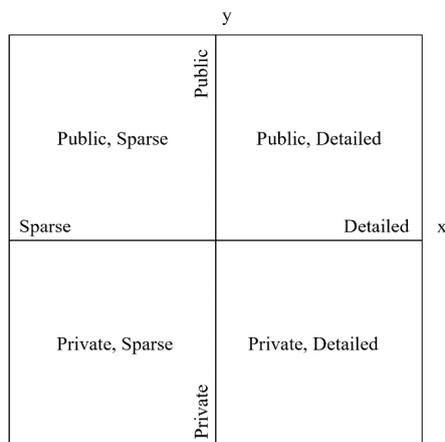
<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

or inquiries by news media are likely.”<sup>206</sup> The policy instructs prosecutors to inform investigating agents of the factual and legal reasons for rejecting charges to keep them “current with the law as well as to assist them in improving future investigation.”<sup>207</sup> However, it does not address whether news releases should include the reasons for the declination, even in the enumerated categories of cases in which the policy recognizes a release may be appropriate. In King County, Washington, longtime State’s Attorney Dan Satterberg has published an extensive policy manual; prosecutors are instructed to notify victims and police agencies of declinations,<sup>208</sup> but the policy does not specify what form those notifications should take or their content. Nor does it address public statements such as those made at a press conference.

## 2. Typology of Declination Statements in Practice

So, what do declination statements look like in practice? Not surprisingly, they vary considerably across multiple dimensions. If declination statements were plotted along one axis (the x-axis) by their content, they would range from the sparsest of statements to the most detailed (e.g. reviewing the facts and pertinent law and explaining the prosecutor’s decision). They also could be plotted along another axis (the y-axis) according to their intended audience, with statements composed solely for internal consumption at one end and those intended for a public audience at the other. The diagram below illustrates:



<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 158.

<sup>208</sup> See KING CTY. PROSECUTING ATTORNEY’S OFFICE, FILING AND DISPOSITION STANDARDS 7, 13 (May 2016). Upon notification, victims are provided with an opportunity to appeal the declination decision within the prosecutor’s office. *Id.*

a. Private, Sparse

Declination statements in the bottom left quadrant (private, sparse) include records kept in prosecutors' offices reflecting the decision not to charge, but without supporting details. Such records might be as limited as a statement that no charges were brought, full stop, along with some identifying information about the case type, target, and any victims.

b. Private, Detailed

Moving further to the right on the x-axis, statements in the bottom right quadrant (private, detailed) include declination statements intended primarily for the prosecutor's files, but that provide the basis for the decision. In some cases, the explanation may be minimal—perhaps captured by the prosecutor marking the applicable reasons on a checklist.<sup>209</sup> However, in more complex cases, the explanation could be quite lengthy. For example, in a case involving a fatal shooting by agents of the U.S. Secret Service and the U.S. Capitol Police, federal prosecutors prepared a ninety-six-page memorandum recommending against prosecution.<sup>210</sup>

Also in this quadrant (slightly further up the y-axis) are statements intended for limited audiences external to the prosecutor's office, such as the targets of an investigation,<sup>211</sup> victims, or referring agencies.<sup>212</sup> Such statements may later become public by virtue of open records laws or disclosure by the recipients, and may be crafted with that possibility in mind. Examples of such statements include the DOJ's letter to congressional

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<sup>209</sup> See, e.g., Miller & Wright, *supra* note 10 (discussing practices in New Orleans District Attorney's office from 1988 to 1989, which required prosecutors to indicate the most applicable reason for declining to bring charges from a list of possible reasons); see also KUTATELADZE & ANDILORO, *supra* note 6 (noting how prosecutors in New York County are required to indicate their rationale for declining or dismissing a case from pre-determined set of reasons).

<sup>210</sup> The description of the memorandum's length and ultimate recommendation comes from a federal district court opinion, in which the court reviewed the memorandum in camera and held that it was exempt from release under FOIA. See *Worldnetdaily.Com, Inc. v. U.S. Dep't of Justice*, 215 F. Supp.3d 381 (D.D.C. 2016).

<sup>211</sup> See, e.g., James C. McKinley, Jr., *No Charges for Governor After Inquiry Into Contract*, N.Y. TIMES (Aug. 27, 2009), <https://www.nytimes.com/2009/08/28/us/politics/28richardson.html> [<https://perma.cc/Y653-697U>] (describing letter sent to counsel for former New Mexico Governor Bill Richardson, announcing that no charges would be filed following inquiry into how a lucrative state contract was awarded to a political donor).

<sup>212</sup> See, e.g., Memorandum to Grant County Sheriff from Jim Carpenter, Grand County District Attorney's Office (Jan. 29, 2015), <https://www.documentcloud.org/documents/2852371-KOITZSCH-DA-Dismissal.html> [<https://perma.cc/JV3V-SRVJ>] (explaining decision not to charge identified individual).

committees regarding particular practices at the IRS,<sup>213</sup> and Manhattan District Attorney Vance's letter to the New York Board of Elections following the referral of Mayor de Blasio's fundraising activity.<sup>214</sup> The Mueller Report also falls into this category. Pursuant to the regulations governing the Special Counsel's appointment, the Special Counsel was required to write a report explaining his prosecution and declination decisions.<sup>215</sup> Although the regulations make clear that the report was to be submitted initially in confidence to the Attorney General for review,<sup>216</sup> they also contemplate that the report would be shared (at least in part) with Congress and the public.<sup>217</sup>

c. Public, Sparse

Declination statements in the top left quadrant (i.e. public, sparse) are most commonly found in cases involving public officials or high-profile targets, whether individuals or corporations. These types of statements farther left on the x-axis typically disclose only that an investigation was concluded without the filing of charges,<sup>218</sup> and generally are issued only where the investigation itself already was public because of the nature of the events under investigation or prior extensive reporting in the media. Toward the middle of the x-axis are public statements that provide some details or reasons to support the declination, but not lengthy ones.<sup>219</sup> In these declination statements, the prosecutor may cite to such reasons as insufficient

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<sup>213</sup> See Letter from Peter J. Kadzik, Assistant Att'y Gen., Dept. of Justice, to House Judiciary Committee Re IRS (Oct. 23, 2015) [hereinafter Kadzik Letter] (eight-paged single-spaced letter detailing investigative findings and application of pertinent federal criminal statutes).

<sup>214</sup> See Vance Letter, *supra* note 18.

<sup>215</sup> See 28 C.F.R. § 600.8 (2020) (providing that, at the conclusion of the Special Counsel's work, the Special Counsel "shall provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached").

<sup>216</sup> *Id.*

<sup>217</sup> See 28 C.F.R. § 600.9 (2020).

<sup>218</sup> See, e.g., *Statement Regarding Closure of Investigation of Former Oregon Governor John Kitzhaber and First Lady Sylvia Hayes*, U.S. ATT'Y'S OFF., D. OR. (June 16, 2017), <https://www.justice.gov/usao-or/pr/statement-regarding-closure-investigation-former-oregon-governor-john-kitzhaber-and-first> [<https://perma.cc/5CJD-6VJK>] (announcing no charges would be filed in influence-peddling cases involving former Governor).

<sup>219</sup> See, e.g., Marc Santora & James C. McKinley Jr., *Sanford Rubenstein Will Not Face Rape Charges*, N.Y. TIMES (Jan. 5, 2015), <https://www.nytimes.com/2015/01/06/nyregion/sanford-rubenstein-will-not-face-rape-charges.html> [<https://perma.cc/L55S-AUVC>] (quoting statement issued by Manhattan District Attorney Vance's office explaining the decision not to file sexual assault charges against prominent lawyer Sanford Rubenstein, citing inter alia "the degree of the complainant's recollection of what occurred at the suspect's apartment, and the results of the toxicological testing").

evidence<sup>220</sup> or the expiration of the statute of limitations.<sup>221</sup> Other examples include the availability of charges in another jurisdiction<sup>222</sup> or the limitations of existing law.<sup>223</sup>

#### d. Public, Detailed

Finally, declination statements in the upper right quadrant (i.e. public, detailed) are statements providing more significant detail. These are most commonly found in cases involving police use of force.<sup>224</sup> This is consistent with the policies issued by various prosecutorial offices, discussed *supra*,<sup>225</sup> which expressly encourage or require public statements whenever prosecutors decline to press charges in such cases—including an explanation of the facts and legal rationale. But such statements also can be found in other contexts, especially those involving public figures. Serving as one example is FBI Director Comey’s public statement at the (initial) conclusion of the Hillary Clinton email investigation. In this report, Comey summarized

<sup>220</sup> See, e.g., *No Charges to be Filed Against Officers Involved in Shooting*, U.S. ATT’Y’S OFF., W.D. OKLA. (Aug. 18, 2017), <https://www.justice.gov/usao-wdok/pr/no-charges-be-filed-against-officers-involved-shooting> [<https://perma.cc/NP8P-KA7U>]; *U.S. Attorney Statement Regarding Conclusion of Investigation into Incident Involving Former Asheville Police Officer*, U.S. ATT’Y’S OFF., W.D.N.C. (June 29, 2019), <https://www.justice.gov/usao-wdnc/pr/us-attorney-statement-regarding-conclusion-investigation-incident-involving-former> [<https://perma.cc/KKT7-U36G>] (stating that “the evidence does not give rise to a prosecutable violation of the federal criminal civil rights laws”).

<sup>221</sup> See *supra* note 50 and examples cited therein.

<sup>222</sup> See, e.g., Schneider, *supra* note 70.

<sup>223</sup> See *supra* notes 49–51 and examples cited therein.

<sup>224</sup> See, e.g., *Federal Officials Close Investigation Into Death of Alton Sterling*, U.S. DEP’T OF JUST. (May 3, 2017), <https://www.justice.gov/opa/pr/federal-officials-close-investigation-death-alton-sterling> [<https://perma.cc/5YQ6-5CXY>] (relatively long statement that discusses the facts and applicable legal standard for the civil rights laws at issue, involving police shooting of man with BB gun); *Federal Officials Close Review of Fatal Shooting of Kionte Spencer*, U.S. DEP’T OF JUST. (Nov. 4, 2016), <https://www.justice.gov/usao-wdva/pr/federal-officials-close-review-fatal-shooting-kionte-spencer> [<https://perma.cc/RC6D-RWBK>] (same); JACKIE LACEY, L.A. CTY. DIST. ATT’Y, OFFICER INVOLVED SHOOTING OF JUAN BARILLAS (2019); *Federal Officials Decline Prosecution in the Death of Freddie Gray*, U.S. DEP’T OF JUST. (Sept. 12, 2017), <https://www.justice.gov/opa/pr/federal-officials-decline-prosecution-death-freddie-gray> [<https://perma.cc/WLW8-VJUP>] (statement with long factual summary, summary of applicable legal standard, and discussion of the law applied to the facts); KIMBERLY M. FOX, COOK CTY. STATE’S ATT’Y, POLICE INVOLVED DEATH DECISION MEMORANDUM DECEDENT: PAUL O’NEAL (three-page, single-spaced report by Cook County, Illinois State’s Attorney Kimberly M. Foxx explaining decision not to charge officer in on-duty shooting, summarizing applicable law and facts learned during investigation). However, one also finds examples in other contexts. See, e.g., Kadzik Letter, *supra* note 213; Vance Letter, *supra* note 18.

<sup>225</sup> See *supra* Part II(C).

the FBI's findings about Clinton's actions, those of her associates, and employees at the State Department, and the intent of those individuals in using a private email server for public business.<sup>226</sup> He also explained why, given those findings, it was his opinion that no reasonable prosecutor would bring charges for mishandling classified material.<sup>227</sup> Another example is the public statement by the Connecticut State's Attorney Frank Marco, explaining the decision not to press charges against Woody Allen for child sex abuse. At a news conference, the prosecutor said that he had probable cause to prosecute Allen, but decided that it was not in the victim's best interest to do so.<sup>228</sup> He also discussed the findings from medical evaluations of the victim, and his own assessment of them, which led him to believe that his office had enough evidence to take the case to trial.<sup>229</sup>

Such detailed statements also are more common in cases where a prosecutor has decided to withdraw charges after they have been filed.<sup>230</sup> For example, Manhattan District Attorney Cyrus Vance filed a twenty-five-page document with the court when it sought to dismiss the charges against former World Bank Director Dominique Strauss-Kahn, explaining the Office's reasons for doubting the complaining witness's credibility and detailing the prosecutor's ethical duty to proceed with a criminal prosecution only when personally convinced of the defendant's guilt and that the evidence would be sufficient to convict.<sup>231</sup> The DOJ's declination letters in FCPA cases also arguably fall into this category, because they often include lengthy fact sections describing the corporate conduct that violated that FCPA statute (such as the payment of bribes to foreign leaders) and the reasons for the declination (such as prompt self-reporting, cooperation with investigating authorities, or remedial action). However, these statements generally read more like negotiated settlements in which defense counsel played a significant role than the typical declination statement issued in the context of an individual target.<sup>232</sup>

e. Tone

One final aspect of declination statements merits discussion: their tone. Detailed statements (those falling on the right half of the diagram) can be

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<sup>226</sup> See Comey Statement, *supra* note 17.

<sup>227</sup> *Id.*

<sup>228</sup> See Henneberger, *supra* note 71.

<sup>229</sup> *Id.*

<sup>230</sup> See, e.g., Statement by Cook County, Illinois Prosecutor regarding Jussie Smollett, *supra* note 32; Strauss-Kahn Dismissal, *supra* note 32.

<sup>231</sup> See Strauss-Kahn Dismissal, *supra* note 32, at 4.

<sup>232</sup> See *supra* note 166 (describing FCPA letters posted on DOJ website).

inculpatory—i.e. they characterize the facts in a way that implies wrongdoing on the part of the target. Examples of inculpatory statements include those by FBI Director Comey about Hillary Clinton and the State Department’s conduct, Manhattan District Attorney Vance’s statements about Mayor de Blasio’s fundraising activity, and Connecticut State’s Attorney Marco’s statement about Woody Allen.<sup>233</sup> Such inculpatory statements are rare and seem to be most common in cases involving public officials and allegations of official misconduct where prosecutors may be concerned that the declination will otherwise send suboptimal signals (e.g. that certain conduct is acceptable) and will not sufficiently hold wrongdoers (if not lawbreakers) accountable.<sup>234</sup> However, declination statements can also be inculpatory as to victims or witnesses. For example, Manhattan District Attorney Vance asserted in his motion to dismiss the sexual assault charges against Dominique Strauss-Kahn that “the complainant’s credibility cannot withstand the most basic evaluation,”<sup>235</sup> which was accompanied by extensive factual details to support that characterization.<sup>236</sup> These derogatory statements about witnesses or victims, which are rare, seem to arise in cases involving high-profile targets where prosecutors anticipate accusations of preferential treatment.

Each type of declination statement discussed above furthers some of the interests identified in Part I and also poses some risk. The following section discusses how prosecutors can maximize such benefits and minimize the risks in various contexts.

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<sup>233</sup> See, Comey Statement, *supra* note 17 (characterizing Hillary Clinton’s conduct as “extremely careless” and opining that the “security culture of the State Department . . . was generally lacking in the kind of care for classified information found elsewhere in the government”); Vance Letter, *supra* note 18 (noting that, while actions “do not make out a provable violation of the Election Law’s criminal provisions,” they appeared to be “contrary to the intent and spirit of the law” and constituted “an end run around the direct candidate contribution limits”).

<sup>234</sup> See, e.g., *Statement of the United States Attorney*, U.S. ATT’Y’S OFF., S.D. IND. (Oct. 22, 2013), <https://www.justice.gov/usao-sdin/pr/statement-united-states-attorney> [<https://perma.cc/C6D7-SY3Q>] (announcing decision not to charge former elected Marion County prosecutor for abuse of his position, but calling the conduct “unacceptable” and announcing that the matter would be referred for investigation to the relevant ethics entities); McKinley, Jr., *supra* note 211 (describing letter sent to counsel for former New Mexico Governor Bill Richardson, announcing that no charges would be filed but stating that “pressure from the governor’s office resulted in corruption of the procurement process” and that the letter “should not be interpreted as exoneration of any party’s conduct in that matter”); Kadzik Letter, *supra* note 213, at 1, 8 (describing conduct discovered as “ineffective management” and “poor judgment” which was “disquieting” but not a crime); Henneberger, *supra* note 71.

<sup>235</sup> Strauss-Kahn Dismissal, *supra* note 32, at 2.

<sup>236</sup> *Id.*

### III. THE THEORY APPLIED TO PRACTICE: A SUGGESTED FRAMEWORK FOR PROSECUTORIAL DECLINATION STATEMENTS

Part III builds on the preceding sections to offer a framework to help prosecutors decide when and how to issue declination statements. The guiding principle of the framework is that prosecutors should issue declination statements when they significantly further one or more of the interests identified in Part I, where the risks posed by such statements are minimized, and where their value cannot be realized through other available means taking into account relative institutional competencies.

#### A. DEFAULT TO PRIVATE DECLINATION STATEMENTS

The framework assumes that prosecutors at a minimum will keep some record of declinations internally, such that the default declination statement will fall in the bottom left quadrant of the diagram (private, sparse). There is little to no risk associated with keeping private, sparse declination records other than minor administrative burdens. And that burden is outweighed by the interests that such records can serve. On an individual level, such records enable prosecutors to respond to inquiries (as appropriate) from targets, victims, and referring agencies, thus furthering significant signaling interests (e.g., closure and respect). Records are particularly important if such inquiries arise long after the reviewing prosecutor has left the office or no longer remembers the case. Taken altogether, such records also constitute the raw material needed to generate aggregate reports, as will be discussed further in Part III(D). Particularly if they include minimal data about the cases that were declined (e.g. type of case, referring agency, and basic biographical information about the targets and victims such as race, gender, and age), such records also can serve significant accountability interests. Keeping track of these declinations can help prosecutors spot trends that might cause them to dig further (e.g. if they suggest under-enforcement on priority issues like sexual assault or police violence, or racial disparities in the exercise of discretion).<sup>237</sup>

What should cause a prosecutor to move from the bottom left quadrant (private, sparse) to the bottom right quadrant (private, detailed) for a declination statement? In an ideal world, *this* would be the default quadrant. Statements that include a narrative of the prosecutor's decision-making—including the facts, law, and normative considerations that informed the exercise of discretion—will be most useful from the perspective of internal

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<sup>237</sup> See, e.g., KUTATELADZE & ANDILORO, *supra* note 6 (analyzing dataset from New York County District Attorney's Office for racial and ethnic disparity at multiple discretionary points, including declinations).

and external accountability.<sup>238</sup> But even those that lack a narrative can further such interests, such as the forms that have a prosecutor choose rationales from a standardized list of reasons, because they also can bring to light patterns and trends (perhaps even more so than narratives, which may still require coding to be useful for this purpose).<sup>239</sup> Such records can help prosecutors evaluate whether they are acting in a consistent manner across cases and, in any individual case, in a manner that aligns with their precommitments.<sup>240</sup> More detail also helps prosecutors accurately convey to affected parties the rationale for the declination (if appropriate), and reconstruct the rationale for the decision should the prosecutor ever need to revisit the case (e.g. should new evidence come to light, or in the context of an oversight hearing).

Because such statements remain private, the risks still are minimal; in fact, the most significant risk is of depleting prosecutorial resources. Thus, the constraint on setting private, detailed declination statements as the default is largely a practical one. That constraint might be addressed in several possible ways, including reducing the amount of information that prosecutors are required to record (e.g. by using checklists). Alternatively, prosecutors might select a few case types for which they will require detailed declination statements, or relatively more detailed statements. For example, prosecutors might choose cases involving allegations of public corruption, police misconduct, or domestic and sexual violence, where there have long been concerns about underenforcement and preferential treatment, and because such conduct uniquely threatens democratic ideals of equal protection of the law and political participation.<sup>241</sup> Or random selection could be utilized.

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<sup>238</sup> See *supra* notes 77–79 and accompanying text (describing how writing one’s reasons serves a beneficial constraining function).

<sup>239</sup> See Miller & Wright, *supra* note 10 (analyzing precisely such data from the New Orleans District Attorney’s Office to identify the most common reasons for declinations in a variety of case types).

<sup>240</sup> See, e.g., KATHERINE K. MOY ET AL., STANFORD CRIMINAL JUSTICE CENTER, RATE MY DISTRICT ATTORNEY: TOWARD A SCORECARD FOR PROSECUTORS’ OFFICES 28 (2018) (citing models of indices developed in other public policy fields and suggesting that similar “prosecutorial scorecard[s] would enable sitting prosecutors to better understand where their offices need the most work”); David Sklansky, *Unpacking the Relationship Between Prosecutors and Democracy in the United States*, in PROSECUTORS AND DEMOCRACY, *supra* note 14.

<sup>241</sup> See Darryl Brown, *supra* note 38 (identifying these three categories of cases as among those prone to under-enforcement); cf. Roiphe, *supra* note 156, at 505 (arguing for an enhanced duty to charge in cases involving “historically neglected and abused” minorities because such cases “implicate[] basic democratic principles of equality and fairness.”); Richman, *supra* note 14, at 55 (suggesting that prosecutors play a particularly important role

Even if prosecutors only write detailed declination statements in occasional randomly selected cases, or in certain categories of cases, doing so would enable spot-checking to ensure consistency with established norms and allow periodic reevaluation of those norms.<sup>242</sup> Fortunately, there are a growing number of private sector resources available to help prosecutors take on these tasks and make the administrative and financial burdens less onerous.<sup>243</sup> Even if prosecutors are able only to record the data, external actors afforded access can help prosecutors analyze it to produce regular reports.<sup>244</sup>

#### B. SOMETIMES MOVE TO PUBLIC, SPARSE

When should a prosecutor move into one of the top two quadrants on the diagram and issue a public declination statement? In the context of a statement that identifies a particular individual as having been the subject or target of investigation (or a victim), this move should remain rare. In any circumstance in which the individual has *not* previously been publicly associated with a criminal investigation, the risk to reputational harm by issuing a public statement ordinarily would be too great. Even if the person is herself aware of the investigation, a private statement informing her of the declination ordinarily should be sufficient for the purposes of closure. So too, a private statement to victims and law enforcement agencies ought to be sufficient to further many signaling and accountability interests. Although a public statement might further additional interests, that marginal benefit often can be accomplished through other means that do not pose the same

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when it comes to cases involving “domestic violence, gang intimidation, or official corruption” because such abuses of power are easily hidden from outsiders, while the harms they inflict extend “well beyond the injury suffered from specific acts” and “can cripple the ability of victims and those around them to flourish as individuals and citizens”).

<sup>242</sup> See Simon, *supra* note 109, at 13–14 (describing the value of peer review of challenging decisions within organizations, including those chosen from random samples of cases).

<sup>243</sup> A number of organizations are now focused on collecting such data and helping prosecutors develop and implement systems to do so as well. See, e.g., FAIR AND JUST PROSECUTION (last visited Mar. 15, 2019), <https://fairandjustprosecution.org> [<https://perma.cc/T5PT-Y9HL>]; INSTITUTE FOR INNOVATION IN PROSECUTION (last visited Mar. 15, 2019), <https://www.prosecution.org/our-mission> [<https://perma.cc/226B-J6DP>]; MEASURES FOR JUSTICE (last visited Mar. 15, 2019), <https://measuresforjustice.org/about/measures/> [<https://perma.cc/QT9L-4CYH>]; see also KUTATELADZE & ANDILORO, *supra* note 6.

<sup>244</sup> See Miller & Wright, *supra* note 10, at 190 (noting the role that “civil society” can play in mining prosecutors’ data and organizing it “in ways that allow lawyers and policy actors to judge the work of the agency as a whole and its individual decisionmakers.”). As David Sklansky has written, “outsiders [such as] academic researchers [and] public policy think tanks . . . [often] have more experience” than prosecutors do at “collecting and analyzing data, and will be more objective in drawing conclusions” from the data. Sklansky, *supra* note 75, at 32. Thus, he suggests, prosecutors “should invite them in.” *Id.*

risk of reputational harm to the target of the investigation, victims, and witnesses.

But when an investigation has been in the public eye, the calculus is different. To begin, the target of the investigation may *seek* a public statement from the prosecutor in order to begin the process of repairing reputational harm that has already occurred. The public interest in the matter also may be such that accountability interests weigh heavily in favor a public statement acknowledging the declination. There may be a benefit in signaling to the public and press (and other investigatory bodies) that the time for other avenues of redress has come, without intruding on a criminal investigation. When there is no specific law enforcement risk associated with doing so (such as an ongoing investigation), the balance of interests and risks then may tilt toward a public declination statement, at least one in the top left quadrant (public, sparse). Such a statement might indicate that an investigation which was previously reported has concluded without the filing of charges.

To minimize concerns about the prosecutor's ability to reopen the case if new information is developed, prosecutors could include standard language about the non-binding nature of the declination, much as prosecutors attach language to press releases announcing the filing of charges, which indicate the charges are merely an accusation and the defendant is presumed innocent until proven guilty.<sup>245</sup> Although such language may be awkward in some circumstances (e.g. where it is not reasonably foreseeable that further investigation will ensue), its inclusion in all declination statements may usefully forestall questions about its significance in any particular case or impact on future cases.

How much prior publicity is sufficient to warrant a public, sparse declination statement is hard to determine *ex ante*. Here, the policy of the DOJ's Antitrust Division, discussed *supra*, is instructive.<sup>246</sup> It provides that "[i]n general, the more publicity the matter has received the more likely it is that the Division will issue a statement."<sup>247</sup> If the prosecutor has previously acknowledged the investigation publicly, that would be a factor weighing in favor of finding the requisite publicity has been established.<sup>248</sup>

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<sup>245</sup> Such language would minimize the risk of prosecutors finding themselves in a situation like the one FBI Director Comey faced when new emails were discovered that necessitated re-opening the Hillary Clinton email investigation. Had the initial declination announcement contained such a caveat, Director Comey might not have felt the need to send his subsequent letter to Congress about the new turn of events. *See supra* note 135.

<sup>246</sup> *See supra* note 173 and accompanying text.

<sup>247</sup> *See id.*

<sup>248</sup> *See id.*

But publicity alone should not be the only factor in determining whether to issue even a sparse, public declination statement. It is a necessary, but not sufficient, condition. Such a statement also should serve significant signaling or accountability interests, or both. These interests generally will be strongest when certain other factors are present, such as (1) the target of an investigation is a public figure; (2) the case involved allegations of official misconduct; or (3) questions may be raised about the prosecutor's conflict of interest or malfeasance.<sup>249</sup> That is because these cases tend to raise the greatest concern about preferential treatment (e.g. for public officials, police, celebrities, donors, or relatives) or a prosecutor's lack of commitment or competency in a particular area (e.g. domestic abuse; police use of force cases). Accountability interests are particularly salient when two or more of these factors are present (e.g. a public official accused of official misconduct, such as corruption or excessive use of force). These factors also may counsel in favor of a public, detailed declination statement, as discussed further below.

### C. RARELY MOVE TO PUBLIC, DETAILED

Assuming the requisite publicity to justify any public statement at all, when should a prosecutor provide a detailed declination statement? Here, the risk of reputational harm is greatest, even if the investigation previously was publicly reported or confirmed. So too, the more detail a prosecutor provides, the greater the risk of disclosing information detrimental to ongoing or future law enforcement efforts, and of later being proven wrong on the facts. When statements openly acknowledge the exercise of discretion in the truest sense, they also render a prosecutor vulnerable to political attack and pressure to act more punitively in the future. Accordingly, detailed statements are warranted only where their value (i.e., the extent to which they further signaling, accountability, or history-keeping interests) in the context of the individual case is unusually high. When that threshold is crossed is difficult to define with precision, but the analysis is not dissimilar to the framework already familiar to law enforcement agencies in other contexts, such as responding to Freedom of Information Act requests for information

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<sup>249</sup> For a thorough discussion of why cases in which police officers are targets invariably raise concerns about local prosecutors' conflict of interest, or at least the appearance of such conflicts, see Levine, *supra* note 106. Other circumstances in which a prosecutor's impartiality might be subject to question include cases where the head prosecutor overruled the recommendation of career prosecutors, or a defense lawyer involved in the case donated to the prosecutor's campaigns.

in their files.<sup>250</sup> Even then, prosecutors should consider whether that value can be sufficiently achieved through other means that do not pose the same risks, such as de-identified case summaries or aggregate reports issued at some later date.

In widely publicized cases involving public figures, allegations of official misconduct, or where questions may be raised about the prosecutor's conflict of interest or malfeasance, a sparse declination statement may not be sufficient to serve accountability interests because it will not provide sufficient context for outsiders to evaluate the prosecutor's decision. Thus, for example, when prosecutors decide not to bring charges in police use of force cases because of insufficient evidence, or because in their judgment criminal charges are not warranted, they should be willing to so acknowledge.<sup>251</sup> So too, such circumstances may provide unique "teachable moments" in which prosecutors can convey important information about the law and its limits to an audience that is paying attention, thus heightening the pedagogical value of such statements.<sup>252</sup> History-keeping interests also are strongest in cases involving public officers engaged in official misconduct (examples of which might include not only police use of force cases, but municipal authorities' failure to maintain a safe water supply). In such cases, there is value not only in communicating (thoroughly) the prosecutor's declination decision, but also the facts uncovered during the investigation. The more extensive and complex the investigation, the greater the history-keeping interests are likely to be.

If the foregoing factors weigh in favor of a public, detailed declination statement, then prosecutors also should consider whether there are *other* available mechanisms to further the same interests. As discussed further

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<sup>250</sup> See, e.g., *DOJ v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 773 (1989) (outlining process for determining whether information in law enforcement records may be withheld from FOIA request under FOIA Exemption 7(C)); see also DEP'T OF JUSTICE, FOIA GUIDE, 2004 EDITION, EXEMPTION 7(C) (last updated July 23, 2014), <https://www.justice.gov/oip/foia-guide-2004-edition-exemption-7c> [perma.cc/7323-YW4J] ("Under the traditional Exemption 7(C) analysis, once a privacy interest has been identified and its magnitude has been assessed, it is balanced against the magnitude of any recognized public interest that would be served by disclosure").

<sup>251</sup> Taking ownership of such decisions is far preferable to a prosecutor obfuscating the extent to which he or she has evaluated the merits of a case, as appeared to be the case with the Ferguson, Missouri on-duty police shooting of Michael Brown. See, e.g., Ben Trachtenberg, *No, You Stand Up: Why Prosecutors Should Stop Hiding Behind Grand Juries*, 80 MO. L. REV. 1099 (2015) (criticizing St. Louis County Prosecutor Robert P. McCulloch for evading accountability for his own decision by submitting the case against police officer Darren Wilson to the Grand Jury).

<sup>252</sup> See *supra* note 109 and accompanying text (discussing the value of a few politically salient public statements).

below, prosecutors may have other tools at their disposal to achieve much of the same value. Also, other institutions may be capable of taking up some of this work, especially history-keeping. When, after considering all of the above, prosecutors decide to proceed with a public, detailed declination statement, they should avoid statements that suggest blame or wrongdoing on the part of the target of an investigation, witnesses, or victims. Such statements pose considerable risk to the reputational interests of the persons thus characterized, who will not have the opportunity to contest them in a judicial forum. Moreover, any marginal value of such comments in promoting the interests served by declination statements is vastly outweighed by these reputational risks. Thus, when prosecutors provide details to support their declinations, they should strive for a neutral tone, letting the facts speak for themselves.<sup>253</sup>

Resisting calls for more public statements in individual cases or for more information may be difficult at times, especially for elected prosecutors. But having a framework to draw upon in deciding when information will be released can help, especially when prosecutors share that framework with the public, including the rationale for withholding information in the vast majority of cases. As Onora O’Neil has observed, it is “deception rather than secrecy” that promotes distrust.<sup>254</sup> Thus, when a prosecutor straightforwardly states that she will not say anything more about a particular declination decision because of longstanding policy against doing so (and explains the important interests advanced by that policy), she may frustrate outsiders, but she is not necessarily undermining their trust in her. That is likely to be particularly so if the prosecutor is able to point to other sources of information that convey the range of situations in which the prosecutor has exercised her discretion not to charge and through which the prosecutor has rendered herself accountable for those decisions as a whole, as discussed further in the next section.<sup>255</sup>

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<sup>253</sup> Again, the DOJ Antitrust Division Guidelines on closing statements are instructive. They provide that “[n]o disparaging characterizations of individuals or organizations will be included in the statement.” *See supra* note 173.

<sup>254</sup> ONORA O’NEILL, A QUESTION OF TRUST 72 (2002).

<sup>255</sup> As Mark Fenster has observed, “[S]ecrecy can be defensible and even justifiable within a framework for accountable secrecy—secrecy whose existence is made public and regulated by democratic procedures that allow the [institution] to be held democratically *accountable* for the secrets it keeps.” MARK FENSTER, THE TRANSPARENCY FIX: SECRETS, LEAKS, AND UNCONTROLLABLE GOVERNMENT INFORMATION (2017) (citing Dennis F. Thompson, *Democratic Secrecy*, 114 POL. SCI. Q. 181 (1999)) (emphasis in original).

#### D. CONSIDER ALTERNATIVES

Before committing to a public, detailed declination statement, prosecutors should consider what other means are available that might serve the same interests while posing fewer risks. Two of the chief alternatives (aggregate reports and de-identified case summaries) draw upon internal resources. The third, the inclusion of other fact-finding institutions, requires that prosecutors look outward to consider whether there are other institutions capable of accomplishing similar aims.

##### *1. Data and Reports*

Many of the signaling and accountability interests discussed in Part I could be furthered by prosecutors' use of internal declination records to generate data and reports for external audiences. For example, such reports provide a vehicle for communicating to different political constituencies the kinds of cases that were declined, at what rates, and why—thus promoting prosecutors' own accountability as well as that of legislators and agencies when they bear some of the responsibility. What is lost in terms of assessing the prosecutor's exercise of discretion in any one case might be more than made up by the availability of information about the prosecutors' declinations overall, which provide important context.<sup>256</sup> In fact, aggregate data and reports may be superior to individual statements because they offer a fuller picture of how prosecutors have exercised their discretion across entire categories of cases, while posing fewer concerns about fairness.<sup>257</sup> To the extent that prosecutors present not just raw data, but a narrative account of what the data signifies in terms of their performance, such reporting is even more useful. As Onora O'Neill has written, "intelligent accountability" is not about metrics or "a set of stock performance indicators."<sup>258</sup> Rather, "[t]hose who are called to account should give an *account* of what they have done, and of their successes or failures, to others who have sufficient time and experience to assess the evidence and report on it."<sup>259</sup> Moreover, such reports provide an important opportunity for prosecutors to signal that they

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<sup>256</sup> See Tazlitz & Henderson, *supra* note 79, at 225 (noting that "[t]he easiest accountability mechanisms to justify are those requiring public reporting and periodic review" of "composite statistics," such as those already required by law in a variety of contexts, such as the number of wiretaps conducted each year).

<sup>257</sup> See Simon, *supra* note 109, at 18 ("Public accountability seems most productive and least dangerous to fairness values when it focuses on general patterns of practice rather than individual decisions.").

<sup>258</sup> O'NEILL, *supra* note 254, at 58 (emphasis in original).

<sup>259</sup> *Id.*

view declinations as a crucial part of their role and to educate the public about this aspect of the prosecutorial function.<sup>260</sup>

## 2. *De-Identified Case Summaries*

Prosecutors also could employ de-identified case summaries to accomplish many of the accountability and pedagogical interests discussed in Part I. That is, prosecutors could periodically publish information about cases that include discussion of the relevant facts, law, and other factors that influenced the prosecutor's exercise of discretion, but redact any identifying information about the targets, victims, and witnesses. This option would approximate the value of public, detailed declination statements in many respects, while avoiding most of their risks.<sup>261</sup> In fact, their pedagogical value would be greater than identified statements, because they could be more detailed and more frequently released, thus more completely conveying critical aspects of the law and prosecutors' interpretation and application of it. They also could provide useful context in which to evaluate a prosecutor's charging decision in any particular case that comes under scrutiny.

## 3. *Other Fact-Finding Institutions*

Finally, prosecutors should consider whether there are other institutions capable of serving the history-keeping interests that a public, detailed declination can provide. In most U.S. jurisdictions, grand juries will not be a candidate for this role. But there are a few where, consistent with their more comprehensive historical role,<sup>262</sup> grand juries still are authorized to

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<sup>260</sup> By way of example, although not required to by law, in King County, Washington, State's Attorney Dan Satterberg publishes such an annual report on his decisions to try individuals under the age of eighteen as adults or juveniles, a matter over which prosecutors have considerable discretion. See DAN SATTERBERG & RONALD WRIGHT, PROSECUTION THAT EARNS COMMUNITY TRUST 5 (Nov. 2018).

<sup>261</sup> For example, in FCPA cases, the Department of Justice has adopted an opinion-letter procedure whereby companies can request an opinion from DOJ as to whether prospective conduct would lead to an enforcement action. DOJ publishes these letters on its website without disclosing the identity of the requesting party or any of the actors involved. See DEP'T OF JUSTICE, OPINION PROCEDURE RELEASES (last updated June 17, 2015), <https://www.justice.gov/criminal-fraud/opinion-procedure-releases> [<https://perma.cc/75JR-F5JQ>]. Because these letters refer only to prospective conduct, they differ from the kind of anonymized declination letter suggested herein, which would describe conduct that a party actually engaged in which resulted in a declination. But the pedagogical value would be similar.

<sup>262</sup> See generally RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634–1941 (1963) (discussing history of grand juries in the United States, which included greater direct citizen involvement and independence from prosecutors); Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and*

deliver a fact-finding report in certain circumstances, usually those involving official misconduct.<sup>263</sup> For example, in 1974 a federal grand jury in the District of Columbia issued a report (now known as the Watergate “road map”) detailing the evidence of misconduct against President Nixon and his associates.<sup>264</sup> That report was not released publicly at the time, but (with court approval) was transmitted to Congress.<sup>265</sup> In New York, a state grand jury issued a 170-page report in the Tawana Brawley scandal of 1987, which involved allegations of police and prosecutorial misconduct.<sup>266</sup> And in 2019, a Pennsylvania state grand jury issued a comprehensive report about sex abuse in the Catholic Church that spanned decades.<sup>267</sup>

Grand jury reports are in some ways superior to prosecutorial declination statements. To begin, they are generally authorized only in cases deemed by the legislature to be of the greatest public interest, such as those involving public corruption.<sup>268</sup> They also offer the advantage of providing some external check on prosecutors’ narrative of events, since such reports, even if drafted by the prosecutor, must be endorsed by the grand jury. Moreover, before such reports may become public, review by the district court may be required to ensure that the report is supported by a preponderance of the evidence developed in the course of the

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*Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 MD. L. REV. 271, 299–306 (1994).

<sup>263</sup> See generally MARVIN E. FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 31–32 (1977) (noting that “[m]any states prohibit grand jury reports” and where they are permitted, they generally are limited to situations involving “publicly elected officials” rather than “purely private activity,” and where there is express statutory authority to issue such a report).

<sup>264</sup> See Spencer S. Hsu, *U.S. Archivists Release Watergate Report That Could Be Possible “Road Map” for Mueller*, WASH. POST (Oct. 31, 2018), <https://nationalpost.com/news/world/u-s-archivists-release-watergate-report-that-could-be-a-possible-road-map-for-robert-mueller-on-trump> [<https://perma.cc/VCW5-XLVD>].

<sup>265</sup> See *In re* Report and Recommendation of June 5, 1972 Grand Jury Concerning Transmission of Evidence to the House of Representatives, 370 F. Supp. 1219 (D.D.C. 1974).

<sup>266</sup> See STATE OF NEW YORK, COUNTY OF DUTCHESS, *REPORT OF THE GRAND JURY OF THE SUPREME COURT* (1988), [https://archive.org/stream/TawanaBrawleyGrandJuryReport/tawana\\_brawley\\_archive\\_djvu.txt](https://archive.org/stream/TawanaBrawleyGrandJuryReport/tawana_brawley_archive_djvu.txt) [<https://perma.cc/LH4X-2U97>]; see also *We, The Grand Jury: Text of Its Conclusions in the Tawana Brawley Case*, N.Y. TIMES, Oct. 7, 1988, at B4 (reprinting key findings of the grand jury).

<sup>267</sup> See *supra* note 142.

<sup>268</sup> See, e.g., 18 U.S.C. § 3333(a) (authorizing grand jury reports in cases involving misconduct by public officers or employees or organized crime); 42 PA. CONS. STAT. § 4542 (limiting investigative grand jury reports to cases involving organized, public corruption, or “proposing recommendations for legislative, executive, or administrative action in the public interest based upon stated findings”).

investigation.<sup>269</sup> Thus, the ensuing report may be more accurate than a statement reviewed only in the prosecutor's office. Some laws authorizing grand jury reports also provide built-in mechanisms for the protection of privacy, such as advance notice to those named in the report and judicial review, so that those named can petition a court to block the report's release or for redactions.<sup>270</sup> Finally, because grand jury reports are issued in the name of the grand jury, pursuant to express authorization, they do not raise the same questions about legitimacy and overreach that may be lodged against prosecutorial declination statements that are public and detailed.

In addition to grand juries, other institutions also may be available to probe the facts of important events and make public their findings. For example, Texas and Washington use lay jurors to hear evidence and answer interrogatories about their findings in a procedure known as an inquest, which does not involve prosecutors or any determination of guilt or liability.<sup>271</sup> These are frequently used to investigate deaths involving on-duty law enforcement officers.<sup>272</sup> And the United States military uses a mechanism called a Board of Inquiry to determine the facts of significant events. This procedure is independent of the Court Martial process, the military's equivalent to criminal trials.<sup>273</sup> Regulatory agencies also may have the authority and even superior expertise to determine the facts surrounding high-impact events like public health or infrastructure disasters.

Legislative oversight committees also could provide the requisite accounting. For example, during the Watergate era, the public learned what transpired not from the grand jury report, but through the televised hearings held by a bipartisan congressional committee, which later issued its own report summarizing the evidence.<sup>274</sup> Similarly, in 2019, notwithstanding the fact that Mueller Report covered much of the same ground, the bipartisan Senate Select Intelligence Committee issued a two-volume report detailing

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<sup>269</sup> See, e.g., 18 U.S.C. § 3333(b)(1); 42 PA. CONS. STAT. § 4552(b).

<sup>270</sup> See 18 U.S.C. § 3333(c); 42 Pa. CONS. STAT. § 4552(e). The federal statute also provides that public grand jury reports may not be "critical of an identified person" who is not a public officer or employee. 18 U.S.C. § 3333(b)(2).

<sup>271</sup> See Steve Miletich, *Review Finds Seattle Police Shooting of Che Taylor Fell Within Department Policy*, SEATTLE TIMES (June 28, 2016), <https://www.seattletimes.com/seattle-news/crime/review-finds-seattle-police-shooting-of-che-taylor-fell-within-department-policy/> [<https://perma.cc/ND69-84RU>].

<sup>272</sup> *Id.*

<sup>273</sup> DEP'T OF NAVY, PROCEDURES APPLICABLE TO COURTS AND BOARDS OF INQUIRY, [http://www.jag.navy.mil/library/instructions/5830\\_1A.pdf](http://www.jag.navy.mil/library/instructions/5830_1A.pdf) [<https://perma.cc/C3LW-NA5G>].

<sup>274</sup> See SENATE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, 93RD CONG., FINAL REPORT OF THE SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES (Comm. Print 1974).

Russian interference in the 2016 U.S. presidential election.<sup>275</sup> Such hearings and reports have a long history in the United States.<sup>276</sup> Legislatures also can appointed independent commissions, such as the 9/11 Commission,<sup>277</sup> to make findings of fact and generate recommendations for reform.<sup>278</sup>

In cases that have attracted extraordinary public attention, advocacy organizations and the press may also be able to fulfill some of this function, including by obtaining information in the prosecutors' files pursuant to Freedom of Information Act requests. Finally, civil enforcement authorities may be enlisted to help serve this function, some co-located within the same offices as prosecutors. For example, state Attorneys General and many units of the DOJ, including United States Attorneys' Offices, have civil enforcement authority. In circumstances where prosecutors have decided that criminal charges are not appropriate, a civil action could further important history-keeping interests (in addition to providing a measure of accountability for wrongdoers) by providing a public forum in which to tell the story about what happened, through the filing of a complaint and eventual civil trial or settlement process.<sup>279</sup>

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<sup>275</sup> See SENATE SELECT COMM. ON INTELLIGENCE, 116TH CONG., REPORT OF THE SELECT COMMITTEE ON INTELLIGENCE, UNITED STATES SENATE, ON RUSSIAN ACTIVE MEASURES CAMPAIGNS AND INTERFERENCE IN THE 2016 U.S. ELECTION, VOL. I AND II, [https://www.intelligence.senate.gov/sites/default/files/documents/Report\\_Volume1.pdf](https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume1.pdf) [<https://perma.cc/6Z6Y-S269>], [https://www.intelligence.senate.gov/sites/default/files/documents/Report\\_Volume2.pdf](https://www.intelligence.senate.gov/sites/default/files/documents/Report_Volume2.pdf) [<https://perma.cc/5TD3-RFV7>].

<sup>276</sup> See INVESTIGATIVE OVERSIGHT, *supra* note 54.

<sup>277</sup> See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004).

<sup>278</sup> For example, Australia, Ireland, and Great Britain have all established Commissions to investigate child sex abuse in the Church, with different mandates and powers. See, e.g., Melissa Davey, *Catholic Church Dismisses Key Recommendations from Landmark Inquiry into Child Abuse*, GUARDIAN (Dec. 14, 2017), <https://www.theguardian.com/australia-news/2017/dec/15/royal-commission-final-report-australia-child-abuse> [<https://perma.cc/8KWC-KU5T>] (reviewing all three commissions and noting that the Australian Commission has been consistently praised by experts and survivors). The Commission model also has been relied upon in the context of wrongful convictions to investigate their causes and make recommendations for reform. See, e.g., Jessica A. Roth, *The Institutions of Innocence Review: A Comparative Sociological Perspective*, 70 RUTGERS U. L. REV. 1143 (2018) (discussing establishment of such commissions in Canada, the United Kingdom, and the United States in reaction to high-profile exonerations).

<sup>279</sup> See, e.g., Peter Lattman & Ben Protess, *From Anonymity to Scourge of Wall Street*, N.Y. TIMES (Oct. 30, 2013), <https://dealbook.nytimes.com/2013/10/30/from-anonymity-to-scourge-of-wall-street/> [<https://perma.cc/6TF6-BEJA>] (describing Department of Justice's use of previously ignored federal civil statute to secure large settlements from banks engaged in mortgage fraud that led to the financial crisis); Michael J. de la Merced, *In JP Morgan Case, the Martin Act Rides Again*, N.Y. TIMES (Oct. 2, 2012), <https://dealbook.nytimes.com/>

When no other institution is available to engage in fact-finding or will not be able to do so quickly enough to satisfy a pressing public need for information, the rationale for prosecutors to issue a public, detailed declination statement is at its highest. But such circumstances ought to arise rarely. Moreover, thinking about them as a category *ex ante* should prompt prosecutors, policy makers, and legislatures to consider whether we want prosecutors to serve as history-keepers, or whether, alternatively, we should invest in creating and supporting a diversity of institutions capable of performing that task outside of the criminal justice system.

#### CONCLUSION

As important as prosecutors' decisions to bring criminal charges are prosecutors' decisions *not* to charge. But historically prosecutors have not talked much about this critical part of their role. Prosecutors' failure to communicate about their exercise of negative discretion is unfortunate, as it leaves the public with an incomplete understanding of the prosecutorial function and other important information, including the content of the law and prosecutors' priorities. It also undermines the ability of the public and other institutions to hold prosecutors accountable for their exercise of discretion, and to hold accountable the other institutional actors who share with prosecutors the authority and responsibility for criminal law enforcement. Although generally there are good reasons not to discuss individual cases in which a prosecutor has declined to charge, those reasons do not support a blanket refusal by prosecutors to discuss declinations at all. To the contrary, there is much to be gained from talking about declinations, which this Article has described as signaling, accountability, and history-keeping interests. But because there are significant risks attached, particularly privacy and reputational risks, in the context of individual cases, statements about declinations must be made with forethought rather than on an *ad hoc* basis or defensively.

This Article offers a framework to help prosecutors do just that. It encourages prosecutors to consider the interests that would be served by issuing a declination statement in a particular manner, the risks that would be posed thereby, and whether alternatives are available that would serve those interests at lesser risk. It enlarges the frame of declination statements to include not only the occasional public statement in a high-profile case, but also other kinds of statements about declinations, such as aggregate reports

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2012/10/02/in-jpmorgan-case-the-martin-act-rides-again/ [https://perma.cc/3P2M-7MFB] (describing aggressive use by New York Attorneys General of the Martin Act, a state statute providing criminal and civil remedies, to address a wide variety of corporate misconduct).

and de-identified case summaries, that can convey much of the same information and accomplish many of the same objectives, only better. Such practices not only serve important interests in signaling and accountability, but they also provide necessary context in the rare circumstance in which a prosecutor decides to issue a detailed, public statement in an individual case. Finally, the framework invites prosecutors to consider what other institutions are available to engage in fact-finding and the reconstruction of past events when the need for such a narrative is pressing. Assisted by this framework, prosecutors can intentionally and effectively communicate about declinations.