

THE PROSECUTOR’S EVOLUTION

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ABSTRACT

It is axiomatic that American prosecutors possess significant discretion. What varies among prosecutors is how they use their discretion. How they use their discretion derives from how prosecutors perceive their role. Different prosecutors perceive their role differently. Some see themselves as representing the victim and others see themselves as ensuring just outcomes. These differences emerge from the American prosecutor’s distinct evolution. Over 200 years, the American prosecutor has transformed through various stages. The private prosecutor, an attorney the victim hired, originated from the British system. With the expansion of democratic institutions, the prosecutor became political, representing a particular political party’s interests. Abuses led to prosecutors becoming more professional, representing the state. This disconnected prosecutors from their community. Proactive prosecutors emerged to reconnect prosecutors to their community. Then, in 2016, a new wave of prosecutors emerged. These prosecutors saw themselves protecting defendants from a punitive criminal justice process.

This article explores these different perspectives, looking for commonalities that can define the American prosecutor’s identity. Three emerge. First, prosecutors are public servants. Though they may serve different publics and do so in different ways, all seek to serve public interests. Second, they represent the community. Prosecutorial policies and case selection derive from community values and priorities. Finally, prosecutors are opportunistic. When given the opportunity to expand their discretion

KEYWORDS

Prosecutors, Discretion, Criminal Justice, History, Identity

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On January 2, 2020, the first court day of newly elected Fairfax County, Virginia prosecutor Steve Descano's term, his chief trial assistant appeared in court to implement one of Descano's campaign promises: the refusal to prosecute "simple possession of marijuana" cases.¹ When the chief trial assistant moved to dismiss the first case he explained the policy's rationale.² The judge denied the request, citing the preference, in his court anyway, for individual decision-making rather than blanket no-prosecution policies.³ The prosecutor's request exemplifies the new wave of prosecutors who are changing the way prosecutors run their offices and evaluate their cases.⁴ Yet, as the judge's resistance demonstrates, some object to this because prosecutors do not traditionally do these things.⁵ That is the point according to these new prosecutors.⁶ They want to change how prosecutors do business.⁷

This change resurrects a question about what prosecutors *should* do. Do they simply prosecute the cases brought to them or do they perform additional functions?⁸ Are they criminal justice policymakers?⁹ Do they advise and oversee the police?¹⁰ Do they represent the victim's interests?¹¹ Do they investigate cases?¹² Are they responsible for alleviating mass incarceration?¹³

¹ Justin Jouvenal & Racel Weiner, *Prosecutors Won't Pursue Marijuana Possession Charges in 2 Northern Va. Counties* The Wash. Post, Jan 2, 2020 For Descano's campaign platform, see Steve Descano, *Progressive Justice: The Case for Criminal Justice Reform in Fairfax County*, available at: <https://static1.squarespace.com/static/5b08d8fd85ede1b5cc3e7d9c/t/5d8b5b91def8834a61161e22/1569414039552/ProgressiveJustice-SteveDescano.pdf>.

² Jouvenal & Weiner, *supra* note 1.

³ *Id.* Later in the day, the judge relented and granted the dismissal. *Id.*

⁴ See generally, EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION Random House (2019); see *infra* Section V.

⁵ Jeffrey Bellin, *Defending Progressive Prosecution*, 39 YALE L. & POL. REV. 218 (2020) (identifying and answering objections to progressive prosecution). See also Laurie Levenson, *Progressive Prosecutors: Winning the Hearts and Minds of Line Prosecutors*, 60 AM. CRIM. L. REV. 1495 (2023).

⁶ BAZELON, *supra* note 4, at xxvii-xxviii.

⁷ *Id.* and Levenson, *supra* note 5, at 1496-98.

⁸ See generally JOAN JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY (1980) Leonard R. Mellon et al., *The Prosecutor Constrained by His Environment: A New Look at Discretionary Justice in the United States*, 72 J. CRIM. L. & CRIMINOLOGY 52 (1981); Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553 (1999); and Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125 (2005).

⁹ Alissa Pollitz Worden, *Policymaking by Prosecutors: The Uses of Discretion in Regulating Plea Bargaining*, 73 JUDICATURE 335(1989-1990) and Mellon, JACOBY & Brewer *supra* note 8, at 53-54.

¹⁰ George F. Cole, *The Decision to Prosecute*, 4 LAW & SOC. REV. 331, 334-337 (1970). See generally Allen F. Anderson, *The Police, the Prosecution, and Plea Negotiation Rates: An Exploratory Look*, 12 CRIM. JUST. REV. 35 (1987).

¹¹ Irene Oritseweyinmi Joe, *The Prosecutor's Client Problem*, 98 BOST. UNIV. L. REV. 885 (2018).

¹² W. Allan Williams, *The Case for Proactive Prosecution*, 13 CRIM JUST. J. 389 (1991-1992).

¹³ Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063 (2016).

The varied demands imposed on prosecutors have led to criticism. Some argue that prosecutors have too much power.¹⁴ It is too easy for them to obtain wrongful convictions, prosecute political opponents, and overwhelm beleaguered defense attorneys.¹⁵ Others assert prosecutors have too much discretion because no one in the court system can effectively hold them accountable.¹⁶ Some critics perceive prosecutors as more punitive than rehabilitative.¹⁷ Another group argues prosecutors engage in misconduct through closing arguments, suppression of evidence, and statements to the public.¹⁸

Professor David Sklansky identifies these problems plus an additional problem that he says is less frequently discussed.¹⁹ He recognizes the prosecutor's ambiguous role in the criminal court process.²⁰ This ambiguity appears most clearly when we think of prosecutors as ministers of justice and as advocates. On one hand, prosecutors represent one side in a story-telling competition.²¹ In this competition both sides must zealously compete for the adversarial system to work.²² After all, if one were to engage in a competition where only one side plays to win, there would not be much of a competition. Yet prosecutors are called upon to do much more than this. They must objectively evaluate cases.²³ They must ensure all discoverable

¹⁴ Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001).

¹⁵ Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to take Prosecution Discipline Seriously*, 8 UNIV D.C. L. REV. 275 (2004); Fred C. Zacharias & Bruce Green, *The Duty to Avoid Wrongful Convictions*, 89 BOSTON UNIV. L. REV. 1 (2009); Laurie Levenson, *The Politicization of Prosecutors: A Tribute to the Work of Bennett Gershman*, 16 OHIO ST. UNIV. L. REV. 325 (2018); Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175 (2020); Peter A. Joy & Kevin C. McMunigal, *Overloaded Prosecutors*, 33 CRIM. JUST. 31 (2018).

¹⁶ KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY*, (1969); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 UNIV. ILL. L. REV. 37 (1983); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. LAW & CRIMINOLOGY 717 (1995); David Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473 (2016); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51 (2016); David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L. J. ONLINE 203 (2011); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 UNIV. OF PENN. L. REV. 959 (2009); Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability*, 83 VA. L. REV. 939 (1997).

¹⁷ David Sklansky, *Problems with Prosecutors*, ANN. REV. CRIM. 2.8-2.9 (2018).

¹⁸ Michael D. Cicchini, *Combating Prosecutorial Misconduct in Closing Arguments*, 70 OKLA. L. REV. 887 (2018); Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415 (2010); John G. Browning, *Prosecutorial Misconduct in the Digital Age*, 77 ALB. L. REV. 881 (2014).

¹⁹ Sklansky, *supra* note 17, at 1:2.1-2.19.

²⁰ *Id.*

²¹ Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118 (1987).

²² *Id.*

²³ Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 N.Y.U. L. REV. 669 (1992); Bennett L. Gershmman, *The Prosecutor's Duty to Truth*, 14 GEO. J. OF

information reaches the defense attorney.²⁴ They must protect the defendant's rights.²⁵ In short, they must remain neutral.²⁶ Prosecutors must choose a path or somehow follow two paths at once. This creates an identity crisis for prosecutors.

Professor Sklansky is not the first to recognize this. Over forty years ago, Joan Jacoby published an often-cited work entitled *The American Prosecutor: A Search for Identity*.²⁷ In this book, she devotes a chapter to the prosecutor's historical development.²⁸ She identifies the prosecutor's origins as an appointed but minor official.²⁹ Then the prosecutor becomes elected.³⁰ Over time, the prosecutor's discretion increases.³¹ She ends arguing that prosecutors need to embrace their policy-making ability and use it to confront crime problems.³² Even forty years later, this is still the most comprehensive treatment of the prosecutor's developmental arc.

While Jacoby's work remains the most complete, others have examined segments in closer detail. The American prosecutor's story begins with its European roots.³³ As people settled in the colonies they brought their legal traditions with them and adapted them to their new surroundings.³⁴ Other scholars explored the increasingly formal legal systems that emerged in the Revolutionary years.³⁵ From there, different scholars examined the transition from victim-centered prosecution to state-driven prosecution.³⁶ Another group studied the transition to

LEGAL ETHICS 309 (2000); Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119 (2010).

²⁴ Sara Gurwitsch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303 (2010) and Ellen Yaroshefsky, *Ethics and Plea Bargaining – What's Discovery Got to Do With It*, 23 CRIM. JUST. 28 (2008).

²⁵ Bruce A. Green, *Gideon's Amici: Why do Prosecutors so Rarely Defend the Rights of the Accused*, 122 YALE L.J. 2336 (2013) and Eric S. Fish, *Prosecutorial Constitutionalism*, 90 SO. CAL. L.R. 237 (2017).

²⁶ H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695 (2000).

²⁷ JACOBY, *supra* note 8.

²⁸ See generally, *id.*, chapter one.

²⁹ *Id.* at 19-28.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ FRANK MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* (1970) and W. Scott van Alstyne, *The District Attorney – A Historical Puzzle*, 1952 WIS. L. REV. 125 (1952) and JOHN LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2003).

³⁴ *Id.*

³⁵ See e.g. WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1994) (Other scholars explored the increasingly formal legal systems that emerged in the Revolutionary years).

³⁶ Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568 (1984); Thomas Meehan, *Courts, Cases, and Counselors in Revolutionary and Post-Revolutionary Pennsylvania*, 91 THE PENN. MAG. OF HIST. AND BIO. 3 (1967); Kathryn Preyer, *Crime, the Criminal Law and Reform in Post-Revolutionary Virginia*, 1 L. & HIST. REV. 53 (1983).

professionalism.³⁷ At the same time, legal scholars and sociologists began studying the prosecution function.³⁸ Their reports supplement the historical record.³⁹ Today, scholarship on prosecutors abounds.⁴⁰ These works, taken together and added to modern prosecutorial activities, provide a view of the prosecutor's more recent transitions. This article connects this disparate scholarship into a unifying narrative that illuminates the prosecutor's developmental arc.

Explaining the prosecutor's developmental arc serves three purposes. First, it fills a prominent scholarship gap. We cannot fully understand today's prosecutors if we do not know their evolutionary development. This article accomplishes this by updating Jacoby's work. Second, scholars, almost universally, recognize that prosecutors play the central role in the criminal court process.⁴¹ Professor Sklansky observed that "above all else, prosecutors are mediating figures, straddling the frontiers between adversarial and inquisitorial justice, between the police and the courts, and between law and discretion."⁴² While there is little dispute that today's prosecutors fill the role, the question remains how this occurred. By understanding this evolution, we can better address the ongoing problem of prosecutorial misconduct.⁴³ Finally, by exploring the prosecutor's evolution, we can begin resolving the prosecutor's identity crisis. Tracing the prosecutor's development helps rectify the prosecutor's client problem.⁴⁴ It also helps us understand why some prosecutors function differently from others and why painting the prosecutorial function with a broad brush leads to a distorted picture.⁴⁵

³⁷ *Id.* See also Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309 (2002).

³⁸ ROSCOE POUND, *CRIMINAL JUSTICE IN AMERICA* (1930) and RAYMOND MOLEY, *POLITICS AND CRIMINAL PROSECUTION* (1929).

³⁹ *Id.*

⁴⁰ A search of Google Scholar for articles referencing "United States prosecutor" returned over 17,000 articles. These include: Jeffrey Bellin, *The Changing Role of the American Prosecutor*, 18 OHIO ST. J. CRIM. L. 329 (2020); Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. UL REV. 627 (2021); Thomas P. Hogan, *De-prosecution and death: A synthetic control analysis of the impact of de-prosecution on homicides*, 21 CRIMINOLOGY & PUB. POL'Y 489 (2022); Ronald F. Wright, *Prosecutors and their state and local politics*, 110 THE J. CRIM. L. AND CRIMINOLOGY 823 (2020); Shima B. Baughman and Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123 (2020); Alexandra L. Cox, & Camila Gripp, *The Legitimation Strategies of "Progressive" Prosecutors*, 31 SOCIAL & LEGAL STUD. 657 (2022); Tyler Yeargain, *Prosecutorial Disassociation*, 47 AM. J. CRIM. L. 85 (2020).

⁴¹ Davis, *supra* note 14, at 408-414; Jonathan A. Rapping, *Who's Guarding the Hen House? How the American Prosecutor Came to Devour Those He is Sworn to Protect*, 51 WASHBURN L.J. 513 (2011); Jason Kreag, *Prosecutorial Analytics*, 94 WASH. UNIV. L. REV. 771 (2016) but see Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171 (2019).

⁴² David A. Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473 (2016).

⁴³ On the need to restrain prosecutorial misconduct, see Jennifer Lee, *'Justice for All': The Necessity of New Prosecutorial Accountability Measures*, (Feb. 7, 2020). Available at SSRN: <https://ssrn.com/abstract=3534139> or <http://dx.doi.org/10.2139/ssrn.3534139>.

⁴⁴ See generally Joe, *supra* note 11.

⁴⁵ At this point it is important to note that this is a broad picture. Future work is required to make each of these phases more granular in their analysis. When that happens, it is likely that more subtle changes occurred within each of these phases.

The prosecutor's developmental arc, or evolution, reveals the incremental expansion of prosecutorial authority from representing a specific client to solving broad societal problems. This evolution occurred in five distinct phases. The first is the "private" phase.⁴⁶ Prosecutors served private interests. In fact, prosecutors were not the lawyers but those who initiated the criminal complaint, usually the victim. This yielded to the "political" phase where prosecutors served the state's interest as embodied by their respective political party interests.⁴⁷ While independent of specific clients, the local political party greatly influenced the criminal prosecution machinery. This phase transitioned to the "professional" phase where prosecutors, though still representing the state, separated themselves from substantial party control.⁴⁸ In this role, the "minister of justice" model emerged. Recently, this phase began fading as prosecutors established closer connections to their community. First, there is the "proactive" phase where prosecutors expand upon their traditional role to address community crime problems.⁴⁹ Most recently, as noted at the outset, the "progressive" phase has arrived.⁵⁰ These prosecutors use their power to address wider social problems caused, at least in part, by the previous prosecutor phases.

Prior to embarking on this historical journey, it is important to note that there are not clear, delineated boundaries between the phases. Different places evolved at different times. Additionally, remnants of one phase may remain even as prosecutors move onto another phase. As the journey unfolds, aspects of earlier phases will sound similar to today's prosecutors. These echoes of earlier phases provide clues to the prosecutor's identity. They remain relatively constant despite variation in perception. Similarly, this is an evolution not a revolution. Even today's "progressive" phase has not fundamentally changed the day-to-day work that prosecutors perform. The prosecutorial function continues to evolve.

I. PRIVATE PROSECUTORS

The American prosecutor's origin story remains clouded. One reason for this is the lack of uniformity between the colonies. Different colonies were settled at different times and by different groups. Consequently, their legal systems developed differently. The American prosecutor appeared within the English common law tradition and assimilated French and Dutch influences. These influences, plus the uniqueness of the colonial environment, gave birth to the American prosecutor.

The predominant feature of the early American prosecutor was the co-existence of public and private aspects.⁵¹ At different times, colonies created public attorneys who represented the British Crown's interests or the local public's interests.⁵² Initially, this public attorney was a minor figure who performed a mix of administrative and legal duties.⁵³ Instead, private individuals carried the bulk of the

⁴⁶ See Section 1, *infra*.

⁴⁷ See Section 2, *infra*.

⁴⁸ See Section 3, *infra*.

⁴⁹ See Section 4, *infra*.

⁵⁰ See Section 5, *infra*.

⁵¹ JACOBY, *supra* note 8, at 19-28.

⁵² See e.g. LAWRENCE H. GIPSON, AMERICAN LOYALIST: JARED INGERSOLL (1971).

⁵³ JACOBY, *supra* note 8, at 19-28.

law enforcement burden.⁵⁴ When people referred to prosecutors at this early time, they meant the person who initiated the case, the private individual. The public figure was not the prosecutor. These private prosecutors, if the case was sufficiently serious, would hire private attorneys to represent them throughout the process.⁵⁵ If they could not afford a private attorney, the public attorney oversaw the case.⁵⁶

A. A DECENTRALIZED PROCESS EMPHASIZING PRIVATE INTERESTS

To understand how “prosecutors” functioned during the private prosecution phase, we must understand early American court procedures and court roles. Although each colony differed in its terminology, procedures and structures, there were some basic similarities owing to the eventual dominance of the British legal system.⁵⁷ While the British system operated on a “pure” private model, no American colony fully adopted it; instead, the colonies blended the private model with a public aspect.⁵⁸ To prevent against excessive authority, however, they utilized decentralized processes, giving individual victims the most control.⁵⁹ How much process also varied between colonies. In Massachusetts, for example, an organized, formal system existed.⁶⁰ This contrasted with New York’s less formal and less respected court system.⁶¹

Each colony operated a similarly structured court system.⁶² A single person, with authority to resolve minor matters and send more serious matters to the next higher court, entailed the first level.⁶³ This individual went by different names in different places.⁶⁴ Small towns might have one person serve the entire town while larger population centers utilized multiple individuals to hear and resolve matters.⁶⁵ In this court, the people and the law interacted intimately and informally, something

⁵⁴ ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE, PHILADELPHIA 1800-1880*, 430-44 (1989).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW*, 50-53, 66 (3d ed. Oxford Univ. Press 2005) and Douglas Greenberg, *Crime, Law Enforcement and Social Control in Colonial America*, 26 AM. J. LEG. HIST. 293, 295 (1982).

⁵⁸ FRIEDMAN, *supra* note 57, at 32-37 and Yue Ma, *Exploring the Origins of Public Prosecution* 18 INT. CRIM. JUST. REV. 190 (2008).

⁵⁹ J. WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAWMAKERS* (1950) 174-5; and FRIEDMAN, *supra* note 57, at 17-19.

⁶⁰ David H. Flaherty, *Crime and Social Control in Provincial Massachusetts*, 24 HIST. J. 339 (1981).

⁶¹ Douglas Greenberg, *The Effectiveness of Law Enforcement in 18th Century New York*, 19 AM. J. LEG. HIST. 173 (1975).

⁶² Erwin C. Surrency, *Courts in the American Colonies* 11 AM. J. LEG. HIST. 347 (1967) and HURST, *supra* note 59, at 98-9 but see FRIEDMAN, *supra* note 57, at 4-7, 37.

⁶³ STEINBERG, *supra* note 54, at 6, 39-41.

⁶⁴ In Philadelphia, the “prosecutor” went to the alderman. STEINBERG, *supra* note 36, at 571. In the New England colonies it was the magistrate. Flaherty, *supra* note 60, at 341. In the southern colonies, it was the justice of the peace. Nathaniel J. Berry, *Justice of the Peace Manuals in Virginia Before 1800*, 26 J.S. Legal Hist. 315 (2018). For consistency sake, this article uses “justice of the peace.”

⁶⁵ Allen Steinberg, *The Spirit of Litigation: Private Prosecution and Criminal Justice in Nineteenth Century Philadelphia*, 29 J. SOC. HIST. 231 (1986) (multiple judges in Philadelphia).

Professor Lawrence Friedman termed “low law.”⁶⁶ Most cases began and ended at this stage.⁶⁷ More serious matters such as high misdemeanors and felonies were sent to a grand jury associated with the county court.⁶⁸ This was the formal colonial—and later state—court.⁶⁹ Its procedures were more formal and only met certain times throughout the year.⁷⁰ Usually, those sitting at this court had formal legal training.⁷¹ Appeals from these courts and the most serious cases went to the highest court level.⁷² During colonial times, when there was no separation of powers, the highest court level consisted of the governor and his council.⁷³ As a result, when this court met, it was at the colonial capital.⁷⁴ This meant litigants and witnesses came from across the colony to this court for trial.⁷⁵ One must remember that there was also no appeal as we presently think of them.⁷⁶ As a case progressed through these three levels, each new level meant a new trial.⁷⁷

When examining the role different people played in this court structure, it is important to delineate two important crime categories. The first is that of crimes against property and people. These ranged from murder to assault to burglary.⁷⁸ In each instance there is an identifiable victim, someone with an interest in pursuing the case.⁷⁹ These cases moved through the system based on victim desire and legal sufficiency.⁸⁰ Generally, private attorneys represented the two sides.⁸¹ For resolution, they had to rise to the middle level of courts.⁸² The second category includes moral offenses ranging from adultery to disorderly conduct or public drunkenness.⁸³ Generally, these offenses were only prosecuted when they created social problems.⁸⁴ Most colonial jurisdictions lacked the resources to prosecute such offenses because it required a public figure, paid by the colony.⁸⁵ Prosecuting such offenses also required high functioning legal systems, meaning they had the resources to process

⁶⁶ Lawrence M. Friedman, *High Law and Low Law*, 10 FL. UNIV. L. REV. 53 (2014). Low law is the unwritten law that people use to resolve perceived legal barriers to accomplish their objectives. In a sense, it is similar to Roscoe Pound’s dichotomy between the law in action and law on the books. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

⁶⁷ HURST, *supra* note 59, at 147.

⁶⁸ Surrency, *supra* note 62, at 269-270.

⁶⁹ George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L. J. 857 (2000).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Surrency, *supra* note 62, at 268-269.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ STEINBERG, *supra* note 54, at 48-51.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* See also Fisher, *supra* note 69, at 861-862.

⁸³ Steinberg, *supra* note 65, at 233; See also DAVID H. FLAHERTY, *Law and the Enforcement of Morals in Early America*, in 1 CRIME AND JUSTICE IN AMERICAN HISTORY, 127, 129-130 (Erik Monkkonen ed., 1991) and Greenberg, *supra* note 57, at 303.

⁸⁴ FLAHERTY, *supra* note 83, at 140.

⁸⁵ *Id.*

cases.⁸⁶ High functioning systems were necessary because most morals offenses were nonindictable, meaning that the lowest level court had jurisdiction to resolve the matter.⁸⁷ Whether the offense was indictable or not determined which court actors performed which function.

In cases involving a victim, the victim initiated the process and was the “prosecutor.”⁸⁸ They initiated cases by appearing before the “judge” of the lowest level court.⁸⁹ Once before the “judge,” the “prosecutor” would present his claim.⁹⁰ If the “judge” found the claim meritorious, and the “prosecutor” paid the requisite fee, the “judge” would order the defendant to appear.⁹¹ Once the defendant appeared, the “judge” would hear the defendant’s version.⁹² Minor cases would be resolved immediately, or ignored completely, but more serious offenses would be bound over for the mid-level court.⁹³ If the “judge” found the claim lacking, the “prosecutor” could locate another “judge” who might hold a different opinion.⁹⁴ With this system, the victim’s main discretionary concern seems to be whether the possible sanction was worth the fee payment. Ultimately, the “prosecutor’s” discretion was unlimited. Even if the “judge” bound over the “prosecutor’s” case, the “prosecutor” could terminate the action by simply not appearing at the next court date.⁹⁵ “Prosecutors” would often terminate the case due to the costs incurred with each step in the process and because the “prosecutor” and defendant often knew each other.⁹⁶ This familiarity led to informal resolution, outside the court process.⁹⁷ It also meant that someone could be “prosecutor” one day and defendant another day.⁹⁸ In this sense, the courts preserved order but did not resolve conflict.

The Justice of the Peace played the most critical role when resolving “prosecutor” complaints. Justices of the Peace originated in the British system and eventually crossed the Atlantic to the colonies.⁹⁹ The British Crown required dispute resolution mechanisms but did not want to pay for them.¹⁰⁰ The monarchy devised a model whereby private complainants went to a local official for dispute

⁸⁶ Greenberg, *supra* note 57, at 325-6.

⁸⁷ Steinberg, *supra* note 65, at 233.

⁸⁸ Allen Steinberg, *The ‘Lawman’ in New York: William Travers Jerome and the Origins of the Modern District Attorney in Turn-of-the-Century New York* 34 UNIV. TOL. L. REV. 753 (2003); See e.g. *Commonwealth v. Hutcheson*, 4 Ky. 355 (Ct. App. Ky., 1809) (reasoning that: “Snapp, who was summoned to give evidence, cannot be considered as the prosecutor required by law. No man can be made a prosecutor against his will, but every man is bound to obey the process of the law. If Snapp was the prosecutor or willing to become so, it was easy to have named him.”)

⁸⁹ This was not a judge as modern litigants would experience. See *infra* notes 99-118 and accompanying text.

⁹⁰ STEINBERG, *supra* note 54, at 39-44.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*; Flaherty, *supra* note 60, at 358-59.

⁹⁴ STEINBERG, *supra* note 54, at 39-44.

⁹⁵ *Id.*

⁹⁶ *Id.*; NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940*. (2013).

⁹⁷ PARRILLO, *supra* note 96, at 256.

⁹⁸ STEINBERG, *supra* note 54, at 39-44.

⁹⁹ LANGBEIN, *supra* note 33, at 40-47.

¹⁰⁰ *Id.*

resolution.¹⁰¹ Had the Crown desired, it could have created a more centralized and professional prosecutorial corps.¹⁰² Instead, it opted for a local solution with resolutions based on community knowledge and practices.¹⁰³ These Justices of the Peace conducted cursory investigations and adjudicated disputes.¹⁰⁴ Rather than monetary payment, the British Crown rewarded Justices of the Peace with honor and authority.¹⁰⁵

Justices of the Peace performed both investigative and adjudicative functions.¹⁰⁶ Their investigative work was not modern investigative work but involved hearing from witnesses produced by the “prosecutor” and memorializing the statements.¹⁰⁷ Often this entailed asking those involved in disputes relevant questions to determine responsibility.¹⁰⁸ Once they gathered the information, they decided what to do with the case. They could find the case lacked sufficient evidence. If the offense was sufficiently serious, they could send it to the grand jury.¹⁰⁹ If there was sufficient evidence of only a minor offense, the Justice of the Peace could impose a sanction.¹¹⁰

Justices of the Peace heard a wide range of cases. Professor Steinberg recounts a typical day for a Philadelphia Justice of the Peace, known as an alderman. “On a typical day in 1848, one alderman heard six assault and battery cases, three larceny cases, three breach of ordinance cases, one firecracker case, one fast driving case and one case of throwing “torpedoes” on the stage of the Arch Street Theatre; committed three boys to the House of Refuge, issued two landlord’s warrants of eviction, two private notices and eight summonses; had one man examined for life insurance and one operated on for opthalmia; and conducted one marriage ceremony.”¹¹¹ This variety and quantity brought crowds to the office daily and established close relationships between the community and the Justice of the Peace.¹¹²

Despite performing investigative and adjudicative functions, the Justices of the Peace usually lacked formal legal training. Instead, these men obtained their positions due to their community standing.¹¹³ They were men of “substance and power” in their communities.¹¹⁴ Their social standing derived from reputation rather than education. Most Justices of the Peace could not read or write.¹¹⁵ In some places, Justices of the Peace were local politicians. For example, in Philadelphia, the Mayor was selected from the Justices of the Peace.¹¹⁶ Legal training for Justices

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ FLAHERTY, *supra* note 83, at 146-7.

¹⁰⁷ SCOTT INGRAM, CONSTITUTIONAL INQUISITORS: THE ORIGINS AND PRACTICE OF EARLY FEDERAL PROSECUTORS (2023) 23-26.

¹⁰⁸ Mike McConville and Chester Mirsky, *The Rise of Guilty Pleas: New York, 1800-1865* 22 J. L. & SOC. 443 (1995).

¹⁰⁹ Ingram, *supra* note 107, at 26.

¹¹⁰ *Id.*

¹¹¹ Steinberg, *supra* note 65, at 236.

¹¹² *Id.*

¹¹³ Flaherty, *supra* note 60, at 347-350.

¹¹⁴ FLAHERTY, *supra* note 83, at 146-147.

¹¹⁵ Greenberg, *supra* note 57, at 304.

¹¹⁶ STEINBERG, *supra* note 54, at 38-9.

of the Peace was not required because people generally did not trust lawyers.¹¹⁷ The citizenry feared lawyers' ability to use law as an oppressive tool and thus preferred the informal dispute resolution process provided by Justices of the Peace.¹¹⁸

If the offense was sufficiently serious and the Justice of the Peace believed the evidence was sufficient, the Grand Jury would hear the case. These grand juries primarily served a screening function. They filtered out cases that were not worth pursuing or for which the "prosecutor" did not appear.¹¹⁹ When the grand jury found the evidence sufficient and the case worthwhile, it would issue an indictment and those with legal training would handle the case.¹²⁰ Most cases that came before the grand jury were dismissed because the "prosecutor" failed to appear.¹²¹ These "prosecutors" either received the resolution they sought prior to the grand jury hearing the case or did not understand that their case had to progress from the justice of the peace to the grand jury.¹²² As time passed, those with legal training criticized the grand jury for allowing too many unworthwhile cases through the screening process.¹²³

Grand Juries also served an important community function. Comprised of leading citizens, the grand jury served the community by identifying problems.¹²⁴ Grand juries played a critical role as the United States transitioned from colony to nation.¹²⁵ Grand juries oversaw local government functioning and held local officials accountable for their actions.¹²⁶ They did this through "presentments" whereby the grand jury recommended criminal charges based upon the grand jury's own investigation.¹²⁷ Like the Justices of the Peace, the investigations grand juries performed entailed merely questioning witnesses that appeared before the grand jury.¹²⁸ Like indictments, any presentment alleging criminal activity went to a legally trained attorney.¹²⁹

The legally-trained attorney was responsible for drafting the formal legal document that charged the defendant.¹³⁰ These attorneys ranged in ability. Some, such as those in New York, were prominent attorneys who listed the state among their clients.¹³¹ Others lacked significant legal ability and could not find work elsewhere.¹³² Once they drafted the indictment, the attorney handled administrative

¹¹⁷ HURST, *supra* note 59, at 147-148; Steinberg, *supra* note 54, at 6.

¹¹⁸ STEINBERG, *supra* note 54, at 6.

¹¹⁹ INGRAM, *supra* note 107, at 26-29.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941 (1964).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ JACOBY, *supra* note 8, at 18.

¹²⁸ YOUNGER, *supra* note 124, at 11.

¹²⁹ JACOBY, *supra* note 8, at 18-19.

¹³⁰ David J. Bodenhamer, FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY (1992).

¹³¹ McConville and Mirsky, *supra* note 108, at 453.

¹³² Rita W. Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEG. HIST. 304, 310-311 (1958).

duties, including scheduling the case, receiving the case file, and determining which cases received priority.¹³³ This was the extent of their discretion, however. They had no interest in the outcome of the case.¹³⁴ In fact, intervening in the case was perceived as the state sanctioning the “prosecutor’s” case.¹³⁵ This was only warranted in cases of “great public interest.”¹³⁶ Yet these attorneys did perform some legal work. They presented cases to the grand jury and, if no private attorney represented the “prosecutor,” then the publicly appointed attorney would represent the “prosecutor.”¹³⁷ If no private attorney appeared for the defense either, the publicly appointed attorney would represent both sides in the case.¹³⁸ Assuming private counsel appeared for the “prosecutor,” the publicly appointed attorney would prepare a case summary for the private attorney’s use during trial.¹³⁹

Like the Justices of the Peace, these publicly appointed attorneys received income based on fees.¹⁴⁰ In some places, the public attorney received fees based on the number of cases proceeding through the courts.¹⁴¹ This type of arrangement incentivized minimal case screening and allowed litigants their day in court.¹⁴² Other places only allowed fees if a conviction resulted.¹⁴³ These places prioritized close case scrutiny and promoted victimless crimes where the proof did not rely as much upon witness attendance.¹⁴⁴ If the public attorney did not believe the case would result in a conviction, the public attorney did not pursue the case.¹⁴⁵

Jared Ingersoll, whose son would sign the United States Constitution, provides an example of how these public attorneys functioned.¹⁴⁶ Ingersoll initially served as the King’s Attorney for New Haven County in Connecticut.¹⁴⁷ The office had been created in the early 1700s when there was concern about Connecticut’s loyalty to the Crown.¹⁴⁸ To demonstrate their loyalty, the Connecticut legislature adopted a statute appointing an attorney in each county to represent the Crown’s interests with particular emphasis on “prosecut[ing] and implead[ing] in the lawe all criminal offenders, and [doing] all other things necessary and convenient to suppress vice and immorality.”¹⁴⁹ When Ingersoll took office, he immediately increased the number of morals prosecutions.¹⁵⁰ This was the only aspect of the

¹³³ Bodenhamer, *supra* note 130, at 63; McConville and Mirsky, *supra* note 108, at 453-454; Andrew M. Siegel, *When Prosecutors Control Criminal Court Dockets: Dispatches on History and Policy from a Land Time Forgot*, 32 AM. J. CRIM. L. 325 (2005).

¹³⁴ Steinberg, *supra* note 36, at 575-576.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ McConville and Mirsky, *supra* note 108, at 453-454; Steinberg, *supra* note 36, at 577-78.

¹³⁸ Steinberg, *supra* note 36, at 577-578.

¹³⁹ McConville and Mirsky, *supra* note 108, at 453-454.

¹⁴⁰ PARRILLO, *supra* note 96, at 255-256.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See generally, GIPSON, *supra* note 52.

¹⁴⁷ *Id.* at 46-48.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

work that Ingersoll could control. Victims initiated other criminal cases.¹⁵¹ While his emphasis on morals prosecutions did not garner him public support, it enhanced his reputation with Connecticut's ruling bodies.¹⁵² In May 1765 he was selected by the General Assembly as one of 34 Justices of the Peace and as a collector of the Stamp Act tax.¹⁵³

While the public attorneys participated in every case, most cases were litigated by attorneys hired by the "prosecutor" and the defendant. Attorneys and judges rode circuits together, appearing in each town multiple times throughout the year.¹⁵⁴ When the attorneys arrived in town, they would take cases from anyone who could afford their services.¹⁵⁵ This meant that in one case the private attorney might represent the defendant and, in the next, represent the "prosecutor." Much like the English barrister, these private attorneys did not identify themselves with one side or the other and simply presented the cases to the best of their ability.¹⁵⁶ William Rawle, a prominent Philadelphia attorney who would later become the United States Attorney for Pennsylvania, exemplifies this.¹⁵⁷ During parts of the 1780s, he maintained a journal about his law practice in which he recorded his daily activities.¹⁵⁸ Rawle described a case where he served as defense counsel. Rawle's client had assaulted and battered "a poor Ratcatcher."¹⁵⁹ Despite representing the defendant, Rawle seemed to sympathize with the victim, writing that his client "not very needfully assaulted and battered the poor Ratcatcher."¹⁶⁰ In his first case that day, Rawle represented Rogers, whom he referred to as a "vile fellow."¹⁶¹

One final actor occasionally appeared in the process: the state Attorney General. Prior to Independence, each colony had its own Attorney General.¹⁶² The Attorney General represented the English Attorney General in that particular colony and handled any matter necessary to protect the Crown's interests.¹⁶³ This included treason and revenue cases.¹⁶⁴ They also oversaw the work performed by other public officials and provided legal advice to the royal Governor.¹⁶⁵ Following the Revolution, however, the Attorney General lost prestige because of the position's close relationship to the Crown.¹⁶⁶ Local officials assumed responsibility for all

¹⁵¹ See *supra* notes 86-98 and accompanying text.

¹⁵² GIPSON, *supra* note 52, at 52-57.

¹⁵³ *Id.*

¹⁵⁴ FRIEDMAN, *supra* note 57, at 92.

¹⁵⁵ *Id.*

¹⁵⁶ On the English Barrister, see William T. Pizzi, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO REBUILD IT (1999).

¹⁵⁷ Scott Ingram, *George Washington's Attorneys: The Political Selection of United States Attorneys at the Founding*, 39 PACE L. REV. 163 (2018).

¹⁵⁸ Rawle Family Papers, Pennsylvania Historical Society, Philadelphia, PA.

¹⁵⁹ William Rawle Journal, March 25, 1786, Rawle Family Papers, Pennsylvania Historical Society, Philadelphia, PA [photo 6170078]

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Cooley, *supra* note 132, at 309.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ JACOBY, *supra* note 8, at 18-19 (discussing the change to more local control over prosecution).

criminal prosecutions and the Attorney General only had the ability to supervise and advise.¹⁶⁷

B. RATIONALE FOR AND CRITIQUE OF THE PRIVATE PROSECUTION SYSTEM

Nothing required the colonial and early American criminal court system to function this way. The fact that it did so resulted from a confluence of factors. From an economic perspective, the private prosecution model proved cost efficient.¹⁶⁸ Litigants bore the financial burden and paid for the system.¹⁶⁹ Those employed by the system served only part-time and were compensated by the fees.¹⁷⁰ From a political perspective, the private prosecution model kept the state at arm's length, assuaging the citizenry's fears of governmental tyranny. As Steinberg noted, the prevailing ethos was that the government should not intervene in typical cases.¹⁷¹ Private litigants had the power to initiate and conclude cases at their discretion, meaning justice was in the community's hands, rather than the government's. From a social perspective, this was how the colonists wanted it. Prosecution was a local matter based on local values.¹⁷² They did not want outsiders dictating local priorities. As Ingersoll's example demonstrates, even in morals cases, vigorous enforcement did not lead to popular support.¹⁷³ Ingersoll served as a Crown representative.¹⁷⁴ To the people, this was too strong an intervention. Grand Juries also demonstrate this phenomenon when, during the Revolutionary Era, they refused to indict colonists protesting British policies.¹⁷⁵ Ultimately, the American system supplied informal, pragmatic dispute resolution. Combatting crime, as it is thought of today, was not a priority.

Even though this system emerged from the early American experience, the system had its critics. Complaints emerged about the public attorney, the Justice of the Peace, and the Grand Jury. People recognized the lack of legal talent in the public attorney's office.¹⁷⁶ They felt it gave paid defense counsel an unfair advantage in court.¹⁷⁷ Judges in the higher courts also complained about the Justices of the Peace and the Grand Jury.¹⁷⁸ The lack of formal legal training for these roles impaired the screening function by allowing too many unworthy cases to reach the formal court stages.¹⁷⁹

Social changes also necessitated systemic changes. Violence erupted in larger communities, overwhelming the private prosecution model.¹⁸⁰ This caused

¹⁶⁷ *Id.*

¹⁶⁸ LANGBEIN, *supra* note 33, at 11-12.

¹⁶⁹ *Id.*

¹⁷⁰ PARRILLO, *supra* note 96, at 256.

¹⁷¹ Steinberg, *supra* note 36 at 575-576 (government interest in the outcome).

¹⁷² Steinberg, *supra* note 65, at 234-38.

¹⁷³ GIPSON, *supra* note 52, at 52-57.

¹⁷⁴ *Id.*

¹⁷⁵ YOUNGER, *supra* note 124, at 27-28.

¹⁷⁶ Robert Ireland, *Privately Funded Prosecution of Crime in Nineteenth Century United States* 39 AM. J. OF LEG. HIST. 43, 43-46 (1995).

¹⁷⁷ *Id.* and Ramsey, *supra* note 37, at 1328-31.

¹⁷⁸ STEINBERG, *supra* note 54, at 57.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

people to seek greater governmental involvement in law enforcement.¹⁸¹ Rather than the informal, part-time law enforcement of the colonial and early American eras, professional police forces developed in the mid-nineteenth century.¹⁸² The new police forces resulted in a sharp increase in arrests.¹⁸³ The minor public attorney function could not handle the significant caseload increase.¹⁸⁴ The victim became less relevant as a new phenomenon of public prosecution emerged.¹⁸⁵ They were paid by the government, rather than by fees and obtained their jobs through election rather than appointment.¹⁸⁶ This change led to political, rather than private, prosecution.

II. POLITICAL PROSECUTORS

As the nineteenth century progressed two significant changes forced the “public attorney” to transform into a political prosecutor. First, citizens demanded a greater voice in who served in judicial and law enforcement roles.¹⁸⁷ Rather than appoint judges and sheriffs, people argued that those functions should be elected.¹⁸⁸ Due to their association with the courts, the “public attorney” rode along on the wave of democratic accountability.¹⁸⁹ Second, in response to increasing public disorder, urban areas created full-time, professional police forces who were authorized to arrest those violating the law.¹⁹⁰ This created both increased caseloads and a desire for more state involvement in crime control.¹⁹¹ These two changes made the “public attorney” elected, brought the position more discretion, and necessitated more staff. As a result, by the mid-nineteenth century, political parties controlled the prosecution function, making prosecutors subject to party control.

A. SOCIETAL CHANGE IN THE NINETEENTH CENTURY

As the nation expanded west during the nineteenth century, the “public attorney” function traveled with it. States statutorily authorized the role and devised different appointment methods.¹⁹² A few retained appointment by local judges.¹⁹³ Other states permitted the governor, the legislature or the state supreme court to appoint the prosecutor.¹⁹⁴ In these latter states, many perceived it as a governmental attempt to exert political influence over local concerns.¹⁹⁵ They argued for local prosecutorial elections to insulate prosecutors from state-level partisan political battles.¹⁹⁶

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ JACOBY, *supra* note 8, at 21-2.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Michael J. Ellis, *The Origins of the Elected Prosecutor* 121 YALE L.J. 1528 (2012).

¹⁹⁰ STEINBERG, *supra* note 54, at 29.

¹⁹¹ *Id.*

¹⁹² Ellis, *supra* note 189, at 1537-38.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

At the same time, the nation moved towards greater democracy.¹⁹⁷ Few public officials were actually elected. To make public officials more accountable to the people, the public demanded that local officials such as judges and county sheriffs be elected.¹⁹⁸

Significant social upheaval corresponded with the move toward more democratic accountability for public officials, especially in urban areas.¹⁹⁹ Places relying on privately initiated prosecution discovered that the private prosecution model failed to adequately address the problem.²⁰⁰ As a result, people resorted to increased state control over the law enforcement function by creating professional police forces.²⁰¹ Professor Steinberg identifies two important consequences of this decision.²⁰² First, it created two distinct groups of people: those under suspicion of public disorder and those who were not.²⁰³ Naturally, the police focused on the former.²⁰⁴ Second, these new police forces possessed the power to arrest.²⁰⁵ This meant that the state, not a private citizen, became the initiating force behind criminal cases.²⁰⁶

To deal with the large influx of cases, the “public attorney” role had to expand to become the prosecutor. This appears in court decisions from the transitional time period. In an 1809 Kentucky assault case, the grand jury’s indictment failed to include the prosecutor’s name as required by statute.²⁰⁷ In granting the defendant’s motion to identify the prosecutor or, in the alternative, dismiss the case, the court wrote:

To prevent vexatious prosecutions...by those who would willingly convert the process of the commonwealth into an engine of malice and private resentment, provided they could stand behind the curtain secure from costs, it has been enacted...that “the name and surname of the prosecutor, and the town and county in which he shall reside, with his title and profession, shall be written at the foot of every bill of indictment...”²⁰⁸

By 1847, in Mississippi, a defendant indicted for forgery raised the same objection.²⁰⁹ The court noted that the public prosecutor has the statutory duty to identify the prosecutor’s identity on each indictment.²¹⁰ The court defined an indictment as “a criminal prosecution, based on the written accusation of either a private or a public prosecutor, and preferred to the grand jury, and by them indorsed on the back “a

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Steinberg, *supra* note 65, at 242.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Commonwealth v. Hutcheson*, 4 Ky. 355 (Ky. App. Ct., 1809).

²⁰⁸ *Id.* at 355.

²⁰⁹ *Morris v. State of Mississippi*, 16 Miss. 762 (Miss. 1847).

²¹⁰ *Id.*

true bill,” and returned into court.”²¹¹ Recognizing that the District Attorney is the prosecutor, the court wrote:

the record does not show that there was any prosecutor other than the district-attorney, whose name is attached to the indictment. ...[I]f there were no private prosecutor the district-attorney would not be authorized to mark one on the indictment. ...It is not essential to the validity of an indictment, or presentment, that the same should be signed by the district-attorney.... The statutes of this state do not require the district-attorney to sign his own name to any presentment or indictment. They are simply required to “appear and prosecute for the state, in their respective districts, in all criminal prosecutions,” [citation omitted] “and to attend the deliberations of the grand jury, &c. and give them the necessary information touching the law and the facts of each case,” [citation omitted]. If, therefore, the district-attorney signs his own name to an indictment it is a voluntary act, and an assumption of the responsibility of the prosecution.²¹²

As these two cases demonstrate, by the mid-nineteenth century, courts recognized that public prosecutors acquired more authority, supplanting private prosecutors, even in cases where the private prosecutor may not have desired to proceed.

The switch to popular election made public prosecutors an instrument of social control, a tool of the state.²¹³ During this time, working on behalf of the state meant working on behalf of political parties. No one worked for the government who did not also work for the controlling political party. By aligning themselves with a wider political organization, prosecutors had to consider more than the case’s merits or the victim’s interests. Political considerations became a significant factor in discretionary decision-making. Not only did the citizenry embrace this change but demanded vigorous prosecution.²¹⁴

During this time, prosecutors gained discretionary decision-making authority in charging and in plea bargaining. Prosecutors became the grand jury’s gatekeeper.²¹⁵ Whenever the grand jury heard cases, the prosecutor examined witnesses and explained the law to the grand jurors.²¹⁶ This permitted them to influence how the grand jury perceived the case. If the grand jury decided in a manner contrary to the prosecutor’s wishes, the prosecutor could decide not to pursue the indictment.²¹⁷ Once a case reached court, prosecutors offered defendants leniency in exchange for a guilty plea.²¹⁸ Showing leniency insulated defendants from the harshness of the state-dominated prosecutorial apparatus.²¹⁹ With these powers, prosecutors effectively assumed both the grand jury and justice of the peace functions.

²¹¹ *Id.*

²¹² *Id.*

²¹³ Mary E. Vogel, *The Social Origins of Plea Bargaining: Conflict and Law in the Process of State Formation, 1830-1860* 33 L. & Soc. REV. 161 (1999).

²¹⁴ Ramsey, *supra* note 37, at 1336-42.

²¹⁵ McConville & Mirsky, *supra* note 108, at 464-67.

²¹⁶ *Id.*

²¹⁷ *Id.* and Steinberg, *supra* note 88, at 755.

²¹⁸ Vogel, *supra* note 213, at 166-68, 218-19.

²¹⁹ *Id.* Of course, this was more of an illusion as prosecutors were the instruments of social control by the State.

Different prosecutors used their discretionary authority differently. Though this discussion focuses on state-level prosecutors, a federal prosecution during this time period illustrates how changing prosecutors could change outcomes. In St. Louis, during the early 1870s, a group of whiskey distillers and United States government revenue collectors conspired to defraud the United States government of millions of dollars of revenue.²²⁰ Much like state and local government, federal government employment relied upon political affiliation.²²¹ This meant that the United States Attorney for the Eastern District of Missouri, who was responsible for prosecuting the frauds, showed little interest in prosecuting his political associates.²²² His reluctance to do so led to his removal and resulted in an outsider's appointment.²²³ The outsider aggressively pursued the frauds until he unearthed evidence against the President's personal secretary.²²⁴ Simply changing who filled the role, changed the case's trajectory.

Cases like this helped political party leaders discover that utilizing prosecutorial political authority could advance the party's political interests.²²⁵ Prosecutors had the ability to disperse favors and enforce party discipline.²²⁶ They could indict political rivals, threaten indictments against those who considered opposing the party, and ignore indictments returned against party loyalists.²²⁷ Professor Steinberg recounts how, after a newly elected District Attorney took office, his staff found hundreds of indictments that never made it to court.²²⁸ Instead, the indictments remained, awaiting use should the indicted defendant defy party wishes.²²⁹ They could also appeal to key segments of the electorate through their decisions.²³⁰ By showing leniency, they could gain popular support when necessary.²³¹ Obtaining guilty pleas also had the ancillary benefit of increasing the office's conviction rate.²³²

Of course, the political party could only use this power so long as the voters recognized the prosecutor's successes. This brought prosecutors squarely into the public sphere.²³³ News media reported how prosecutors handled criminal cases in court and whether or not they obtained guilty verdicts.²³⁴ Conviction equaled success.²³⁵ This meant that, to boost conviction rates, prosecutors targeted those

²²⁰ RON CHERNOW, GRANT, (2017) 796-808.

²²¹ See generally ARI HOGENBOOM, OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865-1883 (1968).

²²² Scott Ingram, *Politics of Justice: Presidents Trump and Grant and the Problem of Investigating the Executive Branch*, (November 1, 2018). Available at SSRN: <https://ssrn.com/abstract=3363358> or <http://dx.doi.org/10.2139/ssrn.3363358>

²²³ *Id.*

²²⁴ *Id.*; See also CHERNOW, *supra* note 220, at 796-808.

²²⁵ Vogel, *supra* note 213, at 230-232 and Ramsey, *supra* note 37, at 1338-1341.

²²⁶ Moley, *supra* note 38, at 74.

²²⁷ Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 L. & SOC. REV. 273 (1979); Steinberg, *supra* note 88, at 755; Ramsey, *supra* note 37 at 1338-1341.

²²⁸ Steinberg, *supra* note 88, at 755.

²²⁹ *Id.*

²³⁰ Vogel, *supra* note 213, at 233-35.

²³¹ *Id.*

²³² McConville and Mirsky, *supra* note 108, at 460, 465-66; Pound, *supra* note 38, at 183-84.

²³³ McConville and Mirsky, *supra* note 108, at 465-66; Haller, *supra* note 227, at 277-78.

²³⁴ Haller, *supra* note 227, at 277-278; Ramsey, *supra* note 37, at 1340-42.

²³⁵ McConville and Mirsky, *supra* note 108, at 465-66.

without financial resources or the social power to defend themselves.²³⁶ Actual guilt or innocence was secondary.²³⁷ This was particularly important in high profile cases where a conviction could launch the prosecutor to higher office.²³⁸

In her article on the historical development of public prosecutors, Carolyn Ramsey describes the political duel that occurred between two assistant prosecutors who sought election when the incumbent decided not to run.²³⁹ The two assistants jointly pursued a prosecution against several alderman who allegedly accepted bribes during the construction of a Broadway street car line.²⁴⁰ One assistant prepared the cases and the other delivered many of the closing arguments.²⁴¹ When they opposed each other in the election, “respectable” newspapers such as the *New York Times* endorsed the assistant who prepared the cases and labeled the other as associated with the political machines.²⁴² The latter ultimately prevailed and proved the *New York Times* correct when he dismissed the remaining aldermanic bribery cases.²⁴³ The machine-backed prosecutor also refused to act on indictments, making decisions based on personal benefit and leniency.²⁴⁴ When the prosecutor asserted that he intended to save scarce prosecutorial resources for the most significant cases, the media was not convinced.²⁴⁵ At the next election, the assistant who prepared the bribery cases again ran, again associating his former colleague with the political machines.²⁴⁶ At the same time, the challenger asserted his independence from the political machines.²⁴⁷ These two electoral contests further reveal the political prosecutor at work. The winner of the first contest “represented” the less respectable portion of society, those Professor Steinberg identified as the “suspect” group.²⁴⁸ Conversely, the challenger “represented” the respectable portion of society.²⁴⁹

Beyond their discretionary power, prosecutor offices offered political parties a “dumping ground” for political loyalists.²⁵⁰ Increased caseloads required assistant prosecutors. Like those elected, those who worked in the office possessed political ambitions. Starting as an assistant could lead to advancement as the elected prosecutor.²⁵¹ To ensure the assistants remained loyal, those hired had to have proper political connections.²⁵² These assistants shared certain qualities. They entered the office early in their career and remained a short time before advancing to better

²³⁶ Steinberg, *supra* note 88, at 755.

²³⁷ *Id.*

²³⁸ MOLEY, *supra* note 38, at 75-80; Vogel, *supra* note 213, at 235.

²³⁹ Ramsey, *supra* note 37, at 1347-51.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*; Steinberg, *supra* note 65, at 242.

²⁴⁹ Ramsey, *supra* note 37, at 1347-51.

²⁵⁰ Steinberg, *supra* note 88, at 755.

²⁵¹ Vogel, *supra* note 213, at 218.

²⁵² Steinberg, *supra* note 88, at 755.

positions.²⁵³ One reason for this was that the assistants received little pay.²⁵⁴ Instead of pay, they received political rewards when they influenced the outcomes of cases or protected their party's political interests.²⁵⁵ Ultimately, the low pay and low prestige created an office of people who knew more about politics than law.²⁵⁶

B. CRITIQUES AND REFORM

Not surprisingly, the major critique of the political prosecutor was the connection to the political system. As demonstrated through hiring practices and decision-making considerations, partisan, electoral politics played a considerable role. Those supporting the favored party received benefits while those opposed faced persecution. Interestingly, however, there appears to be a tenuous balance between the competing partisans that resulted in both the "respectable" and the "suspect" classes gaining power, albeit at different times.

Recognition that partisan allegiance could have a harmful effect on justice administration appeared quickly. For example, in Ohio, newspapers reported how one prosecutor, in the months before an election, refused to prosecute political allies.²⁵⁷ Aware of such instances, one Ohio legislator questioned whether selecting prosecutors was better left to someone other than the electorate.²⁵⁸ While nothing resulted from the legislator's inquiry, Ohio newspapers regularly reported that prosecutors acted on behalf of political allies rather than in the interests of the people as a whole.²⁵⁹

People also quickly recognized that hiring people based on political affiliation rather than legal ability resulted in ineffective and incompetent representation. This meant that in the most serious cases the victim or victim's family would hire their own representation to prosecute the case. This private prosecutor worked with the public prosecutor, but the private prosecutor took charge.²⁶⁰ In a sense, the private prosecutor model merged with the political prosecutor model. Savvy defense attorneys took note of this, however, and argued that the private prosecutor's interest was vengeance rather than truth or justice.²⁶¹ Once defense attorneys began making these arguments, many state legislatures noticed and responded by prohibiting victims from hiring private prosecutors.²⁶²

Newspapers and legislators were not the only people who observed the flaws presented by political prosecution; defendants did as well. Burdened with cases from both police and political overseers, prosecutors confronted significant caseload pressure. As Professor Steinberg notes in his study of the transition away from political prosecution, a newly elected prosecutor found unacted upon indictments

²⁵³ MOLEY, *supra* note 38, at 87.

²⁵⁴ *Id.*

²⁵⁵ Haller, *supra* note 227, at 277-78.

²⁵⁶ MOLEY, *supra* note 38, at 74-87.

²⁵⁷ Ellis, *supra* note 189, at 1547.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Ramsey, *supra* note 37, at 1329-31.

²⁶¹ *Id.*

²⁶² Andrew Sidman, *The Outmoded Concept of Private Prosecution*, 25 AM. U. L.R. 754, 768-73 (1976).

simply laying around the office.²⁶³ To reduce the caseload pressure, prosecutors made deals with defendants. Defendants learned that the system was not about presenting a defense or administering justice but about manipulating the system to get the best deal possible.²⁶⁴

Despite these critiques, the prosecutor's political connection provided some measure of representation to all societal groups. The political machines recognized the prosecutor's discretionary power and sought to use it to the machine's advantage. This made prosecutorial elections highly contested. The "respectable" class had their candidate and the "suspect" class had their candidate. Whichever candidate prevailed represented their political patron's interests. As Professor Ramsey noted in her study of New York City prosecutors, when the "suspect" class's candidate won, the prosecutor did not pursue as many criminal cases.²⁶⁵ While the "respectable" class decried this as laziness and inattention, the "suspect" class argued that they wished to preserve resources for the most serious cases.²⁶⁶

By the end of the nineteenth century, the Progressive movement began, and its sweeping social agenda affected criminal prosecution as well.²⁶⁷ Demand for an independent prosecutor who would use discretion for the public good increased.²⁶⁸ This transformed the prosecutor into a crime fighter who protected the public and provided law and order.²⁶⁹ The transformation emerged from private organizations who committed themselves to rooting out corruption and immorality.²⁷⁰ They investigated cases and brought them to the prosecutors.²⁷¹ They also created public pressure, making it difficult for prosecutors to refuse the cases.²⁷² These groups received assistance from inside the prosecutor's office too. Professor Steinberg recounts how William Travers Jerome utilized his family name and its connection to Tammany Hall to get a job in the District Attorney's office after graduating from law school.²⁷³ He did not perform as expected when he pursued an assault case against a Tammany district boss.²⁷⁴ While forced to resign, he would later return as an independent prosecutor, having learned from his experience.²⁷⁵

III. PROFESSIONAL PROSECUTORS

As the twentieth century dawned, people such as New York District Attorney William Travers Jerome, ushered in a new perspective on criminal prosecution.

²⁶³ Steinberg, *supra* note 88, at 755.

²⁶⁴ Haller, *supra* note 227, at 277.

²⁶⁵ Ramsey, *supra* note 37, at 1347-51.

²⁶⁶ *Id.*

²⁶⁷ Steinberg, *supra* note 88, at 755. *See also* Bruce A. Green and Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U.L. REV. 805 (2020).

²⁶⁸ Steinberg, *supra* note 88, at 755.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.* On Tammany Hall, *see generally* TERRY GOLWAY MACHINE MADE: TAMMANY HALL AND THE CREATION OF MODERN AMERICAN POLITICS (2014).

²⁷⁴ Steinberg, *supra* note 88, at 755.

²⁷⁵ *Id.*

They established some degree of independence from the political machines.²⁷⁶ Rather than party demands, prosecutors acted based on their conception of justice, becoming “ministers of justice.”²⁷⁷ As the century progressed, the United States Supreme Court required criminal prosecutions adhere to certain procedural protections.²⁷⁸ To obtain convictions, prosecutors had to ensure courts provided defendants these rights. Finally, the progression to procedural rights correlated with career prosecutors. Career prosecutors became specialists and devoted their efforts to making criminal prosecution more efficient. This meant screening out cases with insufficient evidence and learning to improve evidence collection and case presentation. By the end of the twentieth century, people argued that prosecutors had become too powerful and too disconnected from the communities they serve.

A. TWENTIETH-CENTURY INDEPENDENCE

Throughout the twentieth century, prosecutors, for the most part, disconnected themselves from the political connections that dominated their 19th-century decision-making. They established their independence by taking more control over their charging authority. Over time, prosecutors developed strategies to utilize their discretion efficiently.

Public demands for increased morals prosecutions forced prosecutors to adapt.²⁷⁹ Private agencies investigated and presented cases with strong evidence to prosecutors.²⁸⁰ It did not take long for prosecutors to realize they had more success with “good” cases than prosecuting every case the police brought to them.²⁸¹ This added layers of complexity to the prosecution function. Roscoe Pound and Raymond Moley both observed this in the twentieth century’s early decades. Pound perceived the American prosecutor as combining investigative, charging, preparing, and advocating functions.²⁸² He noted that previously the victim, attorney general, solicitor and advocate from the English system performed these diverse functions.²⁸³ Similarly, Moley noted prosecutors must possess both the investigator’s skills and the lawyer’s skills.²⁸⁴ To accomplish these tasks, prosecutors needed to organize

²⁷⁶ This was not total independence from political machines. Even as prosecutors became more professional, they still had to stand for election. JACOBY, *supra* note 8, at xxi.

²⁷⁷ On ministers of justice, *see generally* Bennett L. Gershman, *Hard Strikes and Foul Blows: Berger v. United States 75 Years After*, 42 LOY. U. CHI. L.J. 177 (2010). Bruce A. Green, *Why Should Prosecutors Seek Justice?*, 26 FORDHAM URB. L. J. 607 (1999).

²⁷⁸ A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968); Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319 (1977); Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 UNIV. MICH. J. L. REFORM 591 (1989); and Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L. J. 1 (1995).

²⁷⁹ Steinberg, *supra* note 88, at 755, 768-71.

²⁸⁰ *Id.*

²⁸¹ Orvill C. Snyder, *District Attorney’s Hardest Task*, 30 J. CRIM. L. & CRIMINOLOGY 167 (1939) (prosecuting every case is not efficient or desirable).

²⁸² POUND, *supra* note 38, at 182.

²⁸³ *Id.*

²⁸⁴ MOLEY, *supra* note 38, at 48-52.

their office, acquire permanent personnel, and divide labor.²⁸⁵ These requirements opened the door for professional prosecutors as most attorneys entering office did not enter office with such things.

Courts also quickly noticed prosecutors possessed significant charging discretion and how prosecutors used this discretion impacted the reliability of trials.²⁸⁶ While other courts referenced this concern first, the United States Supreme Court most famously commented about the potential problem in *Berger v. United States*.²⁸⁷ The United States government charged Berger and others with counterfeiting bank notes.²⁸⁸ According to the Supreme Court, the government did not have a strong case.²⁸⁹ During the trial, the assistant United States Attorney presenting the case engaged in several foul blows.²⁹⁰ Most focused on a particular witness whom the prosecutor believed would connect Berger with the conspiracy.²⁹¹ During the testimony, the prosecutor misstated facts, put words into the witness's mouth, stated facts in questions without evidentiary support, and then cross examined based on these unsubstantiated statements.²⁹² The prosecutor highlighted the cross examination during his closing argument.²⁹³ According to the Court, "The prosecuting attorney's argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury."²⁹⁴ Following this conclusion, the Court turned to the prosecutor's role.²⁹⁵ Justice Sutherland wrote:

The United States Attorney 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.²⁹⁶

Sutherland continued,

He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.²⁹⁷

While this would eventually be read as encompassing a general duty, Justice Sutherland, in the next sentence, turned to the prosecutor's role in court, stating:

²⁸⁵ POUND, *supra* note 38, at 183-184.

²⁸⁶ Gershman, *supra* note 277.

²⁸⁷ *Berger v United States*, 295 U.S. 78 (1935).

²⁸⁸ *Id.* at 79-80.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 84-89.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused, when they should properly carry none.²⁹⁸

Consequently, the Court's concern was with a prosecutor's trial conduct and not anything outside of that context.

Following *Berger*, prosecutors became "ministers of justice" but what that meant for how prosecutors should perform their role proved ambiguous. Justice Sutherland recognized the concomitant duties of aggressive prosecution and protecting innocence.²⁹⁹ Legal scholars attempted to discern the balance. Some presented clear duties: ascertain the facts, convict the guilty and protect the innocent from conviction.³⁰⁰ Others saw more ambiguity and imposed greater burdens, including ensuring that the basic element of an adversarial process appear in each trial.³⁰¹ Still others prescribed a more nebulous formulation, placing prosecutors somewhere in the middle of a neutral judge, an advocate, and a defense attorney.³⁰²

If legal scholarship created confusion, then prosecutorial practice did little to bring clarity. Social scientists observed prosecutorial behavior and recognized that different prosecutors perceived their role differently, striking inconsistent balances between their advocacy role and their minister of justice role. Jacoby, in her study of multiple prosecutor offices, observed that some offices adopted a conservative, or legalistic, approach to their office.³⁰³ They rarely employed discretion and prosecuted nearly every case presented to the office.³⁰⁴ This prosecutor is a remnant of the political prosecutor. A second category exemplified the professional prosecutor, who managed to switch roles as the criminal process progressed.³⁰⁵ At the outset they played a judicial role, determining whether a given case was worthwhile prosecuting.³⁰⁶ Then, once the case entered the court system, switched to an advocate.³⁰⁷ Even within this category, however, prosecutors struck the balance differently. Some saw themselves in a more adversarial posture, promoting "law and order" and "public safety."³⁰⁸ In San Diego, California, during the 1970s, individual prosecutors could exercise little discretion when resolving cases.³⁰⁹ All plea negotiations had to be

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ Karen E. Holt, *Hard Blows and Foul Ones: The Limited Bounds on Prosecutorial Summation in Tennessee*, 58 TENN. L. REV. 117 (1990)

³⁰¹ Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

³⁰² Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interest in Prosecutors' Offices*, 22 CORNELL J. L. & PUB. POL'Y 53 (2012).

³⁰³ JACOBY, *supra* note 8, at xxii.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ Pamela Utz, *Two Models of Prosecutorial Professionalism*, in THE PROSECUTOR 99-124 (McDonald, ed. 1979).

³⁰⁹ *Id.*

approved by high-level assistants.³¹⁰ Only rarely did such negotiations occur.³¹¹ By contrast, in Alameda County, California, during the same time period, prosecutors adopted a “magisterial” approach.³¹² Prosecutors embraced their ability to reconsider cases as the system progressed.³¹³ They negotiated cases in moderated and objective fashion.³¹⁴ A third model, which foresaw how prosecutors would expand upon their discretionary authority, cast prosecutors as policymakers who used their position for social, economic, legal or political change.³¹⁵

As prosecutors sought to balance these dual roles, the United States Supreme Court redefined criminal procedure. Its decisions provided criminal defendants protections and vacated convictions when protections were not provided. These included the right to counsel, followed by the requirement that counsel be effective.³¹⁶ It included the requirement that prosecutors provide the defense with exculpatory information.³¹⁷ The Court also created a whole body of search and seizure law and confession law.³¹⁸

These procedural protections further complicated the prosecutorial decision-making calculations. New decisions regarding search and seizure and confessions required prosecutors to further oversee investigative activity.³¹⁹ They became counselors to law enforcement, advising them on which practices were constitutional and which were not.³²⁰ Not all law enforcement agencies heeded this advice, however, and some agencies became more trusted than others.³²¹ Which agency conducted the investigation could affect the charging decision.

The changing rules also proved challenging for prosecutors. Complaints about misconduct emerged, especially in the disclosure of exculpatory evidence. Prosecutors who adopted a win-at-all-costs mentality suppressed exculpatory evidence, hoping to gain trial advantage.³²² Other prosecutors struggled to apply the discovery rules to individual cases.³²³ This proved especially challenging because,

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ Mellon et al., *supra* note 8, at 53, 80.

³¹⁶ Gideon v. Wainwright, 372 U.S. 335 (1963) and Strickland v. Washington, 466 U.S. 668 (1984).

³¹⁷ Brady v. Maryland, 373 U.S. 83 (1963).

³¹⁸ See e.g. Katz v. United States, 389 U.S. 347 (1967), Miranda v. Arizona, 384 U.S. 436 (1966).

³¹⁹ Allen F. Anderson, *The Police, The Prosecution, and Plea Negotiation Rates: An Exploratory Look*, 12 CRIM. JUST. REV. 35 (1987), Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. R. 749 (2003).

³²⁰ *Id.*

³²¹ Carl P. Stover, *Prosecution in Middle County: An Application of Organization Theory to Criminal Justice*, 6 CRIM. JUST. REV. 26 (1981).

³²² See e.g. Athelia Knight, *1983 Murder Conviction Overturned: Missouri Woman Freed as Judge Rules Prosecution was ‘Fundamentally Unfair’*, WASH. POST Aug. 4, 1999, p.A2. See generally Heather Schoenfeld, *Violated Trust: Conceptualizing Prosecutorial Misconduct*, 21 J. OF CONTEMP. CRIM. JUST. 250 (2005).

³²³ Steven Koppell, *An Argument Against Increasing Prosecutors’ Disclosure Requirements Beyond Brady*, 27 GEO. J. OF LEGAL ETHICS 643 (2014) and Brian P. Fox, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 425 (2013).

over time, the scope and complexity of criminal investigations exponentially increased the amount of information that was potentially discoverable.³²⁴ For example, in the 1993 World Trade Center Bombing case, once the trial had concluded, Assistant United States Attorney Patrick Fitzgerald learned about recorded statements made by one of the government's incarcerated witnesses to Bureau of Prisons officers.³²⁵ Erring on the side of caution, Fitzgerald disclosed the problem.³²⁶ To guard against this type of problem, some prosecutors adopted "open file" policies where defense attorneys could simply view the entire case file.³²⁷ With different prosecutors adopting different perspectives, people began defining the prosecutor's duty to do justice as consisting of doing nothing that would undermine any component of the American criminal justice system.³²⁸

Complex laws, complex cases, and complex decisions required people devote more time to criminal prosecution. Rather than merely try cases as private prosecutors did or remain until the next election as political prosecutors did, attorneys began making prosecution their career.³²⁹ This attracted more talented attorneys with better educations and no interest in political advancement.³³⁰ Incumbent elected prosecutors devoted more attention to hiring, preferring merit to political connections.³³¹ For example, in New York City, since 1942, there have been only four elected District Attorneys.³³² Similarly, since 1962, Orleans Parrish, in Louisiana, has had only five district attorneys.³³³ Jurisdictions like these

³²⁴ See generally Jenia I. Turner, *Managing Digital Discovery in Criminal Cases*, 109 J. CRIM. L. & CRIMINOLOGY 237 (2019).

³²⁵ Patrick J. Fitzgerald, *Thoughts on the Ethical Culture of a Prosecutor's Office*, 84 WASH. L. REV. 11 (2009).

³²⁶ *Id.*

³²⁷ Burke, *supra* note 23, at 2126-2127; Fox, *supra* note 323, at 429-430, 433; Steve Williams, *Implementing Brady v. Maryland: An Argument for a Pre-Trial Open File Policy* 43 U. CIN. L. REV. 889 (1974).

³²⁸ Rapping, *supra* note 41, at 518-19, 527-28.

³²⁹ J.J. Fishman, *Social and Occupational Mobility of Prosecutors in New York City*, in THE PROSECUTOR (William McDonald ed., 1979).

³³⁰ Steinberg, *supra* note 88, at 772; and Fishman, *supra* note 329, at 245-50.

³³¹ Fitzgerald, *supra* note 325, at 18; Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y.L. SCH. L. REV. 69 (2019).

³³² Frank Hogan served from 1942-1974. Robert Morgenthau served from 1975-2009. Cyrus Vance served from 2010 to 2021. Alvin Bragg succeeded Vance after the 2021 election. Prior to Hogan, the longest anyone had served as New York District Attorney was eight years, Hugh Maxwell from 1821-1829. New York District Attorney's Office, *History of the Office*, <https://www.manhattanda.org/about-the-office/history-of-the-office/> (last visited Nov. 1, 2023).

³³³ Jim Garrison served from 1962-1973. Harry Connick, Sr. served from 1974-2003. Eddie Jordan served from 2003-2007. Leon Cannizarro served between 2008-2021. In 2021, Jason Williams was elected to succeed Cannizarro. *Harry Connick, Sr.* Wikipedia, https://en.wikipedia.org/wiki/Harry_Connick_Sr. (viewed Jan 7, 2024); *Eddie Jordan (attorney)*, Wikipedia, (viewed Jan 7, 2024); Mike Pearlstein, *New Orleans DA Leon Cannizarro retires with a complicated legacy after 2 terms* 4WWL News, July 24, 2020 (<https://www.wvltv.com/article/news/crime/new-orleans-da-leon-cannizarro-retires-with-a-complicated-legacy-after-2-terms/289-d4fdcccf-3c28-4ff5-96c6-20b3f1bacd20>); DISTRICT ATTORNEY WILLIAMS, Orleans Parish District Attorney, <https://orleansda.com/district-attorney-williams/> (viewed Jan 7, 2024). Both New York and Orleans Parish

demonstrate not only the careerist nature of prosecution that emerged but how prosecutors disconnected themselves from partisan political battles and rendered prosecutor elections relatively meaningless.³³⁴

As these independent, professional prosecutors took office, they professionalized their offices. Offices moved from part-time assistants to full-time assistants.³³⁵ They also created internal office structures to channel and oversee prosecutorial decision-making, particularly in case screening.³³⁶ Some offices separated charging units from trial units. This separated the dual roles of magistrate and advocate.³³⁷ Yet, by focusing their attention on the charging decision, questions arose about how prosecutors reached this decision. Some questioned whether a prosecutor's personal opinion on guilt should matter.³³⁸ Other prosecutors differed about which cases were "worth" pursuing.³³⁹ Other offices avoided these questions by establishing vertical prosecution units that specialized in certain crime types.³⁴⁰ Some units focused on crimes such as sex crimes or homicide.³⁴¹ Prosecutors who worked in these areas became subject-matter experts in their case types.³⁴² These divisions occurred more in urban jurisdictions, rather than rural, because urban offices had more cases and more assistants.³⁴³

Ultimately, while political prosecutors were associated with their political activity, professional prosecutors were identified as law enforcers.³⁴⁴

B. CRITIQUES AND REFORM

Critics focused on the prosecutor's law enforcement mentality in three ways. First, they asserted that prosecutors possessed too much power and needed to be

pale when compared to Paul Ebert who served as Commonwealth Attorney for Prince William County, Virginia, from 1968 to 2019 without interruption. See TRANSCRIPT OF ORAL HISTORY INTERVIEW WITH PAUL EBERT, Prince William County Office of Historic Preservation, https://www.pwcva.gov/assets/2023-12/Transcript%20of%20Oral%20History%20Interview%20with%20Paul%20Ebert_0.pdf (2023).

³³⁴ Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2008).

³³⁵ William F. Wessel, *From Cracker Barrell to Supermarket: Taking the Country Out of Prosecution Management* in THE PROSECUTOR, (William McDonald, ed., 1979).

³³⁶ *Id.*

³³⁷ Uviller, *supra* note 26, at 1716, 1718. See e.g. Wessel, *supra* note 335, at 141-42.

³³⁸ Alafair S. Burke, *Prosecutorial Agnosticism* 8 OHIO, ST. J. CRIM. LAW 79 (2010), Melilli, *supra* note 23, at 685.

³³⁹ Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining* 91 MARQ. L. REV. 183 (2007)

³⁴⁰ Dawn Beichner & Cassia Spohn, *Prosecutorial Charging Decisions in Sexual Assault cases: Examining the Impact of a Specialized Prosecution Unit*, 16 CRIM. JUST. POL. REV. 461 (2005).

³⁴¹ *Id.* See also Cook County State's Attorney's Office, Criminal Prosecution Bureau Divisions, <https://www.cookcountystatesattorney.org/criminal-prosecutions-bureau> and District Attorney's Office, NC Prosecutorial District 26, Office Structure, <https://charmckda.com/our-office/office-structure/>.

³⁴² Beichner & Spohn, *supra* note 340, at 462; David C. Pyrooz et al., *Gang-related Homicide Charging Decisions: The Implementation of a Specialized Prosecution Unit in Los Angeles*, 22 CRIM. JUST. POL'Y REV. 3 (2011).

³⁴³ JACOBY, *supra* note 8, at 62-71.

³⁴⁴ Melilli, *supra* note 23, at 688, 698.

restrained.³⁴⁵ Second, while the “minister of justice” model was to guide professional prosecutorial decision-making, it proved to be too ambiguous to be much use. Finally, by taking a professional approach, not considering the political implications of their decisions, prosecutors became too disconnected from the community and ultimately defined justice as securing conviction at all costs. Concern about the lack of community connection led prosecutors to focus on specific crime problems communities identified.

As prosecutors considered their role and comprehended their authority, professional prosecutors learned to leverage the system to their benefit. As this occurred, prosecutors tipped the balance between themselves and defense attorneys in the prosecutor’s favor.³⁴⁶ During the political stage, defense attorneys possessed greater ability and achieved greater success.³⁴⁷ As prosecutors became more professional, however, they became more skilled and began dominating the criminal court system.³⁴⁸ By tipping the balance in their favor, prosecutors established a system based on the presumption of guilt, rather than the presumption of innocence.³⁴⁹

Prosecutors employed various means to tip the courthouse balance of power in their favor. First, they gained prominence over police departments.³⁵⁰ Police departments became dependent upon prosecutors to file criminal charges in cases where the police made arrests. With prosecutors demanding quality cases, the police were forced to improve their evidence collection techniques and to work collaboratively with prosecutors to develop strong cases.³⁵¹ Prosecutors also used their charging discretion to acquire power. Taking advantage of new broadly-worded criminal laws passed by legislatures, prosecutors filed more cases.³⁵² The caseload increase severely impacted the quality of representation defense attorneys could provide.³⁵³ The large number of high-quality cases led defense attorneys to develop a plea bargain mentality.³⁵⁴ For prosecutors, a score-keeping mentality developed.³⁵⁵

³⁴⁵ See e.g. Davis, *supra* note 14, at 457-64.

³⁴⁶ Bennett L. Gershman, *The New Prosecutors*, 53 UNIV. PITT. L. REV. 393 (1991).

³⁴⁷ *Id.* and *supra*, section 2.A.

³⁴⁸ *Id.*

³⁴⁹ JaneAnne Murray, *A Perfect Prosecution: The State of New York v. Dominique Strauss-Khan*, 8 CRIM. L. & PHIL. 371 (2014).

³⁵⁰ Steinberg, *supra* note 88, at 755.

³⁵¹ Richman, *supra* note 319, at 778-786. Allen F. Anderson, *The Police, the Prosecution, and Plea Bargain Rates: An Exploratory Look*, 12 CRIM. JUST. REV. 35 (1987).

³⁵² Rapping, *supra* note 41, at 537.

³⁵³ William Lawrence, *The Public Defender Crisis in America: Gideon, the War on Drugs, and the Fight for Equality*, 5 UNIV. MIA. RACE & SOC. JUST. L. REV. 167 (2015) and Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771 (2010).

³⁵⁴ Abraham Blumberg, *The Practice of Law as a Confidence Game: Organizational Co-optation of a Profession*, 1 LAW & SOC. REV. 15 (1966); Gilbert Geis, *Revisiting Blumberg’s ‘The Practice of Law as a Confidence Game’*, 31 CRIM. JUST. ETHICS 31 (2012); Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975).

³⁵⁵ Kenneth Bresler, *I Never Lost a Trial: When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537 (1995); Catherine Ferguson-Gilbert, *It is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors*, 38 CAL. W. L. REV. 283 (2001).

Like the political prosecutors, professional prosecutors won re-election based on soaring conviction rates.³⁵⁶ Good prosecutors only filed good cases and secured convictions in those cases.³⁵⁷ The pressure to win pushed prosecutors to develop case processing strategies to induce guilty pleas.³⁵⁸ First, prosecutors overcharged cases by charging the most serious offense for which they had probable cause while knowing there was not proof beyond a reasonable doubt.³⁵⁹ These prosecutors then offered a “reduced” charge in exchange for a guilty plea.³⁶⁰ Risk-averse defendants entered guilty pleas.³⁶¹ Second, prosecutors imposed what some termed a “trial tax.”³⁶² By pleading guilty, defendants received a lesser sentence than if they elected to exercise their constitutional right to a trial. At times, the discount encouraged even factually innocent defendants to plead guilty.³⁶³

While prosecutors saw their advantageous use of the court process as justice, others perceived such practices as unjust. These divergent views highlighted the ambiguous nature of justice and that holding prosecutors to a “justice” standard provided little guidance for prosecutorial decision-making.³⁶⁴ Some saw convicting everyone as justice while others saw protecting the defendant’s rights as justice.³⁶⁵ Others critiqued the justice notion as failing to distinguish prosecutors from any other legal actor.³⁶⁶ At various times people referred to judges, police and all lawyers as ministers of justice.³⁶⁷ Ultimately, the notion of prosecutors as ministers of justice provided some broad aspirational goals but gave no criteria for how prosecutors should decide what is just in any particular case.³⁶⁸

Overall the move to professionalization disconnected prosecutors from the communities they purportedly served. Disparate notions of justice permitted prosecutors to explain any decision as “just.” Securing high conviction rates generally satisfied the public and assured re-election as often as the incumbent desired.³⁶⁹ The high volume of cases also meant that, for nearly every criminal

³⁵⁶ Ronald F. Wright, *supra* note 334, at 603-04; Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593 (2014); David A. Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. OF CRIM. LAW 647 (2016).

³⁵⁷ Catherine M. Coles, *Evolving strategies in 20th-century American prosecution*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 177 (2008).

³⁵⁸ Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717, 763-69 (2005).

³⁵⁹ Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701 (2014).

³⁶⁰ *Id.*

³⁶¹ Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

³⁶² Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313 (2019).

³⁶³ *Id.*

³⁶⁴ Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45 (1991).

³⁶⁵ *Id.*

³⁶⁶ Bresler, *supra* note 355, at 538-40.

³⁶⁷ *Id.*

³⁶⁸ R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor’s Ethical Duty to Seek Justice*, 82 NOTRE DAME L. REV. 635 (2006).

³⁶⁹ Wright, *supra* note 334, at 604-07.

case, few in the public even remotely knew what prosecutors did.³⁷⁰ During the political stage, prosecutors were accountable to the people through party affiliation. Voters knew electing a person as district attorney meant party loyalists would fill the assistant ranks.³⁷¹ Once party affiliation was removed, prosecutorial political activity dropped and the connection to community disappeared.³⁷² Ultimately, this means prosecutors had nothing holding them accountable for their decisions.³⁷³

What remained of the community connection led prosecutors to focus on particular crime problems. At different times, in different places, different prosecutors identified crime problems that they could address through prosecution. In New York, in the 1930s, Thomas Dewey, as district attorney, prioritized breaking up criminal rackets.³⁷⁴ In South Carolina, during the early 1990s, prosecutors targeted prenatal drug use by prosecuting mothers whose newborns tested positive for cocaine in their blood.³⁷⁵ This culminated in a move away from conviction rates and case filing numbers as measures of prosecutorial success.³⁷⁶ Prosecutors eventually placed more emphasis on their quasi-judicial role.³⁷⁷ This opened the door for proactive prosecutors who sought to re-establish their community connection without compromising their professional prosecutorial integrity.

IV. PROACTIVE PROSECUTORS

By the end of the twentieth century, prosecutors recognized the need to better connect with the community and realized that prosecution alone could not resolve community crime problems.³⁷⁸ Instead, prosecutors had to be more proactive. They had to learn from the community and take measures, outside traditional prosecution functions, to prevent criminal activity.³⁷⁹ This evolutionary phase channeled prosecutorial discretion into public policy.³⁸⁰ Criminal prosecution itself became part of broader crime prevention policies. This led to prosecutors working proactively in different areas. They testified before legislatures. They worked with multi-agency task forces to address specific crime problems. To aid this work, they created specialized units beyond focusing on specific crime types. They also worked with specific constituencies, neighborhoods, and problems. Finally, they initiated new “courts” designed to meet the needs of the defendants prosecuted.

³⁷⁰ Stuart A. Scheingold and Lynne A. Gresset *Policy, Politics and the Criminal Courts*, 12 AM. BAR FOUND. RES. J. 461 (1987).

³⁷¹ *Supra* notes 250-56 and accompanying text.

³⁷² Fishman, *supra* note 329, at 245-50.

³⁷³ Davis, *supra* note 14, at 439-43.

³⁷⁴ Mary M. Stolberg FIGHTING ORGANIZED CRIME: POLITICS, JUSTICE AND THE LEGACY OF THOMAS E. DEWEY (1995).

³⁷⁵ Karen J. Maschke, *Prosecutors as Crime Creators: The Case of Prenatal Drug Use*, 20 CRIM. JUST. REV. 21 (1995).

³⁷⁶ Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441 (2008).

³⁷⁷ Stanley Z. Fisher, *In Search of the Virtuous Prosecutor*, 15 AM. J. CRIM. L. 197 (1987).

³⁷⁸ Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321 (2002).

³⁷⁹ *Id.*

³⁸⁰ Mellon, JACOBY and Brewer, *supra* note 8, at 80-81.

A. PROSECUTORS IN THEIR COMMUNITIES

Prosecutors built upon their title as a jurisdiction's "chief law enforcement officer" to advise legislative bodies about criminal law and criminal justice policies that might better assist local communities. Prosecutors provided this advice directly and indirectly. Some legislators or government agencies approached directly. For example, in Oklahoma, the State Department of Human Services solicited prosecutorial input prior to proposing changes to the legislature.³⁸¹ Prosecutors also promoted their agenda through the media, influencing legislation indirectly. In the Bronx, prosecutors advocated for legislation that would give them authority to handle certain eviction cases in civil court.³⁸² They argued this would aid their mission to root out neighborhood crime problems.³⁸³ Prosecutors also provided testimony at legislative hearings. In one instance, the district attorney for Houston, Texas testified before a United States Senate committee seeking funding for DNA testing.³⁸⁴ In another, the National District Attorney's Association (NDAA) sent a representative to testify regarding the waiver of juveniles to criminal court.³⁸⁵ Prosecutors also testified before state legislatures. In Washington, the state Attorney General testified about the state's gang problem.³⁸⁶ In California, prosecutors testified about topics ranging from mortgage fraud to cock-fighting.³⁸⁷ Prosecutors also provided legislation. In Missouri, prosecutors proposed legislation relating to identity theft and compensation for wrongfully convicted defendants.³⁸⁸ A prosecutor drafted these proposals and gave them to a state legislator who then introduced them to the legislature and requested the prosecutor testify before the legislature regarding the proposals. Similarly, in Massachusetts, legislators provided the state legislature with proposed legislation that mandated minimum sentences for certain sex offenders.³⁸⁹

To address specific community concerns about crime problems, prosecutors leveraged their law enforcement relationships to target specific crime problems. Due to overlap between state and federal criminal law and the need to efficiently use resources, state and federal prosecutors worked together to more effectively

³⁸¹ Barbara Hoberock, *Prosecutors' Input Sought in Reworking DHS*, TULSA WORLD, Jan. 20, 2012, at A12.

³⁸² Daniel Beekman, *Getting help with evictions Klein, DA Johnson propose 'Bawdy House Bill' to boot no-good tenants*, N.Y. DAILY NEWS, May 11, 2012, at 46.

³⁸³ *Id.*

³⁸⁴ Brian Rogers, *DA Seeking DNA Funding: Lykos Makes Her Case to US Senate panel*, THE HOUSTON CHRONICLE, Nov. 13, 2009, at B2.

³⁸⁵ James Fox, Testimony on behalf H.R. 2289, the "Juvenile Justice Accountability and Improvement Act of 2009", House Judiciary Subcommittee on Crime, Terrorism and Homeland Security. June 9, 2009.

³⁸⁶ States News Service, *Anti-Gang Legislation Discussed in Olympia*, STATES NEWS SERVICE, Jan. 19, 2011.

³⁸⁷ Mike Cruz, *San Bernadino County DA to Testify on Proposed Cockfighting Law*, San Bernadino County Sun, April 4, 2012; STATES NEWS SERVICE, *Pavley Bill Targeting Mortgage Fraud Passes Public Safety Committee; Fraud Victims, Prosecutors Testify in Favor*, April 28, 2009.

³⁸⁸ This is drawn from the author's personal experience.

³⁸⁹ John J. Monahan, *Stronger Child Rape Penalties Outlined*, TELEGRAM & GAZETTE, May 21, 2008, at A1

prosecute criminal violations.³⁹⁰ The first of these efforts was the Organized Crime Drug Enforcement Task Forces (OCDETF).³⁹¹ These were created to pool resources and focus attention on drug distribution organizations.³⁹² This idea expanded to encompass other crimes. Another nationwide task force was Project Safe Neighborhoods.³⁹³ It removed violent offenders from communities as state and local law enforcement and prosecutors target particular individuals for prosecution.³⁹⁴ Every federal judicial district had a Joint Terrorism Task Force associated with it to deter and disrupt terrorist acts.³⁹⁵ Other task forces included violent offenders and export control.³⁹⁶

With task forces in place, prosecutors created more specialized units to handle the cases. To address the growing and complex problem of property flipping, several offices created mortgage fraud units.³⁹⁷ In Illinois, the Attorney General's Office received a grant to provide training on domestic violence cases to prosecutors throughout the state.³⁹⁸ Others focused on driving under the influence, child abuse and gangs. The effectiveness of these units remains an open question.³⁹⁹

Other offices created specialized units to ensure compliance with prosecutorial obligations. In San Jose, California, the prosecutor's office created an office to review all cases to ensure accurate convictions.⁴⁰⁰ Other jurisdictions created discovery compliance units to ensure all required discovery material actually is disclosed.⁴⁰¹

³⁹⁰ For a more detailed look at this phenomenon see Lisa L. Miller & James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion* 30 LAW & SOC. INQ. 239 (2005).

³⁹¹ United States Drug Enforcement Administration, OCDETF Program, <https://www.dea.gov/organized-crime-drug-enforcement-task-force-ocdetf>, (visited Aug 28, 2023), and United States Department of Justice, About OCDETF, , <https://www.justice.gov/ocdetf/about-ocdetf> (visited Aug 28, 2023).

³⁹² *Id.*

³⁹³ United States Department of Justice, *Project Safe Neighborhoods*, <https://www.justice.gov/psn> (visited Oct. 12, 2023).

³⁹⁴ *Id.*

³⁹⁵ United States Attorney's Office, Western District of Missouri, *Joint Terrorism Task Force*, <https://www.justice.gov/usao-wdmo/joint-terrorism-task-force> (visited Oct. 13, 2023) and Federal Bureau of Investigation, *Joint Terrorism Task Forces*, , <https://www.fbi.gov/investigate/terrorism/joint-terrorism-task-forces> (visited October 13, 2023).

³⁹⁶ United States Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Violent Crime Task Force – Charlotte, NC*, visited October 13, 2023 and Department of Justice, *Justice Department and Partner Agencies Launch National Counter-Proliferation Initiative*, https://www.justice.gov/archive/opa/pr/2007/October/07_nsd_806.html (visited October 13, 2023).

³⁹⁷ Montgomery County (MD) State's Attorney's Office, *Special Prosecutions Division*, <https://www.montgomerycountymd.gov/SAO/units/specialprosecution.html> (visited October 13, 2023) and Solano County (CA) District Attorney's Office, *Prosecution Divisions*, https://www.solanocounty.com/depts/da/prosecution_units.asp (visited October 13, 2023) .

³⁹⁸ Jason Nevel, *Grant Oges to Hire More Attorneys: Federal Money Targets Domestic Violence, Rape Cases; Tazewell to Train Lawyers*, THE PANTAGRAPH, May 1, 2009, at A5.

³⁹⁹ Pyrooz et al., *supra* note 342; Ed Timms and Kevin Krause, DA's Public Integrity Unit Rarely Investigates Officials, THE DALLAS MORNING NEWS, Dec. 12, 2010

⁴⁰⁰ Tracey Kaplan, *New Santa Clara County District Attorney Has Tough Job Ahead*, SAN JOSE MERCURY NEWS, Jan. 3, 2011.

⁴⁰¹ Montgomery County (MD) State's Attorney's Office, *Discovery Process* <https://www.montgomerycountymd.gov/sao/discovery.html>,(visited Oct. 13, 2023), and King County

To further embrace their policy-making ability, prosecutors increased their community interaction, creating something that became known as community prosecution, and developed innovative prosecutorial practices.⁴⁰² Many programs assigned prosecutors to particular areas within the jurisdiction. In Philadelphia, the District Attorney reorganized the office so that prosecutors were assigned to neighborhoods that corresponded with the police department's organization to promote clear communication between the prosecutor, the police and the community.⁴⁰³ Similarly, Prince George's County, Maryland, placed prosecutors inside the police departments.⁴⁰⁴ The State's Attorney hoped the move would generate innovative solutions to county crime problems.⁴⁰⁵ In Fulton County, Georgia, the prosecutor opened an office in the suburb of Alpharetta because the town needed prosecutors to concentrate on that area of the county, rather than become involved in the large number of cases Atlanta generated.⁴⁰⁶

Such changes often resulted from initiatives newly elected prosecutors developed upon entering office. In 2004, a newly elected prosecutor entered office in Pueblo, Colorado bringing what he termed "smart justice."⁴⁰⁷ The program focused on prevention and protection combined with prosecution.⁴⁰⁸ He believed prosecutors should implement criminal justice policies, particularly in juvenile and mental health issues.⁴⁰⁹ While still prosecuting criminals who deserved punishment, he created outreach and diversion programs for youth and offenders with mental illnesses.⁴¹⁰ Finally, he created specialized units to handle difficult criminal cases, allowing the assistants to develop a level of expertise in their area.⁴¹¹ When making charging decisions, the prosecutor adopted a policy whereby the assistants must be certain of conviction prior to filing charges.⁴¹² Newly elected prosecutors would become the driving force behind progressive prosecution as well.

(WA) Prosecuting Attorney's Office, *King County Prosecuting Attorney's Office Brady Committee Protocol*, <https://fairandjustprosecution.org/wp-content/uploads/2017/09/King-County-Brady-Policy-revised-11-06-15.pdf>.

⁴⁰² See Gerard Rainville & M. Elaine Nugent, *Community Prosecution Tenets and Practices: The Relative Mix of "Community" and "Prosecution"*, 26 AM. J. CRIM. JUST. 149 (2002). For this discussion it is considered community prosecution if the office employing the policy labels it as such.

⁴⁰³ Mensah M. Dean, *D.A. Sees Chance for Cut in Crime with New 'Bureau' Court Setup*, PHILA. DAILY NEWS, Oct. 28, 2010, at 18.

⁴⁰⁴ Ruben Castaneda, *Prosecutor Intends to Adjust Focus*, WASH. POST, Jan. 2, 2011, at C1.

⁴⁰⁵ *Id.*

⁴⁰⁶ Andria Simmons, *Prosecutor Adds North Office; Alpharetta Office Joins 5 Others in Fulton Effort to Build Ties With Localities*, ATLANTA JOURNAL-CONSTITUTION, Aug. 15, 2009, at 1A.

⁴⁰⁷ Jeff Tucker, *Thiebaut Cleaves to 'Smart Justice' Style of Prosecution.*, PUEBLO CHIEFTAN, June 24, 2012.

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.*

B. CRITIQUES

As proactive prosecution bloomed at the start of the 21st century, critiques followed almost immediately. Some saw the new community roles as advancing prosecutorial power.⁴¹³ Moving professional prosecutors with a “law and order” philosophy into the community brought an inherent bias into proposed solutions to community problems.⁴¹⁴ Not all professional prosecutors supported embracing the community and this created internal resistance to community prosecution programs.⁴¹⁵ When prosecutors entered the community, questions arose about how to determine the “community’s” voice.⁴¹⁶ Finally, the diverse array of community prosecution programs made some question whether proactive prosecution was more symbolic than functional.

Prior to proactive prosecution, prosecutors had tipped the balance of power in their favor.⁴¹⁷ By expanding their domain into community relations, prosecutors further expanded their influence.⁴¹⁸ Previously seen as magistrates and advocates, prosecutors became social engineers.⁴¹⁹ They attempted to address a wide range of problems identified as causing crime with the goal of reducing it.⁴²⁰ Rooting themselves in the community could bias potential jurors who might establish personal relationships with prosecutors and result in prosecutors targeting individuals for reasons other than their criminal activity.

Professors Green and Burke examined a Delaware County, Pennsylvania, community prosecution program and questioned whether the choices made to address community problems raised ethical questions due to a law enforcement bias.⁴²¹ They argued that some programs “may be inconsistent with ordinary principles regarding how prosecutors should employ their discretion.”⁴²² They found a diversion program available to the wider county was not available to the county seat, which had a higher drug use rate.⁴²³ This denied first-time offenders in the county seat an opportunity to obtain treatment, thus violating a principle of equality.⁴²⁴ Rather than make prosecutorial decisions based on offense conduct, the decision was made based on location.⁴²⁵

Not all prosecutors embraced this change. Having spent their careers prosecuting cases in a particular way, some professional prosecutors resisted community involvement.⁴²⁶ When newly elected prosecutors attempted to implement

⁴¹³ See *infra* notes 412-20 and accompanying text.

⁴¹⁴ *Id.*

⁴¹⁵ Green & Alafair S. Burke, *The Community Prosecutor: Questions of Professional Discretion*, 47 WAKE FOREST L. REV. 285 (2012).

⁴¹⁶ Devin J. Doolan, Jr. *Community Prosecution: A Revolution in Crime-Fighting*, 51 CATH. U. L. REV. 547 (2002).

⁴¹⁷ *Supra* notes 350-63 and accompanying text.

⁴¹⁸ Levine, *supra* note 8, at 1128-29.

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

⁴²¹ Green & Burke, *supra* note 415, at 296-302.

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ *Id.* at 292-293.

new programs, prosecutors more familiar with professional prosecutorial methods saw these new programs in tension with their visions of prosecutorial behavior.⁴²⁷ To them, trying to solve community problems was the job of social workers.⁴²⁸ The office culture also dictated that “community prosecution” assignments were seen as less prestigious than the “professional” prosecution assignments.⁴²⁹

Once prosecutors entered the “community” they struggled to find the “true” community voice. To make initial inroads, prosecutors sought well-defined and well-organized groups.⁴³⁰ Prosecutors also utilized existing connections, such as victim rights organizations.⁴³¹ Some communities proved difficult to integrate into prosecution programs. These groups, based on their life experiences, viewed law enforcement programs suspiciously.⁴³² There might be built-in biases when creating these programs as well. For example, parents of juvenile offenders might be overlooked when planning community programs.⁴³³

Ultimately the novelty and variety of proactive prosecution may render it more symbolic than functional. The novelty of the approach permits any office to label almost anything community or proactive prosecution.⁴³⁴ Some prosecutors who attend neighborhood meetings call their attendance community prosecution.⁴³⁵ Other offices have gone further and installed prosecutors in neighborhood offices or have created community criminal justice councils.⁴³⁶ The most ambitious offices have created collaborative organizations that pair prosecutors with community members to identify crime problems and craft prevention initiatives.⁴³⁷ This led to the critique that proactive prosecution was not a new phenomenon but merely a public relations tactic that ultimately interfered with change.⁴³⁸

V. PROGRESSIVE PROSECUTOR

The 2016 election cycle saw the rise of progressive prosecution.⁴³⁹ Prosecutorial candidates promised not just symbolic change but revolutionary change in how they would approach the prosecution function.⁴⁴⁰ Not all proffered the same ideas.⁴⁴¹ Still, certain similarities emerged. Their main goals were reducing mass incarceration and the racial disparities associated with it and promoting

⁴²⁷ Burke, *supra* note 339, at 186-87; David A. Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS ONLINE 25 (2017).

⁴²⁸ Levine, *supra* note 8, at 1169-76 and Sklansky, *supra* note 427, at 27.

⁴²⁹ Thompson, *supra* note 378, at 357.

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.*

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ Sklansky, *supra* note 427, at 27.

⁴³⁹ Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 720 (2020).

⁴⁴⁰ *Id.*

⁴⁴¹ Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415 (2020).

transparency in prosecutorial decision-making. To reduce mass incarceration, many progressive prosecutors advocated non-prosecution of various low-level crimes and seeking no-cash bail for non-violent offenses. To promote transparency, many progressive prosecutors, as candidates, announced which crimes they would not prosecute and, once in office, made office data available to the public.⁴⁴² Like the proactive prosecutor, critiques of progressive prosecution quickly emerged to argue it expands prosecutorial domain even further, raising separation of power concerns, and re-connects prosecutors to the political process.

A. MORE EQUITABLE PROSECUTIONS

Kim Foxx in Cook County, Illinois, and Larry Krasner in Philadelphia, Pennsylvania, serve as two well-known examples of progressive prosecutors who swept into office between 2016 and 2020. In 2016, Foxx became the first African-American woman to lead her office.⁴⁴³ She ran promising a more forward-thinking agency.⁴⁴⁴ This included regaining public trust and promoting transparency.⁴⁴⁵ Since taking office, Foxx implemented her campaign agenda.⁴⁴⁶ She highlighted the office's conviction integrity unit, created in 2012, noting that it overturned convictions in more than 80 cases.⁴⁴⁷ She instructed prosecutors to consent to non-monetary bonds.⁴⁴⁸ She also diverted resources from low-level crimes to more violent offenses.⁴⁴⁹ To promote transparency, she made her office's data available to anyone interested in reviewing it.⁴⁵⁰ Prior to her election, she worked as an Assistant State's Attorney and served as Chief of Staff to the Cook County Board President where she led the county's criminal justice reform agenda.⁴⁵¹

Where Foxx brought prosecutorial experience to the office, Larry Krasner spent the bulk of his career handling criminal defense work.⁴⁵² His campaign emphasized changing the Philadelphia District Attorney's office's culture.⁴⁵³ He pledged to end mass incarceration by not prosecuting "insufficient and insignificant" cases, reviewing past convictions, and stopping cash bail.⁴⁵⁴ Once in office, he successfully

⁴⁴² Paulina Villegas, *New Manhattan DA Wants to Stop Prosecuting Some Offenses, Make Prison a 'Last Resort'*, WASH. POST, Jan 5, 2022. See e.g. Philadelphia District Attorney Public Data Dashboard for transparency: <https://data.philadao.com/>.

⁴⁴³ Cook County State's Attorney, *Kimberly M. Foxx*, <https://www.cookcountystatesattorney.org/about/kimberly-foxx> (visited Oct. 23, 2023). See also Miriam A. Krinsky, *CHANGE FROM WITHIN: REIMAGINING THE 21ST, CENTURY PROSECUTOR* 77-97 (2022).

⁴⁴⁴ Cook County State's Attorney, *supra* note 443.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² Philadelphia (PA) District Attorney's Office, *Leadership: District Attorney Larry Krasner*, <https://phillyda.org/about/leadership/> (visited Oct. 23, 2023).

⁴⁵³ Larry Krasner for District Attorney, *On the Issues: See What a Real Progressive can Bring to Philadelphia's DA Office*, <https://krasnerforda.com/platform>, (visited Oct. 23, 2023).

⁴⁵⁴ *Id.*

diverted nonviolent offenders and greatly reduced cash bail requirements.⁴⁵⁵ He also unilaterally decriminalized marijuana possession and prostitution.⁴⁵⁶ To accomplish this required sweeping personnel changes.⁴⁵⁷

These two examples demonstrate the fundamental principles of progressive prosecution. The first is that progressive prosecutors focus upon the mass incarceration problem in the United States.⁴⁵⁸ As many have noted, the United States incarcerates people at a staggering rate and this disproportionately affects minority groups.⁴⁵⁹ Progressive prosecutors identified several approaches to reversing this phenomenon. First, they tasked conviction integrity units with reviewing past cases for errors, focusing on police misconduct. Second, they used their discretionary authority to decriminalize—or nullify—what they perceived as minor offenses. Third, they stopped mandating cash bail for non-violent offenses.

Progressive prosecutors built upon the foundation laid for them by their predecessors when it came to conviction integrity units. These units began in Dallas and San Diego between 2007-2009.⁴⁶⁰ These offices were established in the wake of Innocence Project DNA exonerations.⁴⁶¹ They reviewed cases where DNA might indicate the courts convicted the wrong person.⁴⁶² Progressive prosecutors established new units where they previously did not exist and expanded their mission, reviewing convictions for procedural errors or those that resulted from questionable police testimony.⁴⁶³ These units also developed policies to prevent future wrongful convictions such as creating lists of officers with suspect credibility.⁴⁶⁴

During their campaigns, progressive prosecutor candidates announced they would not prosecute entire categories of criminal offenses or create standards for prosecution above what the statutory law required. They focused on perceived low-level misdemeanor offenses including marijuana and retail theft.⁴⁶⁵ This expanded the prosecutor's discretionary authority.⁴⁶⁶ Previous prosecutor phases employed

⁴⁵⁵ Steve Volk, *Larry Krasner vs. Everybody: Inside the Philly DA's Crusade to Revolutionize Criminal Justice*, PHILADELPHIA (Nov. 23, 2019), <https://www.phillymag.com/news/2019/11/23/larry-krasner-criminal-justice-reform/>, (visited Oct. 23, 2023).

⁴⁵⁶ *Id.*

⁴⁵⁷ *Id.*

⁴⁵⁸ Davis, *supra* note 13, at 1077-79 and Bazelon, *supra* note 4, at 316-25.

⁴⁵⁹ Ronnie B. Tucker, Sr. *The Color of Mass Incarceration*, 37 ETHNIC STUDY REVIEWS 135 (2016), Michael C. Campbell & Matt Vogel, *The Demographic Divide: Population Dynamics, Race, and the Rise of Mass Incarceration in the United States*, 21 PUNISHMENT & SOCIETY 47 (2019); James Forman, Jr. *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 101 (2012). On the roots of mass incarceration and race, see generally Heather Schoenfeld, *BUILDING THE PRISON STATE: RACE AND THE POLITICS OF MASS INCARCERATION* (2018).

⁴⁶⁰ Inger H. Chandler, *Conviction Integrity Units: Owning the Past, Changing the Future*, 31 CRIM. JUST. 14, 14 (2016-2017).

⁴⁶¹ *Id.* at 15.

⁴⁶² *Id.*

⁴⁶³ BAZELON, *supra* note 4, at 156-57 and 327-28.

⁴⁶⁴ BAZELON, *supra* note 4, at 156 and 282-86.

⁴⁶⁵ BAZELON, *supra* note 4, at 156.

⁴⁶⁶ Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707 (2020).

discretionary authority on a case-by-case basis.⁴⁶⁷ Progressive prosecutors applied their authority without regard to case facts, instead effectively nullifying entire sections of the criminal code.⁴⁶⁸ They could do this with only minor opposition because their election bestowed a popular mandate.⁴⁶⁹

Finally, progressive prosecutors championed removing cash bail for minor offenses.⁴⁷⁰ While only judges set bail, prosecutors may make recommendations.⁴⁷¹ Often, judges follow the prosecutor's recommendation.⁴⁷² Bail, itself, discriminated against low-income defendants who lack the funds to post bail.⁴⁷³ This means they remain incarcerated thus creating an incentive to plead guilty, even if factually innocent.⁴⁷⁴ Prosecutors found they could reduce incarceration and avoid potentially wrongful convictions by not recommending cash bail to the court.⁴⁷⁵

To demonstrate their policies' effectiveness and develop new policies, progressive prosecutors promoted data transparency.⁴⁷⁶ Both Krasner's and Foxx's offices made their case data publicly available. Interested citizens could see the decisions prosecutors made and the effects those decisions had on the community. For these prosecutors, evidence-based decisions were easily defended.⁴⁷⁷ They could justify their programs as cost-saving and efficient.⁴⁷⁸ Instead of being judged on conviction rates, data transparency created new metrics upon which people could judge the prosecutor's success.

B. CRITIQUES

The progressive prosecution program raises critiques beyond those associated with disliking change. Like proactive prosecution, progressive prosecution suffers from a definitional problem. Many have labeled themselves progressive prosecutors, but the policies implemented differed. Regardless of the label, some progressive prosecutorial policies have raised questions. First, using evidence-based prosecution resembles pretextual prosecutions, prosecuting someone for conduct beyond the formal criminal charges. Second, while condemning prosecutorial power to incarcerate people *en masse*, progressive prosecution expands prosecutorial power to nullify duly enacted legislation. A final critique appears in progressive prosecution's embrace of politics, though not necessarily partisanship.

⁴⁶⁷ See Sections I-IV.

⁴⁶⁸ Roger A. Fairfax, *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011); Erik Luna, *Prosecutorial Decriminalization*, 120 J. CRIM. L. & CRIMINOLOGY 785 (2012); W. Kerrell Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173 (2021).

⁴⁶⁹ BAZELON, *supra* note 4, at 272. Murray, *supra* note 468, at 209-14.

⁴⁷⁰ BAZELON, *supra* note 4, at 41-44. See also Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795 (2018)

⁴⁷¹ BAZELON, *supra* note 4, at 41-44.

⁴⁷² *Id.*

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ BAZELON, *supra* note 4, at 282-283

⁴⁷⁷ Sklansky, *supra* note 17, at 2.10-2.11.

⁴⁷⁸ Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEORGETOWN J. LEG. ETHICS 310 (2017)

Between 2016 and 2020, numerous prosecutors ran under the progressive prosecution banner but advocated different degrees of reform.⁴⁷⁹ One type adopts the name without with action.⁴⁸⁰ This person has progressive political ideas but does nothing to implement them.⁴⁸¹ A second type applies progressive ideas to procedural protections.⁴⁸² To an extent, this is the professional prosecutor leaning to the minister of justice side of the scale.⁴⁸³ It prioritizes procedural protections over convictions but, in the process, makes conviction and sentence more certain.⁴⁸⁴ A third type adopts the wider liberal, or progressive, political agenda and implements it in the context of criminal prosecution.⁴⁸⁵ This type might target police misconduct or specific types of crimes such as wage theft.⁴⁸⁶ A fourth prioritizes the single agenda item of eliminating mass incarceration.⁴⁸⁷ This type crafts policies to achieve this end without regard to the traditional prosecutorial function.⁴⁸⁸ Before even assessing progressive prosecution, the true meaning must be defined.

Beyond labeling, progressive prosecutorial policies have generated some concern. Many progressive prosecutors have adopted evidence-based practices.⁴⁸⁹ For instance, they will argue that bail reform has not meant fewer people appear for court. Yet evidence-based practices may lead to prosecutorial decisions based upon statistical trends rather than individual case assessments. Professor Sklansky sees this akin to pretextual prosecutions where prosecutors pursue minor or technical law violations in order to prosecute someone who has engaged in more broad but unprovable criminal conduct.⁴⁹⁰ For example, the High Point, North Carolina, community implemented a call-in initiative whereby non-violent drug dealers were brought into a community meeting that included social workers, counselors, and law enforcement.⁴⁹¹ The dealers were given a choice to either avail themselves of the community support or face the possibility of long prison sentences.⁴⁹² Those choosing the latter were charged with a crime for which the police had evidence.⁴⁹³ The most significant dealers were identified through evidence-based practices and then sometimes prosecuted for the first identifiable offense, even if unrelated to drug dealing.⁴⁹⁴

⁴⁷⁹ See generally, Levin, *supra* note 441.

⁴⁸⁰ *Id.* at 1428-32.

⁴⁸¹ *Id.*

⁴⁸² *Id.* at 1432-38.

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.* at 1438-44.

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.* at 1444-46.

⁴⁸⁸ *Id.*

⁴⁸⁹ See, e.g., Jeffrey Toobin, *The Milwaukee Experiment: What Can One Prosecutor Do About the Mass Incarceration of African-Americans*, NEW YORKER, May 4, 2015.

⁴⁹⁰ Sklansky, *supra* note 17, at 2.4-2.5, 2.15 and Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005).

⁴⁹¹ David Kennedy, *Drugs, Race and Common Ground: Reflections on the High Point Intervention*, NIJ J., 2008 <http://hpcav.com/wp-content/uploads/2009/12/HP-model-article-1.pdf>

⁴⁹² *Id.*

⁴⁹³ *Id.*

⁴⁹⁴ This is based on the author's discussions with the High Point Police Department and attending the Department's Citizen's Police Academy.

Progressive prosecutorial policies also raise separation of powers concerns.⁴⁹⁵ Today, prosecutors serve as executive officials charged with enforcing legislatively enacted laws.⁴⁹⁶ Prosecutors are not lawmaking offices, even if they do draft legislation and advise legislators.⁴⁹⁷ In the lawmaking process, the executive branch may veto unacceptable legislation.⁴⁹⁸ However, once duly enacted, the executive has a duty to enforce it, within the bounds of prosecutorial discretion.⁴⁹⁹ This discretion has traditionally occurred on a case-by-case basis. Progressive prosecutors have expanded prosecutorial discretion to encompass entire crime categories. These policies essentially give prosecutors a more extensive and unreviewable executive veto power. While only used presently for offenses deemed minor, the possibility exists that other prosecutors will use this “veto” power for laws that progressive prosecutors may think are important, such as prohibitions on gun ownership.

The differing perceptions of important crimes and minor crimes highlight the last criticism of progressive prosecution, namely that it brings political preferences back into prosecutorial decision-making. Commentators on the prosecution function have decried politicized prosecutions, arguing that politics must be separated from prosecutorial decision-making.⁵⁰⁰ Yet, progressive prosecutors rely on the political process—sometimes in a partisan manner—to establish a mandate for their reform agenda.⁵⁰¹ Progressive prosecutors respond to concerns raised by their constituents, especially those who observe court regularly.⁵⁰² As a result, the potential exists for progressive prosecutors to bring charges in particular cases more for their political public relations benefit than based, solely, on the case’s merits.

VI. THE PROSECUTOR’S IDENTITY

As prosecutors have evolved from minor judicial figures in a larger system to a force for not only criminal justice, but social reform, certain themes emerge that illuminate the prosecutor’s identity. First, it appears that prosecutors have a gravitational pull, centralizing authority around themselves. This is not to say their authority is unlimited or even unchecked, but prosecutors have significantly expanded their influence as they have evolved. Second, prosecutors have a community connection. While the connection strength varies throughout the prosecutor’s evolutionary arc, the connection remains. Finally, prosecutors have an interest in case outcomes and this interest exists inversely to their community connection. As prosecutors distance themselves from the community, they perceive winning individual cases as more important. As they connect more closely with the community, other priorities

⁴⁹⁵ Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707 (2020).

⁴⁹⁶ See e.g. RSMo 56.060 (Prosecutor’s duties, generally); NCGS 7A-71; NY Consolidated Laws 18-700.

⁴⁹⁷ See *supra* notes 381-89 and accompanying text.

⁴⁹⁸ See e.g. N.Y. Const. art IV, § 7; FL. Const. art I, §8; and Or. Const. art. V, § 15b.

⁴⁹⁹ See e.g. Or. Const. art V, § 10; Tx Const. art IV, § 10; Ohio Const. Art III, § 6.

⁵⁰⁰ See generally Levenson, *supra* note 15; Bennett L. Gershman, *The Most Dangerous Power of the Prosecutor*, 29 PACE L. Rev. 1 (2008).

⁵⁰¹ BAZELON, *supra* note 4, at 76-101.

⁵⁰² *Id.*

take precedence. Their interest in the outcome also directly relates to their case screening function. Ultimately, this tells us that prosecutors assume an identity that society expects.

A. THE PROSECUTOR'S GRAVITATIONAL PULL

The first key theme that emerges from exploring the prosecutor's historical evolution is that prosecutors transitioned from a small role in a decentralized process to a place where they can create widespread social change. In doing so, they pulled other aspects of the criminal courts and the wider criminal justice system into their domain.⁵⁰³ Sometimes this involved assuming roles held by others. At other times this meant devising strategies to leverage the system in their favor. This shows that prosecutors have a gravitational pull that permits them to centralize authority around themselves.

From their origins as someone who organized files, prosecutors have become agents for social change. Public prosecutors originated because the courts needed someone to translate private criminal complaints into the proper legal form. In more organized colonial legal systems, the courts also needed someone to initiate morals prosecutions. Following independence, these public prosecutors rode the wave ushered in by more elected government positions. With independent electoral authority, prosecutors assumed discretionary authority. Taking over from Justices of the Peace and Grand Juries, prosecutors decided which cases entered the court system and which did not. Acquiring this authority gave prosecutors the tool necessary to exert leverage over other aspects of the criminal courts and criminal justice process.

Over time, prosecutors used their discretionary authority to advance their professional goals. Initially, that meant leveraging their charging authority to gain political advantage. Prosecutors who identified with political machines used their leverage to protect those similarly politically connected by not filing criminal charges, even if warranted. Those who identified with the "other" party faced the threat of potential prosecution, even if unwarranted. Eventually prosecutors only prosecuted cases with strong evidence. This led to a police-prosecutor relationship whereby the two organizations cooperated in criminal investigations, forming an exchange relationship.⁵⁰⁴ This in turn led to prosecutors identifying particular crime problems and addressing them, first, through prosecution and, later, through legislation. When working in this later sphere, prosecutors could propose new crime control measures and advise legislatures on crime control matters. In the courthouse, prosecutors used their discretionary authority to leverage guilty pleas. By offering lesser sentences before trial, as opposed to after trial, prosecutors imposed a measure of risk for defendants who wished to exercise their constitutional right to trial. Then, by overcharging cases, prosecutors could negotiate lower sentences without giving up anything. More recently, prosecutors have used their discretionary authority to not prosecute cases. This could be the result of proactive diversion programs or the belief that, as a policy matter, the offense does not warrant prosecution.

⁵⁰³ On the concept of domain, see William F. McDonald, *The Prosecutor's Domain*, in *THE PROSECUTOR* (William F. McDonald, ed., 1979).

⁵⁰⁴ On exchange relationships, see George F. Cole, *The Decision to Prosecute*, 4 L. & Soc'y REV. 331 (1970).

If we divide the criminal justice system into six stages, we see how prosecutors have expanded their domain throughout the process. First, the legislature must identify conduct as criminal. Prosecutors now propose new laws and advocate for their passage. Second, someone must investigate alleged criminal behavior. Prosecutors work closely with law enforcement to determine priorities and to gather evidence. Third, someone must initiate criminal charges. This is where prosecutors possess near absolute authority. In addition, their work on the investigation leads to a presumption of guilt, making them more advocates than ministers of justice. Fourth, outcomes must be negotiated. Prosecutors, through their charging authority, can heavily influence the boundaries of the negotiation. Fifth, someone must adjudicate the case, especially if an outcome cannot be negotiated. Once again, through their charging authority, prosecutors induce guilty pleas at extraordinary rates. Finally, someone must decide what happens to the person once the person reaches the other side of the process. Prosecutors utilize their charging authority to divert some people from the entire process and mandate certain behavior as a consequence. While prosecutors may not have “power” over the other court actors, they have significant influence over every stage in the process and have centralized authority through their charging discretion.

B. THE PROSECUTOR'S COMMUNITY CONNECTION

As prosecutors expanded their domain, their community connection waxed and waned. Community connection is important because the electoral process is one of the few methods available to hold prosecutors accountable for discretionary decisions. If people do not vote or are not connected to elected prosecutors, then prosecutors can use their charging discretion for nefarious purposes. Throughout the arc of prosecutorial evolution, that connection has varied.

Beginning as minor figures, the only connection prosecutors had to the community was when a case emerged from the grand jury. The prosecutor had a duty to prepare the case for court and, if no private attorney appeared, present the case.⁵⁰⁵ Once the public prosecutor became an elected official, a public connection became essential. At first, prosecutors were part of a larger political organization that reflected people with certain political perspectives. New York City's experience best reflects this. One candidate represented the “respectable” classes and the other candidate represented the “suspect” classes. Depending on which could garner the most support, that group's interests prevailed. In this way, as part of a larger political process, prosecutors were just one representative of the collective community voice. As prosecutors disconnected themselves from the partisan political influences—but not necessarily political parties—they became less connected to the communities they served. Instead, they exercised their own professional judgement rather than being beholden to a particular political interest or agenda. If a community connection had significance during this time, it was to identify crime problems that professional prosecutors should investigate and pursue. This disconnect appears in the infrequent electoral change in prosecutor offices. Eventually, however, as prosecutors sought innovative ways to prevent

⁵⁰⁵ It should not be forgotten that the public prosecutor only performed this function in the most serious cases. In minor matters, the justices of the peace resolved the matter without a public prosecutor ever seeing the case. *See supra*, section 2.

criminal activity, they recognized the need to return to the community. They formed community partnerships to proactively address criminal conduct, before it reached the courts.

Today, we see even more community connection as progressive prosecutors assume more control. In this, we hear echoes of political prosecutors who responded to constituent desires. Progressive prosecutors affiliate more with the Democratic party and their political interests align with groups that traditionally vote Democratic.⁵⁰⁶ Their different perspective also forced progressive prosecutors to replace long-time prosecutors with newly hired prosecutors who share the progressive prosecution vision.⁵⁰⁷ Similar hiring practices occurred with political prosecutors. Just as importantly, progressive prosecutors seek to mitigate the harshness of the criminal justice process just like those during the political prosecution phase. Finally, progressive prosecutors adopt the grand jury's role during the Revolutionary Era when they refuse criminal charges they perceive as unjustly affecting certain societal groups.

C. THE PROSECUTOR'S INTEREST IN THE OUTCOME

Like the prosecutor's community connection, the prosecutor's interest in the case outcome waxes and wanes throughout the prosecutor's evolution. The change occurs, however, in an inverse relationship with the community connection. The closer the community connection the less interest, or emphasis, is placed on obtaining a guilty verdict. Not surprisingly, as prosecutors focus more on winning, they also focus more on case screening, weeding out cases with insufficient evidence.

Initially, the public prosecutor lacked any interest in the case outcome.⁵⁰⁸ With private prosecutors handling most cases, public prosecutors did not even present cases. Instead, they prepared case summaries that both sides utilized. When public prosecutors did handle cases, they merely presented the facts. In some instances, they presented the case for both sides. During this time, the state itself also had no interest in the outcome of criminal cases.⁵⁰⁹ Showing an interest constituted an unacceptable endorsement of the victim's case.

The move to elected prosecutors changed this approach slightly. As party loyalists, prosecutors had an interest in obtaining a conviction if it benefitted their political constituents. Convictions were important for prosecutors who represented the "respectable" classes to show that the prosecutors were protecting the community. Conversely, for prosecutors who represented the "suspect" classes,

⁵⁰⁶ Alicia Victoria Lozano & Lauren Mayk, *U.S. Attorney McSwain, Philadelphia District Attorney Krasner Clash Despite Shared Vision for Safer City*, NBC PHILA. June 20, 2019.

⁵⁰⁷ See e.g. Samantha Melamed et al., *More than 70 Lawyers Hired by DA Larry Krasner Have Left. Some Say the Office Is in Disarray*, PHILA. INQUIRER Dec. 22, 2021 See also Cynthia Godsoe & Maybell Romero, *Prosecutorial Mutiny*, 60 AM. CRIM. L. REV. 1403 (2023).

⁵⁰⁸ A few places tied fees to success but most courts paid fees based on the number of cases processed. Nicholas Parillo, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940* (2013).

⁵⁰⁹ But for matters of great public concern such as treason, see Steinberg, *supra* note 36, at 575 and Carlton F.W. Larson, *TRIALS OF ALLEGIANCE: TREASON, JURIES AND THE AMERICAN REVOLUTION* (2019).

they were less concerned about the quantity of convictions. Instead, they argued that preserving resources for more important cases was paramount.

Professional prosecutors focused exclusively on winning cases. Conviction rates were essential to demonstrate not only their effectiveness, but their worthiness for the position. Some developed a win-at-all-costs mentality that caused them to circumvent constitutional protections. Others strategized means to enhance the likelihood of conviction. The desire to win prompted, at least in part, cooperation with the police and plea negotiation strategies such as overcharging and trial taxes. Over time, the quantity of wins also mattered. By obtaining guilty pleas, prosecutors could trumpet thousands of convictions annually. All of this helped their re-election efforts.

Overwhelming caseloads and community demands for reform, however, shifted the winning orientation of some prosecutors. Instead, they saw preventing criminal activity and avoiding prosecution as meritorious. The number of community partnerships became more important than the number of convictions. Today's progressive prosecutors spend more time lauding their exonerations than their convictions. By hiring new attorneys, who share this vision, measures other than conviction rates demonstrate successful outcomes.

VII. CONCLUSION

In his memoir about his time as United States Attorney for the Southern District of New York and the lessons learned from it, Preet Bharara stated that "prosecutors are sometimes empty vessels in whom the public will pour their hopes or hatreds."⁵¹⁰ Tracing the prosecutor's evolutionary arc provides shape to this vessel. There is no doubt that the public shapes the prosecutor's role. It evolves due to societal demands. Prosecutors respond to community desires. What remains is to define their identity, to describe the vessel.

First and foremost, prosecutors are public servants. This remains one constant throughout the prosecutor's evolutionary journey. Whether they merely created a legal file or attempted to end mass incarceration, prosecutors have served the public in some manner. At times, their efforts may be misguided or have negative consequences. At times, their efforts might be politically motivated. However, they seek to serve the public's interest as they perceive it at that particular time and place.

As public servants, prosecutors represent the community, for better or worse. The public poses the most significant checks on prosecutorial charging decisions through the ballot box and the jury box. When they speak, prosecutors listen. The rise of progressive prosecutors demonstrates this. However, when the community remains silent, prosecutors employ their own judgement. Likewise, we must recognize that not all communities want the same thing. As a result, two prosecutors could look at the same case and justifiably believe their constituency wants different outcomes.

⁵¹⁰ Preet Bharara, *DOING JUSTICE: A PROSECUTOR'S THOUGHTS ON CRIME, PUNISHMENT AND THE RULE OF LAW*, Knopf (2019) 213.

Finally, prosecutors are opportunistic. When given the opportunity, they use their discretion for whatever ends they feel are most appropriate in the moment. Those ends could be political benefit, conviction rates, dropping crime rates, or lower incarceration rates. They may choose to zealously enforce a law in one moment and nullify it in another. For better or worse, as public servants who represent the community, they are subject to community whims and needs. As prosecutors continue to evolve, this identity will undergird their work.