

Article

PROSECUTORIAL DISASSOCIATION

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INTRODUCTION

Progressive prosecutors are on the rise. Buoyed by dramatic changes in public opinion toward criminal justice reform, ambitious primary challengers, and air support from big political donors, they've defeated entrenched, punitive prosecutors in counties and districts across the country and have largely delivered on their campaign promises. But winning is only half the battle—once in office, they continue to face opposition from police unions, other government actors, and even dissent within their own offices.

This Article focuses on a new, and yet tragically underdiscussed, challenge that progressive prosecutors face: prosecutors' associations. These associations, which function as a hybrid professional organization–quasi-government entity, play a large role in the development of criminal justice policy. They lobby the legislature, are statutorily endowed with policymaking authority, exert influence in judicial and referenda elections, file amicus briefs, and provide training and other forms of administrative support to prosecutors' offices. In other words, prosecutors' associations *matter*.

Given the history of how prosecutors' associations affect criminal justice policy, it is perhaps unsurprising that so many progressive, decarceral prosecutors—or progressive, decarceral *candidates* in prosecutorial elections—are skeptical about serving as active members of their state associations. Despite this skepticism, only a few elected prosecutors, most prominently Philadelphia District Attorney Larry Krasner, have actually quit these associations.

Others, including a bipartisan alliance of progressive prosecutors in California, some recently elected prosecutors in Virginia, and several unsuccessful candidates in Pennsylvania, have suggested an alternative way forward: forming their own *progressive* prosecutors' associations as a counterprogramming effort. As conceptualized, these counter-associations would do the exact same things that the existing associations do, but with a thumb on the scale on the opposite side—for decarceral policies instead of tough-on-crime ones. Given the new nature of these proposals, they've generated little academic or activist discussion, which this Article attempts to remedy.

It begins in Part I with relevant background information about prosecutors' associations. It briefly recounts their organizational histories, though given the paucity of historical records kept by the associations and their relative anonymity, this effort is necessarily limited. It then addresses the statutory framework in which prosecutors' associations operate, by discussing the relationships between private and public prosecutors' associations and the state-sanctioned policymaking authority that both associations have.

Part II then considers the external, policymaking role that prosecutors' associations enjoy in their state governments. It considers how this role

operates in three ways—lobbying, electioneering, and participation in litigation. It reviews the strategies and ideological positions of the associations and the results of their efforts.

Part III then explores the rise of progressive prosecutors. It recounts briefly, given the already well-trodden ground in academic literature, how this rise occurred and how candidates have been successful (or not). It then discusses a newer, less-discussed trend: progressive prosecutor candidates pledging to withdraw from prosecutors' associations and to form new ones. Part IV builds on the changes suggested by progressive prosecutors in Part III and conceptualizes several different options that these prosecutors may have—remain, start counterpart associations, create a nationwide association, or some combination thereof—and applies historical analogies and some social psychological research to consider how each option may turn out.

I. THE HISTORY AND DEVELOPMENT OF PROSECUTORS' ASSOCIATIONS

Perhaps somewhat surprisingly given their activity in the realm of criminal justice policymaking, along with their success and power in setting policy, prosecutors' associations have largely operated under the radar. Little academic attention has focused on these associations and only in recent years have political commentators and journalists begun to pay them attention. This Part (and the one that follows) aims to remedy that, by exploring the history and development of prosecutors' associations. Section A begins with a brief history of the associations—how, why, and when they were formed; the historical events that enhanced their stature; and what the landscape of associations looks like today. Section B reviews the associations' internal activities—that is, what services they provide to their members—and how they're organized. Finally, Section C considers the statutory power that prosecutors' associations enjoy by virtue of their membership on state advisory boards, councils, and governing bodies.

A. *Institutional Histories*

Upon winning independence from Britain, the United States largely adopted the legal system of its estranged mother country. That included public prosecutors who were *appointed* to litigate criminal cases for a given geographic area. But, following a long trend in the early-to-mid-nineteenth century toward democratization, appointed prosecutors gave way to elected prosecutors in most states.¹ The earliest prosecutors' associations formed not long after that.²

¹ Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 (2012).

² See John L. Worrall, *Prosecution in America: A Historical and Comparative Account*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 3, 8 (John Worrall & M. Elaine Nugent-Borakove eds., 2008) (noting that prosecutorial power and organization grew beginning in the early 1900s).

The first such association was likely the New York State District Attorneys Association, which was formed in 1909.³ The Pennsylvania District Attorneys Association formed shortly thereafter, in 1912,⁴ and the Michigan Association of Prosecuting Attorneys was organized in 1928, after the Michigan State Bar Association gave the Association its approval.⁵ From here, pinning down the exact dates of formation becomes tricky. Most of the associations haven't kept detailed institutional histories, and there are few available sources contemporary to each association's formation that can provide measures of independent verification. Nonetheless, it's clear that many similar prosecutors' associations were formed in the early-to-mid-twentieth century, but that their organizational structures only became formalized and well-documented beginning in the late 1960s and early 1970s.

Two interrelated factors likely led to the development of modern-day prosecutors' associations: increased attention to coordinating local prosecutorial efforts and the disbursement of federal funds to local law enforcement efforts. In 1967, President Lyndon Johnson formed the President's Commission on Law Enforcement and Administration of Justice. The Commission issued a report later that year, which specifically called attention to the need for statewide collaboration⁶—effectively operating as a call to form prosecutors' associations. It recommended “establishing a State council of prosecutors comprising all local prosecutors under the leadership of the attorney general,” which would allow prosecutors to “exchange views,” engage in policymaking, “insure participation of local prosecutors in the State programs,” “set[] statewide standards,” to engage in dedicated research, and to efficiently allocate resources by not engaging in “activities that duplicate or overlap each other.”⁷ It further recommended “[s]pecial programs to educate and train” prosecutors, which it argued were “badly needed.”⁸

Simultaneously, the federal government, through the Law Enforcement Assistance Administration and other programs, began dedicating significant funds to prosecutors' offices and law enforcement organizations “in the name of crime control.”⁹ The idea for the LEAA came from the Commission's report¹⁰ and ultimately reflected the report's emphasis on organizing law enforcement agencies at the state and local levels. Because “the historical

³ ALBERT M. ROSENBLATT, *THE NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION: AN ILLUSTRATED HISTORY* 19 (1998), https://issuu.com/nypti/docs/an_illustrated_history_of_daasny_-_.

⁴ *PDAA History*, PENN. DIST. ATT'Y ASS'N (Jan. 1, 2019), <https://www.pdaa.org/history/>.

⁵ See Harold H. Smedley, *The Association of Prosecuting Attorneys*, 8 MICH. ST. B.J. 119, 119 (1928–29).

⁶ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 149, 280–91 (1967).

⁷ *Id.* at 149, 280.

⁸ *Id.* at 285–86.

⁹ Worrall, *supra* note 2 at 13.

¹⁰ See Charles Rogovin, *The Genesis of the Law Enforcement Assistance Administration: A Personal Account*, 5 COLUM. HUM. RTS. L. REV. 9, 10–12 (1973).

responsibility for law enforcement rest[ed] with State and local governments,” LEAA was organized to award states block grants, which were then distributed by the states to counties, cities, and statewide programs.¹¹ National prosecutors’ associations, like the National Center for Prosecution Management and the National District Attorneys Association, published guidance for local prosecutors’ offices on how to obtain state and federal funding.¹²

From there, prosecutors’ associations grew much more organized. The combined effect of these two forces catalyzed prosecutors’ associations, many of which were already in existence, to formally organize as nonprofit corporations. Though only 2 prosecutors’ associations had done so prior to 1967—Florida (1963) and Illinois (1948)—from 1967 to 1980, 23 additional associations joined them.¹³ This widespread decision to organize likely served as a means of efficiently requesting, and then distributing, federal funding directly to local prosecutors’ offices,¹⁴ and also resulted in the parallel formation of the National Association of Prosecutor Coordinators, “a national-level organization that facilitate[s] communication between various state-level prosecutors and their associations.”¹⁵

This initial motivation—that is, coordinating efforts among prosecutors to create minimum statewide standards and to encourage resource- and idea-sharing—is reflected in the mission statements or goals of contemporary prosecutors’ associations. These mission statements generally reflect the same goals: promoting the values of coordination, cooperation, efficiency, and uniformity; serving as a collective voice for the state’s prosecutors; advocating on behalf of prosecutors; helping prosecutors liaise with other

¹¹ 1973 LAW ENFORCEMENT ASSISTANCE ADMINISTRATION ANN. REP. 1.

¹² *E.g.*, NAT’L CTR. FOR PROSECUTION MGMT. & NAT’L DIST. ATT’YS ASS’N, HANDBOOK FOR THE RURAL AND SMALL OFFICE PROSECUTOR 64–65 (1974); *see generally*, *e.g.*, NAT’L CTR. FOR PROSECUTION MGMT., BUDGETING FOR THE PROSECUTOR (1974).

¹³ *See* Appendix, *infra* pages 42–44.

¹⁴ *E.g.*, NAT’L ASS’N OF ATT’YS GEN., SELECTED DEVELOPMENTS IN PROSECUTOR TRAINING AND ASSISTANCE PROGRAMS 4–5 (1975) (discussing that “the Arizona County Attorneys’ Association was created [in 1974] through a grant from the Arizona State Justice Planning Agency,” which was funded by LEAA); David Boener, *Prosecution in Washington State*, 41 CRIME & JUST. 167, 177–78 (2012) (discussing how the Washington Association of Prosecuting Attorneys was “largely inactive” prior to receiving LEAA grants); Scott Val Alstynne & Larry J. Roberts, *The Powers of the Attorney General in Wisconsin*, 1974 WIS. L. REV. 721, 749–50 (1974) (discussing how the Commission’s recommendations “are already or will probably soon be in effect in Wisconsin, since the Department of Justice now supplies technical services through its Crime Laboratory Division, statistical and training services, and the Wisconsin District Attorney’s Association and the Prosecutors’ Bulletin”); *see also* Marie Gottschalk, *Bring It On: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559, 575 (2015) (“Prosecutors . . . created powerful local, state, and national organizations to represent their interests and coordinate their political activities.”); Telephone Interview with Robert Kepple, Executive Director, Texas District and County Attorneys Association (Aug. 13, 2019); *see generally* LAW ENFORCEMENT ASSISTANCE ADMIN., PROGRAM RESULTS INVENTORY 43 (1977).

¹⁵ Michael C. Campbell, *Politics, Prisons, and Law Enforcement: An Examination of the Emergence of “Law and Order” Politics in Texas*, 45 LAW & SOC’Y REV. 631, 655 (2011).

state officials, agencies, and the legislature; and providing continuing education and technical training.¹⁶

The operations of prosecutors' associations differ greatly by state—in some states, like Hawai'i, Maine, North Dakota, and Wyoming, the associations are loose associations of the state's elected prosecutors, provide relatively few services, and have either no professional staff or an extremely small one.¹⁷ Several states' prosecutors' associations—like Hawai'i, Illinois, Maine, Mississippi, Nevada, North Carolina, Utah, and Wyoming—have no website and limited contact information. On the other hand, other states' prosecutors' associations, like those in California, Texas, New York, Pennsylvania, and Texas, are much more active organizations, holding annual meetings and regularly scheduling trainings,¹⁸ publishing resources

¹⁶ *E.g.*, *History*, IOWA CTY. ATT'YS ASS'N, <https://iowa-icaa.com/history/> (last visited Dec. 6, 2019); *Frequently Asked Questions*, KY. CTY. ATT'YS ASS'N (click "What is the purpose of KCAA ~ Who can become a member?") (last visited Dec. 6, 2019); *Our Mission*, LA. DIST. ATT'YS ASS'N., <https://www.ladaa.org/main/mission> (last visited Dec. 6, 2019); *Massachusetts District Attorneys Association*, COMMONWEALTH OF MASS., <https://www.mass.gov/orgs/massachusetts-district-attorney-association> (last visited Dec. 6, 2019); *About Us*, PROSECUTING ATT'YS ASS'N. OF MICH., <https://www.michiganprosecutor.org/about-us-menu/paam> (last visited Dec. 6, 2019); *Overview*, MINN. CTY. ATT'YS ASS'N., <https://mcaa-mn.org/page/overview> (last visited Dec. 6, 2019); *About Us*, MO. ASS'N. OF PROSECUTING ATT'YS, <https://www.prosecutors.mo.gov/about> (last visited Dec. 6, 2019); *About MCAA*, MONT. CTY. ATT'YS ASS'N., <https://www.mtcoattorneysassn.org/contact-us/> (last visited Dec. 6, 2019); *About*, NEB. CTY. ATT'YS ASS'N., <https://necaa.org/about/> (last visited Dec. 6, 2019); *A Message from the President*, N.J. STATE MUN. PROSECUTORS' ASS'N., <http://www.njsmpa.org/president.php> (last visited Dec. 6, 2019); *About the Conference*, N.C. CONFERENCE OF DIST. ATT'YS, <http://www.ncdistrictattorney.org/about.html> (last visited Dec. 6, 2019); *About OPAA*, OHIO PROSECUTING ATT'YS ASS'N., <http://www.ohiopa.org/about.html> (last visited Dec. 6, 2019); *ODAA Mission & Values*, ORE. DIST. ATT'YS ASS'N., <https://www.oregonda.org/odaa-mission-and-values> (last visited Dec. 6, 2019); PENN. DIST. ATT'YS ASS'N., *supra* note 4; *About TDCAA*, TEXAS DIST. & CTY. ATT'YS ASS'N., <https://www.tdcaa.com/about/> (last visited Dec. 6, 2019); *Agency: Purpose and Function*, COMMONWEALTH'S ATT'YS' SERVS. COUNCIL, <http://www.cas.state.va.us/agency.htm> (last visited Dec. 6, 2019); WASH. ASS'N OF PROSECUTING ATT'YS, <http://waprosecutors.org/> (last visited Dec. 6, 2019).

¹⁷ *E.g.*, E-mail from Aaron Birst, Executive Director, North Dakota State's Attorneys' Association, to Tyler Yeargain (Aug. 16, 2019, 04:46 PM EST) (on file with author); Telephone Interview with Justin Kollar, Kauai County Prosecuting Attorney, former Chair of the Hawai'i Prosecuting Attorneys Association (Aug. 9, 2019); E-mail from Andrew S. Robinson, District Attorney of Maine's 3rd Prosecutorial District, to Tyler Yeargain (Aug. 7, 2019, 11:55 AM EST) (on file with author); *see also* E-mail from Sharon Wilkinson, Executive Director, Wyoming State Bar, to Tyler Yeargain (Aug. 20, 2019, 09:44 AM EST) (on file with author).

¹⁸ *E.g.*, *Training & Events*, CAL. DIST. ATT'YS ASS'N., <https://www.cdaa.org/training> (last visited Dec. 6, 2019); *Training and Board Mtg. Dates*, IOWA CTY. ATT'YS ASS'N., <https://iowa-icaa.com/training-and-board-mtg-dates/> (last visited Dec. 6, 2019); *LDAAsponsored Training*, LA. DIST. ATT'YS ASS'N., https://www.ladaa.org/main/ldaa_sponsored_training (last visited Dec. 6, 2019); *Ongoing Training*, DIST. ATT'YS ASS'N. OF THE STATE OF N.Y., http://www.daasny.com/?page_id=178 (last visited Dec. 6, 2019); *Training*, TEXAS DIST. & CTY. ATT'YS ASS'N., <https://www.tdcaa.com/training/> (last visited Dec. 6, 2019).

for prosecutors,¹⁹ running blogs,²⁰ or publishing monthly journals or magazines for their members.²¹ Some prosecutors' associations have developed statewide charging recommendations or guidelines, for example.²²

While innocuous-sounding, these sort of activities can sometimes result in the perpetuation of constitutional injustices—for example, prosecutors' associations in North Carolina and Texas distributed “cheat sheets” to prosecutors that provided them with “race-neutral reasons” to cover up their racially discriminatory strikes of prospective jurors of color.²³ These “cheat sheets,” or lists like them, allowed prosecutors to facially comply with *Batson v. Kentucky* while striking black jurors at a rate double that of the overall average.²⁴ Similarly, the California District Attorneys Association developed *Miranda* guides and materials that effectively coached police officers through successfully committing unreviewable, purposeful *Miranda* violations—and even suggested that doing so was *desirable*.²⁵

As prosecutors' associations have proliferated, some state governments have developed government agencies that run parallel to the private associations. Fourteen states have both private prosecutors' associations and state agencies, usually in the form of councils, that are also composed of the state's elected prosecutors.²⁶ Only Vermont, where the State's Attorneys

¹⁹ *E.g.*, *Prosecutor Resources*, CAL. DIST. ATT'YS ASS'N., <https://www.cdaa.org/prosecutor-resources> (last visited Dec. 6, 2019); *Publications*, DIST. ATT'YS ASS'N. OF THE STATE OF N.Y., http://www.daasny.com/?page_id=172 (last visited Dec. 6, 2019); *Publications*, LA. DIST. ATT'YS ASS'N., <https://www.ladaa.org/main/publications> (last visited Dec. 6, 2019); *Resources*, WASH. ASS'N. OF PROSECUTING ATT'YS, <http://waprosecutors.org/resources/> (last visited Dec. 6, 2019).

²⁰ *E.g.*, *Blog*, KY. CTY. ATT'YS ASS'N., <http://kycaa.com/blog/> (last visited Dec. 6, 2019); *Blog*, PENN. DIST. ATT'YS ASS'N., <https://www.pdaa.org/blog/> (last visited Dec. 6, 2019).

²¹ *E.g.*, *KCDA Magazine – The Kansas Prosecutor*, KAN. CTY. & DIST. ATT'YS ASS'N., <http://www.kcdaa.org/magazine> (last visited Dec. 6, 2019); *Subscription Information*, PROSECUTING ATT'YS ASS'N. OF MICH., <https://www.michiganprosecutor.org/resources/about-subscriptions> (last visited Dec. 6, 2019) (referring to the *Michigan Prosecutor Newsletter*); *Member Newsletter*, MINN. CTY. ATT'YS ASS'N., <https://mcaa-mn.org/?page=MemberNewsletter> (last visited Dec. 6, 2019); *The Ohio Prosecutor*, OHIO PROSECUTING ATT'YS ASS'N., <http://www.ohiopa.org/theohioprossecutor.html> (last visited Dec. 6, 2019); *The Texas PROSECUTOR JOURNAL*, TEXAS DIST. & CTY. ATT'YS ASS'N., <https://www.tdcaa.com/journal/> (last visited Dec. 6, 2019).

²² *Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System*, 73 OR. L. REV. 823, 856 (1994).

²³ Stephen B. Bright, *Rigged: When Race and Poverty Determine Outcomes in the Criminal Courts*, 14 OHIO ST. J. CRIM. L. 263, 282–83 (2016).

²⁴ Jacob H. Sussman, *As Compared with What? A Response to Brooks Emanuel's Critique of North Carolina's Comparative Proportionality Review*, 41 N.Y.U. L. REV. & SOC. CHANGE HARBINGER 181, 182 (2016).

²⁵ The CDAA published a bulletin explaining, “As long as officers avoid overbearing tactics that offend Fourteenth Amendment due process, the mere fact of deliberate noncompliance with *Miranda* does not affect admissibility for impeachment. . . . And since *Miranda* is not of constitutional dimension, officers risk no civil liability for ‘benign’ questioning outside *Miranda*. Instead, they have ‘little to lose and perhaps something to gain[.]’” Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 133–34 (1998) (quoting bulletin).

²⁶ Those states are Arizona (County Attorneys and Sheriffs Association; Prosecuting Attorneys' Advisory Council); Colorado (District Attorneys Association; District Attorneys' Council); Georgia (District Attorneys Association; Association of Solicitors-General; Prosecuting Attorneys' Council); Indiana

Association has been defunct for years,²⁷ has *only* a government agency, the Department of State's Attorneys and Sheriffs.²⁸ The dividing line between private associations and state agencies is unclear, but the private associations are likelier to engage in external, more ideological activities, like lobbying, electioneering, and advocacy, while the state agencies are likelier to operate in nonpartisan roles, where they serve as a policymaking resource for state legislators and provide services to prosecutors' offices.²⁹

B. Statutory Power

Even excluding their lobbying, electioneering, and litigation efforts—which are covered in Part II—prosecutors' associations³⁰ already have a great deal of policymaking influence by virtue of their inclusion³¹ on state boards, committees, and councils. Though this power is necessarily limited—it usually, but not always, involves their representation on advisory boards, rather than on direct policymaking authorities—it is far-reaching and worth discussing.

The advisory boards on which prosecutors' associations are statutorily entitled to representation touch most aspects of the criminal justice system, from preventing crimes to regulating post-conviction relief for the convicted. Let's start from the beginning. Prosecutors' associations are represented on boards that seek to implement policies to prevent crimes from happening at all, by making recommendations as to anti-terrorism policies,³² sex-

(Association of Prosecuting Attorneys; Prosecuting Attorneys Council); Michigan (Prosecuting Attorneys Association; Prosecuting Attorneys Coordinating Council); Missouri (Prosecuting Attorneys Association; Prosecutors Coordinators Training Council); New Mexico (District Attorneys Association; Administrative Office of the District Attorneys); North Carolina (District Attorney's Association; Conference of District Attorneys); Oklahoma (District Attorneys Association; District Attorneys Council); South Carolina (Solicitors Association; Commission on Prosecution Coordination); Tennessee (District Attorneys General Association; District Attorneys General Conference); Utah (Statewide Association of Prosecutors; Prosecution Council); Virginia (Association of Commonwealth's Attorneys; Commonwealth's Attorneys' Services Council); and West Virginia (Prosecuting Attorneys Association; Prosecuting Attorneys Institute).

²⁷ See APPENDIX, *infra* pages 42–44.

²⁸ See generally 24 V.S.A. § 367.

²⁹ Section I.B, *infra*.

³⁰ It is worth noting here that prosecutors' associations greatly differ from state to state. Any reference to “prosecutors' associations” as a plural entity in this section or in the next Part is not meant to refer to *all*, *most*, or a *majority* of all such associations. The citations in the footnotes serve to clarify to which prosecutors' associations the main text refers.

³¹ This inclusion usually occurs either because a statute automatically authorizes the president of the association to serve on the board, or because the association has the ability to appoint a representative to serve on a board. These differences are largely meaningless for this discussion.

³² FLA. STAT. ANN. § 943.0313 (Domestic Security Oversight Council).

trafficking prevention,³³ school violence and bullying,³⁴ gun control,³⁵ recidivism,³⁶ child welfare,³⁷ sexual assault prevention,³⁸ and violent crime prevention.³⁹

If a crime *does* occur, then they're also represented on the boards that help establish how crimes are investigated—by regulating medical examinations,⁴⁰ interrogation policies,⁴¹ forensic investigation policies,⁴² sexual assault investigations,⁴³ police standards,⁴⁴ witness protection efforts,⁴⁵ evidence retention,⁴⁶ and cold cases.⁴⁷ For the victims of crimes, prosecutors' associations serve on boards that are tasked with reviewing victims services⁴⁸ and conducting domestic violence and child fatality

³³ ARK. CODE ANN. § 12-19-101(b)(9); CAL. PENAL CODE § 13990 (California Alliance to Combat Trafficking and Slavery Task Force); LA. STAT. ANN. § 46:2166 (Human Trafficking Prevention Commission); MICH. COMP. LAWS SERV. § 752.973 (human trafficking commission); N.J. STAT. ANN. § 52:17B-237 (Commission on Human Trafficking); N.D. Cent. Code. § 54-12-33 (human trafficking commission); S.C. CODE ANN. § 16-3-2050.

³⁴ MASS. ANN. LAWS. ch. 71, § 37O(j); OR. REV. STAT. § 339.331, .333 (Center for School Safety).

³⁵ MD. CODE ANN. PUB. SAFETY § 3-207; MD. CODE ANN. PUB. SAFETY §§ 5-502, -503 (Cease Fire Council); MD. CODE ANN. PUB. SAFETY §§ 5-404, -405 (Handgun Roster Board).

³⁶ COLO. REV. STAT. § 13-3-116 (restorative justice coordinating council); 730 ILL. COMP. STAT. 190/20 (Adult Redeploy Illinois); OKLA. STAT. tit. 57, § 521.2 (Transformational Justice Interagency Task Force)

³⁷ KANS. STAT. ANN. § 38-151 (child welfare system task force); LA. STAT. ANN. § 46:261 (Fatherhood First Initiative); MASS. ANN. LAWS. ch. 18C, § 4 (child advocate advisory board); OKLA. STAT. tit. 10, §§ 601.1, .3 (Oklahoma Commission on Children and Youth); OKLA. STAT. tit. 10A, § 2-9-116 (State Council for Interstate Juvenile Supervision); OKLA. STAT. tit. 10, § 601.20 (Children of Incarcerated Parents Task Force); OKLA. STAT. tit. 10, § 7007-1.9 (Task Force on Reactive Attachment Disorder)

³⁸ FLA. STAT. ANN. § 382.356 (detecting statutory rape through birth-certificate-sharing program); LA. STAT. ANN. § 15:555 (Louisiana Sexual Assault Oversight Commission); LA. STAT. ANN. § 24.933 (Interagency Council on the Prevention of Sex Offenses); MASS. ANN. LAWS. ch. 12, § 33.

³⁹ MINN. STAT. § 299A.642 (Violent Crime Coordinating Council).

⁴⁰ IOWA CODE § 691.68; MISS. CODE ANN. § 41-61-55(3) (State Medical Examiner Advisory Council).

⁴¹ IOWA CODE § 804.31.

⁴² CAL. PENAL CODE § 11062 (Crime Laboratory Review Task Force); CAL. PENAL CODE § 11161.2 (consult with Office of Emergency Services to develop medical forensic forms and guidelines); MASS. ANN. LAWS. ch. 6, § 184A (forensic science oversight board); TEX. CODE CRIM. PROC. ANN. art. 38.01 (Texas Forensic Science Commission); W. VA. CODE. § 15-9B-1 (Sexual Assault Forensic Examination Commission).

⁴³ CAL. PENAL CODE §§ 13823.93(b), (d)(6) (training program); MINN. STAT. § 388.25 (training program).

⁴⁴ MD. CODE ANN. PUB. SAFETY § 3-203 (Maryland Police Training and Standards Commission); MICH. COMP. LAWS SERV. § 28.603 (Michigan commission on law enforcement standards); MONT. CODE ANN. § 44-4-402 (Montana Public Safety Officer Standards and Training Council); N.J. STAT. ANN. § 52:17B-70 (Police Training Commission); N.Y. EXEC. LAW § 844-b (New York State Committee for the Coordination of Police Services to Elderly Persons); OR. REV. STAT. §§ 181A.360, .365 (Board on Public Safety Standards and Training).

⁴⁵ COLO. REV. STAT. § 24-33.5-106.

⁴⁶ COLO. REV. STAT. § 24-33.5-104.5; MD. CODE ANN. CRIM. PROC. § 11-927(d-e) (Maryland Sexual Assault Evidence Kit Policy and Funding Committee); MICH. COMP. LAWS SERV. § 752.962 (sexual assault evidence kit tracking and reporting commission); N.M. STAT. ANN. § 29-16-5 (DNA identification system oversight committee).

⁴⁷ COLO. REV. STAT. § 24-33.5-109 (cold case task force).

⁴⁸ ALA. CODE. § 15-23-17(c).

reviews.⁴⁹ In Oklahoma, the prosecutors' association is even represented on a judicial redistricting task force that effectively determines *where* the case will be heard.⁵⁰

After an investigation has concluded, and a prosecutor has to make a charging decision, the prosecutors' associations have influence there, too. They sit on boards that make recommendations as to prosecution alternatives, like pretrial diversion and prosecution alternatives;⁵¹ that regulate pretrial release and bail;⁵² that review how delinquent juveniles or mentally incompetent adults are prosecuted, if at all;⁵³ and how out-of-state or -country defendants are extradited.⁵⁴

When a prosecutor has successfully sought an indictment from the grand jury and the case proceeds to trial, the boards on which prosecutors' associations are represented make recommendations as to how specific crimes—like identity theft, financial crimes, tax crimes, abuse, environmental crimes, high-tech crimes, gambling crimes, and sexual assault⁵⁵—are prosecuted, how misdemeanors and felonies are classified,⁵⁶ and what kind of defense indigent defendants receive.⁵⁷

Once a conviction has been rendered, prosecutors' associations help make recommendations as to what the consequences of that conviction will

⁴⁹ CAL. PENAL CODE § 11174.34 (Child Death Review Council); COLO. REV. STAT. § 24-31-702 (domestic violence fatality review board); FLA. STAT. ANN. § 383.402 (State Child Abuse Death Review Committee); 325 ILL. COMP. STAT. § 5/11.0 (Child Death Investigation Task Force); LA. STAT. ANN. § 40:2019(C) (Child Death Review Panel); MASS. ANN. LAWS. ch. 6A, § 18N (state domestic violence fatality review team); MASS. ANN. LAWS. ch. 38, § 2A (state child fatality review team); N.J. STAT. ANN. § 52:27D-43.17c (Domestic Violence Fatality and Near Fatality Review Board); N.J. STAT. ANN. § 9:6-8.88 (Child Fatality and Near Fatality Review Board); N.M. STAT. ANN. § 31-22-4.1 (domestic violence homicide review team); N.C. GEN. STAT. § 7B-1402 (North Carolina Child Fatality Task Force); OKLA. STAT. tit. 22, § 1602 (Domestic Violence Fatality Review Board).

⁵⁰ OKLA. STAT. tit. 20, § 127 (Judicial and District Attorney Redistricting Task Force).

⁵¹ COLO. REV. STAT. § 18-1.3-101.5 (mental health diversion pilot program); N.D. CENT. CODE. § 53-35-24 (commission on alternatives to incarceration); OKLA. STAT. § 22-305.2 (deferred prosecution); TENN. CODE ANN. § 40-15-107 (pretrial diversion).

⁵² CAL. INS. CODE § 1810.7; N.J. STAT. ANN. § 2A:162-26 (Pretrial Services Program Review Commission).

⁵³ ARK. CODE ANN. § 5-2-327(c)(1); CAL. WELF. & INST. CODE § 625.6(e); COLO. REV. STAT. § 16-11.3-102 (Commission on Criminal and Juvenile Justice); LA. STAT. ANN. § 15:1424 (juvenile delinquency and gang prevention advisory board); LA. STAT. ANN. § 15:1442 (Louisiana Juvenile Jurisdiction Planning Implementation Committee); LA. STAT. ANN. § 46:2751 (Juvenile Justice Reform Act Implementation Commission); MD. CODE ANN. EDUC. § 7-424.2(d); MD. CODE ANN. HUM. SERVS. § 9-211, -212 (State Advisory Board for Juvenile Services); MASS. ANN. LAWS. ch. 119, § 89 (juvenile justice policy and data board); UTAH CODE ANN. § 78A-6-1208 (Youth Court Board)

⁵⁴ 730 ILL. COMP. STAT. 5/3-3-11.05 (State Council for Interstate Compacts for the State of Illinois).

⁵⁵ CAL. PENAL CODE §§ 14309, 13823.93(b), (d)(6), 13848.4(b); CAL. FISH & GAME CODE § 12028; COLO. REV. STAT. 24-33.5-1703 (identity theft and financial fraud board); FLA. STAT. ANN. 413.4021 (tax enforcement); MASS. ANN. LAWS. ch. 23K, § 68(d) (subcommittee on public safety under the gaming policy advisory committee); MINN. STAT. §§ 299A.681 (Minnesota Financial Crimes Advisory Board), 388.25 (training about sex offender sentencing); OR. REV. STAT. § 468.961(3);

⁵⁶ OKLA. STAT. tit. 22, § 1701 (Criminal Justice Reclassification Coordination Council).

⁵⁷ MICH. COMP. LAWS SERV. §§ 780.985, .987 (Michigan Indigent Defense Commission); UTAH CODE ANN. § 78B-22-501 (Indigent Defense Funds Board).

be—including civil and asset forfeiture,⁵⁸ restitution,⁵⁹ and registering on a sex offender registry.⁶⁰ It's also common for prosecutors' associations to have a representative on a state's sentencing commission,⁶¹ or for state statutes to require the commission to consult with the prosecutors' association prior to issuing sentencing guidelines.⁶² When a defendant is sent to prison, prosecutors' associations also serve on boards that regulate the prison experience—from new prison construction,⁶³ corrections operations,⁶⁴ and prisoner mental health programs.⁶⁵ And afterwards, they make recommendations as to how post-conviction relief claims proceed,⁶⁶ when prisoners are given parole,⁶⁷ and how prisoners re-enter society.⁶⁸

More broadly, prosecutors' associations sit on boards that are concerned with changing criminal justice policy in broad strokes⁶⁹ and that gather information and statistics about crimes.⁷⁰ More recently, state policy groups

⁵⁸ COLO. REV. STAT. § 16-13-701; GA. CODE ANN. § 9-16-19(g)(3)(vi)(B); IND. CODE ANN. § 34-24-1-4.5; MINN. STAT. § 609.531(8); OKLA. STAT. tit. 63 § 2-506(L)(3).

⁵⁹ ALA. CODE § 29-2-20(c); MD. CODE ANN. CRIM. PROC. § 11-1105(a)(6); OR. REV. STAT. § 147.227(4).

⁶⁰ COLO. REV. STAT. § 16-11.7-103 (sex offender management board); NEV. REV. STAT. ANN. § 179D.132 (Advisory Committee to Study Laws Concerning Sex Offender Registration); N.M. STAT. ANN. § 9-3-13 (Sex Offender Management Board); OKLA. STAT. tit. 22, § 1094 (Oklahoma State Council for Interstate Adult Offender Supervision).

⁶¹ ALA. CODE. § 12-25-3; LA. STAT. ANN. § 15:323; MD. CODE ANN. CRIM. PROC. § 6-204 (State Commission on Criminal Sentencing Policy); MASS. ANN. LAWS. ch. 211E, § 1; MINN. STAT. § 244.09 (Minnesota Sentencing Guidelines Commission); NEV. REV. STAT. ANN. § 176.0133 (Nevada Sentencing Commission); N.J. STAT. ANN. §§ 2C:48A-1, -2 (Criminal Sentencing and Disposition Commission); N.M. STAT. ANN. § 9-3-10; S.C. CODE ANN. § 24-26-10.

⁶² *E.g.*, 42 PA. CONS. STAT. § 2155 (opportunity to testify before Commission on Sentencing).

⁶³ ALA. CODE § 29-2-20(3); ARIZ. REV. STAT. § 36-206; IOWA CODE ANN. § 356.37.

⁶⁴ OHIO REV. CODE ANN. § 2967.193(E).

⁶⁵ ALA. CODE § 29-2-20(1); TEX. HEALTH & SAFETY CODE ANN. § 614.002 (Advisory Committee to the Texas Board of Criminal Justice on Offenders with Medical or Mental Impairments).

⁶⁶ N.C. GEN. STAT. § 15A-1475 (North Carolina Innocence Inquiry Commission).

⁶⁷ MASS. ANN. LAWS. ch. 27, § 4; N.J. STAT. ANN. § 30:4-123.47a (Parole Advisory Board).

⁶⁸ LA. STAT. ANN. § 15:1199.4 (Reentry Advisory Council); TEX. GOV'T CODE ANN. § 501.098 (reentry task force).

⁶⁹ GA. CODE ANN. § 35-2-1; IOWA CODE ANN. § 216A.132 (justice advisory board); LA. STAT. ANN. § 15:1202 (Louisiana commission on law enforcement and the administration of criminal justice); MASS. ANN. LAWS. ch. 6A, § 18M (standing commission to study the commonwealth's criminal justice system); NEB. REV. STAT. § 23-1218 (Nebraska Commission on Law Enforcement and Criminal Justice); NEV. REV. STAT. ANN. § 176.0123 (Advisory Commission on the Administration of Justice); UTAH CODE ANN. § 36-29-105 (Criminal Code Evaluation Task Force); VA. CODE. § 9.1-108 (Criminal Justice Services Board).

⁷⁰ ARK. CODE ANN. § 12-12-202(b)(3); CAL. PENAL CODE § 6027; CAL. PENAL CODE § 13100.1; CAL. PENAL CODE § 186.36 (Gang Database Technical Advisory Committee); CAL. PENAL CODE § 11112.3 (Remote Access Network Advisory Committee); FLA. STAT. ANN. 943.06 (Criminal and Juvenile Justice Information Systems Council); IND. CODE ANN. § 5-2-6-24; KANS. STAT. ANN. § 74-5701 (criminal justice information system committee); LA. STAT. ANN. § 40:2902 (Law Enforcement Data Task Force); MASS. ANN. LAWS. ch. 119, § 89 (juvenile justice policy and data board); MICH. COMP. LAWS SERV. § 28.161 (Criminal Justice Information Systems Policy Council); MICH. COMP. LAWS SERV. § 600.175(4); MINN. STAT. § 299C.65 (Criminal and Juvenile Justice Information Advisory Group); MONT. CODE ANN. § 44-5-501 (criminal intelligence information section); N.D. Cent. Code. § 54-12-34; OR. REV. STAT. § 181A.275 (Criminal Justice Information Standards Advisory Board).

have formed to make recommendations regarding criminal justice initiatives like judicial reinvestment and restorative justice.⁷¹

Prosecutors' associations are also represented on authorities that are concerned with issues secondary to the criminal justice system, like child support, attorneys' fees, euthanasia, dispute resolution, and judicial administration.⁷² There are some more bizarre inclusions here as well, like on boards that regulate property insurance, design the state's Stop Domestic Violence license plate, and most interestingly, that oversees livestock branding.⁷³

II. PROSECUTORS' ASSOCIATIONS AS INTEREST GROUPS

A contemporaneous account of the New York State District Attorneys Association's 1909 formation, an article in the *Rochester Union and Advertiser*, explained that it was organized on "the theory that the big crooks have an organization to beat the law," with the aim of "defeat[ing] the lawmakers by mutual help."⁷⁴ The article further explained that the Association would create a "legislative committee to try and bring about changes and improvements in the criminal laws," because "[w]hile the intentions of the legislators are the best, they oftentimes enact laws, through unfamiliarity with criminals, and the methods of their prosecution, which embarrass the prosecuting attorneys of the state."⁷⁵ Further, "the association will have a committee to look over new laws and to confer with the legislators before they are enacted," so that they may "prevent the enactment of statutes which might give criminals more loopholes than they already possess."⁷⁶ In other words, the goal was to benefit prosecutors across the state by creating a counterpart organization to political machines and gangs and to make the voices of prosecutors heard in the policymaking process.

⁷¹ COLO. REV. STAT. § 13-3-116 (restorative justice coordinating council); FLA. STAT. ANN. § 394.656 (Criminal Justice, Mental Health, and Substance Abuse Reinvestment Grant Program); 730 ILL. COMP. STAT. 190/20 (Adult Redeploy Illinois); IND. CODE ANN. § 33-38-9.5-2 (justice reinvestment advisory council); KANS. STAT. ANN. § 75-52.160 (justice reinvestment working group); MD. CODE ANN. STATE GOV'T § 9-3203 (Justice Reinvestment Oversight Board); MASS. ANN. LAWS. ch. 7D, § 11; OKLA. STAT. tit. 57, § 521.2 (Transformational Justice Interagency Task Force).

⁷² FLA. STAT. ANN. § 827.06; LA. STAT. ANN. § 9:315.16(A); LA. STAT. ANN. § 13:5108.4 (Attorney Fee Review Board); MICH. COMP. LAWS SERV. §§ 752.1023-24 (Michigan commission on death and dying); MINN. STAT. § 518A.79 (Child Support Task Force); NEV. REV. STAT. ANN. § 425.610 (Committee to Review Child Support Guidelines); NEB. REV. STAT. § 25-2905 (Advisory Council on Dispute Resolution); OR. REV. STAT. § 25.080(8); VA. CODE § 17.1-706, -708 (Judicial Conference of Virginia); VA. CODE § 16.1-218 (Judicial Conference of Virginia for District Courts); W. VA. CODE § 29-26-1 (West Virginia Courthouse Facilities Improvement Authority); OHIO SUP. R. 36.04 (Commission on Specialized Dockets).

⁷³ ALA. CODE § 32-6-390 (Stop Domestic Violence license plate design); LA. STAT. ANN. §§ 3:732 (livestock branding), 22:2171 (Louisiana Property and Casualty Insurance Commission).

⁷⁴ *Prosecutors to Form an Association: District Attorneys of State Will Combine in Fight Against Crooks*, ROCHESTER UNION & ADVERTISER (Aug. 27, 1909), reprinted in ROSENBLATT, *supra* note 3 at 17.

⁷⁵ *Id.*

⁷⁶ *Id.*

In the years that followed, this became the model that most prosecutors' associations adopted. Though the specific means of achieving these goals changed over time—for example, the associations became more active in judicial elections, referenda, constitutional amendments, and filing amicus briefs—but the goals themselves remained the same. This Part addresses how prosecutors' associations are involved in policymaking in three different ways, each of which is covered in a separate Section: their lobbying efforts, electoral activities, and involvement in litigation, usually as *amici*.

A. Lobbying

Prosecutors' associations have been particularly active in lobbying state governments, and sometimes even the federal government, on criminal justice issues. Though the focus (and results) of this lobbying differs depending on the state and association, it's generally the case that prosecutors' associations have lobbied to make more things illegal, and with greater penalties, and have opposed efforts that would relax sentences, decriminalize certain conduct, or strengthen the defense's position in trial. In more recent years, however, some associations—though certainly not all—have embraced some principles of criminal justice reform. This support is sometimes less altruistic than it seems. Some large criminal justice bills passed by state legislatures include some limited reforms *and* provisions that provide prosecutors with greater tools and powers. In these cases, prosecutors' associations usually take the “good” with the “bad”—from their perspective, at least—and support the overall legislation.⁷⁷ But elsewhere, prosecutors' associations have supported substantial criminal justice reform efforts while ostensibly receiving nothing in return.

Starting from the beginning of the criminal justice process, prosecutors' associations have, for the most part, supported efforts to criminalize more behavior. These associations are obviously not responsible for the codification of most crimes, given the heavy reliance of the American criminal justice system on the English system. However, they have sometimes supported efforts in the last fifty years to re-codify old crimes—like sodomy.⁷⁸ In recent years, prosecutors' associations have responded to technological and societal changes by supporting the criminalization of

⁷⁷ See, e.g., R. Michael Cassidy, *(Ad)ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 LOY. U. CHI. L.J. 981, 1009–10 (2014) (“The experience in other states suggests that even when prosecutors support limited reform of mandatory minimums, they do so as a result of interest convergence rather than any principled opposition to such harsh sentencing schemes.”).

⁷⁸ For example, the Texas District and County Attorneys Association ended up supporting the Texas ban on sodomy that was later struck down by the Supreme Court in *Lawrence v. Texas*. Christopher R. Leslie, *Procedural Rules or Procedural Pretexts?: A Case Study of Procedural Hurdles in Constitutional Challenges to the Texas Sodomy Law*, 89 KY. L.J. 1109, 1129 (2000/2001).

sexting,⁷⁹ refusing to submit to a breathalyzer test,⁸⁰ using narcotics while pregnant,⁸¹ civil looting,⁸² and escape from institutions by civilly committed patients.⁸³

And for many other crimes, prosecutors' associations have pushed for stricter punishments. Some associations were responsible for the state-level adoption of mandatory minimums,⁸⁴ which they continue to defend,⁸⁵ and have supported more punitive sentences for juvenile offenders,⁸⁶ the imposition of maximum sentences that may run afoul of *Blakely v. Washington*,⁸⁷ increased penalties for drug offenders,⁸⁸ and even sending domestic violence victims to jail for contempt.⁸⁹ And they've also supported efforts to create victim compensation funds⁹⁰—which, though not intended to function as *punishments*, per se, nonetheless serve as direct criminal consequences.

⁷⁹ Jennifer Eyl, *Two Bills Demonstrate the Difficulty in Legislating Teen Sexting*, 94 DENV. L. REV. ONLINE 1, 2, 2 n.11 (2017) (Colorado District Attorneys' Council); Jennifer D. Hill, Note, *The Teen Sexting Dilemma: A Look at How Teen Sexting Has Been Treated in the Criminal Justice System and Suggested Responses for Arizona*, 4 PHOENIX L. REV. 561, 594–95 (2010) (Arizona Prosecuting Attorneys' Advisory Council).

⁸⁰ E.g., Kasey Youngetob, *Changing Lanes: The Criminalization of Refusal in DUI Laws*, 70 VAND. L. REV. EN BANC 121, 123 n.15 (2017) (Montana County Attorneys Association).

⁸¹ Cortney E. Lollar, *Criminalizing Pregnancy*, 92 IND. L.J. 947, 993 (2017) (Tennessee District Attorneys General Conference).

⁸² E.g., Lisa Grow Sun, *Disaster Mythology and the Law*, 96 CORNELL L. REV. 1131, 1191 (2011) (California District Attorneys Association).

⁸³ E.g., Grant H. Morris, *Escaping the Asylum: When Freedom Is a Crime*, 40 SAN DIEGO L. REV. 481, 483 (2003) (California District Attorneys Association).

⁸⁴ See, e.g., Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on "Three Strikes" in California*, 28 PAC. L.J. 243, 247–48 (1996) (discussing California District Attorneys Association's support for adoption of three-strikes law).

⁸⁵ Cassidy, *supra* note 77, at 1008 (noting the opposition of the California District Attorneys Association and the Florida Prosecuting Attorneys Association to rolling back mandatory minimums).

⁸⁶ E.g., William G. Schwartz, *Survey of Juvenile Law*, 23 S. ILL. U. L.J. 1161, 1181 (1999) (discussing opposition of Illinois State's Attorneys Association to changes to juvenile delinquency statute); Daniel E. Traver, Comment, *The Wrong Answer to a Serious Problem: A Story of School Shootings, Politics and Automatic Transfer*, 31 LOY. U. CHI. L.J. 281 (2000) (discussing ISAA's recommendation for easier juvenile prosecutions); Kerry Drake, Opinion, *Teen Killers Should Have Chance at Redemption*, CASPER STAR TRIB. (Jan. 13, 2013), https://trib.com/opinion/columns/teen-killers-should-have-chance-at-redemption/article_d9a3bd92-e0e0-54d9-abd4-ae42a6c20c92.html (discussing the Wyoming County and Prosecuting Attorneys Association's support for "keeping juvenile sentences of life without parole an option for Wyoming judges").

⁸⁷ E.g., Frank Sullivan, Jr., *A Look Back: Developing Indiana Law Post-Bench Reflections of an Indiana Supreme Court Justice: Selected Developments in Indiana Criminal Sentencing and Death Penalty Law*, 49 IND. L. REV. 1349, 1352–53 (2016) (discussing Indiana Prosecuting Attorneys Council's support for "presumptive" sentences).

⁸⁸ E.g., Nick J. Erickson, Comment, *Cleaning Up on the Inside: Addiction, Recidivism, and Substance Abuse Treatment Programs in Indiana's Correctional Facilities*, 14 IND. HEALTH L. REV. 83, 102 (2017) (Indiana Prosecuting Attorneys Council).

⁸⁹ E.g., David Wiksell, *Chapter 49: No Jail for Victims of Domestic Violence*, 40 MCGEORGE L. REV. 333, 335, 336–37 (2009) (California District Attorneys Association).

⁹⁰ Michael C. Turpen, *The Criminal Injustice System: An Overview of the Oklahoma Victim's Bill of Rights*, 17 TULSA L.J. 253, 254–55 (1981/1982) (Oklahoma District Attorneys Association).

Moreover, prosecutors' associations have pushed for legislation that makes it easier for their members to prosecute crimes. Sometimes these efforts include their opposition to things like the Castle doctrine,⁹¹ "stand your ground" legislation,⁹² and battered-women syndrome,⁹³ because the presence of these rules in criminal law complicate prosecutions. Other efforts are more straightforward—requiring reciprocal discovery from the defense, even from defendants representing themselves *pro se*;⁹⁴ abolishing preliminary examinations and restricting probable cause determinations;⁹⁵ treating mental disabilities as a "punishment" issue rather than a "guilt" issue;⁹⁶ and limiting corroboration requirements.⁹⁷

Prosecutors' associations are probably best known for their strong support of the death penalty. Most prosecutors' associations joined efforts to defeat the Racial Justice Act of 1994,⁹⁸ which would've prohibited death

⁹¹ E.g., Jonathan S. Goldstein, *Pennsylvania's Expanded Castle Doctrine: An Annotated Tour of the First Five Years*, 88 PA. B. ASS'N Q. 170, 174–75 (2017) (Pennsylvania District Attorneys Association); Alexis M. Haddox, Comment, *The Ohio Castle Doctrine: Shielding Criminals with a Presumption of Self-Defense*, 41 CAP. U.L. REV. 1105, 1121–22 (2013) (Ohio Prosecuting Attorneys Association).

⁹² Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 660 n.205 (2018) (Ohio Prosecuting Attorneys Association); Gregory R.C. Hasman, *State Attorneys Group Opposes 'Stand Your Ground' Bill While Legislators Are Split*, WYO. BUS. REV. (Mar. 8, 2018), https://www.wyomingbusinessreport.com/industry_news/government_and_politics/stateattorneys-group-opposes-stand-your-ground-bill-while-legislators/article_0e95678a-22e0-11e8-86d1-9fa0b4a53ed3.html (Wyoming County and Prosecuting Attorneys' Association).

⁹³ Laura Huber Martin, Case Note, *Ohio Joins the Majority and Allows Expert Testimony on the Battered Women Syndrome: State v. Koss*, 551 N.E.2d 970 (Ohio 1990), 60 U. CIN. L. REV. K 877, 897 n.140 (1992) (Ohio Prosecuting Attorneys Association); see also Scott Gregory Baker, *Deaf Justice?: Battered Women Unjustly Imprisoned Prior to the Enactment of Evidence Code Section 1107*, 24 GOLDEN GATE U.L. REV. 99, 125 (1994) (discussing the original opposition of the California District Attorneys Association to legislation allowing women to present battered women syndrome expert testimony in trial, prior to amendments to the legislation).

⁹⁴ E.g., Mark A. Esqueda, Note, *Michigan Strives to Balance the Adversarial Process and Seek the Truth with Its New Reciprocal Criminal Discovery Rule*, 74 U. DET. MERCY L. REV. 317, 335 n.116 (1997) (Prosecuting Attorneys Association of Michigan); Josué J. Galván, Comment, *Now What?: A Guide to Navigating the Michael Morton Act's Seemingly Unconstitutional Pro Se Provision*, 48 TEX. TECH. L. REV. 423, 430–31, 446 (2016) (Texas District and County Attorneys Association).

⁹⁵ E.g., Lewis Langham, Jr., *Preliminary-Examination Reform: In Fairness We Trust or a Waste of Time and Resources?*, 28 T.M. COOLEY L. REV. 231, 239 (2011) (Prosecuting Attorneys Association of Michigan).

⁹⁶ Graham Baker, Note, *Defining and Determining Retardation in Texas Capital Murder Defendants: A Proposal to the Texas Legislature*, 9 SCHOLAR 237, 267–68 (2007) (Texas District and County Attorneys Association).

⁹⁷ E.g., Geneva O. Brown, *Little Girl Lost: Las Vegas Metro Police Vice Division and the Use of Material Witness Holds Against Teenaged Prostitutes*, 57 CATH. U.L. REV. 471, 497 n.187 (2008) (Nevada District Attorneys Association); Peter P. Handy, *Chapter 153: Jailhouse Informants' Testimony Gets Scrutiny Commensurate with its Reliability*, 43 MCGEORGE L. REV. 755, 762–63 (2012) (California District Attorneys Association); Catherine L. Kello, Note, *Rape Shield Laws: Is It Time for Reinforcement?*, 21 U. MICH. J.L. REFORM 317, 320 (1987/1988) (Prosecuting Attorneys Association of Michigan).

⁹⁸ Daniel E. Lungren & Mark L. Krotoski, *The Racial Justice Act of 1994: Undermining Enforcement of the Death Penalty Without Promoting Racial Justice*, 20 DAYTON L. REV. 655, 659 n.29 (1995) (Alabama District Attorneys Association, Arizona Prosecuting Attorneys' Advisory Council, California District Attorneys Association, Nebraska County Attorneys Association, Pennsylvania District Attorneys

sentences imposed on the basis of race⁹⁹ and many others opposed efforts to exclude the mentally disabled from receiving death sentences.¹⁰⁰ Today, prosecutors' associations continue to support the death penalty—and some have even urged an *expansion* of the death penalty to cover more crimes and more criminals.¹⁰¹ However, this support is not unanimous. In 1966, the Colorado District Attorneys Association publicly endorsed a referendum to abolish the death penalty.¹⁰²

But the lobbying efforts of prosecutors' associations extend further than this. Sometimes, their lobbying concerns proposed constitutional amendments or proposed legislation that directly implicates constitutional rights. For example, some prosecutors' associations have opposed attaching the right to counsel in delinquency proceedings¹⁰³ or in grand jury proceedings¹⁰⁴ and considering racial-profiling allegations in evaluating the permissibility of searches.¹⁰⁵ Others have sought to expand implied consent and to restrict witness immunity.¹⁰⁶ But the most notable efforts have involved the interplay between the federal Constitution's protections and state constitutions' counterpart protections—associations have vehemently opposed applying less permissive (and therefore more defendant-friendly) standards in state constitutional law than the Supreme Court has established in federal constitutional law.¹⁰⁷

Association, Washington Association of Prosecuting Attorneys); see also Ellen A. Donnelly, *Can Legislatures Redress Racial Discrimination in Capital Punishment? Evaluating Racial Justice Acts in Response to McCleskey*, 82 J. CRIM. L. 388, 392 n.34 (2018).

⁹⁹ See *id.* at 391–92.

¹⁰⁰ Michael L. Perlin, “*Merchants and Thieves, Hungry for Power*”: *Prosecutorial Misconduct and Passive Judicial Complicity in Death Penalty Trials of Defendants with Mental Disabilities*, 73 WASH. & LEE L. REV. 1501, 1526 n.105 (2016) (Indiana Prosecuting Attorneys' Council and North Carolina District Attorneys Association); Carol E. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in “Executing” Versus “Symbolic” States in the United States*, 84 TEX. L. REV. 1869, 1914 n.262 (2006) (Texas District and County Attorneys Association).

¹⁰¹ E.g., Michael T. Nolan, Jr., Note, *Hell Bent on Intent: New Jersey Broadens the Class of Death Eligible Defendants*, 19 SETON HALL LEGIS. J. 195, 223 n.146 (1994) (New Jersey County Prosecutor's Association).

¹⁰² Michael L. Radelet, *Capital Punishment in Colorado: 1859–1972*, 74 U. COLO. L. REV. 885, 925 (2003).

¹⁰³ E.g., Jennifer J. Walters, Comment, *Illinois' Weakened Attempt to Prevent False Confessions by Juveniles: The Requirement of Counsel for the Interrogation of Some Juveniles*, 33 LOY. U. CHI. L.J. 487, 514 (2002) (Illinois State's Attorneys Association).

¹⁰⁴ E.g., Michael Vitiello & J. Clark Kelso, *Reform of California's Grand Jury System*, 35 LOY. L.A. L. REV. 513, 548–49, 550 (2002) (California District Attorneys' Association).

¹⁰⁵ E.g., Jenna K. Perrin, Casenote, *Toward Eradicating the Pervasive Problem of Racial Profiling in Minnesota*, 27 HAMLINE L. REV. 63, 90 (2004) (Minnesota County Attorneys Association).

¹⁰⁶ Kasey Youngetob, *Changing Lanes: The Criminalization of Refusal in DUI Laws*, 70 VAND. L. REV. EN BANC 121, 123 n.15 (2017) (Montana County Attorneys Association); *Recent Legislative Development*, 1997 UTAH L. REV. 1169, 1187–88 (1997) (Utah Statewide Association of Prosecutors).

¹⁰⁷ George E. Dix, *Judicial Independence in Defining Criminal Defendant's Texas Constitutional Rights*, 68 TEX. L. REV. 1369, 1375–80 (1990) (Texas District and County Attorneys Association); Louis Woody Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9, 27 (1975) (Louisiana District Attorneys Association); Sanford E. Pitler, Comment, *The Origin and Development of Washington's Independent*

And perhaps because of their unique relationship with police officers, prosecutors' associations have taken an interesting, somewhat internally inconsistent, position on police misconduct. Despite a general practice of lobbying in favor of statutory amendments that make prosecution easier, some prosecutors' associations have lobbied *against* efforts to make it easier to prosecute police officers for misconduct and excessive force.¹⁰⁸ They have opposed making police disciplinary records public, requirements that prosecutors make *Brady* disclosures of police misconduct on file, and the appointment of special prosecutors to handle police killings.¹⁰⁹

Sometimes, prosecutors' associations have lobbied in support of changes to—or the preservation of—their state's system of government. Some of these changes are narrow and are restricted to how their state's criminal justice system operates. For example, prosecutors' associations have opposed spreading prosecutorial responsibility to anyone other than elected prosecutors. They've opposed state efforts to create statewide prosecutors, to vest state attorneys general with greater prosecutorial power, or to create special prosecutors.¹¹⁰ But in other cases, their advocacy extends to the structure of government itself. In Louisiana, when a merit-based system of judicial selection was opposed, the state District Attorneys Association came out in strong opposition to the proposal, instead favoring the popular election of judges.¹¹¹ And following similar successes in Oklahoma and Texas, the Kansas County and District Attorneys Association pushed for the creation of a separate state court with final appellate jurisdiction in criminal cases.¹¹²

Prosecutors' associations have also made their voices heard before their state bar associations or state supreme courts regarding ethical rules for

Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy, 61 WASH. L. REV. 459, 488 n.160 (1986) (Washington Association of Prosecuting Attorneys).

¹⁰⁸ E.g., David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 475 n.10 (2016) (California District Attorneys Association); Jerry P. Coleman & Megan L. Grow, *Prosecutors and Criminal Grand Juries Investigating Peace Officer Fatal Force Cases: How the California Legislature's 2015 Response to a National Tragedy Defied Both Logic and the Constitution*, 51 U.S.F. L. REV. 393, 407–09 (2017) (same).

¹⁰⁹ E.g., Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 777 (2015) (Oregon District Attorneys Association); Katherine J. Bies, Note, *Let the Sunshine In: Illuminating the Powerful Role Police Unions Play in Shielding Officer Misconduct*, 28 STAN. L. & POL'Y REV. 109, 136 n.202 (2017) (California District Attorneys Association); Sabrina G. Singer, Note, *Embracing Federalism in Special Prosecution Models: An Analysis of Experimentation in the States*, 51 COLUM. J.L. & SOC. PROBS. 431, 455–57 (2018) (District Attorneys Association of the State of New York).

¹¹⁰ Steven Helle, *Survey of Illinois Law: New Freedom of Information Act Peeking Behind the Paper Curtain*, 34 S. ILL. U.L.J. 1089, 1091 (2010) (Illinois State's Attorneys Association); R. Scott Palmer & Barbara M. Linthicum, *The Statewide Prosecutor: A New Weapon Against Organized Crime*, 13 FLA. ST. U.L. REV. 653, 658, 671, 675–76 (1985) (Florida Prosecuting Attorneys Association); Bies, *supra* note 109 at 455–57 (DAASNY).

¹¹¹ Judith Haydel, *The Impact of Section 2 of the Voting Rights Act on State Judicial Election Systems*, 72 JUDICATURE 252, 253 (1989).

¹¹² *Recommendations for Improving the Kansas Judicial System: Report of the Kansas Judicial Study Advisory Committee*, 13 WASHBURN L.J. 271, 343 (1974); Paul E. Wilson, *The Kansas Court of Appeals: A Response to Judicial Need*, 25 U. KAN. L. REV. 1, 11 (1976).

prosecutors. In Ohio, the prosecutors' association pushed to include an exemption to the state's ethical rules that allowed "prosecutors to hire their private practice business associates to provide legal services for their city or county."¹¹³ Elsewhere, associations took strong positions in opposition to proposed ethical rules that would have required the disclosure of exculpatory information and that would have required judicial approval for subpoenas directed at lawyers regarding their past clients.¹¹⁴ And when many states considered ratifying the American Bar Association's rule regarding the special responsibilities of prosecutors, which included many of the above provisions, the associations maintained largely opposed the move.¹¹⁵

But, lest this be read as an indictment of *all* prosecutors' associations *all* of the time, it is worth noting that prosecutors' associations also function as nonpartisan, nonideological actors in state government when it comes to criminal justice policy generally. They have frequently apprised legislators of new challenges and trends in criminal law, none of which fit neatly into "criminal justice reform" or "tough-on-crime" boxes. For example, in response to a rise in human sex trafficking, prosecutors have pushed for stronger laws to deter trafficking and punish traffickers.¹¹⁶ In states where so-called "faith healing" has endangered the lives of children, prosecutors' associations have worked with interfaith communities to amend religious exemption laws.¹¹⁷ And prosecutors' associations have worked to protect

¹¹³ Jack P. Desario & David E. Freel, *Ohio Ethics Law Reforms: Tracing the Political and Legal Implications*, 30 AKRON L. REV. 129, 138 (1996).

¹¹⁴ Bruce A. Green, *Prosecutorial Ethics in Retrospect*, 30 GEO. J. LEGAL ETHICS 461, 473 n.84 (2017) (Arizona Prosecuting Attorneys' Advisory Council); Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 891–92, (Washington Association of Prosecuting Attorneys); Laurie L. Levenson, *The Politics of Ethics*, 69 MERCER L. REV. 753, 758–59, 759 n.25 (2018) (California District Attorneys Association); Andrea F. McKenna, *A Prosecutor's Reconsideration of Rule 3.10*, 53 U. PITT. L. REV. 489, 492–94 (1992) (Pennsylvania District Attorneys Association); Keith Swisher, *Prosecutorial Conflicts of Interest in Post-Conviction Practice*, 41 HOFSTRA L. REV. 181, 192–94 (2012) (Arizona Prosecuting Attorneys' Advisory Council). *But see* Green, *Professional Regulation*, *supra* at 890–91, 901 (discussing support of District Attorneys Association of the State of New York, Tennessee District Attorneys General Conference and Wisconsin District Attorneys Association for model rules requiring disclosure of exculpatory evidence).

¹¹⁵ Levenson, *supra* note 114 at 759 n.25 (CDA); Sylvia E. Stevens, *Changing the Rules: Rewriting our DRs, Part II*, 63 OR. ST. B. BULL. 29, 29–30 (2003) (Oregon District Attorneys Association).

¹¹⁶ Jennifer M. Chacón, *Human Trafficking, Immigration Regulation, and Subfederal Criminalization*, 20 NEW CRIM. L.R. 96, 118–19 (2017) (Washington Association of Prosecuting Attorneys); *see also* Lindsey N. Roberson, *She Leads a Lonely Life: When Sex Trafficking and Drug Addiction Collide*, 52 WAKE FOREST L. REV. 359, 367–68 (2017) (discussing human trafficking training provided by the North Carolina Conference of District Attorneys). *But see* Eilen Overbaugh, Comment, *Human Trafficking: The Need for Federal Prosecution of Accused Traffickers*, 39 SETON HALL L. REV. 635, 658–59 (2009) (discussing the Ohio Prosecuting Attorneys Association to proposed human trafficking law because it might "conflict with kidnapping, abduction, extortion, and assault statutes, which could result in a conflict over which law takes precedence").

¹¹⁷ *E.g.*, Annamaria Del Buono, Note, *Living on a Prayer: Faith Healers Escaping Criminal Liability for Child Abuse Through Religious Affirmative Defenses & Exemption Laws*, 17 RUTGERS J.L. & RELIG. 449, 466 (2016) (Idaho Prosecuting Attorneys Association).

marginalized communities by backing hate crime legislation, rape shield laws, and an expansion of protective orders for domestic violence victims.¹¹⁸

In more recent years, prosecutors' associations have developed something of a mixed record on criminal justice reform efforts. Many have endorsed efforts to implement asset forfeiture reform,¹¹⁹ to abolish mandatory minimums,¹²⁰ to relax residency restrictions for registered sex offenders,¹²¹ to promote rehabilitation and other prosecution alternatives,¹²² to reform (or abolish) felon disenfranchisement and other collateral consequences of convictions,¹²³ to expunge criminal records,¹²⁴ and to better support public defenders' offices.¹²⁵ But in other states, prosecutors' associations have remained opposed to rolling back mandatory minimums and three-strikes laws,¹²⁶ reducing drug crime penalties (and legalization),¹²⁷

¹¹⁸ Scott Daniels, *Legislative Highlights*, 14 UTAH B.J. 44, 45 (2001) (Utah Statewide Association of Prosecutors); Kelly M. Driscoll, Essay, *Severing Ties: The Case for Indefinite Orders of Protection for Survivors of Domestic Violence*, 75 MONT. L. REV. 315, 318 (2014) (Montana County Attorneys' Association); Melvin Huang, Note, *Keeping Stalkers at Bay in Texas*, 15 TEX. J.C.L. & C.R. 53, 85 (2009) (Oregon District Attorneys Association); Kello, *supra* note 97 at 320 n.16 (Prosecuting Attorneys Association of Michigan).

¹¹⁹ Ryan Behndleman & Lisa Churvis, *Georgia Uniform Civil Forfeiture Procedure Act*, 32 GA. ST. U.L. REV. 1, 19–20 (2015) (Prosecuting Attorneys' Council of Georgia); Laura Hancock, *Panel Will Sponsor an Asset Forfeiture Reform Bill in 2016*, CASPER STAR-TRIB. (Nov. 4, 2015), https://trib.com/news/state-and-regional/govt-and-politics/panel-will-sponsor-anasset-forfeiture-reform-bill-in/article_fl112282-fdfe-55d2-a8ba-3d8f5dc7952a.html (Wyoming County and Prosecuting Attorneys' Association);

¹²⁰ E.g., Vincent Shiraldi, *Digging Out: As U.S. States Begin to Reduce Prison Use, Can America Turn the Corner on its Imprisonment Binge?*, 24 PACE L. REV. 563, 571 (2004) (Prosecuting Attorneys Association of Michigan).

¹²¹ Asmara Tekle-Johnson, *In the Zone: Sex Offenders and the Ten-Percent Solutions*, 94 IOWA L. REV. 607, 621–22 (2009) (Iowa County Attorneys Association); Laurel White, *Gov. Tony Evers Vetoes Changes to Sex Offender Residency Requirements*, WIS. PUB. RADIO (Nov. 25, 2019), <https://www.wpr.org/gov-tony-evers-vetoes-changes-sex-offender-residency-requirements> (Wisconsin District Attorneys Association).

¹²² E.g., Susan N. Herman, *Getting There: On Strategies for Implementing Criminal Justice Reform*, 23 BERKELEY J. CRIM. L. 32, 44–45 (2018) (Louisiana District Attorneys Association).

¹²³ Mark Haase, *Civil Death in Modern Times: Reconsidering Felony Disenfranchisement in Minnesota*, 99 MINN. L. REV. 1913, 1930–31 (2015) (Minnesota County Attorneys Association); Lorelai Laird, *Rallying for Reform*, 103 A.B.A. J. 46, 50–51 (2017) (LDAA).

¹²⁴ E.g., Sharon M. Dietrich, *Clean Slate Brings Automated and Expanded Criminal Record Sealing to Pennsylvania*, 90 PA. B. ASS'N Q. 39, 45 (2019) (Pennsylvania District Attorneys Association).

¹²⁵ E.g., David J. Carroll, *Sounding Gideon's Trumpet: The Right to Counsel Movement in Louisiana*, 9 LOY. J. PUB. INT. L. 139, 151–52 (2008) (discussing the LDAA's support for a case-weighting program for public defenders' offices);

¹²⁶ E.g., Francis J. Carney, Jr., *Developing Guidelines in Massachusetts: A Work in Progress*, 20 L. & POL'Y 247, 272–73 (1998) (Massachusetts District Attorneys Association); Cassidy, *supra* note 77 at 1008, 1010 n.155 (California District Attorneys Association, Florida Prosecuting Attorneys Association); Ahmed A. White, *The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705, 736–37 (2006) (California District Attorneys Association).

¹²⁷ Cassidy, *supra* note 77 at 1010 n.155 (Massachusetts District Attorneys Association); John Stuart & Robert Sykora, *Minnesota's Failed Experience with Sentencing Guidelines and the Future of Evidence-Based Sentencing*, 37 WM. MITCHELL L. REV. 426, 439–40 (2011) (Minnesota County Attorneys Association); Hunter E. Starr, Comment, *The Carrot and the Stick: Tailoring California's Unlawful Marijuana Cultivation Statute to Address California's Problems*, 4 MCGEORGE L. REV. 1069, 1084–86

discovery reform,¹²⁸ bail reform,¹²⁹ fully funding public defenders,¹³⁰ widescale prison releases (both for budgetary reasons and for medical necessity),¹³¹ compensation funds for the wrongfully convicted,¹³² civil asset forfeiture reform,¹³³ and diversion programs,¹³⁴ among other proposals.

B. Electioneering

Prosecutors are well-known participants in the democratic process. For better or for worse, almost every state in the country provides for directly elected prosecutors,¹³⁵ though most prosecutorial elections are uncontested.¹³⁶ Prosecutors have long been likelier than lawyers with other backgrounds to run in judicial elections,¹³⁷ and judicial candidates both actively seek and enthusiastically tout endorsements from prosecutors.¹³⁸ So

(2013) (California District Attorneys Association); Angus M. Thuermer, Jr., *Wyoming's War on Weed*, WYOFIL (May 24, 2016), <https://www.wyofile.com/wyomings-war-weed/> (Wyoming County and Prosecuting Attorneys' Association).

¹²⁸ Vincent Stark, *New York Discovery Reform Proposals: A Critical Assessment*, 78 ALB. L. REV. 1265, 1275–77 (2015/2016) (District Attorneys Association of the State of New York); Jennifer Horan, Comment, *A Step Toward Robust Criminal Discovery Reform in Virginia: The Disclosure of Witness Statements Before Trial*, 52 U. RICH. L. REV. 223, 234–37 (2017) (Virginia Association of Commonwealth's Attorneys).

¹²⁹ E.g., Samar Khurshid, *State District Attorneys Association Targeted as Roadblock to Reform*, GOTHAM GAZETTE (Mar. 14, 2019), <https://www.gothamgazette.com/state/8356-state-district-attorneys-association-targeted-as-roadblock-to-reform> (DAASNY).

¹³⁰ Andrew Lucas Blaize Davies, *How Do We "Do Data" in Public Defense?*, 78 ALB. L. REV. 1179, 1179–80 (2014/2015) (Missouri Association of Prosecuting Attorneys); Richard Drew, Comment, *Louisiana's New Public Defender System: Origins, Main Feature, and Prospects for Success*, 69 LA. L. REV. 955, 969–70 (2009) (LDAA).

¹³¹ Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER, RACE & JUST. 315, 337, 342–43 (2012) (Florida Prosecuting Attorneys Association); Cameron Easterling, *Chapter 837: Inmate Medical Release under Realignment*, 44 MCGEORGE L. REV. 697, 701–02 (2013) (CDAA); Jelani Jefferson Exum, *Sentencing, Drugs, and Prisons: A Lesson from Ohio*, 42 U. TOL. L. REV. 881, 882, 882 n.8 (2011) (Ohio Prosecuting Attorneys Association).

¹³² E.g., Megan Smith, *Have We Abandoned the Innocent? Society's Debt to the Wrongly Convicted*, 2 CRIM. L. BRIEF 3, 7 (2006) (LDAA).

¹³³ Daniel J. Dew, *Issue 1 Died, Ohio's Criminal Justice Reform Lives*, 31 FED. SENT. R. 177, 178 (2019).

¹³⁴ Dew, *supra* note 133 (Ohio Prosecuting Attorneys Association); Herman, *supra* note 122 at 50–53 (Oklahoma District Attorneys Association);

¹³⁵ See generally Ellis, *supra* note 1.

¹³⁶ Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 593 (2009) (“[P]rosecutor elections produce relatively few challengers. In general election campaigns, prosecutor incumbents ran unopposed in 85% of the races they entered.”).

¹³⁷ See, e.g., Bradley C. Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges – Reconsidered*, 6 L. & SOC'Y. REV. 579, 583 (1972); Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 365 n.219 (2010).

¹³⁸ Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669, 677 n.44 (2001/2002); Rebecca Mae Salokar, *Endorsements in Judicial Campaigns: The Ethics of Messaging*, 28 JUST. SYS. J. 342, 345 (2007); Swisher, *supra* note 137 at 328–30 (collecting campaign pledges from judicial candidates).

the involvement of prosecutors' associations in elections functions less as an iconoclastic move and more as a logical extension of a pre-existing practice.

Some prosecutors' associations have publicly opposed the re-election of state appellate judges. For example, the Oklahoma District Attorneys Association opposed the 1986 re-election of Court of Criminal Appeals Judge Ed Parks, citing his "stated opposition to the death penalty," despite his votes to uphold death sentences.¹³⁹ The Mississippi Prosecutors Association was similarly active in Mississippi Supreme Court elections in the 1990s, endorsing opponents to Justices Joel Blass in 1990¹⁴⁰ and James L. Robertson in 1992.¹⁴¹ In its resolution opposing Robertson, the MPA declared that the Mississippi Supreme Court "had created 'judicial turmoil and chaos', 'tied the hands of prosecutors and law officers', 'denied justice', and had 'given criminal defendants rights not required by the constitution.'"¹⁴²

Other prosecutors' associations have refrained from *formal* opposition to incumbent judges or other judicial candidates, but tacitly supported, with little left to the imagination, more hard-line candidates. For example, in 1984, David Nissman, a 30-year old state prosecutor who served on the Oregon District Attorneys' Association's Legislative Task Force, ran for the Oregon Supreme Court against Justice Hans Linde.¹⁴³ Though the ODAA didn't *explicitly* endorse Nissman's campaign, it gave Nissman—but not Linde or another candidate—space in *The Verdict*, its publicly financed newsletter, to advocate for his campaign.¹⁴⁴

In 1986, the California District Attorneys Association initially opposed the retention elections of Chief Justice Rose Bird and Justices Grodin and

¹³⁹ R. Darcy, *Conflict and Reform: Oklahoma Judicial Elections 1907–1998*, 26 OKLA. CITY U.L. REV. 519, 531–32 (2001); see also Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1400 (2001).

¹⁴⁰ Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 760, 764(1995) ("Joel Blass, whom the Governor had appointed to fill an unexpired term on the court, was defeated in 1990 for a full term by a candidate who promised to be a 'tough judge for tough times' and to put criminals behind bars, and whom, like Justice Robertson's opponent, the Mississippi Prosecutors Association had endorsed.").

¹⁴¹ David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1, 16–17 (1992) ("The Mississippi Prosecutor's Association's public endorsement of Judge Roberts' candidacy, through a one-page resolution based on a vote of its board of directors, was perhaps the most dramatic event of the campaign. The resolution maintained that Roberts 'best represents the views of the law abiding citizens in regards to the administration of criminal justice in this state.' It offered the further view, impressively long on rhetoric but short on factual support, that decisions of the Mississippi Supreme Court had created 'judicial turmoil and chaos', 'tied the hands of prosecutors and law officers', 'denied justice', and had 'given criminal defendants rights not required by the constitution.'").

¹⁴² David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1, 16 (1992).

¹⁴³ Ronald K.L. Collins, *Hans Linde and His 1984 Judicial Election: The Primary*, 70 OR. L. REV. 747, 752 (1991).

¹⁴⁴ *Id.* at 764–65, 764–65 n.138.

Reynoso.¹⁴⁵ Its board of directors voted unanimously to oppose the retention and the CDAA later published a 78-page “White Paper” that outlined its objections to the justices’ rulings and their judicial philosophy.¹⁴⁶ In response to the CDAA’s opposition to the justices, two attorneys requested federal and state investigations into the CDAA’s tax-exempt status.¹⁴⁷ Accordingly, the CDAA dropped its formal opposition to the retentions,¹⁴⁸ and instead encouraged the formation of the Prosecutors Working Group, which carried on the CDAA’s opposition.¹⁴⁹ The Working Group published its own “Prosecutors’ Report,” which attacked the justices for reversing 11 death penalty convictions on December 31, 1985, which it called “The New Year’s Eve Massacre.”¹⁵⁰

Similarly, the Florida Prosecuting Attorneys Association seriously considered involving itself in several state supreme court elections in the early 1990s, but ultimately decided against doing so. Citizens for a Responsible Judiciary, a political action committee “designed as an umbrella organization combining interests of ‘parents, victims of crime, families of those victims, law enforcement officers, attorneys, prosecutors, former jurors, and citizens in general who are concerned about the direction that certain members of the Florida Supreme Court are taking,” formed in 1990 to oppose the re-election of Chief Justice Leander Shaw.¹⁵¹ The anti-retention campaign largely focused on Shaw’s ruling in an abortion case, but he was also attacked for his rulings on criminal justice issues.¹⁵² In 1992, when Chief Justice Rosemary Barkett was up for retention, CRJ similarly organized against her.¹⁵³ That year, “the group nearly got *formal* support from the Florida Prosecuting Attorneys Association.”¹⁵⁴ However, then-State

¹⁴⁵ Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate*, 59 S. CAL. L. REV. 809, 817 n.19 (1986) (noting that the CDAA is “a group opposing the retention of Chief Justice Bird and Justices Grodin and Reynoso”).

¹⁴⁶ Paul J. Pfingst, “*The Genie’s Out of the ‘Jar: The Development of Criminal Justice Policy in California*,” 33 MCGEORGE L. REV. 717, 727 (2002).

¹⁴⁷ *Prosecutors Drop Move To Oust 3 Coast Justices*, N.Y. TIMES (Aug. 14, 1985), <https://www.nytimes.com/1985/08/14/us/around-the-nation-prosecutors-drop-move-to-oust-3-coast-justices.html>.

¹⁴⁸ *Id.*

¹⁴⁹ Claire Cooper, *Assistant DA Canlis A Natural to Lead Moderate Anti-Bird Fight*, SACRAMENTO BEE, Aug. 26, 1985, at A01; Laura Mecoy, *Justice Reynoso Draws Prosecutors’ Fire*, SACRAMENTO BEE, Sept. 30, 1986, at A12.

¹⁵⁰ Pfingst et al., *supra* note 146 at 725.

¹⁵¹ Susan A. MacManus & Lawrence Morehouse, *Race, Abortion, and Judicial Retention: The Case of Florida Supreme Court Justice Leander Shaw*, in *THE CHANGING RACIAL REGIME* 133, 148–49 (Matthew Holden Jr. ed., 2017).

¹⁵² *Id.* at 133–34, 137; Tim Warfel, Editorial, *Should Voters Retain Leander Shaw as a Florida Supreme Court Justice? No: Reject His Liberal Activism, Disregard of the Rule of Law*, SUN-SENTINEL, Oct. 9, 1990, <https://www.sun-sentinel.com/news/fl-xpm-1990-10-09-9002180467-story.html>.

¹⁵³ Diane Rado, *Fiery Debate Rages Ever Hotter over Chief Justice’s Keeping Job*, ORLANDO SENTINEL, Sept. 9, 1992, at 4B.

¹⁵⁴ *Id.* (emphasis added).

Attorney Willie Meggs, the vice-president of the FPAA, explained that “the association recently discussed publicly opposing Barkett’s retention, but decided against it to maintain unity.”¹⁵⁵ Nonetheless, Meggs tipped his hand—he opposed Barkett’s retention, as did 16 other state attorneys, out of twenty, and he criticized the Police Benevolent Association for endorsing her, surmising that “their rank-and-file are livid.”¹⁵⁶

Even in elections where the state prosecutors’ association didn’t *explicitly* endorse a candidate, their impact can still be felt when association-affiliated prosecutors run for office. For example, in 1980, Michael J. McCormick, the executive director of the Texas District and County Attorneys Association, ran for a seat on the Texas Court of Criminal Appeals. He attacked the incumbent judge for not being “friendly to prosecutors” and emphasized his own “law enforcement philosophy,” and ultimately won the election.¹⁵⁷ As mentioned previously, David Nissman, who served on the Oregon District Attorneys’ Association’s Legislative Task Force, unsuccessfully ran for the Oregon Supreme Court.¹⁵⁸ In 2008, Jim Kitchens, a former district attorney who had been active in the Mississippi Prosecutors Association,¹⁵⁹ successfully defeated incumbent Supreme Court Justice James Smith, though he shied away from “tough-on-crime” language.¹⁶⁰

Tracing the involvement of prosecutors’ associations in other elections—in which they didn’t endorse a candidate, made no public statements about candidates, and saw none of their members run for office—is more challenging. It hasn’t been uncommon since the 1980s for state supreme court justices who *occasionally* struck down a death penalty or vacated a criminal conviction to face fierce opposition from law enforcement groups and “tough-on-crime” candidates in the next election. In many states, the opposition to incumbent justices came from political action committees that styled themselves as “victims’ rights” or “public safety” organizations.¹⁶¹ Three state supreme court justices lost re-election in the 1990s—Wyoming Supreme Court Justice Walter Urbigkit in 1992, Nebraska Supreme Court Justice David Lanphier in 1996, and Tennessee Supreme Court Justice Penny

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1826–27 (2000).

¹⁵⁸ Collins, *supra* note 143 at 752; *supra* notes 143–144 and accompanying text.

¹⁵⁹ Becky Gillette, *Supreme Court Races Heat Up for Central and South Mississippi*, MISS. BUS. J., Oct. 20, 2008, <https://msbusiness.com/2008/10/supreme-court-races-heat-up-for-central-and-south-mississippi/>.

¹⁶⁰ Arielle Dreher, *Electing Justice: The JFP Interview with Justice Jim Kitchens*, JACKSON FREE PRESS (Oct. 26, 2016, 2:28 PM CDT), <https://www.jacksonfreepress.com/news/2016/oct/26/electing-justice-jfp-interview-justice-jim-kitchen/>.

¹⁶¹ *E.g.*, *Foes Want Voters to Fire Judge: Battle Rages in Wyoming, Spurred by Claims that Supreme Court Justice is Too Easy on Criminals*, ASSOCIATED PRESS, Oct. 29, 1992, 1992 WLNR 434270; Traci V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68, 70–72 (1999).

White in 1996.¹⁶² All three justices' defeats followed aggressive campaigns against them by "victims' rights" organizations, which pilloried the justices for being "weak on crime" and for their votes in specific cases.¹⁶³ And though the organizations were not formally affiliated with any state prosecutors' associations, their constituent members—police officers,¹⁶⁴ victims rights' advocates employed by the state,¹⁶⁵ and elected prosecutors themselves¹⁶⁶—were close to the associations.

Lest these connections seem tenuous, the involvement of the Tennessee prosecutors' association in the 2014 retention elections of State Supreme Court Justices Cornelia Clark, Sharon Lee, and Gary Wade, was much clearer and easy-to-follow. That year saw a conservative effort, led by Lieutenant Governor Ron Ramsey and Republican Party-affiliated groups funded by the Koch brothers, to unseat all three justices.¹⁶⁷ The Tennessee Forum, an "independent political issues organization that advocates for better government," also came out against the justices' retention, and received funding from the Republican State Leadership Committee to do so.¹⁶⁸ Another group, Tennessee Voices for Victims, a victims' rights and advocacy organization¹⁶⁹ that shared a spokeswoman with the Tennessee Forum,¹⁷⁰ also publicly opposed the justices' retention, criticizing them for allegedly "undermin[ing] the rights of victims" and for their decisions in a handful of criminal justice cases.¹⁷¹

Voices for Victims has a close relationship with the Tennessee District Attorneys General Conference. A district attorney general routinely sits on

¹⁶² Herbert M. Kritzer, *Law is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423, 444, 444 n.93 (2007).

¹⁶³ E.g., ASSOCIATED PRESS, *supra* note 161 (discussing anti-Urbigkit retention campaign); John F. Irwin & Daniel L. Real, Essay, *Enriching Judicial Independence: Seeking to Improve the Retention Vote Phase of an Appointive Selection System*, 34 FORDHAM URB. L.J. 453, 466 (2007) (discussing anti-Lanphier retention campaign); Reid, *supra* note 161 at 70–72 (discussing anti-Lanphier and White retention campaigns).

¹⁶⁴ Michael Milstein, *Lawmen: Urbigkit Must Go*, BILLINGS GAZETTE, Sept. 25, 1992, at 5 (noting that the Wyoming Peace Officers Association passed a resolution opposing Urbigkit's retention); Reid, *supra* note 161 at 70 (noting that "law enforcement organizations" opposed White's retention).

¹⁶⁵ Deirdre Stoelzle, *Voters Remove Urbigkit from State Supreme Court*, CASPER STAR-TRIBUNE, Nov. 5, 1992, at A1, A12 (identifying Jacque Taylor, who led the anti-retention campaign against Urbigkit, as a former victims' rights advocate with the state attorney general's office); *Removal of Urbigkit Called People Victory*, BILLINGS GAZETTE, Nov. 12, 1992, at 17 (identifying Taylor as the "chairwoman of the Wyoming Crime Victims Coalition").

¹⁶⁶ E.g., *Attorney: Urbigkit Pro-Defendant*, CASPER STAR-TRIBUNE, Aug. 25, 1992, at 13 (discussing Campbell County Attorney Russ Hansen's opposition to Urbigkit).

¹⁶⁷ SCOTT GREYTAK, JUSTICE AT STAKE, WINNING RETENTION IN A HOSTILE POLITICAL ENVIRONMENT: HOW SUPPORTERS OF THREE STATE SUPREME COURT JUSTICES PREVAILED IN THE 2014 TENNESSEE RETENTION ELECTIONS 7–8 (2015).

¹⁶⁸ *Id.* at 8.

¹⁶⁹ *Our History*, VOICES FOR VICTIMS, <https://www.tnvoicesforvictims.org/history/> (last visited Dec. 12, 2019).

¹⁷⁰ Kate Coil, *Victims' Rights, Partisan Group Decry Judges*, COLUMBIA DAILY HERALD, July 27, 2014, 2014 WLNR 20553888.

¹⁷¹ *Id.*

the organization's board of directors—as does a representative from the Tennessee Attorney General's Office—and its Statewide Advisory Council includes the Conference's Statewide Victim Witness Coordinator and a handful of other district attorneys general.¹⁷² And the Conference frequently partners with Voices for Victims in its public relations campaigns, like its recent effort to raise awareness of elder abuse.¹⁷³ In other words, the decision-making apparatuses of Voices for Victims, which publicly opposed three justices' 2014 retention, included representatives of the Conference.

Outside of supporting or opposing candidates for office, prosecutors' associations also play a role in the initiative and constitutional amendment process. Prosecutors' associations in Arkansas, California, and Oklahoma waged public campaigns against state constitutional amendments that sought to legalize medical marijuana,¹⁷⁴ and the Colorado District Attorneys Council publicly opposed a 1996 constitutional amendment that sought to grant parents “the inalienable right to ‘direct and control the upbringing, education, values, and discipline of their children.’”¹⁷⁵ In 2016, the Oklahoma District Attorneys Association publicly opposed Propositions 780 and 781, which “reclassified low-level crimes, like drug possession and low-level property offenses, as misdemeanors instead of felonies, resulting in reducing the number of people in the prisons by reducing the length of sentences,” and reinvested the savings in education and job training programs.¹⁷⁶ After the referenda successfully passed, the ODAA backed legislative measures to repeal both of them.¹⁷⁷

However, prosecutors' associations have done more than oppose referenda and amendments. The Oregon District Attorneys Association, for example, has been particularly active in endorsing ballot measures, and has routinely done so for several amendments each year.¹⁷⁸ And some prosecutors' associations have been particularly active in drafting proposed constitutional amendments and initiatives.¹⁷⁹

¹⁷² *Board of Directors & Advisory Council*, TENN. VOICES FOR VICTIMS, <https://www.tnvoicesforvictims.org/board/> (last accessed Dec. 12, 2019).

¹⁷³ *Tennessee Is Talking About Elder Abuse*, TENN. DIST. ATT'YS GEN. CONFERENCE, <https://www.tndagc.org/elderabuse/> (last accessed Dec. 12, 2019).

¹⁷⁴ Carol Goforth & Robyn Goforth, *Medical Marijuana in Arkansas: The Risks of Rushed Drafting*, 71 ARK. L. REV. 647, 653–54 (2019); Marty Ludlum et. al., *Oklahoma's State Question 788 on Medical Marijuana: High on Expectations, Hazy on Details*, 10 S.J. BUS. & ETHICS 60, 68 (2018); Paul J. Pflingst et al., *supra* note 146 at 744.

¹⁷⁵ Linda L. Lane, Comment, *The Parental Rights Movement*, 69 U. COLO. L. REV. 825, 825, 847 n.136 (1998).

¹⁷⁶ Herman, *supra* note 122 at 50–53.

¹⁷⁷ *Id.*

¹⁷⁸ *E.g.*, OREGON SECRETARY OF STATE, VOTERS' PAMPHLET: OREGON PRIMARY ELECTION MAY 20, 2008 75, 82, 86 (2008), <http://records.sos.state.or.us/ORSOSWebDrawer/Record/6873635#>; OREGON SECRETARY OF STATE, VOTERS' PAMPHLET: SPECIAL ELECTION NOVEMBER 2, 1999 13, 19, 25, 30, 35, 39, 43 (1999), <http://library.state.or.us/repository/2009/200912301518203/S-8V94-3-999-11-2.pdf>.

¹⁷⁹ *E.g.*, Pflingst et al., *supra* note 146 at 732 (noting how the California District Attorneys Association drafted Proposition 15, which granted “reciprocal rights to crime victims and to ‘the People’ as represented

C. Participation in Litigation

Prosecutors' associations frequently participate in litigation, usually as *amici*. Their involvement sometimes occurs at the direct request of courts,¹⁸⁰ but otherwise, they file amicus briefs through the normal channels at their own discretion. In so doing, they frequently join with other organizations to file joint briefs. For example, it's not uncommon for prosecutors' associations to join associations of counties,¹⁸¹ state government agencies or officials, like the attorney general or a statewide prosecutor's office;¹⁸² or law enforcement organizations, like associations of sheriffs,¹⁸³ police chiefs and other police officers,¹⁸⁴ or police attorneys,¹⁸⁵ to file briefs. If they're filing in federal court, it's routine for prosecutors' associations from different states

by the prosecution," with an aim of "re-balanc[ing] the scales of justice"); Sara Raymond, Comment, *From Playpens to Prisons: What the Gang Violence and Juvenile Crime Prevention Act of 1998 Does to California's Juvenile Justice System and Reasons to Repeal It*, 30 GOLDEN GATE U. L. REV. 233, 252–53 (2000) (noting how the CDAA "drafted the final version of the" Gang Violence and Juvenile Crime Prevention Act that appeared as a ballot measure in California's March 2000 election).

¹⁸⁰ See, e.g., Andrew King-Ries, *State v. Mizenko: The Montana Supreme Court Wades into the Post Crawford Waters*, 67 MONT. L. REV. 275, 292–93 (2006) (noting that the Montana Supreme Court invited the Montana County Attorneys Association to file an *amicus* brief); Brief of the Attorney General and the Prosecuting Attorneys Association of Michigan as Amicus Curiae at 1, *People v. McCauley*, 493 Mich. 872 (Mich. 2012) (No. 140422) ("The [Michigan Supreme] Court invited the association to file an *amicus* brief in this case.").

¹⁸¹ See generally, e.g., Amicus Brief by the Nevada District Attorneys Association and the Nevada Association of Counties, In re Mallory, 128 Nev. 436 (Nev. 2012) (No. 57312).

¹⁸² See generally, e.g., Brief of the Alabama District Attorneys Association and Office of Prosecution Services as Amicus Curiae in Support of Appellant the State of Alabama and Reversal, *State v. Brown*, 259 So.3d 655 (Ala. 2018) (No. 1161087); Brief of the Attorney General and the Prosecuting Attorneys Association of Michigan as Amicus Curiae, *supra* note 180.

¹⁸³ See generally, e.g., Brief of Alabama Chiefs of Police Association, Alabama Sheriffs Association, and Alabama District Attorneys Association, as Amicus Curiae, Ala. Peace Officers' Standards & Training Comm'n v. Grimmett, 238 So.3d 48 (Ala. 2017) (No. 2150888); Brief of Amici Curiae Oklahoma Sheriffs' Association, Oklahoma District Attorneys Association, and Ten Oklahoma District Attorneys in Support of Petitioner at 1, *Carpenter v. Murphy*, No. 17-1107 (U.S. argued Nov. 27, 2018); Brief Amici Curiae of the Virginia Association of Commonwealth's Attorneys, Virginia Association of Chiefs of Police, Virginia Sheriffs' Association, Virginia State Police Association, and Fraternal Order of Police of Virginia, in Support of the Petition for Writ of Certiorari, *Virginia v. Rudolph*, 558 U.S. 1048 (2009) (No. 09-102).

¹⁸⁴ See generally, e.g., Brief of Alabama Chiefs of Police Association, Alabama Sheriffs Association, and Alabama District Attorneys Association, as Amicus Curiae, *supra* note 183; Brief Amici Curiae of the Virginia Association of Commonwealth's Attorneys, Virginia Association of Chiefs of Police, Virginia Sheriffs' Association, Virginia State Police Association, and Fraternal Order of Police of Virginia, in Support of the Petition for Writ of Certiorari, *supra* note 183.

¹⁸⁵ See generally, e.g., Brief for Amicus Curiae North Carolina Conference of District Attorneys & North Carolina Association of Police Attorneys, *State v. Barnard*, 362 N.C. 244 (N.C. 2008) (No. 347A07).

to join forces,¹⁸⁶ and are even sometimes joined by other professional or ideological associations.¹⁸⁷

The cases—or, more accurately, the legal issues in the cases—in which prosecutors’ associations file amicus briefs are largely predictable. For example, if a state trial court issued a ruling in a criminal defendant’s favor that could impose a statewide rule unfavorable to prosecutors, the association might be expected to file a brief with the state’s appellate court.¹⁸⁸ Similarly, prosecutors’ associations routinely file amicus briefs before the Supreme Court in many well-known criminal cases, like *Minnesota v. Dickerson*, *Connick v. Thompson*, and *Missouri v. McNeely*.¹⁸⁹ Prosecutors’ associations will also participate in court cases as *amici* that involve the powers and privileges of prosecutors’ offices themselves—for example, the state attorney

¹⁸⁶ *E.g.*, Brief of Amici Curiae National District Attorneys Association, California District Attorneys Association, Kansas County and District Attorneys Association, Missouri Prosecuting Attorneys Association, District Attorneys Association of the State of New York, and Oklahoma District Attorneys Association, in Support of Petitioner, *Kansas v. Cheever*, 134 U.S. 596 (2013) (No. 12-609); Brief Amici Curiae of Americans for Effective Law Enforcement, Inc. joined by the International Association of Chiefs of Police, Inc., the National Sheriffs’ Association, the National District Attorneys Association, the States of Alaska, Alabama, Arizona, Arkansas, California, Delaware, Florida, Indiana, Kansas, Louisiana, Missouri, Montana, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, Utah, Virginia, Vermont, the District of Columbia, Puerto Rico, the Second Judicial District of the State of New Mexico, Alabama District Attorneys Association, Prosecuting Attorney’s Council of Georgia, Kansas County and District Attorneys Association, Massachusetts District Attorneys Association, Prosecuting Attorney’s Association of Michigan, the Minnesota County Attorneys Association, Pennsylvania District Attorneys Association, South Carolina Commission on Prosecution Coordination, Tennessee Attorney General Conference, Department of State’s Attorneys for the State of Vermont, Virginia Association of Commonwealth’s Attorneys, and Washington Association of Prosecuting Attorneys, in Support of the Petitioner State of Minnesota, *Minnesota v. Dickerson*, 508 U.S. 366 (1993) (No. 91-2019).

¹⁸⁷ *See generally, e.g.*, Brief of Amici Curiae National District Attorneys Association, California District Attorneys Association, American Society of Crime Lab Directors, California Association of Crime Laboratory Directors, International Association of Coroners and Medical Examiners, National Association of Medical Examiners, California State Coroners Association in Support of Respondent, *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) (No. 09-10876).

¹⁸⁸ *E.g.*, Brief of the Alabama District Attorneys Association and Office of Prosecution Services as Amicus Curiae in Support of Appellant the State of Alabama and Reversal, *supra* note 182 (opposing “requirement that discovery be provided at or before the preliminary hearing”); Amicus Brief of Florida Prosecuting Attorneys Association at 6–10, *State v. Whitby*, 975 So.2d 1124 (Fla. 2008) (No. SC06-420) (arguing in favor of requiring parties objecting to the exercise of a peremptory challenge to establish a prima facie case of discrimination as a prerequisite to requiring the proponent of the strike to come forward with a race-neutral explanation); Original Amicus Curiae Brief Filed on Behalf of the Louisiana District Attorneys Association in Support of the Appellant, *State of Louisiana, on Writ Grant by This Court Regarding Assessment of Costs of Prosecution* at 3, *State v. Griffin*, 208 So.3d 896 (La. 2016) (No. 2015-KO-1894) (arguing that the district attorney’s office is entitled to recover its “ordinary operating expenses” as a cost of prosecution upon the conviction of a defendant).

¹⁸⁹ *See generally* Amici Curiae Brief of the National District Attorneys Association and the California District Attorneys Association in Support of Petitioners, *Connick v. Thompson*, 563 U.S. 51 (2011) (No. 09-571); *See generally* Brief of Amici Curiae, *supra* note 186; Brief of Amici Curiae National District Attorneys Association, Missouri Association of Prosecuting Attorneys, National Association of Prosecutor Coordinators, and State Prosecuting Attorney Organizations (Totaling Thirty), in Support of Petitioner, *Missouri v. McNeely*, 569 U.S. 141 (2013) (No. 11-1425).

general's supremacy over local prosecutors,¹⁹⁰ the ability of courts to appoint special prosecutors or to transfer cases to other prosecutors,¹⁹¹ whether state term limits apply to prosecutors,¹⁹² and *Sharp v. Murphy*, a recently-decided case that will greatly affect the sovereignty of Native American tribes in Oklahoma and the viability of state-level prosecutions in Oklahoma.¹⁹³ Sometimes, their involvement in litigation will involve parochial matters, like whether elected prosecutors can pay association dues with statutorily appropriated money.¹⁹⁴

But while most involvement in litigation serves to *enhance* the power of prosecutors, the associations will occasionally advance a position in litigation that *reduces* their power in service of larger ideological goals, like commitment to the death penalty. For example, in *Ayala v. Scott*, a case involving the propriety of the Governor of Florida's decision to unilaterally transfer homicide cases out of State Attorney Aramis Ayala's office because she refused to seek the death penalty,¹⁹⁵ the Florida Prosecuting Attorneys Association intervened in *support* of the Governor's action.¹⁹⁶ Ayala noted that the FPAA's actions "exposed so many truths about our commitment to kill and call it justice. The commitment was so strong that a group of

¹⁹⁰ *E.g.*, Brief for Alabama District Attorneys Association as Amicus Curiae at 1–2, *Ex parte King*, 59 So. 3d 21 (Ala. 2010) (Nos. 1090388, 1090399) (opposing state attorney general's attempt to dismiss a civil action brought by a district attorney); West Virginia Prosecuting Attorneys Association Amicus Curiae Brief in Support of the Respondents at 3–4, *State ex rel. Morrissey v. W. Va. Office of Disciplinary Counsel*, 234 W. Va. 238 (W.V. 2014) (No. 14-0587) (opposing attorney general's writ to establish that he has the authority to provide "assistance" to county prosecutors in "prosecut[ing] crime").

¹⁹¹ *E.g.*, Brief of Amicus Curiae Arkansas Prosecuting Attorneys Association at 2–4, *Foster v. Hill*, 372 Ark. 263 (Ark. 2008) (No. 07-1235) (opposing division of the circuit court "empanel[ing] a grand jury to investigate an incident to criminal conduct when another division of the circuit court in the same judicial district has already appointed a special prosecutor to perform the same task" and "after a prosecutor or special prosecutor has commenced an investigation into the matter and exercises his discretion"); Brief Amicus Curiae of the Virginia Association of Commonwealth's Attorneys and the Virginia Sheriffs' Association, Inc., at 1, *In re Hannett*, 270 Va. 223 (Va. 2005) (No. 050985) (opposing state court appointment of acting commonwealth's attorney while elected commonwealth's attorney was deployed to Iraq).

¹⁹² *E.g.*, Amicus Brief by the Nevada District Attorneys Association and the Nevada Association of Counties at 1, *In re Mallory*, 128 Nev. 436 (Nev. 2011) (No. 57312) (advancing interpretation of constitutional amendment that excluded district attorneys from term limits).

¹⁹³ Brief of Amici Curiae Oklahoma Sheriffs' Association, Oklahoma District Attorneys Association, and Ten Oklahoma District Attorneys in Support of Petitioner at 1, *Carpenter v. Murphy* (No. 17- 1107) (opposing determination that Oklahoma state courts lacked jurisdiction over crimes that occurred in the Creek Reservation); *see also* Jack Healy & Adam Liptak, *Landmark Supreme Court Ruling Affirms Native American Rights in Oklahoma*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/us/supreme-court-oklahoma-mcgart-creek-nation.html>.

¹⁹⁴ *See generally* *Petition for Writ of Mandamus, Florida Prosecuting Attys. Ass'n, etc., vs. Roberts* (Fla. June 30, 2010) (No. SC10-1148).

¹⁹⁵ *See generally* *Ayala v. Scott*, 224 So.3d 755 (Fla. 2017); Tyler Yeargain, Comment, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95 (2018).

¹⁹⁶ *See generally* Brief of Amicus Curiae the Florida Prosecuting Attorneys Association Opposing Emergency Petition for Extraordinary Writ, *Ayala v. Scott*, 224 So.3d 755 (Fla. 2017) (No. SC17-653) (supporting decision of Governor Rick Scott to reassign case from State Attorney Aramis Ayala for her refusal to seek the death penalty).

prosecutors were willing to relinquish their own discretion and document it for the Court's review."¹⁹⁷

Finally, prosecutors' associations will sometimes file briefs in cases involving questions that aren't strictly criminal in nature. Prosecutors' associations frequently double as associations for *county* attorneys (who primarily provide advice to county governments), and some elected prosecutors double as county attorneys. Accordingly, associations will represent those interests in litigation seeking to affect rulings that concern child support obligations,¹⁹⁸ state tax issues,¹⁹⁹ and zoning matters.²⁰⁰ And in other cases, prosecutors' associations will attempt to influence public policy more broadly, with a loose connection to their interest in criminal law. For example, the issue in *Insurance Federation of Pennsylvania, Inc. v. Commonwealth* was whether "group health insurers must provide specified minimum coverage for alcohol and drug abuse treatment once an insured receives a certification and a referral for treatment."²⁰¹ The Pennsylvania District Attorneys Association filed an amicus brief, explaining that it was interested in the resolution of the case because "all too often, untreated addicts commit crime and pose other threats to public safety."²⁰² It argued, therefore, that "public safety, and the maintenance of law and order in our communities, is directly at stake."²⁰³

¹⁹⁷ Email from Eryka Washington, Public Information Officer, Ninth Judicial Circuit State Attorney's Office, to author (Aug. 7, 2019, 3:10 PM EST) (on file with author) (responses from State Attorney Ayala to author's questions).

¹⁹⁸ See generally, e.g., Brief for the State of California, the Appellate Committee of the California Family Support Council, the Appellate Committee of the California District Attorneys' Association, the National Child Support Enforcement Association, and the Minnesota County Attorneys' Association as Amici Curiae Supporting Appellees, *Rose v. Rose*, 481 U.S. 619 (1987) (No. 85-1206) (filing amicus brief concerning child support orders).

¹⁹⁹ See generally, e.g., Amicus Curiae Brief of the Minnesota County Attorneys Association at 4–5, *Kmart Corp. v. County of Stearns*, 710 N.W.2d 761 (Minn. 2006) (No. A05-442) (filing amicus brief concerning resolution of tax petitions).

²⁰⁰ See generally, e.g., Amicus Curiae Brief of the Montana County Attorneys Association at 3, *Charlotte Milles, Clerk & Recorder v. Alta Vista Ranch*, 344 Mont. 212 (2008) (No. DA 07-0323) (filing amicus brief in opposition to district court's interpretation of subdivision laws that "will have an adverse [e]ffect on the boards of county commissioners' ability to regulate land use"); Amicus Curiae Washington Association of Prosecuting Attorneys' Memorandum in Support of Snohomish County's Petition for Review at 1–2, *Stafne v. Snohomish Cty.*, 271 P.3d 868 (Wash. 2012) (No. 84894-7) (filing amicus brief in case involving challenges to comprehensive plan amendments because "[p]rosecuting attorneys are responsible for providing legal counsel to the counties on a wide range of legal issues, including planning under the Growth Management Act ('GSA')").

²⁰¹ *Ins. Fed'n. of Pa. v. Commonwealth*, 970 A.2d 1108, 1111 (Pa. 2009).

²⁰² Brief of Amicus Curiae Pennsylvania District Attorneys Association at 1, *Ins. Fed'n. of Pa., Inc. v. Commonwealth*, 601 Pa. 20 (Pa. 2009) (No. 89 MAP 2007).

²⁰³ *Id.*

III. PROGRESSIVE PROSECUTORS AND PROSECUTORS' ASSOCIATIONS

Beginning in the mid-2010s, counties in (mostly) liberal, urban areas have turned away from the “tough-on-crime” policies that characterized the previous half-century by electing reform-minded, increasingly decarceral prosecutors. This shift has been one of the most impactful and noticeable political trends of recent years—and it lends itself to an infinite vein of scholarly research, ranging from predictions about what will happen in the future, statistical analyses of the actual impact of prosecutorial elections on incarceration, and more. But the impact of the election of decarceral—or progressive, or reform-minded, or whatever the preferred terminology is—prosecutors sets up a looming, and perhaps presently realized, conflict with prosecutors' associations.

The conflict is relatively straightforward. Given the vast universe of influence possessed by prosecutors' associations, and their record of using that influence to pursue “tough-on-crime” policies, it makes sense that decarceral prosecutors would be reluctant to continue their offices' memberships in the associations. Why should they pay dues and actively participate in an association that uses its financial and human resources to lobby against policies antithetical to their beliefs? On the other hand, given the membership resources and influence provided by the associations, is it worth it to maintain membership and agitate for organizational change?

Few prosecutors—even just a few decarceral ones—have taken the step of calling it quits. But as more and more counties have held prosecutorial elections, more and more decarceral candidates have included pledges to quit their state-level prosecutors' association as part of their campaign platforms. Others have launched campaigns against long-serving prosecutors who have held leadership roles in their states' associations, sometimes levying direct criticism against the associations during the course of their campaign. This Section summarizes these efforts in two parts. Section A begins by reviewing the past decade's worth of prosecutorial elections, focusing primarily on the highest-profile elections, the conditions giving rise to each election, and the factors that likely contributed to the ultimate outcomes. Section B follows up with a narrower focus. It considers the role that prosecutors' associations played in some prosecutors' elections—not as participants, but as subjects of discussion. It reviews the small, but growing, number of decarceral candidates who have pledged to quit the associations and the actions of successfully elected decarceral prosecutors to maintain or quit their membership.

A. The Rise of the Progressive Prosecutor

It's difficult to pinpoint the exact moment that progressive prosecutors first appeared on the scene, but it probably happened in the early-to-mid 2010s. For one thing, the definition has changed considerably over the last

two decades. When she was first elected San Francisco District Attorney in 2004, Kamala Harris might have reasonably been identified as a progressive prosecutor—she promised to not pursue the death penalty, supported reform of California’s three-strikes law, and pursued diversion and other alternatives to prosecution.²⁰⁴ Indeed, when she ran for California Attorney General in 2010, her Republican opponent called her a “radical” who cared more about the rights of criminals than the lives of Californians.²⁰⁵ But just a short while later, the mood of the country—and especially the Democratic electorate—had changed. Harris struggled to explain the less-progressive parts of her prosecutorial record in the 2020 Democratic presidential primary,²⁰⁶ and ultimately dropped out after failing to gain traction.²⁰⁷ And in San Francisco, Harris had been replaced by an even more progressive District Attorney, George Gascón.²⁰⁸ When Gascón resigned to move to Los Angeles and challenge the incumbent DA there for re-election, a special election to replace him saw one of Harris’s top lieutenants, Suzy Loftus, narrowly lose to Chesa Boudin, a public defender with incarcerated parents.²⁰⁹

In other words, a “progressive prosecutor” in 2004—or in 2010 or 2016—may not be a “progressive prosecutor” today. Harris was one of the first reform-minded prosecutors to later attract scrutiny from more decarceral reformers, but she was far from the last. Marilyn Mosby, for example, was elected Baltimore City State’s Attorney in 2014 on a “reform-lite” platform,²¹⁰ and quickly attracted attention for her willingness to prosecute Baltimore police officers for the death of Freddie Gray.²¹¹ But four years later, she faced a tough re-election battle in the Democratic primary against Thiru Vignarajah and Ivan Bates, each of whom simultaneously employed “tough-on-crime” and reformist attacks against Mosby.²¹²

²⁰⁴ Branko Marcetic, *The Two Faces of Kamala Harris*, JACOBIN (Aug. 10, 2017), <https://jacobinmag.com/2017/08/kamala-harris-trump-obama-california-attorney-general>.

²⁰⁵ Phil Willon, *Kamala Harris is a Different Kind of Prosecutor*, LOS ANGELES TIMES (Oct. 20, 2010), <https://www.latimes.com/archives/la-xpm-2010-oct-20-la-me-harris-20101015-story.html>.

²⁰⁶ See, e.g., Conor Friedersdorf, *When Kamala Was a Top Cop*, ATLANTIC (Aug. 25, 2019), <https://www.theatlantic.com/ideas/archive/2019/08/kamala-cop-record/596758/>.

²⁰⁷ Christopher Cadelago & Caitlin Oprysko, *‘One of the Hardest Decisions of My Life’: Kamala Harris Ends Once-Promising Campaign*, POLITICO (Dec. 3, 2019, 1:03 EST), <https://www.politico.com/news/2019/12/03/kamala-harris-drops-out-out-of-presidential-race-074902>.

²⁰⁸ Evan Sernoffsky, *George Gascón Was a Progressive DA in Progressive San Francisco. Why Did He Make So Many Enemies?*, SAN FRANCISCO CHRON. (Oct. 21, 2019), <https://www.sfchronicle.com/crime/article/Gasc-n-made-enemies-as-SF-s-reformer-district-14545705.php>.

²⁰⁹ Evan Sernoffsky, *Chesa Boudin, Reform Public Defender, Wins Election as San Francisco’s New DA*, SAN FRANCISCO CHRON. (Nov. 9, 2019), <https://www.sfchronicle.com/bayarea/article/Chesa-Boudin-reformer-public-defender-wins-14823166.php>.

²¹⁰ Yeargain, *supra* note 195 at 103.

²¹¹ Wil S. Hylton, *Baltimore v. Marilyn Mosby*, N.Y. TIMES MAG. (Sept. 28, 2016), <https://www.nytimes.com/2016/10/02/magazine/marilyn-mosby-freddie-gray-baltimore.html>.

²¹² Luke Broadwater & Tim Prudente, *Attacks Fly in First Three-Way Debate in Baltimore State’s Attorney Race*, BALTIMORE SUN (June 7, 2018, 3:10 PM EST), <https://www.baltimoresun.com/politics/bs-md-ci-prosecutor-debate-20180606-story.html>; Tim Prudente & Doug Donovan, *Ivan Bates, Thiru Vignarajah Debate at Baltimore State’s Attorney Forum Despite Marilyn Mosby’s Absence*, BALTIMORE

In 2016, a number of reform-minded candidates—many of whom were backed by political action committees funded by Democratic mega-donor George Soros²¹³—ran in prosecutorial elections against more punitive or unpopular incumbents. Kim Foxx successfully upset incumbent Cook County State’s Attorney Anita Alvarez in the Democratic primary, who had attracted widespread criticism for her failure to charge Chicago police officer Jason Van Dyke in the fatal shooting of Laquan McDonald.²¹⁴ Similarly, Michael O’Malley defeated fellow Democrat Cuyahoga County Prosecutor Timothy McGinty following his failure to pursue charges against Cleveland police officers for the shooting of 12-year-old Tamir Rice.²¹⁵ In Orlando, Aramis Ayala defeated first-term State Attorney Jeff Ashton in the Democratic primary after Soros-backed advertisements accused Ashton of “enacting racially disparate policies.”²¹⁶

Other challengers, running as Democrats, defeated ostensibly more punitive Republican opponents in general elections. In 2015, former state court judge James Stewart, a Democrat, beat Republican prosecutor Dhu Thompson in the race for Caddo Parish District Attorney in Shreveport, Louisiana.²¹⁷ The race saw significant outside involvement on both sides, and eventually became a proxy election over the death penalty.²¹⁸ In 2016, Democrat Andrew Warren ran for Hillsborough County State Attorney in Tampa, where he attacked the incumbent Republican for “los[ing] sight of . . . reducing recidivism, rehabilitation, and victims’ rights” and for his “aggressive prosecution of low-level drug crimes.”²¹⁹ Warren blended this criminal justice reform language with more traditional attacks on Ober’s

SUN (May 9, 2018, 10:40 PM), <https://www.baltimoresun.com/politics/bs-md-marilyn-mosby-debates-20180509-story.html>.

²¹³ Scott Bland, *George Soros’ Quiet Overhaul of the U.S. Justice System*, POLITICO (Aug. 30, 2016, 5:25 AM EST), <https://www.politico.com/story/2016/08/george-soros-criminal-justice-reform-227519>.

²¹⁴ Steve Bogira, *The Hustle of Kim Foxx*, MARSHALL PROJECT (Oct. 29, 2018), <https://www.themarshallproject.org/2018/10/29/the-hustle-of-kim-foxx>.

²¹⁵ Cory Shaffer, *Michael O’Malley Topples Cuyahoga County Prosecutor Timothy McGinty*, CLEVELAND.COM (Mar. 17, 2017, 1:42 AM), https://www.cleveland.com/metro/2016/03/michael_omalley_topples_cuyaho_1.html.

²¹⁶ Bland, *supra* note 213; Elyssa Cherney, *Aramis Ayala Upsets Jeff Ashton for State Attorney*, ORLANDO SENTINEL (Aug. 31, 2016, 6:41 AM EST), <https://www.orlandosentinel.com/politics/os-primary-state-attorney-judges-20160829-story.html>.

²¹⁷ Alexandria Burns, *Stewart Wins Caddo DA Race*, SHREVEPORT TIMES (Nov. 21, 2015, 6:19 PM CST), <https://www.shreveporttimes.com/story/news/election/2015/11/21/caddo-da-election-runoff-results/75899240/>.

²¹⁸ Jay Michaelson, *The Death Penalty Election: A Louisiana Parish Is Ground Zero for the Capital Punishment Debate*, DAILY BEAST (Oct. 26, 2015, 1:00 AM EST), <https://www.thedailybeast.com/the-death-penalty-election-a-louisiana-parish-is-ground-zero-for-the-capital-punishment-debate>; Janell Ross, *Democrats Won Another Big Race in Louisiana – A Campaign Involving Race, Justice and the Death Penalty*, WASH. POST (Nov. 23, 2015, 9:01 PM EST), <https://www.washingtonpost.com/news/the-fix/wp/2015/10/15/race-justice-and-the-death-penalty/>.

²¹⁹ Maurice Chammah, *New Strategy for Justice Reform: Vote Out the DA*, MARSHALL PROJECT (Oct. 18, 2016), <https://www.themarshallproject.org/2016/10/18/new-strategy-for-justice-reform-vote-out-the-da>.

effectiveness and his regard for crime victims, and narrowly beat him.²²⁰ Similarly, in Houston, Democrat Kim Ogg challenged incumbent Harris County District Attorney Devon Anderson, a Republican, attacking him for disproportionately prosecuting low-level offenders,²²¹ and she benefited from the financial support of Soros-funded committees.²²²

But after some of the reform-minded prosecutors won—or, rather, after the punitive incumbents *lost*—grassroots reformers realized that they may not have gotten less than they bargained for. Take, for example, the 2015 Caddo Parish District Attorney election. It became one of 2015’s marquee races for district attorneys,²²³ but the outside attention may have clouded what was actually at stake. True enough, Dhu Thompson, the Republican nominee, promised to continue the office’s policies—which were overwhelmingly punitive and which churned out a massive amount of death penalty verdicts²²⁴—but it wasn’t as though his Democratic opponent, James Stewart, *opposed* the death penalty. Rather, Stewart supported the death penalty in “limited but appropriate” circumstances.²²⁵

Many others of the would-be reformers attracted criticisms for their failure to follow through on their promises. In Cleveland, first-term District Attorney Michael O’Malley doubled the number of juveniles prosecuted in adult court, attracting criticism from reformers.²²⁶ And during public discontent at the conditions in county jails,²²⁷ the Coalition to Stop the Inhumanity at the Cuyahoga County Jail demanded that O’Malley employ pretrial diversion, reform cash bail, and “[c]ease using law enforcement officers with a documented history of lying” in his prosecutions.²²⁸ And in Houston, District Attorney Kim Ogg attracted criticism for pushing to hire

²²⁰ Dan Sullivan, *Andrew Warren Narrowly Defeats Mark Ober in Race for Hillsborough State Attorney*, TAMPA BAY TIMES (Nov. 9, 2016), <https://www.tampabay.com/news/politics/stateroundup/hillsborough-state-attorney-race-too-close-to-call-ober-slightly-trails/2302065/>.

²²¹ Meagan Flynn, *In Hotly Contested District Attorney’s Race, Ogg Defeats Anderson (UPDATED)*, HOUSTON PRESS (Nov. 8, 2016), <https://www.houstonpress.com/news/in-hotly-contested-district-attorneys-race-ogg-defeats-anderson-updated-8932062>.

²²² Chammah, *supra* note 219.

²²³ *See, e.g.*, Ross, *supra* note 218.

²²⁴ Michaelson, *supra* note 218.

²²⁵ Ross, *supra* note 218.

²²⁶ Elizabeth Weill-Greenberg, *Despite Flat Crime Rates, More Cleveland-Area Young People Are Being Tried as Adults*, THE APPEAL (Oct. 22, 2019), <https://theappeal.org/despite-flat-crime-rates-more-cleveland-area-young-people-are-being-tried-as-adults/>; *Group Marches in Protest of ‘Ongoing Crisis’ at Cuyahoga County Jail, Demands Reform*, WKYC NEWS (Oct. 8, 2019, 8:17 AM EST), <https://www.wkyc.com/article/news/local/cleveland/group-marches-in-protest-of-conditions-at-cuyahoga-county-jail/95-a6ece28e-d232-4020-bd33-b7b9408ff99e> [hereinafter *Ongoing Crisis*].

²²⁷ *E.g.*, Eric Heisig, *Cuyahoga County Jail Conditions as Bad as Ever, Even as Budish Administration Boasts About Improvements, New Court Filing Says*, PLAIN DEALER (Apr. 23, 2019), <https://www.cleveland.com/court-justice/2019/04/cuyahoga-county-jail-conditions-as-bad-as-ever-even-as-budish-administration-boasts-about-improvements-new-court-filing-says.html>.

²²⁸ *Ongoing Crisis*, *supra* note 226.

100 new prosecutors²²⁹ and for pursuing “high bonds” for defendants—even as she called cash bail “a tool to oppress the poor” in her 2016 campaign.²³⁰ Even others, like Kim Foxx, who implemented much more progressive policies, still attracted some criticism from reformers for not keeping all of their promises.²³¹

Accordingly, it may be appropriate to divide the *Rise of the Progressive Prosecutor* into two distinct eras, with 2017 as the dividing line between them. Before identifying the second segment, consider the commonalities of the reform-minded prosecutors elected between 2014 and 2016. Virtually all of them were career prosecutors (though some had dabbled as public defenders), most ran against particularly punitive incumbents (or opponents closely aligned with punitive incumbents), and most talked in relatively cagey language that fused reform buzzwords with more traditional rhetoric (like diverting resources from low-level offenders to violent crime).

Enter candidates like Larry Krasner, a lifelong criminal defense attorney who successfully ran for District Attorney of Philadelphia in 2017. Krasner had never been a prosecutor before running, an attack against him that he repurposed into a positive.²³² He spoke about “end[ing] mass incarceration by effectively starving the criminal-justice system” of defendants²³³ and cited books like Michelle Alexander’s *The New Jim Crow*.²³⁴ He won easily, and largely made good on the promises he made.²³⁵

But the more widely-felt impact of Krasner’s win has been inspiring other candidates with similar profiles. These candidates were more likely to be public defenders than prosecutors, more likely to campaign on ending mass incarceration than on being “tough on crime,” and more likely to favor big, dramatic changes to criminal justice policy rather than changes at the margins. And, most interestingly of all, many of these prosecutors have

²²⁹ Roxanna Asgarian, *D.A. Who Ran as a Reformer Says She Needs 100 More Prosecutors*, THE APPEAL (Feb. 8, 2019), <https://theappeal.org/da-who-ran-as-a-reformer-says-she-needs-100-more-prosecutors/>.

²³⁰ Alex Hannaford, *Harris County D.A. Ran as a Reformer. So Why Is She Pushing High Bail for Minor Offenses?*, THE APPEAL (Aug. 9, 2018), <https://theappeal.org/harris-county-kim-ogg-bail-reform-jail/>.

²³¹ See, e.g., Curtis Black, *Where Does Criminal Justice Reform Stand One Year After Kim Foxx Elected?*, CHICAGO REP. (Dec. 7, 2017), <https://www.chicagoreporter.com/where-does-criminal-justice-reform-stand-one-year-after-kim-foxx-elected/> (“One year after being elected and sworn into office on a reform platform, Cook County State’s Attorney Kim Foxx is making progress—but, not surprisingly, has more to do to accomplish those reforms, according to a new report.”).

²³² Jennifer Gonnerman, *Larry Krasner’s Campaign to End Mass Incarceration*, NEW YORKER (Oct. 22, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration>.

²³³ Maura Ewing, *The Progressive Civil-Rights Lawyer Philadelphia Wants for District Attorney*, ATLANTIC (May 16, 2017), <https://www.theatlantic.com/politics/archive/2017/05/philadelphia-district-attorney-election-reform/526812/>.

²³⁴ Gonnerman, *supra* note 232.

²³⁵ Shaun King, *Philadelphia DA Larry Krasner Promised a Criminal Justice Revolution. He’s Exceeding Expectations.*, INTERCEPT (Mar. 20, 2018, 2:59 PM), <https://theintercept.com/2018/03/20/larry-krasner-philadelphia-da/>. But see Bryce Covert, *Progressive Philly D.A. Larry Krasner’s Bail Reform Plans Seem Stalled, Advocates Say*, THE APPEAL (June 25, 2019), <https://theappeal.org/progressive-philly-d-a-larry-krasners-bail-reform-plans-seem-stalled-advocates-say/>. Screen reader support enabled.

endorsed and campaigned for each other, forming a loose ideological network in the process.²³⁶

Amid largely disappointing 2018 election results for progressive prosecutors,²³⁷ Rachael Rollins was elected Suffolk County District Attorney in Boston over an opponent backed by the incumbent prosecutor and virtually every police union,²³⁸ while promising to effectively stop prosecuting a number of low-level offenses.²³⁹ Though Rollins has attracted some criticism for still prosecuting some of those offenses,²⁴⁰ she stood her ground and refused to prosecute protesters at a “Straight Pride Parade,”²⁴¹ which ultimately prompted a legal battle decided in her favor by the Massachusetts Supreme Judicial Court.²⁴²

The biggest changes came in 2019, when many Krasneresque candidates ran in prosecutorial elections attracted attention and mostly won. Though just a handful of states held elections for prosecutor that year, career public defenders won elections against entrenched prosecutors in Northern Virginia and Charlottesville, upstate New York, San Francisco, and Jackson, Mississippi²⁴³—and many others got quite close.²⁴⁴

²³⁶ Justin Miller, *The New Reformer DAs*, AMERICAN PROSPECT, Jan. 2, 2018 <https://prospect.org/health/new-reformer-das/> (describing “Fair and Just Prosecution, a network of more than 15 DAs around the country who ‘share the view that we need a justice system based on smart approaches, equity, and compassion’”); see also, e.g., Rick Rojas, *5 Key Things to Know About Tiffany Cabán*, N.Y. TIMES (June 26, 2019), <https://www.nytimes.com/2019/06/26/nyregion/who-is-tiffany-caban.html> (noting that Cabán was endorsed by Krasner and Suffolk County, Massachusetts, District Attorney Rachael Rollins); Elizabeth Weill-Greenberg, *Public Defender Chesa Boudin Wins San Francisco D.A. Race in Major Victory for Progressive Prosecutor Movement*, THE APPEAL (Nov. 9, 2019), <https://theappeal.org/public-defender-chesa-boudin-wins-san-francisco-da-race-in-major-victory-progressive-prosecutor-movement/> (noting that Chesa Boudin was endorsed by Krasner).

²³⁷ E.g., Abbie VanSickle, *Big Spending by George Soros and Liberal Groups Fails to Sway D.A. Races in California*, L.A. TIMES (June 6, 2018, 9:55 PM), <https://www.latimes.com/local/california/la-me-da-election-soros-20180606-story.html>.

²³⁸ Zaid Jilani, *Underdog Criminal Justice Reformer Rachael Rollins Wins District Attorney Primary in Boston’s Suffolk County*, INTERCEPT (Sept. 7, 2018, 4:00 AM), <https://theintercept.com/2018/09/07/boston-suffolk-county-district-attorney-rachael-rollins/>.

²³⁹ John Pfaff, *Boston’s New D.A. Pushes Back Against Prosecutors’ ‘Punishment-Centric’ Point of View*, THE APPEAL (Nov. 14, 2018), <https://theappeal.org/bostons-new-da-pushes-back-against-the-punishment-centric-point-of-view-of-prosecutors/>.

²⁴⁰ Emma Whitford, *Suffolk County D.A. Rachael Rollins’s Office is Still Prosecuting Cases She Pledged to Drop*, THE APPEAL (Feb. 6, 2019), <https://theappeal.org/suffolk-county-da-rachael-rollins-office-is-still-prosecuting-cases-she-pledged-to-drop/>.

²⁴¹ Sarah Lustbader, *Boston Judge Won’t Let DA Dismiss Cases; Standoff Ensues*, THE APPEAL (Sept. 7, 2019), <https://theappeal.org/boston-judge-wont-let-da-dismiss-cases-standoff-ensues/>.

²⁴² Roberto Scalse, *Mass. High Court Sides with Suffolk DA Rollins in Battle with Judge Over Protester Charge*, WBUR NEWS (Sept. 9, 2019, 3:36 PM), <https://www.wbur.org/news/2019/09/09/states-highest-court-sides-with-suffolk-da-rollins-in-straight-pride-battle-with-judge>.

²⁴³ *Infra* Part III.B (discussing elections of Boudin, Clegg, Dehghani-Tafti, and Descano).

²⁴⁴ Daniel Nichanian, *Voters Beyond Big Cities Rejected Mass Incarceration in Tuesday’s Elections*, THE APPEAL (Nov. 7, 2019), <https://theappeal.org/politicalreport/voters-beyond-big-cities-rejected-mass-incarceration-in-tuesdays-elections/> (discussing losses of progressive candidates in Dutchess, Monroe, and Onondaga Counties in New York); Vivian Wang, *Tiffany Cabán Concedes Queens D.A. Race, Dashing Progressives’ Hopes*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/nyregion/tiffany-caban-queens-da-concedes.html> (discussing Tiffany Cabán’s narrow loss in the June

B. *The Progressive Prosecutors' Decisions*

When he campaigned to be Philadelphia's District Attorney in 2017, Larry Krasner didn't bring up the Pennsylvania District Attorneys Association as an issue. Though Krasner made headlines for pledging to ditch the prosecution of low-level drug possession charges, to use the office to go after big pharmaceutical companies, to re-staff the office with like-minded reformers, and most prominently, to end mass incarceration,²⁴⁵ the PDAA wasn't an issue at all.

Perhaps for good reason. Prosecutors' associations have attracted little attention for their quiet but impactful policy work, and it would make sense that a reform-minded candidate running for district attorney wouldn't attempt to use a little-known association as a piñata. After winning the election, however, and rolling out a number of reforms in his first year on the job,²⁴⁶ Krasner announced in a speech given at a prosecutorial innovation conference that he was quitting the PDAA. Krasner said that the PDAA was "the voice of the past," embraced policies that were regressive, and that its members were not representative of the state as a whole.²⁴⁷ Krasner was the first district attorney to announce that he was quitting his state's prosecutors' association, but he wasn't the last—in January 2020, San Joaquin County District Attorney Tori Salazar, a Republican, announced that she was quitting the California District Attorneys Association.²⁴⁸ Salazar specifically cited the CDAA's opposition to criminal justice reform proposals that had been adopted by the voters of California and noted that the CDAA board was unrepresentative of members as a whole. She predicted that more DAs "are probably going to come out" of the CDAA in the wake of her resignation.²⁴⁹

In 2019, the year following Krasner's public resignation, membership in prosecutors' associations became an issue in that year's prosecutorial elections. Most counties in New York, Pennsylvania, and Virginia—along with big cities like San Francisco—elected prosecutors in 2019, and many candidates for office (both successful and not) raised the issue of associational membership in their campaigns.

2019 Democratic primary for Queens District Attorney); *infra* notes 255–260 and accompanying text (discussing losses of Turahn Jenkins and Lisa Middleman in the election for Allegheny County District Attorney in Pennsylvania).

²⁴⁵ Yeagain, *supra* note 195 at 104–05.

²⁴⁶ See, e.g., King, *supra* note 235.

²⁴⁷ Chris Palmer, *Philly DA Larry Krasner Withdraws Office from Statewide Prosecutors Group*, PHILA. INQUIRER (Nov. 16, 2018), <https://www.inquirer.com/philly/news/crime/philadelphia-da-district-attorney-larry-krasner-withdraws-pdaa-20181116.html>.

²⁴⁸ Daniel Nichanian, *California Prosecutor Quits State's D.A. Association: "Let's Accept Responsibility for the Mistakes We've Made"*, THE APPEAL (Jan. 23, 2020), <https://theappeal.org/politicalreport/prosecutor-quits-california-district-attorney-association-tori-salazar/>; Evan Sernoffsky, *Central California DA Quits State Association Over Its Opposition to Criminal Justice Reforms*, SAN FRANCISCO CHRON. (Jan. 16, 2020), <https://www.sfchronicle.com/crime/article/Central-California-DA-quits-state-association-14981879.php>.

²⁴⁹ Nichanian, *supra* note 246.

It began elsewhere in Pennsylvania, in Pittsburgh. Allegheny County District Attorney Stephen Zappala ran for re-election and faced two different opponents who each attacked him for his office's punitive policies and who each suggested that they would leave the Pennsylvania District Attorneys Association. Zappala had served as district attorney since 1998 and faced criticism over his record—specifically, for “prosecuting low-level crimes and charging children as adult, and for how he uses drug forfeiture money”²⁵⁰—and served on the PDAA's executive committee.²⁵¹ He was opposed in the Democratic primary by Turahn Jenkins, a former public defender and prosecutor who won the endorsement of the Pittsburgh Democratic Socialists of America.²⁵² Jenkins committed to some prosecutorial reforms—like opting for diversion instead of prosecution for low-level drug crimes—but shied away from others—like not prosecuting overdoses as homicides—and attracted criticism for homophobic and transphobic remarks he made during the campaign.²⁵³ Jenkins also suggested that he may leave the PDAA, as Philadelphia DA Larry Krasner had done the previous year. He noted that the “views and policies of the [PDAA] are partly responsible for many of the issues that plague our criminal justice system,” and that he would “not seek inclusion in the PDAA unless the organization demonstrates a willingness to reconsider their policy positions and the negative impact they have.”²⁵⁴ Ultimately, Zappala overwhelmingly won the Democratic primary over Jenkins²⁵⁵—and won the Republican primary through write-in votes,²⁵⁶ which initially meant that he would not have faced a challenger in the general election.

However, Lisa Middleman, a public defender like Jenkins, announced that she would challenge Zappala in the general election as an independent candidate.²⁵⁷ Middleman picked up where Jenkins left off, criticizing Zappala for his prosecutorial record, campaigning on “reducing mass incarceration

²⁵⁰ Kira Lerner, *With Vast Surveillance Network, Pittsburgh D.A. Has 'Created a Dystopian Reality'*, THE APPEAL (Sept. 20, 2019), <https://theappeal.org/with-vast-surveillance-network-pittsburgh-d-a-has-created-a-dystopian-reality/>.

²⁵¹ Daniel Nichanian, *Pittsburgh's DA Election Showcases 'Fundamental Disagreement'*, THE APPEAL (May 16, 2019), <https://theappeal.org/politicalreport/pittsburghs-da-election-showcases-fundamental-disagreement/>.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ Daniel Nichanian, *Larry Krasner Quit Pennsylvania's DA Association. What Does Group Stand for?*, THE APPEAL (Dec. 20, 2018), <https://theappeal.org/politicalreport/spotlight-pdaa/>.

²⁵⁵ Paula Reed Ward, *Zappala Retains Seat as District Attorney*, PITTSBURGH POST-GAZETTE (May 21, 2019), <https://www.post-gazette.com/news/crime-courts/2019/05/21/Zappala-district-attorney-allegheny-county-election-turah-n-jenkins/stories/201905210142>.

²⁵⁶ Andrew Seidman, *Insurgent Candidates Across Pennsylvania Are Rattling Establishment Democrats*, PHILADELPHIA INQUIRER (Nov. 3, 2019), <https://www.inquirer.com/news/pennsylvania-elections-2019-progressive-candidates-lisa-middleman-stephen-zappala-20191103.html>.

²⁵⁷ Paula Reed Ward & Andrew Goldstein, *DA Zappala Holds Off Challenger Middleman; Full Election Results*, PITTSBURGH POST-GAZETTE (Nov. 5, 2019), <https://www.post-gazette.com/news/politics-local/2019/11/05/DA-Zappala-holds-off-challenger-Middleman/stories/201911050154>.

and creating equity,” and by pledging that she would quit the PDAA because it had “set criminal justice reform back.”²⁵⁸ As an alternative, she said that she would “join[] forces” with Krasner and lobby the legislature with him.²⁵⁹ Though Middleman ended up losing to Zappala by a margin similar to Jenkins, she won the county’s most Democratic areas—like the precincts in downtown Pittsburgh and blue-trending suburbs.²⁶⁰

New York followed suit. In Queens, which saw the highest-profile prosecutorial election of 2019, a similar fault-line developed among the candidates. While public defender Tiffany Cabán and City Councilman Rory Lancman pledged to quit the District Attorneys Association of the State of New York, the other candidates—most notably, Brooklyn Borough President Melinda Katz, former state judge Gregory Lasak, and former prosecutor Mina Malik—said that they wouldn’t.²⁶¹ Cabán’s and Lancman’s opposition to DAASNY stemmed from the association’s efforts to sink discovery reform legislation that was being considered in the state legislature, while the other candidates explained that they would keep their membership to push for progressive change in the association.²⁶² However, the candidates’ positions on DAASNY didn’t end up becoming a major campaign issue, with most of the campaign rhetoric focusing on reforms in the DA’s office itself—like whether to prosecute turnstile jumping and sex work.²⁶³ Though Cabán appeared to win the race on election night, a subsequent tallying of absentee and provisional ballots, along with a hotly contested recount, eventually led to a Katz victory²⁶⁴—and so the Queens County District Attorney’s office remained in DAASNY.

Elsewhere in New York, DAASNY officials, along with prosecutors who supported DAASNY’s stance on discovery reform proposals, faced difficult re-elections, but their challengers were more equivocal on their membership in the association. For example, Sandra Doorley, the District Attorney of Monroe County and the President-elect of DAASNY, faced Shani Curry Mitchell in the 2019 general election.²⁶⁵ Mitchell campaigned on criminal

²⁵⁸ Daniel Nichanian, *A Public Defender, Running for DA in Pittsburgh, Wants to Join Forces with Philly’s Larry Krasner*, THE APPEAL (Oct. 4, 2019), <https://theappeal.org/politicalreport/lisa-middleman-interview-running-pittsburgh-allegheeny-district-attorney/>.

²⁵⁹ *Id.*

²⁶⁰ See Ward & Goldstein, *supra* note 257.

²⁶¹ David Brand, *Lobbying Group Divides Queens DA Candidates*, QUEENS DAILY EAGLE (Mar. 1, 2019), <https://queenseagle.com/all/2019/3/1/lobbying-group-divides-queens-da-candidates>; see also Garrison Lovely, *Tiffany Cabán Will Put the System on Trial*, JACOBIN (June 24, 2019), <https://www.jacobinmag.com/2019/06/tiffany-caban-queens-district-attorney-elections>.

²⁶² Brand, *supra* note 261.

²⁶³ See Samantha Michaels, *The Queens District Attorney Race Has Turned Into a Battle About Which Votes Count*, MOTHER JONES (July 10, 2019), <https://www.motherjones.com/crime-justice/2019/07/the-queens-district-attorney-race-has-turned-into-a-battle-about-which-votes-count/>.

²⁶⁴ *Id.*

²⁶⁵ Daniel Nichanian, *New York’s DA Elections Will Shape Prosecutorial Practices, And a Virginia Candidate Discusses His Platform*, THE APPEAL (Apr. 18, 2019), <https://theappeal.org/new-yorks-da-elections-will-shape-prosecutorial-practices-and-a-virginia-candidate-discusses-his-platform/>.

justice reform, but not on ending the office's membership in DAASNY—she noted that the association “can assist legislators in guiding reform as it relates to criminal justice” and that “to move them in the direction of being in the forefront, you would have to be part of the association, and not on the outside.”²⁶⁶ Similarly, Dave Clegg, a public defender who successfully ran for Ulster County District Attorney the same year, also suggested that he would remain a member of DAASNY, to provide “more of a progressive view than there is in the DAASNY world.”²⁶⁷

Virginia's 2019 elections saw similar rhetoric, but with substantially better results for reformers. In Fairfax County, former federal prosecutor Steve Descano challenged incumbent Commonwealth's Attorney Ray Morrogh and in Arlington County, Parisa Dehghani-Tafti, the legal director of the Mid-Atlantic Innocence Project and a former public defender, challenged incumbent Theo Stamos—both in the Democratic primary.²⁶⁸ Both Descano and Dehghani-Tafti criticized the Virginia Association of Commonwealth's Attorneys—which Morrogh and Stamos had served in leadership roles in—and suggested that they would work to create a counterpart association.²⁶⁹ Descano said that he wanted to “create a coalition of progressive-minded prosecutors, attorneys, advocates, stakeholders to act as a counterpoint to VACA” before the legislature, but to remain a member of VACA “so that I can vote when I disagree with policies VACA is pushing.”²⁷⁰ Dehghani-Tafti held out hope that electing more progressive prosecutors around the state could “transform the association,” which she “would like to be a part of,” but if not, “right now, they don't speak for me.”²⁷¹ Both Descano and Dehghani-Tafti narrowly won their primaries and their subsequent general elections—Dehghani-Tafti unopposed and Descano after facing an independent candidate affiliated with Morrogh and the “tough-on-crime” establishment.²⁷²

²⁶⁶ Daniel Nichanian, “*We Desperately Need Reform Regarding Discovery Rules*”: *A Q&A with Shani Curry Mitchell*, THE APPEAL (Mar. 7, 2019), <https://theappeal.org/politicalreport/interview-with-shani-curry-mitchell-candidate-for-monroe-county-district-attorney/>.

²⁶⁷ Daniel Nichanian, *New York Adopted Pretrial Reforms. Its DA Races Will Decide Who Implements Them.*, THE APPEAL (Oct. 10, 2019), <https://theappeal.org/politicalreport/new-york-bail-discovery-district-attorney-elections-dutchess-monroe-ulster/>.

²⁶⁸ Daniel Nichanian, *Tuesday's Elections Could Overhaul Prosecution in Northern Virginia*, THE APPEAL (June 6, 2019), <https://theappeal.org/politicalreport/virginia-elections-preview-arlington-fairfax-prince-william-commonwealths-attorney-2019/>.

²⁶⁹ *Id.*

²⁷⁰ Daniel Nichanian, *An Interview with Steve Descano: “Ending Mass Incarceration” Requires “a Systematic Approach”*, THE APPEAL (Apr. 18, 2019), <https://theappeal.org/politicalreport/interview-with-descano-fairfax-commonwealths-attorney/>.

²⁷¹ Daniel Nichanian, “*The Commonwealth's Attorney Has a Very Holistic Role*”: *An Interview with Virginia Candidate Parisa Dehghani-Tafti*, THE APPEAL (Feb. 22, 2019), <https://theappeal.org/politicalreport/interview-with-parisa-dehghani-tafti-candidate-commonwealths-attorney-arlington-virginia/>.

²⁷² Justin Jouvenal, “*A Sea Change*” for Prosecutors in Northern Virginia as Liberal Democratic Candidates Sweep Races, WASH. POST (Nov. 5, 2019, 10:50 PM EST), https://www.washingtonpost.com/local/virginia-politics/a-sea-change-for-prosecutors-in-northern-virginia-as-liberal-democratic-candidates-poised-to-sweep-races/2019/11/05/a473b2e0-ff28-11e9-8501-2a7123a38c58_story.html.

Mississippi's prosecutorial elections—though mostly uncontested²⁷³—featured similar, though less pronounced, themes. Shameca Collins, a city prosecutor in Natchez, Mississippi, ran against and defeated Ronnie Harper, the District Attorney for the Sixth District, based in the southwestern region of the state, on a platform of prison alternatives.²⁷⁴ Harper was the former president of the Mississippi Prosecutors Association,²⁷⁵ though Collins didn't articulate any opposition to the MPA or include any criticism of it in her campaign.

Jody Owens, who worked for the Southern Poverty Law Center as the manager of its Mississippi office, ran in the Democratic primary in the Seventh District, which included the city of Jackson.²⁷⁶ Owens focused on his experience lobbying for criminal justice reform on behalf of SPLC, and noted that prosecutors' associations had "been the voice of policy-making historically in this country."²⁷⁷ He argued that continuing his office's membership in the MPA would be beneficial—by continuing "to be involved in that conversation to propose alternatives to putting more people in prison" and to "work with the prosecutors' association to present an alternative view of being safer."²⁷⁸ Progressive reformers in the area—like Jackson Mayor Chokwe Antar Lumumba—considered electing Owens to be a priority for "wresting power from the regressive Mississippi Prosecutors Association."²⁷⁹ Owens faced criminal defense lawyer Darla Palmer and veteran prosecutor Stanley Alexander in the Democratic primary²⁸⁰ and won endorsements from Lumumba and national criminal justice reform organizations, and ultimately won by a wide margin.²⁸¹ Shortly before the general election—where he was

²⁷³ Daniel Nichanian, *Mississippi Sets Up Its DA Elections, and Only Five Are Contested This Year*, THE APPEAL (Mar. 7, 2019), <https://theappeal.org/politicalreport/mississippi-sets-up-its-da-elections/>. Uncontested DA elections are a disturbingly common phenomenon. See generally Wright, *supra* note 136, at 582, 593–94.

²⁷⁴ Scott Hawkins, *Collins Apparent Winner in 6th Judicial District Attorney's Race*, NATCHEZ DEMOCRAT (Aug. 7, 2019), <https://www.natchezdemocrat.com/2019/08/07/collins-apparent-winner-in-6th-district-attorneys-race/>; Daniel Nichanian, *Two Candidates Run on Reform and Prevail in Mississippi's DA Elections*, THE APPEAL (Aug. 8, 2019), <https://theappeal.org/politicalreport/two-candidates-run-on-reform-and-prevail-in-mississippis-da-elections/>.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ Daniel Nichanian, *How Jody Owens Would Reform Mississippi's "Truly Broken" Legal System*, THE APPEAL (July 11, 2019), <https://theappeal.org/politicalreport/jody-owens-hinds-county-mississippi-da-election-interview/>.

²⁷⁸ *Id.*

²⁷⁹ Rory Fleming, *Mississippi's Warring Prosecutors Leave the Door Open to Hope*, FILTER MAG. (Mar. 4, 2019), <https://filtermag.org/mississippis-warring-prosecutors-leave-the-door-open-to-hope/>.

²⁸⁰ *Id.*

²⁸¹ Jimmie E. Gates, *Jody Owens Wins Hinds County District Attorney's Race*, MISS. CLARION LEDGER (Aug. 6, 2019, 9:56 PM CST), <https://www.clarionledger.com/story/news/politics/2019/08/06/2019-mississippi-election-jody-owens-hinds-county-da-district-attorney-race-democrat/1899602001/>.

unopposed—Owens was accused of sexual harassment by former SPLC employees,²⁸² perhaps diminishing his ability to effect change in the MPA.

Ultimately, in all of the states electing prosecutors in 2019, the progressive candidate who promised to quit her state's prosecutors' association was, far and away, rarer than not. Though many candidates ran in the 2019 elections—most notably in New York, Pennsylvania, San Francisco, and Virginia—only a handful of them made membership in a prosecutors' association a part of their campaign. Most of them reserved their criticism for the individual prosecutors they hoped to replace, and many of those who articulated extraordinarily bold proposals shied away from directly criticizing the state-level associations. Of course, that a candidate didn't discuss an issue certainly doesn't mean it wasn't on her mind, and there is good reason to believe that, given the newfound attention that prosecutors' associations are receiving, amplified by Larry Krasner's prominent opposition to the PDAA, more prosecutors will follow Krasner's lead in the years that follow.

The 2020 elections for prosecutor, though they have not fully gotten underway, have supported this hypothesis so far. In Travis County, Texas, José Garza and Dominic Selvera, candidates for District Attorney and County Attorney, respectively, have each pledged to not join the Texas District and County Attorneys Association.²⁸³ In explaining their decisions, Garza argued that the TDCAA “has been one of the largest impediments to progress” in the legislature,²⁸⁴ and Selvera simply noted that the TCDA represented the “traditional method of believing in pretrial incarceration, believing in jail to be the answer for everything,” and that his “ideals don't align with theirs.”²⁸⁵ Though Selvera ended up losing the Democratic primary,²⁸⁶ Garza ended up defeating incumbent District Attorney Margaret Moore in the July 2020 runoff,²⁸⁷ a sign that change may be coming to the TCDA. Elsewhere,

²⁸² Jimmie E. Gates, *Former Colleagues Accuse Incoming Hinds DA Jody Owens of Sexual Harassment*, MISS. CLARION LEDGER (Oct. 11, 2019, 10:54 AM CT), <https://www.clarionledger.com/story/news/politics/2019/10/11/former-splc-leader-jody-owens-incoming-hinds-da-accused-of-sexual-harassment/3941918002/>.

²⁸³ Daniel Nichanian, *Blockbuster D.A. Races Rock Big Texas Counties, from Austin to Houston*, THE APPEAL (Jan. 30, 2020), <https://theappeal.org/politicalreport/texas-2020-district-attorney-elections-houston-harris-austin-travis-nueces/>.

²⁸⁴ José Garza (@JosePGarza), TWITTER (Jan. 17, 2020, 10:40 AM), <https://twitter.com/JosePGarza/status/1218211566748872704>.

²⁸⁵ Daniel Nichanian, *Austin Prosecutor Candidate Wants to Cut His Budget and Avoid Jailing Anyone*, THE APPEAL (Feb. 13, 2020), <https://theappeal.org/politicalreport/interview-with-dominic-selvera-candidate-travis-county-austin/>.

²⁸⁶ Ryan Autullo, *Eiserloh, Garza Headed to Runoff in Travis County Attorney Race*, AUS. AM. STATESMAN (Mar. 3, 2020, 1:30 PM), <https://www.statesman.com/news/20200303/eiserloh-garza-headed-to-runoff-in-travis-county-attorney-race>.

²⁸⁷ Katie Hall, *Travis County DA Margaret Moore Concedes Primary Runoff to Democratic Rival José Garza*, AUS. AM. STATESMAN (July 14, 2020, 10:13 PM), <https://www.statesman.com/news/20200714/travis-county-da-margaret-moore-concedes-primary-runoff-to-democratic-rival-joseacuta-garza>.

reform candidates are more cautious about expressing their opposition to prosecutors' associations, instead suggesting that they would lobby for change within the associations where possible and organize outside where it isn't.²⁸⁸

But with a number of other hotly-contested races developing in Texas and other states,²⁸⁹ some of which are already attracting national attention,²⁹⁰ this number is likely to grow.

IV. THE DECARCERAL DILEMMA

To a decarceral prosecutor considering their options, the choice might seem binary: "Should I stay or should I go?"²⁹¹ That is, start a new association or remain in the old one? But the questions that need to be asked go behind this simple, binary choice, as this Section explains. First, as a threshold matter, there's no universal answer. How the associations are organized—which differs from state to state—speaks to the viability of remaining in the association in an attempt to change the association's policies. Second, the choice is not a mutually exclusive one—a prosecutor might both stay *and* go. Third, starting a new association may not mean the same thing to every prosecutor in every state—it might make sense in some states for decarceral prosecutors to form a counterpart state association, and in others to formalize an emerging national network as a new association unto itself. Fourth, the

²⁸⁸ E.g., Daniel Nichanian, *A Powerful D.A. Fought New York's Reforms. His Challenger Wants to Push Them Further.*, THE APPEAL (Apr. 30, 2020), <https://theappeal.org/politicalreport/interview-matt-toporowski-albany-district-attorney-election/> (noting that Albany County, New York, District Attorney candidate Matt Toporowski noted that he would "walk down the halls [of the state capitol] with advocates and lobby for progressive reform"); Daniel Nichanian, *D.A. Associations Should Own up to the Splintering Politics of Prosecution*, THE APPEAL (Feb. 14, 2020), <https://theappeal.org/politicalreport/district-attorney-associations-political-conflicts-cdaa/> (noting that Los Angeles County District Attorney candidate Rachel Rossi said that "she would first try to 'reform and modernize' the CDAA from within but would 'consider leaving it' if 'reform is continually resisted'"); Daniel Nichanian, *New Mexico D.A.s United to Torpedo Reforms. The 2020 Elections Could Breach That Unanimity*, THE APPEAL (May 15, 2020), <https://theappeal.org/politicalreport/new-mexico-district-attorney-elections-2020/> (noting that Mary Carmack-Altwies and Scott Fuqua, candidates for District Attorney in the First District of New Mexico, and Brett Phelps, a candidate in the Fourth District, said that they would lobby in opposition to the NMDAA).

²⁸⁹ See Nichanian, *supra* note 283.

²⁹⁰ For example, former presidential candidates Elizabeth Warren and Bernie Sanders have already endorsed progressive prosecutors for re-election and progressive prosecutorial candidates in a number of states. E.g., Nicole Cobler, *Elizabeth Warren Backs Garza in Travis County DA Race*, AUS. AM. STATESMAN (Jan. 28, 2020, 6:11 AM), <https://www.statesman.com/news/20200128/elizabeth-warren-backs-garza-in-travis-county-da-race>; Rachel Hinton, *Elizabeth Warren Backs Kim Foxx, Calls Prosecutor 'a Champion' . . . Who Leads with Compassion*, CHI. SUN TIMES (Jan. 28, 2020, 6:00 AM CST), <https://chicago.suntimes.com/elections/2020/1/28/21110883/elizabeth-warren-kim-foxx-states-attorney-race-endorsement>; Samantha Ketterer, *Sen. Bernie Sanders Endorses Audia Jones for Harris County DA*, HOUS. CHRON. (Feb. 13, 2020, 1:05 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Sen-Bernie-Sanders-endorses-Audia-Jones-for-15054044.php> (noting that Sanders endorsed Junaid Afeef, a candidate for Kane County, Illinois, State's Attorney; Cook County, Illinois, State's Attorney Kim Foxx; Garza; and Houston County, Texas, District Attorney candidate Audia Jones).

²⁹¹ See generally THE CLASH, *Should I Stay or Should I Go*, on COMBAT ROCK (CBS Records 1982).

choice presented isn't just the decarceral prosecutor's. The establishment—or old-guard, “tough-on-crime,” whatever the terminology—prosecutor has a choice to make, too. If decarceral prosecutors decide to stay in the existing associations, and to fight for institutional changes within, the establishment prosecutors may well disfavor the new changes and decide to start their own new associations. Each of these permutations and forks in the road is explored in a brief section.

A. *The Viability of Effecting Change*

It may be difficult to craft a one-size-fits-all recommendation for decarceral prosecutors. Depending on the bylaws of the state association in question, and whether they provide for organizational representation based on population, it may be entirely possible to elect enough like-minded members to influence the association's policies and external advocacy. But in others, it may not be.

Here's the relevant starting point: Every prosecutors' association conditions voting on membership in the association itself, but they define “membership” differently. Some associations only allow elected prosecutors to be voting members.²⁹² Others allow all prosecutors—the state's attorney general, the United States Attorney, elected prosecutors, *and* all assistant prosecutors working under them—to be members.²⁹³ The former are

²⁹² For example, the Hawai'i Prosecuting Attorneys Association divides membership into “four classes: Regular Members, Assistant Members, Associate Members and Honorary Members.” Regular members are “duly elected or appointed Prosecuting Attorneys” (including the attorney general and U.S. Attorney), assistant members are “attorneys employed in the office of a Prosecuting Attorney,” associate members are “former Prosecuting Attorneys of the State of Hawaii and former assistants in such offices,” and honorary members are “persons distinguished for public service or eminence in law who may be elected to honorary membership by vote of the Board of Directors and affirmed by the majority of the members present at a meeting.” However, though “[a]ll members may take part in the discussions on matters which may come before all meetings,” only “[e]ach regular member or his duly authorized designee shall be entitled to one vote on each matter submitted to a vote.” Haw. Prosecuting Att'ys Ass'n, By-Laws, art. II, §§ 1–5, 9 (May 17, 1979) (on file with author). Similarly, the Virginia Association of Commonwealth's Attorneys divides membership into “Active Members” (“elected or appointed Attorneys for the Commonwealth”) and “Associate Members” (“Assistant Attorneys for the Commonwealth”), restricting voting privileges to active members. Va. Ass'n of Commonwealth's Att'ys, Constitution and By-Laws, art. III, §§ 1–2 (Apr. 17, 1975, amend. Dec. 5, 2018) (on file with author); *see also* Mo. Ass'n of Prosecuting Att'ys, By-Laws, art. III, §§ 1–2 (on file with author) (defining “Active Member” as “[t]he chief elected or appointed prosecuting attorney in any County of Missouri,” and restricting voting rights to “Active Member[s].”). The North Carolina Conference of District Attorneys defines membership even more narrowly, only providing that “[t]he District Attorney of each prosecutorial district in North Carolina shall be a member of the Conference,” providing no non-voting membership for line prosecutors. Conference of Dist. Att'ys of N.C., Bylaws, art. II, § 1 (on file with author). The Prosecuting Attorneys' Council of Georgia is even more restrictive with its membership—it has a nine-member council (6 district attorneys and 3 solicitors-general) and the council selects replacements for its own members. O.C.G.A. §§ 15-18-41(a)–(d).

²⁹³ *E.g.*, Me. Prosecutors Ass'n, By-Laws, art. II, § 1 (“Membership shall be open to any person holding the office of Attorney General, District Attorney, Deputy or Assistant District Attorney or Deputy or Assistant Attorney General assigned to the Criminal Division or the Financial Crimes Division of the Attorney General's Office.”) (Oct. 20, 2006) (on file with author); Minn. Cty. Att'ys Ass'n, By-Laws, art.

constructed in a manner that roughly resembles the United States Senate: all elected prosecutors, regardless of the population of the county or constituency they represent, are entitled to equal representation, meaning that lesser-populated, overwhelmingly rural and white places are overrepresented at the expense of densely populated, urban, diverse places. The latter are constructed more equitably. The more prosecutors that work in an office, the greater the representation that office has in its state association—so long as every prosecutor becomes an active member. And because counties with larger populations are likelier to have more prosecutors, both because they have greater resources and greater need, their combined vote is likelier to make their electorate's share of the statewide population, which makes effecting change in the association easier.

There are several other mechanisms that may, perhaps somewhat indirectly, mean that progressive prosecutors have an easier time than would be expected given the membership restrictions on voting in changing the ideological course of the group. First, not all states elect prosecutors at the county level. A little less than half of the states with elected prosecutors elect their prosecutors not by county, but by districts—which, in the case of large, populous counties, are coterminous with the county itself.²⁹⁴ These states' methods of electing their prosecutors indirectly result in more equitable membership in their prosecutors' associations, regardless of how the association itself defines membership. Second, some prosecutors' associations require unanimity to take a position on legislation or to file an amicus brief in a case.²⁹⁵ Though it is difficult to tell how many state associations have such a requirement, in the states that do, it seems likely that progressive prosecutors would be able to force the group to take more neutral, middle-of-the road positions and to shy away from polarizing issues altogether.²⁹⁶

III, §§ A–C (“All persons . . . who duly hold the office of County Attorney, or Assistant County Attorney, are eligible for membership in the Corporation as REGULAR MEMBERS. . . . Only Regular Members may vote at Membership Meetings or vote for and hold the office of Director or other office of the Corporation as provided by these By-Laws.”); N.D. State’s Att’ys Ass’n, Bylaws, art. V, § 1 (“The membership of the Association shall include any duly elected or appointed state’s attorney or assistant state’s attorney, the Attorney General, any duly appointed assistant attorney general, the United States Attorney, and any assistant United States attorneys in the State of North Dakota, and any municipal prosecutor in the State of North Dakota . . . However, municipal prosecutor’s [sic] who are members under this section do not have voting rights under Section 3 of this Article.”).

²⁹⁴ See CAROL J. DEFRANCES, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ193441 PROSECUTORS IN STATE COURTS, 2001 11 (2002), <https://www.bjs.gov/content/pub/pdf/psc01.pdf>.

²⁹⁵ E.g., Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1652 (2018) (“Although the vast majority of Louisiana’s sixty-four district attorneys opposed the proposal, the politically powerful Louisiana District Attorneys Association remained neutral; the organization does not take a public stance on important matters unless its membership is unanimous.”).

²⁹⁶ See, e.g., Thomas T. Holyoke, *Interest Group Competition and Coalition Formation*, 53 AM. J. POL. SCI. 360, 363–64 (2009) (“[I]n large groups representing professions or trades, where the tools of recruitment are primarily material incentives rather than opportunities to change policy, members are less likely to be united or feel strongly about an issue (or even be aware of policy alternatives) because advocacy has little to do with why they joined. Thus the group’s lobbyist confronts a distribution of

The takeaway is that, at least in the associations that provide greater representation to elected prosecutors from more populous areas, decarceral prosecutors *could* organize to take control of the existing associations and chart a new path, especially if they elect like-minded prosecutors elsewhere in their states. In these states, it would likely make sense for decarceral prosecutors in these states to maintain their membership in their state associations. But in the state associations with less equitable representation, it may be all but impossible to effect ideological change, which limits the value in remaining.

B. *Stay and Go*

In a state where the prosecutors' association routinely pushes positions on criminal justice issues with which a decarceral prosecutor *vehemently* disagrees, it may be tempting—and cathartic—to call it quits. But the practical benefits provided by the associations, which in the absence of a statewide prosecutor's office or another state prosecution coordinator²⁹⁷ may be the extent of the available resources,²⁹⁸ may outweigh ideological differences. Indeed, State Attorney Aramis Ayala—who, recall, saw the Florida Prosecuting Attorneys Association file an amicus brief in support of Rick Scott's decision to transfer her cases to another State Attorney—noted that her

unwavering commitment to justice and reforming our system does in fact make it challenging to maintain membership in an organization that fails to reflect my vision of justice. Despite my individual concerns however, the benefits offered to the 160+ lawyers in my

member preferences so that no one position chosen will please every member. . . . If group member preferences are distributed symmetrically around a mean position, then the best position the lobbyist can take to please this audience (or minimize the anger) is the mean of the distribution.”)

²⁹⁷ Many of the country's statewide prosecutor coordinators—as defined by the National Association of Prosecutor Coordinators—are affiliated with the state-level prosecutors' associations, *not* with the state government. See generally *Prosecutor Coordinators*, NAT'L ASS'N OF PROSECUTOR COORDINATORS, <https://www.napc.us/about-napc/prosecutor-coordinators> (last visited Jan. 10, 2020).

²⁹⁸ Though the Law Enforcement Assistance Administration was abolished in the 1980s, it was replaced by the Office of Justice Programs, which includes the Bureau of Justice Assistance. See Roger Conner et. al., *The Office of U.S. Attorney and Public Safety: A Brief History Prepared for the “Changing Role of U.S. Attorneys’ Offices in Public Safety” Symposium*, 28 CAP. U.L. REV. 753, 763 (2000). The BJA now awards “grants, training and technical assistance, and policy development services [to] state, local, and tribal governments with the cutting edge tools and best practices they need to reduce violent and drug-related crime, support law enforcement, and combat victimization.” *About*, BUREAU OF JUST. ASSISTANCE, <https://bja.ojp.gov/about> (last visited Jan. 10, 2020). It has awarded millions of dollars in grants to prosecutors' associations—most prominently the Alabama District Attorneys Association, the Louisiana District Attorneys Association, and the Oklahoma District Attorneys Council. See *Awards*, BUREAU OF JUST. ASSISTANCE, <https://bja.ojp.gov/funding/awards/list> (last visited Jan. 10, 2020) (click “Search Filters,” and type “Alabama District Attorneys Association,” “Louisiana District Attorneys Association,” and “Oklahoma District Attorneys Council” under “Awardee Name”). The awards to the ADAA and the LDAA were surprising, given that they, like most prosecutors' associations, are privately chartered corporations, *not* government agencies.

office including training, trial techniques, and other legal resources outweighed my desire to formally withdraw from the organization.²⁹⁹

Given that many prosecutors' offices are underfunded and overloaded³⁰⁰ and assuredly benefit from the training that a well-funded, statewide association provides, a decarceral prosecutor—despite her misgivings about what ideological priorities her membership dues support—may well decide that maintaining her membership is worth it. These tangible benefits, combined with the political power of prosecutors' associations,³⁰¹ may sufficiently justify maintaining membership.

This decision does not foreclose, however, starting *another* association more in line with her values. Indeed, though more out of rising partisanship and less out of disagreements regarding professional philosophy, the development of the Democratic and Republican Governors Associations—along with the continued existence and power of the nonpartisan National Governors Association—provides a reasonable analogy for how this dual membership might function in practice.

The origin story of the NGA should sound familiar. It, or rather its predecessor association, formed in the early twentieth century, primarily to develop best practices for its constituent governors without any regard for ideology or activism.³⁰² Its institutional growth primarily occurred in the mid-twentieth century, during the 1960s and 1970s, and ultimately became a political force in the 1980s, as concerns about federalism became more prominent.³⁰³ And like prosecutors' associations, the NGA soon developed an ideological cleavage—Republicans complained that it was too liberal, and Democrats that it was “catering too much to this conservative criticism.”³⁰⁴ Counterpart organizations—the DGA and RGA—formed decades previously, but only achieved real prominence as political polarization increased over the course of the last twenty years.³⁰⁵ Now, the DGA and RGA offer their own versions of “best practices,” like the NGA—but the party groups' versions are more ideological in nature.³⁰⁶

The delicate balance among the NGA, DGA, and RGA illustrates a balance that could develop among prosecutors' associations. The existing associations could soon occupy a role similar to that of the NGA, focusing more on non-ideological advocacy, training, and “best practices,” while new

²⁹⁹ See Email from Eryka Washington to author, *supra* note 197.

³⁰⁰ See generally Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U.L. REV. 261 (2011); Peter A. Joy & Kevin C. McMunigal, *Overloaded Prosecutors*, 33 CRIM. JUST. 31, 31 (2018).

³⁰¹ *Supra* Part I.B (discussing statutory policymaking power of prosecutors' associations).

³⁰² JENNIFER M. JENSEN, *THE GOVERNORS' LOBBYISTS* 63–64 (2016).

³⁰³ *Id.* at 58–63, 65–73.

³⁰⁴ *Id.* at 92.

³⁰⁵ *Id.* at 158.

³⁰⁶ *Id.* at 158–59.

organizations—organized by progressive and establishment prosecutors, respectively—could take over the more ideological advocacy. The existing associations could then maintain their membership on state advisory boards and councils, while ensuring internally that membership ensures ideologically diverse representation wherever possible. Alternatively, the state could take over the services that the existing associations provide today, perhaps routed through the state attorney general’s (or statewide prosecutor’s) office, and states could provide for representation from both ideological associations on policymaking authorities.

C. *State vs. National Associations*

But suppose that a progressive prosecutor decides—regardless of whether she stays in or leaves the existing association—to start a new association. She faces another question: Should the new association be organized at the state or national level? (Or both?) This fork in the road can be resolved by the answers to two related questions. First, how many like-minded prosecutors are there in her state? Second, how many prosecutors—in general—are there in her state?

In some states, like Virginia, there are enough progressive prosecutors representing enough populous areas that an alternative state association could make sense. Following 2019’s elections, in which reformers Amy Ashworth, Parisa Dehghani-Tafti, Steve Descano, and Buta Biberaj were elected in Northern Virginia and Jim Hingeley was elected in Charlottesville, that adds five reformers to the one who held office previously—Portsmouth Commonwealth’s Attorney Stephanie Morales.³⁰⁷ And in a state where the existing association conditions voting rights on elected prosecutors, those six prosecutors—who represent a large share of the state’s population, but a small share of the voting-eligible members of the association³⁰⁸—the argument in favor of an alternative association is stronger. Recently, in summer of 2020, two progressive prosecutors’ associations were formed: in California, the Prosecutors Alliance of California was formed by four current and former district attorneys, and in Virginia, the aforementioned progressive prosecutors formed Virginia Progressive Prosecutors for Justice.³⁰⁹ While

³⁰⁷ Rory Fleming, *A Mixed Election Night for Reform Prosecutors: The Key Results*, FILTER MAG. (Nov. 6, 2019), <https://filtermag.org/prosecutor-election-results/>. Counting Ashworth, who does not identify as a “progressive,” in this group may slightly overstate their standing. See, e.g., Jouvenal, *supra* note 272. However, Ashworth endorsed liberal reforms during her campaign and may be sympathetic to forming an alternative association. *Id.*; Daniel Nichanian, “It is Not Smart to Focus on Prosecuting Victimless Crimes Like Drug Possession”: A Q&A with Amy Ashworth, THE APPEAL (May 30, 2019), <https://theappeal.org/politicalreport/prince-william-county-commonwealths-attorney-amy-ashworth-interview/>.

³⁰⁸ See generally Va. Ass’n of Commonwealth’s Att’ys, *supra* note 292.

³⁰⁹ Megan Cassidy, *Progressive DAs Form New Alliance to Combat ‘Tough-on-Crime’ Orgs*, SAN FRANCISCO CHRON. (Sept. 15, 2020), <https://www.sfchronicle.com/crime/article/Progressive-DAs-form-new-alliance-to-combat-15569007.php>; Alonzo Small, *In a Letter to Lawmakers, Virginia Prosecutors*

VPPJ has only recently formed, it immediately began organizing for its legislative priorities, including police accountability, warrant reform, an end to drivers-license suspension, record expungement, the abolition of mandatory minimums, and more.³¹⁰

Meanwhile, one-seventh of the elected prosecutors in Mississippi—Shameca Collins and Jody Owens, mentioned previously, along with Sixteenth Circuit District Attorney Scott Colom, who was first elected in 2015 and re-elected in 2019—identify as reformers³¹¹—which could similarly justify an alternative organization, though none of them has identified that as a priority yet.³¹²

But if a progressive prosecutor is all alone in her state, it likely makes little sense to start an alternative state prosecutors' association with one constituent member. Even if membership is defined broadly to encompass the line prosecutors in her office, for all practical purposes the association accomplishes little. That is to say, for Larry Krasner—who, despite being one of many Democratic District Attorneys in Pennsylvania, lacks another DA of kindred spirit—starting the Pennsylvania Progressive Prosecutors Association would make little sense. Similarly, in states with relatively few counties or judicial districts, like Hawai'i or Maine, more than one group makes little sense mathematically. Hawai'i has four county prosecutors³¹³—a group that has one or two prosecutors on one side and two or three on another is simply wasteful and unnecessarily duplicative.

Accordingly, in Krasner's case, in the case of similarly situated prosecutors around the country, and in states with relatively few elected prosecutors at all, it would likely make more sense to formalize the informal network that already exists among progressive prosecutors,³¹⁴ perhaps as a counterpoint to the National District Attorneys Association. Indeed, this may already be in the works, given that Miriam Krinsky has started Fair and Just Prosecution, a network of progressive prosecutors.³¹⁵ FJP's mission sounds quite similar to the missions of existing prosecutors' associations,³¹⁶ and it

Advocate for Criminal Justice Reform, WRIC (July 13, 2020), <https://www.wric.com/news/virginia-news/in-a-letter-to-lawmakers-virginia-prosecutors-advocate-for-criminal-justice-reform/>.

³¹⁰ Letter from Va. Progressive Prosecutors for Justice to Virginia State Legislators (July 13, 2020), <https://www.wric.com/wp-content/uploads/sites/74/2020/07/VPPFJ-July-13-2020-Final.pdf> (also on file with author).

³¹¹ Nichanian, *supra* note 244.

³¹² See *supra* notes 273–281. *But see* Fleming, *supra* note 279 (discussing how Owens' victory was seen by local reformers as a means of “wresting power from the regressive Mississippi Prosecutors Association”).

³¹³ See Yeagain, *supra* note 195 at 117 n.133.

³¹⁴ See *supra* note 236 and accompanying text.

³¹⁵ Miller, *supra* note 236.

³¹⁶ *Compare Our Work And Vision*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/about-fjp/our-work-and-vision/> (last visited Jan. 10, 2020) (“Fair and Just Prosecution Connects an exciting new generation of prosecutive leaders to the latest learning and best practices of respected experts from around the country. As these leaders model new strategies in prosecution and public service, FJP helps them,” by “[b]uilding a network of new prosecutors,” “[c]reating learning opportunities for newly-elected

has already initiated policymaking efforts that seek to counter the influence of the existing associations. For example, FJP has launched efforts to arrange prison visits for progressive prosecutors so that it can “broaden prosecutors’ perspectives and inform decisions on sentencing, bail and alternatives to incarceration.”³¹⁷ It coordinated the filing of an *amicus* brief with the Missouri Supreme Court in support of St. Louis City Circuit Attorney Kim Gardner’s “efforts to remedy serious misconduct that resulted in [Lamar] Johnson’s wrongful conviction.”³¹⁸ And it organized a joint statement from 39 progressive prosecutors that denounced U.S. Attorney General William Barr’s remarks “attacking local elected prosecutors who are implementing smarter criminal justice strategies grounded in evidence-based policies that lift people up, while prioritizing cases that cause communities real harm.”³¹⁹ Other groups, like Prosecutor Impact and the Institute for Innovation in Prosecution, have engaged in similar, though not as high-profile, efforts to create support systems among reform-minded prosecutors.³²⁰

D. *The Establishment Prosecutors’ Dilemma*

Of course, the choice of progressive prosecutors is only half of the equation. The existing, establishment prosecutors, who dominate prosecutors’ associations in their current forms, may have their own ideological objections if the associations suddenly shift gears.

This isn’t idle speculation. Politicians who depend on support from white, rural communities have long resented being outvoted by those from urban communities of color, and have frequently converted that resentment

prosecutors,” “[s]upporting newly elected leaders as they develop, implement, and champion effective changes to policies and practices in the criminal justice system[,]” and “[p]artnering with, and connecting new prosecutors to, local and national organizations and resources, academic institutions, and experts committed to supporting prosecutive reform.”), with *supra* Part I.A and *supra* note 16 and accompanying text (discussing missions of prosecutors’ associations).

³¹⁷ Justin Jouvenal, *They Send People to Prison Every Day. Now, They Are Pledging to Visit.*, WASH. POST (Nov. 25, 2019, 8:00 AM EST), https://www.washingtonpost.com/local/legal-issues/they-send-people-to-prison-everyday-now-they-are-pledging-to-visit/2019/11/22/5e0ff274-0d64-11ea-97ac-a7ccc8dd1ebc_story.html.

³¹⁸ Press Release, Fair & Just Prosecution, Elected Prosecutors File State Supreme Court Brief in Support of New Trial for Innocent Man Behind Bars (Feb. 10, 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/02/Johnson-SC-Amicus-Brief-Release.pdf>.

³¹⁹ Press Release, Fair & Just Prosecution, Nearly 40 Elected Prosecutors Denounce Attorney GeneralAtt’y Gen. Barr’s Baseless Rant Against Proven Criminal Justice Reforms Taking Hold in Cities Across the Country (Feb. 13, 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/02/BARR-RELEASE-FEB-2020.pdf>.

³²⁰ E.g., Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667, 1708–09 (2018) (noting that “groups such as Prosecutor Impact and the Institute for Innovation in Prosecution” have “reinforced” progressive prosecutors’ efforts “to de-emphasize low-level crimes or even to decriminalize low-impact offenses”); Note, *The Paradox of “Progressive Prosecution”*, 132 HARV. L. REV. 748, 755–56 (2018) (noting that the Institute’s work “has led to specific developments, such as conviction integrity units in Brooklyn and Manhattan”).

into rhetoric about illegitimate results.³²¹ If establishment, “tough-on-crime” district attorneys from rural areas—who are greater in number than progressive district attorneys from urban areas, but frequently represent fewer people—are outvoted and outmaneuvered in prosecutors’ associations, it seems reasonable that they would adopt similar rhetoric themselves. This roughly tracks with research on organizational membership trends, which has found that, when an organization undergoes an ideological change, and the previous majority view is relegated to the minority, members of the (new) minority ideology are likelier to leave.³²² Moreover, it makes sense that states with diverse populations would end up with more than one prosecutors’ association because of organizational schisms; “states with a heterogeneous population (in terms of race, religion, income, education, and urbanization) will have a more varied and influential [criminal justice] interest group structure than those with a homogeneous population.”³²³ This would result in a sort of self-sorting that may cause a final alignment similar to that of the NGA, DGA, and RGA.³²⁴

E. Conclusion

No matter one’s sympathies or ideological preferences—whether one finds commonalities with progressive or establishment prosecutors—there is no *single* ideal solution. Either group has a vested interest in just *one* association remaining, with their ideology dominant, resulting in a virtual

³²¹ See, e.g., Emily Badger, *Are Rural Voters the ‘Real’ Voters? Wisconsin Republicans Seem to Think So*, N.Y. TIMES (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/upshot/wisconsin-republicans-rural-urban-voters.html> (“[Wisconsin State Senate Majority Leader Scott] Fitzgerald . . . essentially recast[] the new Democratic governor, Tony Evers, not as the winner of a statewide mandate but as a creature of the capital city, put there by people in the cities. . . . Robin Vos, the Republican speaker of the Wisconsin Statehouse, drew this distinction even more explicitly after the midterm elections. ‘If you took Madison and Milwaukee out of the state election formula, we would have a clear majority,’ he said.”); Chris Cillizza, *Debunking Two Viral (and Deeply Misleading) 2019 Maps*, CNN (Nov. 7, 2019, 12:46 PM ET), <https://www.cnn.com/2019/11/07/politics/kentucky-map-electoral-college/index.html> (noting that some Republicans called for an electoral college at the state level after Democrat Andy Beshear won the 2019 Kentucky gubernatorial election); Ben Tobin, *Bevin, Still Claiming Election Fraud, Says Liberals Are ‘Good at Harvesting’ Urban Votes*, LOUISVILLE COURIER J. (Dec. 4, 2019, 10:36 AM EST), <https://www.courier-journal.com/story/news/politics/elections/kentucky/2019/12/04/kentucky-election-bevin-said-he-lost-because-liberals-harvest-votes/2606486001/> (“[Bevin] said he had trouble winning the race because of how Democrats increased voter turnout in cities like Louisville and Lexington. Liberals are ‘very good at harvesting votes in densely populated urban areas,’ Bevin said in one interview.”).

³²² E.g., Radmila Prislina & P. Niels Christensen, *The Effects of Social Change Within a Group on Membership Preferences: To Leave or Not to Leave?*, 31 PERSONALITY & SOC. PSYCH. BULL. 595, 601 (2005) (“Preference to leave the group was particularly clear in the new minority that was forced into the disadvantaged position after initially enjoying the preferred majority position.”); Fabio Sani & John Todman, *Should We Stay or Should We Go? A Social Psychological Model of Schisms in Groups*, 28 PERSONALITY & SOC. PSYCH. BULL. 1647, 1648–49 (2002) (“[W]hen members of a subgroup believe that the group identity has been subverted, and as a consequence they are without a voice and the group is not a cohesive identity, they may express schismatic intentions.”).

³²³ Erika S. Fairchild, *Interest Groups in the Criminal Justice Process*, 9 J. CRIM. JUST. 181, 188 (1981).

³²⁴ See *supra* Part IV.B.

monopoly of criminal justice policymaking authority. Such an outcome is unlikely in the years to come. Applying some form of a Rawlsian veil of ignorance, the solution that makes the most sense is likely three separate groups in each state—a progressive group, an “tough-on-crime” group, and a nonpartisan, nonideological group, perhaps run by the state, that provides training and resources to *all* prosecutors evenly and avoids partisan involvement—and groups representing each camp at the national level.

But, for the reasons outlined previously, this outcome is unlikely and infeasible. Enough progressive prosecutors are one-person islands in their states, and others are in states with relatively few elected prosecutors at all, which would result in duplicative, low-membership associations. In many of these cases, it makes more sense to seek out resources and ideological support from an allied national association.

CONCLUSION

Though they had a slow start in the beginning, prosecutors’ associations, buoyed by grants from the federal government and blessed with statutory authority from the states, have been hard at work for decades, churning out criminal justice policies that have, for better or worse, been transformative. They’ve been involved in every aspect of the criminal justice policy arena—elections, lobbying, litigation—and some aspects of policy arenas beyond that. But the rise of progressive prosecutors, who are disillusioned with the status quo, including prosecutors’ associations, threatens the associations’ hegemony. Many of them, led by Larry Krasner in Philadelphia, but joined by others in New York, Virginia, and elsewhere, have suggested breaking away, forming alternative organizations—and the seeds of some organizations have already been planted, in the form of state-level organizations—like the Prosecutors Alliance of California and Virginia Progressive Prosecutors for Justice—and national organizations like Fair and Just Prosecution. The effects of these changes, as well as what changes actually end up taking place, are far from known, but this much is: the domination of prosecutors’ associations, in their current form, is over.

APPENDIX: DATES OF PROSECUTORS' ASSOCIATIONS'
CORPORATION FILINGS

Association	Date of filing	Identification Number	Dissolution date (if applicable)
Alabama District Attorneys Association	10/26/1977	752 - 129	
Arizona County Attorneys and Sheriffs Association	10/22/1991	02365984	
Arkansas Prosecuting Attorneys Association	1/17/1975	100003556	
California District Attorneys Association	11/8/1974	C0725795	
Colorado District Attorneys Association	6/2/1989	Unknown	4/1/1996
Connecticut Association of Prosecutors	1/3/2000	639090	
Florida Prosecuting Attorneys Association	2/4/1963	705203	
District Attorneys Association of Georgia	7/14/2017	1709828	
Georgia Association of Solicitors-General	6/21/2017	17071041	
Hawaii Prosecuting Attorneys Association	1/21/1976	30259 D2	
Idaho Prosecuting Attorneys Association	10/21/1976	162521	12/2/1985
Idaho Prosecuting Attorneys Association	11/13/2013	604039	
Illinois State's Attorneys Association	12/3/1948	31025605	
Association of Indiana Prosecuting Attorneys	11/3/1980	198011-040	
Iowa County Attorneys Association	7/7/1976	59126	
Kansas County and District Attorneys	12/23/1971	0213348	
Kentucky County Attorneys Association	1/29/1997	0427756	

Louisiana District Attorneys Association	6/22/1973	04305740N	
Maine Prosecutors Association	12/6/2010	20110257ND	
Maryland State's Attorneys' Association	2/10/1967	D00152421	
Prosecuting Attorneys Association of Michigan	10/23/1970	800855599	
Minnesota County Attorneys Association	9/1/1977	P-772	
Mississippi Prosecutors Association	3/28/1988	552435	
Missouri Association of Prosecuting Attorneys	4/24/1969	N00009162	
Montana County Attorneys Association	8/5/1974	D040475	
Nebraska County Attorneys Association	11/1/1972	0224421	
Nevada District Attorneys Association	12/6/2018	NV20111080833	
County Prosecutors Association of New Jersey	9/14/1979	0100096708	
New Mexico District Attorney Association	10/16/1972	747055	Unknown date
District Attorneys Association of the State of New York	7/19/2000	2533008	
North Carolina District Attorney's Association	1/24/2002	0617681	
North Dakota State's Attorneys' Association	9/9/1996	0000204945	
Ohio Prosecuting Attorneys Association	7/17/1986	382690	
Oklahoma District Attorneys Association	6/21/2007	2112144534	
Oregon District Attorneys Association	10/28/2010	724488-98	
Pennsylvania District Attorneys Association	3/7/1994	2569573	

Solicitors Association of South Carolina	12/22/1975	Unknown	
South Dakota State's Attorneys Association	6/24/1977	NS006274	
Tennessee District Attorneys General Association	1/12/2000	000382767	9/6/2007
Texas District and County Attorneys Association	12/13/1971	1.742E+10	12/13/1971
Statewide Association of Prosecutors of Utah	10/29/1973	638666-0140	2/5/2008
Statewide Association of Prosecutors of Utah	1/4/2014	8903541-0151	3/1/2017
Statewide Association of Prosecutors of Utah	11/17/2017	10602144-0151	
Vermont State's Attorneys Association	7/9/1974	0045464	Unknown date
Washington Association of Prosecuting Attorneys	10/19/1977	600 390 306	
West Virginia Prosecuting Attorneys Association	12/19/1996	168905	
Wisconsin District Attorney's Association	3/23/1971	6W12248	
Wyoming County and Prosecuting Attorneys' Association	10/19/1993	1993-000285620	