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 county 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

The first such association was likely the New York State District Attorneys Association, which was formed in 1909. The Pennsylvania District Attorneys Association formed shortly thereafter, in 1912, and the Michigan Association of Prosecuting Attorneys was organized in 1928, after the Michigan State Bar Association gave the Association its approval. 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 collaboration—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.” It further recommended “[s]pecial programs to educate and train” prosecutors, which it argued were “badly needed.”

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.” The idea for the LEAA came from the Commission’s report and ultimately reflected the report’s emphasis on organizing law enforcement agencies at the state and local levels. Because “the historical

7 Id. at 149, 280.
8 Id. at 285–86.
9 Worrall, supra note 2 at 13.
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. 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.

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. This widespread decision to organize likely
served as a means of efficiently requesting, and then distributing, federal
funding directly to local prosecutors’ offices, 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.”

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

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
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 Alstyne & 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
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

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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 Yeargin (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 Yeargin (Aug. 20, 2019, 09:44 AM EST) (on file with author).

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for prosecutors, running blogs, or publishing monthly journals or magazines for their members. Some prosecutors’ associations have developed statewide charging recommendations or guidelines, for example.

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. 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. 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.

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. Only Vermont, where the State’s Attorneys

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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, has only a government agency, the Department of State’s Attorneys and Sheriffs. 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.

B. Statutory Power

Even excluding their lobbying, electioneering, and litigation efforts—which are covered in Part II—prosecutors’ associations already have a great deal of policymaking influence by virtue of their inclusion 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, 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).
traffic prevention, school violence and bullying, gun control, recidivism, child welfare, sexual assault prevention, and violent crime prevention.

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

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, § 370O(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.
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 ALA. CODE. § 15-23-17(c).
reviews. In Oklahoma, the prosecutors’ association is even represented on a judicial redistricting task force that effectively determines where the case will be heard.

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; that regulate pretrial release and bail; that review how delinquent juveniles or mentally incompetent adults are prosecuted, if at all; and how out-of-state or -country defendants are extradited.

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 assault—are prosecuted, how misdemeanors and felonies are classified, and what kind of defense indigent defendants receive.

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

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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. AN. § 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 (Pretreatment 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).

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

More broadly, prosecutors’ associations sit on boards that are concerned with changing criminal justice policy in broad strokes and that gather information and statistics about crimes. 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).
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.\footnote{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).}

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.\footnote{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).} 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.\footnote{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).}

II. PROSECUTORS’ ASSOCIATIONS AS INTEREST GROUPS

A contemporaneous account of the New York State District Attorneys Association’s 1909 formation, an article in the \textit{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.”\footnote{Prosecutors to Form an Association: District Attorneys of State Will Combine in Fight Against Crooks, \textit{ROCHESTER UNION & ADVERTISER} (Aug. 27, 1909), reprinted in ROSENBLATT, supra note 3 at 17.} 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.”\footnote{Id.} 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.”\footnote{Id.} 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.
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 *amicus*.

### 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, *Administering 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, refusing to submit to a breathalyzer test, using narcotics while pregnant, civil looting, and escape from institutions by civilly committed patients.

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


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).


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 \textit{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


\(^{95}\) E.g., Lewis Langham, Jr., \textit{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).


sentences imposed on the basis of race and many others opposed efforts to exclude the mentally disabled from receiving death sentences. 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. However, this support is not unanimous. In 1966, the Colorado District Attorneys Association publicly endorsed a referendum to abolish the death penalty.

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 proceedings or in grand jury proceedings and considering racial-profiling allegations in evaluating the permissibility of searches. Others have sought to expand implied consent and to restrict witness immunity. 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.

99 See id. at 391–92.


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. 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.

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. 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. 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.

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

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. 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. And prosecutors’ associations have worked to protect

115 Levenson, supra note 114 at 759 n.25 (CDAA); Sylvia E. Stevens, Changing the Rules: Rewriting our DRs, Part II, 63 Or. St. B. Bull. 29, 29–30 (2003) (Oregon District Attorneys Association).
marginalized communities by backing hate crime legislation, rape shield laws, and an expansion of protective orders for domestic violence victims.\textsuperscript{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,\textsuperscript{119} to abolish mandatory minimums,\textsuperscript{120} to relax residency restrictions for registered sex offenders,\textsuperscript{121} to promote rehabilitation and other prosecution alternatives,\textsuperscript{122} to reform (or abolish) felon disenfranchisement and other collateral consequences of convictions,\textsuperscript{123} to expunge criminal records,\textsuperscript{124} and to better support public defenders’ offices.\textsuperscript{125} But in other states, prosecutors’ associations have remained opposed to rolling back mandatory minimums and three-strikes laws,\textsuperscript{126} reducing drug crime penalties (and legalization).\textsuperscript{127}

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\textsuperscript{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).


\textsuperscript{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);


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

\textbf{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,\textsuperscript{135} though most prosecutorial elections are uncontested.\textsuperscript{136} Prosecutors have long been likelier than lawyers with other backgrounds to run in judicial elections,\textsuperscript{137} and judicial candidates both actively seek and enthusiastically tout endorsements from prosecutors.\textsuperscript{138} So
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 1990\(^{140}\) 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

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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.’”).


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


\(^{148}\) Id.


\(^{150}\) Pfingst et al., supra note 146 at 725.


\(^{153}\) 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.” 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.”

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. As mentioned previously, David Nissman, who served on the Oregon District Attorneys’ Association’s Legislative Task Force, unsuccessfully ran for the Oregon Supreme Court. In 2008, Jim Kitchens, a former district attorney who had been active in the Mississippi Prosecutors Association, successfully defeated incumbent Supreme Court Justice James Smith, though he shied away from “tough-on-crime” language.

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.

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.
158 Collins, supra note 143 at 752; supra notes 143–144 and accompanying text.
White in 1996. 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. And though the organizations were not formally affiliated with any state prosecutors’ associations, their constituent members—police officers, victims rights’ advocates employed by the state, and elected prosecutors themselves—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. 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. Another group, Tennessee Voices for Victims, a victims’ rights and advocacy organization that shared a spokeswoman with the Tennessee Forum, 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.

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

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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”).
168 Id. at 8.
171 Id.
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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

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. Pfingst et al., supra note 146 at 744.
176 Herman, supra note 122 at 50–53.
177 Id.
179 E.g., Pfingst 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, 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; state government agencies or officials, like the attorney general or a statewide prosecutor’s office; or law enforcement organizations, like associations of sheriffs, police chiefs and other police officers, or police attorneys, 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).


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.


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

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. 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*. 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

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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).

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

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\(^{190}\) *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 “prosec[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).


\(^{194}\) See generally Petition for Writ of Mandamus, Florida Prosecuting Atts. 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.”

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 post 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
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.\(^{212}\)

\(^{210}\) Yeargain, supra note 195 at 103.
In 2016, a number of reform-minded candidates—many of whom were backed by political action committees funded by Democratic mega-donor George Soros—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. 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. 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.”

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. The race saw significant outside involvement on both sides, and eventually became a proxy election over the death penalty. 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.” Warren blended this criminal justice reform language with more traditional attacks on Ober’s
effectiveness and his regard for crime victims, and narrowly beat him.\textsuperscript{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,\textsuperscript{221} and she benefited from the financial support of Soros-funded committees.\textsuperscript{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,\textsuperscript{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 verdicts\textsuperscript{224}—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.\textsuperscript{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.\textsuperscript{226} And during public discontent at the conditions in county jails,\textsuperscript{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.\textsuperscript{228} And in Houston, District Attorney Kim Ogg attracted criticism for pushing to hire


\textsuperscript{222} Chammah, supra note 219.

\textsuperscript{223} See, e.g., Ross, supra note 218.

\textsuperscript{224} Michaelson, supra note 218.

\textsuperscript{225} Ross, supra note 218.


\textsuperscript{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

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.”).
234 Gonnerman, supra note 232.
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
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, 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, 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. 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. 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.

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 Yeargain, supra note 195 at 104–05.

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


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” and served on the PDAA’s executive committee. 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. 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. 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.”

Ultimately, Zappala overwhelmingly won the Democratic primary over Jenkins—and won the Republican primary through write-in votes, 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. Middleman picked up where Jenkins left off, criticizing Zappala for his prosecutorial record, campaigning on “reducing mass incarceration

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252 Id.

253 Id.


and creating equity,” and by pledging that she would quit the PDAA because it had “set criminal justice reform back.” As an alternative, she said that she would “join[] forces” with Krasner and lobby the legislature with him. 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.

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. 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. 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. 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 victory—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.

259 Id.
260 See Ward & Goldstein, supra note 257.
262 Id.
264 Id.
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

269 Id.
270 Id.
Mississippi’s prosecutorial elections—though mostly uncontested\(^{273}\)—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 primary\(^{280}\) 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


\(^{275}\) *Id.*

\(^{276}\) *Id.*


\(^{278}\) *Id.*


\(^{280}\) *Id.*

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. In explaining their decisions, Garza argued that the TDCAA “has been one of the largest impediments to progress” in the legislature, and Selvera simply noted that the TCDAA 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.” Though Selvera ended up losing the Democratic primary, Garza ended up defeating incumbent District Attorney Margaret Moore in the July 2020 runoff, a sign that change may be coming to the TCDAA. Elsewhere,

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


289 See Nichanian, supra note 283.

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 vote on each matter submitted to a vote.” Haw. Prosecuting Att’y’s 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’y’s, 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’y’s, 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., By-Laws, 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’y’s 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. 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. 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.

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’y’s 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.”).


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 coordinator may be the extent of the available resources, 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.
301 Supra Part I.B (discussing statutory policymaking power of prosecutors’ associations).
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


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

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

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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 Yeargain, 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.” 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.” 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.” 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.

**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 into action.

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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-a7cc8dd1ebc_story.html.


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. 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. 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.” This would result in a sort of self-sorting that may cause a final alignment similar to that of the NGA, DGA, and RGA.

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

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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 Prislin & 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.”).


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

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