CAN THE ACLU AND JOHN LEGEND MAKE PROSECUTORIAL ELECTIONS MATTER? OR DOES AMERICA NEED TO CHANGE ITS SYSTEM?

REVA GHADGE*

When John Legend partnered with the ACLU of California to help bring public awareness to district attorney's races, he was seeking to draw attention to the fact that prosecutors do more than just prosecute the law. He wanted to remind people that prosecutor's control and influence a vast portion of the criminal justice system, including two prevalent issues: cash bail and mass incarceration. Given modern movements towards criminal justice reform, it may be time for a reexamination of how lead prosecutors come into their power. Ideally, elected prosecutors would tailor their platforms in response to public need; however, the ACLU has pointed out that many modern district attorneys are out of step with their constituents, choosing to focus on "tough on crime" mantras over the more positive "end mass incarceration" slogans. What may be worse is that the public seems apathetic towards district attorney elections, allowing for this the gap between lead prosecutors and constituents to widen. This Note ultimately argues that modern circumstances tilt towards appointing state prosecutors, rather than electing them. Given a diversifying society with different needs, appointments would ensure that prosecutors are insulated against corruption and that public needs are protected.

TABLE OF CONTENTS

* J.D. Candidate, 2020, University of Illinois College of Law; B.A., University of Illinois at Urbana-Champaign. Thank you to the editors, members, and staff of the *University of Illinois Law Review* for your diligent work on this Note. To Gauri and Gayatri, you have provided a grounding presence in my life and I am incredibly grateful for your friendship. Thank you to my Mom and to Kunal, who have been constant sources of support and love to me. And to my Dad, you are my hero and being a published author, like you, is my greatest achievement to date.

I. INTRODUCTION

Early in 2018, John Legend partnered with the American Civil Liberties Union ("ACLU") of California to remind the public that district attorneys across the country do more than just prosecute the law.[1] Prosecutors control and influence vast amounts of the criminal justice system including mass incarceration and cash bail.[2] And, starkly, forty-seven of fifty states elect their prosecutors.[3] In a society grappling with mass incarceration and criminal justice reform, both the power held by prosecutors and how individuals come into that power need to be reexamined.[4] The ideal scenario is that, as a result of the election system, state

1. *See* John Legend, *Hey, Meet Your DA!*, ACLU NORCAL, https://www.aclunc.org/take-action/hey-meet-your-da (last visited Jan. 24, 2020).

2. *Id.*; Thomas Fuller, *California Is the First State to Scrap Cash Bail*, N.Y. TIMES (Aug. 28, 2018), https://www.nytimes.com/2018/08/28/us/california-cash-bail.html (stating California's new law gives wide prosecutorial discretion and may lead to a larger incarceration rate).

3. STEVEN W. PERRY, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2005 2 (2006).

4. Legend, *supra* note 1.

prosecutors tailor their decisions based on the platforms that will most appeal to the public.[5]

As the ACLU pointed out, though, what is more likely is that modern district attorneys are out of step with their constituents.[6] When 95% of prosecutors are white Americans and 85% of prosecutors run unopposed in elections, the logical inference is there is no incentive for elected prosecutors to really pay attention to public need and respond accordingly.[7] Lead prosecutors seem to continue to focus on the historically winning "tough on crime" mantra even as the public is responding more positively to "end mass incarceration."[8] And this dissonance between lead prosecutors and their electorate is widened by the fact that voters tend to be apathetic in elections for district attorney.[9]

This Note argues that it is within public interest to appoint, rather than elect, state prosecutors in order to best respond to public necessity and ensure against corruption. Part II reviews the history of elected prosecutors by tracking the creation of their offices following the Revolutionary War, exploring the transition from appointed state prosecutors to elected prosecutors, and stating the concerns that prompted that transition. This Part also discusses the statutory basis for prosecutorial power and the current scope of that power including the charging power, plea deals, and more.

Part III analyzes modern prosecutors using the lens of concerns of corruption and the ability to meet public necessity. This Part uses examples of modern prosecutors in both elected and appointed capacities to explore whether the above concerns have changed or are better met in modern times. Part IV then recommends state prosecutors be appointed rather than elected to better respond to shifting public necessity.

II. BACKGROUND

"The United States is the only country in the world where citizens elect prosecutors."[10] And modern prosecutors are responsible for a vast number of responsibilities.[11] They are officers of the court even as their powers come from

5. *See* Andrew Novak, *It's Too Dangerous to Elect Prosecutors*, DAILY BEAST (Aug. 24, 2015, 1:12 AM), https://www.thedailybeast.com/its-too-dangerous-to-elect-prosecutors ("[E]lections affect how prosecutors behave, and not for the better. . . . when running for reelection, prosecutors become overly pugnacious, sacrificing fairness . . . for convictions.").

6. Legend, *supra* note 1.

7. *Justice For All*?: A Project by the Reflective Democracy Campaign on Who Prosecutes in America*, WOMEN DONORS NETWORK: REFLECTIVE DEMOCRACY CAMPAIGN, https://wholeads.us/justice/#, (last visited Jan. 24, 2020) [hereinafter *Justice for All*].

8. Paige St. John & Abbie Vansickle, *The California Experiment: Prosecutor Elections Now a Front Line in the Justice Wars*, MARSHALL PROJECT (May 23, 2018, 6:00 AM), https://www.themarshallproject.org/2018/05/23/prosecutor-elections-now-a-front-line-in-the-justice-wars.

9. Ave Mince-Didier, *State Crimes vs. Federal Crimes*, NOLO, https://www.criminaldefenselawyer.com/resources/state-crimes-vs-federal-crimes.htm (last visited Jan. 24, 2020).

10. Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 (2010).

11. *See infra* Section II.B.

the Executive Branch of both the federal and state governments.[12] This dichotomy is further broken up by the differences between the appointment of lead prosecutors at the federal level and the election of most lead prosecutors at the state level.[13] But prosecutors in the United States were not always elected, and their history as appointed officials provides valuable insight into their current status as elected officials.[14] This Part seeks to explain how prosecutors came to be elected beginning with the creation of their office following the Revolutionary War.

A. Tracing the History of Elected Prosecutors

The history of elected prosecutors sheds light on an interesting phenomenon—the transition of prosecutors from an appointment system to an elected system.[15] The original colonies held firm beliefs that prosecutors were unable to be effective due to corruption within the office and an inability to respond to public needs.[16] The following Section explores these original concerns and the shift from the appointed prosecutor to the elected one.

1. Post-Revolutionary War: The Creation of the Public Prosecutor

Prior to gaining independence, the American colonies chose to follow the British system in which there was an attorney general who participated in civil and criminal cases on behalf of the Crown.[17] The majority of criminal cases, however, were left to the victims to prosecute.[18] This meant victims brought charges as a way to "exert pressure for financial reparation," and that "offenders avoid[ed] criminal sanctions by settling their cases privately."[19] The system was therefore considered inadequate to a new society.[20] As crime and population increased in the colonies, county prosecutors became more prevalent.[21] By the time of the Revolutionary War, most colonies had an attorney general or county prosecutors to handle local matters.[22]

When the United States gained independence from Britain, many individual states sought to create a chief prosecutor.[23] Mirroring other officers at this time, various institutions appointed prosecutors within state governments.[24] The actual office to appoint the chief prosecutor varied: the county court judge was

12. *Id.*
13. Not all states elect their lead prosecutors. *See* PERRY, *supra* note 3, at 2.
14. *See generally* Ellis, *supra* note 10.
15. In this Note, the terms "district attorney" and "state's attorney" will be used interchangeably.
16. *See generally* Ellis, *supra* note 10.
17. *Prosecution: History of the Public Prosecutor*, ENCYCLOPEDIA CRIME & JUST., https://www.encyclopedia.com/law/legal-and-political-magazines/prosecution-history-public-prosecutor (last visited Jan. 24, 2020).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. Ellis, *supra* note 10, at 1530.
24. *Id.* at 1536.

required to make the appointment, the state legislature made appointments, or the Governor performed this duty with advice from either their advisors or the state senate.[25] Concurrently, Governors typically held little power within state governments.[26]

2. The Original Role of the Prosecutor

In their original form, chief prosecutors were intended to be officers of the court with nondiscretionary roles.[27] They were meant to prosecute criminals, represent the state if a civil matter arose, and order subpoenas.[28] Chief prosecutors were not full-time employees at the start of the office; instead they were often citizens with minimal legal experience, including the Attorney General of the United States.[29] In the alternative, state and the federal governments found full-time attorneys who needed to supplant their income to appoint as prosecutors.[30]

As time passed, prosecutors claimed more discretionary power over whether charges were brought and partnered with also-growing police departments to screen charges.[31] One author noted, "district attorneys began to make 'administrative decisions which determined whether or not a case was prosecuted.'"[32] This shifted prosecutors to be in tandem with the executive branch rather than existing as a neutral body of the court.[33] By the time the Civil War began, governors were no longer as powerless as they originally were; the majority of governors held veto power over state legislatures.[34] Distrust grew in the consolidation of power within governorships and people began to fear political parties were taking over the appointment process and twisting it to reward allies or punish enemies.[35] Coupled with concerns about the growing power of prosecutors within the justice system and prosecutors gaining more discretion, early America became restless with the appointment process.[36] This restlessness began to spark change in the states, starting with Mississippi and Ohio.

3. Mississippi & Ohio: The Initial Shift to Elections

Mississippi was the first state to elect its prosecutors, a decision met with a mixture of excitement and disdain.[37] The Mississippi Legislature was responsible for choosing state officials other than the governor and lieutenant governor.[38]

25. *Id.* at 1537.
26. *Id.*
27. *Id.* at 1538.
28. *Id.*
29. *Id.* at 1539.
30. *Id.*
31. *Id.* at 1538.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 1536.
36. *Id.* at 1538.
37. *Id.* at 1540.
38. *Id.*

Unrest grew within less-populated areas because at the time only free white males who served in the militia or who were able to pay taxes were allowed to vote, therefore limiting those who were able to vote for the governorship and legislature.[39] This led to "a legislature controlled by . . . the state's commercial center," and the eventual dominating of "state and local court appointments."[40] At a state constitutional convention, citizens eliminated the taxpayer requirement and argued "'the competency of the people to govern themselves' required the 'election of all important public officers by direct popular agency.'"[41] During this convention, delegates likewise passed a measure to allow for the election of district attorneys.[42]

Ohio followed Mississippi's example and transitioned to an elected model in 1833.[43] In Ohio, citizens were upset with appointed judicial officials who seemed to be ripe with conflicts of interest: lower judges were expected to serve as "agents of central power" and enforce rules that trumped popular opinion.[44] In 1807, the Ohio Supreme Court struck down a law giving elected justices of the peace jurisdiction over smaller civil claims.[45] Ohio's citizens became more and more dismayed by the consolidation of power in political parties and the use of "government appointments to secure private advantages."[46] In 1832, Ohio's legislature passed a bill providing for elected prosecutors who were "responsible for bringing 'all complaints, suits, and controversies, in which the state shall be a party, within the party for which he shall have been elected.'"[47]

Ohio's unrest was a precursor for what would follow at the national stage. Ohio's chief prosecutor gained significant authority over the next few decades—he was required to summon grand juries for capital cases and was able to decide the extent to which charges were filed against a defendant.[48] This power expanded when the endorsement of the prosecuting attorney became required for grand jury bills and effectively precluded private prosecutions.[49] Even in cases where prosecutorial presence was not required, Ohio prosecutors used a *nolle prosequi* writ to exercise discretion and dismiss cases.[50] There was speculation prosecutors used these writs to dismiss cases that required less time and would yield less political clout for future elections.[51] Ohio's elections of prosecutors would continue to hold political ties that mirror modern considerations.[52]

39. *Id.* at 1551.
40. *Id.* at 1540.
41. *Id.* at 1541.
42. *Id.*
43. *Id.* at 1543–44.
44. *Id.* at 1543.
45. *Id.*
46. *Id.*
47. *Id.* at 1544.
48. *Id.* at 1545.
49. *Id.*
50. *Id.* at 1545–46 (stating that of 449 total felony indictments, prosecutors issued 111 *nolle prosequis* writs and six years later the rate increased to 900 out of 2427 indictments).
51. *Id.* at 1546.
52. *Id.* at 1547.

4. Appointed Prosecutors Come Under Fire

The election of Andrew Jackson to the Presidency opened the door for continued suspicion of appointed officials at the national level.[53] After entering office, President Jackson "sought to fill as many government positions as possible with his allies, both to ensure that his agenda on policy would be carried out by sympathetic officials and to reward his supporters for their loyalty."[54] States apparently followed this trend, leading to a compounded effect at the state and federal level of patronage appointments.[55] In Illinois, appointments were initially made by the Governor, but the legislature consolidated as much power as it could and began appointing prosecutors itself.[56] This led to "innumerable intrigues and corruptions."[57] In New York, patronage appointments were notorious and in one case a district attorney kept "[challenging] prospective jurors until he was able to empanel a jury he thought would convict a man he had charged with cutting down timber from the land owned by a political ally of the governor."[58]

The shift from allowing the governor to appoint at his own discretion to requiring the consent of the state legislature in Pennsylvania likewise reflected this phenomenon.[59] The hope was this change "would have the effect to diminish the inordinate desire which was now to prevalent, to become favorites of the Executive."[60] But this trend increased as prosecutors were paid in salaries rather than in fee-based rates.[61] Under a fee-based system, district attorneys were paid per-volume and the rates were statutorily set.[62] Under a salary system, attorneys were able to collect a fixed income regardless of the amount of the criminal work, and it ultimately led to the office being more profitable for patronage appointments.[63]

Reformers believed elections would remove some of the politics that patronage appointments held and, because elections would make prosecutors accountable to the public, they would be "more responsive to the concerns of the voters."[64] In Tennessee, the legislature released a report stating its judiciary was "the most expensive and least efficient of any in the United States."[65] Considering impeachment of judicial officers was also common, it followed that Tennessee chose to institute a popular election for state's attorneys in 1853.[66] Likewise,

53. *Id.*
54. *Id.* at 1547–48.
55. *Id.* at 1548.
56. *Id.*
57. *Id.* at 1548–49.
58. *Id.* at 1549.
59. *Id.*
60. *Id.*
61. *Id.* at 1550.
62. *Id.*
63. *Id.*
64. *Id.* at 1550–51.
65. *Id.* at 1551.
66. *Id.*

Massachusetts was able to pass an amendment to elect district attorneys in 1855 amid the same concerns.[67]

Supporters of elected prosecutors seemed sure citizens would be able to determine competent attorneys.[68] A supporter at the Massachusetts convention stated, "there is no class of men of whose qualifications the people are better judges than of lawyers, as there is none whose success depends so little upon mere personal popularity."[69] The excitement over elected prosecutors likewise coincided with loosening restrictions to becoming a lawyer: apprenticeships were no longer required to be an attorney.[70] There is speculation both of these ideas were the product of a belief that lawyers "needed only common sense, rather than formal training, to practice law."[71]

Regardless, states showed an ongoing belief that appointed positions were "influenced more by political considerations than by public interest."[72] In Maryland, findings revealed that district attorneys were failing to charge political allies for potential crimes, and in New York, complaints against appointed officers were high.[73] New York, in particular, tried to isolate the district attorney as the sole officer whom the governor could not fire from office.[74] But the provision was removed upon an objection that the district attorney was a member of the executive branch and therefore should be subject to supervision by the governor.[75] The ultimate proposal in New York adopted a number of safeguards to insulate against political influence beyond just elections.[76] Elections were to run every three years, required "two-thirds of all district attorneys would be elected separately from the governor," and required the governor to provide a district attorney with "the charges against him and the opportunity to be heard" if seeking to remove him.[77]

5. Other Concerns

Political considerations were not the only concerns citizens held about the appointment of prosecutors. They were likewise concerned about the financial costs of appointed prosecutors.[78] In New York, elected prosecutors were suspected to be less likely to drain the finances of a state.[79] The state even went so

67. *Id.* at 1552.
68. *Id.* at 1553.
69. *Id.* at 1552.
70. *Id.* at 1553.
71. *Id.*
72. *Id.* (citation omitted).
73. *Id.* at 1554–55.
74. *Id.* at 1555–56 ("The initial draft of the 1846 New York Constitution singled out the district attorney as the one local officer whom the governor could not remove.").
75. *Id.* at 1556.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*

far as to consider whether county boards of supervisors should designate the salaries of district attorneys rather than a government official.[80] Ultimately though, the New York delegates decided it was the role of the legislature to determine who set the salaries.[81]

Concerns whether district attorneys would be responsible for the needs of their constituents also factored into electing prosecutors.[82] Noted scholars like Alexis de Tocqueville argued that "the organization of towns and counties in the United States is everywhere based on the same idea, namely, that each is the best judge of what pertains only to itself."[83] Some states, like Kentucky, debated a more complicated system in which both a state "attorney for the commonwealth" and a separate "county attorney" were elected—with the state's attorney being concerned with state matters and the county attorney being concerned with county matters.[84]

Kentucky, and other states including Illinois, decided to elect county-level prosecutors rather than solely a state level official for numerous reasons.[85] Delegates wanted district attorneys to know their constituents and be more attuned to their constituents' needs.[86] There existed further concerns that prosecutors beholden to a judicial district rather than a county would be unavailable to easily travel to where they were needed or they may be unprepared for cases.[87] In response, some states required candidates for district attorney to live in their district for a certain minimum time period before running for office.[88] Prosecutors elected by county also provided insurance that criminals would not have their charges dismissed *nolle prosequi* because the prosecutor was unfamiliar with the circumstances of the case.[89]

6. Animus to Elected Prosecutors

This is not to say elected prosecutors were met with open arms or a unanimous willingness to make the transition.[90] Opponents had valid arguments in which they sought to have addressed prior to transitioning to elected prosecutors.[91] One of their concerns was that political influence would merely shift from appointments by a single entity, like the governor, to political parties who chose their candidates.[92] A second concern centered around whether voters would be

80. *Id.* at 1557.
81. *Id.*
82. *Id.* at 1558.
83. *Id.* (internal citation omitted).
84. *Id.* at 1558–59.
85. *Id.* at 1561.
86. *Id.*
87. *Id.*
88. *Id.* at 1558.
89. *Id.* at 1561.
90. *Id.* at 1562.
91. *Id.*
92. *Id.* (stating one critic from Massachusetts argued "the present mode of appointment has worked well; it has secured to us faithful and competent officers . . . [it is] unsafe to have an attorney-general dependent on the

able to accurately judge the qualifications of potential prosecutorial candidates.[93] This stemmed from an idea that voters would be unable to gather enough information to make an informed decision about candidates, particularly when people were more apathetic about these races.[94]

In particular, other Southern states were reluctant to follow Mississippi's example and elect their prosecutors.[95] This may partially have been because of hostility to constitutional reform.[96] It may also have stemmed from concerns that in certain states, like Louisiana, "property qualifications for voting and an apportionment scheme . . . favored rural, wealthy . . . plantation owners over the nonlandowning white residents of New Orleans."[97] It was a surge of immigrants demanding suffrage that ultimately spurred Louisiana to reform their constitution to include electing prosecuting attorneys.[98] By the Civil War, twenty-five states adopted elected prosecutors, and in modern times, all but three states elect their lead prosecutor.[99] The shift to elected prosecutors has become more meaningful as prosecutorial power has grown over time as well.[100]

B. Where Prosecutorial Power Comes From

The scope of prosecutorial power is broad, and prosecutorial power originates from federal and state constitutions; however, the prosecutorial offices themselves typically derive their power from statutes.[101] The following Section analyzes the statutory and constitutional basis for prosecutorial power.

1. Federal Prosecutorial Power

Federally, the U.S. Constitution mandates that the President "take Care that the Laws be faithfully executed."[102] Combined with other sections of Article II, this clause has been held as the source of prosecutorial discretion.[103] This power is further expanded under the Judiciary statute, Title 28, which lays out the organization of the federal courts, their officers, and the Department of Justice.[104] This statute gives a foundation for the Attorney General's office, the Federal

popular will of the party, where the party may be very desirous that some of its members should not be prosecuted, who ought to be . . .") (citation omitted).

93. *Id.*

94. *Id.* (quoting a Kentucky delegate who said, "the county attorney 'is a little trifling office of no account, and the people care but little about it'").

95. *Id.* at 1564.

96. *Id.*

97. *Id.* at 1563.

98. *Id.*

99. *Id.* at 1568; George Coppolo, *States that Elect their Chief Prosecutors*, CONN. GEN. ASSEMBLY (Feb. 24, 2003), https://www.cga.ct.gov/2003/rpt/2003-R-0231.htm.

100. *See infra* Section B.1.

101. *See id.*

102. U.S. CONST. art. II, § 3.

103. Erin Cady, Note, *Prosecutorial Discretion and the Expansion of Executive Power: An Analysis of the Holder Memorandum*, HARV. J. ON LEGIS. ONLINE (Oct. 15, 2015), http://harvardjol.com/2015/10/15/prosecutorial-discretion-holder-memorandum/.

104. 28 U.S.C. §§ 1–5001 (2018).

Bureau of Investigations, the United States' Marshalls Service, and provides for United States Attorneys who "shall . . . prosecute for all offenses against the United States."[105] Section 541 of Title 28 specifically requires a president to "appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district."[106]

2. State Prosecutorial Power

The states have similar provisions in their constitutions that give power to governors to execute the laws. For example, the Illinois constitution provides that "[t]he Governor shall have the supreme executive power, and shall be responsible for the faithful execution of the laws."[107] Michigan's constitution reiterates that it is the governor's job to faithfully execute the laws and provides that "[t]he governor may initiate court proceedings in the name of the state to enforce compliance with any constitutional or legislative mandate."[108]

State legislatures have refined this general power by creating explicit statutes to address these concerns. In New York, the state legislature defined the district attorney's power as a "duty . . . to conduct all prosecutions for crimes and offenses cognizable by the courts for which he or she shall have been elected or appointed."[109] This power was codified in its own article within New York's County Law.[110] Illinois's Compiled Statutes likewise provide within their county codes that state's attorneys have a duty to "commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for this county."[111]

California's Constitution provides for a district attorney, and its legislature enforces its powers stating "[t]he district attorney is the public prosecutor . . . [and] shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of all the people all prosecutions for public offenses."[112] Colorado specifies under the Judicial Department in its Constitution that district attorneys are to be elected every four years, with salaries and duties delegated by statute.[113] Texas likewise states under Article V of its Constitution that "[t]he Legislature may provide for the election of District Attorneys in such districts, as may be deemed necessary."[114]

These statutes provide for prosecutors to address civil prosecutions on behalf of state or federal governments, defend the government from civil actions,

105. 28 U.S.C. §§ 503, 531, 541, 547, 561 (2018).
106. 28 U.S.C. § 541 (2018).
107. ILL. CONST. art. V, § 8.
108. MICH. CONST. art. V, § 8.
109. N.Y. COUNTY LAW § 700 (Consol. 2018).
110. *Id.*
111. 55 ILL. COMP. STAT. 5/3-9005 (2019).
112. CAL. GOV'T CODE § 26500 (Deering 2018); *District Attorney*, CAL. STATE ASS'N OF COUNTIES, http://www.counties.org/county-office/district-attorney (last visited Jan. 24, 2020).
113. COLO. CONST. art. VI § 13.
114. TEX. CONST. art. V § 21.

prosecute forfeited bonds and recognizances, and collect fines, bonds, and penalties on behalf of the state.[115] The statutes, however, exclude specific powers, like the charging power or discretionary interests of a prosecutor. When a state references one of these, as in California, it is still broad in scope—California's statute says it is within the district attorney's discretion to initiate prosecutions.[116] The statutory derivation of power is only one aspect to prosecutorial power; prosecutors also claim power through various programs, pleas, and charging decisions.[117]

C. The Current Scope of Prosecutorial Power

Heavy caseloads, plea bargains, and the increasing federal criminal code all give prosecutors greater power than originally anticipated.[118] Statutory federal crimes have increased and, as such, an increase in federal criminal prosecutions has followed.[119] With this increase in prosecutions, resources are spread thin at the federal level.[120] This is even more prevalent at the state level, where the majority of criminal prosecutions occur.[121] The federal criminal code has similarly increased from 183 crimes in 1837 to more than 1,000 as of 2009.[122] A large number of the crimes codified in Title 18 were enacted within the last four decades, and thus "the rule that 'when an act violates more than one criminal statute, the Government may prosecute under either' provides federal prosecutors with even more discretionary power today."[123]

1. The Charging Power

Federal law specifies that prosecutors have the choice to prosecute any crime supported by probable cause, and courts typically will not interfere with their decisions.[124] There are recognized limits, including vindictive prosecution, wherein a prosecutor uses a higher charge to penalize a defendant for exercising constitutional rights, violates the Due Process Clause.[125] Likewise, selective prosecution claims argue a prosecutor violated the Equal Protection Clause by impermissibly charging a defendant "based on race, religion, or other impermissible criterion."[126] In either case, the defendant bears the burden of proof, which can be difficult to prove.[127]

115. 28 U.S.C. § 547; 55 ILL. COMP. STAT. 5/3-9005.
116. CAL. GOV'T CODE § 26500 (Deering 2018).
117. *See infra* Section II.C.
118. Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 7 (2009).
119. *Id.* at 8.
120. *Id.*
121. Mince-Didier, *supra* note 9.
122. Krauss, *supra* note 118, at 7.
123. *Id.* at 8.
124. *Id.* at 4–5.
125. *Id.* at 5.
126. *Id.* at 6.
127. *Id.*

The Supreme Court has addressed the decision to prosecute and concluded prosecutors have a broad scope of prosecutorial discretion.[128] In 1979, a criminal defendant appealed his conviction when he was faced with potential crimes under two statutes but was charged and convicted under the statute bearing a higher penalty.[129] The Supreme Court noted that the two statutes at issue were not the same, and stated:

> This Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.[130]

Under this reasoning, the Court upheld the defendant's conviction with higher penalties.[131]

The Fifth Circuit explained the need for prosecutorial independence in *United States v. Cox*.[132] The court argued:

> The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause. Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the [U.S. Attorney].[133]

The Supreme Court bolstered this view when it stated, "the decision of a prosecutor in the Executive Branch not to indict . . . has long been regarded as the special province of the Executive Branch."[134]

Similarly, lower courts have used the separation of powers as persuasive language to limit interference with prosecutorial discretion.[135] The Seventh Circuit in *In Re United States* stated the Justice Department holds the discretion to charge, and "[t]he Constitution's 'Take Care' clause places the power to prosecute in the executive branch . . . [and a judge could not] refuse to dismiss a prosecution merely because he was convinced that the prosecutor was acting in bad faith or contrary to the public interest."[136] The Ninth Circuit stated a "high degree

128. *See* United States v. Batchelder, 442 U.S. 114, 124 (1979).

129. *Id.* at 116 (citation omitted).

130. *Id.* at 123–24.

131. *Id.* at 124.

132. 342 F.2d 167, 171 (5th Cir. 1965).

133. *Id.*

134. Krauss, *supra* note 118, at 10 (citing Heckler v. Chaney, 470 U.S. 821, 832 (1985)); *see also* United States v. Armstrong, 517 U.S. 456, 464 (1996) (holding that separation of powers requires broad prosecutorial discretion).

135. *In re* United States, 345 F.3d 450, 453–54 (7th Cir. 2003).

136. *Id.* at 453.

of deference" was required for a prosecutor's decision to charge a defendant because it is a power assigned to the executive branch in the Constitution.[137] The First Circuit adopted the Seventh Circuit's language and stated that "we note that 'the exercise of prosecutorial discretion, at the very core of the executive function, has long been held presumptively unreviewable.'"[138] Although the charging power is broad and left almost entirely in the hands of prosecutors, it is not the only power they wield; in conjunction with the charging power, prosecutors have the power to offer plea deals as well.[139]

2. Plea Deals

With roughly 97% of all cases being resolved via plea deals as of 2017, the prosecutorial power of pleas is vast.[140] The United States Attorney's Office states that "[w]hen the Government has a strong case, the Government may offer the defendant a plea deal to avoid trial and perhaps reduce his exposure."[141] Further, "[a] defendant may only plead guilty if they actually committed the crime and admits to doing so in open court before the judge."[142] The power to negotiate and work on pleas is one primarily in the hands of the prosecuting and defense attorneys.[143] The Department of Justice manual states "Fed. R. Crim. P. 11(e) recognizes the possibility that the attorney for the government and either the attorney for the defendant or the defendant pro se may enter into an agreement."[144] Regardless, the court is not allowed to participate in plea negotiations.[145]

The power to offer pleas is also essentially unlimited in scope.[146] In *Brady v. United States*, the United States Supreme Court adopted a standard by which a guilty plea was valid "unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business."[147] This standard allows prosecutors and defense attorneys to treat plea deals like contracts that can involve

137. United States v. Arenas-Ortiz, 339 F.3d 1066, 1068 (9th Cir. 2003) ("We must exercise a high degree of deference to the decision of prosecuting authorities to bring charges, because the Constitution assigns that decision to the executive branch of government.").

138. United States v. Smith, 178 F.3d 22, 26 (1st Cir. 1998) (quoting *In Re* Sealed Case, 131 F.3d 208, 214 (D.C. Cir. 1997)).

139. Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence, Until It's Too Late*, N.Y. TIMES (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html?_r=0.

140. *Id.*

141. *Justice 101: Plea Bargaining*, OFFICES U.S. ATTORNEYS, https://www.justice.gov/usao/justice-101/pleabargaining (last visited Jan. 24, 2020).

142. *Id.*

143. *Criminal Resource Manual 625: Federal Rule of Criminal Procedure 11(E)*, U.S. DEP'T OF JUST., https://www.justice.gov/jm/criminal-resource-manual-625-federal-rule-criminal-procedure-11e (last visited Jan. 24, 2020) [hereinafter *Criminal Resource Manual*].

144. *Id.*

145. *Id.*

146. *Id.*

147. 397 U.S. 742, 755 (1970) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc)).

recommending sentences, dropping charges, or anything else the parties may agree to.[148]

Like with the charging power, the judiciary is prohibited by federal case law from interfering with prosecutorial discretion, even when plea bargaining seems to "resemble matters traditionally left to judges."[149] In *Bordenkircher v. Hayes*, the defendant argued that a prosecutor's conduct was vindictive when he told the defendant he would re-indict with higher charges if the defendant chose not to accept the plea.[150] The Court stated that "[t]o hold that the prosecutor's desire to induce a guilty plea is an 'unjustifiable standard,' which like race or religion, may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself."[151] The Court further intimated that "a rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings . . . could only invite unhealthy subterfuge."[152] Ultimately, the Court held prosecutors were free to use the "give and take" of dropping charges or bringing new ones in plea bargaining "so long as the accused is free to accept or reject the prosecutions offer."[153]

There is skepticism about the plea deal system.[154] There are suggestions that the system coerces people who may be innocent into pleading guilty for several reasons.[155] One possible explanation is because prosecutors and public defenders are so understaffed, they can be working with limited information and pleas are efficient ways to settle cases.[156] This is especially true because if a prosecutor offers a plea, the defense attorney is legally obligated to convey the potential deal to his or her client and allow the defendant to choose whether to accept or reject it.[157] Among other protests to the plea system is the system is tempting for low-income defendants who are concerned about getting back to work or their families to take a plea to get home faster.[158] This does not diminish the power prosecutors have to create pleas but does illuminate just how vast that power is.

One manifestation of power via plea deals is prosecutors can offer a sentencing recommendation in return for a plea, or alternatively, to not protest against a request by defense counsel at the plea hearing for a certain sentence.[159] There are mandatory minimum sentences in place for certain crimes—narcotics, firearm offenses, child pornography, and more.[160] This limits prosecutors to

148. *Criminal Resource Manual*, *supra* note 143.
149. Krauss, *supra* note 118, at 9.
150. 434 U.S. 357, 358–59 (1978).
151. *Id.* at 364–65.
152. *Id.* at 365.
153. *Id.* at 363.
154. Jed. S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. (Nov. 20, 2014), https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/.
155. *Id.*
156. *Id.*
157. *Id.*
158. Schwartzapfel, *supra* note 139.
159. *Criminal Resource Manual*, *supra* note 143.
160. Rakoff, *supra* note 154.

some extent because prosecutors and the judge are each required to operate within the guidelines; but it does not stop them from using pleas to offer a defendant the option to plead to a charge with a lesser sentence.[161]

3. Bail & Bond Powers

It is also within prosecutorial power to determine whether bail will be requested and what amount of bail will be requested.[162] The ACLU argues that it is not the crime that keeps people in jail unnecessarily but the inability to pay bail which is controlled by the prosecutor.[163] This is partially because if a district attorney does not request bail, it is unlikely a judge will order it on his or her own.[164] It is also within a district attorney's power to request that bail be revoked.[165] Notably, in some jurisdictions, defendants may not have a defense attorney at a bail hearing.[166] Instead, prosecutors are responsible for presenting their cases and may be the only attorney on either side of the courtroom.[167]

4. Diversion & Alternate Sentencing Programs

One growing field within prosecutorial offices has been the use of diversion programs to help address the large caseloads district attorneys typically have.[168] Diversion programs are typically aimed at low-level, first-time offenders because the justice system has recognized those defendants are better served with counseling, monitoring, and more, rather than with traditional plea deals and sentencing.[169] For prosecutors, the benefits include lower overall costs and better opportunities for victim compensation and completion of community service projects.[170] The typical diversion program for criminal defendants has one of two paths: defendants can be diverted to counseling before they give official pleas or they can be required to formally plead guilty and the court suspends punishment until their requirements are complete.[171] Requirements for diversion programs include fees, community service, treatment, classes or vocational training, or

161. *Id.*

162. *The Power of Prosecutors*, ACLU, https://www.aclu.org/issues/smart-justice/power-prosecutors (last visited Jan. 24, 2020).

163. *Id.*

164. Rahsaan Hall, *District Attorney 101: The Power They Wield*, ACLU MASS. (Jan. 31, 2018), https://www.aclum.org/en/news/district-attorney-101-power-they-wield.

165. *Id.*

166. Sandra Guerra Thompson, *Do Prosecutors Really Matter?: A Proposal to Ban One-Sided Bail Hearings*, 44 HOFSTRA L. REV. 1161, 1164 (2016).

167. *Id.*

168. MELISSA LABRIOLA ET AL., PROSECUTOR-LED PRETRIAL DIVERSION: CASE STUDIES IN ELEVEN JURISDICTIONS vi (2018).

169. Sara J. Berman, *Diversion Programs*, NOLO, https://www.nolo.com/legal-encyclopedia/diversion-programs.html (last visited Jan. 24, 2020).

170. *Id.*

171. *Id.*

more, and these requirements are aimed at implementing measures that will modify defendants' behavior.[172] After completing their requirements, defendants typically will have their case dismissed and may be able to have the record expunged.[173] The ACLU considers diversion programs to be a "positive tool that should be used in our nation much more frequently" because it targets underlying problems and can improve "long-term community safety and reduce recidivism" more effectively than traditional sentences.[174]

Diversion programs often have strengths and weaknesses.[175] They can be limited to low-level conduct that then places more requirements on defendants than they would have otherwise; or they may only offer temporary treatment for defendants who need long term supervision or rehabilitation.[176] If implemented properly, however, the perceived value and the potential to positively influence defendants' lives are high.[177] It is also prosecutorial offices that are typically responsible for diversion programs and are considered alternatives to prosecution of crimes.[178] Prosecutors typically control these programs because they can be instituted before charges are officially filed, because prosecutors control charges, and prosecutors control plea deals.[179] And prosecutor's offices are expanding their use of diversion programs.[180] Prosecutorial offices are lowering their requirements for what cases qualify for diversion, they are diversifying into various types of programs, and, because they can be flexible, they help prosecutors to meet the needs of the public.[181]

III. ANALYSIS

Given the vast scope of prosecutorial power that exists now, and the apparent apathy of voters, it is necessary to reevaluate whether prosecutors should continue to be elected.[182] The election of prosecutors now requires a reanalyzing of the problems that caused the initial switch to an elected system from appointments.[183] Because modern society is different than the time when prosecutors were first elected, and because the scope of prosecutorial power has expanded, the concerns originally held by states have necessarily shifted as well.[184] The following sections will explore concerns about corruption and abuses of power

172. *Id.*

173. *Id.*

174. Micah W. Kubic & Taylor Pendergrass, *Diversion Programs Are Cheaper and More Effective Than Incarceration. Prosecutors Should Embrace Them.*, ACLU (Dec. 6, 2017, 12:45 AM), https://www.aclu.org/blog/smart-justice/diversion-programs-are-cheaper-and-more-effective-incarceration-prosecutors.

175. LABRIOLA ET AL., *supra* note 168, at 2–3.

176. *Id.*

177. *Id.* at 41.

178. *Pretrial Diversion Program*, DOJ, https://www.justice.gov/jm/jm-9-22000-pretrial-diversion-program (last visited Jan. 24, 2020).

179. *Id.*

180. LABRIOLA ET AL., *supra* note 168, at 55–56.

181. *Id.*

182. Mince-Didier, *supra* note 9; *see supra* Part II.

183. *See generally supra* Part II.

184. *See infra* Sections III.A–C.

and whether either elected or appointed prosecutors may meet the needs of the public.

A. Protecting Against Corruption & Abuses of Power

As explained above, one of the primary concerns constitutional convention delegates had when first switching to an electoral system centered around concerns that the appointment of lead prosecutors was rife with corruption.[185] These are concerns that continue to persist within the elected model as well, but that warrant a deeper discussion because they have taken on different forms as prosecutors gained more power.

1. Elected Prosecutors

For elected prosecutors, the biggest potential for corruption is that, like most other elected officials, "elections affect how prosecutors behave."[186] For example, the district attorney responsible for prosecuting Duke University students for false rape charges was berated for stating that primary elections were a motivating factor in his decision to prosecute.[187] Further, a 2015 article argued that elections "provide structural incentives for district attorneys to bring more cases to trial and seek longer sentences for prisoners," likely in response to the powerful "tough on crime" mantra that helps win elections and reelections.[188] A 2013 study affirmed this belief when it found "reelection incentives result in a 9.7% increase in the proportion of cases taken to trial, while the presence of a challenger results in an additional 14.7% increase."[189] These statistics indicate that prosecutors who are elected are just as likely to be swayed into making decisions based improperly on public opinion as historically appointed prosecutors who made decisions based on the person who appointed them.[190]

A second avenue for corruption also exists: using the power of the prosecutorial office to over-punish individuals or allowing conflicts of interest to persist.[191] Recently, the case of Jussie Smollett has drawn national attention for a crime he allegedly staged, but there are concerns that the sixteen felony counts his indictment alleged were because public "[a]uthorities are angry at Smollett."[192] Smollett alleged that two men attacked him and yelled homophobic and racial slurs at him while retrieving food in Chicago.[193] He also alleged that his attackers wrapped a noose around his neck. Consequently, this incident prompted

185. *See* Ellis, *supra* note 10, at 1543; *supra* Section I.A.

186. Novak, *supra* note 5.

187. *Id.*

188. *Id.*

189. Siddhartha Bandyopadhyay & Bryan C. McCannon, *The Effect of the Election of Prosecutors on Criminal Trials*, 161 PUB. CHOICE 141, 142 (2013).

190. *Id.*

191. Don Babwin, *For Jussie Smollett, 1 Story Equals 16 Felony Counts*, AP NEWS (Mar. 9, 2019), https://www.apnews.com/2d174d9c28b9419787428bbb8eec0499.

192. *Id.*

193. Chicago Tribune Staff, *A Timeline of the Jussie Smollett Case*, CHI. TRIB. (Aug. 23, 2019 10:23 AM), https://www.chicagotribune.com/news/breaking/ct-met-cb-jussie-smollett-20190215-story.html.

outrage and support on social media.[194] Smollett's original indictment featured a single felony count for obstruction of justice, but as more details emerged, that expanded to eight counts for statements he told to a police officer and another eight counts for statements made to a detective.[195] Although it is not unusual for prosecutors to charge as many counts as possible at the start, Terry Sullivan, a prominent attorney in Chicago, argued prosecutors took each lie and made it an individual account because they were "obviously mad at him for embarrassing the city."[196]

Among the twists in the case was the recusal of Cook County's State's Attorney Kim Foxx.[197] Foxx spoke with one of Smollett's relatives after the original incident was reported and acted as an intermediary between the Chicago Police Department and Smollett's family and felt, out of caution, that she should recuse herself.[198] Her decision came nearly a month after the investigation began and after suspects in the case came to potentially testify before a grand jury, which led to Foxx receiving criticism on social media.[199] Her predecessor, Anita Alvarez, even went so far as to say, "I was under the impression that when the voters elected me and I took my oath of office it meant I had to do my job."[200]

Finally, the scope of their power is so broad that district attorneys have the opportunity to affect *other elected officials*. Under *Bordenkircher v. Hayes*, prosecutors have free reign to bargain and induce a criminal defendant to accept a plea deal with minimal restrictions.[201] Their only limitations are to ensure they do not coerce a defendant's plea, but they may induce or encourage at their leisure.[202] Detroit's former mayor, Kwame Kilpatrick, was induced to step down as mayor as part of his plea deal for obstructing justice from a sex-and-misconduct case.[203] The prosecutor in that case stated, "[t]he resignation was never, ever a bargaining chip for me" and elaborated, "[h]e could have resigned right away; my position would have been much more favorable if that had happened."[204] His plea deal included a requirement he abstain from running for office during his probation.[205]

194. *Id.*

195. Babwin, *supra* note 191.

196. *Id.*

197. Jeremy Gorner et al., *State's attorney's office: Foxx recused herself from Jussie Smollett investigation after acting as go-between with CPD*, CHI. TRIB. (Feb. 20, 2019 4:00 PM), https://www.chicagotribune.com/news/breaking/ct-met-jussie-smollett-court-20190219-story.html.

198. *Id.*

199. *Id.*

200. *Id.*

201. 434 U.S. 357, 365 (1978) (stating "[t]here is no doubt that the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise. We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.").

202. *See generally* Brady v. United States, 397 U.S. 742, 752–53 (1970).

203. Sara Bonisteel, *Detroit Mayor Kwame Kilpatrick Resigns in Plea Deal*, FOX NEWS (Sept. 4, 2008), https://www.foxnews.com/story/detroit-mayor-kwame-kilpatrick-resigns-in-plea-deal.

204. *Id.*

205. *Id.*

In Missouri, Governor Eric Greitens contacted the circuit attorney with an offer to resign from office in return for a felony charge against him being dropped.[206] In reporting this incident, it was particularly noted that the circuit attorney was a Democrat and Greitens was a Republican, which suggests political party tensions had a role in the interactions between the circuit attorney and Greitens.[207] Kilpatrick and Grietens's cases provide two different stories in which prosecutorial power can influence elected officials. Although the prosecutor in Kilpatrick's case stated he would have been more favorable had Kilpatrick resigned at an earlier time, it can be inferred this played into his decision to offer Kilpatrick concurrent four month jail sentences and restitution in the amount of $1 million.[208] Both cases, however, represent the idea that prosecutors can, and in some cases do, influence whether an elected official resigns by using charges and plea deals.[209]

The political opposition noted in Grietens's case is minimized by the fact that he reached out to the circuit attorney first to propose the deal, but this nonetheless indicates that an elected official of one party was able to remove an elected official from another party.[210] Voters originally chose to elect their prosecutors because they were worried about political appointments and corruption, and elected prosecutors were meant to provide people with a greater voice in the policies influencing criminal justice.[211] The idea that a circuit attorney with jurisdiction over one county could remove the governor of a state seems to open the door to the type of corruption constitutional convention delegates sought to prevent.

Alabama Governor Robert Bentley's resignation proved an interesting case that implicated prosecutors in his corruption as governor.[212] Bentley allegedly had inappropriate relations with a political advisor and the backlash and investigation took years to resolve.[213] It took the special counsel in the case, standing before the state's House Judicial Committee, outlining the allegations to impeach the governor for Bentley to reach a deal—resignation in return for pleading to two misdemeanors, waiving retirement benefits, paying fines, and performing 100 hours of community service.[214] Bentley did not receive jail time,[215] but his case "turned into a maelstrom, sucking in everything around it: the state's top

206. Joel Currier & Robert Patrick, *A Plea Deal and a Resignation: What Gov. Greitens Got for Giving Up*, GOVERNING (May 31, 2018, 9:10 AM), http://www.governing.com/topics/politics/tns-greitens-plea-deal.html.

207. *Id.*

208. Bonisteel, *supra* note 203.

209. *See id.*; Currier & Patrick, *supra* note 206.

210. *See* Currier & Patrick, *supra* note 206.

211. *See generally supra* Part II (reviewing the history of elected prosecutors).

212. Eliott C. McLaughlin et al., *'Dark Day' as Alabama Governor Cuts Plea Deal, Resigns*, CNN, https://www.cnn.com/2017/04/10/us/alabama-governor-robert-bentley-meeting/index.html (last updated Apr. 11, 2017, 4:00 PM).

213. *Id.*

214. *Id.*

215. *Id.*

cop, the state attorney general's office, a US Senate seat, multiple prosecutors, the Legislature and the Alabama Ethics Commission."[216]

2. Appointed Prosecutors

Appointed prosecutors similarly face corruption concerns, and the frailty of their office lies in the power of their appointor. Preet Bharara has been hailed by *Vanity Fair* as "famously fired by Donald Trump in early 2017, only to emerge as America's preeminent seer of all things related to the Muller probe."[217] Yet, his rise and fall as a United States Attorney indicates one of the primary concerns of a prosecutor appointed by a president or governor: the potential for that job to be taken for seemingly arbitrary reasons. Bharara graduated from Columbia Law School, worked in private practice, served as an Assistant U.S. Attorney, then worked for Senator Chuck Schumer in Washington D.C.[218] His choice to work for Schumer was seen as unexpected but it ultimately yielded a recommendation by Schumer to then President Obama for Bharara to take over as United States Attorney for the Southern District of New York.[219]

The U.S. Attorney's Office for the Southern District of New York is largely considered one of the most respected offices in the country and Bharara's time in the office included a legacy filled with great accolades and the accompanying criticism.[220] Bharara's victories included the successful prosecution in Albany of the "Times Square Bomber." He was also known for cracking down on insider-trading.[221] Bharara was criticized, however, for not being tough enough on those involved in the 2008 market crash.[222] Ultimately, his reputation from the U.S. Attorney's Office was that he "struck fear" in the hearts of those on Wall Street and was unafraid to prosecute even foreign nationals for crimes committed in the Southern District.[223] But his reputation did not save his job when the Presidency switched from Barack Obama to Donald Trump.[224]

Trump reached out to Bharara in November 2016 to ask him to remain in his position as U.S. Attorney when the two met after the election.[225] In early

216. *Id.*

217. Joe Pompeo, *"It Might Be the Biggest Get This Year": How* The Guardian*'s Bombshell Set Off Its Own Little Media World War*, VANITY FAIR: HIVE (Nov. 27, 2018), https://www.vanityfair.com/news/2018/11/the-guardian-paul-manafort-julian-assange.

218. Jeffrey Toobin, *The Showman: How U.S. Attorney Preet Bharara Struck Fear Into Wall Street and Albany*, NEW YORKER (May 2, 2016), https://www.newyorker.com/magazine/2016/05/09/the-man-who-terrifies-wall-street.

219. *Id.*

220. William D. Cohan, *The Flawed Legend of Preet Bharara*, THE NATION (July 10, 2018), https://www.thenation.com/article/flawed-legend-preet-bharara/.

221. *Id.*

222. *Id.*

223. Toobin, *supra* note 218.

224. Barbara Demick, *Former U.S. Atty. Preet Bharara Says Trump Fired Him After a Series of 'Uncomfortable' Calls*, L.A. TIMES (June 11, 2017, 11:40 PM), https://www.latimes.com/politics/washington/la-na-essential-washington-updates-fired-u-s-attorney-preet-bharara-says-1497233437-htmlstory.html.

225. Aric Jenkins, *U.S. Attorney Preet Bharara Says He Was Fired by Justice Department After Refusing to Resign*, TIME (Mar. 11, 2017), http://time.com/4699086/us-attorney-preet-bharara-fired/.

2017, however, Trump's assistant called Bharara, asking him to return a call to the White House.[226] Bharara declined to do so by citing protocols in place for direct contact between a federal prosecutor and the President of the United States; instead, he chose to follow those protocols and notify Jeff Sessions, then Attorney General, of the President's call.[227] The next day Bharara was asked to resign.[228]

From an outside perspective, this assumes a link between Bharara passing up Trump's phone call. Of course, Bharara himself stated that he believed his refusal to answer the President's call was the reason for his termination.[229] Notably, it was reported Bharara had been overseeing an investigation into President Trump's Health and Human Services secretary at the time of his removal.[230] Therefore, Bharara's case presents an important downside of the appointed prosecutor: serving at the whim of the President.[231]

The Attorney General is likewise subject to the will of the Executive. Jeff Sessions recently received his "pink slip" by the President following the midterm elections.[232] President Trump did not hide his disdain for Sessions, once tweeting "[s]o why aren't the Committees and investigators, and of course our beleaguered A.G., looking into Crooked Hillarys [sic] crimes & Russia relations?"[233] He was also known to express his disappointment with Sessions and once claimed he did not have an Attorney General while Sessions still held the position.[234] And Session's move to recuse himself from the investigation into Russian interference during the 2016 election likely played a part in his removal as well.[235] When Sessions removed himself from the investigation, however, he did so because he felt he could legally not be part of the investigation as a participant in President Trump's campaign.[236]

226. Maggie Haberman & Charlie Savage, *U.S. Attorney Preet Bharara Says He Was Fired After Refusing to Quit*, N.Y. TIMES (Mar. 11, 2017), https://www.nytimes.com/2017/03/11/us/politics/preet-bharara-us-attorney.html.

227. *Id.*

228. *Id.*

229. Sandhya Somashekhar & Jenna Johnson, *Bharara Says Trump Phone Calls Made Him Uncomfortable*, WASH. POST (June 11, 2017), https://www.washingtonpost.com/politics/bharara-says-trump-phone-calls-made-him-uncomfortable/2017/06/11/53d4b090-4ebe-11e7-91eb-9611861a988f_story.html.

230. *Id*.

231. *See id.*

232. William Cummings, *Former Attorney General Jeff Sessions Jokes About Getting 'Pink Slip'*, USA TODAY (Nov. 29, 2018, 8:40 AM), https://www.usatoday.com/story/news/politics/onpolitics/2018/11/29/jeff-sessions-jokes-pink-slip/2146920002/.

233. Ryan W. Miller, *Jeff Sessions is Out as Attorney General: Here's What We Know,* USA TODAY (Nov. 7, 2018, 4:24 PM ET), https://www.usatoday.com/story/news/politics/2018/11/07/jeff-sessions-fired-donald-trump-heres-what-we-know-now/1922566002/.

234. *Id.*

235. *Id.*

236. *See* Mark Landler & Eric Lichtblau, *Jeff Sessions Recuses Himself From Russia Inquiry*, N.Y. TIMES (Mar. 2, 2017), https://www.nytimes.com/2017/03/02/us/politics/jeff-sessions-russia-trump-investigation-democrats.html?module=inline.

Regardless of the reason for Session's removal, both he and Bharara show the ease with which appointed attorneys can be removed.[237] This frailty for appointed prosecutors suggests that the appointment model for prosecutors is just as flawed as an elected model is.

B. Meeting the Needs of the Public

A second concern faced by the original colonies when creating an election system was whether elected prosecutors would be able to sufficiently meet the needs of the public.[238] This Section explores whether those concerns were resolved with elected prosecutors or whether they still remain a problem.

1. Elected Prosecutors

Prior literature has focused on the shortcomings of the elected model of prosecutorial power. In 2009, Ronald F. Wright cited two reasons for the failure of the elected system: First, incumbent prosecutors rarely have to explain patterns and practices of their offices; and second, even if they do have a challenger, specific cases are the concern during debates rather than big-picture values.[239] Combined with voter apathy, Wright believes that instead some part of the electoral model needs to be shifted in order to make elected prosecutors accurately represent the people they are elected to serve.[240]

Wright's concerns in 2009 continued well into the late 2010's. John Pfaff's 2017 book *Locked In* centers around dismantling the "Standard Story"—aka the idea that the "war on drugs," disproportionate sentencing, and an emphasis on statistics and shocking events are the reason behind mass incarceration.[241] Instead, Pfaff argues it is prosecutors who ultimately are responsible for this phenomenon, but they are "almost completely ignored by reformers."[242] His theory argues that if real change is to come about in the criminal justice system, reformers and society need to start paying attention to prosecutorial officers, elections, and powers.[243]

The ACLU of California saw the concerns discussed above that voters were unable to accurately judge their district attorney candidates and responded by creating their "Meet Your DA" campaign in 2017.[244] They stated the "[d]istrict

237. *See* Andrew Rice, *Preet Bharara Is Now in the Trump-Opposition Business*, N.Y. MAG.: INTELLIGENCER (Oct. 2, 2017), http://nymag.com/intelligencer/2017/10/preet-bharara-is-now-in-the-trump-opposition-business.html (explaining Bharara has begun a podcast and other media efforts that are centered around modern politics and an anti-Trump resistance).

238. *See supra* Part II.

239. Ronald F. Wright, *Prosecutorial Discretion: How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 583 (2009).

240. *See generally id.*

241. JOHN F. PFAFF, LOCKED IN 5 (2017).

242. *Id.* at 127.

243. *Id.* at 234.

244. Legend, *supra* note 1.

attorneys in California have tremendous power to impact the lives of millions of people, their families, and entire communities."[245] As the ACLU points out:

> [T]he [district attorney] . . . has the sole power to decide if criminal charges are filed and the severity of those charges. They alone decide who is deserving of a jail or prison sentence by deciding to file felony charges, who will instead be routed into a diversion program designed to help them rebuild their lives, and who will have charges dismissed.[246]

But the ACLU pushed their reforms because prosecutors also have the power to "take officer-involved shootings seriously by investigating them and holding police accountable, or they can turn a blind eye to officers who shoot and kill members of our community."[247] It is with this backdrop the ACLU began its campaign to make Californians more aware of who their district attorneys were and what they stand for.[248] As stated on its webpage "[i]n the past four years, California voters have overwhelmingly supported safe and sensible justice reforms—but most DA's have gone against this tide of change."[249]

The "Know Your DA" campaign expanded on this dissonance between district attorneys and their constituents.[250] In 2016, 64.5% of Californians voted in favor of Proposition 57, the Public Safety and Rehabilitation Act.[251] The Act was meant to focus on rehabilitation and to create incentives for "inmates to take responsibility for their own rehabilitation with credit-earning opportunities for sustained good behavior . . . . [It] also moves up parole consideration of nonviolent offenders . . . [and demonstrates] their release to the community would not pose an unreasonable risk of violence to the community."[252] Regardless of popular support for this proposition, however, only *one* of fifty-eight district attorneys in California supported this change.[253]

Likewise, in 2017, 59.6% of Californians voted in favor of a proposition that sought to reduce some drug offenses from felonies to misdemeanors while only two out of fifty-eight district attorneys supported this same measure.[254] If district attorneys are responsible for prosecuting laws, and citizens are actively voting to reduce certain crimes to misdemeanors, perhaps it is right that we elect our prosecutors so citizens are likewise choosing attorneys who will help accomplish their interests. But these numbers from the ACLU—only one or two of

245. ACLU CAL. & FAIR PUNISHMENT PROJECT, MEET CALIFORNIA'S DISTRICT ATTORNEYS (2017), http://meetyourda.org/wp-content/uploads/2017/08/meetcasdas-aug2017.pdf.

246. *Id.* at 1.

247. *Hey, MEET YOUR DA: The Most Powerful Elected Official You May Not Know*, ACLU CAL., https://meetyourda.org/#meet-your-da (last visited Jan. 24, 2020).

248. *See id.*

249. *How Do DAs Serve Their Community?*, ACLU CAL, https://meetyourda.org/ (last visited Jan. 24, 2020) [hereinafter *How Do DAs Serve Their Community?*]

250. *See id.*

251. *Id.*; *Proposition 57: The Public Safety and Rehabilitation Act of 2016*, CAL. DEP'T OF CORR. & REHAB., https://www.cdcr.ca.gov/proposition57/ (last visited Jan. 24, 2020) [hereinafter *Proposition 57*].

252. *Proposition 57*, *supra* note 251.

253. *How Do DAs Serve Their Community?*, *supra* note 249.

254. *Id.*; *Proposition 47*, INST. GOVERNMENTAL STUD., https://igs.berkeley.edu/library/elections/proposition-47 (last visited Jan. 24, 2020).

fifty-eight district attorneys support the public measures voted in—also suggest that the races for district attorney do not get as much exposure as some of these propositions do.[255]

Financial donors likewise seem to echo the same concerns when prosecutors were first shifting to an elected system: are elected prosecutors in touch with the communities they want to represent?[256] Shaun King of the Real Justice PAC stated "[t]he district attorneys in our country don't represent the true diversity, the broad cross-section of views of our country . . . . Less than 1 percent are women of color . . . . People who are running for the office of district attorney are prosecuting people they don't know."[257]

Of course, the obvious benefit of elected prosecutors is the public can remove district attorneys who they feel are corrupt, misusing their power, or unable to respond effectively to public necessity. The removal of the St. Louis County District Attorney serves as an example of this. Robert McCulloch's office was criticized for its handling of Michael Brown's death and the lack of an indictment filed against the offending officer.[258] McCulloch was a prosecutor known for being a staunch ally to police officers, which critics argued came at the expense of justice.[259] And although he was known as a "tough talking prosecutor," a message that likely helped him stay in office for almost three decades, it was Brown's death that ultimately ended his tenure because the public was outraged at his inability to bring charges against the officer who shot Brown.[260] The city broke into riots and protests following Brown's death and included the use of tear gas against protesters.[261] Critics felt McCulloch simply did not do enough to seek justice for Brown.[262]

McCulloch was the St. Louis County, Missouri chief prosecutor for twenty-eight years before he was unexpectedly ousted by Wesley Bell within his own party in the 2018 primary election.[263] Bell ran unopposed in the general election and effectively replaced McCulloch as the chief prosecutor.[264] This was also the

255. Legend, *supra* note 1; Novak, *supra* note 5.

256. St. John & Vansickle, *supra* note 8.

257. *Id.*

258. Joel Currier, *Wesley Bell Ousts Longtime St. Louis County Prosecuting Attorney*, ST. LOUIS POST-DISPATCH (Aug. 8, 2018), https://www.stltoday.com/news/local/govt-and-politics/wesley-bell-ousts-longtime-st-louis-county-prosecuting-attorney/article_5b2134b8-f204-5e20-9572-e59cacbb0aed.html.

259. Pema Levy, *Ferguson Prosecutor Robert P. McCulloch's Long History of Siding with the Police*, NEWSWEEK (Aug. 29, 2014, 6:33 AM), https://www.newsweek.com/2014/09/12/ferguson-prosecutor-robert-p-mccullochs-long-history-siding-police-267357.html.

260. Kim Bell, *Robert P. McCulloch, Following Up: People, Place and Ideas from Ferguson Series*, ST. LOUIS POST-DISPATCH (Aug. 6, 2015), https://www.stltoday.com/news/special-reports/multimedia/robert-p-mcculloch/article_c904c511-0e13-5291-831d-8602298824af.html; Currier, *supra* note 258.

261. Cassandra Vinograd, *Shooting of Michael Brown Sparks Riots in Ferguson, Missouri*, NBC NEWS (Aug. 11, 2014, 12:42 PM), https://www.nbcnews.com/storyline/michael-brown-shooting/shooting-michael-brown-sparks-riots-ferguson-missouri-n177481.

262. Currier, *supra* note 258 ("Protesters criticized his office for its handling of the grand jury inquiry into the killing of Brown. The grand jury brought no charges against Officer Darren Wilson.").

263. *Id.*

264. *Id.*

first time McCulloch was up for election following the violent protests that occurred in the wake of Brown's death by a Ferguson police officer.[265] McCulloch is the prime example of a prosecutor who potentially mishandled a public trial, and it led to his political downfall.[266] More importantly, he demonstrates that when explosive cases like Ferguson occur, the public pays attention and a spotlight is brought upon prosecutor's offices.[267]

This public response followed the Cook County State's Attorney, Anita Alvarez, and her response to Laquan McDonald's death.[268] McDonald was shot in October 2014 by Officer Jason Van Dyke.[269] Alvarez held off on filing charges "until late November 2015, hours before a judge ordered the release of police dashboard-camera video that showed Van Dyke shooting McDonald."[270] Alvarez's explanation for this delay centered around a joint investigation with the FBI regarding McDonald's death and she claimed that she had wanted to charge Van Dyke weeks earlier only to hold off until the investigations regarding civil rights violations concluded.[271]

Current Cook County State's Attorney Kim Foxx was quoted at the time saying that the "delays in pressing charges were a 'heinous disservice' to McDonald's family and the criminal justice system as a whole."[272] Foxx ended up as one of two challengers to Alvarez as State's Attorney as Alvarez faced backlash amidst the controversy surrounding the release of the tape showing McDonald's death and her office's handling of the case.[273] *The New York Times* reported demonstrators flew banners reading "Chicago stands with Laquan" and "#ByeAnita" at protests during her campaign.[274] When Alvarez ultimately lost her party's nomination to Foxx in 2016, reports indicated that Laquan McDonald's death played a large part in the outcome.[275]

265. *Id.*

266. *See, e.g.*, *id.*

267. *See id.*

268. Dana Ford, *Anita Alvarez Concedes Bid for Third Term in Chicago*, CNN (Mar. 15, 2016, 10:59 PM), https://www.cnn.com/2016/03/15/politics/anita-alvarez-election/index.html.

269. Hal Dardick & Rick Pearson, *Alvarez: 'I Don't Believe Any Mistakes Were Made' on Laquan McDonald Case*, CHI. TRIB. (Feb. 5, 2016, 5:45 AM), https://www.chicagotribune.com/news/local/politics/ct-cook-county-states-attorney-race-met-0205-20160204-story.html.

270. *Id.*

271. *Id.*; *Alvarez Defends Herself, Mayor Emanuel in Timing of Charges in Laquan McDonald Case*, NBC CHI. (Nov. 24, 2015, 3:20 PM), https://www.nbcchicago.com/blogs/ward-room/Alvarez-Opponents-Question-Timeline-of-Release-of-McDonald-Video-353183351.html [hereinafter *Alvarez Defends Herself*].

272. *Alvarez Defends Herself*, *supra* note 271.

273. *Id.*

274. Monica Davey, *Prosecutor Criticized over Laquan McDonald Case Is Defeated in Primary*, N.Y. TIMES (Mar. 16, 2016), https://www.nytimes.com/2016/03/16/us/prosecutor-criticized-over-laquan-mcdonald-case-is-defeated-in-primary.html.

275. *See id.*

2. Appointed Prosecutors

Appointed prosecutors have the ability to respond aggressively to public needs as well. Specifically, they can remain neutral and prosecute crimes against public officials who are found to be corrupt. The Department of Justice has said it is within its responsibility to "protect the public from criminal abuse of the public trust by high federal officials."[276] Likewise, federal prosecutors are "encouraged to continue to consider voluntary offers of resignation from office as a desirable feature in plea agreements with elected and appointed public officials at all levels of government."[277]

While federal prosecutors are encouraged to consider plea deals with elected or appointed officials, they are likewise cautioned that some courts do not look kindly on prosecutors using plea deals to encourage public officials to step down.[278] The DOJ Criminal Resource Manual cites *United States v. Richmond* as its key case in this respect.[279] The United States District Court for the Eastern District of New York struck down a plea agreement between Congressman Richmond and prosecutors in which Richmond would voluntarily resign and plead guilty to "federal tax, narcotics, and conflict of interests offenses."[280] The District Court saw this as a violation "upon the constitutional right of the public to select their Congressmen of their choosing," and the doctrine of separation of powers.[281] The DOJ considers *Richmond* an incorrectly decided case and stated it "is particularly troublesome from the standpoint of the orderly and efficient discharge of the Justice Department's responsibilities."[282] The *Richmond* case, however, raises important questions about whether appointed prosecutors have too much leeway in charging public officials and influencing their decisions to resign or say in their posts.

For example, Chicago Alderman Ed Burke has been notorious for his participation in the city's ongoing corruption.[283] Burke, an alderman for fifty years, managed to survive a number of Chicago corruption scandals and retain his seat, including the city's Council Wars, ghost-payrolling scandals, and more.[284] Burke is currently charged with extortion for his use of his office to persuade Burger King executives to attend events and donate funds in exchange for getting permits approved for remodeling work, along with other acts.[285] And although he

276. *Plea Negotiations with Public Officials*—United States v. Richmond, U.S. DEP'T JUST.: CRIM. RESOURCE MANUAL, https://www.justice.gov/jm/criminal-resource-manual-624-plea-negotiations-public-officials-us-v-richmond (last visited Jan. 24, 2020).

277. *Id.*

278. *See id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *See generally* Phil Kadner, *The Culture of Corruption and Our Politicians*, CHI. SUN TIMES (Jan. 8, 2019, 4:19 PM), https://chicago.suntimes.com/politics/edward-burke-illinois-governors-culture-corruption/; Bill Myers, *Ed Burke's Corruption Has Been Ecumenical*, WASH. EXAMINER (Jan. 7, 2019, 12:00 AM), https://www.washingtonexaminer.com/opinion/op-eds/ed-burkes-corruption-has-been-ecumenical.

284. Myers, *supra* note 283.

285. Kadner, *supra* note 283; Myers, *supra* note 283.

was recently reelected in 2019, the FBI and prosecutors in the Northern District of Illinois have persisted in their indictment against Burke and an ongoing investigation.[286] In doing so, they demonstrate the ability of federal, appointed prosecutors to remain removed from local politics and prosecute local officials who are doing their communities a disservice when the electorate cannot remove them.[287]

Similarly, appointed prosecutors can bring charges against potentially popular defendants who are nonetheless inhibiting massive systems from functioning properly. Recently, two actresses, including Lori Laughlin and other wealthy individuals, were indicted for mail and honest services fraud for using a nonprofit organization to cheat their children into highly-selective universities.[288] Their actions ultimately removed seats at these universities from students who may have been legitimately qualified to be at those schools but unable to be offered a position because the spot went to a student whose parents bought their seat.[289] Because appointed prosecutors are free from worrying about the electorate or reelection, and because this investigation clearly takes place across state lines, in a case like this they have the security of knowing they cannot be voted out of office by the constituents with deep pockets they may be charging.[290]

Appointed prosecutors, however, are also more limited in what they can do and how they can exercise their powers. At the federal level, prosecutors often need some jurisdictional "hook" to prosecute crimes.[291] For example, in 2016 the Supreme Court had decided whether Hobbs Act prosecutions for drug-dealer robberies required a showing that the defendant's conduct affected commerce or attempted to affect commerce.[292] The Court ultimately decided commerce was broadly defined as "all interstate commerce over which the federal government has jurisdiction," and that "although the sale of drugs is illegal under federal law, it is still an economic activity; therefore Congress can regulate purely intrastate drug theft."[293] What this demonstrates is that, although federal prosecutors have broad direction in determining what is considered commerce, they are bound by stricter constraints than state prosecutors. This is also because the majority of crimes are within state jurisdictions rather than federal ones.[294]

Appointed prosecutors are also beholden to the individuals who appoint them, for example the president, and are therefore limited even when trying to help the public. While assistant U.S. Attorneys may have the flexibility to maintain independence from their appointing presidents, attorney generals or special

286. *See* Kadner, *supra* note 283.

287. *Id.*

288. Sopan Deb, *Felicity Huffman and Lori Loughlin: How College Admission Scandal Ensnared Stars*, N.Y. TIMES (Mar. 12, 2019), https://www.nytimes.com/2019/03/12/arts/huffman-loughlin-college-scandal.html.

289. *See id.*

290. Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 605 (2014).

291. Rory Little, *Argument Preview: Proving the Federal Criminal "Element" of Affecting Commerce*, SCOTUS BLOG (Feb. 17, 2016, 8:19 AM), https://www.scotusblog.com/2016/02/argument-preview-proving-the-federal-criminal-element-of-affecting-commerce/.

292. *Id.*

293. *Id.*

294. Mince-Didier, *supra* note 9.

counsels may not.[295] For example, Special Counsel Robert Mueller's investigation into Russian interference in the 2016 election resulted in a report that did not exonerate or implicate President Trump in obstructing justice.[296] His decision to make no formal decision regarding the President was made although a long-time DOJ policy prevents sitting presidents from being charged with federal crimes because it "would interfere with the President's unique official duties, most of which cannot be performed by anyone else."[297]

Mueller's role was meant to give him "independence and autonomy to lead investigations of politically sensitive, nationally important matters."[298] Because he was appointed by the Attorney General, who reports to the President, however, there was the possibility that President Trump could have removed him from his position.[299] In fact, there were rumors the President intended to do exactly that.[300] Mueller proves that appointed prosecutors unfortunately are no more insulated at the federal level than state prosecutors are even when working to find information the public wants.[301] Instead, elected prosecutors have the benefit of only being able to be removed by the electorate rather than by one individual.

IV. RECOMMENDATION

At the start of the writing process, the logical recommendation to this Note is to switch the electoral model to an appointment system that has caveats. And that model makes the most sense as a response to the lack of diversity, and reform-minded, candidates.[302] It also makes sense when there seems to be political apathy where the election of lead prosecutors is concerned. With the surge during the 2018 election cycle of candidates who sought to end mass incarceration, the election system seems like it is perpetuating the change it was meant to embody. This Part will argue that, although the 2018 election cycle is perhaps changing the electoral system for prosecutors, it may not be enough and a switch to an appointment system may still be more beneficial.

295. *See* Renae Reints, *Why Couldn't Mueller Indict Trump? This DOJ Policy Prevented Him*, FORTUNE (May 30, 2019), http://fortune.com/2019/05/30/indict-a-sitting-president-doj-policy/.

296. SPECIAL COUNSEL ROBERT S. MUELLER III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, VOL. II, 2 (U.S. Dept. of. Just., March 2019); Bloomberg, *If Donald Trump Orders Robert Mueller Fired, Here's What Might Happen*, FORTUNE (Jan. 27, 2018), http://fortune.com/2018/01/27/if-donald-trump-fires-robert-mueller/; Quinta Jurecic, *4 Disturbing Details You May Have Missed in the Mueller Report*, N.Y. TIMES (Jun. 7, 2019), https://www.nytimes.com/2019/06/07/opinion/mueller-report-trump-impeachment.html.

297. Reints, *supra* note 295.

298. Bloomberg, *supra* note 296.

299. *Id.*

300. *Id.*

301. *See id.*

302. *See supra* notes 6–9 and accompanying text.

A. Why an Appointment System Made Sense Before the 2018 Elections and What That System Should Look Like

There has been a longstanding belief that voters are apathetic where district attorney's races are concerned.[303] Apathy on the part of people of color in particular has been of concern—an activist in Illinois was quoted saying "people of color don't pay much attention to the local races for sheriff, judges and state prosecutors . . . . But what we're finding is that these local political races impact more on our daily lives in the community than the federal and state elections."[304] And prominent statistics show that 95% of prosecutors are white Americans and 85% of prosecutors run unopposed in elections.[305] Considering this, perhaps the best course of action is to return to an appointment system, but one that has checks in place via a confirmation by state legislatures. A system such as this may help address the concerns that arose when prosecutors were first shifting to an election model and concerns that seem to still be prevalent.[306]

One of the largest concerns was that appointed positions were "influenced more by political considerations than by public interest."[307] Yet this is a concern echoed in modern times as a critique of elected prosecutors: that they are not representative of their districts—and that they are equally motivated by political considerations and reelection.[308] As detailed above, the ACLU provided statistics that district attorneys were not in support of referendums that gained a majority of voter support during elections.[309] If this is a problem that continues to persist, then it highlights that the current system is ineffective at responding to public necessity.

The 1800s saw a shift to the elected prosecutor because appointed prosecutors were not meeting the needs of the public.[310] But the public now needs prosecutors who can effectively respond to what the public needs like focusing on criminal justice reform.[311] If 85% of prosecutors are running unopposed in elections, this suggests that the electorate is either uninformed or unaware of their impact, and therefore legislatures are in a better position to address these needs.[312] And an appointment system would be better able to address this need by having governors think actively about who they are nominating into those

303. Jessica Pishko, *Can the California Elections Usher in a Slate of Progressive District Attorneys*, THE NATION (June 5, 2018), https://www.thenation.com/article/can-slate-progressive-prosecutors-upend-status-quo-california/ ("An elected DA's job is to seek justice, work to prevent crime, and serve as a leader of the diverse communities they represent. But, for too long, many DAs have operated inside a bubble free from public oversight.").

304. Charles D. Ellison, *Do You Know Who's Running for District Attorney? Here's Why You Should*, THE ROOT (Oct. 27, 2014 3:00 AM), https://www.theroot.com/do-you-know-who-s-running-for-district-attorney-here-s-1790877494.

305. *Justice for All*, *supra* note 7.

306. *See supra* Part III.

307. Ellis, *supra* note 10, at 1555.

308. *See* Novak, *supra* note 5.

309. *See supra* notes 249–53 and accompanying text.

310. Ellis, *supra* note 10, at 1530–31.

311. *See Proposition 57*, *supra* note 251; Legend, *supra* note 1.

312. *Justice for All*, *supra* note 7.

roles. More importantly, having a confirmation process would ensure that the public retains a voice in who is charged with enforcing their laws. This way, governors are not left with the sole power to appoint a district attorney and this can protect against the appointment of a district attorney who is entirely against changes sought by the public.

This idea is not necessarily novel either: the New York State Legislature originally wanted the option to regulate the salaries of local district attorneys and to insulate the district attorney from control by the governor.[313] Although this measure ultimately failed, the idea of checks and balances on the appointment of district attorneys is one that has persisted across time. In New Jersey, statutory measures in place limit the term of appointed prosecutors and likewise limit their ability to plead within specified guidelines.[314] Similarly, prior to electing lead prosecutors in Pennsylvania, congressional consent was added as a condition to the appointment process to limit corruption possibilities.[315]

There has also been a suggestion that allowing an appointment process will "[b]etter insulate working prosecutors from voters" who may be operating with a "bloodthirsty clamor for the longest possible sentences."[316] Further critics of the electoral system have argued elections do not provide actual accountability for elected prosecutors because incumbents have advantages built in like no opposition.[317] As an example, while United States Attorneys at the federal level, have to work within the bounds of policies set by the DOJ, they are often in better positions to dismiss cases and enter plea agreements, and they are better suited to be insulated from political backlash.[318]

B. The 2018 Election Cycle

The last two years have yielded several changes to the attention placed on local prosecutors. As described above, the publicity afforded the murders of young black men and criminal justice reform movements has shifted the importance placed on district attorney elections.[319] Organizations like the ACLU and news sources like *Politico* began releasing articles in 2017 that did not just center around the fact that people do not pay attention to district attorneys races, but *why* paying attention was important.[320] Writing for *Politico*, Evan Hughes

313. Ellis, *supra* note 10, at 1557.

314. Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, THE ATLANTIC: POLITICS (May 18, 2016), https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/.

315. Ellis, *supra* note 10, at 1549.

316. Wright, *supra* note 290, at 605.

317. *See id.*

318. *See supra* Section III.B.2.

319. *See id.*

320. Evan Hughes, *America's Prosecutors Were Supposed to be Accountable to Voters. What Went Wrong?*, POLITICO MAG. (Nov. 5, 2017), https://www.politico.com/magazine/story/2017/11/05/cyrus-vance-jr-americas-prosecutor-problem-215786; David Rogers, *The Most Powerful Elected Official You've Never Heard Of*, ACLU OF OR. (Feb. 9, 2017), https://www.aclu-or.org/en/publications/most-powerful-elected-official-youve-never-heard.

argued that understanding what district attorneys do is an important step in asking people to pay attention to the election.[321] He stated, "[e]lected prosecutors might see a need to get out and explain their legal vision to voters if they ran in contested races, but, . . . they mostly do nothing of the kind."[322] Perhaps when Hughes wrote his article that was true, but in the 2018 election cycle, "End Mass Incarceration" became a much more powerful campaign slogan than the previously popular "Tough on Crime" language.[323]

C. Washington County, Oregon: A Study in Whether the ACLU is Making a Difference for Elected Prosecutors

In 2016, the ACLU of Oregon released a report titled *Roadblocks to Reform* that began with a description that the "War on Drugs" failed and mass incarceration has reached intolerable levels.[324] The report's ultimate goal was to "[examine] how district attorney elections and appointments lock in the criminal justice status quo, preventing much needed progress and public engagement."[325] And their ultimate conclusion was district attorneys were "a central barrier to criminal justice reform" and "[e]ncouraging public engagement with district attorneys and pushing for greater prosecutorial accountability will be decisive factors in solving the serious problems in our criminal justice system."[326]

In 2018, when the district attorney for Oregon's second largest county chose to retire, one of his assistant district attorneys, Kevin Barton, a longtime prosecutor, chose to run for the top position.[327] But instead of running uncontested like fourteen other counties in Oregon, Barton found himself with a challenger backed by the Safety and Justice Action Fund ("SJAF").[328] The SJAF actively sought candidates who supported "a shift from prison and mandatory minimum sentences while emphasizing drug and alcohol treatment and mental health services."[329] Max Wall, Barton's challenger, was also a former district attorney who had shifted careers to represent defendants.[330]

321. Hughes, *supra* note 320.

322. *Id.*

323. Farah Stockman, *How 'End Mass Incarceration' Became a Slogan for D.A. Candidates*, N.Y. TIMES (Oct. 25, 2018), https://www.nytimes.com/2018/10/25/us/texas-district-attorney-race-mass-incarceration.html ("In the past, candidates running to be district attorney —if they were challenged at all —touted their toughness on crime. But now district attorneys' races have become more competitive, attracting large donations and challengers running on pledges to transform the criminal justice system.").

324. ACLU OF OR., ROADBLOCKS TO REFORM: DISTRICT ATTORNEYS, ELECTIONS, AND THE CRIMINAL JUSTICE STATUS QUO 3 (2016).

325. *Id.* at 4.

326. Rogers, *supra* note 320.

327. Noelle Crombie, *National Push to Find Reform-Minded DA Candidates Comes to Oregon*, THE OREGONIAN, https://www.oregonlive.com/washingtoncounty/2018/03/national_push_to_find_reform-m.html (last updated Jan. 30, 2019).

328. *Id.*

329. *Id.*

330. Dirk VanderHart, *Money and Rhetoric Fly in the Race for Washington County DA*, OPB, https://www.opb.org/news/article/washington-county-oregon-district-attorney-contribution-aclu-debate/ (last updated May 2, 2018, 5:14 PM).

The race between Barton and Wall mirrored nationwide races. Barton was the "established prosecutor, with long experience in the office and support from a wide swatch of the law enforcement community and local officials," and Wall was "the reform-minded outsider, who wants to prioritize treatment over incarceration, and to smooth relations between prosecutors and defense attorneys."[331] Their campaigns have included implications of "dirty money" coercing Wall to run and accusations against Barton that his refusal to engage in an ACLU forum "indicates 'it's not a priority [for Barton] to engage with impacted communities and communities of color.'"[332]

And their campaigns began to draw in large contributions from national sources—Wall received $200,000 from a political action committee funded by George Soros and Barton received $25,000 from the founder of Nike.[333] John Legend seemingly weighed in on the conversation as well by tweeting, "Hey Oregon, you might not realize that your district attorney is one of the most powerful elected officials in your state."[334] He followed up by tweeting, "Oregon, you have the power to elect a government official who is dedicated to reforming criminal justice in your community."[335]

Where Barton may have been able to run strictly with a "tough on crime" mantra and his conviction record in the past, Wall's introduction into the race forced him to consider reforms, as well.[336] Wall himself stated in his concession speech that he entered the race to "start a debate about how to keep our communities safe, use our taxpayer dollars more wisely, and do justice the right way. And to ensure our District Attorney goes through an election, not a coronation."[337]

This was the first time in two decades that the district attorney seat in Washington County had been open for a new candidate and the interest taken in the candidates and the issues of reform allowed for a true race for the office.[338] More importantly, the influx of information and funding made this a race that voters took interest in, and one that sought to respond to what the voters in Washington County cared about—community safety, fair treatment, and saving taxpayer dollars.[339] The ACLU of Oregon said it best when it said, "Six months ago, very

331. *Id.*

332. *Id.*

333. *Id.*

334. Eder Campuzano, *John Legend Wades into Oregon Politics and a High-Profile DA Race*, THE OREGONIAN, https://www.oregonlive.com/politics/2018/05/john_legend_washington_county_district_attorney_oregon_politics.html (last updated Jan. 30, 2019).

335. *Id.*

336. *See* Crombie, *supra* note 327.

337. Dirk VanderHart & Conrad Wilson, *After Record-Shattering Spending, Barton Wins Washington County DA Race*, OPB, https://www.opb.org/news/article/oregon-primary-kevin-barton-max-wall-washington-county-district-attorney/ (last updated May 16, 2018, 10:46 AM).

338. Crombie, *supra* note 327.

339. Sarah Armstrong, *Washington County District Attorney Election Shows Shifting Political Landscape*, ACLU OR. (May 15, 2018), https://www.aclu-or.org/en/press-releases/washington-county-district-attorney-election-shows-shifting-political-landscape.

few people would have predicted this race would be contested. Voters and potential reform candidates are beginning [to] think about district attorney elections as a strategy to impact system change. DA incumbents and their chosen successors can no longer take elections for granted."[340]

But Wall ultimately lost the election to Barton.[341] And what is most notable is that while Oregon indicates the political tide is shifting, and ACLU campaigns to draw attention to district attorney campaigns may be working, it also indicates they may not be working well enough. Oregon further demonstrates that whether the focus on prosecutors remains prevalent can only be answered in time. Even in Oregon, Washington County was the second largest county in the district and there is no evidence to indicate whether campaigns like the ACLU's will be successful in the numerous smaller jurisdictions across the country.[342] Meanwhile, prosecutors may still be out of step with what the public wants and with what *reformers* want, and so an alternative needs to be found.

Although appointing prosecutors rather than electing them would require massive statutory changes, this country has undergone the change once before.[343] In choosing to change prosecutors to the elected model, states had to undergo statutory overhauls and amendments to create an electoral system and they can use that same power to switch back to an appointment model.[344] The appointment of prosecutors would provide the potential for greater responses to public priorities and implementing an accompanying confirmation process would likewise ensure the public, through their elected officials, also retained a say in the candidates.

V. CONCLUSION

States should switch to a system where district attorneys are appointed and confirmed rather than elected. A system like this would ensure prosecutors are better able to respond to the needs of their districts. Although there may be concerns that this system is still subject to political appointments and corruption, the dual structure would allow constituents to voice their opinions through their elected officials. Ultimately, in an ever-diversifying society, it seems logical that the nation's top prosecuting attorneys can adapt to the needs of their electorates, and a system that appoints and confirms their district attorneys would allow just that.

340. *Id.*
341. VanderHart & Wilson, *supra* note 337.
342. Crombie, *supra* note 327.
343. *Ellis*, *supra* note 10, at 1528; *see supra* Part II.
344. Ellis, *supra* note 10, at 1528.