

DEAR READER: Thank you in advance for allowing me to present a work in its very early stages. Perhaps more importantly, thank you for allowing me to present at this *Policing Colloquium* a piece that is only tangentially about policing. Though my recent article on policing, “Afrofuturism, Critical Race Theory, and Policing in the Year 2044,” 94 *N.Y.U. L. Rev.* 101 (2019), provides a backdrop of sorts to this project, my current focus is not so much on the police, but on their partners in crime (or rather partners in responding to crime): prosecutors. Specifically, the focus of my talk will be an argument I’m hoping to develop as the last chapter in a book I’m working on. Because the book, *The Prosecutor's Turn*, is still in the proposal stage, I’m including below my goal for the book as a whole. After that is the current summary of the book’s last chapter. I look forward to your suggestions and comments.

ABOUT THE BOOK

The goal of *The Prosecutor's Turn* is to weave an intimate personal story with a larger critique of the criminal justice system and public prosecutors. After all, the arguments this book makes are inextricably linked to my experiences as someone once considered a criminal because of my sexuality, someone now too often considered a criminal because of my race, someone who served nearly ten years as a federal prosecutor, and someone who now teaches and writes about criminal justice issues. As such, it is perhaps unsurprising that the structure of the book is like something woven, something put together. Although the book is divided into three seemingly distinct parts or layers—my time as a prosecutor, my transition to academia, my legal writing—continuing threads run through each. The hope is that the gradual weaving of the parts into a whole will reveal a new way of thinking about criminal justice.

Set against the backdrop of national events like the OJ Simpson trial and President Clinton’s tough on crime rhetoric and the 9/11 terrorist attack, the first part tells the story of my decade as a federal prosecutor. It also traces the start of my realizing that

I was the one being deceived, led to think that the justice system, however flawed, was basically fair. During my decade of sending hundreds of men who look just like me to prison, I come to realize that unfairness is integral to the system.

The second part of the book—the shortest part—marks my transition from being a prosecutor to being a law professor. Removed from the assembly line of prosecution, I begin to get an even clearer picture of the system, and come to see that what I assumed were flaws are in fact features. In short, the system is designed to maintain inequality. My response is to begin to think about how to address these problems. And to write.

The third part of the book is where I turn to what the criminal justice system could be: fair, egalitarian, and citizenship-enhancing. Still interweaving stories from my personal experience, one chapter uncovers and critiques the role the Supreme Court has played in enabling unequal policing and fostering unequal citizenship; in short, the role the Supreme Court has tacitly played in positioning me, and everyone who looks like me, as a probationary citizen, a citizen-at-will, a second-class citizen. Borrowing from Afrofuturism and Critical Race Theory, another chapter imagines how policing might finally become fairer in the year 2044, when the country is projected to become majority-minority, and in the ensuing years when black and brown people like me use our numerical advantage to secure corresponding political and economic power and social capital. It suggests how all of us can lay the groundwork now for a more egalitarian future. All of this builds to the final chapter and my final argument, one that most clearly returns to my experience as a prosecutor: that is time to turn away from public prosecutors.

Chapter Seven: Beyond Policing. Against Prosecutors.

The prosecutor has more control over life, liberty, and reputation than any other person in America.

—Attorney General Robert H. Jackson¹

It has now become common, at least among progressive criminal justice scholars, to argue that the criminal justice system could be fixed—or at least get a major improvement—if we simply regulated prosecutors more. If we curbed their unfettered discretion.² If they sought less harsh punishments, which arguably have contributed more to mass incarceration than the War on Drugs.³ If we required them to have open file discovery—the norm in civil cases—instead of keeping evidence, even exculpatory evidence, close to the vest. If they confronted their implicit biases about race and class and everything else.⁴ If we limited their power to coerce pleas,⁵ or fixed things so the prosecutors who investigate and advocate aren't the same prosecutors who in effect adjudicate decisions.⁶ Or if we at least provided equal funding to public defenders to level the playing field between the prosecution and the defense. I too made these arguments. Not anymore.

The argument I make in this Chapter is radical, but also straightforward. I am a former prosecutor, and I have come to the realization that it is time to turn away from prosecution. As a federal prosecutor, I put hundreds of defendants, mostly brown and black, almost always poor, in prison as part of the War on Drugs. But if the goal was to limit the influx of drugs in this country, what I did was an abject failure. And it is not just drug prosecutions. Even looking back on many of the other cases I prosecuted

involving victimless “crimes,” I question whether I did more harm than good. I certainly contributed to mass incarceration and to the separation of families. And again, to what end?

Just consider. Each year we book approximately 12 million people into local jails to await trial, the vast majority for nonviolent crimes. We are now at a point where one in every three adults in America has a criminal recorded, and where 1 in every 15 individuals will spend time in jail or prison.⁷ None of this can be solved simply by providing more defense attorneys, or curbing police discretion. It is time to rethink why we prosecute in the first place.

What would it mean to turn away from prosecution and not rely on the criminal justice system as the first responder to address social ills, such as mental illness and poverty (the two main drivers of our prison industrial complex)? More radically, what would it mean to not turn to state-controlled prosecution as the primary way to address crime? After all, our reliance on public prosecutors is not inevitable. It is not pre-ordained. It is even not part of our long common law history. As one scholar put it:

In common law, a crime was viewed not as an act against the state, but rather as a wrong inflicted upon a victim. The aggrieved victim, or an interested friend or relative, would personally arrest and prosecute the offender, after which the courts would adjudicate the matter much as they would a contract dispute or a tortuous injury.⁸

In fact, the public prosecutor is “an historical latecomer,”⁹ and was largely “foreign”¹⁰ in the American colonies until 1704, when Connecticut adopted a system of public prosecution.¹¹ Eventually, other colonies followed suit, with the federal

government establishing the Office of a United States Attorney General and U.S. Attorneys through the Judiciary Act of 1789. But before this turn to public prosecutors, “crime” was handled for the most part through private actors, the aggrieved against the offender.¹² Or as one scholar put it, “In colonial America, criminal justice was the business of laymen, not lawyers.”¹³ This is not to say there were no public prosecutors at all. The colonies had the equivalent of attorneys general, but their function was limited to prosecuting matters that were of particular interest to the Crown. Even with the i.e., when public prosecutors first entered the scene—indeed, what some might call part of the “publicization of the private”¹⁴—their power was understood to be limited. The prosecutor was, “in the eyes of the earliest Americans, clearly a minor actor in the court’s structure.”¹⁵

Today, we take public prosecutors so for granted that this history is largely unknown, or if not unknown, treated as merely of historical interest.¹⁶ But knowing this history shows at least three things. *First*, how historically contingent prosecutors are. Instead of a system dependent on “insiders who run the criminal justice system—judges, police, and especially prosecutors”¹⁷—it was a system that belonged, in practice and in theory, to victims and the general public.

Second, and even more important, this history suggests how the state came to supplant the role of crime victims. Consider this language from a 1921 Connecticut court decision:

In all criminal cases in Connecticut, the state is the prosecutor. The offenses are against the state. The victim of the offense is not a party to the prosecution, nor does he occupy any relation to it other than that of a

witness, an interested witness mayhaps, but none the less, only a witness .

. . . It is not necessary for the injured party to make complaint . . . He cannot in any way control the prosecution and whether reluctant or not, he can be compelled like any other witness to appear and testify.¹⁸

Indeed, just a few years later in *Berger v. United States*, the United States Supreme Court would use similar language to describe federal prosecutors: "The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty . . ." ¹⁹

Third, this history reveals how easily *we* went from thinking of prosecution as a means to redress wrongs to victims to thinking of prosecution as a means to redress wrongs to the state. Put differently, the turn to public prosecution allowed the state not only to usurp the role of crime victims; it also allowed the state to create new crimes in which the state could claim the role of the victim. This meant that interracial marriage, for example, could become a crime against the state. After all, there were no victims, so to speak, unless the state could claim victimhood, which it did. Ditto for two men having sex. Ditto for someone walking at night "with no apparent reason or business."²⁰ And of course, the ability of the state to claim victim-status for victim-less "crimes" continues today. Consider again the War on Drugs, which resulted in the incarceration of users more than distributors. The creation of a system of state prosecutors not only allowed the state to claim victim-status when someone engages in the recreational use of drugs. It also allowed the state to claim to be victimized by some drug use more than other drug use. Hence, it could treat the use of crack cocaine more severely than the use of cocaine, and more severely than the current use of opioid, in ways that just happen to correlate with race. In short, there is a reason why the War on Drugs served as a major driver of

mass incarceration and over-criminalization, a reason why it is referred to as the “raced” War on Drugs,²¹ and that reason has everything to do with the advent of public prosecutors and the prosecution of victim-less crimes.²²

What alternatives might open up if we imagine a world without prosecutors, or at least with far fewer prosecutors? What might it mean to reject the notion of the state as the “real” victim of crime, and to instead imagine a criminal justice system in which real victims have the power to decide whether or not to seek recompense, whether in the form of monetary compensation or restorative justice or punishment? To be clear, I am not suggesting a return to purely private prosecutions or a system in which wealth inequality would allow some people to pursue private actions, and preclude others. But what if, instead of using the public fisc to fund public prosecutions, we used that fisc to fund private prosecutions? What might it mean to allow a victim of theft, for example, to not only initiate a prosecution but also seek return of the stolen item or financial damages? Or a hate crime victim to decide what is more important to him: punishment or an apology? Or a victim of domestic violence to decide whether to pursue charges or not, to decide whether incarceration of her abuser is best for her, and to decide whether mandating anger abuse classes or substance abuse classes might benefit her more? To be sure, returning prosecutions to the people runs the risk of personal vendettas and malicious prosecutions,²³ but even here there is a gatekeeping mechanism: the intermediary of a grand jury to screen cases that lack probable cause, that are unmeritorious.²⁴

More importantly, what might it mean to abandon prosecutions for purely victim-less crimes, which should really be considered non-crimes? In other words, to reserve

public prosecution for only those matters where the state truly is a victim, or where non-divisible harm truly effects a swath of the population, such as environmental crimes or crimes arising out of financial regulation?²⁵

If we let go of our fear of radical change and open ourselves up to the possibility of this proposal, I submit that the results might surprise us. Indeed, there would be at least two benefits. The first benefit is that instead of a system in which prosecutors decide which cases are worthy of pursuit, “we the people,” including those of us who have traditionally had little power, would now have the power to seek justice, and to achieve it ourselves.

Here, the numbers are the argument. According to one recent study looking at rape reporting between 1995 and 2012, roughly a million reported “forcible vaginal rapes of female victims nationwide disappeared from the official records”; police officers and prosecutors simply decided not to prosecute them. Instead, police and prosecutors culled and chose the few cases they wanted to pursue.²⁶ Indeed, to the extent they elected not to prosecute notwithstanding probable cause to proceed, they engaged in what Austin Sarat might call “lawful lawlessness,”²⁷ and what others have called “the ‘mortality’ of cases.”²⁸ Now imagine a system in which this decision rested with the victim, was screened for merit by a grand jury, and in which restorative justice and rehabilitation are options; in short, imagine a system in which victims choose when and how to prosecute. Consider more numbers. The Black Lives Matter movement has brought blue on black violence into the national conversation—the police kill about 1000 civilians every year, and use excessive force in many multiples more—and yet prosecutors, who have a symbiotic relationship with the police, are loath to bring charges against officers. Again,

imagine a system in which prosecutors do not choose which cases to bring, but victims do. Consider too victims of domestic violence. Too often, domestic violence victims are re-victimized by the state, forced to participate in a prosecution resulting in incarceration even when incarceration of their abusers causes more harm than good. But again, imagine a system in which victims decide whether to pursue prosecution, and on what terms.²⁹ Imagine too a system in which the public fisc funded prosecutors to work *for and with* victims, much in the same way the public fisc now funds defense lawyers to work *for and with* the accused.³⁰ Again, the first thing that might happen if we open ourselves up to private prosecutions is that all of us, including outsiders, will have the power to chart our own course, and in that way make ourselves whole.

There is second benefit too. When we transfer power from state prosecutors to the people, we may realize that many of the victimless “crimes” we take for granted—drug use and drug distribution are the biggest ones, since they are the biggest drivers of our incarceration rates—are not worthy of prosecution at all. We may question why they were ever called crimes, and why we imposed such draconian sentences when there were no real victims, including sentences of life without the possibility of parole. We may even see that “‘punishment’ does not follow from ‘crime’ in the neat and logical sequence offered by discourses that insist on the justice of imprisonment.”³¹ It is quite possible that the veil will be lifted for all of us, and we will see, finally, clearly, that our history of prosecuting victimless crimes has less to do with harm, and more with social control along axes of race, gender, sexuality, and class. And that the words we tell ourselves, that we are a country where everyone is equal before the law, has been a myth all along.

Given these benefits, and building on the prior chapter's observation that demographic shifts present an opportunity to reimagine what criminal justice might look like when black and brown people hold the keys to the courthouses and to the prisons, this Chapter argues that is the prosecutor's turn. It time for prosecutors to turn away from prosecution and cede their almost monopolistic power to prosecute, and to pave the way for a criminal justice system in which "we the people"—from rape victims to victims of unscrupulous mortgage lenders to victims of securities fraud, and yes, to victims of police abuse—have the power to decide whether and how to seek redress. Specifically, this Chapter asks that prosecutors do two things: step up, and step back. Prosecutors should step up and acknowledge the role they have played in packing our prisons with men and women, mostly poor and of color, for committing victimless "crimes" and their role in enabling a system predicated on maintaining structural inequality and social control. They can support reforms such as equal funding for public defenders. And prosecutors should step back. They can do this by over time by refusing to hire new prosecutors and refusing to replace those who leave, in short, by downsizing their offices. They can do this by prosecuting far fewer victim-less crimes. And they can do this by retraining prosecutors to function as prosecutor-advocates to work for real crime victims (much in the way public defense lawyers work for their clients)³² and assist them with an array of options, from mediation to prosecution. All of this would set the groundwork for a system that shifts power from public prosecutors and gives it to the people.

To be certain, this is an unconventional argument. To some, the idea of a world without public prosecutors may conjure images of lawlessness, or criminals run amok, even if history suggests otherwise. As is the case whenever the status quo is called into

question, there is sure to be push back. I welcome the push back. Bring it. If nothing else, this Chapter will make us rethink why we have prosecutors, and prompt us to rethink the power we have given them. Indeed, allow me to go a step further. It is a foundational tenet of Critical Race Theory that we should always “ask the other question.”³³ This includes asking, Who benefits from the status quo of allowing public prosecutors to decide what cases to pursue? Who benefits when the predominance of public prosecutors enables the state to create a swath of victimless crimes and claim itself as the victim? In short, this Chapter will prompt us to rethink the power we have given prosecutors, and prompt us to ask who benefits from this grant of power? And who does not?

¹ Robert H. Jackson, 24 J. of Am. Judicature Society 18 (1940).

² ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (Oxford 2007).

³ JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (Basic Books 2017).

⁴ DAVIS, *supra*.

⁵ STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (Oxford 2015).

⁶ See, e.g., Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 Stan. L. Rev. 869 (2009).

⁷ The Sentencing Project, *Americans with Criminal Records*; Kadish, Schulhofer, and Barkow, *Criminal Law and its Processes* (2017).

⁸ J.M. Riess, Progress and Prosecution, 423 Annals of American Academy of Political and Soc. Sic. 99, 100 (1976).

⁹ John Langbein, The Origins of Public Prosecution and Common Law, 17 Am. J. of Legal History 313, 313 (1973).

¹⁰ Most legal historians trace the American form of prosecution to the Dutch, who controlled New York as New Amsterdam and much of the surrounding area as New Netherland until 1673, when the Dutch ceded control to the English by treaty. The Dutch used a prosecuting authority called a *schout*, whose duty it was to present criminal charges against offenders. There is evidence that the use of a *schout* continued well after Dutch control ended, with the term sheriff eventually replacing the term *schout*. Other later influences include the French *procureur*. See generally John Langbein, The Origins of Public Prosecution and Common Law, 17 Am. J. of Legal History 313-25 (1973); see also Albert Reiss, Public Prosecutors and Criminal Prosecution in the United States of American, 20 Juridical Rev. 1-21 (1975); Joan Jacoby, *The American Prosecutor: A Search for Identity* (1980). The end result was a “uniquely American prosecutor.” Jacoby, *The American Prosecutor*, at 12.

¹¹ The Connecticut law provided:

Henceforth there shall be in every countie a sober, discreet and religious person appointed by the countie courts, to be attorney for the Queen to prosecute and implead in the lawe all criminals and to doe all other things necessary or convenient as an attorney to suppress vice and immorallitie.

Quoted in Walter M. Pickett *The Office of the Public Prosecutor in Connecticut*, 17 *J. of Crim. L. Criminology* 348 (1926)

¹² See Roger A. Fairfax, *Delegation of the Criminal Prosecution Function to Private Actors*, 43 *U.C. Davis L. Rev.* 411, 421 (2009) (“Although prosecutorial power in the early colonies initially often was concentrated in a representative of the Crown, the English tradition of private prosecution dominated the early American experience before the Revolution.”); Angela J. Davis, *Arbitrary Justice: The Power of the American Prosecutor* 9 (2007) (“Before the American Revolution, the crime victim maintained dole responsibility for apprehending and prosecuting the criminal suspect.”).

¹³ Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 *N.Y.U. L. Rev.* 911, 912 (2006).

¹⁴ See, e.g., John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making it Work Better* 7-8 (2008). Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 *Harv. L. Rev.* 1285, 1285 n.1 (2003).

¹⁵ Joan Jacoby, *The American Prosecutor: A Search for Identity* 23 (1980).

¹⁶ This is not to suggest that all public prosecution is handled by “[f]ull time government servants who are bureaucratically organized and paid according to a fixed salary schedule from appropriated funds.” See Patrick Halligan, *A Political Economy of Prosecutorial Discretion*, 5 *Am. J. Crim. L.* 2, 3-4 (1977); see also Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 *Ohio St. J. Crim. L.* 441, 442 (2009) (noting that most prosecutors receive annual salaries and civil-service protection). Some smaller jurisdictions outsource prosecution to private attorneys to prosecute crimes. Halligan, *supra* note __, at 4. But even here, the private attorneys are representing the state. See Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 *U.C. Davis L. Rev.* 411, 416-19 (2009). In addition, a handful of jurisdictions still allow victims to, in effect, usurp the role of the state prosecutor and handle the prosecution themselves. *Id.* at 423-24.

¹⁷ Bibas, *Transparency and Participation*, *supra* note __, at 912.

¹⁸ *Mallery v. Lane*, 87 *Conn.* 132, 138 (1921).

¹⁹ See *Berger v. United States*, 295 *U.S.* 78, 88 (1935).

²⁰ This is of course a reference to our history of arresting and prosecuting outsiders for “loitering.” See, e.g., *Kolendar v. Lawson*, 461 *U.S.* 352 (1983); cf. Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 *Yale L.J.* 1161 (1966).

²¹ Benjamin D. Steiner & Victor Argoshy, *White Addiction: Racial Inequality, Racial Ideology, and the War on Drugs*, 10 *TEMP. POL. & CIVIL RTS. L. REV.* 443, 443 (2001) (describing the War on Drugs as a “raced war”).

²² Cf. Darryl K. Brown, *Prosecutors and Overcriminalization: Thoughts on Political Dynamics and a Doctrinal Response*, 6 *Ohio St. J. Crim. L.* 453 (2009).

²³ This is not to suggest our current system of public prosecution is free from personal vendettas and malicious prosecutions. Far from it.

²⁴ Judges could also impose sanctions on frivolous cases, similar to the sanctions that are already available for civil cases.

²⁵ This in fact was the practice before the advent of public prosecutors. In addition, during parts of the 16th and 17th centuries in England, justices of the peace functioned as “back-up prosecutors” when private prosecution was not possible. See Langbein, *supra* note __, at 323.

²⁶ As it stands now, the state decides which rape cases to pursue, and what redress to seek. As one scholar recently observed, this approach “concomitantly reifies state power and positions the state as the savior of women,” at least in cases that the state prosecutes. See Erin Collins, *The Criminalization of Title IX*, 13 *Ohio St. J. Crim. L.* 365 (2016). Another scholar observes with respect to prosecutorial power and discretion, “[B]ecause the enforcement of the criminal law is entrusted fully to the office [of the prosecutor], prosecutors can effectively nullify a law in a jurisdiction.” Fairfax, *supra* note __,

at 430; see also Schuyler C. Wallace, *Nullification: A Process of Government*, 45 *Pol. Sci. Q.* 347, 347-48 (1930).

²⁷ Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 *Law & Soc. Inquiry* 387, 390 (2008).

²⁸ S. Walker, *Origins of the Contemporary Criminal Justice Paradigm: The American Bar Foundations Survey, 1953-1969*, 9 *Just. Q.* 47, 55 (1992).

²⁹ In a sense, this is a return. As Roger Fairfax has observed, "Complainants in the system of private prosecution court, and often did, settle their criminal cases out of court." Fairfax, *supra* note __, at 423.

³⁰ Obviously, one of the major flaws of the Colonial system of private prosecutions was that victims who could afford to hire attorneys to prosecute on their behalf had an advantage over victims who could not, and therefore left to manage their cases *pro se*. See Fairfax, *supra* note __, at 422-23; see also Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 *Am. J. Legal Hist.* 43, 46-48 (1995).

³¹ Angela Y. Davis, *Are Prisons Obsolete?* 112 (2003).

³² A recent empirical study of plea bargaining confirms that public defenders rank client wishes above all other consideration. See Ronald F. Wright & Jenny Roberts, *The Bargaining Part of Plea Bargaining* (on file with author.) One could imagine a similar client-centered approach with respect to prosecutor-advocates.

³³ Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out Of Coalition*, 43 *Stan. L. Rev.* 1183, 1189 (1991).