

Volume 25 | Issue 1

Winter 2022

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Recommended Citation

Steven Zeidman, *Virtuous Prosecutors?*, 25 CUNY L. Rev. F. 1 (2022).

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VIRTUOUS PROSECUTORS?

Steven Zeidman[†]

A movement is building for President Biden to rewrite the book on judicial appointments and look to civil rights lawyers and public defenders instead of the usual crop of federal prosecutors.¹ While the movement is grounded in the need to diversify the breadth of experience on the bench, it could also be interpreted as, or lead to, an effort to reexamine the exalted role of the prosecutor.²

Prosecutors did not always occupy a venerated and outsized place in the political landscape.³ In the early 19th century, prosecutors were essentially administrators appointed by elected officials to handle non-discretionary matters.⁴ In the 1840s, a movement to elect prosecutors took root.⁵ By the time of the Civil War, most District Attorneys were elected, and prosecutorial functions began to resemble modern day practice.⁶

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¹ See, e.g., Harper Neidig, *Biden Under Pressure to Revamp the Judiciary*, HILL (Dec. 24, 2020, 6:00 AM), <https://perma.cc/G8TK-J9VH>.

² See Andrew Cohen, *What Biden Means About a Judiciary that Looks More Like America*, BRENNAN CTR. FOR JUST. (Apr. 1, 2021), <https://perma.cc/FB4N-FNLJ>; see also Molly Greene, *The Senate Should Answer Biden's Call for Public Interest Jud. Nominees*, APPEAL (Feb. 8, 2021), <https://perma.cc/R5G8-S7Q4> (noting that so far, Biden has indeed nominated a number of civil rights lawyers and public defenders for federal judicial posts); see, e.g., Aida Chavez, *Will Democratic Court Nominations Live Up to Biden's Promises*, NATION (June 16, 2021), <https://perma.cc/3WFH-43GR>; see generally Ian Millheiser, *What Biden's First List of Judicial Nominees Tells Us About His Approach to the Courts*, VOX (Mar. 30, 2021, 4:00 PM), <https://perma.cc/4FMK-T3QH>; see generally Ilya Shapiro, Commentary, *On Judicial Appointments... Is Joe Just Biden His Time?*, AM. CONSEQUENCES, June 2021, at 78, 80.

³ Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1568 (2012); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 451 (2001).

⁴ W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 191 (2021); Ellis, *supra* note 3, at 1537-39.

⁵ Murray, *supra* note 4, at 191.

⁶ Ellis, *supra* note 3, at 1568; Davis, *supra* note 3, at 397.

It took another sixty years before prosecutors became imbued with prestige.⁷ During the prohibition era of the 1920s and 1930s, organized crime began to flourish and crime families and notorious figures like Al Capone were sensationalized in the media and became nationally recognized.⁸ In a similar fashion, law enforcement agents like Eliot Ness working in tandem with prosecutors became national crime-fighting heroes.⁹

In New York, the prosecutor posed as virtuous crime-fighter was best personified by Thomas Dewey.¹⁰ Dewey's efforts targeted at the Mafia and organized racketeering led to his nickname the "Gangbuster" and elevated him to elected office.¹¹

As prosecutors were seen as noble and righteous protectors of virtue and morality, their prominence led to increased resources, power, and influence.¹² Prosecutors began to fill the ranks of the judiciary, government, and big law firms.¹³ Dewey is a prime example—he was elected Manhattan District Attorney in 1937,¹⁴ New York Governor in 1943,¹⁵ and was the Republican nominee for President in 1944 and 1948.¹⁶ To this day, prosecutors regularly use their jobs as stepping stones to a higher office or the judiciary.¹⁷

⁷ See, e.g., Bennett L. Gershman, "Hard Strikes and Foul Blows" *Berger v. United States 75 Years After*, 42 LOY. U. CHI. L.J. 177, 181 (2010) (noting that "[t]he prosecutor's public image in 1935 was high," and referring to a popular radio show of that era, "Mr. District Attorney," that had the "memorable opening: 'Mr. District Attorney! Champion of the People! Guardian of our Fundamental Rights to Life, Liberty, and the Pursuit of Happiness!'").

⁸ *Id.*; see also Jed Shugerman, *Introduction & Chapter Outline*, in THE RISE OF THE PROSECUTOR POLITICIAN (forthcoming) (manuscript at 23), <https://perma.cc/CL7S-G5GP>.

⁹ See, e.g., *Eliot Ness*, BUREAU ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, <https://perma.cc/6ZXH-FFFM> (last updated July 14, 2020).

¹⁰ Russell Fowler, *Thomas E. Dewey: America's Greatest Prosecutor*, TENN. BAR ASS'N.: L. BLOG (Nov. 1, 2017), <https://perma.cc/X5HT-3ZQF>; *Thomas Dewey*, THIRTEEN <https://perma.cc/SD45-L8Q> (last visited on Sept. 27, 2021).

¹¹ Fowler, *supra*, note 10; *Thomas Dewey*, *supra*, note 10.

¹² Jed Shugerman, "The Rise of the Prosecutor Politicians": *Database of Prosecutorial Experience for Justices, Circuit Judges, Governors, AGs, and Senators, 1880-2017*, SHUGERBLOG (July 7, 2017), <https://perma.cc/DMN7-L5D7> (noting that prosecutors have historically used their position "as a steppingstone for higher office").

¹³ *Id.*

¹⁴ Fowler, *supra* note 10.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Laurie L. Levenson, *The Politicization of Prosecutors: A Tribute to the Work of Bennett Gershman*, OHIO ST. J. CRIM. L. 325, 340 (2019); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 BOS. UNIV. L. REV. 760, 811 (1995); Kenneth L. Wainstein, *Judicially Initiated Prosecution: A Means of Preventing Continuing Victimization in the Event of Prosecutorial Inaction*, 76 CAL. L. REV. 727, 741 n.70 (1988).

Over the past many decades, the noble crime-fighter reputation remained in place even as prosecutorial work dramatically changed.¹⁸ No longer is the prosecutor's role to fight the few notorious figures, but rather to act as society's guardians against large swaths of the population.¹⁹ This transition led to qualitative and quantitative changes in prosecution, but not to the prosecutor's vast power that is unmatched in any other industrialized nation.²⁰

At the federal level, the enormous growth of federal crimes over the past several decades led to more enforcement and people serving longer sentences.²¹ Today, drug crimes, immigration offenses, firearms, fraud, theft and embezzlement rule the federal criminal docket.²² Signature prosecutorial efforts include vigorous enforcement of the War on Drugs that filled federal prisons and destroyed countless lives.²³ Presently, immigration is a major focus of federal prosecution with illegal entry, re-entry, and similar charges making up a significant percentage of all prosecutions, feeding anti-immigrant sentiment.²⁴ In a provocative essay, criminal law scholars Rachel Barkow and Mark Osler conclude that broad

¹⁸ See Wendy Sawyer & Alex Clark, *New Data: The Rise of the "Prosecutor Politician,"* PRISON POL'Y INITIATIVE (July 13, 2017), <https://perma.cc/HP3L-HXQV>.

¹⁹ See generally NAT'L RSCH. COUNCIL, WHAT'S CHANGING IN PROSECUTION? 12 (Philip Heymann & Carol Petrie eds., 2001).

²⁰ Allen Steinberg, *From Private Prosecution to Plea Bargaining: Crime, Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 584 (1984).

²¹ Glenn R. Schmitt, *Overview of Federal Criminal Cases Fiscal Year 2018*, U.S. SENT'G COMM'N, (June 2019), <https://perma.cc/X2SJ-LBX8>; John Baker, *Revisiting the Explosive Growth of Federal Crimes*, HERITAGE FOUND. (2018), <https://perma.cc/8DRX-6Q68>; Nora Demleitner, *Revisiting the Role of Federal Prosecutors in Times of Mass Imprisonment*, 30 FED. SENT'G REP. 165 (2018), <https://perma.cc/7LGX-XDBS> (referencing the exponential growth in the federal prison population).

²² Schmitt, *supra* note 21 (stating immigration (34%) and drug (28%) charges account for well over half of the total federal criminal caseload).

²³ Jelani J. Exum, *Reconstructing Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*, 58 AM. CRIM. L. REV. 1685, 1693 (2021); see generally Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, BRENNAN CTR. FOR PEACE & JUST. (May 10, 2021), <https://perma.cc/9H8E-CGM2>.

²⁴ *Immigration Now 52 Percent of All Federal Criminal Prosecutions*, TRAC REPORTS (Nov. 28, 2016), <https://perma.cc/569N-RJB4>; *Prosecuting People Coming to the United States*, AM. IMMIGR. COUNCIL (Aug. 23, 2021), <https://perma.cc/9BYH-4JCK> (outlining that illegal reentry offenses, combined with illegal entry offenses, are the "most prosecuted federal offenses in recent years. Indeed, as of December 2018, they constituted 65 percent of all criminal prosecutions in federal court."); Joshua Breisblatt, *Government to Criminally Prosecute More Migrants and Separate Them from Their Children*, IMMIGR. IMPACT (May 8, 2018), <https://perma.cc/7ECC-CPN9> ("Immigration entry-related offenses are already the most federally prosecuted offenses, constituting almost half of all prosecutions in federal court in 2016.").

criminal justice reform is likely impossible if policy remains driven by the Department of Justice.²⁵

At a local level, “Broken Windows,”²⁶ or quality-of-life enforcement²⁷ have taken on an ever-increasing prominence with hyper-aggressive policing in communities of color.²⁸ In large cities like New York, minor misdemeanors and offenses (such as marijuana possession and farebeating) comprise 80% of all cases prosecuted in local Criminal Court,²⁹ and District Attorney budgets have increased despite decreasing crime rates.³⁰ In New York City this year, the death of twelve people held pretrial in local jails has shined a light on the punitive prosecutorial bail practices.³¹

Notwithstanding this dramatic shift in their day-to-day work, prosecutors still have maintained their vaunted status as righteous public servants.³² Federal hearings regularly feature members of Congress attempting to establish their gravitas by solemnly noting their prior service as a prosecutor.³³ It is commonplace to hear cable news hosts begin myriad segments by earnestly declaring that “We are so fortunate to have with us former prosecutor”

²⁵ Rachel Barkow & Mark Osler, *Where Reform Goes to Die*, INQUEST (July 26, 2021), <https://perma.cc/557K-HW2F> (“ . . . [The] DOJ is bold in the easy job of locking people up and timid in the more difficult task of crafting alternatives to brute-force incarceration. Consistently, DOJ fights common-sense reform, maintains a stranglehold on access to the rusted levers of change, and resists second-guessing its decisions.”).

²⁶ George L. Kellig & James Q. Wilson, *Broken Windows*, ATLANTIC (Mar. 1982), <https://perma.cc/A6S4-7E4N>; see also *Broken Windows Theory*, PSYCHOLOGY TODAY, <https://perma.cc/ZL82-J9G8> (explaining that “[t]he broken windows theory states that visible signs of disorder and misbehavior in an environment encourage further disorder and misbehavior, leading to serious crimes.”) (last visited Sept. 27, 2021).

²⁷ *Quality of Life Policing*, INCITE!, <https://perma.cc/7PLU-4Q5X> (last visited Sept. 29, 2021).

²⁸ See K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 291 (2009); see also Conor Friedersdorf, *Apply Broken-Windows Theory to the Policy*, ATLANTIC (JUNE 19, 2020), <https://perma.cc/FV63-GSPM>.

²⁹ See CRIM. CT. OF THE CITY OF N.Y. ANNUAL REPORT 2017, 25 (2018), <https://perma.cc/3TMA-XLK5>; see, e.g., Steven Zeidman, *Some Modest Proposals for a Progressive Prosecutor*, UCLA CRIM. JUS. L. REV. (forthcoming 2020).

³⁰ Melanie Gray, *NYC’s Dist. Att’y Went on Hiring Spree as Arrests Plunged*, Data Shows, N.Y. POST (Sept. 19, 2020, 5:33 PM), <https://perma.cc/29A3-YUKD>.

³¹ Erich Lach, *What Responsibility Do Courts Bear for the Crisis at Rikers Island*, NEW YORKER (Oct. 9, 2021), <https://perma.cc/57JZ-WDRG>.

³² See Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 341 (2001) (“Jurors trust prosecutors; they are impressed by the prosecutor’s prestige and experience.”).

³³ See, e.g., David Hawkings, *Politicians Prosecuting Their Case to Come to Cong.*, ROLL CALL (June 2, 2015, 5:00 AM), <https://perma.cc/QB47-HQK5>.

Yet perhaps the prosecutorial shine is starting to dim. Scholars like John Pfaff in his book “Locked In” argue that prosecutors were the main drivers of the blight of mass incarceration.³⁴ Protests in the aftermath of George Floyd’s murder shined a light on the entire criminal legal system and its institutional actors, including prosecutors.³⁵ During the campaign for the Democratic Party’s presidential nominee, Amy Klobuchar and Kamala Harris were attacked, rather than lauded, for their records as prosecutors.³⁶ While her prosecutorial record obviously did not prevent Harris from being nominated for Vice-President, those attacks surely had a negative impact on her presidential campaign.³⁷

Perhaps no one has done more to cause people to reconsider the vaunted reputation of prosecutors than Rudy Giuliani, former heralded United States Attorney for the Southern District of New York (1983-89).³⁸ Giuliani’s role in contesting the election and inciting the January 6th insurrection at the Capitol caused many former prosecutors, who previously hailed him as a mentor, to finally denounce him.³⁹ This belated reappraisal by formerly loyal colleagues was long overdue. In 1992, when he was campaigning to be the Mayor of New York City, Giuliani incited a riot on the steps of City Hall, largely consisting of police officers chanting vile and racist slogans about then-Mayor David Dinkins, the City’s

³⁴ See generally JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 8 (Basic Books, ed. 2017) (arguing that prosecutors bear responsibility for mass incarceration); see also Eli Hager & Bill Keller, *Everything You Think You Know About Mass Incarceration Is Wrong*, MARSHALL PROJECT (Feb. 9, 2017, 5:45 PM), <https://perma.cc/96F2-VANZ> (“Pfaff’s most potent—and perhaps contentious—argument is that reforms should instead focus on bringing fewer felony charges against Americans in the first place. And that means zeroing in on prosecutors.”).

³⁵ Katie Levine & Joanna Schwartz, *Hold Prosecutors Accountable, Too*, BOS. REV. L. & JUST. (June 22, 2020), <https://perma.cc/4FSS-DLQE> (“Prosecutors bring the legal charges that support arrests. They also ignore unconstitutional police work, act out their racist beliefs on juries, and commit varying levels of unconstitutional to illegal conduct themselves in their zeal to win cases.”).

³⁶ See generally Bonnie Kristian, *The Unaddressed Sins of Kamala Harris and Amy Klobuchar*, THE WEEK (Feb. 13, 2019), <https://perma.cc/HET7-HBLT>; German Lopez, *Amy Klobuchar’s Record as a “Tough on Crime” Prosecutor, Explained*, VOX (Feb. 25, 2019, 7:00 AM), <https://perma.cc/6N8F-7YEA>.

³⁷ See Danny Hakim et al., “Top Cop” Kamala Harris’s Record of Policing the Police, N.Y. TIMES, <https://perma.cc/4MZX-AQ6B> (“ . . . in [Kamala Harris’s] own unsuccessful presidential run, she struggled to reconcile her calls for reform with her record on these same issues during a long career in law enforcement.”) (last updated Nov. 9, 2020).

³⁸ Daniel E. Slotnik, *Prominent Lawyers Want Giuliani’s Law License Suspended Over Trump Work*, N.Y. TIMES, <https://perma.cc/6GMV-RRTH> (last updated Apr. 28, 2021).

³⁹ *Id.*; Paul Moses, *The U.S. Attorneys Who Revered Rudy Loathe Him Now*, DAILY BEAST, <https://perma.cc/5RBR-FK8> (last updated July 10, 2019).

first African American Mayor.⁴⁰ Giuliani's fall from grace recently reached new lows when a court in New York temporarily suspended his law license.⁴¹

To be sure, the image of prosecutor as hero still lingers even as cracks begin to appear. After Merrick Garland was nominated by President Biden to be Attorney General, heaps of praise poured in for his prosecutorial career prior to becoming a judge.⁴² He was roundly commended for his role in the prosecution and ultimate execution of Timothy McVeigh and other high-profile cases.⁴³ No one asked him about the thousands of other prosecutions he was involved in that contributed to mass incarceration.⁴⁴

The current political climate presents a propitious opportunity for President Biden to flip the usual script and eschew the prosecutor to judge pipeline. By doing so, he would add a much needed balance to the judiciary,⁴⁵ and help begin a national reckoning on behalf of families and communities decimated by decades of punitive prosecutorial practices.⁴⁶ After all, on the debate stage and the campaign trail, Biden often made a point of saying, "I was a public defender. I didn't become a prosecutor."⁴⁷

Those responsible for incarcerating so many people are not heroes. The uncritical approval of prosecutors and prosecution has led the nation

⁴⁰ Nat Hentoff & Nick Hentoff, Commentary, *Rudy's Racist Rants: NYPD History Lesson*, CATO INST. (July 14, 2016), <https://perma.cc/2XM2-62X9>; Jaelyn Diaz, *David Dinkins, New York City's 1st Black Mayor, Dies At 93*, NPR (Nov. 24, 2020, 1:31 AM), <https://perma.cc/V3Q4-VR8W>.

⁴¹ Nicole Hong et al., *Court Suspends Giuliani's Law License, Citing Trump Election Lies*, N.Y. TIMES (June 24, 2021), <https://perma.cc/6GMV-RRTH>.

⁴² Bart Jansen, *Witnesses Praise Merrick Garland, Joe Biden's Pick for Attorney General, Confirmation Vote Expected Next Week*, USA TODAY (Feb. 23, 2021, 1:01 PM), <https://perma.cc/WU7G-8UDZ>.

⁴³ See generally Marianne Levine & Josh Gerstein, *Garland Cruises Through Confirmation Hearing as GOP Support Solidifies* (Feb. 22, 2021, 7:08 PM), <https://perma.cc/9XVC-6N4X>.

⁴⁴ *Confirmation Hearing for Attorney General Nominee Merrick Garland; Supreme Court Allows Release of Trump Tax Records to New York Prosecutor*, CNN (Feb. 22, 2021, 11:00 AM ET), <https://perma.cc/VNU6-GQDL>.

⁴⁵ Carrie Johnson, *Corporate Lawyers Who Become Judges Less Likely to Side with Workers, Study Shows*, NPR, (Feb. 24, 2021), <https://perma.cc/4CRF-BTB3>; Clark Neily, *The Importance of a Diverse Federal Judiciary*, CATO INST. (Mar. 25, 2021), <https://perma.cc/M5KW-G6B4>.

⁴⁶ See Angela J. Davis, *The Power and Discretion of the American Prosecutor*, 49 ÉGALITÉ ET DISCRIMINATION 55 (2005), <https://perma.cc/2YBQ-XQTC>.

⁴⁷ Isabella Grullón Paz, *Kamala Harris and Joe Biden Clash on Race and Busing*, N.Y. TIMES (June 27, 2019), <https://perma.cc/T43H-FES8>.

down a dark and racist path.⁴⁸ It has caused a staggering and unforgivable amount of two million people, wildly disproportionately people of color, to languish in jails and prisons across the United States.⁴⁹ It is time to take prosecutors off their pedestal.

⁴⁸ See *Report of the Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance*, THE SENT'G PROJECT (April 19, 2018), <https://perma.cc/M6UV-HMG9>.

⁴⁹ *Criminal Justice Facts*, THE SENT'G PROJECT, <https://perma.cc/DKH4-X658> (last visited Sept. 27, 2021).