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Do Prosecutors Really Represent the People? A New Proposal for Civilian Oversight of Prosecutors

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Do Prosecutors Really Represent the People? A New Proposal for Civilian Oversight of Prosecutors

Laurie L. Levenson*

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For years, we have assumed that prosecutors represent the “People” in criminal prosecutions. At trial, prosecutors assume the mantle of the representatives of the community. Whether it is the “People v.,” “Commonwealth v.,” or “State v.,” the prosecutor’s responsibility is to be the voice of the community during a criminal prosecution. Prosecutors are charged with representing more than just the victim in a criminal trial. They must also represent the broader interests of justice and, in doing so, consider the impact of a case on all those they represent.

However, it is becoming increasingly apparent that prosecutors either cannot or may not choose to perform that role. For example, prosecutors have been criticized for not bringing charges against police officers when community members are concerned that police are using excessive force.1 Another example has been the criticism

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of prosecution offices for aggressively prosecuting drug crimes contrary to the interest of minority community members. Finally, there has been a generalized critique that prosecutors give insufficient consideration to the interests of people of color when they evaluate cases.

In light of these examples, and others, it is time to reexamine the assumption that prosecutors can be depended upon to represent the best interests of a community. If they cannot, a change is needed to make them better representatives. As this article proposes, that change is to create civilian oversight bodies for prosecution offices. This proposal is not nearly as radical as it may sound. Over the last decade, civilian oversight commissions have been adopted for law enforcement. They have also been used to monitor specific functions of prosecution offices, such as discovery compliance. Some prosecutors have voluntarily created advisory bodies to help them be more responsive to the needs of their communities. Whether appointed or elected, prosecutors need a mechanism by which they can receive continued input and feedback from their communities. Being selected or elected every few years provides insufficient oversight and accountability. The representatives of the “People” need more direct accountability to the “People.” Civilian oversight can provide that.

This article begins with a review of the literature that portrays prosecutors as the “ministers of justice” and the “representatives of the community.” This view is so engrained that it has persisted for decades with little challenge. Yet, it is a misleading paradigm.


4. See Eric Gonzalez, Using the Power of Prosecutors to Drive Reform, CRIM. JUST., Fall 2019, at 9, 9. As noted by the first Latino District Attorney elected in New York State:

[i]f for decades prosecutors have routinely been both praised and criticized for their decisions, but until recently, the scope of prosecutorial decision-making authority—the sheer power granted to prosecutors—got little public scrutiny. Outside of legal practitioners, and defendants on the receiving end of prosecutorial discretion, many Americans have little conception of how much latitude DAs have in the criminal justice process. Consequently, many also underestimate how much responsibility prosecutors bear for profound system failures like mass incarceration, widespread racial disparities in the justice system, and the persistence of violent crime plaguing the same communities for whom the system is most punitive.
Once appointed or elected, many prosecutors have little contact with actual community members other than an occasional town hall meeting. Prosecutors assume that they and their deputies know what is in the public’s best interest and can make decisions accordingly. There is little day-to-day input by the community into the functioning of the prosecutor’s office. Zealous prosecutors eager to win their cases have a narrower focus. Except at the highest echelons (and often not even there), little consideration is given to how the prosecution’s efforts are perceived by the diverse groups that may populate the jurisdiction. The model has become one in which prosecutors make decisions and the community reacts to them, rather than ongoing community input into the prosecutor’s decisions.

Part Two of this article details the increasing rift between prosecutors and their communities. It identifies how ongoing community oversight can assist prosecutors in their decision-making while still respecting the need for a high degree of prosecutorial independence. Community oversight does not mean that an oversight body will necessarily dictate to a prosecutor when charges should be brought or dropped, though that could be part of its function. However, unlike a grand jury that traditionally evaluates one case at a time, a civilian oversight commission can help set prosecutorial priorities and identify ongoing problems in the prosecutor’s decisions.

Finally, Part Three suggests some models for civilian oversight. Just as communities and their prosecutorial agencies differ in the United States, so may the model of civilian oversight. However, we can certainly do better than what we are doing today. This year’s symposium has wisely chosen to focus on “A 2020 Vision of Criminal Prosecution and Defense.” In this new decade, my vision of prosecution is one that includes real community involvement in prosecutorial decision-making. It is not enough to label prosecutors the “representative of the People.” They must have the means and charge to perform this role. Just as civilian oversight has been implemented for law enforcement, it should take hold for prosecutorial agencies. Direct civilian involvement with prosecution offices can provide transparency and accountability that leads to a more honest and effective representation of the community by their prosecutorial agencies.

Currently, the reform movement for prosecutors has depended on the personal decisions of individual prosecutors to serve as change agents in their communities. But their numbers are few and their

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5. See Liane Jackson, Change Agents: A New Wave of Reform Prosecutors Upends the Status Quo, AM. BAR ASS’N J., June 2019, at 40, 40.
success depends on their ability to navigate the internal politics of their offices and the reaction of their communities. Civilian oversight need not depend on the personality and popularity of the prosecutor. It can create a systemic mechanism to ensure that prosecutors perform their broader role of being a "representative of the community."

I. PROSECUTORS AS "REPRESENTATIVES OF THE COMMUNITY"

"Prosecutors are public officials who represent the residents of a community ('the People') and their interests in the criminal justice system."6

Prosecutors have classically represented their roles as government officials "who represent the people" of their jurisdiction.7 "The prosecutor's constituency is generally understood to be 'the people' of the geographical division that the prosecutor has been elected or appointed to represent."8 As a "minister of justice," it is assumed that prosecutors will competently and effectively represent the interests of their constituencies.9 Yet, as others have observed, "the very concept of serving 'the people' is inevitably imprecise."10 Placing prosecutors in the role of the community's representative gives them special authority in proceedings. They wear the white hats; we presume that they know what is best for the community and will do their best to achieve the community's goals.11

7. See, e.g., Office Overview, L.A. COUNTY DISTRICT ATT'Y OFF., http://da.co.la.ca.us/about/office-overview (last visited Jan. 26, 2020). "Deputy district attorneys are prosecutors who represent the people of the State of California." Id. The American Bar Association Criminal Justice Standards for the Prosecution Function further elaborates: "[t]he prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor's clients."

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.3 (2015).
9. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.3. "The public's interests and views should be determined by the chief prosecutor and designated assistants in the jurisdiction." Id.
10. Thompson, supra note 8, at 327; see also Susan W. Brenner & James Geoffrey Durham, Towards Resolving Prosecutor Conflicts of Interest, 6 GEO. J. LEGAL ETHICS 415, 471 (noting the challenges for prosecutors in not having a readily identifiable client).
This elevated view of prosecutors has granted them great leeway in their decision-making. Constitutionally, prosecutors have broad discretion to make charging decisions. As "representatives of the people," prosecutors decide who will be charged, what crimes they will be charged with, and the severity of those crimes. While there are constitutional limits against charging individuals based upon their race, ethnicity, and exercise of First Amendment rights, prosecutors are otherwise entrusted to use their judgement on behalf of the community. Judges trust that a prosecutor who is appointed will act "solely to pursue the public interest in vindication of the court's authority."

The Supreme Court enshrined this view of prosecutors with Justice Sutherland's famous quote in Berger v. United States:

[*the United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.*]

Thus, the paradigm established by the Supreme Court is that a prosecutor's goal is to serve the greater realm and to do so only in a way that will promote greater justice for all.

The quote is powerful but does not deal with the fundamental issues that arise where prosecutors act as representatives of a community. First, how does one define "the community?" In many jurisdictions, the diverse nature of a community can pose challenges for prosecutors when deciding how to proceed on a case. For example, a call for zealous prosecution of drug offenses by some members of a jurisdiction may disproportionately affect other members. Community is a complex subject that involves a thoughtful examination of some of the most difficult issues in society, including those of race and socioeconomic norms. The criminal justice system has a tendency to dash past these issues with generalizations.

14. Id. at 804.
16. Id.
that a prosecutor represents everyone in a particular geographical realm, even if they have stark differences and interactions with the criminal justice system.\textsuperscript{19}

"Community" involves a wide range of individuals, including those who, as the most marginalized, often have the biggest stake in the criminal justice system.\textsuperscript{20} Consider how the homeless are viewed. By definition, they are considered as outsiders to the broader community.\textsuperscript{21} Even when "community" courts are established, homeless offenders lack any true representation.\textsuperscript{22} As noted by other scholars:

\begin{quote}
[t]he ideal of prosecutorial representation has a baseline faulty assumption: that popular input happens, and happens well. The dichotomy between the people and the defendant assumes that because prosecutors and police chiefs are often elected, they are able to transform public sentiment into legal action. However, while prosecutorial and policing decisions surely reflect some popular sentiment, and possibly even the majority view of justice, studies have continually shown that they usually do not reflect the input of the most marginalized voices . . .
\end{quote}

\textsuperscript{23}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{19} As scholars have noted, it is undoubtedly somewhat misleading to claim that there is one "community" that is represented by our criminal justice institutions. See Paul H. Robinson, Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change, 111 NW. U. L. REV. 1565, 1595 (2017). Yet, there tends to be community consensus regarding some core issues regarding criminal justice and considering the positions of those who will be most affected by criminal legislation can reap important benefits, including harnessing the power of stigmatization and earning moral credibility with people to help avoid vigilantism. \textit{Id.} \"[T]he available evidence suggests not that community judgments of justice are an endless collection of individual disagreements but that there is strong agreement on a core of issues regarding the relative blameworthiness of a wide range of offenses and offenders.\" \textit{Id.}
\item \textsuperscript{20} See Jocelyn Simonson, The Place of "The People" in Criminal Procedure, 119 COLUM. L. REV. 249, 254 (2019); see also Thompson, supra note 8, at 353 (explaining that "the neighborhoods that most often experience the greatest incidence of crime tend to participate the least in the electoral process").
\item \textsuperscript{22} See Maya Nordberg, Jails Not Homes: Quality of Life on the Streets of San Francisco, 13 HASTINGS WOMEN'S L.J. 261, 297 (2002).
\item Simonson, supra note 20, at 281. Several important articles have been written about the problems with the concept of democratizing criminal justice. See John Rappaport, Comment, Some Doubts About "Democratizing" Criminal Justice, 87 U. CHI. L. REV. (forthcoming 2020); Joshua Kleinfeld et al., White Paper of Democratic Criminal Justice, 111 NW. U. L. REV. 1693 (2017). These studies and articles are important in understanding the overall issues regarding the relationship between the community and the criminal justice system. Yet, unlike this article, their focus tends to be more on law enforcement, judges, and juries,
\end{itemize}
\end{footnotesize}
Additionally, to what extent does “the community” include law enforcement officers within that community? “In our dominant contemporary conception of criminal procedure, the place of the public—‘the People’—is on the side of the police and the prosecution” and the police, in conjunction with the prosecutors, speak as representatives of the local community. Thus, it is not surprising that one of the areas that often causes great difficulty for local prosecutors is the decision whether to prosecute local law enforcement officials for mistreating residents in that community. If law enforcement officials are viewed as invested in protecting the interests of the community, it is particularly difficult to view those same officers as a threat to the community itself.

Finally, how do prosecutors assess what is in the interest of the community? There is often no daily interaction of prosecutors with their community members. While election campaigns might draw prosecutors out of their offices, their decisions are made in a more insular setting—surrounded by other prosecutors. There is generally no mechanism, unless perhaps where a grand jury is involved, to even include community views in prosecutorial decisions. Prosecutors may misread an election vote as a vote of approval for all decisions that the elected prosecutor may make during her term. Thus, the election of a “get tough on crime” prosecutor provides, in essence, carte blanche to prosecutors even when their individual decisions would not stand up to a community poll.

Prosecutors often represent the community in concept only. They have broad discretionary power and little transparency. On a case-by-case basis, it is hard to assess which community interests were considered in their decision-making. As even their staunchest supporters will agree, prosecutorial power is complex and not well understood.

Finally, there is often a lack of transparency that makes

with less attention on how community representation should play a role in the prosecutors’ offices.

24. See Simonson, supra note 20, at 270.

25. Previously, there were strong arguments to the contrary and an open recognition of the differences between the police interests and those of the community. See Samuel Walker, Governing the American Police: Wrestling with the Problems of Democracy, 2016 U. Chi. Legal F. 615, 622-28 (2016). However, with the advent of “community policing,” it is easier for the police to argue that are in tune with, and represent, the community’s interests. See id.

26. See Jeffrey Bellin, The Power of Prosecutors, 94 N.Y.U. L. REV. 171, 175, 203 (2019). Although arguing that the claim of prosecutorial power has been imprecisely made, Professor Bellin does concede an essential point regarding concerns about prosecutorial power. Id. at 206. As he states, “[i]t may simply be that prosecutors’ lack of transparency and unwillingness to go against the political grain create an inflated perception of maneuverability.” Id. Rather than fixating on the extent of prosecutorial “power,” this article’s proposal for civilian
it difficult for the community to see whose interests are prioritized and why.\textsuperscript{27}

\section*{II. THE RIFT BETWEEN PROSECUTORS AND THEIR COMMUNITIES}

While prosecutors are viewed and may view themselves as representatives of the community, their relationship with the community is actually much more complex. The immediate constituents for prosecutors are law enforcement officials who bring cases to them, together with victims who may directly or indirectly seek the prosecutor’s involvement.

Conflicts between prosecutors and members of their community can arise in a variety of ways. Communities can push back against prosecutors because they believe that the prosecutors are only representing certain groups—often non-minority and affluent members of the community.\textsuperscript{28} Mass incarceration creates an enormous divide between prosecutors and members of their community.\textsuperscript{29} The rhetoric regarding prosecutors has shifted in the last twenty years with complaints ranging from prosecutors being corrupt to claims that they are out of touch with their own communities.\textsuperscript{30} With no daily role in prosecutorial decision-making, the community can become frustrated and may vent that frustration in the form of public protests and demonstrations.

This is particularly true when allegations that the local police are using excessive force or racial profiling within the community. In such situations, members of the community often regard as fanciful the notion that the prosecutor represents their interest at all.\textsuperscript{31} Instead, the prosecutor is seen as representing a dominant power structure against the interests of individuals in the community. As one commentator recently wrote:

\begin{itemize}
  \item\textsuperscript{27} Abby L. Dennis, Note, \textit{Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power}, 57 DUKE L.J. 131, 136 (2007).
  \item\textsuperscript{28} See e.g., Jessica Fishko, \textit{How District Attorney Jackie Lacey Failed Los Angeles}, THE APPEAL (Nov. 12, 2019), https://theappeal.org/how-district-attorney-jackie-lacey-failed-los-angeles/.
  \item\textsuperscript{30} See Green & Yaroshesky, supra note 11, at 67.
\end{itemize}
We should abandon the idea that prosecutors act “for the People,” eliminating it from formal case captions and colloquial speech alike. Instead, it is more honest to designate prosecutors as “the State,” “the Commonwealth,” or “the Government”: they are state actors, wielding their state power to prosecute individual defendants. We might view them as a necessary role of the state, but when they act, they do so against part of the people as much as for them.\footnote{32}

In December 2018, the MacArthur Foundation issued its report on “Prosecutorial Attitudes, Perspectives, and Priorities: Insights from the Inside” as part of its “Advancing Prosecutorial Effectiveness and Fairness Report Series.”\footnote{33} Its findings regarding community engagement are important. As reported by those surveyed, the following themes arose:

1. Communities of color do not hold positive views of the State Attorney’s office.

2. Community engagement helps build trust in the criminal justice system, and it may increase reporting and cooperation with law enforcement.

3. Community engagement increases the public’s understanding of what prosecutors do and humanizes the institutional identity of the office.

4. Though community engagement has become [more of] a priority for [prosecutors], some barriers to engagement remain.

5. Prosecutors do not associate community engagement with problem solving or crime prevention.\footnote{34}


34. \textit{Id.} at 10-11. Further, in a 2009 study by the Pew Research Center, it was reported that, although Latinos had increased interaction with police and prosecutors, their overall confidence that they would be treated fairly by the criminal justice system dropped to under 50%. See Mark Hugo Lopez & Gretchen Livingston, \textit{Hispanics and the Criminal Justice System: Low Confidence, High Exposure}, \textit{Pew Res. Ctr.} (Apr. 7, 2009), \url{https://www.pewresearch.org/hispanic/2009/04/07/hispanics-and-the-criminal-justice-system/}. Blacks had even less confidence that they would be treated fairly. \textit{Id.}}
Thus, while prosecutors believe that they are representing the community, their actual operations tell a different story. As noted by Professor Ronald White and District Attorney Dan Satterberg:

[engagement with the community does not stop with victims and their families; prosecutors must ask for input from other members of the community. But in doing so, there is also a danger that a prosecutor will hear only the loudest voices or the best-connected groups. The prosecutor must represent the whole community: that includes those who are politically engaged and those who are not.35

There continues to be calls for new approaches to ensure that prosecutors do a better job of representing the entire community.36 The current system of periodic elections and even less frequent disciplinary actions has been insufficient to accomplish the task.37

III. PUTTING THE COMMUNITY BACK INTO THE PROSECUTOR’S ROLE

In 2020, it is time to consider how to give the community a meaningful role in ensuring that their representative prosecutor truly represents their interests.38 There are several models that can be considered.

36. See Leena Kurki, Restorative and Community Justice in the United States, 27 CRIME & JUST. 235 (2000). Much of the push to having more consideration of community interests in the criminal justice system can be credited to the restorative justice and community justice movements. See generally id. By including representatives of victim advocates, grassroots advocates, researchers, and others, advocates in the restorative justice movement have sought to demonstrate crucial links between the operations of criminal justice agencies and the health and welfare of related communities. Id. at 235. Most importantly, the movement has highlighted how traditional criminal justice interventions actually destroy community. Id. at 241. For the last twenty years, advocates of community empowerment have encouraged criminal justice agencies to “change the way they interact with the public, learn to listen to ordinary citizens, and work together with local people to prevent crime and solve crime-related problems.” Id. at 245.
37. See Dennis, supra note 27, at 139-40. It should also be added that civil lawsuits have almost no impact on prosecutors because of their absolute immunity. Id. at 144-45; see also Prentice L. White, Absolute Immunity: A License to Rape Justice at Will, 17 WASH. & LEE J. C.R. & SOC. JUST. 333 (2011).
38. The genesis and impact of efforts toward participatory democracy are discussed in detail in David Alan Sklansky, Police and Democracy, 103 MICH. L. REV. 1839 (2005). The rise of the community justice movement in the United States can be traced back to the 1990s. See Adrian Lanni, The Future of Community Justice, 40 HARV. C.R.-C.L. L. REV. 359, 365 (2005). It is an important movement that has affected a wide range of issues in the criminal justice system. See id. Yet, it has often taken a limited view of how community justice involves prosecutors. Generally, it envisions the community providing input to prosecutors.
First, internal changes can be made and are being made to some prosecution offices so that there will be greater representation of all segments of the community and outreach to them. For example, some prosecution offices have created subgroups of prosecutors to interact and represent specific constituencies in the community. For example, prosecution offices are forming “Latino Prosecutors Associations” or “Black Prosecutors Associations.” These prosecutors often become a combination of prosecutor and community activist. Their stated goals include to “give a face to the many people in our community who perceive that law enforcement organizations are not fair.”

One of the challenges to this approach is that the statistics for prosecutors of color are still painfully low. In California, Latinos recently surpassed whites as the largest demographic group in the state. Yet, only 9% of California’s prosecutors are Latino. Thus, it is a challenge for Latino prosecutors to implement an operation where they are the liaisons to the community, as well as act as their voice in the courtroom. American Bar Association (ABA) Criminal Justice Standard for the Prosecution Function § 3-2.2 focuses on “[a]ssuring [e]xcellence and [d]iversity in the [h]iring, [r]etention, and [c]ompensation of [p]rosecutors.” It specifically directs that “[i]n selecting personnel, the prosecutor’s office should also consider the diverse interests and makeup of the community it serves, and seek to recruit, hire, promote and retain a diverse group of prosecutors and staff that reflect that community.”

Prosecution offices may also try to create special units in their offices that take a broader perspective on prosecution and, in particular, review possible wrongful convictions. During the last ten

and then prosecutors proposing strategies to address those concerns. Id. at 369-70. Proposals generally do not include community members actually having oversight over the operation of prosecutors. Id.

40. Id.
41. Id. For a firsthand account of why a black prosecutor thinks it makes a difference that minorities be represented in the ranks of prosecutors, see Melba Pearson, My Life as a Black Prosecutor, MARSHALL PROJECT (July 21, 2016, 10:00 PM), https://www.themarshallproject.org/2016/07/21/my-life-as-a-black-prosecutor (quoting Stanley Williams, Los Angeles County Deputy District Attorney).
43. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-2.2 (2015).
44. Id. § 3-2.2(b).
years, prosecution offices throughout the country have imple-
menced various types of Conviction Integrity Units.45 While these
units play an important role in ensuring that all persons are treated
according to the law, they are not generally viewed as “voices of the
community” in prosecution offices. There are enormous differences
among how these units work in individual prosecution offices. In
some offices, there is a concerted effort to ferret out wrongful con-
victions and to put in place a series of initiatives that will prevent
future injustices.46

Prosecutors might seek to bring in “outside prosecutors” from
other state agencies to ensure that cases are given a fair review.
Yet, these outside prosecutorial agencies face the same challenge.
They are, by and large, career prosecutors who evaluate the cases
from their personal perspective and have little, if any, understand-
ing of how the broader community wants such cases to be handled.
Thus far, a few prosecutors have only taken the incremental step of
integrating civilian oversight into their work through the formation
of Innocence Commissions to engage in post-conviction review.47
Although the work of such commissions is undoubtedly helpful,
they do not go far enough because they focus primarily on whether
there have been wrongful convictions and, sometimes, on how to
prevent such injustices. They generally do not take a day-to-day
role in guiding the work of prosecutors.

Similarly, there have been efforts to adopt state-wide commis-
sions to address prosecutorial misconduct.48 In August 2018, New
York enacted a bill that would create a stand-alone commission to

45. See Conviction Integrity Units: Vanguard of Criminal Justice Reform, CTR.
For Prosecutor Integrity (2014), http://www.prosecutorintegrity.org/pr/center-for-prose-
cutor-integrity-surveys-rise-of-conviction-integrity-units/; see also Barry C. Scheck, Convic-
tion Integrity Units Revisited, 14 Ohio St. J. Crim. L. 705 (2017); Daniel S. Medwed, The
Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pul-
pit, 84 Wash. L. Rev. 35, 61-65 (2009); John Hollway, Conviction Review Units: A

46. See generally Barry Scheck, The Integrity of Our Convictions: Holding Stakeholders
(2019) (providing insight as to the range of reforms that can help prevent wrongful convic-
tions).

47. See David Wolitz, Innocence Commissions and the Future of Post-Conviction Review,
52 Ariz. L. Rev. 1027, 1046 (2010) (demonstrating that at least six states—California, Con-
necticut, Illinois, North Carolina, Pennsylvania, and Wisconsin—have convened some form
of a commission to study the problem of post-conviction review).

48. See H. Mitchell Caldwell, The Prosecutorial Prince: Misconduct, Accountability, and
to investigate and sanction acts of prosecutorial misconduct).
systematically and transparently address misconduct by prosecutors. The commission has the power to hold hearings at which it will receive evidence regarding prosecutorial misconduct. The goal is to have the commission provide transparency about what is occurring in prosecution offices and to issue annual reports to the governor, legislature, and courts regarding its findings. While such broad oversight is helpful, it is fundamentally different from an oversight commission for an individual prosecution office that gives real time feedback on the workings of that office.

A different approach has been to create an advisory board to examine the practices of a district attorney’s office and to make specific reform recommendations based upon the board’s examination. For example, the Brooklyn District Attorney’s Office opted to address systemic change through an initiative called “Justice 2020.” The goal was to “transform[] the culture of the Office and . . . strengthen community trust while enhancing public safety.” Justice 2020 convened a seventy member committee of reformers, formerly incarcerated people, law enforcement members, community advocates, clergy, and academics to do an analysis of the office and to make recommendations. The committee has made recommendations about how to reduce incarceration, engage communities as partners in justice, focus resources on drivers of crime, and invest in prosecution work in a way that will benefit prosecutors and the community they serve.

If these recommendations are heeded, they could have a significant impact upon the prosecutor’s office. Instead of reflexively seeking incarceration, prosecutors may be redirected to consider a diversity of community interests and the use of alternative programs, such as drug diversion and second-chance initiatives. The overall goal—and it is an important one—is to change the culture of the prosecution office from being case processors who punish people for doing bad things to being problem solvers. In finding ways to protect the community, prosecutors must hold people accountable in a

51. See Gonzalez, supra note 4, at 9-10.
52. Id. at 10.
53. Id. at 11-13.
way that serves all core community values, including the likely impact on people of color in that community.\textsuperscript{54} Having such an advisory committee to make strategic changes is a wonderful first step that can and should be embraced by other prosecution offices. So far, the results have been promising. As the community becomes more trusting, law enforcement becomes more effective in fighting crime.\textsuperscript{55}

Others have called for partnerships between prosecutors and community or business groups to facilitate communication between community groups and prosecutors.\textsuperscript{56} The goal is to create a bond with community members that will heighten prosecutors’ awareness of and responsiveness to community problems.\textsuperscript{57} In this model, prosecutors are sent into the community to be “field” prosecutors so that the community can have greater access to them.\textsuperscript{58} Similarly, there have been proposals for prosecutors to go out of the courthouse and into the community to serve the proactive role of identifying ongoing criminal justice problems.\textsuperscript{59} Yet, a clear limitation of this model is that the prosecutor is still “calling the shots.” Community members may have better access and prosecutors might be better situated to see, hear, and understand the concerns of the community, but prosecutors still wield the decision-making authority.

Yet, it may be time to take an even bolder step—to have civilian oversight much in the way that law enforcement agencies are now being subjected to civilian oversight.\textsuperscript{60} On-site community representatives who have the authority to question prosecutors’ exercise of discretion would more powerfully ensure that the voices of more members of the community are heard. Especially in the area of prosecuting police, the current approach of prosecutors deciding

\begin{itemize}
\item \textsuperscript{54} The range of recommendations is impressive. They include, among others, sealing or expunging old convictions, developing protocols for addressing police misconduct, encouraging appropriate parole recommendations, creating a single point of contact for hate crimes, and implementing a Post-Conviction Justice Bureau. \textit{Id.} at 14.
\item \textsuperscript{55} \textit{Id.} For example, there has been a decline in serious crimes, including the homicide rate, in the jurisdiction. \textit{Id.}
\item \textsuperscript{57} \textit{Id.} at 564.
\item \textsuperscript{58} \textit{Id.} at 565.
\item \textsuperscript{59} See Bruce A. Green & Alafair S. Burke, \textit{The Community Prosecutor: Questions of Professional Discretion}, \textit{47 WAKE FOREST L. REV.} 285, 291-93 (2012); Doolan, \textit{supra} note 56, at 547.
\item \textsuperscript{60} In embracing oversight commissions, it is critical to avoid the problems that have occurred in the implementation of civilian oversight commissions of police. See \textit{generally} Stephen Clarke, \textit{Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails}, \textit{43 COLUM. J.L. & SOC. PROBS.} 1 (2009).
\end{itemize}
when fellow law enforcement individuals should be charged has created skepticism and cynicism about prosecutors. This concern has led to calls for independent special prosecutors, outsiders appointed by the state attorney general, or civilian review boards drawn from the community who have direct input into the prosecution’s decision to bring or decline such cases.61

As we enter 2020, it may be time to have prosecutors actually share their authority with community members or have community members provide oversight over the decision-making of prosecutors with the power to take action if prosecutors are out-of-tune with the community’s needs and interests. How would this be done? Civilian boards could work in prosecution offices to give input on the screening of cases and the priorities of prosecution offices. Rather than waiting for the community’s reactions, representatives of the community could give daily feedback on prosecutorial decision-making. These individuals would actually have a say in what cases are or are not being brought by prosecutors. While there is still the challenge of deciding who would be on such boards, they would have much faster and direct input into prosecutorial decision-making.62

A slightly different model would be to ensure that prosecutors have a kitchen cabinet composed of diverse members of the community who would advise the head prosecutor on a regular basis regarding prosecutorial priorities, concerns of the community, hiring and training decisions, and needed reforms. Thus, while this group might not provide daily oversight of every case, it will have a regular presence in the prosecutor’s office.

The benefit of infusing prosecution offices with such “outsiders” is to respond to the natural tendency of prosecutor’s offices to become very insular and, at times, adversaries of those seeking reforms. With working groups, it is much more likely that the civilian groups will have a greater appreciation of the prosecutor’s work and prosecutors will establish relationships where they will be more open to direction. Of course, there is the risk that the “embedded” community members might shift their allegiance to the prosecutors. However, clear and regular reminders of their roles could combat such movement.

61. Robertson, supra note 1, at 4; Dennis, supra note 27, at 145-46, 151-53.
62. There is a range of approaches to designating individuals for such boards—ranging from appointment by political authorities to the creation of civilian advisory councils whose members are elected through preference voting methods designed to ensure proportional representation. See Reenah L. Kim, Note, Legitimizing Community Consent to Local Policing: The Need for Democratically Negotiated Community Representation on Civilian Advisory Councils, 36 Harv. C.R.-C.L. L. Rev. 461 (2001).
There are also valuable benefits to prosecutors in having civilian oversight or internal advisory boards. To the extent that the community is upset or has concerns, the civilian groups can interact with individuals as ombudsmen. They can be a hotline and lifeline for community complaints. Community engagement increases transparency both for prosecutors and the community. It is critical that community members appreciate that their concerns are being heard and considered.\(^{63}\) It is also important that prosecutors have an effective means to share their decision-making process with the citizenry.\(^{64}\) As with consent decrees, oversight boards provide a means of reviewing the propriety and effectiveness of prosecutorial policies, providing information to the community and conveying feedback, advising the decision-makers about what factors they may not have considered in their decision-making, and linking decision-making to actual data showing how a prosecutor’s decisions are affecting community members.\(^{65}\)

The sticking point in this proposal will be what actual authority civilians have to stop prosecutors from bringing cases or to direct them to bring difficult cases, such as excessive force cases by police officers.\(^{66}\) Prosecutors pride themselves on their independence\(^ {67}\) and are not legally required to charge cases even at the request of judges.\(^ {68}\) Alternatively, community members may counsel against bringing charges that prosecutors are inclined to file.

However, this conflict does not pose an insurmountable obstacle to engaging community oversight for a prosecution office. First, prosecutors could voluntarily defer to the community oversight group’s recommendations, recognizing that its role is to represent the community in difficult decisions of exercising prosecutorial discretion. At worst, prosecutors may end up not bringing some cases

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\(^{64}\) The community engagement process, and structures to enforce it, “accord with deliberative democracy and legitimacy theory,” although there are some that argue that the inherent biases in the police system make it nearly impossible to have sufficient community engagement. Id. at 867.

\(^{65}\) Id. at 828-29 (noting how consent decrees integrate collaborative problem-solving and bias-free policing and crime prevention).


\(^{67}\) See Bruce A. Green & Fred C. Zacharias, Prosecutorial Neutrality, 2004 WIS. L. REV. 837, 861-64 (2004) (noting how overreliance on prosecutorial independence may be counterproductive because it divorces prosecutors from the interests of the community and creates greater distrust about prosecutorial decision making).

that some of their members might otherwise want to bring. If prosecutors are truly acting as “representatives of the community,” and the community is truly represented on such boards, the prosecutor should probably defer to such decisions. Realistically, if the community sentiment is strong enough to counsel against charging the offense, a subsequent trial jury is likely to nullify the prosecution charge that is brought.

But what if community advisors counsel prosecutors to bring a charge that they are reluctant to bring? Prosecutors cannot ethically bring charges when they do not believe they have sufficient proof for their case. Under the ABA Standards for prosecutors: “[a] prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.” Thus, even if a community oversight commission recommends charges, prosecutors will not be obliged to bring those charges if there is insufficient evidence to support them. While the oversight group may have opinions about whether a charge is in the best interest of justice, the prosecutor makes the ultimate assessment of the strength of the evidence. If the community members cannot convince the prosecutor of the merits of a case, one alternative for breaking the deadlock is to engage a special prosecutor who will bring the case directly to a grand jury.

Oversight groups can also play an important role in evaluating what should happen in a case following a conviction. Prosecutors may be particularly reluctant to step back and evaluate whether an

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69. Given that prosecutors exercise their discretion to such an extent that only an estimated 2% of all crimes are actually charged, deferring to a recommendation not to bring a charge will not dramatically change the overall practices of prosecutors. See Sara Sun Beale, The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization, 54 AM. U. L. REV. 747, 757 (2005).

70. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-4.3(a) (2015). The professional rules of conduct of individual states may also set similar standards for the prosecutor’s decision to bring charges.

71. Id.

72. Cf. Dennis, supra note 27, at 155-61 (proposing system of special superseding prosecutors when there has been a showing of prosecutorial misconduct). In order for grand juries to be effective in representing the community there may need to be important changes in how grand jurors are selected. See generally Kevin K. Washburn, Restoring the Grand Jury, 76 FORDHAM L. REV. 2933 (2008) (advocating for the reconstitution of grand juries to represent the broader community).
injustice occurred when that evaluation requires acknowledging errors by their own office.\textsuperscript{73} While a growing number of prosecution offices have created conviction review units,\textsuperscript{74} very few have input from persons other than prosecutors about how such cases should be evaluated.\textsuperscript{75} Community members may have the perspective to evaluate post-conviction claims of wrongful convictions without being hampered by the concern that they are criticizing their current or past co-workers. The issue of wrongful conviction has become too big for prosecutors to ignore,\textsuperscript{76} and community members are growing increasingly concerned about the issue. Accordingly, community representation in the evaluation of these cases is a key opportunity for the public to learn why there have been wrongful convictions and provides an invaluable chance for prosecution offices to develop more trust in their communities as community members can directly evaluate the prosecution’s efforts to correct injustices and prevent them in the future. At minimum, prosecutor’s offices should create entities like the North Carolina Actual Innocence Commission that, while not an actual review agency, is a body that

\textsuperscript{73} See Daniel S. Medwed, The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence, 84 B.U. L. REV. 125, 134 (2004). There are many reasons that prosecutors have difficulties in evaluating post-conviction claims of innocence. The major factor is the culture of the prosecutorial office. “[P]rosecutors can find themselves swept up in a team-spirit mentality, pitting the district attorney’s office against the defendant, regardless of potential innocence. Studies on prosecutorial offices have revealed that prosecutors tend to adopt a belief that their trials are staged on a good versus evil landscape, where prosecutors attempt to fulfill a mission of protecting the public and fighting crime.” Brandon Hamburg, Legally Guilty, Factually Innocent: An Analysis of Post-Conviction Review Units, 25 S. CAL. REV. L. & SOC. JUST. 183, 194 (2016). A key benefit of having community members on the post-conviction review team is to allow for decision making that is not affected by the overall culture of a prosecutor’s office, including the stigma that it sometimes creates for prosecutors who are in that office. Id.

\textsuperscript{74} For an overview and review of post-conviction units, see CONVICTION INTEGRITY UNITS, supra note 45; Hamburg, supra note 73; Dana C. Boehm, The New Prosecutor’s Dilemma: Prosecutorial Ethics and the Evaluation of Actual Innocence, 2014 UTAH L. REV. 613 (2014); Mike Ware, Dallas County Conviction Integrity Unit and the Importance of Getting it Right the First Time, 56 N.Y. L. SCH. L. REV. 1033 (2012); Barry Scheck, Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them, 31 CARDozo L. REV. 2215 (2010).

\textsuperscript{75} In general, the Conviction Integrity Unit of Dallas County has been recognized as making the most effort to have a diversity of input in its evaluation of potential wrongful convictions. In creating the Unit, District Attorney Craig Watkins handpicked a team of prosecutors and defense lawyers, from public and private practice, to establish the unit. Hamburg, supra note 73, at 191-92 (internal citation omitted).

\textsuperscript{76} According to one study, the current population of innocent defendants is between 2.3% and 5% of the overall population, which is between 46,000 and 100,000 people in custody. \textsuperscript{29} See Frequently Asked Questions, INNOCENCE PROJECT, http://www.innocenceproject.org/about-innocence-project/faqs/how-many-innocent-people-are-there-in-prison (last visited Jan. 27, 2020). Earlier studies had estimated the number of wrongfully convicted individuals during a fifteen-year period of 1989 to 2003, to be 29,000 people. Samuel R. Gross et al., Exonerations in the United States 1989 Through 2003, 35 J. CRIM. L. & CRIMINOLOGY 523, 532 (2005).
studies, discusses, and makes recommendations regarding best practices to avoid wrongful convictions.77

In North Carolina, based upon the recommendation of its Innocence Commission, the state created a review agency that works completely independently from any governmental agency.78 It is considered a "neutral entity with no allegiance to either prosecution or defense teams."79 While it can boast independence, there have been criticisms of its operations.80 First, depending on the persons appointed to the Commission, it can itself be viewed as biased. Rather than supplement a prosecutorial agency, it becomes the substitute for it. Thus, political criticisms of the group have a magnified impact on how the Commission's work is evaluated. Second, as a small group, its ability to investigate and resolve cases is more limited. Very few cases reviewed by the Commission have actually led to exoneration.81 Finally, there may be a mixed message by having a Commission that works apart from the actual prosecutorial agency. To the extent that prosecutorial agencies believe that an outside agency is a back-up for its mistakes, there may be complacency in the prosecutorial agency itself in monitoring its own work and ensuring that wrongful convictions are remedied.

Although the details for any individual oversight committee may depend heavily on the size, past, organization, and other outreach efforts by the individual prosecutorial office, the step of allowing citizens to actually observe and play a role in prosecutorial decision-making represents an important effort toward increasing transparency and accountability by prosecutors. Having prosecutors know that they are subject to regular oversight is likely to have a salutary effect. A citizen group in their midst is a symbolic reminder that prosecutors are not all powerful and must remember their role to serve the interests of their community—not just in election years and not just for those who can influence the prosecutor’s election or
appointment. Rather, prosecutors must have a tangible daily reminder that if they are going to represent the People, they must actually have an idea of how the citizenry is viewing their decision-making.

Oversight groups are meant to break down the walls of prosecution offices and make them true partners with the community in seeking justice. In Europe, there are independent officials who review charging decisions by prosecution agencies. The European model also allows more judicial oversight of prosecutors' charging and declination decisions. In America, the democratic framework dictates that in order to ensure that prosecutors are representing the interests of the community, a group of community representatives, rather than judicial officers, should review prosecutors' decisions.

Civilian oversight can be used broadly or narrowly. It has a natural fit for cases involving public corruption or police violence. With a natural skepticism about whether prosecutors represent the police or the citizens, having direct citizen input into their decisions would be helpful. Under-prosecution of these types of cases, as well as other crimes like sexual offenses that affect a community, undermine a community's confidence in the criminal justice system. Alternatively, with growing concerns of mass incarceration and the overuse of certain criminal charges, such as narcotics offenses, civilian oversight can play a vital role by directing prosecutors to use alternative approaches, like drug courts and diversion programs. For those prosecution offices that still pursue death penalty cases, having members of the community involved in the crucial decision to pursue such a penalty may be essential to ensure that the most significant decisions by a prosecutorial office are not arbitrary, capricious, or based upon improper factors, including race. In fact, the one constant that a civilian group can provide is a reminder that cognitive biases may be impacting prosecutors' decisions.

82. See Thompson, supra note 8, at 353 (noting that "during the prosecutor's term, the voting public has little or no ability to influence [the prosecutor's] policies and practices"); see also James N. Johnson, The Influence of Politics upon the Office of the American Prosecutor, 2 Am. J. Crim. Law 187, 190-91 (1973) (discussing the role of elections of prosecutors).
83. See Brown, supra note 66, at 874-77.
84. Id. at 891-92.
85. See id. at 852-57.
itself could contribute to prosecutors doing a better job of representing all members of their community.

When first instituted, there was also resistance to the use of civilian oversight boards to monitor law enforcement agencies. Police were viewed as a “breed apart,” experts in their role of safeguarding the community. Moreover, many of the oversight commissions that were instituted were not successful in curbing police excesses. Decades later, law enforcement is touting the benefits of having civilian oversight. These range from generally improving community relations and fostering communication between the community and the police agency to improve department policies and procedures.

Similar benefits may be available to prosecutors. A civilian oversight committee gives prosecutors an opportunity to get direct community input before they institute new programs.

Even when prosecutors claim to be reformers, their efforts may be rejected because they did not anticipate criticism of their efforts. A citizen group can give the prosecutor more direct feedback about likely community reaction and measures that can be used to have the reform best serve the interests of the community. This would be a vast improvement over the current system in which prosecutorial decisions are largely unreviewable; prosecutors are “among the least accountable public officials.”

IV. CONCLUSION AND PROPOSAL

For years, we have assumed that the community’s most direct involvement in the criminal justice system is in their role as jurors. However, it is time to do more and give the community a

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89. See Sklansky, supra note 38, at 1771-74. Many of the arguments being made for oversight of prosecutorial agencies were made during the early proposals for civilian oversight of policing. See Kim, supra note 62.
90. Sklansky, supra note 38, at 1797.
91. See Clarke, supra note 60.
93. Id.
95. Green & Zacharias, supra note 67, at 902.
direct role in prosecutorial decision-making. 97 The current model provides very little transparency about how and why prosecutors make their decisions and gives prosecutors nearly unchecked power to decide what is in the "public interest." If prosecutors represent the community, then there should be a move toward increasing community representation in prosecutorial decision-making. The time may be right for oversight commissions, not just of the police 98 but of their partners as well—prosecutors.

This article is designed to prompt a serious discussion about implementing such oversight commissions for prosecutorial offices across the country. For the last twenty years, the focus has been on how to reform the police and, to some extent, how to address prosecutorial misconduct. However, there has been relatively little attention to the idea of making prosecutors more responsible to their constituents by giving the community a seat in the prosecutor's office. While the means of implementation may not be immediately evident, the need is. Reform in the criminal justice system will not occur without prosecutors engaging—voluntarily or through direction—with such reforms. Suggesting that they might be subject to daily oversight can actively prompt an important discussion of what model prosecutorial offices should look like in 2020 and beyond.

97. One benefit in increasing community involvement is to ensure that individuals need not go through trials if it is clear that the community does not support their case. While this input can also be provided by grand juries, because the Fifth Amendment has not been incorporated to the states, see Hurtado v. California, 110 U.S. 516 (1884), only twenty-three states require their use to bring charges. Greg Hurley, The Modern Grand Jury, NAT'L CTR. FOR ST. CTS. (2014), https://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2014/The-Modern-Grand-Jury.aspx.  

98. During recent years, over one hundred jurisdictions have adopted Civilian Oversight Commissions to monitor and guide the work of law enforcement. See, e.g., Police Oversight by Jurisdiction (USA), NAT'L ASS'N CIVILIAN OVERSIGHT L. ENFORCEMENT, https://www.nacole.org/police_oversight_by_jurisdiction_usa (last visited Jan. 26, 2020); About Us, L.A. COUNTY CIVILIAN OVERSIGHT COMMISSION, https://coc.lacounty.gov/About-Us (last visited Jan. 26, 2020).