

Introduction

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Plato is quoted as saying, “*It matters not if the cobblers or masons fail at their work, but if the guardians fail, the democracy crumbles.*”

The prosecutor is often viewed as the guardian of the people in a given geographical area. This book expands on that guardian concept, exploring all that falls under prosecutorial discretion—what prosecutors can and cannot do—as defined by people who have been prosecutors, those who have studied the criminal justice system, or anyone who has been affected directly by its outcomes.

In this introduction, we’ll look at the intended audience for this book, define the prosecutor’s role, and explore the coming attractions of this text.

Who Is This Book For?

This book is for lawyers and nonlawyers—essentially, anyone who is interested in how the criminal justice system works. If you are reading this as a new prosecutor, this book will help you learn from where others went wrong, as well as explore the various options available to you. As a law student, you will see why the path to becoming a prosecutor is so important—and determine what character traits you’d like to develop as a future prosecutor. For senior prosecutors, there is always room for growth and improvement as with anything in life.

If you are not a lawyer, you can benefit from this book as a voter. The primary goal of this book is for voters to see what the

criminal justice system really looks like. Voters need to ask questions such as:

- What is my elected prosecutor doing? What methods do they use?
- Am I in a jurisdiction where my elected prosecutor is a shining example?
- Does my elected prosecutor reflect my personal values and views on justice?
- Do my legislators provide enough funding for the staffing needed to do the job of a prosecutor effectively?
- Are there obstacles to my elected prosecutor's success—like a city commission, a mayor, or an elected sheriff who disagrees with the direction of the office?

Based on the answers to these questions, it is critical for voters to make their voices heard at the ballot box.

In recent years, the question of what a prosecutor should be and what role they should play has moved to the forefront of our collective consciousness. From special prosecutors such as Kenneth Starr and Robert Mueller III who have investigated U.S. presidents, to the decisions on whether to indict police officers who have shot civilians while on duty (as in the cases of Michael Brown, Tamir Rice, and Philando Castile), the public has engaged in robust debate on the power of the prosecutor's office.

As a result of this evolving debate, I gathered a diverse group of experts with a wide array of viewpoints to define and dissect prosecutorial discretion in this book. This collective voice is by design, as no one person has all the answers. Some of the authors are highly critical of the system based on their experiences. Some are fiercely supportive of the way the system functions at present. Each expert provides compelling arguments to support their positions. Taken together, the chapters in this volume will bring a greater understanding of the prosecutor's role—with the nuances and controversies inherent in it—to help readers formulate informed opinions of their own.

What Does—and What Should—a Prosecutor Do?

The job of a prosecutor is to seek justice for crimes in their area. What justice means and looks like can vary from case to case, area to area, and prosecutor to prosecutor. In the discussions throughout the book, the word “prosecutor” is often used interchangeably with other similar terms.

There are two levels of prosecutors. First is the *elected* prosecutor (with exceptions in Alaska, Connecticut, New Jersey, and Washington D.C., where the top prosecutor is appointed). The elected prosecutor is accountable to the people of their respective district, with elections every four years. They set the tone of the office, create policies, and hire based on their viewpoints of how they want their office to look, feel, and function. The elected prosecutor, depending on the location, is referred to as the district attorney, the state attorney, the state’s attorney, or the commonwealth attorney.

The second level is the *assistant* prosecutor. The assistant prosecutor may have other titles based on the type of work that they do within the office, but they ultimately report to the elected prosecutor. An assistant prosecutor is referred to as assistant district attorney, assistant state attorney, and so on depending on the elected person’s title. The assistant prosecutor in larger offices is the one who tries cases and does the frontline work. In smaller areas/towns, the elected prosecutor will try the most serious cases, like murder. Both have discretion—but it looks different. It is the classic case of “*where you sit is where you stand*.” The elected prosecutor sets the rules of how little or how much discretion the assistant prosecutor can use. The elected decides what crimes should get the most resources, and generally empowers the assistants to do their work daily. The assistant prosecutor has the discretion in deciding if there is enough evidence to file a case, whether to go to trial, or what plea should be offered. Some offices restrict some aspects more than others, but generally, this is the framework.

Many people are not aware of how prosecutors’ offices are staffed, or from where elected prosecutors derive their power. Other people have never thought about the power of the prosecutor at all, since

they have never been involved with the criminal justice system as a victim or person charged with a crime. Now that high-profile cases are bringing the work of the prosecutor to the forefront, it is key to understand how the offices work—and it also helps to frame the discussion that is forthcoming in the chapters ahead.

Coming Attractions

Each of the ten chapters distinctively contributes to the topic at hand. Throughout the book, you will notice common themes—unfettered discretion, and the use of power to help or to harm.

This book is divided into three parts. Part I considers *the 30,000-foot view*, as explored by professors providing theory on how prosecutors do their work.

- **Phyllis Williams Kotey** explores prosecutorial discretion through the lens of a former prosecutor, as well as that of a sitting judge. She tells powerful stories of how injustice manifests, and how judges are able to reduce the adverse effects if they are attuned to what is happening.
- **Nicole Zayas Fortier** talks about the power of the prosecutor in the context of voting, and how the public needs to be engaged—learn about the candidates, understand the power of this office, and vote. She outlines specific changes that an elected prosecutor can make to ensure that the system is more just.
- **Ron Goldstock** and **Matt Redle** provide a historical perspective on discretion, and how high-profile cases shaped the standards that are in place today.

Part II showcases *voices from the front lines*—current practitioners such as prosecutors, public defenders, and victim advocates—who witness firsthand what is working and what is not.

- **Molly Gill** examines the so-called white hat mentality—and how it influences the lawmaking process. This is the power that prosecutors have *outside* of the courtroom—which is not often

discussed. Depending on the agenda of the prosecutor, this type of influence can be good or harmful to the community.

- **Fan Li** uses the backdrop of the seasons to look at the life cycle of a prosecutor—from new and inexperienced, to having more expertise—and the dire effects that each season can have on people charged in the criminal justice system.
- **Mike Moore** and **Brian Carney** explore the boundaries of prosecutorial discretion, and when using discretion conflicts with following the law.

Part III presents *voices for change*—those who are advocating to rethink the way prosecution is handled in our country.

- **Steve Kelly** and **Aramis Ayala** share powerful firsthand narratives about how they learned the meaning of prosecutorial discretion through pain, adversity, and tragedy.
- **JoNel Newman** explores the world of juvenile justice, and pulls back the curtains on how juveniles are prosecuted as adults in America.
- **Nora Demleitner** takes a global view on prosecutorial discretion, exploring not only its history in the United States but also its evolution across the globe.

It is my hope that the work of all of the authors sheds some light on prosecution in America, and provides concrete ideas of where to go from here both in practice and at the ballot box.