

Introduction: Prosecutorial Discretion Symposium

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Prosecutorial discretion has been under unprecedented attack around the country. In recent years, we have seen new efforts to undermine the role of prosecutors in making decisions in accordance with what is best for their communities. This has looked different in various parts of the country. In some states, like Georgia, we have seen laws passed that allow a commission to remove prosecutors based on how they exercise their prosecutorial discretion.¹ In states like Florida, we have seen a governor interfere with the will of local voters by suspending their duly-elected prosecutors based on his disagreement with the prosecutors' reform-minded approaches.² In states like Pennsylvania, we have seen legislatures attempt to impeach the leading reform prosecutor—even after he was overwhelmingly reelected.³ And right here in California, we have seen repeated, heavily-funded recalls targeting reform-minded prosecutors by spreading misinformation and fear.⁴ All of these efforts may look different, but they come from the same playbook. These attempts to constrain or even remove prosecutors not only threaten criminal justice reform and progress—but also undermine local democracy.

The attacks on prosecutorial independence use different strategies in different states. In California, it's recalls. In Georgia, it's a commission. In Pennsylvania, it's impeachment. In Florida, it's the governor. And there are new strategies emerging frequently: In Utah, the legislature specifically targeted District Attorney Sim Gill, a Democrat in a very red state. The state passed a bill that audits every fifteen minutes of prosecutorial staff's time, but it only

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1. S.B. 92, 157th Gen Assemb., Reg. Sess. (Ga. 2023); 2023 Ga. Laws 718, § 2, at 720 (effective May 5, 2023) [hereinafter Ga. Senate Bill 92].

2. Fla. Exec. Order No. 22-176 (Aug. 4, 2022) (suspending State Attorney Andrew Warren); Fla. Exec. Order No. 23-160 (Aug. 9, 2023) (suspending State Attorney Monique Worrell).

3. H.R. 240 (Nov. 16, 2022) (impeaching Philadelphia District Attorney Larry Krasner).

4. San Francisco Proposition H (June 7, 2022) (recalling District Attorney Chesa Boudin); Alameda County, "General Election - Certified Final Results" (Nov. 5, 2024) (recalling District Attorney Pamela Price).

applies to Gill’s county of Salt Lake City, and not the rest of the state.⁵ Those who want to protect prosecutorial reform could try to fight these strategies individually, Whac-A-Mole style. But, more broadly, we need to see the common threads in these attacks and work to preserve prosecutorial independence and endorse the use of prosecutorial discretion in ways that promote justice.

This symposium unfolded less than two weeks prior to the 2024 election, in which there were many threats to democracy at play—including, as made clear by Project 2025, efforts to prevent local, reform-minded prosecutors from exercising their discretion and threatening to pursue legal action against local prosecutors.⁶ Protecting the role of prosecutors in responding to the changing needs and demands of their communities is a critical part of preserving our democracy. Indeed, Georgia’s bill would prevent a prosecutor who had been duly elected by her community, but removed by a state commission, from running again for 10 years.⁷ This quite literally disenfranchises the communities that voted for their prosecutor. These kinds of measures say to these communities: No, you don’t get to have who you want in office; you don’t get to determine how to achieve public safety in your community.

Make no mistake—these efforts to restrict prosecutors’ decision-making only cut one way. For decades, prosecutorial discretion was largely unchecked. Historically, prosecutors were able to use their broad discretion to make decisions that often caused great harm to many communities, whether through promoting mass incarceration, perpetuating racial disparities, or causing wrongful convictions, to name a few. Too many prosecutors lost sight of their duty to promote justice and instead became focused on securing convictions above all else.

Luckily, there are many prosecutors around the country who center their communities’ need for long-term public safety while reducing the harms of the legal system. We have now seen more and more prosecutors embrace new approaches to their work—ones that advance equity, hold the powerful to account, and rely on alternatives to incarceration that address the root causes of crime.

In this context, the Institute for Innovation in Prosecution (IIP) at John Jay College, the Berkeley Criminal Law and Justice Center (CLJC), *Berkeley Journal of Criminal Law*, the Freedman Institute for the Study of Legal Ethics at Hofstra Law, and the American Bar Association (ABA) Taskforce for

5. 2024 Utah Laws Ch. 538 (S.B. 273) (passed Mar. 1, 2024, effective July 1, 2025).

6. HERITAGE FOUNDATION, MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE – PROJECT 2025 PRESIDENTIAL TRANSITION PROJECT, 2023.

7. Ga. Senate Bill 92, § 2 (“In the event that a district attorney or solicitor-general is removed or involuntarily retired pursuant to this Code section, such individual shall be disqualified from being appointed or elected to the office of district attorney of any judicial circuit or to the office of solicitor-general of any county of this state for a period of ten years from the date of such removal or involuntary retirement.”)

Prosecutorial Independence co-hosted a symposium on discretion in the legal system in October 2024 at Berkeley Law. The day-long gathering attracted over 200 in-person attendees and hundreds more via Zoom from across the country.

Over the course of the symposium, panelists explored the many ways in which discretion plays a role in the legal system—and the driving forces behind changes to its use and impact. Some of the leading prosecutors who have been pioneers of using discretion in new ways shared their thoughts at the symposium, including Cook County State’s Attorney Kim Foxx; Dekalb County District Attorney Sherry Boston from Atlanta, Georgia; Ramsey County Attorney John Choi from St. Paul, Minnesota; former State Attorney for the Ninth Judicial Circuit Court of Florida Aramis Ayala; former San Francisco District Attorney Chesa Boudin; and Alameda County District Attorney Pamela Price.

As this new wave of prosecutors has emerged, so has the backlash. It is only now that prosecutors have begun adopting new reform-minded approaches that we see an unprecedented backlash to the breadth of prosecutorial discretion. Unsurprisingly, this wave of attempts to restrict the power of the prosecutor also comes as record numbers of women and people of color have been elected as prosecutors. As the executive director of the Institute for Innovation in Prosecution (IIP), a national prosecutorial reform organization, I am especially concerned about the recent, persistent threats to prosecutorial discretion, which the IIP is dedicated to combatting. I am inspired by the courage of those prosecutors who are willing to stand up to media vitriol and political fire while also facing personal attacks, including death threats. Dedicating your career to public service shouldn’t mean your own personal safety is compromised.

But these threats follow the unprecedented level of scrutiny that happens when reform-minded prosecutors take office. This extraordinary attention from the media and political figures often misleads the public. The general public is not very familiar with the processing of an ordinary criminal case: Few people have a real understanding of conviction rates, dismissal rates, plea deals, diversion rates, the course of a typical case, the elements of certain crimes, or what counts as sufficient evidence. But when there is nonstop coverage critiquing every decision in a prosecutor’s office—which often happens the moment a reform-minded prosecutor takes office—individual stories presented without context to a public unfamiliar with the ins and outs of the legal system create a distorted image of the prosecutor.⁸

8. As a concrete example, under DA Boudin, the media attention created a perceived crime wave, particularly around shoplifting or other petty theft, that was completely divorced from the reality. What we know is that these types of crimes had been very common in San Francisco for many, many years, if not decades. *See*, ERNESTO LOPEZ, ROBERT BOXERMAN & KELSEY CUNDIFF, “SHOPLIFTING TRENDS: WHAT YOU NEED TO KNOW,” COUNSEL ON CRIMINAL JUSTICE (Nov. 2023); Thea Sebastian & Hanna Love, *Retail theft in US cities: Separating fact from fiction*, BROOKINGS (Mar. 6, 2024) (“Even San Francisco—which has often been cited as having a ‘shoplifting epidemic’—saw a 5% decline in shoplifting between 2019 and 2023.”).

That distortion can lead to false assumptions about the impact of the prosecutor's actions; for example, many prosecutors are falsely blamed for crime trends, even when crime has not increased in their communities. Indeed, existing research has shown that prosecutorial reform does not lead to more crime. But members of the public who elected such reform-minded prosecutors sometimes report *feeling* unsafe, despite the reality of public safety in their communities. This is not surprising: this fear can come from the kind of anecdotes that could be cherry-picked from any prosecutor's office—these stories often get reported when a reform-minded prosecutor is in office, but don't get told when there is a more tough-on-crime prosecutor in office. This creates a false sense that reform-minded prosecutors are using their discretion in ways that are inappropriate and harmful. Then, as a result of this misinformation, some reform-minded prosecutors have been removed. After they have been removed, we have seen again and again that crime rates do not decrease afterwards. But the narrative about crime in the neighborhood does change significantly because the scrutiny has stopped since the reform prosecutor is no longer in office. This pattern reveals the urgent need not only for preserving prosecutorial discretion but also for public education on the role of the prosecutor.

This symposium included several members of the ABA Task Force for Prosecutorial Independence, on which I am proud to serve, as it views transparency and education about how prosecutors operate in the legal system as so critical.⁹ The public must understand what prosecutors do and how they make decisions on cases. And only then can community members make informed decisions and not be misled by political influences.

As the symposium panels dove deep into the role of prosecutorial discretion in various contexts, including charging decisions, sentencing approaches, and immigration impacts, we were also cognizant of the importance of preserving the independence of judges and the need to defend against efforts to restrict their discretion by compelling them to approach cases in a limited, narrow way. If we allow further restrictions on judicial independence, we will continue to see the role of discretion in the legal system chipped away when it is used to promote evidence-based, innovative approaches. This harms all of us. The importance of protecting the rights of local communities—and of locally elected prosecutors to advocate for them—cannot be overstated. If we care about democracy, and if we value fairness in our legal system, we must ensure that prosecutors and judges can remain independent.

What follows is the annual Symposium Edition of the *Berkeley Journal of Criminal Law*, including contributions from several of the speakers at the

9. ABA Task Force for Prosecutorial Independence, *Statement on Prosecutorial Independence* (Sep. 28, 2023), https://www.americanbar.org/content/aba-cms-dotorg/en/advocacy/governmental_legislative_work/publications/washingtonletter/sept-23-wl/prosecutors-0923wl/.

symposium, as well as scholars and practitioners discussing discretion in the legal system.