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The Prosecutor Lobby

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Abstract

Prosecutors shape the use of the criminal law at many points during criminal proceedings but there is an earlier point in the process where prosecutors have influence: during the legislative process. The conventional wisdom in legal scholarship is that prosecutors are powerful and successful lobbyists who routinely

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support laws that make the criminal law more punitive and oppose criminal justice reform. In this Article, we test that narrative with an empirical assessment of prosecutor lobbying in America. Using an original dataset of four years of legislative activity from all fifty states, we analyze how frequently prosecutors lobbied, the issues on which they lobbied, the positions they took, and how often they succeeded.

Our data tell a complex story of partial success for the prosecutor lobby. Prosecutors are less successful than expected when lobbying against bills, and they are most successful when lobbying in favor of criminal justice reform. By analyzing not only national data, but also data from each state, we document that prosecutorial success is correlated with Republican control of the state legislature. We further conclude that perceived expertise does not drive prosecutorial lobbying success and that legislatures in some contexts respond to the prosecutor lobby much as they would to any other self-interested rent-seeking lobbyists.

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INTRODUCTION

When Nebraska State Corrections Director, Scott Frake, told state lawmakers that the state's prison population hit a new high and that the prisons were at 163% of capacity,[1] state prosecutors went on the defensive. Criminal filings in Douglas County, the most populous county in the state which includes the city of Omaha, had increased more than thirty percent in the previous four years.[2] Nonetheless, the chief deputy prosecutor insisted that "prosecutors were not to blame for the overcrowding" because "they are just following the law."[3]

Of course, prosecutors have significant discretion about whether to bring criminal charges at all,[4] so any suggestion that increased criminal filings are required by law is simply false. But the idea that prosecutors are "just following the law"

1. *See* Kelsey Murphy, *Lincoln Correctional Center Warden Reassigned Pending Investigation*, 8 ABC (June 13, 2016), https://perma.cc/VL58-DSTD.

2. *See* Paul Hammel, *Nebraska Prison Population Hits New High; 'I Hope It's an Anomaly,' Corrections Chief Says*, OMAHA WORLD-HERALD (Mar. 19, 2019), https://perma.cc/GDV9-7T6Y.

3. *Id.*

4. *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408–10 (2001) ("The charging decision is arguably the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion. Prosecutors decide whether and how to charge an individual." (citations omitted)); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 676 (2014).

obscures another important truth—the role that prosecutors play in *shaping* the law in the legislature.

During the same four years that criminal filings in Douglas County increased more than thirty percent, Nebraska prosecutors were incredibly active lobbyists—they lobbied on more than ninety-five percent of criminal justice bills that were introduced in the state's legislature. Nebraska prosecutors were not only active lobbyists, but they also lobbied in favor of harsher criminal laws that would have increased the state's prison population.[5] At the same time, they also lobbied against more lenient laws that would have narrowed the scope of criminal law or decreased punishments.[6]

Nebraska is not the only state where prosecutors have been active lobbyists. Prosecutors across the country often testify in favor of or against legislation in their states.[7] Sometimes prosecutors play an even more active role in the legislative process, helping to draft legislation or offering amendments.[8]

The lobbying activity of prosecutors has attracted public attention in recent years. Journalists frequently comment on prosecutors' systematic efforts to block criminal justice reform,[9]

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5. *See* THE PROSECUTORS & POL. PROJECT, UNIV. N.C. SCH. L., PROSECUTOR LOBBYING IN THE STATES, 2015–2018, 173 (2021), https://perma.cc/XW32-XJV9 (PDF).

6. Nebraska introduced a total of 169 criminal justice bills in this time period. *Id.* Prosecutors lobbied on 161 of those bills. *Id.* Their lobbying activity included supporting thirty-three bills that would have either expanded the criminal law or increased punishments and opposing twelve bills that would have decreased the scope of criminal law or decreased sentences. *Id.* Their lobbying, however, was not uniformly in favor of punitive bills and against lenient bills. They opposed seventeen bills that would have either expanded the criminal law or increased punishments and they supported three bills that would have decreased the scope of criminal law or decreased sentences. *Id.*

7. *See id.* at 10.

8. *See, e.g.*, *id.* at 110 ("[T]he [Kansas County and District Attorneys Association] engaged in personal meetings with House and Senate leaders to discuss the bill prior to and during the relevant legislative session and they offered opposition testimony and amendments in committees.").

9. *See, e.g.*, Radley Balko, Opinion, *Behind the Scenes, Prosecutor Lobbies Wield Immense Power*, WASH. POST (Apr. 23, 2018), https://perma.cc/XRX2-TFZD; Jessica Pishko, *Prosecutors Are Banding Together to Prevent Criminal-Justice Reform*, THE NATION (Oct. 18, 2017), https://perma.cc/C34R-8TQK; Josie Duffy Rice, *Prosecutors Aren't Just Enforcing the Law—They Are Making It*, THE APPEAL (Apr. 20, 2018), https://perma.cc/7MNX-92JA.

and legal scholars have similarly highlighted the general phenomenon of prosecutor lobbying as a powerful force in favor of harsh, anti-reform laws.[10] A small body of scholarship has also detailed the influence of prosecutors on criminal justice policy in Congress[11] or in single states.[12]

This reporting and scholarship documents that much—and possibly the majority—of this lobbying is coordinated by statewide prosecutor associations that represent the interests of the state's elected prosecutors by sending registered lobbyists to the state capitol,[13] or by the U.S. Department of Justice at the

10. *See, e.g.*, RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 53–54 (2019) [hereinafter BARKOW, PRISONERS OF POLITICS]; LISA L. MILLER, THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL 10, 14, 64–65, 168–69 (2008) [hereinafter MILLER, THE PERILS OF FEDERALISM]; JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 93, 132, 158 (2017); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728 (2005) [hereinafter Barkow, *Administering Crime*]; John F. Pfaff, *A Second Step Act for the States (and Counties, and Cities)*, 41 CARDOZO L. REV. 151, 170 (2019); Aaron M. Williams, *The Noisy "Silent Witness": The Misperception and Misuse of Criminal Video Evidence*, 94 IND. L.J. 1651, 1683–84 (2019).

11. *See, e.g.*, MILLER, THE PERILS OF FEDERALISM, *supra* note 10, at 50–84 (discussing the lobbying of prosecutors and other law enforcement groups before Congress); Shon Hopwood, *The Misplaced Trust in the DOJ's Expertise on Criminal Justice Policy*, 118 MICH. L. REV.1181, 1184 (2020).

12. *See, e.g.*, RICHARD A. BERK ET AL., A MEASURE OF JUSTICE: AN EMPIRICAL STUDY OF CHANGES IN THE CALIFORNIA PENAL CODE, 1955–1971, 199–203 (1977); MILLER, THE PERILS OF FEDERALISM, *supra* note 10, at 85–125 (discussing lobbying efforts in the Pennsylvania legislature); Michael C. Campbell, *Politics, Prisons, and Law Enforcement: An Examination of the Emergence of "Law and Order" Politics in Texas*, 45 LAW & SOC'Y REV. 631, 642–43 (2011); Michael Serota, *Taking A Second Look at (In)Justice*, U. CHI. L. REV. ONLINE (2020) (discussing lobbying in the District of Columbia); Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, 41 CRIME & JUST. 211, 234 (2012) [hereinafter Wright, *Persistent Localism*].

13. *See* Pishko, *supra* note 9. *See generally* Tyler Yeargain, *Prosecutorial Disassociation*, 47 AM. J. CRIM. L. 85 (2020). The concept of state prosecutor associations, formed to lobby the legislature on criminal justice issues, dates to the late nineteenth and early twentieth centuries. *See, e.g.*, *District Attorneys' State Association*, SANTA CRUZ MORNING SENTINEL, Mar. 7, 1902, at 1 (discussing the formation of a prosecutor association in California); *Annual Convention of the Illinois State's Attorney's Association*, STREATOR DAILY FREE PRESS, June 29, 1899, at 3; *The Prosecutors: Annual Convention of the County Attorneys' Association*, THE TOPEKA DAILY CAPITAL, Dec. 23, 1892, at 5. Modern associations have expanded their missions to include professional training for prosecutors in topics such as trial advocacy or investigative methods. *See, e.g.*,

federal level.[14] Chief prosecutors in almost every state join these associations—many of which are state government entities—and rely on the organization to lobby for them;[15] in some states, assistant prosecutors can join the association as well.[16] These associations influence policy not only through their lobbying,[17] but also through their members' participation on various committees tasked with drafting new statewide policies.[18]

Many—though not all[19]—of the media and scholarly accounts of prosecutor lobbying have assumed that prosecutors are an active and powerful interest group that has succeeded in passing harsh criminal justice policies and in blocking reform.[20]

MICH. COMP. LAWS § 49.62 (2022) ("It shall be the duty of the prosecuting attorneys' association to keep the prosecuting attorneys of the state informed of all changes in legislation . . . to the end that a uniform system of conduct, duty and procedure be established in each county of the state."); *see also* Yeargain, *supra*, at 87–92.

14. *See, e.g.*, Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 587–88 (2002) ("The only area in which we heard that paid lobbyists had a limited role was standard criminal law issues, where there is no real lobby but where the Department of Justice is a regular player.").

15. *See, e.g.*, THE PROSECUTORS & POL. PROJECT, *supra* note 5, at 20, 52, 60, 197, 246 (discussing various prosecutor associations' organization). The association in Vermont is affiliated with the Sheriffs' Association. *See id.* at 284. Only Alaska, Connecticut, Delaware, New Jersey, and Rhode Island do not have statewide associations of prosecutors.

16. *See, e.g.*, *id.* at 63, 150, 159, 163, 203 (describing other state prosecutor associations' membership criteria).

17. For example, the Montana County Attorneys' Association employs a staff member whose title is "Government Relations/Lobbyist." *About*, MONT. CNTY. ATT'YS' ASS'N, https://perma.cc/X5JM-YP4S. In addition, the association appears in the state's lobbying database as a principal—that is to say, as an entity that employs lobbyists—and the database reveals the bills that the association supported or opposed. *See Search Registry for Lobbyists and Principals*, COMM'R OF POL. PRACS., https://perma.cc/4BXL-BGJ5.

18. *See* Yeargain, *supra* note 13, at 92–96; *see also, e.g.*, Campbell, *supra* note 12, at 653–56; Wright, *Persistent Localism*, *supra* note 12, at 234.

19. *See, e.g.*, Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 206 (2019) ("Cutting through the hyperbole, then, claims of prosecutorial power turn out to be little more than vaguely articulated, undeveloped contentions about prosecutorial freedom to manipulate the power held by others.").

20. *See supra* notes 9–12 and accompanying text.

Some have gone so far as to claim that prosecutors have helped Republican officials win political control of a state.[21]

In support of these claims, journalists generally point to a few high-profile examples and academics tend to rely on case studies of specific pieces of legislation, particular time periods in Congress, or a single state legislature.[22] But it is unclear whether those examples and case studies offer any general truths about the prosecutor lobby. When it comes to many criminal justice issues, practices and results vary depending on the state and the surrounding context. There is reason to think that prosecutor lobbying is not a monolith.

This Article aims to provide an empirical account of prosecutor lobbying in America.[23] Using an original dataset of four years of legislative activity from all fifty states, we analyze how often prosecutors lobbied, the issues on which they lobbied, the positions that they took, and whether they succeeded. Based on the existing academic literature, we expected to find (1) that

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21. *See infra* notes 118–120 and accompanying text.

22. *See, e.g.*, Balko, *supra* note 9.

23. It appears that ours may be the first systematic empirical study of prosecutor lobbying. Our own research has uncovered no such study, which is consistent with other work in the field. *See* Bellin, *supra* note 19, at 208 (noting that there "has been no systematic study" of the lobbying positions of prosecutors and the correlation between that lobbying and the passage or defeat of legislation); *see also* Erika S. Fairchild, *Interest Groups in the Criminal Justice Process*, 9 J. CRIM. JUST. 181, 182 (1981) ("What has been missing in the study of the politics of criminal justice, however, has been systematic empirical research about general questions related to interest-group influence and operations."); Barbara Ann Stolz, *The Roles of Interest Groups in US Criminal Justice Making: Who, When, and How*, 2 CRIM. JUST. 51, 51, 53 (2002) [hereinafter Stolz, *The Roles of Interest Groups*]. Zoe Robinson and Stephen Rushin have collected media accounts of lobbying by law enforcement organizations and prosecutors as part of a critique of such lobbying grounded in political theory but they did not systematically collect data about the prevalence or results of such lobbying. *See generally* Zoe Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 MINN. L. REV. (forthcoming 2023) (available at https://perma.cc/E8MA-CZSK).

More recently, Brenner Fissell collected illustrative examples of the participation of law enforcement officers and organizations in the drafting of local criminal ordinances. *See* Brenner Fissell, *Police-Made Laws*, 108 MINN. L. REV. (forthcoming 2024) (available at https://perma.cc/3DKY-GTVF). His primary objective in the article is normative, identifying the conditions under which police participation in the lawmaking process is illegitimate. Fissell does not make findings about the prevalence of police lawmaking or the typical topics or outcomes of their participation.

prosecutors lobbied frequently; (2) that they typically hoped to increase the scope of criminal law and sentences; and (3) that they usually achieved their policy goals.

Our data tell a complicated story of partial success for the prosecutor lobby. Prosecutors were quite active—lobbying on more than a quarter of all criminal justice bills that were introduced. They were also successful in getting legislation passed; in general, bills that prosecutors supported were more likely to pass than other criminal justice bills. On the other hand, prosecutors were not particularly successful in opposing legislation—bills that they opposed were passed at essentially the same rate as all criminal justice bills. This finding is inconsistent with the political science literature on lobbying which indicates that, as a general matter, those who lobby against the passage of new legislation are more likely to succeed than those who lobby in favor.[24] This inconsistency suggests that the prosecutor lobby differs from lobbyists for other special interests.

The data are even more interesting when we separate bills by issue. As the academic literature predicts, prosecutors often lobby in favor of harsher laws and are typically successful when they do so.[25] Legislatures, however, are perfectly happy to pass these harsh laws without prosecutor support, or even in the face of prosecutor opposition.

Perhaps most surprising is how prosecutor lobbying plays out in the context of criminal justice reform bills. Prosecutors are less likely to support bills to create new defenses, reduce punishments, or otherwise make criminal law more lenient than they are to support bills that would make criminal law harsher. Once they take the plunge to support such lenient bills, however, prosecutors succeed *more often* than they do for other types of bills. Indeed, prosecutor lobbyists are most effective when they play against expectations. These findings suggest that prosecutors could serve as an important avenue for criminal justice reform. Those who wish to make the criminal law more lenient may find their legislative agenda more likely to advance if they secure the support of prosecutors.

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24. *See infra* notes 96–101 and accompanying text.

25. *See supra* notes 9–12 and accompanying text.

Our data also make clear that prosecutor lobbying differs dramatically among the states. The prosecutors in some states are quite active: in Ohio, for example, prosecutors lobbied on more than ninety-five percent of criminal justice bills.[26] But in other states, prosecutors rarely lobby. In five states, prosecutors lobbied on less than ten percent of the criminal justice bills introduced.[27]

The success of prosecutorial lobbying is similarly mixed. In many states, prosecutors' lobbying efforts appear to be quite successful. In Illinois, for example, bills were four times more likely to pass when state prosecutors supported them.[28] Similarly, in Arizona, not a single bill that prosecutors opposed became law.[29] In some places, however, prosecutors have not been nearly as successful. In Nebraska, prosecutors' support of a bill does not result in bills passing at a higher rate.[30] And in ten states, including California and Georgia, bills that prosecutors oppose actually pass at a higher rate than criminal justice bills more generally.[31] In other words, it is a mistake to treat prosecutor lobbying as a single national phenomenon; as with many criminal justice issues, there are significant differences across the country.

These differences point to future lines of research about the factors that lead to the success and failure of prosecutorial lobbying, as well as factors that influence the adoption or rejection of criminal justice policy more generally. As an initial observation, our analysis suggests that the partisan control of state legislatures is correlated with success rates for the prosecutor lobby.

In sum, the data suggest that prosecutor lobbyists do not succeed based simply on their expertise—their greatest failures and their greatest successes both happen in areas of prosecutorial expertise. Rather, legislators respond to prosecutors as if they are self-interested lobbyists. Prosecutor lobbyists fail most often when they argue for budget increases

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26. *See infra* APPENDIX B.

27. *See infra* APPENDIX A.

28. The average pass rate for criminal justice bills in Illinois is 9.75%; of the bills that prosecutors supported, 39.53% passed. *See infra* APPENDIX B.

29. *See infra* APPENDIX B.

30. *See infra* APPENDIX B.

31. *See infra* APPENDIX B.

for their own departments and succeed more often when they argue against-type, i.e., in favor of bills that could benefit the public interest through decreased use of the criminal courts (even though these bills make prosecutors' traditional courtroom jobs more difficult).

This Article represents the opening statement in what we hope will be a broader conversation about the influence and agenda of the prosecutor lobby. By supplying both specific examples and comprehensive data about prosecutorial lobbying, we aim to move the academic conversation on this topic beyond anecdote and assumption. Our national statistics and preliminary state analyses make it possible to spot patterns within the heterogeneous and complex outcomes. Sometimes those patterns show predictable incentives at work, while in other settings the patterns of outcomes show conflicting influences on prosecutors and legislators. The data also mark the limits of our knowledge about prosecutor influence, suggesting fruitful areas for further research.

This Article proceeds in four parts. Part I summarizes the current state of knowledge about prosecutor lobbying. It identifies news accounts of prosecutorial lobbying and describes the existing academic literature on the topic, noting the predominant legal theory that prosecutors lobby (successfully) to expand their own power. Part I also provides an overview of the political science literature on lobbying.

Part II reports the result of our nationwide study of prosecutor lobbying in state legislatures. It describes our methodology and provides an overview of our findings—findings about the sort of legislation that was introduced, the frequency with which prosecutors lobbied, how that lobbying differed depending on the legislative topic, and the average success rates of prosecutorial lobbying across all states and all types of bills. Part II takes a closer look at what happens when prosecutor lobbying defies expectations. It explores the bills that prosecutors supported even though the bills would have made the criminal law more lenient. Conversely, it discusses prosecutor opposition to some bills even though they would have made the criminal law more severe.

Part III moves from a national analysis to analyzing each state separately. It identifies which states had the most successful and the least successful prosecutorial lobbying

efforts. Further, it explains that prosecutorial success appears to be correlated with Republican control of legislatures.

Part IV discusses the best ways to characterize the prosecutor lobby in light of our data. Prosecutor lobbyists appear to block legislation most effectively during the agenda-setting stage before the bills are even introduced. Their success during the formal legislative process shifts over to the bills that they support, while they fail more often when they attempt to block legislation after the process begins. The pattern of legislative outcomes also shows that prosecutor expertise does not drive success rates in the legislature; instead, the prosecutor lobby succeeds more frequently on some issues and less frequently on others, even though prosecutor expertise remains equally strong across those issues.

Part IV also records an unexpected observation from our study. In addition to showing that the conventional wisdom surrounding prosecutor lobbying is oversimplified, we also find that a common metaphor for criminal law legislation—namely that it operates as a "one-way ratchet" that always makes criminal law more punitive and never more lenient[32]—does not accurately capture what is happening in state legislatures. While it is certainly true that legislatures introduced and passed more punitive bills, the smaller number of lenient bills that were introduced actually passed at a higher rate. We explain why this pattern suggests that legislatures can, and do, shrink the footprint of the criminal justice system, and thus why the metaphor is outdated.

Part IV closes with our observations about the changing political landscape for criminal legislation. In states where prosecutors no longer speak with a single voice through their statewide association, the influence of the prosecutor lobby may wane or it may strike out in new directions.

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32. *E.g.*, Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 773 (2005); Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293, 301 (2005); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 547 (2001).

I. CURRENT UNDERSTANDINGS OF THE PROSECUTOR LOBBY

Although ours appears to be the first national study of prosecutor lobbying, the phenomenon is hardly unknown. Incidents of prosecutors supporting or opposing bills frequently appear in media accounts of state legislative agendas. Furthermore, the legal literature contains multiple claims about the prevalence and nature of prosecutor influence on criminal justice legislation, and there is a small political science literature on the practice.

In this Part, we describe the media coverage of prosecutor lobbying, as well as the academic writings on the topic. We supplement the legal literature on prosecutor lobbying with an overview of the political science literature on lobbying more generally and prosecutor lobbying specifically.

A. *Prosecutor Lobbying in the News*

Any consumer of political news can recall times when criminal prosecutors lobbied the state legislature, expressing views about bills related to criminal law and its enforcement. Indeed, reporters write stories on this topic whenever the state legislature is in session.[33] Some journalists have even begun to write about prosecutor lobbying as a broader phenomenon.[34]

Some of these prosecutor lobbying efforts appear in the news by design. The prosecutors' statements are loud and proud; they use various communication channels to reach a broad audience that the lobbyists hope will ultimately sway the legislators. Consider New York's bail reform. When the state

33. Sometimes those stories address only specific bills or policy proposals. *See, e.g.*, Reed Allen, *Arkansas Lawmakers Mull Pro-gun Proposals*, KSL.COM (Feb. 8, 2015), https://perma.cc/8J7M-7S8Z (detailing the Arkansas Prosecuting Attorneys Association's opposition to a "stand your ground" bill); Matt Buedel & Dean Olsen, *Illinois Bill Would Establish Nation's Highest Marijuana-Impaired Driving Threshold in U.S.*, THE STATE J.-REG. (June 27, 2015), https://perma.cc/B64U-7678 (highlighting the Illinois State's Attorneys Association's support for a marijuana decriminalization bill). Other stories include coverage of prosecutors' legislative agenda more generally. *See, e.g.*, Steve Garrison, *San Juan County DA Rick Tedrow Talks About His Work This Legislative Session*, FARMINGTON DAILY TIMES (Mar. 14, 2015), https://perma.cc/88TV-MK87; *Prosecutors Push for Legislative Action to Curb Drug Crime*, DAILY NEWS (Dec. 11, 2015), https://perma.cc/8EBM-WZ2W.

34. *See supra* note 9.

legislature considered bills in 2019 to limit the use of cash bail as a mechanism for releasing defendants from jail prior to their trial dates, the District Attorneys Association of the State of New York ("DAASNY") opposed the most ambitious of these bills, asking legislators to adopt more limited changes.[35] Once the legislature enacted a statute in 2019 that DAASNY did not favor, prosecutors joined with law enforcement lobbyists to roll the law back in 2020.[36] The prosecutors made frequent public statements, highlighting examples of defendants they considered to be dangerous who were released under the new law.[37] The prosecutors pointed to crime increases that coincided with the passage of the reform statute and highlighted individual crimes allegedly committed by defendants released after their arrests for previous crimes.[38] In the end, the legislature replaced the 2019 law with a weaker version that was more to the prosecutors' liking.[39]

At other times, prosecutors work more quietly to influence legislation. A news story might describe the bill and mention

35. *See* Denis Slattery, *Advocates for Criminal Justice Reform Accuse Prosecutors, State Task Force of Falling Short on Bail Changes*, N.Y. DAILY NEWS (Mar. 4, 2019), https://perma.cc/LMQ6-SNYU; Jesse McKinley & Ashley Southall, *Kalief Browder's Suicide Inspired a Push to End Cash Bail. Now Lawmakers Have a Deal*, N.Y. TIMES (Mar. 29, 2019), https://perma.cc/P3Y6-SZPD. The legislature also voted on changes to criminal discovery laws in 2019, adopting another reform that DAASNY opposed. *See* Ashley Southall & Jan Ransom, *Once as Pro-Prosecution as Any Red State, New York Makes a Big Shift on Trials*, N.Y. TIMES (May 2, 2019), https://perma.cc/33DN-FS5P.

36. *See* Nick Pinto, *The Backlash: Police, Prosecutors, and Republicans Are Looking to Undo a Criminal Justice Reform in New York*, THE INTERCEPT (Feb. 23, 2020), https://perma.cc/5K9H-QDBZ; Ebony Bowden, *State's New Cash Bail Reform Puts Public at Risk: District Attorneys*, N.Y. POST (Apr. 10, 2019), https://perma.cc/46MJ-M865; Dan Frosch & Ben Chapman, *New Bail Laws Leading to Release of Dangerous Criminals, Some Prosecutors Say*, WALL ST. J. (Feb. 10, 2020), https://perma.cc/QH95-5ZTY.

37. *See supra* note 36.

38. *See* Pinto, *supra* note 36.

39. *See* Taryn A. Merkl, *New York's Latest Bail Law Changes Explained*, BRENNAN CTR. FOR JUST. (Apr. 16, 2020), https://perma.cc/SL5A-G3AP; Jeff Coltin, *How New York Changed Its Bail Law*, CITY & STATE N.Y. (Apr. 4, 2020), https://perma.cc/T4TD-2DXU ("New York avoided making a major change to its system of pre-trial detention in this year's state budget, with lawmakers instead making tweaks to the bail law that will likely result in more people being held in jail while they await trial."); Beth Fertig, *What the New Rollbacks to Bail Reform Mean in New York*, GOTHAMIST (July 2, 2020), https://perma.cc/HH5D-N9A9.

that prosecutors took an interest in it, but the details of the prosecutors' involvement remains fuzzy. In 2019, for example, a libertarian-leaning Republican in the Missouri House of Representatives introduced a bill to make it more difficult for law enforcement agencies to obtain cash and other property from suspected drug traffickers through civil asset forfeiture.[40] After the bill passed unanimously through a criminal justice committee, prosecutors approached the chair of the House Rules Committee to express their opposition to the bill.[41] The prosecutors and police groups who opposed the bill never testified publicly against it, but in private conversations with legislators they framed it as "anti-police" and an interference with their "war on drugs."[42] The Rules Committee's chair never brought the bill onto the floor of the House for a vote.[43]

Standing alone, news accounts cannot provide a comprehensive picture of prosecutorial lobbying. Although some media coverage treats prosecutorial lobbying as newsworthy in and of itself, much of the coverage appears in the context of reporting about a particular piece of legislation—the reports frame prosecutors' involvement as merely one piece of that legislative story.[44] Media coverage is also less than comprehensive because the news does not cover every criminal justice bill that is introduced. As a result, prosecutorial lobbying on more mundane or less newsworthy legislation frequently goes unreported.[45]

News coverage of prosecutor lobbying may also not occur when prosecutorial influence occurs outside of the public eye. That influence might take the form of unobserved telephone calls or closed-door meetings. Longstanding relationships between veteran legislators and prosecutors could also influence

40. *See* Mimi Wright, *How a Quiet Police Lobbying Campaign Killed Civil Asset Forfeiture Reform in Missouri*, ST. LOUIS PUB. RADIO (Dec. 30, 2019) [hereinafter Wright, *Quiet Police Lobbying*], https://perma.cc/ANT7-JWLB.

41. *Id.*

42. *Id.*

43. *Id.*

44. *See supra* note 33 and accompanying text.

45. *Cf.* FRANK R. BAUMGARTNER ET AL., LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY 18 (2009) (reporting that "most" of the legislative agenda items in a comprehensive study of lobbying "received little or no news coverage in mainstream media outlets").

the filing of bills without any public discussion ever happening.[46] If insiders decide to talk about that influence, then it may receive media coverage—as was the case with the 2019 Missouri bill described above.[47] But if insiders do not talk about it, then that "substantively meaningful influence will always remain unobservable."[48] Thus, as a general matter, news coverage can only provide a partial—and perhaps skewed—glimpse of prosecutor lobbying.

B. *Prosecutor Lobbying in the Academic Literature*

When legal scholars discuss prosecutorial lobbying, they largely conclude (1) that prosecutors lobby to expand their own power by supporting broad criminal laws with harsh penalties and by opposing criminal justice reform; (2) that those lobbying efforts are largely successful; and (3) that the result is a criminal justice system with laws and procedures that benefit prosecutors and other law enforcement.[49] Some scholars, however, have reached different conclusions about what prosecutors want the legislature to do and how often prosecutors convince the legislature to vote their way.[50] And, as discussed below, the dominant theory in the legal literature is not entirely consistent with the robust political science literature on lobbying more generally.

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46. *See* Alex Burness, *At Colorado's Capitol, Prosecutors No Longer Rule the Roost*, DENVER POST (June 20, 2021), https://perma.cc/AUB6-WND6; *see also* David Lowery, *Lobbying Influence: Meaning, Measurement, and Missing*, 2 INT. GRPS. & ADVOC. 1, 6–7 (2013) ("A lot of what rightfully should be labeled influence probably takes place via such shaping of initial bargaining positions by anticipated reactions, but it is essentially invisible to most research on lobbying.").

47. *See supra* notes 40–43 and accompanying text.

48. Lowery, *supra* note 46, at 8; *see also* BERK ET AL., *supra* note 12, at 23–24 (noting the importance of "closed-door negotiations" in a California case study).

49. *See* Barkow, *Administering Crime*, *supra* note 10, at 728 ("[O]ne of the most—if not *the* most—powerful lobbying groups in criminal law consists of those charged with exercising the penal power: law enforcement, and in particular, prosecutors." (emphasis in original)); Balko, *supra* note 9 (noting a prosecutor association that has "scuttled [criminal justice] reform efforts for years").

50. *See, e.g.*, Bellin, *supra* note 19, at 207–08 ("The mechanism by which prosecutorial lobbying influences criminal law is unclear.").

The conventional wisdom in legal scholarship about prosecutors and crime legislation applies insights from public choice theory.[51] According to this view, prosecutors generally want to expand their own power and usually convince legislators to go along.[52] William Stuntz, who articulated the most detailed account of this conventional wisdom, posited that legislators routinely expand the substantive criminal law and increase the available range of sentences.[53] Expanded sentencing and charging options not only give prosecutors more power to obtain more severe prison sentences,[54] but also allow prosecutors to obtain more convictions with fewer resources by threatening defendants with greater trial penalties and inducing more plea agreements.[55]

Stuntz's narrative about the partnership between prosecutors and legislators to increase the depth and breadth of criminal law is largely theoretical. Other scholars, however, have pursued concrete empirical research about prosecutor lobbying.[56] This empirical research ordinarily takes the form of case studies—studies of criminal legislation in a single state, legislature, or in Congress during a particular time, or studies of the passage of particular legislation.[57]

An early study of criminal legislation in the Illinois legislature, for example, found that police and prosecutors were the most demanding and the most influential voices in the

51. Public choice theory, in a nutshell, is the use of economic tools to examine political science topics. *See* Gordon Tullock, *Public Choice*, *in* NEW PALGRAVE DICTIONARY OF ECONOMICS 723, 723–27 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008). *See generally* DENNIS C. MUELLER, PUBLIC CHOICE III (2003).

52. Public choice theory bases analysis around the idea that individuals act selfishly through their political behavior, and so prosecutors would want to use politics to increase their power. *See supra* note 51.

53. *See generally* Stuntz, *supra* note 32.

54. *See* FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 24–26, 66–68, 83–84 (2001); *see also* Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUST. 1, 13–15, 17–18 (2012).

55. *See* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 35–60 (2021).

56. *See, e.g.*, Nourse & Schacter, *supra* note 14, at 587–88.

57. *See supra* notes 11–12 and accompanying text.

legislative process.[58] That study reported that, in 1967, the prosecutor's office in Cook County "proposed a legislative program consisting of several bills."[59] Interestingly, while a representative of the prosecutor's office testified in favor of those bills, "he tried to limit rather strictly the number of times he testified for bills not sponsored by his own office because he felt that if he appeared before the legislature too often his effectiveness would be diminished."[60] Equally of interest, the study found that the Cook County State's Attorney was usually the only prosecutor lobbying in favor of these bills—the statewide association did not "regularly" lobby, though the authors noted that such lobbying might occur in the future.[61]

More recently, Shon Hopwood systematically analyzed the lobbying efforts of the U.S. Department of Justice and the National Association of Assistant U.S. Attorneys' ("NAAUSA") in the past decade.[62] He found that federal prosecutors are active lobbyists and that they have "affirmatively opposed most federal criminal justice reforms on issues involving sentencing, corrections, and clemency."[63] Hopwood also concluded that this lobbying was often successful, giving prosecutors "a vise-like grip on federal policymakers when deciding criminal justice issues."[64]

As these examples illustrate, the legal literature largely portrays prosecutors as active and successful lobbyists whose lobbying efforts favor law-and-order policies and block criminal justice reform. This literature does not merely make empirical claims about the frequency and success of prosecutor lobbying, it also criticizes the practice. That criticism takes two related but distinct forms. The first is that, when lobbying for harsher laws and against reform, prosecutors have a conflict of interest.[65] Broadly written laws and laws that otherwise provide leverage in plea bargaining serve the self-interest of prosecutors

58. *See* John P. Heinz et al., *Legislative Politics and the Criminal Law*, 64 NW. U. L REV. 277, 339 (1969).

59. *Id.* at 288 (citation omitted).

60. *Id.* at 289.

61. *Id.* at 290.

62. *See generally* Hopwood, *supra* note 11.

63. *Id.* at 1184.

64. *Id.* at 1185.

65. *See* Hopwood, *supra* note 11, at 1202.

by making their cases "easier to prove."[66] Commentators argue that, to the extent that their positions are based on self-interest, prosecutors are not offering honest assessments of what lawmakers should do.[67]

The second criticism is about prosecutors' expertise. Sometimes the complaint is addressed to prosecutor influence in specific areas of the law, such as corrections policy, about which they have no genuine expertise.[68] Others question prosecutorial expertise more generally regarding criminal justice policy decisions, noting that prosecutors do not have the training or the knowledge about what policies most effectively increase public safety:

> [P]rosecutors often lack the necessary expertise to know what does and does not work across a range of criminal justice options. While they often believe they are experts in public safety, they are not criminologists or social scientists who study these issues on a regular basis. When they decide policy questions, it tends to be from their own experience as prosecutors, uninformed by broader data or empirical analysis.[69]

These two criticisms may seem unrelated—after all, a person can act in her own self-interest even if she possesses relevant expertise. As Hopwood explains, though, they are connected because lawmakers often defer to prosecutors' views on the mistaken assumption that prosecutors are experts.[70] In

66. BARKOW, PRISONERS OF POLITICS, *supra* note 10, at 7 (citation omitted); *see also* Robinson & Rushin, *supra* note 23, at 37–39.

67. *See* BARKOW, PRISONERS OF POLITICS, *supra* note 10, at 7 ("If prosecutors cared mainly about public safety instead of what made their professional lives easier, they would be just as vocal about other issues that affect the successful reentry or reform of individuals who have committed crimes.").

68. *See* Hopwood, *supra* note 11, at 1202. Hopwood argues that Congress should instead listen to "policy experts," including criminologists, economists, political scientists, and legal scholars, who "agree that the criminal justice system can be reformed in ways that protect liberty and improve public safety, human lives, and communities, all at a lower cost." *Id.* at 1202–03.

69. BARKOW, PRISONERS OF POLITICS, *supra* note 10, at 166. While Hopwood and Barkow question the expertise of prosecutors, Heinz and his coauthors appear to take for granted that prosecutors' experiences necessarily lead to expertise. *See* Heinz et al., *supra* note 58, at 354.

70. *See* Hopwood, *supra* note 11, at 1184.

reality, so the argument goes, prosecutors do not actually possess relevant expertise, but the self-interested views that prosecutors offer to lawmakers are nonetheless mistaken for expertise.[71]

Although the prevailing academic wisdom is that prosecutors are frequent and powerful lobbyists whose efforts have resulted in broad and harsh criminal laws, that view is not universally shared. Jeffrey Bellin has most directly challenged the view that prosecutorial lobbying is responsible for our current criminal justice policies.[72] Bellin notes that prosecutors do not "possess the traditional means to influence legislators"—namely large memberships or significant amounts of money[73]—and that prosecutors "often lose" when they lobby against the interests of "traditional lobbying groups, such as the gun lobby."[74] While Bellin recognizes that the lobbying positions of prosecutors sometimes correspond to the success or failure of legislation, he argues that the correlation may be attributable to "a shared interest among prosecutors and lawmakers" rather than the lobbying power of prosecutors.[75]

> [P]rosecutors have little need to lobby. Given a choice, legislators (and their voters) often favor the ("tough-on-crime") positions that prosecutors traditionally take. A similar story could be spun about public parks. Legislators don't support parks because the parks department and park ranger associations are a powerful lobbying force. Legislators support parks because voters do too. These are bland stories of legislative power in a

71. *See* Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 392 (2017) ("[I]t defies everything we know about human nature as well as government incentives to expect prosecutors in the Department to [reform criminal justice policies] objectively and without prioritizing prosecutorial interests above other valid interests.").

72. *See* Bellin, *supra* note 19, at 206–07.

73. *Id.* at 207.

74. *Id.*; *see also* Wright, *Persistent Localism*, *supra* note 12, at 235–36 (noting that "district attorneys do not always succeed in their lobbying efforts" and recounting legislative defeats in North Carolina).

75. Bellin, *supra* note 19, at 208 (citation omitted). Indeed, Bellin's view is consistent with Stuntz's description of the relationship between legislatures and prosecutors, as well as legislative incentives. *See* Stuntz, *supra* note 32, at 546–57.

> democracy, not conspiratorial tales of prosecutorial (or park ranger) power.[76]

In other words, Bellin argues that prosecutorial lobbying is merely incidental to legislators' desires to pass laws broadening the criminal law and increasing sentences.

Bellin is not alone in his rejection of the conventional wisdom.[77] Darryl Brown has also pushed back against the notion that legislatures are always quick to expand the criminal law and loathe to contract it, and that this "one-way ratchet" is attributable, in part, to the fact that "prosecutors are especially effective lobbyists for criminal law expansion."[78] Brown provides empirical backing for his skepticism. After analyzing all the criminal law bills introduced in three state legislatures over several years, he found "that criminal law bills succeed roughly as often as—in fact, probably slightly *less often than*—legislative proposals on other topics."[79] Based on these findings, Brown concluded that criminal law legislation does not "have unusual advantages in overcoming the multiple hurdles to a bill's

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76. Bellin, *supra* note 19, at 208.

77. There is some support for this view in the political science literature as well. *See* STUART A. SCHEINGOLD, THE POLITICS OF STREET CRIME: CRIMINAL PROCESS AND CULTURAL OBSESSION 30 (1991) ("At the national level, where the war on street crime is . . . a symbolic activity uniting 'us' against 'them,' politicization resonates very well with the public and is thus a tempting target of opportunity for politicians."); CHRISTINA L. BOYD ET AL., THE POLITICS OF FEDERAL PROSECUTION 103–19 (2021) (developing a theory of prosecutorial responsiveness to legislative activity).

78. Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 232 (2007) (citation omitted). Brown also takes aim at the conventional wisdom that "majority preferences lean strongly and consistently in favor of expanded offenses and more severe punishment." *Id.* (citation omitted). In this, he is not alone. Other legal scholars take issue with the idea that voters have stable preferences that favor expanded reach of the criminal law. *See, e.g.*, Lauren M. Ouziel, *Democracy, Bureaucracy and Criminal Justice Reform*, 61 B.C. L. REV. 523, 543–45 (2020) ("[T]he 'public' in criminal justice over the last half-century has been a messy, dynamic, and constantly shifting concept."). These scholars note that, in some times and places, the public might have more moderate views that balance their public safety concerns against other potential public goods. *See, e.g.*, Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 253–61 (2004). Regardless, the question of voters' preferences is distinct from the role that prosecutorial lobbying plays in the setting of criminal justice policy.

79. Brown, *supra* note 78, at 246 (emphasis in original).

passage," and that those who lobby in favor of new criminal laws are not more powerful than other interest groups.[80]

Of course, legal scholars are not the only group to have studied lobbying by prosecutors or lobbying more generally. The political science literature, for example, has long claimed that public policy results from the work and desires of different, and sometimes competing, interest groups.[81] Beginning from this premise, political scientists seek to understand politics by focusing on "the aggregation of groups in any given policy arena."[82]

Interest group theory offers various ways to understand how different interests shape the work of legislatures, including through lobbying.[83] Some policy changes occur simply because they are broadly popular and capture the attention of lawmakers. In other settings, however, more complicated stories carry the day. Private interests that favor change could be comprised of relatively small groups that nonetheless remain powerful because they can organize easily and because the interests on the other side of the issue are diffuse and unlikely to speak up.[84] In other words, interest group lobbying allows smaller groups to serve their own interests at the expense of the greater good.

But interest group lobbying can also serve the greater good. Small groups might carry great influence because they focus and articulate the preferences of larger and more diffuse groups.[85]

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80. *Id.* at 249; *see also* Heinz et al., *supra* note 58, at 355 ("The politics of criminal law is politics as usual.").

81. *See generally, e.g.*, ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT: A STUDY OF SOCIAL PRESSURES (1908); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS: PUBLIC INTERESTS AND PUBLIC OPINION (1951).

82. Albert P. Melone & Robert Slagter, *Interest Group Politics and the Reform of the Federal Criminal Code*, *in* THE POLITICAL SCIENCE OF CRIMINAL JUSTICE 41, 41 (Stuart Nagel et al. eds., 1983).

83. *See, e.g.*, Richard L. Hall & Alan V. Deardorff, *Lobbying as Legislative Subsidy*, 100 AM. POL. SCI. REV. 69, 72–76 (2006).

84. *Cf.* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOCAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 67–73 (1965).

85. *See, e.g.*, Scott E. Kalafatis & Maria Carmen Lemos, *The Emergence of Climate Change Policy Entrepreneurs in Urban Regions*, 17 REG'L ENV'T CHANGE 1791, 1791–92 (2017); Paul Cairney, *Three Habits of Successful Policy Entrepreneurs*, 46 POL'Y & POL. 199, 206–10 (2018).

In this model, interest group lobbying enables lawmakers to adopt policies that are optimal for the broader community.

Prosecutors' lobbying could potentially satisfy either model. On the one hand, there is little doubt that state prosecutors are well-organized—especially as compared to groups that might speak for those who have been or will be accused of crimes.[86] As detailed above, prosecutors in most states have organized themselves into associations that articulate policy agendas and lobby the legislature.[87] And when prosecutors lobby for laws that would increase their funding or make it easier for them to seek convictions, that lobbying—at least at first glance—can be explained by the idea of rent-seeking or acting in self-interest.[88] On the other hand, when they lobby, prosecutors purport to speak for crime victims or for the public's interest in safe communities.[89] Moreover, the laws for which they lobby do not appear to serve prosecutors' interests as individuals—for example, they do not stand to financially benefit from laws that lengthen sentences.

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86. *See* Rachel E. Barkow & Kathleen M. O'Neill, *Delegating Punitive Power: The Political Economy of Sentencing Commission and Guideline Formation*, 84 TEX. L. REV. 1973, 1980–81 (2006) (explaining that, with the exception of those who care about white collar crime, "the groups that seek shorter sentences and more flexible sentencing authority do not wield much political power"); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1029–31 (2006); *see also* Carissa Byrne Hessick & Nathan Pinnell, *Special Interests in Prosecutor Elections*, 19 OHIO ST. J. CRIM. L. 39, 49–57 (2021).

87. *See supra* note 13.

88. *See, e.g.*, Fairchild, *supra* note 23, at 188 (noting that the involvement of criminal justice interest groups, including prosecutors, "tends to reinforce . . . the various self-interest theories about motivation to participate in group processes"); Lisa L. Miller, *Rethinking Bureaucrats in the Policy Process: Criminal Justice Agents and the National Crime Agenda*, 32 POL'Y STUD. J. 569, 584 (2004) [hereinafter Miller, *Rethinking Bureaucrats*] (hypothesizing that prosecutors and other law enforcement interests lobbying before Congress "may connect the material interests of criminal justice agencies to federal spending").

89. *See, e.g.*, Andrew DeMillo, *Proposal to End Life Without Parole for Juveniles Tabled*, WASH. TIMES (Feb. 17, 2015), https://perma.cc/89FE-RQGN ("[The] president of the Arkansas Prosecuting Attorneys Association . . . told the committee that . . . making juveniles eligible for parole after they have already been sentenced disrespects victims' families and the juries in the cases.").

The political science literature on lobbying is not just theoretical; it is also empirical. This literature attempts to document which groups, including government officials,[90] are involved in lobbying and under what circumstances lobbyists succeed in getting new legislation passed.[91] Interestingly, the empirical findings on lobbying do not unambiguously support the theoretical framework on interest groups.[92] As one scholar put it:

> For those who try to quantify and systematically measure [interest group] influence . . . it has proved illusive. . . . Almost everyone believes that interest groups are influential, and yet systematic studies have as often pointed to the limits on interest group influence as have concluded that strong influence exists.[93]

Put differently, the large empirical literature on the effectiveness of lobbying in passing new legislation is "decidedly mixed," with some studies uncovering evidence that lobbying influences results, "but just as many turn[ing] up little or none."[94] What is more, the mixed state of the empirical literature may overstate the evidence of effectiveness "given the usual bias against publishing null findings."[95]

While the empirical evidence for the effect of lobbying in favor of legislation is mixed, recent studies indicate that lobbying *against* legislation is effective—that is to say, groups who lobby against a new piece of legislation are more likely to succeed than those who lobby in favor of legislative change.[96]

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90. Government officials are often identified as being interested parties in these contests of legislative influence. *See, e.g.*, BAUMGARTNER ET AL., *supra* note 45, at 8, 14–15, Indeed, they are regularly perceived as "lobbyists" by legislative staff. *See* Nourse & Schacter, *supra* note 14, at 587.

91. *See, e.g.*, Amy McKay, *Negative Lobbying and Policy Outcomes*, 40 AM. POL. RSCH. 116, 127–35.

92. Sarah F. Anzia, *Looking for Influence in All the Wrong Places: How Studying Subnational Policy Can Revive Research on Interest Groups*, 81 J. POL. 343, 343 (2019).

93. Beth Leech, *Lobbying and Influence*, *in* THE OXFORD HANDBOOK OF AMERICAN POLITICAL PARTIES AND INTEREST GROUPS 534, 534 (L. Sandy Maisel & Jeffrey M. Berry eds., 2010).

94. Anzia, *supra* note 92, at 343.

95. Lowery, *supra* note 46, at 18.

96. *See* BAUMGARTNER ET AL., *supra* note 45, at 29–45 (documenting "the endurance of the status quo" in American legislative policy); McKay, *supra*

For example, one study of lobbying found that "[p]ublic interests lobbying in opposition to a proposal have a far greater effect on the likely outcome than business interests lobbying for it have."[97] More specifically, it found that "each lobbyist against a measure is worth 3.5 lobbyists pushing for it."[98] Some political scientists attribute the success of so-called "negative lobbying" to the status quo bias,[99] that is, the tendency to overvalue the status quo relative to a new possibility, even when the new policy is expected to produce better results than the status quo.[100] Others attribute the outcome—the defeat of legislation—to the success of the lobbying itself and the tendency of lawmakers to be "more interested in avoiding criticism than in receiving praise."[101]

The literature on negative lobbying against legislation also includes an important caveat: an absence of *any* lobbying against a bill is also correlated with the failure of bills to pass.[102] Political scientists explain this correlation in terms of scarce resources.[103] Because legislative attention is scarce, groups who favor the status quo need not actively lobby against all bills that they oppose; instead, they "can often sit back and wait, confident that the scarcity of attention will make it unnecessary for them to voice their active opposition."[104] If—and only if—it appears that the legislation has a real chance of passing, then the defenders of the status quo can deploy their resources and make their opposition known.[105] The majority of bills will not garner enough attention to present a threat of passing, so negative lobbying isn't necessary.[106]

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note 91, at 127 (finding that lobbying against legislation is a "strongly significant" predictor of whether legislation will fail to pass and it "outweighs nearly all other variables").

97. McKay, *supra* note 91, at 136.

98. *Id.* at 135.

99. *See* BAUMGARTNER ET AL., *supra* note 45, at 248–50.

100. *See* Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039, 1042–44 (1991).

101. McKay, *supra* note 91, at 122.

102. *See* BAUMGARTNER ET AL., *supra* note 45, at 75.

103. *See id.* at 71–72.

104. *Id.* at 75.

105. *Id.* at 150.

106. *See id.* at 68–74.

Although political science has a rich literature on lobbying generally, its discussion of prosecutorial lobbying is limited.[107] The existing literature appears to confirm that prosecutors are frequent participants in the development of criminal justice policy. One example is political scientist Lisa Miller's study of interest groups' participation in the formation of criminal justice policy, both at the federal level and in Pennsylvania.[108] Miller found that Pennsylvania prosecutors were very active lobbyists—both in terms of testifying in front of the legislature and in working behind the scenes[109]—and that federal prosecutors had been "particularly successful in expanding their presence" at congressional hearings.[110] She concluded that the "dominance" of prosecutors, other criminal justice groups, and a few single-issue citizen groups (such as Mothers Against Drunk Driving) created a policy environment in which punishing offenders became "the focal point of policy objectives."[111] Other political science case studies confirm that prosecutors lobby in favor of punitive measures and against criminal justice reform.[112]

There is also some support in the political science literature for the idea that prosecutors are successful when they lobby.[113] For example, in her case study of federal criminal code reform, Barbara Ann Stolz found that congressional staffers perceived the Department of Justice as particularly influential,[114] in that

107. What is more, the political science literature on criminal justice lobbying tends to treat prosecutorial lobbying as a smaller piece of lobbying by criminal justice agencies and thus fails to distinguish between lobbying by prosecutors, lobbying by police, and lobbying by other related groups. *See, e.g.*, Fairchild, *supra* note 23, at 183; Miller, *Rethinking Bureaucrats*, *supra* note 88, at 575.

108. MILLER, THE PERILS OF FEDERALISM, *supra* note 10, at 21.

109. *See id.* at 96–97, 104–06, 168.

110. *Id.* at 64–67.

111. *Id.* at 10.

112. *See, e.g.*, BERK ET AL., *supra* note 12, at 153 ("[P]rosecutors and police typically stood shoulder to shoulder against most liberal criminal justice legislation [in California].").

113. *E.g.*, Fairchild, *supra* note 23, at 188 ("Among the various interest groups that attempt to influence policy in the realm of criminal justice, those groups that are professionally concerned with the outcomes seem to exert more influence than those that have a social service or public interest concern.").

114. Barbara Ann Stolz, *Interest Groups and Criminal Law: The Case of Federal Criminal Code Revision*, 30 CRIME & DELINQ. 91, 96–98 (1984)

the DOJ was able to have its concerns "given serious consideration" by lawmakers and more likely to have those concerns either result in changes to legislation or blocking the legislation itself.[115]

A case study of Texas criminal legislation in the 1980s and 1990s also found that prosecutors were frequent and successful lobbyists.[116] At the same time, the author of that case study did not portray prosecutors as the catalyst for legislative change.[117] Instead, he concluded that the Texas governor enlisted the help of prosecutors and other law enforcement to support an ambitious anti-crime agenda, part of a larger effort by Republican politicians to control the governor's mansion and the state legislature.[118] Prosecutors were seen as attractive legislative partners because they were active lobbyists and because they were organized in a well-established state prosecutor association.[119] But while prosecutors did not initiate the legislative agenda, they were "central in shaping" the ultimate policy outcome of that agenda.[120]

The political science literature includes several theories about why prosecutor lobbying is so successful. One recurring theory is that prosecutors are influential lobbyists because of their expertise. For example, the congressional staffers that Stolz surveyed attributed the DOJ's influence to its expertise.[121]

[hereinafter Stolz, *Interest Groups*]. Of the hundreds of groups that testified about code reforms, staffers identified only nine groups as influential. *See id.* at 96, 104 (explaining that these influential groups included the DOJ, the ACLU, and the ABA).

115. *Id.* at 96.

116. *See* Campbell, *supra* note 12, at 632 ("Law enforcement groups played an important role in shaping crime legislation and stirring support for polices that prioritized prisons and harsher punishments.").

117. *See id.* at 658–61.

118. *See id.* at 644–46.

119. *See id.* at 655.

120. *Id.* at 659 ("The prominence of the TDCAA and its members in [the Governor's] planning and in campaigning and lobbying for passage of the legislation suggests that they were central in shaping crime policy."); *see also id.* at 655 (noting that, although the Texas prosecutor association "does not officially take positions on legislation or lobby, its members . . . were often cited in communications between lawmakers and in legislative files as a key player in shaping crime legislation").

121. *See* Stolz, *Interest Groups*, *supra* note 114, at 100 ("[W]hile the Justice Department cannot lobby, in the sense of mobilizing constituents to send

Miller similarly identifies prosecutors' expertise as a reason for their increased appearance at congressional hearings.[122] She notes that it is not unusual for lawmakers to rely on the expertise of government officials in the policymaking process.[123] Indeed, the expertise that lobbyists offer to lawmakers is a standard justification for lobbyists' involvement in American policymaking more generally.[124]

Although Miller seems to accept that prosecutors possess relevant expertise, she also expresses some concerns about the depth of that expertise and how prosecutor lobbying is "deeply intertwined with their agencies' needs"—including the agencies' financial needs.[125] She notes that "prosecutors frequently have a narrow set of interests focused on making it easier for them to get convictions," while legislators should be focused on the bigger issue of how to reduce crime.[126] To the extent that lawmakers listen to police and prosecutors rather than other experts and interest groups, criminal justice policy is fated to rely on law enforcement tools that those groups favor, such as expanding the scope of criminal law and increasing sentences.[127]

Expertise is not the only theory that political scientists offer to explain prosecutors' influence. Some point to the longstanding presence of prosecutor associations in state capitols[128] or prosecutors' independent political power as locally

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letters, of all the influential groups involved in criminal code reform it was best able to provide the expertise to support its position.").

122. *See* MILLER, THE PERILS OF FEDERALISM, *supra* note 10, at 80 ("[T]hese witnesses represent not just agencies reporting on their activities but also perceived *experts*, detailing to Congress their perspectives, policy goals, and agency needs." (emphasis in original)).

123. *See* Miller, *Rethinking Bureaucrats*, *supra* note 88, at 570–72.

124. *See* Nourse & Schacter, *supra* note 14, at 611.

125. MILLER, THE PERILS OF FEDERALISM, *supra* note 10, at 80; *see also* Miller, *Rethinking Bureaucrats*, *supra* note 88, at 584 ("The presence of criminal justice bureaucrats may connect the material interests of criminal justice agencies to federal spending.").

126. MILLER, THE PERILS OF FEDERALISM, *supra* note 10, at 169 (citation omitted).

127. *See* Miller, *Rethinking Bureaucrats*, *supra* note 88, at 583 (characterizing the "stranglehold" that criminal justice actors have on the lawmaking process as creating a "feedback loop").

128. *See, e.g.*, Campbell, *supra* note 12, at 659; MILLER, THE PERILS OF FEDERALISM, *supra* note 10, at 104–05.

elected officials.[129] Perhaps because of these features, prosecutors are sometimes referred to as part of a "legal elite" that influences criminal justice policy.[130] Others note that prosecutors can claim to speak for "the public good," which garners legislative attention.[131]

There is also evidence that political party control has some effect on prosecutor influence.[132] As noted above, a Texas case study found that Republicans in the state relied on prosecutorial lobbying to advance their law-and-order agenda.[133] A mid-twentieth century case study of California penal legislation similarly found a relationship between crime legislation and political partisanship.[134] The study's authors found that "law-and-order legislation of 1969 and 1970 was associated with a return to Republican dominance" in the state legislature,[135] and that the years in which the law enforcement lobby was most effective "were also likely to be years when Republicans were ascendant."[136] Partisan politics, however, were far from a perfect predictor of outcomes for crime legislation in California; harsh legislation also passed when Democrats held the statehouse.[137] Nonetheless, the authors' statistical analysis led them to

129. *See* Campbell, *supra* note 12, at 659 ("As elected public officials, the TDCAA was also able to stir negative media activity as soon as conservative Democrats attempted to lower penalties for minor crimes."); Fairchild, *supra* note 23, at 192.

130. *See* Heinz et al., *supra* note 58, at 335–37; Melone & Slagter, *supra* note 82, at 52 (describing the "six recurrent criminal justice professional groups plus the American Civil Liberties Union" as "something of a criminal justice elite"); *see also* BERK ET AL., *supra* note 12, at 36 (noting the "'elite' model" in 1950s California, in which there was an "unchallenged belief that vital legislative decisions affecting the criminal justice system *ought* to be made by legal experts" (emphasis in original)).

131. Stolz, *Interest Groups*, *supra* note 114, at 100–01.

132. *But see* Heinz et al., *supra* note 58, at 350 ("[W]e found little or no evidence of partisanship on any of the bills we studied.").

133. *See supra* notes 116–120 and accompanying text.

134. BERK ET AL., *supra* note 12, at 192.

135. *Id.*

136. *Id.* at 203.

137. *See id.* at 192 ("[O]ne might expect more liberal legislation with Democrats in power. Yet in 1961 much of the antidrug legislation was passed. And Democrats were still the majority when Berkley and Watts seemed to trigger a variety of hard-line legislative responses.").

conclude that Republican-controlled legislatures are more punitive.[138]

In short, the limited political science literature appears to support the conventional wisdom in the legal literature that prosecutors lobby often and that they are influential when they do so. It suggests, however, that prosecutors may be more influential when they engage in negative lobbying than when they affirmatively support legislation.

II. THE STUDY

This Part presents our hypotheses, the methodologies we used to collect and analyze data, and the principal results of our study. The study captured every criminal justice bill introduced in all fifty state legislatures between the years 2015 and 2018. We constructed interconnected databases of legislation and lobbying, using legislative history materials (such as committee reports and testimony), news accounts of the legislative process, and materials from state prosecutor associations, such as press releases, to identify when prosecutors lobbied and what positions they took.

We found that prosecutors are active lobbyists who most often support laws that make the criminal justice system harsher and oppose bills that make the system more lenient. We also found that prosecutors were quite successful in getting legislation that they supported passed into law. These findings are consistent with the academic literature discussed in the previous Part.

Some of our findings, however, contradict the academic literature. We found, for example, that prosecutors were largely unsuccessful in blocking legislation that they opposed. That conflicts with the political science literature on negative lobbying.[139] We also found that, in a sizable percentage of cases, prosecutors supported legislation that would have decreased

138. Their analysis also showed that defendants' rights legislation was more likely to pass when Democrats held the majority. *Id.* at 193. And while Democratic majorities were also more likely to increase criminal penalties, the authors noted that the incremental increases tended to be smaller under Democrats and that the increases were likely attributable to the fact that "virtually every change in the Penal Code *added* resources, criminalized behavior, or increased penalties." *Id.* at 193 n.* (emphasis in original).

139. *See supra* notes 96–106 and accompanying text.

punishments or reduced the scope of the substantive criminal law. Indeed, they were most successful when they engaged in this lobbying against positions that observers typically expect from prosecutors. That lobbying pattern is inconsistent with the conventional wisdom—drawn from legal and political science theory—that prosecutors lobby largely in their own self-interest.[140]

A. Hypotheses and Methodology

We set out to empirically test two aspects of academic theory about prosecutor lobbying: (1) the proposition that prosecutors systematically favor expansions of the criminal law; and (2) the notion that their lobbying generally carries great weight with legislators.[141] Our first hypothesis was that prosecutors—whether lobbying as individuals or when speaking through their statewide associations—favor legislation that strengthens their power through the expansion of substantive criminal law and the increase of penalties, rather than legislation that curtails that power. At the same time, we did not believe that prosecutors would always favor harsher laws.

For our second hypothesis, we expected to find that legislation supported by prosecutors passed at a higher rate than the average criminal justice bill and that legislation opposed by prosecutors passed at a rate lower than average. However, we also predicted variation in levels of prosecutorial lobbying success in different states. Specifically, we expected to see prosecutors succeed more frequently in politically conservative states than in politically liberal states.

To explore these two questions, we identified criminal-justice-related bills filed in state legislatures during a four-year period. We categorized those bills based on subject matter and recorded whether those bills were enacted. Then we collected materials that would allow us to measure the types and outcomes of lobbying activity by prosecutors.

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140. *See supra* notes 66–67, 88, 125–127 and accompanying text.

141. We save for later research any effort to compare the influence of prosecutors to the lobbying influence of law enforcement agencies, civil liberties groups, or other frequent lobbyists on criminal enforcement bills. Such a comparison would require us to assemble data of the work of those competing (or cooperating) groups—data which we have not collected for this Article.

The study relies on three types of documents: (1) bills related to criminal justice and accompanying legislative history documents; (2) news stories about state legislative debates; and (3) materials that prosecutor associations created to describe their involvement in the legislative process. Employing the standard practices of content analysis,[142] we developed a codebook to guide researchers as they recorded information about each bill, news story, or association announcement.

1. Legislative History Documents

The first step in our assembly of data involved the collection of relevant bills. We created a database identifying every criminal justice bill introduced in all fifty state legislatures during the study period beginning January 1, 2015 and ending December 31, 2018. The state legislature's website provided the necessary information in most states. In a few states, when the legislature's website proved difficult to navigate, we conducted searches on LegiScan instead.[143]

Our research design does not address policy ideas that are never introduced as bills in the state legislative process. This means that some important interactions between prosecutors and legislators escaped our attention. For example, when prosecutors convinced the legislature not to address a topic, that inaction is not captured in our data, even though it has important consequences.[144] Our starting point—bills that at least one member of a state legislature thought worthwhile to introduce—nevertheless gives us insight into the policy choices that policymakers treated as viable and worth their time to debate.

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142. *See generally* KLAUS KRIPPENDORFF, CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY (4th ed. 2019).

143. LegiScan is an online platform that provides up-to-date information about legislation that has been introduced in Congress and state legislatures. Users can access the platform's search features to locate bills, read their text, and ascertain their status. *Welcome to LegiScan*, LEGISCAN, https://perma.cc/FC3J-XVZZ.

144. *Cf.* Stolz, *The Roles of Interest Groups*, *supra* note 23, at 54 ("Research that focuses only on the legislative process may not account for the participation of groups at the agenda setting stage (promoting or blocking new policy items on the public policy agenda) of the policy making process . . . .").

After identifying bills in the relevant time frame, researchers placed each bill into a topical category: e.g., "to increase or decrease the scope of the criminal law," "to increase or reduce available criminal sentences," or "to increase or decrease funding."[145] Researchers also recorded details about the legislative process for each bill, showing any actions that legislators took (e.g., committee hearing, committee vote, or floor vote). The coders recorded information about whether the bills became statutes or stalled at some point in the legislative process.

Once we defined the relevant universe of bills and recorded the actions that the legislature took on each bill, we looked for evidence in the legislative history to indicate some involvement by prosecutors. Admittedly, some prosecutor involvement in the bills might have remained invisible.[146] Still, we believe that the written record of prosecutor involvement can help us make meaningful comparisons between states or across time, showing differences in the frequency and objectives of prosecutor lobbying that occurred publicly, while acknowledging that some of their activity might occur without leaving a trace in the legislative history.

Various types of legislative history materials revealed the involvement of prosecutor associations or individual prosecutors. These included committee reports, witness lists, and transcripts or recordings of hearings and debates. Our researchers (over two dozen of them) coded information about the positions that prosecutors took during hearings and debates.[147]

There was great variety in the available legislative history materials from state to state. Some states archived videos, witness lists, or similar materials from committee hearings that allowed researchers to determine whether prosecutors spoke in

145. Researchers could also place a single bill into more than one topical category. For more details about the coding options, see *infra* Part II.B.

146. *See* BAUMGARTNER ET AL., *supra* note 45, at 151 (documenting that informal and less visible lobbying tactics are more pervasive than formal lobbying tactics that appear in legislative history documents); Stolz, *Interest Groups*, *supra* note 114, at 102 ("[T]estifying at hearings, the formal means through which groups express their views, was deemed less significant with respect to a group's successful influence on legislation than the informal mechanisms.").

147. For more details about the coding options, see *infra* Part II.C.

favor or against particular bills. Some even went so far as to create their own databases of lobbying activities.[148] In other states, however, those materials were only sporadically available through online sources or in hard copy from state archives, and some states did not appear to make such materials available at all. We were therefore unable to develop a comprehensive picture of prosecutorial lobbying for those states.[149]

2. News Stories and Association Newsletters

We supplemented the data from the legislative history documents with a database of news stories about the legislative process. These stories revealed some prosecutor lobbying that was not visible in the legislative history documents, and we assume that additional prosecutor lobbying happened without news reporters ever learning or writing about it.[150]

For the news media database, researchers looked for stories that mentioned the state prosecutor association and its leadership in the newspapers of their respective states.[151] If searches located stories that mentioned lobbying by an individual chief prosecutor from a local district, we included the story in the database. We did not, however, attempt to capture an exhaustive list of news stories that mentioned individual chief prosecutors who did not hold leadership positions in the statewide association.[152]

Researchers conducted news searches in two databases: LexisNexis (which covers larger publications) and NewsBank's America's News (which covers smaller local newspapers). They supplemented those two resources with Google News searches.

148. *E.g.*, *Searches*, MO. ETHICS COMM'N, https://perma.cc/38BR-ERW4.

149. These states are: Alabama, Arkansas, Kentucky, Mississippi, New Jersey, New Mexico, New York, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming. THE PROSECUTORS & POL. PROJECT, *supra* note 5, at 7 n.3. We exclude these states from the analysis of state variation in Part III.

150. *See, e.g.*, Burness, *supra* note 46.

151. When identical or nearly identical stories from wire services appeared in multiple news outlets in the state, researchers made a separate entry for each story as a measure of the influence of the story.

152. Such a search would be impractical because those individuals receive substantial news coverage due to their ordinary enforcement duties.

Each researcher recorded the characteristics of every news story discussing lobbying activity relevant to criminal justice legislation in state legislatures or local legislative bodies like city councils or county commissions.[153]

In the third database, our researchers collected materials where prosecutor associations mentioned their own lobbying activities. Those materials—typically posted on the associations' websites—included press releases, newsletters, bill trackers, and other materials referring to associations' support or opposition to pending legislation.[154] This database proved to be less comprehensive than the news media and legislative history documents.[155] These documents nevertheless revealed some lobbying activity that never surfaced in the other types of data. They also offered important evidence about the priorities and legislative strategies of statewide associations' leaders.

3. Data Opportunities and Limitations

We cross-referenced our three sources—news articles, legislative materials, and materials from associations—to create a master database of prosecutor involvement in criminal justice legislation.[156] We then created an initial quantitative portrait of each state in its own spreadsheet, showing the types of bills, the categories of prosecutor lobbying activity, and the outcomes of the legislative process. We combined that tally of legislative activity with news accounts of lobbying in the state to generate a brief narrative that describes the major issues and trends in each state.[157]

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153. They also included stories about the association's endorsement of voter initiatives relevant to criminal justice and its endorsements of candidates for public office, but we do not address that information in this Article.

154. *See, e.g.*, *Newsletters*, IND. PROSECUTING ATT'YS COUNCIL, https://perma.cc/BD5Q-X8KA; *Bill Tracker*, UTAH STATEWIDE ASS'N OF PROSECUTORS & PUB. ATT'YS, https://perma.cc/GC9Q-B763.

155. Some associations did not make such documents publicly available; some had only certain years of material publicly available, but not all years in the study period; and some appeared to have haphazardly archived these materials.

156. That database is available at Carissa Hessick, *Prosecutor Lobbying in the States, 2015–2018*, DATAVERSE (2021), https://perma.cc/T6J4-8FN2.

157. Those narratives, along with a summary of statistical information, can be found in THE PROSECUTORS & POL. PROJECT, *supra* note 5.

The resulting dataset gives us a unique quantitative picture of prosecutor lobbying activity in state legislatures across the country. It also allows meaningful comparisons from state to state.[158] With this data, we can generalize about the typical makeup of a state's legislative agenda for criminal justice issues. We can also draw relevant conclusions about the frequency of prosecutor involvement in visible lobbying, the types of bills that attract the most attention, and the objectives that prosecutors most often pursue in the legislature.

To be sure, there are limitations to this dataset. For example, qualitative research is required to determine the extent and content of low-visibility prosecutor involvement in the legislative process.[159] Our researchers did not attempt to record the lobbying activities of other interested groups, such as law enforcement, prison officials, defense attorneys, civil liberties groups, state bar associations, or victim groups.[160] Thus, it is not possible to compare the activity levels or objectives of these groups or to study their interactions with our data. Finally, we cannot make claims based on this data that prosecutors *caused* particular outcomes; we can only say that their advocacy either aligned with the eventual outcome or that it did not.

With these limitations in mind, the rest of this Part will present our primary findings about prosecutor lobbying.

B. *Amounts and Types of Legislative Activity*

One strength of our database is its breadth of coverage across a variety of topics related to criminal law and its enforcement. During our four-year window, the data offer a

158. In the future, collection of comparable documents from different years could also make it possible to analyze change over time. For purposes of this dataset, we would not expect to see large changes in practice over the four-year period from 2015 to 2018.

159. Such qualitative research requires time-intensive methods such as interviews, and thus it is ordinarily conducted as part of a case study rather than a national study like the one described in this Article. *See, e.g.*, Stolz, *The Roles of Interest Groups*, *supra* note 23, at 58.

160. Previous research documents lobbying by such groups. *See, e.g.*, BERK ET AL., *supra* note 12, at 34, 36, 40, 43, 79; MILLER, THE PERILS OF FEDERALISM, *supra* note 10, at 63–65, 74, 98, 131; Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 102–10 (2016).

reasonably complete picture of the formal legislative process after a legislator introduces a bill. Before turning to the question of prosecutor lobbying, we first look at the entire universe of criminal-justice-related bills introduced during our study period. Understanding what bills were introduced provides context for the lobbying that we examine in Part II.C. In portraying these legislatures at work, we also provide additional detail about how we coded the bills.

During the four-year study period, state legislators introduced more than 22,000 criminal justice bills.[161] The median state considered 296 criminal justice bills during the study period.[162] New York introduced the most bills (1,536), while Alaska introduced the fewest (80).[163]

We categorized the bills according to the types of legal changes they proposed, using the following seven categories:

> 1. *Increase Coverage of Substantive Criminal Law*—e.g., bills that would create new crimes, broaden offense definitions, or eliminate defenses
>
> 2. *Increase Available Sentencing Range*—e.g., bills that would raise maximum sentences, institute or increase mandatory minimum sentences, increase the amount of time before defendants are eligible for parole or early release, or raise the authorized amount of fines
>
> 3. *Decrease Coverage of Substantive Criminal Law*—e.g., bills that would create new defenses, narrow definitions of crime, or decriminalize conduct
>
> 4. *Decrease Available Sentencing Range*—e.g., bills that would reduce maximum sentences, eliminate or decrease mandatory minimum sentences, reduce the amount of time before defendants are eligible for parole or early release, or lower the authorized amount of fines

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161. THE PROSECUTORS & POL. PROJECT, *supra* note 5, at 4. The database includes 22,216 bills. We encountered some inconsistencies in counting methods from state to state because some state legislatures' websites clearly linked companion bills to one another (allowing us to treat the senate and house version as a single bill), while the websites in other states did not make the linkage as clear.

162. *Id.*

163. *Id.*

> 5. *Change Relevant Procedural Limitations on Criminal Justice Actors*—e.g., bills that would impose or remove search warrant requirements on law enforcement activity, alter bail or pretrial release procedures, change evidentiary requirements, or change the criteria that determine when juveniles can be tried in adult court
>
> 6. *Fund Criminal Justice Activities*—e.g., bills that would increase or decrease funding for criminal justice activities, alter the allocation of criminal justice funding, or reauthorize criminal justice funding
>
> 7. *Change to the Rights, Responsibilities, or Liability of Criminal Justice Actors*—e.g., bills that would establish or alter the jurisdiction of criminal justice agencies, alter asset forfeiture requirements, or increase or reduce immunity protections for law enforcement

When a single bill touched on multiple issues, we coded that bill using multiple issue codes. A bill, for example, that would create a new crime to address a specific form of fraud and increase penalties available for other existing fraud crimes would be coded as both an increase in the coverage of substantive criminal law and an increase in available sentences.

When bills are broken down by the type of legal issue they address, we see that state lawmakers are more likely to introduce bills that make the criminal justice system harsher than bills that make the system more lenient.[164] As Table 1 shows, 39% of the bills introduced either increased the coverage of substantive criminal law or increased the available sentencing range. In contrast, only 10% of bill topics decreased the coverage of substantive criminal law or decreased the available sentencing range.[165] This pattern was not limited to just a few states. Legislatures in all fifty states considered fewer lenient bills than harsh bills.[166]

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164. *Id.* at 6.

165. As noted above, some bills touched on multiple issues. Table 1 counts each bill that addressed the designated type of legal change, leading us to count multi-topic bills in more than one category. As a result, when added together, the number of bills exceeds the total number of bills in our data set (22,216).

166. For an analysis of the differences among the states, see *infra* Part III.

Table 1. Bills Introduced and Passed by Topic

Type of Legal Change	Number of Bills	Percent of Total Bills	Pass Rate
Increase criminal law	7,612	27%	17%
Increase punishment	3,507	12%	17%
Decrease criminal law	1,797	6%	21%
Decrease punishment	1,233	4%	23%
Procedural limits	5,501	19%	27%
Rights, responsibilities	6,467	23%	26%
Funding	1,164	4%	31%
Other	1,395	5%	21%

The ratio of harsher to more lenient bills (39% to 10%) is roughly consistent with the theoretical academic literature which notes that legislators have strong incentives to pass new criminal laws or to increase punishments, and weaker reasons to repeal or restrict existing crimes or punishments.[167] At the same time, while legislatures introduced far more bills to make the criminal law harsher, they tended to pass those harsh bills at a lower rate.[168] Every other type of legal change showed a higher passage rate than bills that made the system harsher.[169] For context, during the four years of our study, nearly 19% of all bills introduced in the state legislatures were enacted.[170] That is

167. *See supra* notes 51–55 and accompanying text.

168. *See supra* Table 1.

169. *Id.* This contrast is more pronounced if we look at single-issue bills. The 5,459 single-issue bills that would have increased the scope of criminal law had a passage rate of 15%, and 14% of the 1,759 bills that would have increased penalties passed. In contrast, the 1,161 single-issue bills that would have decreased the scope of criminal law passed 21% of the time, and the 672 bills that would have decreased penalties had a pass rate of 19%.

170. We derive this number from data collected by the Council of State Governments—specifically, annual data identifying the number of bills

roughly the midpoint between the pass rates for harsh criminal justice bills (17%) and lenient criminal justice bills (22%).[171] This is consistent with Darryl Brown's findings that criminal law bills succeed at essentially the same rate as bills on other topics.[172]

In our view, the combination of two trends—higher volumes of harsh bills that become law at lower rates—has different implications when considering the system as a whole and when thinking about individual bills. When we consider the system as a whole, the size and reach of the criminal law does appear to grow over time. At the same time, when viewed from the vantage point of a single bill, a more lenient bill in the formal legislative process has comparatively good odds of passing.[173]

About 42% of bills introduced would have changed the procedural limitations on criminal justice actors or would have changed the rights, responsibilities, or liability of those actors. Many of those bills probably would have made changes that favored prosecutors or law enforcement more generally. However, we did not code those bills according to whether they would have helped or hurt law enforcement because such a designation would have required too much state-specific knowledge and may have proven to be too subjective a determination.[174]

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introduced and the number of bills enacted in all fifty legislatures during the regular session and any special sessions. *See* THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 76 tbl.3.19, 78 tbl.3.20 (2019); THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 77 tbl.3.19, 79 tbl.3.20 (2018); THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 101 tbl.3.19, 103 tbl.3.20 (2017); THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 105 tbl.3.19, 107 tbl.3.20 (2016).

171. *See supra* Table 1.

172. *See* Brown, *supra* note 78, at 245–49 ("The results show that criminal law bills succeed roughly as often as—in fact, probably slightly *less often than* legislative proposals on other topics." (emphasis in original); *see also supra* notes 78–80 and accompanying text.

173. *See infra* Part IV.C. Our fifty-state survey confirms, in broad outlines, Darryl Brown's conclusions (based on three states) about the openness of state legislatures to reductions in the coverage of the criminal law for individual crimes. *See* Brown, *supra* note 78, at 245–49.

174. We double coded a sample of bills to check for inter-coder reliability in the final assignment of topics. In addition, after the initial coding was complete, a small group of specially trained researchers checked each state database for missing data or data errors. In particular, researchers reviewed

Compared to some staples of state-policy debate like transportation and insurance, criminal justice topics were not particularly dominant in state legislatures. During our four-year study period, more than 442,000 bills were introduced in state legislatures, approximately 22,000 of which were criminal justice bills.[175] Although only 5% of total bills were related to criminal justice, that is still a substantial absolute number of bills related to criminal justice issues. These topics received steady and substantial attention in state legislatures.

C. *Amount of Prosecutor Lobbying*

We define prosecutor "lobbying" broadly to include any visible involvement in the legislature's consideration of a bill, at any point in the legislative process after the introduction of the bill. Unsurprisingly, individual prosecutors and their statewide associations frequently and visibly lobbied either for or against criminal justice bills.[176]

This prosecutor involvement took several different forms:

- Lobbying in favor of the bill;
- Speaking favorably about the bill, but not endorsing it;
- Lobbying against the bill;
- Speaking unfavorably about the bill, but not opposing it;
- Offering neutral testimony;
- Requesting an amendment to the bill; or
- Drafting or helping to draft the bill.

When a prosecutor lobbied in favor of a bill or spoke favorably of a bill, we treat that activity as "supporting" the bill. Similarly,

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bills coded as lenient or harsh to ensure that those coding categories were uniformly applied across states.

175. *See supra* note 170.

176. Although our News Story and Association Newsletter data only captured lobbying on behalf of the entire statewide prosecutor association, our Legislative History database revealed any recorded lobbying activity by those associations or by individual prosecutors.

when a prosecutor lobbied against a bill or spoke unfavorably about a bill, we categorize that activity as "opposing" the bill.[177]

Overall, we documented prosecutor involvement in 27% of all criminal-justice-related bills that were introduced during the study period.[178] This national lobbying figure, however, has serious limitations. For example, it excludes thousands of bills because we were unable to determine whether prosecutor lobbying touched those bills. Our inability to determine whether prosecutor lobbying occurred stemmed from poor access to legislative history materials in some states.[179]

The limitations of this figure extend beyond missing legislative history materials. As noted above, there is evidence that some prosecutor lobbying occurs behind closed doors.[180] News reports offer evidence of such hidden lobbying in a few states, such as Arizona and Missouri.[181] There is no reason to think that closed-door lobbying is limited to those states or that media reports from those states captured all prosecutor lobbying.

Missing documents and hidden lobbying aside, the 27% figure could be misleadingly low. In calculating that figure, we used all criminal justice bills that were introduced as the denominator, including bills that were introduced but never had a committee hearing or a floor debate. In many states, the

177. Our codebook allowed researchers to designate more than one code for this variable; for instance, a prosecutor might draft a bill and lobby in favor of the same bill.

178. For purposes of this calculation, we included all single-topic and multi-topic bills for which we could determine whether prosecutors were involved.

179. The legislative history database lacks adequate records for 5,388 bills, preventing us from determining whether prosecutors were involved. The news databases, however, did reveal some prosecutor involvement in a subset of bills in those states. *See supra* notes 146–149 and accompanying text. A full accounting of how many bills lacked sufficient legislative history documents is included in APPENDIX A.

180. *See supra* notes 42, 146 and accompanying text.

181. *See* Megan Cassidy, *Justice Statutes Resistant to Reform*, ARIZ. REPUBLIC, May 9, 2018, at A15 ("[P]rosecutor's real power may be wielded behind the scenes, through private conversations with legislators, according to reform advocates."); Wright, *Quiet Police Lobbying*, *supra* note 40 ("[P]olice chiefs, sheriffs, drug task forces and police and prosecutors from . . . across [Missouri] . . . didn't officially testify against the bill or make public statements, but their message was clear: Dogan and anyone else who supported his bill was anti-police and soft on the war on drugs.").

decision not to hold a hearing foreclosed any opportunity for prosecutor lobbying because visible prosecutor lobbying in those states usually took the form of public testimony at a committee hearing.[182]

On the other hand, the 27% figure might be misleadingly high. When we were unable to determine whether prosecutors lobbied on a bill—such as when legislative history documents were missing—we eliminated those bills from our calculations regarding prosecutor involvement. Imagine, for example, a state with one hundred criminal justice bills but available legislative history materials for only forty of those bills. If we found prosecutors lobbied on twenty of those forty bills, then we would report that prosecutors were involved in 50% of all bills introduced, even though we do not know whether they lobbied on the other sixty bills.

Our dataset also might be systematically skewed to report higher prosecutorial involvement because we identified some prosecutor lobbying via media reports and press releases.[183] The media did not report the absence of prosecutor lobbying—only its presence—so including the prosecutor lobbying identified in

182. Imagine, for example, a state that introduced one hundred criminal justice bills, twenty of which received a committee hearing. If prosecutors testified in ten of those hearings, then our statistics would say that they had lobbied on 10% of all criminal justice bills. It might be more accurate, however, to think of them as having lobbied 50% of the time.

Unfortunately, the way we coded legislative activity distinguished between bills that received a committee vote and those that did not, but it did not reliably distinguish between bills that received a hearing and those that did not. Not all bills that received hearings also received committee votes and not all bills that received committee votes also received hearings. Consequently, we are unable to say how often prosecutors lobbied on bills that received a hearing.

183. In those states where legislative history materials are not available, our only records come from media reports and prosecutor association statements—sources that involve *only* those bills with prosecutor involvement. For example, news reports from New Mexico confirm that prosecutors were involved in 52 of the 262 criminal justice bills introduced during the study period. Because we do not have legislative materials to determine whether prosecutors were involved in the other bills, we dropped the remaining 210 bills from our analysis. As a consequence, it appears that New Mexico prosecutors were involved in 100% of the criminal justice bills introduced during the study period, when that is almost certainly not the case.

media reports consistently increased the number of bills we identified as the subject of prosecutor lobbying.[184]

Despite these data limitations, the available evidence of lobbying still tells us something worthwhile about how often prosecutors try to shape legislation. Comparisons from state to state, at least among those states that offer reasonably complete legislative history documents, are possible in a rough way. Furthermore, prosecutor activity connected to the most debatable and consequential bills is the subset of lobbying that is most important to understand.

With these data limitations in mind, we found that prosecutors were more likely to lobby on certain legislative issues than others. As Table 2 shows, they were most likely to lobby in favor of funding bills. Given that many of these bills would have increased or sustained funding for their offices or other law enforcement agencies, it is unsurprising that prosecutors supported so many bills in this category. The passage of such laws would serve their self-interest. In this respect, a prosecutorial decision to lobby seems no different than what we might see from any other interest group.[185]

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184. Relying on media reports may also have skewed our data related to the *success* of prosecutor lobbying. Media reports typically emphasize the highest-profile bills, and there is some evidence that the public profile of a bill may affect the likelihood that it will pass. *See* Heike Klüver, *The Contextual Nature of Lobbying: Explaining Lobbying Success in the European Union*, 12 EUR. UNION POL. 483, 502 (2012) (finding that the salience of policy issues has an effect on lobbying success, but that the effect differs based on the size of the lobbying group); Matthew Yglesias, Opinion, *Shh. Congress Is Working.*, BLOOMBERG (May 30, 2021), https://perma.cc/BGY8-CM82 (claiming that a bill's passage "is happening not *despite* the fact that it's under the radar, but *because* it's under the radar" (emphasis in original)).

185. As a general matter, interest groups lobby policymakers because government "ha[s] the power to create benefits that [are] unavailable other than through politics, or [are] more cheaply available through politics." FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 9–10 (1997). These benefits, which are often referred to as "rents," can be positive (rent creation), redistributing wealth in ways that benefit the favored interests, or negative (rent extraction), threatening to impose costs on the interest group. When they lobby, interest groups are simply acting in a rational way, either seeking to extract rents or to avoid rent extraction. *See* Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 104 (1987). For further discussion of prosecutors as an interest group engaged in rent seeking or avoiding rent extraction, see *infra* Part IV.B.

Prosecutors also behaved consistent with the theory of rent-seeking when it came to expansive bills. They were quite likely to support bills that made criminal law harsher. Prosecutors lobbied in favor of 15% of all bills that sought to create new crimes or otherwise expand the scope of criminal law. Similarly, they lobbied in favor of 17% of all bills that sought to increase punishment.[186] Prosecutors, for example, testified in support of an Indiana bill that created a sentencing enhancement for bias-related crimes.[187] The bill authorized judges to impose higher sentences if a defendant's crime was motivated by a victim's "race, religion, color, sex, gender identity, disability, national origin, ancestry, or sexual orientation."[188] The bill's author introduced the measure, in part, because of religiously motivated assaults that had occurred in her community.[189] Some groups opposed the bill because it did not extend to other forms of bias, such as political bias.[190] Prosecutors, however, testified in support of the bill, calling the sentencing enhancement an "important tool" that expressed the legislature's moral condemnation of such acts and "hopefully . . . will be a deterrent."[191] Despite prosecutors' support, the bill did not pass. Similar legislation was introduced in the next legislative session with a slightly different list of protected groups and disagreement persisted about which characteristics to include.[192]

In contrast, prosecutors rarely opposed bills that sought to increase the scope of criminal law or to increase punishment—they opposed only 2% and 3% of those bills,

186. Prosecutors lobbied against seventy single-issue bills that increased the scope of criminal law (1% of the 5,459 such single-issue bills introduced), and they lobbied against thirty single-issue bills that increased punishments (2% of the total 1,759 bills).

187. *See* Niki Kelly, *Bias-Crimes Sentencing Bill Advances*, J. GAZETTE (Feb. 8, 2017), https://perma.cc/4QGP-RA73.

188. *Id.*

189. *See id.* ("Glick described a 9-year-old watching her mother grabbed because she was wearing a burka. And she said crosses have been burned in yards and swastikas painted on a synagogue.").

190. *See id.*

191. *Id.*

192. *See* Niki Kelly, *House Advances Amended Bias Bill*, J. GAZETTE (Mar. 26, 2019), https://perma.cc/5E7H-NH6Q.

respectively.[193] Prosecutors supported these harsh bills five to seven times as often as they opposed them.

193. Sometimes that opposition was grounded in principle. For example, the Ohio Prosecuting Attorneys Association opposed H.B. 276, which would have expanded the offense of aggravated menacing because the association "generally disfavors laws that provide for increased penalties for classes of victims . . . ." *See* H.B. 276, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018).

But much of the prosecutorial opposition to laws that would have made criminal law harsher was attributable to the fact that bills touched on multiple issues. For example, if a bill contains provisions that would both increase and decrease the scope of criminal law, prosecutors may decide that the increase is not worth the decrease. Accordingly, prosecutors opposed H.B. 213, which was introduced in the Kentucky legislature in 2015. *See* H.B. 213, 2015 Gen. Assemb., Reg. Sess. (Ky. 2015). That bill would have recognized three levels of heroin trafficking, with escalating penalties based on how much heroin traffickers had in their possession; the bill also granted legal immunity on most drug-related charges to people who report a drug overdose to authorities and remain with the victim. *Id.* Prosecutors opposed H.B. 213 despite the increased penalties because they did not want to grant immunity to those who reported an overdose. *See* John Cheves, *Kentucky Lawmakers Explore Their Differences on Anti-Heroin Bills*, LEXINGTON HERALD LEADER (Nov. 12, 2015), https://perma.cc/4HDC-SDB9

> The House bill would allow someone using heroin to wave off an approaching police officer by crying out, "Help, officer, my buddy is overdosing," regardless of whether it's true, said Rob Sanders, Kenton County commonwealth's attorney. Then prosecutors would have to prove the heroin user did not know his friend was overdosing, or else drop all charges, Sanders said.

Prosecutors supported a similar bill in the state senate, which contained a much narrower defense. *See id.* ("The prosecutors prefer the Senate version, which lets drug users claim as a legal defense that they reported an overdose, without necessarily shielding them from criminal charges.").

Table 2. Bills That Prosecutors Supported and Opposed by Topic

Type of Legal Change	Bills with Prosecutor Support	Bills with Prosecutor Opposition
Increase Criminal Law	15%	2%
Increase Punishment	17%	3%
Decrease Criminal Law	8%	13%
Decrease Punishment	12%	17%
Procedural Limits	16%	9%
Rights, Responsibilities	15%	8%
Funding	19%	4%
Other	14%	5%

This lobbying pattern could be interpreted as a form of self-interested behavior—seeking laws that make it easier for prosecutors to convict defendants. When criminal laws are broader, prosecutors are more likely to secure convictions because a defendant's conduct can be relevant when proving the elements of a larger number of similar offenses.[194] A criminal code with more options for crimes to charge, as well as more severe punishments, also gives prosecutors the flexibility to offer attractive plea bargains.[195]

Prosecutor lobbying did not follow a similarly predictable self-interested pattern, however, when legislatures thought about limiting the reach of the criminal law. Prosecutors supported such lenient bills at a surprisingly high rate.[196] They

194. *See* Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1953–54 (2006).

195. *See id.*; *supra* notes 55–56 and accompanying text.

196. Some of this support can be explained by bills sometimes touching on multiple issues. Imagine, for example, a bill that would increase punishments for some crimes and decrease punishments for others. A prosecutor might decide that the additional leverage they would gain from the increases outweighs the lost leverage from the decreases, and would therefore support the bill. In that instance, the prosecutor would still be acting out of self-interest.

supported 8% of the bills that sought to decrease the scope of the criminal law and 12% of bills that sought to decrease punishment.

Prosecutors occasionally played to type with lenient bills: they opposed 13% of all bills that would have created new defenses, decriminalized conduct, or otherwise narrowed the scope of criminal law. Similarly, they lobbied against 17% of all bills that aimed to decrease punishment.[197]

One example of prosecutors lobbying as expected occurred during 2017 and 2018, when the Louisiana legislature considered a series of proposed bills designed to reduce the prison population and alleviate the costs of incarceration throughout the state.[198] The Pew Charitable Trusts contributed significantly to the underlying research and initial policy proposals, which were vetted and discussed in special legislative hearings throughout 2016 and 2017.[199]

Prosecutors representing the Louisiana District Attorney Association—including the politically powerful E. Pete

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When we look at those bills which touched on only a single issue, however, we still found a few prosecutors supporting bills that were more lenient and opposing bills that were harsher. Prosecutors lobbied in favor of sixty single-issue bills that decreased the scope of criminal law—which represents 5% of the 1,161 single-issue bills introduced. Prosecutors also lobbied in favor of fifty-nine single-issue bills that decreased punishment, which accounts for 9% of the 672 single-issue bills of this type.

197. For single-issue bills, prosecutors opposed 104 of the 1,161 bills that made the criminal law more lenient (9%). They opposed 122 of the 672 single-issue bills that reduced criminal punishments (18%).

198. According to a 2019 report presented to the Louisiana Legislature, ten bills were passed as part of the Justice Reinvestment Initiative. LA. DEP'T OF PUB. SAFETY & CORR. & LA. COMM'N ON L. ENF'T, LOUISIANA'S JUSTICE REINVESTMENT REFORMS 2019 ANNUAL PERFORMANCE REPORT (2019), https://perma.cc/UBZ9-5H2R (PDF). The Justice Reinvestment Initiative was

> a national project sponsored by the Bureau of Justice Assistance (BJA) and The Pew Charitable Trusts. It seeks to assist states in adopting data-driven approaches to improve public safety, examine corrections and related criminal justice spending, manage criminal justice populations in a more cost-effective manner, and reinvest savings in strategies that can hold offenders accountable, decrease crime, and strengthen neighborhoods.

Id. at 3 n.1.

199. *See* LA. JUST. REINVESTMENT TASK FORCE, REPORT AND RECOMMENDATIONS 10–11 (2017), https://perma.cc/EU5C-55AS (PDF).

Adams—were active participants in these meetings.[200] The proposed initiatives included measures to eliminate life-without-parole sentences for juveniles, to reduce mandatory minimums for non-violent crimes, and to release elderly inmates.[201] But in April 2017, after a year of negotiations and analysis, the LDAA held a weekend retreat and published a pamphlet in which the prosecutors argued against many of the proposals.[202] Of particular concern to the LDAA was the reduction in prison sentences for those convicted of violent crimes.[203]

The legislative process stalled after the LDAA came out against the package.[204] Indeed, when discussing one bill, "[a] committee member emphasized to his colleagues that the LDAA support was essential: 'If the DAs withdraw their support of the bill, this bill will not pass.'"[205] Ultimately, the legislature passed amended bills to address the concerns of the LDAA.[206]

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200. *Id.* at 60. There was also one prosecutor on the Justice Reinvestment Task Force, District Attorney Bo Duhe of the Sixteenth Judicial Circuit. *Id.* at 2. The recommendations of the Justice Reinvestment Task Force were issued in March of 2017. *See id.* at 32–59.

201. THE PROSECUTORS & POL. PROJECT, *supra* note 5, at 123 (citation omitted).

202. *See generally* THE LA. DISTRICT ATT'YS ASS'N, SPECIAL REPORT ON THE JUSTICE REINVESTMENT TASKFORCE (2017), https://perma.cc/7VMS-AEQD (PDF).

203. *See id.* at 1–2.

204. *See* THE PROSECUTORS & POL. PROJECT, *supra* note 5, at 123

> For example, SB 139, which extended parole eligibility to some people serving long prisons sentences, including those with severe medical issues or who were elderly, faced pushback from the LDAA. Pete Adams testified to the Judiciary Committee that the LDAA would only support the bill "if it excludes violent offenders." . . . The LDAA also initially opposed HB 249, which reduced financial obligations for those convicted of crimes. The LDAA, represented by the 11th Judicial Circuit District Attorney John Burkett, only agreed to the legislation with amendments after testifying, "We will offer amendments to assure that the presumption of financial hardship does not become a loophole for many who can afford to pay." (citations omitted).

205. *Id.*

206. *See* Rebekah Allen, *Gov. Edwards Signs Criminal Justice Overhaul into Law, in What Some Laud as Historic Achievement*, ADVOCATE (June 15, 2017), https://perma.cc/6AEQ-N2VL.

In sum, unlike the dominance of prosecutor support for harsh bills (as one might expect), prosecutors opposed lenient bills only somewhat more often than they favored those bills. While prosecutors mostly lobbied for predictable positions related to funding bills and harsh criminal law bills, they played against type more frequently regarding lenient bills. Specifically, they argued in favor of restrictions on the reach of the criminal law or limits on authorized punishments approximately 40% of the time that they took positions on those bills.

D. *National Rates of Prosecutorial Success*

Overall, prosecutors were relatively successful when they lobbied in favor of legislation and less successful when they lobbied against legislation. Only 22% of all criminal justice bills received the necessary votes in the legislature.[207] The bills that prosecutors supported showed a 45% passage rate, while bills that prosecutors opposed passed at basically the same rate as all criminal justice bills (23%).

To be clear, when we talk about prosecutors' lobbying "success," we are not making a causal claim—we cannot say whether their involvement made a bill's passage more or less likely. Other groups lobbied as well and state lawmakers may have made their voting decisions without listening to any lobbyists or interest groups. As a consequence, this Article cannot offer any definitive conclusions about the effect of prosecutor lobbying on the legislative process. Nonetheless, we think it appropriate to speak in terms of "success," as this term suggests that we are measuring *whether* prosecutors achieved their legislative goals, rather than *why* they achieved them.[208]

The lower success rate when prosecutors opposed bills is surprising. Studies of lobbying in other contexts have noted the difficulty of lobbying against the status quo and in favor of new legislation.[209] The legislative process includes so many

207. Of the 22,216 total bills, 4,796 passed. We do not track gubernatorial vetoes in our data, although the topic certainly merits close study in the future.

208. This terminology is consistent with the practice in the political science literature. *See, e.g.*, BAUMGARTNER ET AL., *supra* note 45, at 232.

209. *See supra* notes 96–101 and accompanying text.

vetogates—decision points that could kill the bill[210]—that it is generally easier to lobby against a bill than in its favor, whatever its topic. Our database of bill topics and outcomes does not answer the mystery of why prosecutors succeeded less often than expected in their negative lobbying.[211]

Prosecutor success rates—both for positive and negative lobbying—differed by the type of legal change that the bill envisioned. As Table 3 shows, prosecutors succeeded most often when they supported bills that decreased coverage of the substantive criminal law, increasing the 21% general pass rate for such bills up to 58%.

Table 3. Prosecutors' Success by Type of Legal Change

Type of Legal Change	Overall Pass Percentage	Pass Percentage with Support	Increase Percentage in Pass Rate with Support	Pass Percentage with Opposition	Decrease Percentage in Pass Rate with Opposition
Increase criminal law	17%	40%	135%	28%	-64%
Increase punishment	17%	42%	147%	23%	-35%
Decrease criminal law	21%	58%	176%	15%	29%
Decrease punishment	23%	56%	144%	26%	-13%
Procedural limits	27%	54%	100%	27%	0%
Rights, responsibilities	26%	52%	100%	24%	8%
Funding	31%	43%	39%	36%	-16%
Other	21%	43%	105%	20%	5%

When prosecutors acted predictably and supported increases in the coverage of criminal law and in punishments, the pass rate more than doubled.[212] On the other hand, when

210. *See, e.g.*, William N. Eskridge Jr., *Vetogates and American Public Law*, 31 J.L., ECON., & ORG. 756, 756–57 (2012).

211. In our view, interviews of participants in the lobbying process offer some promise of answering this question. *See infra* Part IV.A.

212. Of the 947 bills prosecutors supported that contained a provision expanding the criminal law, 381 passed; 215 of the 518 bills containing a provision that expanded punishments with prosecutor support passed. Among single-issue expansive bills with prosecutor support, 271 of 785 passed, for a

prosecutors played against expectations and lobbied against these harsher laws, those bills were actually more likely to pass despite the prosecutors' opposition. Prosecutors were least successful when they opposed laws which would increase the scope of criminal law.[213]

Regarding lenient bills (reductions in the coverage of criminal law and in punishments), the bills passed at a rate of 15% and 26%, respectively, when prosecutors took the expected position and opposed those bills.[214] When compared to the general passage rates of 21% and 23% for those lenient bills, respectively, it appears that prosecutors largely failed to achieve their goal of preventing these types of bills' passage—the reduction in the pass rate for the first type of bill was modest, and the second type of bill was actually more likely to pass when opposed by prosecutors. Nonetheless, the modest decrease in the pass rate for bills that decreased the scope of criminal law (from 21% to 15%) represents the most success for prosecutor opposition.[215]

On the other hand, the most striking results occurred when prosecutors took an unexpected position and supported bills that trimmed back the coverage of the criminal law or bills that reduced available punishments. Legislators passed these lenient bills at a rate of 58% and 56%, respectively—a tremendous increase over the 21% and 23% overall passage rate for these types of bills.[216]

Because prosecutors did not always explain their positions, we cannot generalize about why they supported these bills. Sometimes prosecutors appeared to wholeheartedly endorse steps toward making the criminal justice system more lenient.

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rate of 35%—slightly lower than the rate for multi-issue and single-issue bills combined.

213. Prosecutors opposed 198 harsher bills (criminal law increases and punishment increases combined), 51 of which passed.

214. In total, prosecutors opposed 404 lenient bills, and 82 of those bills passed.

215. *See supra* Table 3.

216. Of the 136 bills containing a provision that reduced the coverage of the criminal law with prosecutor support, 79 passed; 88 of the 157 bills with prosecutor support that contained a provision reducing punishments passed. The passage rate for the two categories combined was 57%. Among single-issue, lenient bills with prosecutor support, 67 of 126 bills passed, for a rate of 53%.

In California, for example, prosecutors supported a bill to allow misdemeanors punishable by a maximum term of confinement not exceeding six months in a county jail to be charged as a misdemeanor or an infraction, at the discretion of the prosecuting attorney.[217] A San Diego prosecutor testified in support of the bill, arguing that it "will result in steering minor offenders away from the criminal justice system, and from the stigma associated with it."[218]

Other times, the support for a reform-oriented bill appeared to be strategic. In Indiana, for example, prosecutors supported a bill that legalized CBD oil, but that support may have been attributable to their continuing efforts to ensure that marijuana was not legalized in the state.[219] Prosecutors were actively involved in crafting bills that were introduced in 2017 to allow CBD oil—a derivative of the marijuana plant—to be used to treat epilepsy.[220] Speaking in support of one of these bills, David Powell of the Indiana Prosecuting Attorney Council said, "We do support the legislation. . . . Obviously we are opposed to medical marijuana and the legalization of marijuana, but this bill does not do that."[221]

Prosecutors sometimes supported bills because their passage was unavoidable, such as when prosecutors in several states supported laws to eliminate or modify laws surrounding juvenile life-without-parole sentences.[222] Those changes were largely undertaken in response to the Supreme Court holding that the Constitution limited the circumstances under which such sentences could be imposed.[223] Speaking on behalf of the Nevada state prosecutor association regarding one such bill, one

217. *See* S.B. 617, 2015 Leg., Reg. Sess. (Cal. 2015).

218. THE PROSECUTORS & POL. PROJECT, *supra* note 5, at 42 (citation omitted).

219. *See id.* at 101–02.

220. *Id.* at 101.

221. *Id.* at 103 n.21.

222. *See, e.g.*, *id.* at 182.

223. *See* Miller v. Alabama, 567 U.S. 460, 472 (2012) ("[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.").

prosecutor explained: "The Nevada District Attorneys Association supports [this bill] as a compliance measure."[224]

III. DIFFERENCES AMONG STATES IN LOBBYING OUTCOMES

So far, we have discussed the track record of prosecutors as lobbyists in state legislatures by reporting national average rates. Those averages, however, obscure real differences between states. In this Part, we scrutinize the variance among states regarding prosecutor success rates. We also explore potential explanations for the differences and ground our outcomes in political science theory.

A. *State Differences in Success Rates*

The number of criminal enforcement bills introduced in the state legislature ranged from highs of 1,536 in New York and 1,244 in Mississippi to lows of 80 in Alaska and 107 in Wyoming.[225] These differences in raw numbers often reflect the overall volume of legislation that each state tends to produce across all topics. For example, more than 67,000 bills were introduced in New York during the study period compared to only 1,955 in Alaska and 1,353 in Wyoming. When we looked at the number of criminal justice bills as a percentage of all bills introduced, we discovered that criminal justice bills made up the greatest proportion of the legislative agendas in Virginia and Iowa (approximately 14%), and the smallest proportion of the agenda in Minnesota, New York, and Illinois (less than 3%).

The overall passage rate of criminal justice bills varies significantly from state to state. North Dakota boasts the highest rate (72%), while New York has the lowest (less than 2%). But these rates undoubtedly derive, at least in part, from the number of criminal justice bills introduced. What is more, the pass rates of all bills—not just criminal justice bills—varies wildly from state to state. It can be as high as 67% (Idaho) and as low as 2.7% (Minnesota).

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224. *Hearing on Assembly Bill (A.B.) 218 Before the S. Comm. on Judiciary*, 2017 Leg., 79th Sess. 8 (Nev. 2017), https://perma.cc/R7HD-8RWT (PDF).

225. For a full list of the number of bills introduced in each state, see *infra* APPENDIX A.

The percentage of bills that attracted prosecutor lobbying efforts also looks quite different from state to state. Prosecutors in Oklahoma, for example, lobbied on only 6% of the 820 criminal justice bills introduced in the state, and prosecutors in Maryland and Pennsylvania likewise lobbied on only 7% of bills introduced in their states.[226] In contrast, prosecutors in Ohio lobbied on 96% of the 267 criminal justice bills introduced in that state, and Nebraska prosecutors lobbied on 95% of the 169 bills introduced in their state.[227] Again, these state-to-state differences are necessarily imprecise and do not support strong inferences about different levels of activity among prosecutor lobbyists in various states.[228]

The success rates of prosecutor lobbying, however, offer more meaningful comparison points. As a starting point, the overall success rates of prosecutors varied significantly from state to state.[229] In Delaware, for example, every bill that prosecutors supported ultimately passed.[230] Arizona prosecutors were also very successful lobbyists—none of the bills they opposed were able to pass.[231] Prosecutors in other states did not fare as well. The bills that Nebraska prosecutors supported were no more likely to pass than the bills they opposed.[232] And in several states, bills that prosecutors opposed were *more* likely to pass than the average criminal justice bill.[233]

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226. *See infra* APPENDIX A. There were 419 bills introduced in Maryland and 607 bills introduced in Pennsylvania.

227. For a full list of states and levels of prosecutor involvement, see *infra* APPENDIX A.

228. *See supra* notes 161, 181 and accompanying text.

229. For a state-by-state breakdown of success rates of prosecutor supported and opposed bills, see THE PROSECUTORS & POL. PROJECT, *supra* note 5.

230. *Id.* at 59.

231. *Id.* at 24.

232. The overall pass rate for criminal justice legislation in Nebraska was 18.3%, and the pass rate for bills that Nebraska prosecutors supported was 18.2%. *Id.* at 173; *infra* APPENDIX A.

233. For example, Alaska's overall criminal justice bill passage rate was 15%, while its passage rage for bills opposed by prosecutors was 20%. *See* THE PROSECUTORS & POL. PROJECT, *supra* note 5, at 19; *infra* APPENDIX. A.

In the thirty-five states where we had sufficient information,[234] we sought to identify where prosecutors were most and least successful. We compared the ordinary rate at which criminal justice bills passed to the rate that bills passed when supported by prosecutors or when opposed by prosecutors. We calculated the impact of prosecutor opposition or support as a percentage of the overall pass rate.

Imagine State A ordinarily passed 10% of all criminal justice bills, and they passed 20% of bills that prosecutors supported. And imagine that State B ordinarily passed 40% of all criminal justice bills, and they passed 50% of bills that prosecutors supported. The difference in pass rates for both states is 10%, but the gap as a percentage of the initial pass rate is different—the increase is 100% for State A and 25% for State B. We therefore rank State A prosecutors as more successful than State B prosecutors.

Using this approach, Table 4 offers a list of the states in which prosecutors were most successful when supporting bills.[235]

234. The twelve states that did not make their legislative history material available—Alabama, Arkansas, Kentucky, Mississippi, New Jersey, New Mexico, New York, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming—are excluded. We also excluded Indiana, Massachusetts, and Missouri because, although those states make legislative history materials available online, we were unable to locate the materials for more than half of the criminal justice bills that were introduced during the study period.

235. For a list of all 35 states with their rankings, see *infra* APPENDIX B.

Table 4. Top and Bottom States, Prosecutor Success Rate When Supporting Bills

State	Overall Bill Passage Rate	Pass Rate with Prosecutor Support	Percent Increase in Pass Rate with Support	Support Rank
PA	7%	53%	680%	1
IL	10%	40%	305%	2
FL	17%	46%	173%	3
OK	23%	59%	158%	4
AZ	29%	69%	140%	5
VT	26%	52%	100%	6
MI	24%	46%	97%	7
DE	52%	100%	92%	8
KS	23%	43%	90%	9
HI	12%	22%	85%	10
…	…	…	…	…
UT	60%	73%	22%	30
MD	21%	24%	16%	31
ID	58%	67%	14%	32
ND	73%	81%	12%	33
CA	43%	47%	9%	34
NE	18.3%	18.2%	-0.9%	35

As Table 4 indicates, Pennsylvania's prosecutors were far and away more successful than prosecutors in every other state when they supported bills. Bills that they supported were 680% more likely to pass than other criminal justice bills. The state with the next most successful prosecutors was Illinois, where bills supported by prosecutors were 305% more likely to pass than the average criminal justice bill. Florida, Oklahoma, Arizona, Vermont, Michigan, Delaware, Kansas, and Hawaii round out the top ten.[236]

As noted above, prosecutors were more successful when supporting bills than when opposing bills. Therefore, in all but one of the states where prosecutors succeeded less often

236. *See infra* APPENDIX B.

(Nebraska), bills were still more likely to pass with prosecutor support.[237]

The list of states looks somewhat different when analyzing the states where prosecutors were most and least successful in opposing bills.[238]

Table 5. Top and Bottom States, Prosecutor Success Rates When Opposing Bills

State	Overall Bill Pass Rate	Pass Rate with Prosecutor Opposition	Percent Decrease in Pass Rate with Opposition	Opposition Rank
PA	7%	0%	100%	1
OK	23%	0%	100%	1
AZ	29%	0%	100%	1
DE	52%	0%	100%	1
MN	21%	0%	100%	1
NH	26%	5%	81%	6
MI	24%	8%	68%	7
ME	44%	14%	68%	8
ID	58%	25%	57%	9
WI	39%	17%	57%	10
. . .	. . .	. . .	. . .	. . .
CT	22%	34%	-55%	30
MD	21%	33%	-62%	31
VT	26%	43%	-64%	32
HI	12%	24%	-100%	33
IL	10%	23%	-139%	34
GA	27%	67%	-151%	35

There are a few examples of overlap among the most successful states in passing and opposing bills. Most notably,

237. *See supra* Table 4.

238. For a full list of states with their ranking, see APPENDIX B.

Pennsylvania prosecutors claim the top spot both when supporting and opposing bills.[239]

The two lists as a whole, however, show no connection between the two distinct forms of lobbying. A high success rate in supporting bills provides no clue about whether prosecutors in that state also succeeded in opposing bills.[240] Illinois prosecutors, for example, were relatively successful in getting bills they supported passed, but they were among the least successful in blocking bills that they opposed.[241] It seems that the behaviors and resources that make prosecutors successful for one type of lobbying (say, negative lobbying against passage of a bill) do not carry over to other types of lobbying in favor of a bill.

The comparison between opposing and supporting bills also shows how ineffectual some state prosecutors are when opposing bills as compared to supporting them. In all but one state, prosecutor support resulted in a higher bill passage rate.[242] But in ten states, the bills that prosecutors opposed were actually *more* likely to pass than the average criminal justice bill.[243]

B. *Potential Explanations for State Differences*

What factors might explain prosecutors' different success rates in various states? One obvious candidate is the partisan tilt of the state legislature. There is some support in the legal and political science literature for the proposition that legislatures controlled by Republicans are more receptive to harsh criminal enforcement bills.[244] By extension, when

239. *See supra* Tables 4, 5.

240. In particular, the correlation statistic between the state ranks for supporting bills and their ranks for opposing bills was 0.05. A correlation statistic of 0.00 would indicate no relationship whatsoever, while a statistic of 1.00 would indicate a perfect positive correlation (each state receiving the same rank in both lists).

241. Illinois experienced a 139% increase in passage rate for bills opposed by prosecutors and a 304% increase in passage rate for bills supported by prosecutors. *See supra* Tables 4, 5.

242. *See supra* Table 4.

243. *See infra* APPENDIX B.

244. *See, e.g.*, BERK ET AL., *supra* note 12, at 192; Michael Tonry, *Explanations of American Punishment Policies: A National History*, 11

prosecutors take a conventional position to support harsher bills related to criminal law and punishment, they should succeed more often in states where Republicans control the legislature.

In our lobbying data, we found a clear correlation between the partisan makeup of the state legislature and prosecutor success.[245] We determined the partisan makeup of each state by first determining how many seats in each chamber were filled by Republicans in the years 2015 through 2018, dividing that number by the total number of seats in the chamber, and then averaging that number for both legislative chambers in the state.[246] Once we had that calculation in hand, we ranked the states by what percentage of their legislature was Republican during the four years of our study. Table 6 provides a stylized example of these calculations and how they generated a ranking for state partisanship.

PUNISHMENT & SOC'Y 377, 382–84, 388–89 (2009) (discussing Republicans' "'southern strategy' with its race-coded emphasis on states' rights, crime and welfare"). At the same time, many scholars note the shared preferences of Republican and Democratic legislators for "tough-on-crime" politics. *See, e.g.*, Frank O. Bowman, III, Pour Encourager Les Autres? *The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments that Followed*, 1 OHIO ST. J. CRIM. L. 373, 393–402 (2004) (discussing Democratic congressmen's support of bills that were tough on white collar crime); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1998–99 (2008) (noting politicians on both the right and the left who engaged in "symbolic politics" by supporting salient criminal bills).

245. We calculated a correlation coefficient for the relationship between prosecutorial success and other factors. More specifically, we used a Spearman correlation coefficient when dealing with ordinal data (factors that involve the rankings of each state), and a Pearson correlation when dealing with continuous data (factors that involve the rates of each state). These statistics measure the strength of the relationship between two factors—for instance, a ranking of states by the lobbying success rates of their prosecutor associations compared to a ranking of those same states based on their populations. The calculation produces a number between -1 and 1, where a coefficient of 1 indicates the strongest positive correlation between the two lists (i.e. rank 1 on the first list corresponds with rank 1 on the second list), while a coefficient of -1 indicates the strongest possible inverse relationship between the two lists.

246. For Nebraska, which has a unicameral legislature, the averaging was not necessary.

Table 6. Stylized Partisan Ranking

State	Senate Seats	Number of Senate Republicans	Percentage of Senate Republicans	House Seats	Number of House Republicans	Percentage of House Republicans	Score	Rank
A	30	20	66%	100	60	60%	63%	1
B	50	25	50%	150	75	50%	50%	2
C	40	10	25%	120	40	33%	29%	3

Before turning to the question of prosecutor success, it is worth noting that partisanship in state legislatures was quite lopsided during our study period. Of the thirty-five states we studied, Republicans controlled more than 50% of seats in twenty-two of those states. Indeed, Republicans controlled more than 60% of seats in sixteen of those states, as compared to only six states in which Republicans controlled less than 40% of seats.

In general, high levels of Republican influence in the legislature correlated with a stronger ranking for prosecutors, but only when they *opposed* legislation. The higher the Republican partisan ranking of a state, the more likely it was for prosecutors to succeed in lobbying against legislation. In particular, the correlation between the percentage of the state legislature that was Republican and the decrease in a bill's pass rate when opposed by prosecutors was 0.40.[247]

Not every increase in Republican control is created equal. The difference between 59% and 61% control of the legislature is far less important than the difference between 49% and 51% control. We therefore sorted state legislatures into two categories: those with more than 50% of its members as Republicans (coded as 1) and those with less than 50% (coded as 2). The correlation between this Partisan Control category and the state's rank in prosecutor success when opposing legislation

247. This correlation is statistically significant, with p=0.03. The Spearman's correlation between a state's partisan rank (as distinct from the percentage of Republican control) and the state's rank for prosecutors who successfully opposed legislation was 0.34.

Similarly, there was a significant negative correlation between states where Democrats control a non-competitive legislature (more than 55% Democratic control) and the prosecutors' rank in successfully opposing legislation. The correlation is -0.42, with p=0.02.

was strong.[248] In short, when Republicans held just enough seats to control the state legislature, the prosecutors in that state were likely to be more successful when they tried to block bills than prosecutors in other states.

The same patterns did not operate, however, when prosecutors lobbied in favor of legislation. There was no meaningful correlation between the percentage of the legislators in a state who were Republican and the state's rank for prosecutor success when supporting legislation.[249] Indeed, prosecutors were relatively unsuccessful in getting legislation to pass in both solidly red states—such as Idaho, North Dakota, and Utah—as well as very blue states like California and Maryland.

Factors other than the partisan tilt of the legislature probably influence prosecutor success as well. For instance, the comparative strength of different lobbying groups might matter. A state with well-organized and credible lobbyists for civil liberties groups might produce lower rates of prosecutor success than states without such a counterbalance among lobbyists. The interaction between prosecutors and law enforcement lobbyists might also vary from state to state.

The structure of the state legislature itself could also influence the success of prosecutor lobbyists. Political scientists note the differing levels of professional staffing in various state legislatures.[250] It is possible that legislators with less support staff rely more heavily on input from lobbyists. On first blush, however, this factor does not correlate strongly with prosecutor lobbying success in the states.[251]

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248. The correlation statistic was 0.49, a result that is statistically significant, with p=0.0008.

249. The correlation statistic was -0.15.

250. *See Full- and Part-Time Legislatures*, NAT'L CONF. OF ST. LEGISLATURES, https://perma.cc/9D9Z-THHN.

251. The correlation statistic is 0.27. The professionalization categories that we applied to each state appear in APPENDIX C. We used categories assigned by the National Conference of State Legislatures which were designed to capture whether legislatures were full time or part time.

We also did not find any correlation between the competitive status of state legislatures and the success of prosecutors. We coded states as "competitive" if a political party controlled the legislative delegation with less than 55% of the seats. The correlation between competitive legislatures and prosecutor success in supporting bills was -0.11, while the correlation for

It is also possible that differences in state prosecutor associations may have affected lobbying success. While most states have such associations,[252] associations differ from one another in various ways, including their composition, voting rules, and funding sources.[253] The most unified state prosecutor associations with the most secure sources of funding might enjoy the highest levels of success in the state legislature.

Finally, differences in the social and political environments in each state might influence the success of the prosecutor lobby. States with higher crime rates might listen more closely to their prosecutors during legislative debates. The same might be true of states with fewer people concentrated in urban areas.

Future research will be necessary to determine the importance of these differences among states and the interactions among these various influences. For now, we offer the observations that state prosecutors vary in their success in opposing legislation and in supporting legislation, and that their opposition seems to matter more in Republican-controlled legislatures.

IV. LESSONS AND IMPLICATIONS

We close with a discussion of the most important implications of our study—those aspects of prosecutor lobbying that are least expected and most valuable to those hoping to predict and influence legislatures as they debate and vote on crime legislation. We focus on four lessons in particular.

First, we note that prosecutors succeeded more often when they supported bills than when they opposed them; we consider possible explanations for this finding's inconsistency with the political science literature. Second, we focus on prosecutors' success when they behaved in ways that resemble more typical, self-interested actors who lobby for legislation that benefits themselves. Third, our study reveals that even though a larger number of harsher bills are introduced, lenient bills become law at a higher rate, particularly when prosecutors support them.

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prosecutor success in opposing bills was -0.04. The competitive status of each state legislature appears in APPENDIX C.

252. *See supra* note 15 and accompanying text.

253. *See generally* Yeargain, *supra* note 13; THE PROSECUTORS & POL. PROJECT, *supra* note 5.

Finally, we consider the implications of a changing political landscape, in which legislatures are more receptive to reform and prosecutors more frequently disagree and lobby on both sides of some bills.

A. *Opposition, In Plain View and Behind the Scenes*

We were surprised to find that prosecutors were far more successful in supporting legislation than in opposing it.[254] Prosecutors were not only less successful in opposing legislation than in supporting it, but they did not appear to be very successful at all when opposing legislation.[255] Nationally, bills that prosecutors opposed were just as likely to pass as all other criminal justice bills, and, in ten states, bills that prosecutors opposed were more likely to pass than the average criminal justice bill.[256]

This finding contradicts the conventional wisdom in the legal literature—that prosecutors are a powerful lobbying group[257]—or, at a minimum, indicates that it is oversimplified. The conventional wisdom about powerful prosecutors is further undermined by the fact that prosecutorial lobbying patterns are not consistent with political science studies. Those studies found that, as a general matter, negative lobbying was more effective than affirmative lobbying.[258] If prosecutors are less successful in blocking legislation than other interest groups, then perhaps prosecutors are not, in fact, a particularly powerful lobbying group.

There is, however, an alternative explanation for prosecutors' relative lack of success in opposing legislation—an explanation that would reinforce, rather than contradict, claims about prosecutorial lobbying power. Our findings about prosecutor opposition may have been affected, at least in part, by the types of bills that prosecutors affirmatively opposed. If, as political scientists theorize, prosecutors mobilize to oppose bills only when they pose a danger of passing,[259] then it is

254. *See supra* notes 242–243 and accompanying text.
255. *See supra* Table 5.
256. *See supra* Table 5.
257. *See supra* notes 49–64 and accompanying text.
258. *See supra* notes 96–101 and accompanying text.
259. *See supra* notes 102–106 and accompanying text.

possible that our measure of prosecutor success is skewed because it excludes many other bills that prosecutors would have opposed but did not need to. Imagine that ten criminal justice reform bills were introduced in a session and that prosecutors wished to see all ten bills fail. Only two of those bills had a realistic chance of passing, so those are the bills that the prosecutors actively opposed. One of the two bills passed, and none of the other eight bills passed. Our study would indicate that prosecutors succeeded only 50% of the time that they opposed a bill; but from the prosecutors' perspective, they only failed 10% of the time. Unfortunately, to test this theory fully we would need more information about which bills had a realistic chance of passing—information that our quantitative methods alone were not designed to capture.

There is another possible explanation for prosecutors' relative lack of success when opposing bills than when supporting bills—namely that successful prosecutorial opposition often occurs behind closed doors. This explanation draws on the idea of agenda setting, which is sometimes called agenda control.[260] Agenda setting is the process of determining which topics will be taken up in the legislative process and which will not.[261] Agenda setting occurs either early in the legislative process or before it even begins, as actors decide which bills to introduce, and which bills will receive hearings and votes.[262]

If prosecutors succeed in agenda setting, then laws they support get introduced as bills, and laws they oppose are never introduced as legislation. That success would be asymmetrically captured in our dataset.[263] Successful agenda setting in support of bills means a bill would be introduced and thus present in our dataset; however, successful agenda setting in opposition to bills

260. *See* Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV. 1401, 1403 n.6 (2016).

261. *See generally* FRANK R. BAUMGARTNER & BRIAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS (2d ed. 2009); JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 1995).

262. *See generally* BAUMGARTNER & JONES, *supra* note 261.

263. *See* Stolz, *The Roles of Interest Groups*, *supra* note 23, at 54 ("Research that focuses only on the legislative process may not account for the participation of groups at the agenda setting stage (promoting or blocking new policy items on the public policy agenda) of the policy making process . . . .").

means no bill would be introduced and therefore leaves nothing for our dataset to record. While our dataset cannot quantify prosecutorial agenda setting, our study did discover evidence that it was occurring. In Florida,[264] for example, beyond the ordinary legislative process of introducing, amending, and voting on bills, the legislature conducts "workshops" at which they discuss criminal-justice-related topics and hear testimony on ideas for possible future legislation related to those topics.[265] Prosecutors sometimes participated in those workshops, indicating that they are involved in agenda setting in Florida.[266]

Finally, we know that our data fail to capture at least some closed-door prosecutor lobbying. Media accounts demonstrate that some of that private lobbying involves opposition to bills.[267] Of course, prosecutors could support *and* oppose bills in private settings, and we have no way of knowing whether their opposition is more likely to be hidden than is their support.

In sum, while our findings indicate that the academic literature has overstated the power of prosecutorial lobbying, it is possible that information our study did not capture would be more supportive of the conventional wisdom.

B. *Self-Interest and Expertise*

One of the major academic criticisms about prosecutor lobbying is that prosecutors should be viewed as lobbying to promote their own self-interest rather than as neutral experts.[268] Legal commenters tend to raise this criticism in the context of lobbying about bills that give prosecutors more power,

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264. Florida was one of several states where bills that prosecutors opposed passed at a higher rate than the average criminal justice bill. *See infra* APPENDIX B.

265. *See* THE PROSECUTORS & POL. PROJECT, *supra* note 5, at 63, 67–70.

266. Because materials from the workshop are publicly available, we were able to get a glimpse of at least part of the agenda-setting process in the state. When prosecutors participated in those workshops and the workshops gave rise to proposed legislation that was introduced, we were able to capture the prosecutors' position on those bills as part of our dataset. When no bills were introduced, though, any opposition or support that prosecutors expressed at the workshop could not be captured by our quantitative analysis.

267. *See* Wright, *Quiet Police Lobbying*, *supra* note 40; Cassidy, *supra* note 181.

268. *See supra* notes 65–71, 88 and accompanying text.

such as bills that increase the scope of the criminal law or sentences.[269] When prosecutors testify in favor of more crimes and harsher sentences, however, they are likely to state that such laws will benefit victims or the public interest more broadly.[270] As a result, legislatures are unlikely to perceive prosecutorial lobbying as self-interested in the same way that they might perceive, for example, lobbying by the fossil fuel industry against environmental controls.[271]

Although lobbying about the scope of criminal law or the amount of punishment may not be perceived as self-interested, other prosecutor lobbying may be. As political scientist Lisa Miller noted, the modern increase in law enforcement lobbying may be related to increased spending for criminal justice agencies.[272] When prosecutors lobby on spending issues, however, they are less likely to be seen as experts and more likely to be seen as an interest group.[273] After all, unlike criminal law and punishment, prosecutors have no special expertise on financial matters and legislatures are doubtlessly on the receiving end of much lobbying about how to spend the state's money. Consequently, legislatures might be more likely to see prosecutors as self-interested when they lobby about funding.

When we look at the bills that prosecutors supported by issue, we see that prosecutors were far less successful when they lobbied in favor of funding bills. While the pass rate for every other type of bill at least doubled when prosecutors supported them, the increased pass rate for funding bills was far more

269. *See, e.g.*, Hopwood, *supra* note 11, at 1202.

270. *See, e.g.*, Press Release, Ala. Dist. Att'ys Ass'n, Hum. Trafficking Awareness Day (Apr. 24, 2019), https://perma.cc/JA65-MGUA (supporting legislation "to help the victims" of human trafficking); Andrew DeMillo, *Proposal to End Life Without Parole for Youths Tabled*, ARK. DEMOCRAT GAZETTE (Feb. 17, 2015), https://perma.cc/E86Q-RGH6 ("Prosecutors opposed the bill, saying removing life without parole as a sentencing option would disrespect juries and the families of victims."); *see also* Stolz, *Interest Groups*, *supra* note 114, at 100–01.

271. *Cf.* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 102 (2007) ("Police and prosecutors have been popularly perceived as those actors in the criminal justice system most aligned to the interests of victims . . . .").

272. *See* Miller, *Rethinking Bureaucrats*, *supra* note 88, at 584.

273. *Cf. supra* note 70 and accompanying text.

modest: funding bills in general passed 31% of the time, a rate that increased modestly up to 43% when they were supported by prosecutors.[274] Prosecutor opposition to funding bills was also not particularly successful. Funding bills that prosecutors opposed were more likely to pass than funding bills in general (36% as opposed to 31%).[275] These findings may be explained by legislators perceiving prosecutors as lobbying out of self-interest.

If funding bills represent the most obvious category of self-interested lobbying by prosecutors, then prosecutorial lobbying against type may be the least self-interested. As noted above, despite their stereotypical positions, prosecutors sometimes lobbied in favor of bills that would decrease the scope of criminal law or decrease punishment.[276] Prosecutors are quite successful when they lobby against type in favor of these more lenient bills.[277]

Other findings, however, suggest that something more than legislators' perception of prosecutorial self-interest is at play. Prosecutors arguing against increases in the scope of criminal law or against an increase in punishment are arguing against their own self-interest—after all, these laws would make it easier for them to convict defendants. Yet, their negative lobbying was least successful when they lobbied against their self-interest on these bills.[278]

Reconceptualizing prosecutors as "experts" when they lobby does not explain these findings. Prosecutors enjoy significant success when they lobby in favor of harsh bills, more than doubling the pass rate of those bills.[279] Presumably, prosecutors' status as "experts" cannot be contingent on the positions that they take—they either possess expertise about the appropriate scope of criminal law and the correct amount of punishment or they do not.

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274. *See supra* Table 3.

275. *See supra* Table 3. As discussed below, there are other categories of bills—specifically those that would make the criminal law more punitive—where prosecutor opposition was even less successful.

276. *See supra* notes 216–224 and accompanying text.

277. *See supra* notes 212–213 and accompanying text.

278. *See supra* note 213 and accompanying text.

279. *See supra* Table 3.

It may be that the different levels of prosecutorial success do not turn on legislative perceptions of self-interest or expertise. Instead, the relevant variable may be legislators' *own* perceived self-interest. Because criminal legislation has a symbolic component,[280] a legislator may want to be seen as addressing a well-publicized public safety problem without caring much about whether the action will actually fix the problem.[281] Legislators therefore have an incentive to vote in favor of harsh new criminal laws even if prosecutors tell them that such a law is unnecessary.[282] In other words, our data suggest that Jeffrey Bellin may be correct in arguing that legislative desires to pass harsh laws can explain the passage of criminal justice legislation better than a theory of prosecutorial influence with other governmental actors.[283]

Legislative self-interest may also help explain prosecutorial success. Prosecutor support for laws that decrease the scope of criminal law or decrease punishment can provide political cover for lawmakers who want to enact reform. This is consistent with the dramatic increase in pass rates for this legislation when it receives prosecutor support.[284]

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280. *See, e.g.*, Sara Sun Beale, *Federalizing Hate Crimes: Symbolic Politics, Expressive Law, or Tool for Criminal Enforcement*, 80 B.U. L. REV. 1227, 1254 (2000) ("One of the most important arguments in support of the . . . creation of the new federal hate crime has been the need to 'send a message'.").

281. *See* BARKOW, PRISONERS OF POLITICS, *supra* note 10, at 110–12; ANTHONY KING, RUNNING SCARED: WHY AMERICA'S POLITICIANS CAMPAIGN TOO MUCH AND GOVERN TOO LITTLE 138–41 (1997); Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 428–31 (2003); Brian T. FitzPatrick, *Congressional Re-election Through Symbolic Politics: The Enhanced Banking Crime Penalties*, 32 AM. CRIM. L. REV. 1, 29 (1994) ("[A] legislature may enact 'a law that promises to solve or ameliorate a problem even if there is little likelihood it will.' Political motives spur symbolic legislation." (citation omitted)); Nancy E. Marion, *Symbolic Policies in Clinton's Crime Control Agenda*, 1 BUFF. CRIM. L. REV. 67, 67 (1997) ("Symbolic policies are legislative acts that do not provide any tangible change, but serve to evoke a particular response from the public." (citation omitted)).

282. Of course, prosecutors offer reasons other than the idea that a new law is unnecessary when opposing these bills. *See supra* note 193 and accompanying text.

283. *See supra* notes 72–76 and accompanying text.

284. *See supra* Table 3.

Legislative self-interest provides only a partial explanation for prosecutorial success when opposing more lenient bills. On the one hand, prosecutors are quite successful when opposing legislation that would decrease the scope of criminal law—indeed, that is the category of bills in which their negative lobbying efforts are most successful.[285] But that pattern does not hold true regarding bills that would decrease punishments. There, bills opposed by prosecutors pass at a slightly higher rate (26%) than all bills in the category (23%).[286] To be clear, this is a much smaller increase in the pass rate than bills that would increase the scope of the criminal law (28% versus 17%) or bills that would increase punishment (23% versus 17%).[287] Nonetheless, the trend is inconsistent with a simple story about legislative self-interest.

C. *Ratchets and Bathtubs*

While our hypotheses and data collection centered on prosecutor lobbying, we also made some incidental discoveries about the legislative process in the field of criminal law. One implication of our data is that a popular academic metaphor, characterizing the legislative process for criminal matters as a "one-way ratchet,"[288] does not accurately describe the nuanced reality.

According to this metaphor, new crimes enter the code every year, but they don't come out.[289] The one-way ratchet theory is based on observations about the self-interest of legislators who reap political rewards when they spot new social harms and take credit for solving that problem by creating a new crime to punish the behavior.[290] It is standard fare for legal scholars and political

285. *See supra* Table 3.

286. *See supra* Table 3.

287. *See supra* Table 3.

288. *See supra* note 32.

289. *See* Stuntz, *supra* note 32, at 509 (describing criminal law as a "one-way ratchet that makes an ever larger slice of the population felons and . . . turns real felons into felons several times over").

290. *See id.* ("Voters demand harsh treatment of criminals; politicians respond with tougher sentences . . . and more criminal prohibitions.").

scientists to mention this metaphor as a starting point for understanding the politics of crime.[291]

The implications of this theory are enormous. The one-way ratchet view is predicated on the idea that the politics surrounding crime legislation are fundamentally dysfunctional.[292] Even if it becomes clear that some crimes or punishments are subject to abuse, produce unjust outcomes, or incarcerate too many people, the legislature will not repeal those laws or amend them to address shortcomings.[293] The impetus to build a better system of criminal law, so the argument goes, must therefore fall to others—prosecutors, defense attorneys, judges, sentencing commissions, probation services, non-profit organizations involved in diversion and reentry programs—anybody other than the legislators who define crimes and punishments at the outset.

Darryl Brown has questioned the claim that legislatures are always quick to enlarge the criminal code and never reduce it, documenting examples of amendments and repeals of criminal statutes in three states.[294] Our findings confirm Brown's observations and take them a step farther. Not only did we find examples of lenient legislation that became law, we also found that such bills are not rare or aberrational—they appear every year, in every state, and succeed relatively often.

Our database of legislation demonstrates that harsh bills that expand the reach of the criminal law or increase the severity of criminal penalties appear on the legislative agenda far more often than lenient bills. In the years that we studied, more than three times as many harsh bills were introduced than

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291. *See supra* note 32 and accompanying text; *see also, e.g.*, Scott R. Hechinger, *Juvenile Life Without Parole: An Antidote to Congress's One-Way Criminal Law Ratchet?*, 35 N.Y.U. REV. L. & SOC. CHANGE 408, 427 (2011); Carlton Gunn & Myra Sun, *Sometimes the Cure Is Worse Than the Disease: The One-Way White-Collar Sentencing Ratchet*, 38 HUM. RTS. 9, 11 (2011).

292. *See* Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 WASH. U. L. REV. 351, 359–63 (2019).

293. *See generally* Richard H. McAdams, *The Political Economy of Criminal Law and Procedure: The Pessimists' View*, *in* CRIMINAL LAW CONVERSATIONS 517 (Paul H. Robinson et al. eds., 2009); Russell M. Gold, *Prosecutors and Their Legislatures, Legislatures and Their Prosecutors*, *in* THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 327 (Ronald F. Wright et al. eds., 2021).

294. *See* Brown, *supra* note 78, at 245–49.

lenient bills.[295] Nonetheless, we found an unexpectedly high success rate for lenient bills once they were introduced. While harsh bills passed only 17% of the time, more than 20% of lenient bills passed.[296]

Of course, the higher pass rate for more lenient bills is dwarfed by the significant difference in the number of bills introduced—approximately 11,000 harsh bills, compared to roughly 3,000 lenient bills.[297] For that reason, the long-term trend in the legislative process is to increase the footprint of the criminal law by covering more human activity and threatening greater punishments every year. In that sense, our data supports the theories in law, criminology, and political science that predict an ever-expanding criminal code[298] and an ever more powerful culture of social control.[299]

While our findings unambiguously confirm that criminal codes continue to expand, they also suggest a change in academic metaphors is in order. The "one-way ratchet" metaphor is overstated. It conjures up a mechanism that is capable of moving only in a single direction, suggesting that legislatures are incapable of reducing sentences or narrowing substantive law. That suggestion is simply untrue, and the mental image is misguided.

We suggest that, instead of a ratchet, the better metaphor is a filling bathtub—the tap is on and adding new water, but the drain at the bottom of the tub is also open, allowing some water to drain out.[300] Under this metaphor, new crimes flow in easily, year after year, through plumbing with high capacity. The open drain represents the bills that decriminalize, reduce penalties, or otherwise remove potential convictions and punishments

295. *See supra* Table 1.

296. *See supra* Table 3.

297. *See supra* Table 1.

298. *See* Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1339 (2008); *see, e.g.*, Paul H. Robinson & Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 HASTINGS L.J. 633, 644 (2005); Luna, *supra* note 32, at 704–11.

299. *See generally, e.g.*, DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL CONTROL IN CONTEMPORARY SOCIETY (2001); SIMON, *supra* note 271.

300. *Cf.* Tony Fabelo & Michael Thompson, *Reducing Incarceration Rates: When Science Meets Political Realities*, ISSUES SCI. & TECH., Fall 2015, at 35, 37 (analogizing filling bathtubs and prison admissions).

from the system. Unfortunately, the drain cannot keep up, and the overall volume of the bathtub water increases predictably over time. Someday the bathtub will overflow (if it hasn't already), but the water coming in through the pipes could be decreased or the drain could be enlarged, and thus disaster can be averted. In other words, state legislatures not only can, but do, control the water level—they just need to adjust the flow in and out of the system.

D. *Shifting Political Winds and Loss of Consensus*

Our study concentrated on a single four-year window in state legislatures. Consequently, our data do not capture evidence of change over time. It is nonetheless clear that the landscape in crime politics is changing rapidly in ways that might affect the influence of the prosecutor lobby. In particular, prosecutors may not enjoy the same influence they once did and they may no longer speak with one voice on issues of policy. Our study period may have captured the beginning of a shift in the influence of prosecutors in statehouses, as consensus among prosecutors themselves begins to fray and as lawmakers become increasingly concerned with growing prison populations and public calls for criminal justice reform.

One recent news account from Colorado suggested that the prosecutorial influence of prosecutors has waned, that lawmakers are more interested in reform, and that prosecutors are more divided over policy:

> Tom Raynes has helmed the Colorado District Attorneys' Council for a decade. It used to have a lot more power, he said, recalling a talk he had years ago with his predecessor.
>
> "He said, 'In my day, I'd pick up the phone and call the Senate majority leader and say this or that needs to happen and it would happen,' Raynes said. . . .
>
> Compared to previous decades, state lawmakers today are more willing to sponsor and pass bills without the blessing of district attorneys, the most potent group in the law enforcement lobby. . . .
>
> The district attorneys have changed, too. There's less unanimity among them now, Raynes said, as more of them run on reform platforms, "and I don't see that necessarily as a negative."

> The upshot is a gradual power shift at the Capitol on policing and criminal justice.[301]

Shifting political winds are not limited to the state of Colorado. The success and failure of state ballot initiatives may indicate that voters have shifted away from prosecutors' tough-on-crime positions. In Oklahoma, for example, prosecutors opposed 2016's State Question 780, "which reclassified several drug and property crimes from felonies to misdemeanors."[302] Prosecutors argued that the measure "would lead to higher crime rates and allow drug use to run rampant," but nearly three-fifths of Oklahoma voters disagreed and approved the measure.[303]

Similarly, California voters passed a number of criminal justice reform initiatives over prosecutorial objections.[304] A majority of prosecutors opposed these referenda, but some prominent chief prosecutors from large cities broke ranks and supported the more lenient policies.[305] These high-profile losses in multiple statewide referenda may help explain why California prosecutors' lobbying efforts were less successful than prosecutors' efforts in other states.[306] California prosecutors

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301. Burness, *supra* note 46.

302. Keaton Ross, *Study: Oklahoma Prosecutors Are Powerful Lobbyists*, THE J. REC. (June 15, 2021), https://perma.cc/TKY5-NZK9.

303. *Id.*

304. *See generally* Michael W. Sances, *Do District Attorneys Represent Their Voters? Evidence from California's Era of Criminal Justice Reform*, 2 J. POL. INSTS. & POL. ECON. 169 (2021).

305. *See id.* at 181–82.

306. Proposition 47, passed by voter referendum in 2014, and Proposition 57, passed by voter referendum in 2016, provide two further examples of prosecutor losses and fragmented prosecutor advocacy. Propositions 47 and 57 reduced the penalties for many so-called "wobbler" crimes—crimes that were sometimes charged as felonies and sometimes as misdemeanors—to misdemeanors punishable by less than a year. They further increased funding for counties to implement diversion programs. Prop 57 also shortened some prison sentences and ended the practice of "direct file," which previously allowed prosecutors to automatically charge youths as adults for an enumerated list of crimes without a fitness hearing before a judge. The CDAA not only opposed Prop 47 and 57, but also filed a lawsuit in 2016 attempting to block Prop 57 from appearing on the ballot, arguing that then-Governor Jerry Brown had "hijacked the initiative system and cut in line to the front, ahead of other initiatives and completely avoided the proper public comment period." Adam Randall, *California District Attorneys Successfully Stall Proposed Public Safety Measure*, THE UKIAH DAILY J. (Feb. 25, 2016),

ranked thirty-fourth out of thirty-five states in terms of their success when supporting legislation and ranked twenty-sixth when opposing legislation.[307] Oklahoma prosecutors, however, continue to be quite successful, ranking fourth in success when supporting bills and first when opposing.[308]

The loss of consensus among prosecutors is not limited to a single bill here or a voter referendum there. In a few states, prosecutors have left their statewide associations altogether. Philadelphia District Attorney Larry Krasner, for example, left his state association after taking office in 2018.[309] He stated his intent in no uncertain terms, describing the Pennsylvania District Attorneys Association as "regressive."[310] In California, Tori Salazar, the San Joaquin District Attorney, publicly withdrew from the California District Attorney Association in 2020.[311] She explained her decision, saying, "As criminal justice reform sweeps through California and the nation, I witnessed the CDAA oppose most reform-based initiatives, which tells me the association is out of touch and unwilling to find new

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https://perma.cc/69AE-3QZF (last updated Aug. 23, 2018); *see also* LauraB, *CDAA Lawsuit Against the Governor's Proposed Sentencing Initiative*, CAL. DIST. ATT'YS ASS'N (Mar. 11, 2016), https://perma.cc/F4JU-EZSF; Jim Miller, *Prosecutors' Lawsuit Challenges Jerry Brown's Crime Initiative*, SACRAMENTO BEE (Feb. 12, 2016), https://perma.cc/7FU4-8NG7. The lawsuit was brought by forty-four of the state's fifty-eight district attorneys. Don Thompson, *Prosecutors Sue Over California Prison Good Conduct Rules*, AP NEWS (May 26, 2021), https://perma.cc/J4TN-D2NQ ("Notably absent [from the lawsuit] were district attorneys in Los Angeles and San Francisco who have backed criminal sentencing changes.").

307. *See infra* APPENDIX B.

308. *See infra* APPENDIX B. The difference may be attributable to California prosecutors' repeated losses. Despite their 2016 loss, Oklahoma prosecutors succeeded in blocking a 2020 ballot measure that would have prevented courts from "imposing repeat sentence enhancements on certain nonviolent offenders." Ross, *supra* note 302.

309. *See* Daniel Nichanian, *Larry Krasner Quit Pennsylvania's DA Association. What Does Group Stand For?*, THE APPEAL (Dec. 20, 2018) [hereinafter Nichanian, *Pennsylvania's DA Association*], https://perma.cc/2T8A-8FW6.

310. *Id.*

311. *See* Evan Sernoffsky, *Central California DA Quits State Association Over Its Opposition to Criminal Justice Reforms*, S.F. CHRON. (Jan. 16, 2020), https://perma.cc/V79T-8Z6A.

approaches to criminal justice."[312] Salazar described herself as a progressive-minded prosecutor who does not identify as left-leaning or a Democrat.[313]

Salazar did not merely leave the CDAA. She, along with other reform-minded prosecutors, formed a new group, the Prosecutors Alliance of California ("PAC").[314] PAC defines their mission as "support[ing] and amplify[ing] the voices of California prosecutors committed to reforming our criminal justice system through smart, safe, modern solutions that advance not just public safety but community well-being."[315]

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312. Salazar remained a member of both the National District Attorneys Association and the American Prosecutors Association. She also allows her line prosecutors to be CDAA members. *Id.*

313. *See* Robert Greene, *Opinion: Is California's Most Progressive District Attorney a Republican*, L.A. TIMES (Oct. 29, 2020), https://perma.cc/Q6TQ-M7GC. The response to Salazar's decision by the CDAA's president, Alameda County District Attorney Nancy O'Malley, was telling: she said that "the association's legislative advocacy doesn't necessarily reflect its diverse membership, and the group's reform-minded prosecutors are working to influence the association's more conservative members." Sernoffsky, *supra* note 311. Salazar lost her re-election campaign in 2022. *See* Wes Bowers, *San Joaquin County Registrar Certifies Election Results*, LODI NEWS-SENTINEL (July 4, 2022), https://perma.cc/4R8F-MSXS.

Salazar was not the first California district attorney to leave the CDAA. In 2006, then-Los Angeles County District Attorney Steve Cooley was removed from his CDAA leadership position because of a disagreement over the "three strikes" law. Kevin Cody, *Cooley's Law: Once Elected, Steve Cooley Kept Politics Out of the Los Angeles County District Attorney's Office*, EASY READER & PENINSULA (June 19, 2016), https://perma.cc/K59V-NH5D. Cooley, a Republican who did not identify as a reformer, wanted to walk back the use of California's infamously draconian law, and he ordered a review of all three-strikes cases. Emily Bazelon, *Arguing Three Strikes*, N.Y. TIMES MAG. (May 21, 2010), https://perma.cc/JRS7-R7EA. California's version of three strikes allowed prosecutors to sentence anyone who had previously been convicted of two "serious" offenses to life in prison even if the third offense was not "serious." *Id.* Cooley did not support the full repeal of the law, but he did advocate for a reduction in the use of three strikes against people convicted of a third offense that was a low-level drug possession or theft crime. *Id.*

314. *See* Katy Grimes, *Does George Gascon's 'Prosecutors Alliance of California' Have a Future?*, CAL. GLOBE (July 13, 2022), https://perma.cc/QB3V-YK2T. The Los Angeles district attorney, George Gascon, participated for a time as a member of both CDAA and PAC, but left the CDAA in 2021. *See* Letter from George Gascon, L.A. Cnty. Dist. Att'y, to Vern Pierson, Cal. Dist. Att'ys Ass'n (Feb. 16, 2021), https://perma.cc/5A6P-KVVM (PDF). Chesa Boudin, the district attorney in San Francisco, participated in PAC until he was recalled in June 2022. Grimes, *supra*.

315. *About*, PROSECUTORS ALL. CAL., https://perma.cc/PMW9-TQYF.

PAC also specifically positions its general goals in opposition to the CDAA: "The voices of these prosecutors are often drowned out by the traditional law enforcement organizations that oppose reform. PAC will gather and grow the voices of law enforcement that support transformation of our criminal legal system."[316]

California is not the only state to have birthed an alternative prosecutor association. In Virginia, eleven reform-minded prosecutors formed a new association called the Virginia Progressive Prosecutors for Justice.[317] The group lobbied the Virginia legislature in support of legislation to abolish the death penalty, to legalize marijuana, and to end the "three strikes" felony enhancement for petit larceny offenses.[318]

As more reform-minded prosecutors are elected, that shift may become noticeable in other states. Even a single prosecutor who insists on reform can affect state legislation by signaling a lack of consensus among state prosecutors.[319] One example

316. *Id*. The organization has already supported a bill that would "require elected prosecutors to recuse themselves from the investigation and prosecution of law enforcement misconduct if they accept financial contributions from law enforcement unions." *See* Press Release, Prosecutors All. Cal., Assemblymember Bonta Announces First-in-the-Nation Legislation to Cure Conflict of Interest for Elected Prosecutors Investigating Police Misconduct (Oct. 22, 2020), https://perma.cc/YK9R-NK4G.

317. *See* Daniel Nichanian, *Eleven Prosecutors Form a Progressive Alliance in Virginia*, THE APPEAL (July 28, 2020), https://perma.cc/VZ4U-MEZX.

318. *See* Letter from Va. Progressive Prosecutors for Just. to Eileen Filler-Corn, Speaker, Va. House of Delegates et al. (Mar. 8, 2021), https://perma.cc/7UE6-WXLP. They also argued for ending cash bail and mandatory minimum sentences, as well as decreasing the use of no-knock warrants and reducing drivers' license suspensions as punishment. *Id.*; *see also* Ned Oliver, *11 Commonwealth's Attorneys Form Group to Back Criminal Justice Reform*, VA. MERCURY (July 20, 2020) https://perma.cc/48RP-PW4Q.

319. This is supported by a comment from an ACLU director in Pennsylvania, who told a publication:

> Because they're speaking as the association, my strong belief is that legislators often assume that it's all DAs saying that to them—and that matters . . . . Some of their power derives from the assumption that their positions are held uniformly and unanimously by all district attorneys who remain in the association, but I don't know if that's true.

Nichanian, *Pennsylvania's DA Association*, *supra* note 309. In other words, unless individual prosecutors explain and lobby the legislature on their views, lawmakers may interpret association approval as being unanimous, which is

comes from Washington State, where the Washington Association of Prosecuting Attorneys ("WAPA") normally supported harsher bills, but also supported a number of more lenient bills during our study period.[320] In several instances, King County Prosecuting Attorney Dan Satterberg, who was elected on a reform-minded platform, either opposed WAPA publicly or pushed WAPA to moderate its opposition.[321] For example, the WAPA and Satterberg agreed on many bills that made the criminal justice system more rehabilitative.[322] And, when it came to legislation to eliminate capital punishment, Satterberg publicly supported these efforts.[323] The WAPA decided not to take a position because its members were split.

Another example comes from Oregon, where the prosecutors from three counties issued a public statement breaking with the Oregon District Attorneys Association on the issue of mandatory minimum sentences. The Association had issued a statement saying it supported Oregon's mandatory minimum sentencing law that came as the state legislature was expected to take up reforms.[324] The three dissenting district attorneys then issued their own statement stating that

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an even stronger argument for reform-minded prosecutors to advocate for their positions within and outside of associations.

320. The WAPA supported sixty bills that made the systems harsher, supported eight more lenient bills, and opposed seven more lenient bills. THE PROSECUTORS & POL. PROJECT, *supra* note 5, at 293.

321. *See, e.g.*, Steve Miletich, *King County Prosecutor Backs Law Change to Make It Easier to Charge Police Over Deadly Force*, SEATTLE TIMES (Jan. 19, 2017), https://perma.cc/ZX7D-QGHE. WAPA demanded some amendments to a bill that would make it easier to prosecute law enforcement officers who kill civilians in the line of duty, but they did not oppose it entirely. Satterberg supported the bill as presented. *See* Steve Miletich et al., *Analysis: Restrictive Law Shields Police from Prosecution*, WASH. TIMES (Sept. 27, 2015), https://perma.cc/534Q-9L5L.

322. *See* THE PROSECUTORS & POL. PROJECT, *supra* note 5, at 296 (quoting Dan Satterberg, speaking on behalf of WAPA, as stating, "[I]t is not the goal of the criminal justice system to impose lifelong penalties on people who run afoul of the law . . . it should be our social mission to make sure they don't come back and commit new crimes").

323. *See id.* at 297 (quoting Dan Satterberg as saying, "I believe [the death penalty] is unworkable, I believe it is unnecessary and it doesn't serve the interest of victims").

324. Conrad Wilson, *Oregon's District Attorneys Divided on Mandatory Minimum Jail Sentences*, OPB (Jan. 9, 2021), https://perma.cc/8GMK-R6HU.

mandatory minimum punishments should be "a thing of the past."[325]

It is hard to know whether reform-minded prosecutors will continue to succeed in the future. It is also hard to predict the states where such changes might happen and where, by contrast, the prosecutor lobby will continue to take more common and expected roles in the legislative process. But it appears that prosecutorial politics—and by extension prosecutorial lobbying—is in a state of flux. Prosecutors do not reliably agree on their policy goals and state legislatures are more interested in reform than they have been for decades.

These profound changes in the political environment raise a series of critical questions. Prosecutors do tend to favor expansions of the criminal law, but exactly when and why do they depart from that tendency? Similarly, prosecutors do appear to carry weight with legislators, but they are not equally successful in all contexts. What might explain the recurring and predictable differences in the lobbying outcomes prosecutors achieve? These questions form the starting point for the future development of political theory and the deep empirical inquiry that prosecutor lobbyists deserve.

CONCLUSION

People interested in criminal justice reform have noticed from time to time that prosecutor lobbying occurs, and they have assumed that when prosecutors lobby, they create pro-carceral results. Beyond that, the details seemed sketchy. Up until now, we had no map of the influence of the prosecutor lobby. It seemed that prosecutors were equally likely in all places to get the outcomes they wanted from the legislature.

Now, for the first time, we have a map. The data about legislative lobbying show us that prosecutors are more likely to get involved in some contexts than in others. As political science theory predicts, they lobby least often in favor of lenient laws and most often against lenient laws. Prosecutors predictably ask the legislature to expand their traditional tools—laws that address public safety concerns through criminal charges and severe penalties.

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325. *Id.*

The map reveals more unexpected twists in the road, however, when it comes to success rates for the prosecutor lobby. Prosecutors are more likely to succeed in some contexts than in others. In particular, the pass rate of bills increases the most when prosecutors lobby in favor of lenient bills. When prosecutors support lenient bills, they play against typical expectations and give legislators political cover for trying new approaches to public safety. This is not just an anecdotal observation about what happens here and there—it is a pattern that holds up to nationwide empirical analysis.

Moreover, our map of prosecutor influence shows variety among states. Those differences give political scientists, economists, criminologists, and legal scholars the chance to sort out the various factors that contribute to the success and failure of the prosecutor lobby. Through familiar social science empirical analysis, it is now possible to learn more about the features of each state and statewide prosecutor association, and predict prosecutor lobbying success.

Others will fill in some blank places on the map and expand its borders. In the meantime, we know for the first time some of its crucial features. With this map, we can predict with more nuance when the prosecutor lobby will get involved with a bill and when their arguments will succeed. Although the main legislative roads have led to short-sighted and ineffective criminal justice policies for decades, it now may be possible to travel to new places.

APPENDIX A—STATE LEGISLATION DATA[326]

State	Total Number of Bills	Number of CJ Bills	CJ Bills as % of Total Bills	Number of CJ Bills with Insufficient Information	Percent of Bills with Prosecutor Involvement	Overall CJ Bill Pass Rate	General Bill Pass Rate
AK	1,955	80	4.09%	0	41.25%	15%	11.5%
AL	4,383	188	4.29%	168	100%	23.40%	29.3%
AR	4,749	424	8.93%	369	41.82%	54.01%	63.4%
AZ	4,701	136	2.89%	0	13.24%	28.68%	29.6%
CA	12,647	745	5.89%	24	56.17%	43.49%	34.5%
CO	2,772	247	8.91%	0	49.80%	59.51%	57.5%
CT	8,865	518	5.84%	0	14.86%	22.20%	11.2%
DE	1,877	146	7.78%	83	17.46%	52.05%	64.5%
FL	9,290	495	5.33%	1	21.05%	16.97%	10.3%
GA	4,765	139	2.92%	43	33.33%	26.62%	30.7%
HI	10,459	300	2.87%	0	35.67%	12%	9.1%
IA	6,122	845	13.80 %	2	44.01%	9.35%	13.1%
ID	2,182	115	5.27%	0	12.17%	58.26%	66.9%
IL	35,932	831	2.31%	0	8.54%	9.75%	28.4%
IN	5,204	364	6.99%	215	61.74%	28.02%	18.4%
KS	2,527	246	9.73%	3	34.16%	22.76%	17.4%
KY	2,512	225	8.96%	208	100%	16.89%	25.4%
LA	5,603	412	7.35%	0	35.68%	53.16%	42.9%
MA	21,815	701	3.21%	601	43%	6.13%	9.3%
MD	11,013	419	3.80%	12	7.37%	20.53%	28.3%
ME	4,492	131	2.92%	3	18.75%	44.27%	36.8%
MI	9,359	904	9.66%	1	31.89%	23.56%	21.9%
MN	13,918	205	1.47%	11	24.23%	20.98%	2.7%

326. Data for non-criminal justice bills is derived from the sources identified in n.170, *supra*.

MO	7,702	343	4.45%	205	29.71%	3.79%	5.8%
MS	11,035	1244	11.27 %	0	0.80%	3.86%	10.9%
MT	4,125	220	5.33%	0	69.09%	43.64%	16.6%
NC	4,349	149	3.43%	0	7.38%	24.16%	20.8%
ND	1,634	164	10.04 %	0	25.61%	72.56%	56.7%
NE	4,019	169	4.21%	0	95.27%	18.34%	34.6%
NH	3,720	212	5.70%	0	15.09%	25.94%	33.6%
NJ	33,442	1219	3.65%	1217	100%	5.09%	3.5%
NM	4,103	262	6.39%	210	55.77%	8.78%	9.9%
NV	2,103	188	8.94%	0	50%	55.32%	57.5%
NY	67,603	1536	2.27%	0	2.28%	1.24%	3.9%
OH	2,850	267	9.37%	0	95.88%	17.23%	11.9%
OK	10,816	820	7.58%	0	5.73%	23.05%	17.5%
OR	4,565	345	7.56%	151	45.36%	29.57%	34.9%
PA	10,821	607	5.61%	0	7.74%	6.75%	5.3%
RI	9,224	905	9.81%	56	45.82%	17.90%	27.9%
SC	6,209	206	3.32%	139	0%	2.91%	35.1%
SD	1,919	218	11.36 %	0	49.08%	54.59%	52.3%
TN	11,334	593	5.23%	0	7.08%	40.81%	42.5%
TX	13,415	848	6.32%	2	30.50%	26.42%	19%
UT	3,426	307	8.96%	9	26.51%	59.61%	55.7%
VA	8,609	1215	14.11 %	1122	95.70%	24.03%	38.1%
VT	3,092	195	6.31%	14	32.04%	26.15%	15.8%
WA	9,575	406	4.24%	98	44.48%	21.18%	17.6%
WI	7,380	291	3.94%	0	23.37%	38.83%	16.8%
WV	7,156	364	5.09%	347	100%	18.68%	14.7%
WY	1,353	107	7.91%	74	100%	35.51%	33.9%

APPENDIX B—PROSECUTOR INVOLVEMENT DATA

State	Overall CJ Bill Pass Rate	Pass Rate with Prosecutor Support	Difference in Pass Rate with Support	Prosecutor Support Success Rank	Pass Rate with Prosecutor Opposition	Difference in Pass Rate with Opposition	Prosecutor Opposition Success Rank
AK	15%	19.05%	27%	29	20%	-5%	28
AZ	28.68%	68.75%	140%	5	0%	29%	1
CA	43.49%	47.42%	9%	34	51.72%	-8%	26
CO	59.51%	79.78%	34%	26	48.48%	11%	20
CT	22.20%	40.82%	84%	12	34.48%	-12%	30
DE	52.05%	100%	92%	8	0%	52%	1
FL	16.97%	46.38%	173%	3	23.53%	-7%	29
GA	26.62%	45.83%	72%	16	66.67%	-40%	35
HI	12%	22.22%	85%	10	24%	-12%	33
IA	9.35%	17.31%	85%	11	8.82%	1%	22
ID	58.26%	66.67%	14%	32	25%	33%	9
IL	9.75%	39.53%	305%	2	23.33%	-14%	34
KS	22.76%	43.33%	90%	9	29.41%	-7%	27
LA	53.16%	70.21%	32%	27	25.71%	27%	12
MD	20.53%	23.81%	16%	31	33.33%	-13%	31
ME	44.27%	56.25%	27%	28	14.29%	30%	8
MI	23.56%	46.46%	97%	7	7.58%	16%	7
MN	20.98%	36.36%	73%	15	0%	21%	1
MT	43.64%	61.45%	41%	24	28.85%	15%	16
ND	72.56%	81.48%	12%	33	33.33%	39%	11
NE	18.34%	18.18%	-1%	35	13.16%	5%	19
NH	25.94%	45.45%	75%	14	5%	21%	6
NV	55.32%	75.76%	37%	25	38.10%	17%	18
OH	17.23%	25.41%	47%	22	10.96%	6%	15
OK	23.05%	59.46%	158%	4	0%	23%	1
OR	29.57%	53.45%	81%	13	30.77%	-1%	25
PA	6.75%	52.63%	680%	1	0%	7%	1
RI	17.90%	27.87%	56%	20	17.83%	0%	24

SD	54.59%	78.95%	45%	23	27.27%	27%	13
TN	40.81%	61.90%	52%	21	35.71%	5%	21
TX	26.42%	42.45%	61%	18	15.52%	11%	14
UT	59.61%	72.88%	22%	30	40%	20%	17
VT	26.15%	52.38%	100%	6	42.86%	-17%	32
WA	21.18%	35.59%	68%	17	20%	1%	23
WI	38.83%	60.87%	57%	19	16.67%	22%	10

APPENDIX C—STATE LEGISLATURE DATA

State	Partisan Rank	Competitive Category	Partisan Control Category	Professionalization Tier
AK	17	1	1	2
AZ	21	1	1	3
CA	32	1	2	1
CO	26	2	2	3
CT	25	2	2	3
DE	27	1	2	3
FL	11	1	1	3
GA	9	1	1	3
HI	35	1	2	2
IA	19	1	1	3
ID	2	1	1	4
IL	30	1	2	2
KS	7	1	1	4
LA	18	1	1	3
MD	31	1	2	3
ME	24	2	1	4
MI	12	1	1	1
MN	22	2	1	3
MT	16	1	1	5
ND	3	1	1	5
NE	10	1	1	3
NH	20	1	1	4
NV	29	2	1	3
OH	8	1	1	2
OK	5	1	1	3
OR	28	1	2	3
PA	14	1	1	1
RI	34	1	2	4
SD	1	1	1	5
TN	6	1	1	3
TX	13	1	1	3

UT	4	1	1	4
VT	33	1	2	4
WA	23	2	2	3
WI	15	1	1	2