
PROSECUTING IN THE POLICE-LESS CITY: POLICE ABOLITION'S IMPACT ON LOCAL PROSECUTORS

What good is a prosecutor without police? On June 26, 2020, that question gained unexpected importance when the Minneapolis City Council unanimously approved a proposed amendment to the city's charter that would allow the city to dismantle its police department.¹ The city's Charter Commission eventually rejected the proposal, but had it been enacted,² the amendment would have broken with American cities' two-century-long approach to public safety and raised serious questions about the role prosecutors play in a city without police.

The City Council's vote was spurred by weeks of protests that erupted following George Floyd's killing at the hands of the Minneapolis Police Department (MPD) on May 25, 2020.³ Beyond Minneapolis, the killing sparked a nationwide movement to abolish the police, and advocates have used the opportunity to agitate for legislative change at the municipal, state, and federal levels.⁴

The police are only one thread in the complex knot that comprises America's criminal legal system, however.⁵ In the event that activists in Minnesota achieve unmitigated success, dismantling the MPD and redirecting its considerable budget⁶ toward a new kind of public safety department,⁷ there would still be other officials and offices that have

¹ Solomon Gustavo, *What We Know (and Don't Know) So Far About the Effort to Dismantle the Minneapolis Police Department*, MINNPOST (July 9, 2020), <https://www.minnpost.com/metro/2020/07/what-we-know-and-dont-know-so-far-about-the-effort-to-dismantle-the-minneapolis-police-department> [<https://perma.cc/PWM7-53L9>].

² Cf. Letter from Barry Clegg, Chair, Minneapolis Charter Comm'n, to Lisa Bender, President, Minneapolis City Council, <https://lms.minneapolismn.gov/Download/File/4564/Community%20Safety%20and%20Violence%20Prevention%20Transmittal%20Letter.pdf> [<https://perma.cc/3S7K-ZK8A>].

³ See *id.*; Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Jan. 6, 2021), <https://nyti.ms/3ex6loy> [<https://perma.cc/8MTJ-EGV4>].

⁴ See Elliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning that Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020, 11:31 AM), <https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html> [<https://perma.cc/AM4V-KLAL>].

⁵ See, e.g., Rachel Cicurel, Opinion, *Don't Stop with the Police: Check Racism in the Prosecutor's Office*, WASH. POST (July 9, 2020, 4:33 PM), <https://www.washingtonpost.com/opinions/2020/07/09/dont-stop-with-police-check-racism-prosecutors-office> [<https://perma.cc/5UBE-V7LY>].

⁶ The Mayor of Minneapolis's proposed 2021 budget included \$193 million for the police department. See Brandt Williams, *Minneapolis Budget Committee Approves Cuts in Police Funding*, MPR NEWS (July 22, 2020, 11:10 PM), <https://www.mprnews.org/story/2020/07/22/minneapolis-budget-committee-cutting-away-at-police-funding> [<https://perma.cc/KTP4-VPEK>].

⁷ Cf. Minneapolis, Minn., Ordinance Amending Article VII of the City Charter Relating to Administration, Pertaining to the Creation of a New Charter Department to Provide for Community Safety and Violence Prevention, and the Removal of the Police Department as a Charter Department § 1-3 (May 21, 2020) (proposing an amendment to the city charter removing the police department). *But cf.* Letter from Barry Clegg to Lisa Bender, *supra* note 2 (rejecting proposed amendment).

roles to play, the existence of which, unlike that of the police, is not necessarily under the direct control of municipal government.

Chief among the actors who are likely to survive police abolition are local prosecutors. Whether known as district attorneys, county attorneys, states' attorneys, or some other title, local prosecutors' offices are the legal counterparts to local police, prosecuting crimes in state or municipal court. In light of this role, activists have likewise argued for the reform or abolition of local prosecutors.⁸

Generally, however, municipal governments lack the power to abolish whatever prosecutor's office possesses jurisdiction over their cities. This is because the office of local prosecutor is almost always mandated by state statutory or constitutional law,⁹ whereas whether to create a local police department is a decision that lies almost entirely at the discretion of the municipal government.¹⁰ As a consequence of this distinction, municipalities that eliminate their local police departments will remain under the vestigial jurisdiction of a statutorily mandated prosecutor absent state-level reforms. The possibility that a municipality's criminal legal system might be partially dismantled in this way raises two obvious questions: How will that system look and — more importantly — how *should* that system look?

Prosecutors in jurisdictions whose police departments are abolished may retain their offices, but they are likely to find their jobs fundamentally altered. The two institutions are so interdependent that the elimination of one will undoubtedly destabilize the other.¹¹ Successful police abolition will demand that local prosecutors adapt to changing circumstances, but it also provides an opportunity to challenge long-standing assumptions about how laws are enforced and remake what it means to be an American prosecutor. This Note will speculate about the impact that police abolition would have on local prosecutors and set forth a vision of what local prosecution should become in a city without police.

To that end, Part I of this Note establishes the status quo: it provides an overview of the statutory schemes that establish local prosecutors' offices and the relationship that those offices have with the police.

⁸ See Gyasi Lake, *There's No Such Thing as a "Progressive Prosecutor" in a System Designed to Criminalize Blackness*, BLACK YOUTH PROJECT (July 10, 2019), <http://blackyouthproject.com/theres-no-such-thing-as-a-progressive-prosecutor-in-a-system-designed-to-criminalize-blackness> [<https://perma.cc/5XFA-QRC7>]; Note, *The Paradox of "Progressive Prosecution,"* 132 HARV. L. REV. 748, 768–70 (2018).

⁹ The Appendix to this Note, a fifty-state survey of state constitutions and statutes mandating the existence of police departments and prosecutors, is available on the *Harvard Law Review* website. See app.

¹⁰ See app.; see also, e.g., MASS. GEN. LAWS ANN. ch. 41, § 97A (West 2020) ("In any town which accepts this section there shall be a police department established by the selectmen . . .").

¹¹ See Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 900–01, 909 (2020).

Part II explores the ways in which police abolition might have downstream effects on local prosecutors.

Part III argues that the most natural way for local prosecutors to adapt to police abolition is to replace the contemporary, punishment-oriented approach to prosecution with one rooted in theories of transformative justice. It briefly describes transformative justice and illustrates what the approach might look like in practice as well as the sources of law that might be relied on in its implementation.

Finally, Part IV addresses the risks that accompany serious attempts at prosecutorial reform. Chief among these is the concern that state legislatures might counter prosecutorial reform with reforms of their own. The Part also discusses the worry that reforms will simply serve to strengthen an institution that has traditionally proven to be an untrustworthy steward of power. Part IV then argues that the transition away from carceral justice toward transformative justice makes instrumental use of an institution that is insulated from abolition while potentially reducing prosecutors' power in the long term.

I. THE STRUCTURE AND RELATIONSHIPS OF CONTEMPORARY PROSECUTION

Local prosecutors' offices and local police departments share a mutually dependent relationship, but their existences are generally derived from very different sources of law: prosecutors from state constitutions or statutes, and police from city charters, municipal ordinances, or municipal officers' power to appoint subordinates. Despite municipal police's "inferior" place in the legal hierarchy, they exercise considerable control over the criminal process.¹² This influence begins with the decision of whom to police and what laws to enforce and continues through pretrial proceedings and trial itself.

The position of local prosecutor can take many forms, but it is almost always created by state law.¹³ Because the position's role — indeed its very existence — is mandated at the state level, activists are limited in their ability to agitate for prosecutorial reform from the same governmental entities that could otherwise satisfy their demands for abolition of the police.

In Massachusetts, for example, the law requires that "[t]here *shall* be a district attorney for each district set forth in the following section,"¹⁴ followed by a list of districts that encompass the geographic entirety of

¹² See *id.* at 909.

¹³ See *app.*

¹⁴ MASS. GEN. LAWS ANN. ch. 12, § 12 (West 2020) (emphasis added).

the state.¹⁵ Compare this to the Massachusetts statute enabling the creation of municipal police departments, which lays out a series of regulations governing only those towns that “accept[]” the relevant section of the General Laws.¹⁶ In other words, a municipality is free to create — or decline to create — a municipal police force; but if it does create a police department, Massachusetts law sets out the particulars to which the police must conform.

This arrangement, in which prosecutors are state officials assigned or elected to discrete jurisdictions but police are municipal officials, is subject to some variance throughout the United States. In Minnesota, for instance, municipalities retain their own lawyers who are responsible for prosecuting some minor crimes,¹⁷ while more serious crimes are overseen by a county prosecutor whose existence and duties are controlled by state law.¹⁸ In some states, such as North Carolina, the local prosecutor is enshrined in the state’s constitution, which details some of the position’s responsibilities,¹⁹ while state law fills out the specifics.²⁰ Overall, however, the broad strokes are relatively consistent: cities are free to decide whether to establish a police force but have no discretion as to the existence of a local prosecutor.²¹

The relationship between prosecutor and police, and the effect that the relationship has on the administration of law, likewise remain relatively consistent throughout the country. Police largely dictate what crimes are brought before the local prosecutor to pursue charges.²² A large portion of the cases police — and therefore prosecutors — handle

¹⁵ See *id.* § 13.

¹⁶ See *id.* ch. 41, § 97.

¹⁷ See MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 2, § 25.10 (2020).

¹⁸ MINN. STAT. § 388.01 (2020).

¹⁹ N.C. CONST. art. IV, § 18.

²⁰ See, e.g., N.C. GEN. STAT. § 7A-61 (2020).

²¹ Forty-eight states mandate the election or appointment of local prosecutors through state law or a state constitutional provision. See *app.* Conversely, only one state constitution mandates that municipalities establish police forces, and only nine states have statutes creating such a requirement. See *app.* This relatively clear-cut arrangement is muddled by variations in the relationship between municipal entities and their charters. A municipal police department might be created by a municipal charter, in which case the municipality’s ability to abolish its police department relies on its ability to amend its charter. See 2A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 9:27, Westlaw (database updated Aug. 2020). That ability is typically afforded only to larger “home rule” municipalities. See NAT’L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 13 (2020) <https://www.nlc.org/wp-content/uploads/2020/02/Home20Rule20Principles20ReportWEB-2-1.pdf> [<https://perma.cc/GB2A-9PA6>]. Taken together, these variables lead to a dizzying array of permutations, some of which might leave a municipality powerless to abolish its own police department, despite no formal statute constraining its ability to do so. But since larger cities tend to have the power to amend their charters, and larger cities are the focus of this Note, those edge cases are somewhat beyond its scope.

²² See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1337–40 (2012).

each day are nonviolent crimes and misdemeanors, such as drug possession.²³ Arrests in these cases are often made following prolonged police surveillance²⁴ or as the fruit of some unrelated stop.²⁵ In the areas that see the highest rates of arrests for drug possession, it is rarely the case that a member of the community reached out to local law enforcement to report the illegal activity; instead, the police patrol the streets of their jurisdiction looking for individuals to arrest.²⁶

Police are more likely to stop Black and brown drivers or pedestrians,²⁷ which translates into more opportunities to uncover the kinds of illegality that often go uninvestigated in white society.²⁸ Similarly, the neighborhoods and other locations police choose to surveil or subject to other forms of proactive policing are those in which Black and brown people live or that they frequent, despite evidence that many of those same neighborhoods have historically been underserved by the police.²⁹ The consequence of this disparate treatment by police is well chronicled, and the decisions officers make about what cross section of the population to police flow directly into what cross section of the population will face prosecution.³⁰ Local prosecutors charge the vast majority of misdemeanor arrests police make,³¹ and so police officers' initial

²³ See HUM. RTS. WATCH & ACLU, EVERY 25 SECONDS: THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES 2 (2016), https://www.hrw.org/sites/default/files/report_pdf/usdrug1016_web_o.pdf [<https://perma.cc/Y4HS-XWTE>] (“[P]olice make more arrests for drug possession than for any other crime.”).

²⁴ See ALEX HAROCOPOS & MIKE HOUGH, CTR. FOR PROBLEM-ORIENTED POLICING, DRUG DEALING IN OPEN-AIR MARKETS 21–30 (2012), https://popcenter.asu.edu/sites/default/files/drug_dealing_in_open-air_markets_2012_update.pdf [<https://perma.cc/92HQ-4FZV>] (recommending intense policing, in-person surveillance, and “reverse stings,” *id.* at 25, targeting drug users to reduce outdoor drug sales).

²⁵ See David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 254–56 (criticizing Supreme Court precedent permitting such surveillance).

²⁶ See Jeffrey Fagan et al., *Stops and Stares: Street Stops, Surveillance, and Race in the New Policing*, 43 FORDHAM URB. L.J. 539, 543–44 (2016) (describing the proactive strategies used to police high-crime neighborhoods); Rudovsky, *supra* note 25, at 249.

²⁷ See, e.g., *RIPA Stop Data*, OPEN JUST., <https://openjustice.doj.ca.gov/exploration/stop-data> [<https://perma.cc/E8MS-89B9>] (showing that California police were more likely to stop Hispanic people than any other racial group in 2018).

²⁸ See PATRICK A. LANGAN, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., THE RACIAL DISPARITY IN U.S. DRUG ARRESTS 2–3 (1995).

²⁹ See THE NAT’L ACADS. OF SCIS., ENG’G, & MED., PROACTIVE POLICING: EFFECTS ON CRIME AND COMMUNITIES 270, 276 (David Weisburd & Malay K. Majmundar eds., 2018).

³⁰ See, e.g., THE SENT’G PROJECT, BLACK LIVES MATTER: ELIMINATING RACIAL INEQUITY IN THE CRIMINAL JUSTICE SYSTEM 8 (2015), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf> [<https://perma.cc/GZ3A-TKQC>] (noting that between 2001 and 2013, although only 51% of New York City residents were Black or Hispanic, those demographics comprised 82% of the city’s misdemeanor arrests).

³¹ See Natapoff, *supra* note 22, at 1338–39 (noting that, in New York and Iowa, prosecutors declined to charge only two percent of misdemeanor arrests). It is important to note, however, that

determination as to which communities to police and how to go about policing them is reified at each step in the criminal process.

Police officers' influence over prosecution extends beyond selecting who will be policed. Police are often the only witnesses available to the state, making officers a ubiquitous feature of many courtrooms,³² and the officers' presence in the courtroom applies intense social pressure to the prosecuting attorney. Prosecutors depend on the police to make their case, and "every prosecutor has experienced having a police officer catch an attitude, sometimes in the middle of a trial, and purposely ruin your case because they don't like you."³³ Prosecutors' incentive to accommodate police opens the door to soft influence from officers as prosecutors attempt to head off ill will or encourage their "star witnesses . . . to go the extra mile."³⁴

Police can exert substantial influence over the prosecution's understanding of a case's merits through the police reports they write³⁵ and the opinions they voice during pretrial proceedings.³⁶ Police then also play an outsized role in the criminal trial itself. When police testimony is the only evidence of guilt available to the prosecution, it might be pitted directly against the defendant's testimony in a lopsided "swearing contest," in which the outcome of the case is decided by which of the two conflicting testimonies the factfinder believes.³⁷ The swearing contest is not exclusively a feature of criminal cases, but police testimony enjoys a great deal of credibility that civilian testimony does not.³⁸

That credibility advantage is reinforced throughout the trial process. Officers frequently testify as direct witnesses to the criminal behavior being charged, whether that is the possession of drugs uncovered by

racial disparities continue even when prosecutors exercise their discretion more frequently. *Id.* at 1339.

³² See Rachel Moran, *Contesting Police Credibility*, 93 WASH. L. REV. 1339, 1341 (2018).

³³ Paul Butler, Opinion, *The System Must Counteract Prosecutors' Natural Sympathies for Cops*, N.Y. TIMES (Apr. 28, 2015, 12:26 PM), <https://www.nytimes.com/roomfordebate/2014/12/04/d0-cases-like-eric-garners-require-a-special-prosecutor/the-system-must-counteract-prosecutors-natural-sympathies-for-cops> [https://perma.cc/3PKK-86P8].

³⁴ *Id.*

³⁵ See Juliet Brodie, *Reflections on the Unjust Influence of Police Reports in the Criminal Justice System*, SLS BLOGS (June 10, 2015), <https://law.stanford.edu/2015/06/10/clinics-2015-06-10-reflections-on-the-unjust-influence-of-police-reports-in-the-criminal-justice-system> [https://perma.cc/JC8N-YRXT].

³⁶ See Jonathan Abel, Essay, *Cops and Pleas: Police Officers' Influence on Plea Bargaining*, 126 YALE L.J. 1730, 1769-77 (2017).

³⁷ See Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 871 (1981) (book review).

³⁸ See Moran, *supra* note 32, at 1341. Judges and juries have become more skeptical of police testimony in recent years, see Brian Dickerson, Opinion, *Cops on the Witness Stand Face More Skeptical Juries*, DETROIT FREE PRESS (Jul. 5, 2015, 12:22 PM), <https://www.freep.com/story/opinion/columnists/brian-dickerson/2015/07/04/cops-witness-stand-face-skeptical-juries/29676921> [https://perma.cc/C235-CUEG], but officers' credibility advantage persists.

officers during a search or a drug sale observed by police.³⁹ These police officers then testify to the same facts that formed the basis of their initial report; this testimony may be flawed,⁴⁰ rehearsed,⁴¹ or even fabricated,⁴² and it carries the prosecutor's imprimatur by virtue of their decision to put the testifying officer on the stand. Finally, the officers testify secure in the knowledge that their testimony will receive little to no scrutiny from trial court judges.⁴³

The influence that police exert over a criminal trial is substantial, from the initial decision to arrest, to direct and indirect influence over the prosecutor's strategic decisions, to the testimony the officer offers at trial. Removing that influence will naturally have a substantial impact on the way a prosecutor engages in their work, forcing local prosecutors to adopt new methods of acquiring evidence and permitting them to pursue strategies that might have otherwise been foreclosed by police pressure.

II. POLICE ABOLITION AND THE UNMOORING OF AMERICAN PROSECUTION

To properly consider the effect that police abolition might have on prosecution, it is important to understand what police abolition looks like. The approach to police abolition that activists in Minneapolis pursued provides a helpful example for that discussion, but the movement for police abolition — that is to say, a desire for police-less cities — is broadly applicable beyond Minneapolis. Indeed, the Minneapolis City Council seems to have lost some of their enthusiasm for abolition as of this writing,⁴⁴ but the cause regains its salience with each new instance

³⁹ See Moran, *supra* note 32, at 1341.

⁴⁰ See Brodie, *supra* note 35.

⁴¹ See MICHELLE M. HELDMYER, FED. L. ENF'T TRAINING CTRS., THE ART OF LAW ENFORCEMENT TESTIMONY: FINE TUNING YOUR SKILLS AS A WITNESS 3, https://www.fletc.gov/sites/default/files/the_art_of_testimony_4.20.18.pdf [<https://perma.cc/V3QQ-RLVC>] (advising law enforcement officers to become more effective witnesses by improving their skills as “storyteller[s]”).

⁴² See I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 836–37 (2008) (quoting then-Judge Alex Kozinski as saying “it is ‘an open secret long shared by prosecutors, defense lawyers and judges that perjury is widespread among law enforcement officers’”).

⁴³ See Morgan Cloud, *Judges, “Testilying,” and the Constitution*, 69 S. CAL. L. REV. 1341, 1355–56 (1996) (“[P]olice officers commit perjury most often to avoid suppression of evidence and to fabricate probable cause, knowing that judges ‘may “wink” at obvious police perjury in order to admit incriminating evidence.’” (footnotes omitted) (quoting Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1023 (1987))).

⁴⁴ See Liz Navratil, *Momentum Slows in Minneapolis City Council's Plan to Remake Police*, STAR TRIB. (Sept. 6, 2020, 5:24 PM), <https://www.startribune.com/momentum-slows-in-minneapolis-city-council-s-plan-to-remake-police/572329932> [<https://perma.cc/9RZ3-SJQG>]. In addition, the plan's opponents sued the City Council, arguing that the proposed amendment to the city charter violated another provision in the charter that sets a floor for the size of the city's police

of police misconduct.⁴⁵ Because the realities of abolition might be so idiosyncratic to the abolishing municipality as to be difficult to capture in a single Note, this Note will use as its baseline a city in which the police department has been completely eliminated.⁴⁶ In this fictional jurisdiction, no entity engages in the day-to-day activities that we typically associate with municipal police and that have the greatest impact on local prosecution: conducting investigations and field stops, advising prosecutors, and serving as witnesses in court. This police-less city might task other offices with some of the duties currently performed by municipal police — such as enforcing judicial decrees, responding to ongoing emergencies, or investigating allegations of criminality — and prosecutors might still bring charges on behalf of citizen complainants. But police officers' most pernicious roles in our criminal legal system would go unfilled. This Part will focus on the effect that leaving those roles unfilled might have on local prosecutors' offices.

The simple act of abolition would eliminate the influence that police departments have over the policy priorities that local prosecutors set, do away with structurally unfair “swearing contests” between police and defendant, and reduce the racial disparity of police surveillance and arrest policies.

Without local police departments, there would likely be fewer officials available to conduct surveillance, investigations, and arrests. There are good reasons that police abolition will not necessarily mean the end of those functions.⁴⁷ But so long as any new investigatory body is restrained from conducting proactive, stop- and surveillance-oriented

force. See Press Release, Upper Midwest L. Ctr., Residents Sue Minneapolis City Council and Mayor Frey for Failing to Protect Residents by Defying Charter's Policy Force Strength Requirements (Aug. 18, 2020), <https://www.umwlc.org/news/residents-sue-minneapolis-city-council-and-mayor-frey-for-failing-to-protect-residents-by-defying-charters-police-force-strength-requirements> [https://perma.cc/EFW9-CH4Q]. The thrust of the challengers' argument appears to be that the Council erred by not amending both Charter provisions, rather than that they lack the power to amend the Charter at all. See *id.*

⁴⁵ See, e.g., Oona Goodin-Smith & Anna Orso, *Calls to “Defund the Police” Intensify After Philadelphia Police Killing of Walter Wallace Jr.*, PHILA. INQUIRER (Nov. 2, 2020), <https://www.inquirer.com/news/philadelphia/defund-the-police-philadelphia-walter-wallace-killing-20201102.html> [https://perma.cc/FGJ5-PLA8].

⁴⁶ See Anna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1785 (2020) (“Ending our reliance on prisons and police requires a radical and capacious path focused on transforming structures of our world and our relationships to each other.”); Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 105–22 (2019) (“Abolitionists are engaged in a collective project of radical speculative imagination” *Id.* at 120.).

⁴⁷ Prosecutors' need to ascertain the existence of probable cause before pressing charges suggests that *someone* will need to investigate cases. See, e.g., FED. R. CRIM. P. 5.1(e)–(f); MODEL RULES OF PRO. CONDUCT r. 3.8(a) (AM. BAR ASS'N 2020). The limited discovery generally available to prosecutors also suggests that the most practical way to meet their burden of proof will typically be using information acquired by some kind of investigator. See, e.g., FED. R. CRIM. P. 12.1.

policing, its power to control prosecutors' agendas through who or what it chooses to police might be diminished.

Those non-police offices that take over any necessary investigative or emergency response functions are also unlikely to retain the cachet that allows police to exert influence over the course of a criminal trial. Local police are an institution like no other. The mythology that police — and police unions — have woven for themselves inhabits a nearly unparalleled place in Americans' hearts and minds.⁴⁸ Prosecutors are wrapped up in this mythology, as fellow law enforcement officers, but they are largely the junior partner — supporting characters in the story of American policing.⁴⁹ Despite this dynamic, police and prosecutors' codependent relationship is the product of decades-long cooperation⁵⁰ and is unlikely to translate neatly to any surrogate institutions that emerge.

If cases are brought to trial, having fewer victimless crimes to charge could reduce prosecutors' reliance on police as their star witnesses. Evidentiary burdens will need to be met through more traditional means such as documentary evidence or testimony from civilian witnesses. Those individuals who are charged would be better able to mount a defense, since a government official would be less likely to be the sole witness, and even if they are, that official would be unlikely to carry the credibility of a police officer.

And without police making arrests each day, the pool of cases that the local prosecutor might charge could instead be drawn from complaints brought by civilians. This shift would likely reduce the racial disparity in cases charged by reducing the racial disparity in cases brought to prosecutors' attention by the stakeouts and random stops that disproportionately target Black and brown people — although evidence and common sense both suggest that this change would not eliminate racial disparity in charging entirely.⁵¹

Any municipality that abolishes its police force also abolishes the soft influence that police officers exercise on prosecutorial discretion, the extraordinary weight that judges and juries afford officer testimony, and the enormous number of cases that would not reach trial without the police to literally bring them there. Even the most punitive local prosecutor could face countless setbacks if they tried to go about business as usual without the help of a municipal police force.

⁴⁸ See David Feige, *The Myth of the Hero Cop*, SLATE (May 25, 2015, 7:18 PM), <https://slate.com/news-and-politics/2015/05/the-myth-of-the-hero-cop-police-unions-have-spread-a-dangerous-message-about-americas-law-enforcement-officers.html> [<https://perma.cc/TA28-SFCF>].

⁴⁹ See Trivedi & Gonzalez Van Cleve, *supra* note 11, at 905 (“For prosecutors, breaking step with police or questioning their framing of events was tantamount to being dead in the office.”).

⁵⁰ See *id.* at 902–03.

⁵¹ Cf. Natapoff, *supra* note 22, at 1339 (noting that racial disparities continue even when prosecutors exercise their discretion more frequently).

Complete police abolition might have the greatest effect on the day-to-day operations of a local prosecutor's office, but even a municipality that adopts measures short of total abolition would force local prosecutors to adapt their practices. By reducing police funding or redirecting some public services from local police to other organizations or offices, reformers could diminish the capacity for police surveillance, and there is no guarantee that the institutional relationships between police and prosecutor would be transferred to any organization that takes over some responsibilities currently overseen by local police.

These impacts are most likely to be felt — and most readily taken advantage of — in jurisdictions where the local prosecutor and the local police share the same geographic jurisdiction. Police abolition is much more likely to destabilize local prosecutors when the totality of the jurisdiction is stripped of its police force. If a county is comprised of several municipal subdivisions, it is not necessarily the case that every unit will eliminate its police force, allowing the local prosecutor to continue their reliance on the status quo — at least in part. This is because other municipalities within the prosecutor's jurisdiction would still have police forces available to make arrests and bring cases to the prosecutor's office for prosecution. Likewise, states with a tradition of strong county-level government might maintain both county and city police departments.⁵² As a result of these dynamics, the most likely candidates for the proposed reforms are what are called “consolidated city-counties” and “independent cities.” Consolidated city-counties are instances in which a city merges with the county in which it sits, creating a single municipal entity,⁵³ independent cities, on the other hand, sit outside their state's county structure.⁵⁴ In both cases, a single municipal entity administers the responsibilities of both city and county, meaning that the jurisdiction of the local police and that of the local prosecutor are concurrent.⁵⁵ Thus, in either a consolidated city-county or an independent city, the elimination of the local police force would totally deprive the prosecutor's office of the law enforcement officers on which it currently relies.

Abolishing municipal police might fail to substantially destabilize a local prosecutor's office if state police fill the void left by their municipal

⁵² See, e.g., IND. CODE § 36-2-13-5 (2020) (outlining the expansive duties and authority of the county sheriff); *id.* § 36-8-2-2 (permitting each city to “establish, maintain, and operate a police and law enforcement system”).

⁵³ See *Cities 101 — Consolidations*, NAT'L LEAGUE OF CITIES (Dec. 14, 2016), <https://www.nlc.org/resource/cities-101-consolidations> [<https://perma.cc/VK47-HUJM>].

⁵⁴ See, e.g., *City Government Structure*, STLOUIS-MO.GOV, <https://www.stlouis-mo.gov/government/about/city-government-structure.cfm> [<https://perma.cc/UK5T-S6VD>] (explaining the impact of St. Louis's status as an independent city on its municipal government).

⁵⁵ See *Cities 101 — Consolidations*, *supra* note 53.

counterparts and begin directing cases to local prosecutors, but this outcome is highly dependent on the existing statutory scheme of the state. State police jurisdiction is highly contingent; in most states, state-level law enforcement “primarily serve[s] highway patrol and investigative support functions,” while primary law enforcement duties are left to county and municipal police forces.⁵⁶ In these states, transitioning municipal police duties to the existing state agency may require a substantial change in existing statutory law that could prove untenable.⁵⁷ In other states — mostly in the New England and Mid-Atlantic regions — the state police forces provide the full gamut of law enforcement services and already function as the police forces for those municipalities that do not have their own full-time police departments.⁵⁸ In these states, statutory changes would be less necessary and prosecutors might find their existing practices less destabilized by police abolition. In either case, however, state police departments would need to drastically increase in size to match the scope of the policing that goes on in the average American city.⁵⁹ It is not necessarily the case that the political will — or the budget — exists to inject state officials into municipal affairs, although every state is different in that regard.

It seems unlikely, then, that the practice of prosecution in American municipalities would survive the abolition of local police unscathed, even in a jurisdiction in which state police stood ready to step in, if necessary.

III. CHARTING A NEW PATH GUIDED BY THE PRINCIPLES OF TRANSFORMATIVE JUSTICE

Abolition also affords willing prosecutors the opportunity to redirect resources that were traditionally spent on enormous caseloads, thus capitalizing on the shock of police abolition to reconfigure their offices. The opportunity for further change arises because local prosecutors will be

⁵⁶ GARY ZAJAC & LINDSAY KOWALSKI, AN EXAMINATION OF PENNSYLVANIA STATE POLICE COVERAGE OF MUNICIPALITIES 1 (2012), <https://www.justicecenter.la.psu.edu/research/projects/files/PSP%20Final%20Report%20-%20Justice%20Center%20version.pdf> [https://perma.cc/9ZYK-7JSZ].

⁵⁷ See, e.g., OHIO REV. CODE ANN. § 5503.02(A) (West 2020) (granting the Ohio State Highway Patrol jurisdiction over motor vehicle laws and over all criminal violations that take place on state property). *But see* ARK. CODE ANN. § 12-8-106(b) (2020) (granting the Arkansas Department of State Police “the powers possessed by police officers in cities and county sheriffs in counties, except that the Division of the Arkansas State Police may exercise such powers anywhere in this state”).

⁵⁸ ZAJAC & KOWALSKI, *supra* note 56, at 1.

⁵⁹ For example, Hartford, Connecticut, employed 406 municipal police officers in 2016, VERONICA ROSE, OFF. OF LEGIS. RSCH., NUMBER OF MUNICIPAL POLICE DEPARTMENTS IN CONNECTICUT 1 (2016), <https://www.cga.ct.gov/2016/rpt/pdf/2016-R-0275.pdf> [https://perma.cc/3638-28QD], while Connecticut’s entire state police force numbered 856 officers as of September 2020, Keith M. Phaneuf, *Auditors: More State Police Needed to Control Surging Overtime*, CT MIRROR (Sept. 22, 2020), <https://ctmirror.org/2020/09/22/ct-auditors-say-more-state-police-needed-to-control-surging-overtime> [https://perma.cc/7UCR-QMZP].

forced to reallocate office resources due to the structural changes that police abolition causes. That reallocation creates a window in which activists might influence the office's priorities and development. And, perhaps most importantly, the changes that a prosecutor's office *must* make to compensate for the lack of police — reduced prosecution of victimless and low-level crimes and reduced reliance on police testimony and surveillance, for instance — are already more in line with abolitionist approaches to public safety than with modern tough-on-crime law enforcement. Changes in the office's spending priorities and mechanisms for law enforcement that might have been unimaginably drastic when viewed in relation to the status quo are instead simply one course that an evolving office might select. Activists in a police-less community who are currently unable to transfer their gains at the municipal level to similar gains with the state legislature are nevertheless gifted with both momentum for change and a preexisting break with the status quo ante.

Under the existing law enforcement paradigm, the police make the first-order determination as to what violations of the criminal code are worth pursuing. Thus, the principles undergirding those determinations are also determined by local police and expressed through their enforcement, patrol, and arrest policies. Prosecutors have the power to decline to prosecute even broad categories of cases, but the relationship between police and prosecutor laid out in Part II portrays local prosecutors primarily as the executors of police policy — and of the principles that inform those policies. In a city without police, prosecutors will need to determine for themselves the processes by which their offices will select and pursue cases and the principles from which the policies are derived. This is largely because the office's capacity will not necessarily wane alongside the flow of cases from local police. The budgets for local prosecutors' offices, like the offices themselves, tend to be fixed by state law.⁶⁰ Although contemporary urban offices are generally overworked under the current paradigm, the flow of cases is likely to slow drastically should local police be eliminated — while the budget remains fixed. How a local prosecutor's office will use that newfound slack in the line will depend on the principles the office chooses as the foundation for its new law enforcement paradigm.

Transformative justice provides exactly the guiding star that this moment in history requires, including ample uses for an office's newfound excess of money and manpower. Affirmative government litigation is a powerful tool for the pursuit of transformative justice, and affirmative

⁶⁰ See, e.g., CONN. GEN. STAT. § 51-279(a)(16) (2018) (“The Chief State’s Attorney . . . shall . . . maintain adequate accounting and budgetary records for all appropriations by the state for the maintenance of the Division of Criminal Justice . . .”). Connecticut’s Division of Criminal Justice oversees local prosecutors’ offices. *The Division of Criminal Justice*, CONN. STATE DIV. OF CRIM. JUST., <https://portal.ct.gov/DCJ/About-Us/About-Us/About-Us> [https://perma.cc/FZ46-WPQ4].

litigation is the task for which local prosecutor's offices were designed and for which they already possess most of the tools they might need. The only thing missing is the office's will to change its enforcement priorities.

Transformative justice is an approach to the preservation of public safety developed by prison abolitionists and conceived of as an alternative to imprisonment.⁶¹ The term "transformative justice" can refer to two interrelated issues. It can be a method of responding to individual harm "without relying on alienation, punishment, or State or systemic violence,"⁶² and it can also refer to the process of remedying the societal circumstances that enable those individual harms.⁶³ In its latter form, transformative justice seeks to eliminate the environmental, economic, and sociopolitical forces that are the root causes of many discrete, interpersonal injuries.⁶⁴ Transformative justice should guide the efforts of local prosecutors in a city without police.

In the context of a local prosecutor's office, an approach to law enforcement informed by transformative justice principles might focus on the first facet of transformative justice by taking a more humane approach to remedying individual harm. For instance, these offices could develop robust infrastructure featuring larger numbers of caseworkers, therapists, and counselors. However, this approach does not take advantage of the institutional knowledge and skills that prosecutors' offices have developed. Although public services targeting individuals struggling with mental health or addiction issues are valuable, incorporating them into the local prosecutor's office essentially asks a duck to put on a suit and pretend it's a penguin.⁶⁵ It is more worthwhile, perhaps, to play to a prosecutor's strength while simultaneously increasing

⁶¹ See GENERATION FIVE, TOWARD TRANSFORMATIVE JUSTICE 5 (2007), http://www.generationfive.org/wp-content/uploads/2013/07/G5_Toward_Transformative_Justice-Docment.pdf [<https://perma.cc/6PZN-TYSD>].

⁶² *Id.*

⁶³ See *id.* at 5–6.

⁶⁴ See John F. Wozniak, *Introduction* to TRANSFORMATIVE JUSTICE: CRITICAL AND PEACEMAKING THEMES INFLUENCED BY RICHARD QUINNEY 18 (John F. Wozniak et al. eds., 2008).

⁶⁵ For example, mental health courts are alternative, problem-solving courtrooms established to reduce the criminalization of individuals with mental health issues. See JOHN S. GOLDKAMP & CHERYL IRONS-GUYN, BUREAU OF JUST. ASSISTANCE, EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD: MENTAL HEALTH COURTS IN FORT LAUDERDALE, SEATTLE, SAN BERNARDINO, AND ANCHORAGE, at vii–ix (2000). Unfortunately, they suffer from earned criticism that they overcriminalize mental illness nonetheless and overrely on supervised release. See, e.g., Shannon Murphy, *Mental Health Courts like Those in Genesee County Draw Some Criticism, Debate over Savings*, MLIVE (Apr. 4, 2019), https://www.mlive.com/news/flint/2009/03/mental_health_courts_like_thos.html [<https://perma.cc/HT2P-SEH6>]; see also *Position Statement 53: Mental Health Courts*, MENTAL HEALTH AM. (June 13, 2019), <https://www.mhanational.org/issues/position-statement-53-mental-health-courts>

funding for other organizations better equipped to tackle nuanced public health issues. Giving prosecutors control over these delicate matters also runs the risk of driving away those individuals most in need of the expanded services; after all, prosecutors' offices tend to have well-earned distrust among members of those communities the offices have long sought to imprison.⁶⁶

The role that prosecutors come already equipped to fill is that of the affirmative litigator, through which they can pursue transformative justice's second facet by addressing the structural causes of harm. If a prosecutor's office focuses on its existing skill set in this way, the pursuit of transformative justice might manifest as — among other things — the increased enforcement of municipal ordinances and state laws that prohibit environmental harms, residential and employment discrimination, or predatory economic practices.⁶⁷

For example, a local prosecutor's office might receive complaints that a company is driving its waste to a neighborhood within the office's jurisdiction and dumping it.⁶⁸ If this is a neighborhood without many resources or with little political clout, the residents might lack the tools necessary to oppose the illegal dumping.⁶⁹ The dumping might lower the quality of life for neighborhood residents, communicate that those

[<https://perma.cc/Z6TY-F53S>]. Other issues that have been associated with prosecutor-driven programs providing alternatives to incarceration include overreliance on fines and fees as a precondition to diversion and the mandatory use of "one-size-fits-all" programming. See MELISSA LABRIOLA ET AL., NAT'L CRIM. JUST. REFERENCE SERV., PROSECUTOR-LED PRETRIAL DIVERSION: CASE STUDIES IN ELEVEN JURISDICTIONS 2–3 (2018), <https://www.ncjrs.gov/pdffiles1/nij/grants/251664.pdf> [<https://perma.cc/3DW2-92E7>].

⁶⁶ See EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 124–25 (2019) (noting that candidates for diversion in New York City suspected that their caseworkers "pumped [them] for information that could be fed to the police or the D.A.'s office," *id.* at 124, and had "little trust that a program run by the D.A.'s office would keep [their] secrets," *id.* at 125).

⁶⁷ See JILL HABIG ET AL., LOCAL ACTION, NATIONAL IMPACT: A PRACTICAL GUIDE TO AFFIRMATIVE LITIGATION FOR LOCAL GOVERNMENTS 6–13 (2019), <https://www.sfcityattorney.org/wp-content/uploads/2019/04/A-Practical-Guide-to-Affirmative-Litigation-FINAL-4.13.19-1.pdf> [<https://perma.cc/9CKM-VU8T>]; see also Press Release, S.F. Off. of the City Att'y, Herrera Secures \$245,000 Settlement from Lem-Ray Properties for Discriminating Against Low-Income Tenants (Nov. 1, 2019), <https://www.sfcityattorney.org/2019/11/01/herrera-secures-245000-settlement-from-lem-ray-properties-for-discriminating-against-low-income-tenants> [<https://perma.cc/97GX-CTXW>]; Press Release, S.F. Off. of the City Att'y, Herrera Secures Settlement with Chipotle for \$95,000 to Employees Owed Paid Sick Leave (Sept. 13, 2016), <https://www.sfcityattorney.org/2016/09/13/herrera-secures-settlement-chipotle-95000-employees-owed-paid-sick-leave> [<https://perma.cc/2MQA-82PB>].

⁶⁸ See, e.g., Talis Shelbourne, "Treating an Entire Neighborhood like a Trash Can": Amani Residents Fed Up with People Who Illegally Dump Trash, MILWAUKEE J. SENTINEL (Feb. 20, 2020, 9:47 AM), <https://www.jsonline.com/story/news/local/milwaukee/2020/02/19/amani-residents-say-system-handle-illegal-dumping-inadequate/2609601001> [<https://perma.cc/658J-VPG7>].

⁶⁹ See *id.*

residents are not valued, and harm residents' health.⁷⁰ By targeting illegal dumping, local prosecutors can transform their practice from one that polices indigent communities to one that protects those communities from mistreatment and predation.⁷¹ Affirmative litigation is an important part of addressing the problem because, although municipal workers might take steps to clean up the waste from a single occurrence, legal action against the companies responsible is likely necessary to address the illegal practice itself.⁷² The local prosecutor's office, relying on state laws or municipal ordinances that prohibit unpermitted waste disposal, might then intervene on behalf of the residents to make the cost of unpermitted dumping prohibitively high.

Institutional barriers, more so than legal restraints, are the primary impediment to the pursuit of transformative justice at the local level.⁷³ Practicing transformative justice requires local prosecutors to look at their office's mission and jurisdiction with fresh eyes, and to challenge their institution's assumptions with regard to the kinds of laws the office ought to be enforcing and the kinds of enforcement actions it ought to be bringing.

Local prosecutors that wish to pursue an affirmative litigation program rooted in principles of transformative justice might already be in possession of the jurisdictional authority required — if they choose to look for it. The archetypal local prosecutor's jurisdiction includes a broad grant of authority under which they may enforce any state or municipal criminal laws applicable within their geographical jurisdiction.⁷⁴ Some local prosecutors are also empowered to sue on behalf of their state to enforce those laws that are upheld through civil prosecution.⁷⁵ In addition, some states have laws on the books that otherwise

⁷⁰ See *id.* To avoid simply replicating the current carceral system of law enforcement, prosecutors will need to focus on the corporate or institutional sources of dumped waste, rather than the discrete individuals caught illegally dumping. Cf. Press Release, S. Poverty L. Ctr., SPLC Lawsuit Closes Debtors' Prison in Alabama Capital (Aug. 26, 2014) <https://www.splcenter.org/news/2014/08/26/splc-lawsuit-closes-debtors%E2%80%99-prison-alabama-capital> [https://perma.cc/5ZHN-SBZE] (discussing Alabama's practice of jailing individuals who cannot afford to pay fines or fees).

⁷¹ Illegal dumping is simply an easily imagined first rung in a ladder of predatory practices that might be addressed by local prosecutors. See Tayyab Mahmud, "Surplus Humanity" and the Margins of Legality: Slums, Slumdogs, and Accumulation by Dispossession, 14 CHAP. L. REV. 1, 11–25 (2010) (describing the role that poor urban neighborhoods play in the predatory ecology of the global economy).

⁷² Cf. Shelbourne, *supra* note 68 (discussing the use of citations and fines to help reduce illegal dumping).

⁷³ See Kathleen S. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, in WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY 51, 52 (2008), https://law.yale.edu/sites/default/files/documents/pdf/liman_whyTheLocalMatters.pdf [https://perma.cc/S9TC-CQDS].

⁷⁴ See, e.g., 16 PA. STAT. AND CONS. STAT. ANN. § 4402(a) (West 2020) ("The district attorney shall . . . conduct in court all criminal and other prosecutions, in the name of the Commonwealth . . .").

⁷⁵ See *id.*

might fall outside the scope of a local prosecutor's authority, but that specifically grant enforcement power over a particular subset of laws to every local prosecutor's office within the state, so long as the offices see fit to exert that jurisdiction.⁷⁶ A prosecutor's office pursuing transformative justice should study its existing enforcement authority for extant opportunities to engage in affirmative civil or criminal litigation targeting the root causes of harm within its geographic jurisdiction.

Local prosecutors are accustomed to pushing the limits of their jurisdiction when it comes to enforcing conventional criminal laws.⁷⁷ It is not unheard of for prosecutors to charge a single defendant with a crime more serious than the evidence supports, or to unnecessarily fragment a sequence of unlawful events into its component offenses in order to charge the defendant with a larger number of crimes.⁷⁸ In these instances, prosecutors apply the law with infinite creativity. Instead of pushing statutory language to its limit to criminalize behavior, this Note argues that prosecutors should use that same creativity to regulate those local institutions that are the root cause of social instability.

By taking full advantage of existing laws, a local prosecutor can become more than a rote enforcer of traditional criminal law. Instead, they can reimagine themselves as a government agency whose mission is to address the structural ills that plague their communities. As a local government office, the prosecutor oversees a much smaller geographic area than the state and federal officials traditionally responsible for looking after the community's needs — that is, a state attorney general or the United States Department of Justice.⁷⁹ This more limited jurisdiction allows local prosecutors to maintain closer ties to the communities they serve and to provide more tailored and responsive solutions to community needs.⁸⁰ Public interest legal organizations and community nonprofits are traditionally responsible for filling the service gaps that state and federal government can leave, but local prosecutors' offices have the advantage of having a broader focus and being democratically accountable.⁸¹

⁷⁶ See, e.g., 25 PA. CONS. STAT. § 1802 (2020) (granting district attorneys prosecutorial jurisdiction over all state violations except for driver's license applications and matters relating to government agencies).

⁷⁷ See, e.g., Elise Schmelzer, *Protesters, Demonstration Leaders Arrested in Connection to Rallies in Aurora*, DENV. POST (Sept. 18, 2020, 12:56 PM), <https://www.denverpost.com/2020/09/17/aurora-denver-police-protesters-arrested-riot> [<https://perma.cc/VJZ6-JFA3>] (reporting that civil rights activists were charged with kidnapping for surrounding and picketing a police station).

⁷⁸ See Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1254 (2008).

⁷⁹ See Morris, *supra* note 73, at 59–60.

⁸⁰ See *id.*

⁸¹ See *id.* at 60.

The pursuit of transformative justice can include individual — but broadly impactful — enforcement actions or precedent-setting impact litigation. And, to the extent that affirmative litigation is capable of transformative results within the modern legal environment, it is best undertaken by a governmental entity. Article III standing, forced arbitration, and limitations on class action litigation are only some of the many doctrinal developments that conspire to prevent private plaintiffs from vindicating their rights.⁸² Although public plaintiffs such as municipal offices face their fair share of hurdles,⁸³ they are nevertheless better positioned than even large nonprofit organizations to actually have the case decided on the merits in court.⁸⁴

Using existing authority to pursue ends that align with transformative justice principles is not a new practice, but it could gain new focus in a city without police. The preeminent example of a municipal entity engaging in affirmative litigation for the public interest is the San Francisco City Attorney's Office. The civil counterpart to the city's District Attorney's Office, the San Francisco City Attorney created a task force dedicated to affirmative civil litigation in 2006.⁸⁵ Since then, the office has continued to perform its traditional advisory and defensive functions but has maintained a groundbreaking commitment to structural change through civil lawsuits.⁸⁶ Municipalities do not need to create a new office to engage in affirmative litigation. Already, some local prosecutors have expanded their civil litigation to include enforcement actions and constituent-suits,⁸⁷ but such suits have generally remained secondary priorities when compared to the offices' traditional responsibility for individual criminal law enforcement.⁸⁸ Police abolition is an opportunity to expand these efforts.

IV. THE DANGERS REFORM POSES

The transition from carceral justice to transformative justice runs the risk of allowing prosecutors to expand their authority too far or attracting other actors in the criminal legal system to the municipality. Successfully engaging in transformative justice requires prosecutors to expand the scope of their enforcement activity, which might alarm

⁸² See HABIG ET AL., *supra* note 67, at 5 & n.5 (discussing the practical barriers to suits by private plaintiffs).

⁸³ See Morris, *supra* note 73, at 58.

⁸⁴ See *id.* at 58–59.

⁸⁵ See *id.* at 54.

⁸⁶ See *id.* at 55–56.

⁸⁷ See, e.g., Press Release, Phila. Dist. Att'y's Off., Larry Krasner Announces Opioid Lawsuit Under Commonwealth's Unfair Trade Practices and Consumer Protection Laws (Feb. 15, 2018), <https://phillyda.wordpress.com/2018/02/15/larry-krasner-announces-opioid-lawsuit-under-commonwealths-unfair-trade-practices-and-consumer-protection-laws> [<https://perma.cc/85ST-59SP>].

⁸⁸ Cf., e.g., Public Data Dashboard, PHILA. DIST. ATT'Y'S OFF., https://data.philadao.com/Charge_Report.html [<https://perma.cc/LZH6-MYNT>] (reporting thousands of criminal charges brought per year).

interest-holders that would otherwise be skeptical of prosecutorial power. The unconventional nature of the work that transformative justice entails might also encourage actors outside the local prosecutor's office to exercise their own jurisdiction and stymie otherwise productive reform. These dangers should not discourage reformers, however, because conflict among institutional actors is a necessary part of the pursuit of transformative justice.

There is good reason to be skeptical of any increase to a local prosecutor's authority. Regardless of the good intentions with which prosecutors expand their jurisdiction, that exercise of power by a historically untrustworthy institution will raise red flags with many activists. In particular, prison abolitionists regard prosecutors as institutionally incapable of meaningful reform because the very act of prioritizing reform over abolition is categorically insufficient to achieve the movement's goals.⁸⁹ Prosecutors' interests align with those of other actors in the criminal legal system, such as police and prison guards; the tools prosecutors have available are likewise rooted in the punitive and carceral aspects of that system.⁹⁰ When attempts at reform maintain existing interests and rely on existing tools, abolitionists argue that those efforts simply empower the existing carceral system and distract from efforts to eliminate it.⁹¹ Instead, abolitionists demand "nonreformist reforms" that reduce — rather than reconstitute — the power of oppressive carceral systems.⁹²

Abolitionist critiques of prosecutorial reform are borne out by attempts to incorporate social services into the criminal legal system alongside traditional carceral problem-solving strategies. After all, giving prosecutors final say over whether someone qualifies for a diversion program — the practice in many jurisdictions⁹³ — transforms what might be an important intervention into leverage. As abolitionist groups explain, "[r]esource shifting from carceral prosecution to carceral social services is not de-resourcing. Social services become another punishment tool of the punishment system whether housed in or mandated by the prosecuting office."⁹⁴

⁸⁹ See Danielle Silva, *Defining Prison Abolitionism in a Time of Progressive Prosecutors*, DAVIS VANGUARD (Nov. 8, 2019), <https://www.davisvanguard.org/2019/11/defining-prison-abolitionism-in-a-time-of-progressive-prosecutors> [<https://perma.cc/PD7F-JNEE>].

⁹⁰ See *id.*

⁹¹ See Roberts, *supra* note 46, at 114.

⁹² See Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [<https://perma.cc/BD8Q-W5MC>].

⁹³ See LABRIOLA ET AL., *supra* note 65, at 2–3.

⁹⁴ CMTY. JUST. EXCH. ET AL., ABOLITIONIST PRINCIPLES & CAMPAIGN STRATEGIES FOR PROSECUTOR ORGANIZING 2 (2019), https://static1.squarespace.com/static/5e1f966c45f53f254011b45a/t/5e46c2744feb170e01fco9f7/1581695604941/CJE_AbolitionistPrinciples_FINAL.pdf [<https://perma.cc/E57H-LC73>].

In the circumstances addressed by this Note, however, the transformation of local prosecution that police abolition will spur is, at worst, an opportunity to seize instrumental value from an abolition-resistant institution, and at best an opportunity to reduce the carceral power of local prosecutors. Pursuing transformative justice through affirmative litigation is not a matter of achieving social control of the individuals and social groups traditionally subject to policing; rather, it can be seen as a type of nonreformist reform. The prosecutorial apparatus is redirected toward actors and institutions that have traditionally escaped government scrutiny.⁹⁵ Simply redirecting prosecution does not necessarily ensure that prosecutors' power is reduced, but prosecution focused on systems and organizations — or even on individual misconduct when that misconduct is “white collar” — is not generally undertaken through the same carceral strategies to which most individuals arrested, charged, and imprisoned are subject.⁹⁶ Local prosecutors focused on addressing systemic injustices are likely to bring with them their preconceptions about how best to achieve those ends. In other words, prosecutors engaging in transformative justice will be starting from a place of mercy, not cruelty.

Redirecting prosecutorial energy toward transformative justice may also further abolitionist ends by casting light on the criminal legal system's “inability to solve the crises it creates.”⁹⁷ In abolitionist circles, the only effective solution to the unnecessary harms our criminal legal system causes is for that system to cease to exist.⁹⁸ Because transformative and carceral justice are so different in terms of the strategies they employ and the entities they target, prosecutors' pursuit of transformative justice necessarily comes with a cost in terms of the resources prosecutors can dedicate to carceral law enforcement. Repurposing existing institutions in this way need not be about reform. Rather, it could be an opportunity to “create the new world in the shell of the old.”⁹⁹ If local prosecutors' carceral tools go unused, but the police-less city flourishes, it will be a proof of concept for prison abolition.

It is also possible that attempts to redirect prosecutors from carceral law enforcement to the pursuit of transformative justice will not only serve to entrench the office's power but will also draw the attention of

⁹⁵ See Marianne Levine, *Behind the Minimum Wage Fight, a Sweeping Failure to Enforce the Law*, POLITICO (Feb. 18, 2018, 10:40 AM), <https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644> [<https://perma.cc/3S2C-ZVK7>] (finding that states' failure to enforce minimum wage and wage theft laws led workers to lose an estimated \$15 billion per year).

⁹⁶ See FAY HONEY KNOPP ET AL., *INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS* 28 (1976).

⁹⁷ Berger et al., *supra* note 92.

⁹⁸ Roberts, *supra* note 46, at 114.

⁹⁹ Berger et al., *supra* note 92.

other government actors. The movement for progressive prosecution has seen many instances in which government actors moved to check the discretion of a newly elected local prosecutor or even to go so far as to usurp a local prosecutor's jurisdiction.¹⁰⁰

Attempts to prevent municipal entities from moving away from the modern approach to law enforcement threaten to undermine local self-determination. The extent to which the threats become reality varies widely, however. A Pennsylvania law granting the state's Attorney General authority over Philadelphia gun cases in reaction to the election of a progressive prosecutor in that city seems ultimately to have had little practical impact.¹⁰¹ As a result, the danger is far too speculative

¹⁰⁰ In Pennsylvania, for example, state legislators responded to Philadelphia District Attorney Larry Krasner's 2018 election by quietly granting the Pennsylvania Attorney General concurrent jurisdiction over some firearms crimes in Philadelphia, but not other cities. See Akela Lacy & Ryan Grim, *Pennsylvania Lawmakers Move to Strip Reformist Prosecutor Larry Krasner of Authority*, THE INTERCEPT (July 8, 2019, 5:55 PM), <https://theintercept.com/2019/07/08/da-larry-krasner-pennsylvania-attorney-general> [<https://perma.cc/HG47-DKTS>]. In Missouri, legislators sought to transition enforcement authority from St. Louis's local prosecutor, Circuit Attorney Kimberly Gardner, to the state's Attorney General. See Rebecca Rivas, *Republican State Senators Pass Provision that "Usurps" Circuit Attorney Kimberly Gardner's Authority, Missouri Prosecutors Say*, ST. LOUIS AM. (Sept. 8, 2020), http://www.stlamerican.com/news/republican-state-senators-pass-provision-that-usurps-circuit-attorney-kimberly-gardner-s-authority-missouri-prosecutors/article_oao50270-ee30-11ea-aaf8-efbca5ecef46.html [<https://perma.cc/WQ5P-S6US>]. More recently, then-President Donald Trump extended the activities of federal law enforcement to those jurisdictions in which the President thought local officials were failing to restore order following protests against police brutality. See Peter Baker, Zolan Kanno-Youngs & Monica Davey, *Trump Threatens to Send Federal Law Enforcement Forces to More Cities*, N.Y. TIMES (July 24, 2020), <https://nyti.ms/3joPGZ> [<https://perma.cc/6TAK-UC99>]. Cities that the Trump Administration perceived as being soft on anti-police protestors were classified as "anarchy jurisdictions" and threatened with the revocation of their federal funding. See Christina Carrega, *Justice Department Labels New York, Portland and Seattle as "Anarchy" Jurisdictions*, CNN (Sept. 21, 2020, 2:45 PM), <https://www.cnn.com/2020/09/21/politics/doj-anarchy-jurisdictions/index.html> [<https://perma.cc/TJ3N-HF59>].

¹⁰¹ See *New Law Seems Unlikely to Alter Philadelphia Gun Law Prosecutions*, CBS PHILLY (July 9, 2019, 7:57 PM), <https://philadelphia.cbslocal.com/2019/07/09/new-pennsylvania-law-josh-shapiro-unlikely-alter-philadelphia-gun-law-prosecutions-larry-krasner> [<https://perma.cc/4TY5-X8P3>] ("Pennsylvania's top prosecutor . . . does not intend to use new unilateral authority to prosecute gun crimes in Philadelphia under a state law passed after criticism of the city district attorney's handling of gun law violations."); Akela Lacy, *Pennsylvania Attorney General Josh Shapiro Will Support Repeal of Controversial Law Stripping Larry Krasner of Authority*, THE INTERCEPT (July 12, 2019, 4:18 PM), <https://theintercept.com/2019/07/12/josh-shapiro-larry-krasner-pennsylvania-repeal-hb-1614> [<https://perma.cc/A5R4-6PA9>]. But see Akela Lacy, *Pennsylvania Attorney General's Staff Pushed Philadelphia Inquirer to Be More Critical of Larry Krasner: Emails*, THE INTERCEPT (Oct. 8, 2019, 10:58 A.M.), <https://theintercept.com/2019/10/08/josh-shapiro-philadelphia-inquirer-larry-krasner-josh-shapiro> [<https://perma.cc/6CUW-QSTF>] (reporting that the state Attorney General's former press secretary pushed a Philadelphia newspaper to report more negatively on the District Attorney's approach to prosecuting gun crimes). At the federal level, then–United States Attorney General William Barr criticized Philadelphia District Attorney Larry Krasner for his support of a proposed safe opioid injection site in Philadelphia, but the Department of Justice's legal challenge of the proposal has thus far proven unsuccessful. See *United States v. Safehouse*, 408 F. Supp. 3d 583, 618 (E.D. Pa. 2019).

to outweigh the benefits that might result from a local prosecutor's transition to transformative justice-based law enforcement.

Even successful attempts to stymie reform or colonize a local prosecutor's law enforcement jurisdiction are not so grave that they should dissuade attempts at reform. These efforts are, at most, something that prosecutors attempting to transition to a transformative justice model should keep in mind when developing their strategy. Local prosecutors need not be the passive recipients of outsiders' political meddling. For example, some reform prosecutors have tried to protect local communities from federal immigration authorities by considering a defendant's immigration status when making charging decisions.¹⁰² San Francisco District Attorney Chesa Boudin has spoken out against the Trump Administration's enforcement of immigration law within San Francisco city limits,¹⁰³ and, while running for the office, went so far as to propose establishing a department within the District Attorney's Office dedicated to providing legal assistance to noncitizens.¹⁰⁴ Even more dramatically, Philadelphia District Attorney Larry Krasner threatened to arrest federal agents caught unlawfully assaulting or detaining protesters in Philadelphia.¹⁰⁵

Far from being examples of the negative repercussions that might flow from local prosecutors' embracing transformative justice, inter-governmental conflicts are transformative justice in action: local prosecutors protecting the interests of vulnerable populations from systems that those populations cannot, themselves, successfully challenge. Any tension that arises between a prosecutor dedicated to transformative justice and other governmental actors — state or federal — is an argument *for*, not against, this approach to local law enforcement.

¹⁰² See, e.g., Justin Fenton, *Baltimore Prosecutors Told to Consider Consequences for Prosecuting Illegal Immigrants for Minor Crimes*, BALT. SUN (Apr. 28, 2017, 5:35 PM), <https://www.baltimoresun.com/news/crime/bs-md-ci-states-attorney-immigrants-20170428-story.html> [https://perma.cc/SS7J-QA5F].

¹⁰³ See Tatiana Sanchez & Evan Sernoffsky, *SF Public Defender Mano Raju, DA Chesa Boudin, Condemn ICE Courthouse Arrest*, S.F. CHRON. (Mar. 5, 2020, 8:41 PM), <https://www.sfchronicle.com/crime/article/ICE-arrests-defendant-outside-SF-courthouse-15107989.php> [https://perma.cc/BQ8W-LKKD].

¹⁰⁴ See Michael Barba, *SF Public Defender Running for DA Calls for Unit to Protect Immigrants from Deportation*, S.F. EXAMINER (June 11, 2019, 8:30 PM), <https://www.sfexaminer.com/the-city/sf-public-defender-running-for-da-calls-for-unit-to-protect-immigrants-from-deportation> [https://perma.cc/VV74-Q26A].

¹⁰⁵ Brentin Mock, *Philadelphia's Top Prosecutor Is Prepared to Arrest Federal Agents*, BLOOMBERG: CITYLAB (July 22, 2020, 5:00 AM), <https://www.bloomberg.com/news/articles/2020-07-22/philly-d-a-threatens-to-arrest-federal-agents#:~:text=Philadelphia's%20Top%20Prosecutor%20Is%20Prepared,might%20criminally%20charge%20ofederal%20officers> [https://perma.cc/28GB-9VXY].

CONCLUSION

Local prosecutors' privileged position in state law protects them from attempts to eliminate their offices. Despite this, any municipality that takes steps to eliminate its local police department also fundamentally transforms its local prosecutor's office. This process of reconstitution is the moment at which fundamental transformation becomes possible. As prosecutors transition away from their dependent relationship with local police and the individually punitive strategies that relationship encourages, they can instead adopt a holistic approach to maintaining public safety that is guided by principles of transformative justice. This approach to prosecutorial reform is not without its dangers, providing cover for prosecutors looking to consolidate power or inviting outside actors to meddle in municipal affairs. But these risks represent the cost of change in a complex web of statutory law. To the extent that outside actors push back against attempts at prosecutorial transformation, that conflict is not a negative repercussion of transformation, but the act of transformation itself. Any municipality that has gone so far as to abolish its police department is already engaged in a groundbreaking process and these difficulties should not stand in the city's way.