

# Unusual (and Unconstitutional?) Prosecutorial Models and a Recommendation for Reform

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## INTRODUCTION

While there has been a renewed spotlight in recent years on the disturbingly close relationship between prosecutors and law enforcement, there has been very little attention paid to unorthodox prosecutorial models.<sup>1</sup> Even with standard practices, prosecutors and police officers rely on each other heavily for information and access.<sup>2</sup> Without law enforcement, prosecutors would not be able to do their jobs. Prosecutors depend on police investigations, evidence, and officers appearing in court as witnesses. This heavy reliance on the police makes prosecutors reluctant to charge officers when they break the law.<sup>3</sup> Consequently, these conversations occasionally arise in public debate in cases of police brutality which garner a large amount of media coverage. But even when the officers themselves are not violating the law, the close police-prosecutor relationship creates an inherent conflict of interest.<sup>4</sup> This “tag-team” approach means police have a “dog in the fight” when it comes to prosecutions, potentially inhibiting their ability to conduct independent investigations.<sup>5</sup> Worse still, some jurisdictions have institutionalized police-prosecutor cooperation by allowing for joint police-prosecutorial units or even by collapsing the two roles, allowing police officers themselves to prosecute low-level crimes.<sup>6</sup> The result is a likely unconstitutional violation of defendants’ due process rights under the Fifth and Fourteenth Amendments and further incentivizes prosecutors to violate Rule 3.8(a) of the American Bar Association (ABA) *Model Rule of Professional Conduct*, which

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1. The renewed spotlight refers to more public attention in the media.

2. *The Prosecutor-Police Relationship: Promoting Accountability and Building Public Confidence*, NAACP LEGAL DEF. FUND: VOTING FOR JUST., <https://votingforjustice.org/resource/policeprosecutorrelationship/#:~:text=Prosecutors%20and%20police%20are%20interdependent,police%20for%20misconduct%20and%20violence> [<https://perma.cc/7HSV-2L8D>] (last visited Apr. 26, 2021).

3. *Id.*

4. See Alexandra Hodson, *The American Injustice System: The Inherent Conflict of Interest in Police-Prosecutor Relationships* & How Immunity Lets Them ‘Get Away with Murder,’ 54 IDAHO L. REV. 563, 563 (2018).

5. *Id.* at 26.

6. Adam H. Johnson, Julia Rock & Harry August, *When Police Officers Double as Prosecutors*, THE APPEAL (Oct. 31, 2019), <https://theappeal.org/the-appeal-podcast-when-police-officers-double-as-prosecutors/> [<https://perma.cc/NEM6-YZKE>].

states: “[t]he prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”<sup>7</sup>

These unusual prosecutorial practices foster both police and prosecutorial misconduct by skewing attorneys’ incentives and obligations. Officers have a clear incentive to commit perjury in order to obtain convictions, and then they enjoy absolute immunity in their capacity as testifying witnesses.<sup>8</sup> In one survey, defense attorneys, judges, and prosecutors estimated that police lie in suppression hearings at least twenty to fifty percent of the time.<sup>9</sup> This problem is compounded by the prosecutor-to-judge pipeline, which makes judges more likely to be sympathetic to prosecutors and law enforcement.<sup>10</sup> Former prosecutors are vastly overrepresented on the bench at both federal and state levels.<sup>11</sup> This contributes to a system where the odds are deeply stacked against defendants, particularly for low-level crimes and misdemeanors where people are typically low-income and do not necessarily have access to legal representation, in a system that is already built on criminalizing low-income people and people of color.

This Note examines three different types of unorthodox prosecutorial structures: private prosecutors, police-prosecutors, and joint police-prosecutorial units. This Note will first begin by laying out two different theoretical frameworks of the role of prosecutors in our justice system. Second, it will discuss private prosecutors. At least fourteen states allow for private prosecution in some capacity, whether that involves private citizens initiating the charges directly or just being involved in the actual prosecution, and at least nine states allow police officers to serve as prosecutors for low-level crimes.<sup>12</sup> With this discussion it will also discuss the dangers of private prosecution. Third, it will discuss police prosecutors. Several states allow for criminal charges to be filed and/or actually prosecuted by someone other than a bar-admitted government attorney, or they have institutionalized cooperation among prosecutors and law enforcement. Next, it will discuss joint private-police prosecutions. All of these raise significant constitutional and ethical concerns. These situations deprive defendants of their due process rights and allow for serious and unavoidable conflicts of interest. In conclusion, this Note recommends that all three types be abolished immediately through congressional action.

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7. MODEL RULES OF PROF’L CONDUCT R. 3.8 (2018) [hereinafter MODEL RULES].

8. Hodson, *supra* note 4.

9. Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 VAND. L. REV. 1037, 1041 (1996).

10. Rob Robinson, *Does Prosecutorial Experience “Balance Out” a Judge’s Liberal Tendencies?*, 32 JUST. SYS. J. 143, 144 (2011) (stating that “judges who have been prosecutors are more likely to side with the government in criminal cases”).

11. Casey Tolán, *Why Public Defenders are Less Likely to Become Judges - and Why That Matters*, SPLINTER NEWS (Mar. 18, 2016), <https://splinternews.com/why-public-defenders-are-less-likely-to-become-judges-a-1793855687> [<https://perma.cc/2CKA-YRT8>].

12. Johnson, Rock & August, *supra* note 6.

I. *MEISTER–BIEMEL* AND *KENT* PROSECUTORIAL MODELS

First, it is important to understand the role of the prosecution in our current justice system. In his scholarship, Professor Robert M. Ireland defines a divergent characterization of the ideal prosecutorial structure through differing state supreme court decisions.<sup>13</sup> The *Meister–Biemel* model, as embodied by *Biemel v. State*<sup>14</sup> in Wisconsin and *Meister v. People*<sup>15</sup> in Michigan, describes the prosecutor as a “seeker of justice rather than the arduous pursuer of conviction.”<sup>16</sup> The idea is that it is the prosecutor’s role to seek a conviction only when justice warrants it, and an acquittal if the defendant deserves it. The *Kent* model from *State v. Kent* in North Dakota embodied a “zealous prosecutor who tended to be convinced that justice and conviction were synonymous and implied that any overzealousness on the part of the prosecutor would usually be offset by a spiritedly adversarial defense.”<sup>17</sup>

This Note is premised on the idea that the neutral prosecutor of *Meister–Biemel* is a legal fiction. The *Kent* adversarial model best describes our current system. However, this characterization is still not perfect. It oversimplifies other factors at play, mistakenly boiling down the push-pull nature of the adversarial system to the talent and zeal of the attorneys themselves. Equally talented and spirited counsel will still never lead to true equilibrium, particularly for low-level crimes. The vast imbalance of non-financial resources and information which the state has access to will always put the defendant at a material disadvantage. Witnesses and other third-party bystanders will share information with someone with the inherent authority of a police officer or working for the government far sooner than they will a defense attorney.<sup>18</sup> Additionally, police officers who often have access to vital information are not particularly keen on speaking with the defense.<sup>19</sup> Officers typically view defense attorneys and themselves as on separate sides.<sup>20</sup> The principle of lenity, which requires courts to apply any unclear or ambiguous law in a manner most favorable to the defendant, is not enough to overcome these systemic disadvantages at every stage. Overall, it is naive to pretend that prosecutors are always acting as neutral arbiters of justice, as suggested in *Meister–Biemel*, rather than zealous advocates. This already skewed incentive

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13. Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 AM. J. LEGAL HIST. 1, 43–58 (1995).

14. *Biemel v. State*, 37 N.W. 44, 245–48 (Wis. 1888).

15. *Meister v. People*, 31 Mich. 99, 103–04 (1875).

16. Ireland, *supra* note 13.

17. *Id.* at 51.

18. Jon Katz, *When Prosecutors And Police Interfere With Defense Efforts To Speak With Prosecution Witnesses*, JON KATZ PC CRIM. DEF. BLOG (Feb. 23, 2017), <https://katzjustice.com/prosecutors-police-and-witnesses-2-17/> [https://perma.cc/KX74-MSMK].

19. See Sara Kropf, *Why Won't the Witness Talk to Me?*, GRAND JURY TARGET (Feb. 18, 2017), <https://grandjurytarget.com/2017/02/18/why-wont-the-witness-talk-to-me/> [https://perma.cc/R8QX-UCDL].

20. *Id.*

structure must be understood to realize the full ramifications of setups which incentivize prosecutors to move further away from neutrality.

## II. PRIVATE PROSECUTORS<sup>21</sup>

A criminal case typically begins when the police file a report and a public prosecutor decides to file criminal charges on behalf of the government. However, in the nineteenth century common law system in the United States,<sup>22</sup> privately funded prosecutors held a large role in the criminal justice system.<sup>23</sup> In the “early days of our Republic, [a] ‘prosecutor’ was simply anyone who voluntarily went before the grand jury with a complaint.”<sup>24</sup> The practice was outlawed for federal cases in 1973 by *Linda R.S. v. Richard D.*<sup>25</sup> Justice Marshall wrote for the majority in *Linda R.S.* that “in American jurisprudence . . . a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.”<sup>26</sup> Despite this ruling, a 1987 Supreme Court case held that a federal court can appoint a private attorney to prosecute an action of criminal contempt if the executive branch refuses to prosecute.<sup>27</sup> The opinion notes that the prosecutor should not also represent an interested party, since the ABA’s *Model Rules* would require that the prosecutor take into account an interest other than the government’s.<sup>28</sup> At the time of publication, fourteen states allow for private citizens to initiate criminal charges in some capacity: Georgia, Idaho, Kentucky, Maryland, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Virginia, and New Hampshire. The following table provides the laws and authority for each aforementioned state.

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21. A private prosecution differs from a citizen’s arrest, although the end result can be similar in effect. A citizen’s arrest is when a private individual detains another for committing a crime. State law varies in what evidence must exist and the types of crimes which permit this practice. Some states specify whether citizen’s arrest laws can be used for felony or misdemeanor crimes, and some specify whether the arresting individual must actually witness the crime in question in order to make that arrest. Citizen’s arrests are not only potentially dangerous but also expose arresting individuals to civil and criminal liability, since a citizen does not acquire the qualified immunity that police officers have. Additionally, citizen’s arrest laws in this country are a legacy of slavery. As a response to the 2020 murder of Ahmaud Arbery, Georgia repealed its Civil War-era citizen’s arrest statute in May of 2021, making it the first state to do so. See Emma Hurt, *In Ahmaud Arbery’s Name, Georgia Repeals Citizen’s Arrest Law*, NPR (May 11, 2021, 12:00 PM). <https://www.npr.org/2021/05/11/995835333/in-ahmaud-arberys-name-georgia-repeals-citizens-arrest-law> [https://perma.cc/4AGA-B8UU].

22. This practice also dates back to thirteenth-century England. See Daniel Klerman, *Settlement and the Decline of Private Prosecution in Thirteenth-Century England*, 19 L. & HIST. REV. 1, 1 (2001).

23. Ireland, *supra* note 16.

24. *United States v. Sandford*, Fed. Case No.16, 221 (C. Ct. D.C. 1806).

25. *Linda R.S. v. Richard D.*, 410 U.S. 614, 614 (1973).

26. *Id.* at 619.

27. *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 796 (1987).

28. *Id.* at 788.

**STATES WHERE PRIVATE CITIZENS CAN INITIATE PROSECUTION IN  
SOME CAPACITY**

<b>Georgia</b>	A criminal process may be issued based on a request by a private citizen after a warrant application hearing. This provides the accused with the chance to argue that charges should not be issued. <sup>29</sup>	Ga. Code. Ann. § 17-4-40 (2010).
<b>Idaho</b>	A private citizen can initiate a warrant for arrest by filing a complaint if the magistrate investigates and is satisfied that the offense has been committed. <sup>30</sup>	<i>State v. Murphy</i> , 99 Idaho 511, 516 (1978).
<b>Kentucky</b>	Private citizens, as opposed to police officers, are allowed to swear out criminal complaints. If law enforcement declines to get involved or does not witness the misdemeanor, or the victim does not notify the police of a crime, the citizen has the option of going to the Warrant Intake Division in the Hall of Justice to directly file a complaint. <sup>31</sup>	As stated on an archived version of the Louisville, Kentucky government website.
<b>Maryland</b>	Private citizens can ask a District Court Commissioner to file a statement of charges to initiate a criminal case against another. That person has to provide a sworn affidavit and the Commissioner must determine whether the affidavit shows probable cause. <sup>32</sup>	

29. GA. CODE ANN. §17-4-40 (2010).

30. *State v. Murphy*, 99 Idaho 511, 616 (1978) (citing *Howard v. Felton*, 85 Idaho 286 (1963)).

31. *Criminal Prosecution*, LOUISVILLEKY.GOV, <https://web.archive.org/web/20150929223451/https://perma.cc/5UHB-YW5L> (last visited Apr. 26, 2022).

32. *Maryland Victims' Rights-Lawyer Explains the Rights of Crime Victims*, ENLAWYERS: MD. DEF. ATT'YS (Sept. 2, 2020), <https://www.enlawyers.com/maryland-victims-rights-lawyer>, [perma.cc/E5VR-J86L].

<b>New Jersey</b>	Private prosecutions are allowed in municipal courts. However, they are not allowed if the party intending to prosecute has a conflict of interest with the defendants or a financial interest in the case. <sup>33</sup>	“A private prosecutor is not permitted, unless a detailed attorney certification is submitted and rules upon first by the Court R 7:8-7(b).”
<b>New York</b>	A federal district court concluded in a 2002 case that private prosecutors were barred as a violation of the defendant’s due process rights, but distinguished in dicta private prosecutions where there is an “underlying civil cause of action.” <sup>34</sup>	<i>Kampfer v. Vonderheide</i> , 216 F. Supp. 2d. (N.D. N.Y. 2002).
<b>Ohio</b>	While the actual prosecution is limited to the state, Ohio state law allows private citizens to file an affidavit to support criminal charges. <sup>35</sup>	Ohio Rev. Code Ann. § 2935.96 (LexisNexis 2022).
<b>Pennsylvania</b>	Private prosecutions require the approval of a state prosecuting attorney. <sup>36</sup>	As stated in the Pennsylvania Rules of Criminal Procedure.
<b>Rhode Island</b>	A private citizen is allowed to file criminal complaints for misdemeanors, not felonies, and cannot seek penalties of greater than one year of incarceration or a fine of greater than \$1,000. <sup>37</sup>	

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33. *State v. Storm*, 661 A. 2d 790, 253 (N.J. 1995).

34. *Kampfer v. Vonderheide*, 216 F. Supp. 2d. 4, 8 (N.D.N.Y. 2002).

35. OHIO REV. CODE ANN. § 2935.96 (LexisNexis 2022).

36. *Private Complaint Process*, MONTGOMERY COUNTY, PA. (Nov. 11, 2012), [https://www.montcopa.org/DocumentCenter/View/3417/Private\\_Complaint\\_Process\\_Final\\_Version\\_11\\_5\\_12?bidId=](https://www.montcopa.org/DocumentCenter/View/3417/Private_Complaint_Process_Final_Version_11_5_12?bidId=) [<https://perma.cc/QFA2-U7CL>].

37. *Cronan ex rel. State v. Cronan*, 774 A.2d 886 (R.I. 2001).

<b>Texas</b>	Private citizens are allowed to directly contact grand juries to seek indictments. <sup>38</sup>	
<b>Virginia</b>	The use of private prosecutors was incorporated into the common law of Virginia and is still allowed. <sup>39</sup>	Authorized by common law.
<b>New Hampshire</b>	Common law in New Hampshire permits private prosecutions unless the offenses can be punished by imprisonment. <sup>40</sup>	Authorized by common law and case precedent.

The fact that private prosecutors' obligations are to their clients rather than in the best interest of the state is an inherent risk to defendants' due process rights.<sup>41</sup> Conviction of a defendant often paves the way for a subsequent, related civil suit in which the client stands to benefit.<sup>42</sup> Some states have formally ruled that private prosecution should not be permitted. When the Colorado Supreme Court outlawed the practice, it held that the participation of private prosecutors was improper and prejudicial to the defendant.<sup>43</sup> This rationale views private prosecution as eliminating the prosecutor's obligations to the public and instead becoming a "pure advocate and representative of the crime victim."<sup>44</sup> Ideally, our criminal justice system is designed to be one of justice, rather than one of vengeance.<sup>45</sup> The Supreme Court has stated that "the purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant."<sup>46</sup> While the prosecutor as a pure advocate of the victim may fit within the *Kent* conception, this would not work in the *Miester-Biemel* notion of a prosecutor as a seeker of justice rather than the conviction. A private prosecutor is not a representative of the state and thus does not have the same duties toward the state.

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38. Doug Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135, 1142 (2007).

39. Matthew S. Nichols, *No One Can Serve Two Masters: Arguments Against Private Prosecutors*, 13 CAP. DEF. J. 2, 279 (2001).

40. Michael T. McCormack, Note, *The Need for Private Prosecutors: An Analysis of Massachusetts and New Hampshire Law*, 37 SUFFOLK U. L. REV. 497, 501-02 (2004).

41. *Id.*

42. *Id.*

43. *People v. Jiminez*, 528 P.2d 913, 915-16 (Colo. 1974).

44. Nichols, *supra* note 39, at 10.

45. *Id.* at 9.

46. *Standefer v. United States*, 447 U.S. 10, 25 (1980) (citing *United States v. Standefer*, 610 F.2d 1076, 1093 (3d Cir. 1979)).

Despite being harmful overall, one benefit of this practice should be acknowledged. There are times where accountability would not otherwise exist without private prosecution. When a Cleveland police officer shot and killed 12-year-old Tamir Rice for holding a toy gun at a park in 2014, the months-long delay in the county prosecutor sending the case to a grand jury inspired activists to use the private prosecution avenue. Since Ohio allows anyone with “knowledge of the facts” of an incident to request a judge file an arrest warrant without approval from prosecutors or police, community activists used this to appeal to the judge directly to attempt to prosecute Officer Timothy Loehmann.<sup>47</sup> However, these exceptional circumstances are not enough to salvage a practice which is harmful overall. Although lack of accountability is a concern as well, particularly in regards to cases of police misconduct, the primary concern for this note is an overzealous prosecutorial system.

### III. FOR-PROFIT PROSECUTION

For-profit prosecution is another concerning practice which is closely related to private prosecution. The motivation behind criminal prosecution should be the interest of the state and its citizens, and the addition of financial motivations creates perverse incentives to prosecute. Prosecution can become a profitable scheme where defendants themselves are responsible for footing the bill. Cities in at least two states, Texas and California, have outsourced the prosecution of certain crimes to law firms to handle.<sup>48</sup> These firms have then billed residents far higher legal fees for their services than the actual punishment for wrongdoing.<sup>49</sup> The fines for small crimes are no longer the fees set by the government, but rather what a private company is deciding to charge. This essentially creates a situation where a company is co-opting the responsibility of the legislative branch to set fines for certain types of misdemeanors. The law firm typically was filing the charges in the first place, creating an egregious conflict of interest.<sup>50</sup> The firm was directly choosing who to go after in the first place and then profiting off of those choices.

In the southern California cities of Coachella and Indio, the law firm Silver & Wright billed at least 18 unwitting residents a total of \$122,000 in “prosecution

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47. Afi Scruggs, *Tamir Rice Case Reveals Justice Systems: “One for Police, One for Everybody Else,”* THE GUARDIAN (Jun. 12, 2015), <https://www.theguardian.com/us-news/2015/jun/12/tamir-rice-shooting-cleveland-justice-activists> [<https://perma.cc/CZ6X-LSYY>].

48. Jeffrey Redfern, *Bringing Justice to Policing for Profit Victims in California*, INST. FOR JUST. (Mar. 21, 2019), <https://ij.org/ll/bringing-justice-to-policing-for-profit-victims-in-california/> [<https://perma.cc/L5CZ-73SQ>].

49. *Id.*

50. Brett Kelman, *They Confessed to Minor Crimes. Then City Hall Billed Them \$122K in ‘Prosecution Fees,’* DESERT SUN (Apr. 26, 2018, 6:29 PM), [https://www.desertsun.com/story/news/crime\\_courts/2017/11/15/he-confessed-minor-crime-then-city-hall-billed-him-31-k-his-own-prosecution/846850001/](https://www.desertsun.com/story/news/crime_courts/2017/11/15/he-confessed-minor-crime-then-city-hall-billed-him-31-k-his-own-prosecution/846850001/) [<https://perma.cc/6UM5-NSGM>].



fees.”<sup>51</sup> The total price tag was over \$200,000 once administrative fees, abatement fees, litigation fees, and appeal fees are included.<sup>52</sup> In Coachella Valley, a minor infraction such as a \$225 ticket for keeping chickens in a suburban backyard could turn into a \$6,000 bill from a private law firm.<sup>53</sup> In 2015, a city inspector discovered that Coachella Valley resident Jose Garcia expanded his living room without first obtaining the proper city permits.<sup>54</sup> Silver & Wright filed twenty-nine misdemeanor charges against Garcia and he ultimately signed a plea agreement and paid a \$900 fine to the court.<sup>55</sup> A year and a half later, Silver & Wright billed him \$26,000, raising it to \$31,000 after he protested.<sup>56</sup> This is not an isolated incident. In several cases, hundreds or thousands of dollars of additional charges were added to residents’ bills when they appealed for “defending the appeal.”<sup>57</sup> This entire practice occurred despite the fact that federal and California courts had clearly made it illegal for prosecutors to have a direct financial interest in their cases.<sup>58</sup> This serves as yet another example of how judges routinely subvert the law and congressional action is needed to intervene.

#### IV. POLICE-PROSECUTORS

Several states allow for law enforcement to prosecute low-level crimes and misdemeanors.<sup>59</sup> This practice raises a number of serious constitutional and ethical concerns. Extraordinarily, it is not actually known how many states allow this practice to occur, although it was reported to be at least nine as of 2019.<sup>60</sup> While these are typically non-jailable offenses, this practice still raises a number of concerns, from a lack of duty to comply with the ABA *Model Rules*, the potential for institutional conflict of interest, the difficulty of holding prosecutors and law enforcement accountable, and officers assuming absolute immunity within the scope of their role as prosecutor.

Police prosecutors do not have to comply with ethical rules that certified attorneys do, even while acting in that capacity. Bar-certified attorneys are required to follow the rules of professional conduct in their jurisdictions, which are typically modeled off of the ABA *Model Rules*. If not, they are subject to discipline.<sup>61</sup> The ABA has specific rules regarding prosecution standards, such as requiring a

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51. *Id.*

52. *Id.*

53. *IJ Fights to End For-Profit Prosecution in California*, INST. FOR JUST. (Mar. 26, 2018), <https://ij.org/ll/ijfightsendprofitprosecutioncalifornia/#:~:text=For%20almost%20two%20decades%2C%20IJ,using%20excessive%20fines%20and%20fees> [https://perma.cc/YGA5-MSJQ].

54. Kelman, *supra* note 50.

55. *Id.*

56. *Id.*

57. *Id.*

58. See *People v. Eubanks*, 14 Cal. 4th 580, 598 (Cal. 1996).

59. Johnson, Rock & August, *supra* note 6.

60. *Id.*

61. MODEL RULES R. 8.4.

prosecutor to “make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.”<sup>62</sup> These ABA rules provide for far greater protections for the defendant than what the Supreme Court requires through due process, even if police prosecutors were to follow these due process requirements.<sup>63</sup>

Police-prosecutors have largely operated under the radar. When this issue does come in front of courts, judges may acknowledge the inherent problems with the practice and then still decline to decide this matter on the merits.<sup>64</sup> In 1953, the Supreme Court of New Hampshire specifically approved the practice of police prosecution in *State v. Urban*, even while acknowledging, “[w]hether this statute was intended to preclude police officers from prosecuting criminal cases in municipal courts has never been decided.”<sup>65</sup> The *Urban* court referenced an 1855 opinion which states that a criminal proceeding “is prosecuted by a public officer, as part of his official duty, but might be prosecuted by any other person as well.”<sup>66</sup> Although this opinion was sanctioning the practice of police officers as prosecutors, that quote could also be used in support of private prosecutions. Judges willfully misinterpret the law when they so choose. Certain decisions are unabashedly ignorant of what the statute or prior decisions actually intended. In *State v. Urban*, the court specifically approved the practice of police prosecution despite having a statute on the books which literally stated that it was unlawful for a police officer to “appear in any court or before a justice as attorney for any party in a suit.”<sup>67</sup> There is no way to reconcile these two interpretations.

## V. JOINT POLICE-PROSECUTION UNITS

Some jurisdictions have created joint police-prosecution units for the sake of efficiency, but this structure also skews attorney incentives. As discussed above, police and prosecutors work closely together towards the shared goal of conviction.<sup>68</sup> Prosecutors rely heavily on information from the police to build a case but are not always able to easily coordinate directly with officers due to a difference in hours and lack of close physical proximity.<sup>69</sup> This coordination can be helpful

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62. STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-1.11(a) (Am. Bar Ass’n 3d ed. 1992).

63. Andrew Horwitz, *Taking the Cop Out of Copping a Plea: Eradicating Police Prosecution of Criminal Cases*, 40 ARIZ. L. REV. 1305, 1319 (1998).

64. See generally *Frese v. MacDonald*, 425 F. Supp. 3d 64 (D.N.H. 2019).

65. *State v. Urban*, 98 N.H. 346, 347 (1953).

66. *State v. Stearns*, 31 N.H. 106, 110–11 (1855).

67. *Urban*, 98 N.H. at 347.

68. John Buchanan, *Police-Prosecutor Teams: Innovations in Several Jurisdictions*, U.S. DEP’T JUST.: NAT’L INST. JUST. (May/June 1984), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/policeprosecutorteaminnovationsseveraljurisdictions> [https://perma.cc/QS89-WH8S].

69. *Id.* at 1.

for officers and the prosecutors to discuss potential weaknesses and strategize for trial.<sup>70</sup> Due to these systemic necessities, some jurisdictions are improving this cooperation gap in creative ways, such as frequent consultations and conducting interviews together.<sup>71</sup> Some have gone as far as institutionalizing teamwork and creating joint police-prosecutorial units.<sup>72</sup>

There are a few examples of this practice, such as Maine's Bureau of Intergovernmental Drug Enforcement, Multnomah County's Organized Crime/Narcotics Task Force in Oregon, and New York City's Homicide Investigation and Gang Units.<sup>73</sup> Laconia, New Hampshire has also adopted the police-prosecutor concept, but their approach is notable because the city even applies this cooperation to misdemeanor charges, whereas in other jurisdictions it only applies to certain felonies.<sup>74</sup>

In Laconia, an attorney with an office situated directly within the police department has prosecuted all misdemeanor arrests since 1977.<sup>75</sup> Proponents of this institutionalized cooperation sing its praises. Increased information exchange is certainly beneficial to the prosecutors, and law enforcement having easy and direct access to an attorney helps them navigate legally ambiguous situations and can help prevent unintentional unlawful actions. In a 1989 interview, Laconia Police Chief Bruce Chey stated, "The department is not currently the defendant in any lawsuits. I think this can be partially attributed to the constant contact between officers and the prosecutor. A higher degree of legal awareness has developed and it is reflected in the officers' actions on the street."<sup>76</sup> But perhaps this is due to the fact that the prosecutor-police relationship leads to increased protection of the two from lawsuits, even those that are well-deserved.

Increased coordination and access come with a heavy price. What may initially look like a positive attribute to this arrangement may actually be a concern. That same 1989 report gave the following example: Laconia police officers were confronted with a "chronic noise ordinance violator" who was the source of several complaints. The police and the prosecutor worked together to develop a plan in which they would obtain a search warrant and seize the offender's stereo if necessary. "Armed with the knowledge that the prosecutor would support this . . . action, the police convinced the violator that a stereo at lower volume was better than no stereo at all."<sup>77</sup> Although the author portrays this anecdote in a positive light, the story raises several concerns.

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70. *Id.*

71. *Id.* at 1–2.

72. *Id.*

73. *See id.*

74. *Id.*

75. *Id.* at 6.

76. *Id.*

77. *Id.*

First, this likely would not have been a lawful seizure under the Fourth Amendment. The Fourth Amendment prohibits *unreasonable* searches and seizures, which means that searches and seizures must be supported by probable cause.<sup>78</sup> This means that the facts and circumstances within the officers' knowledge and of which they have reasonable trustworthy information are sufficient in themselves to warrant a reasonable person in the belief that evidence subject to seizure will be found in the place to be searched. It does not make sense that a search of a stereo would reveal that it is consistently played at high volumes. Seizing an object so a person no longer has access to it would not seem to fall within the scope of the Fourth Amendment. Second, the officers should not be operating with the knowledge that the prosecutor would support their actions regardless of how questionable as they may be.<sup>79</sup> This underlies the key issue of the police-prosecutor unit. The police and prosecutors should not be working as one unit. Law enforcement may be more emboldened to skirt or even outright break the law with the added incentive of legal protection and lack of accountability.

## VI. RECOMMENDATION FOR REFORM

The criminal justice system disproportionately criminalizes people of color. A 2018 report from the Vera Institute of Justice states that one in three Black men can expect to be incarcerated in his lifetime, compared to one in six Latino men and one in 17 white men.<sup>80</sup> Similarly, one in 18 Black women born in 2001 is likely to be incarcerated at some point in her life compared to one in 111 white women.<sup>81</sup> Barring unethical prosecution practices will not fix a system that is fundamentally broken, and inherent conflicts of interest in the everyday police-prosecutor relationship will remain.

However, the concerns addressed in this Note are not unsolvable. This practice has existed for too long and repeatedly gone unfixed by the judiciary system. The best hope for barring the practices of private prosecution, police prosecution, and police-prosecutorial units is congressional action. Congress outlawing this practice will prevent the problem of courts declining to make a decision which will adversely impact judicial efficacy.

Such a decision would ideally motivate the judicial system to become more efficient. One way to do this, which would also help to tackle the problem of over-incarceration within our system, would be to eliminate a number of criminal

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78. *Probable Cause*, CORNELL L. SCH.: LEGAL INFO. INST., [https://www.law.cornell.edu/wex/probable\\_cause](https://www.law.cornell.edu/wex/probable_cause) [<https://perma.cc/X22H-Z7LK>].

79. See generally Maybell Romero, *Prosecutors and Police: An Unholy Union*, 54 U. RICH. L. REV. 1097 (2020) (discussing the importance of the police-prosecutorial divide).

80. Elizabeth Hinton, LeShae Henderson & Cindy Reed, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. JUST. (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [<https://perma.cc/NT44-MA8P>].

81. *Id.*

charges. However, it must be noted that this comes with its own potential harms. It would be easy to convert certain misdemeanors to fine-only offenses, but that would leave certain problems in place. Fineable offenses still adversely impact low-income communities and communities of color. A better option would be to legalize certain offenses entirely, such as nonviolent drug offenses. Through such methods, judicial efficiency can be preserved while maintaining defendants' due process.

### CONCLUSION

Using legislative power to prevent the practice of police-prosecutors and private prosecutors will make a small difference and it is something that can be done now. As mentioned above, one potential consequence of this solution is the added costs on the governmental prosecutorial system to take up the additional case load. Allowing the police to prosecute low-level crimes was borne out of convenience, since the prosecutor's office did not have the time to handle all charges. A way to approach this is to decriminalize a number of offenses and reduce the overload of our system. This is a multi-faceted problem and it requires a multi-faceted solution. The government cannot continue to deprive defendants of their due process rights out of convenience.