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ARTICLES

VOLUNTEER PROSECUTORS

Russell M. Gold*

ABSTRACT

As support has grown to reduce the footprint of criminal law by defunding the police, volunteer prosecution—a practice that has garnered little attention—continues to expand criminal law’s footprint. Volunteer prosecutors come in many different forms, but their core similarity is that they all prosecute crime without getting paid. Some are entry-level lawyers seeking to gain a foothold in the legal profession, while others are retirees seeking to contribute to their communities. Others work full-time paid jobs in civil practice but volunteer to prosecute some criminal cases too. Many volunteers bring only misdemeanors or petty offenses—prosecutions that disproportionately burden people of color. The racial disparity of those prosecutions prompted a large Minnesota law firm to cancel its volunteer prosecutor program after police killed George Floyd.

This Article provides the first scholarly treatment of volunteer prosecutors. It aims to understand the nature and motivations of this practice by conducting a content analysis of news stories and interviewing law school career services employees. It then examines those findings through the theoretical lens of the sociology of volunteer work. It relies on these sources to build a taxonomy of the various forms of volunteer prosecution and catalog some places where it occurs.

Volunteer prosecution may offer substantial benefits, particularly to recent law school graduates trying to gain paid work as prosecutors in an office that does not have an opening. But volunteer prosecution raises systemic normative concerns. This Article focuses on one particularly salient concern: volunteer prosecution allows the government to cast a wider net in criminal law than the one that the legislature afforded. That net disproportionately ensnares people of color. Stepping back a bit, the most meaningful constraint on prosecutors’

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authority is their limited budgets, but volunteer prosecution allows prosecutors' offices to evade budget constraints and bring low-level misdemeanor or petty offense cases even when elected officials have not appropriated sufficient funds to bring those cases. Low-level prosecutions disproportionately target poor people of color. Compounding the net-widening problem, volunteer prosecution may skew toward individuals with intergenerational wealth—a group that will be less able to identify with and therefore likely will treat more harshly the largely poor defendants who disproportionately populate our criminal legal systems.

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INTRODUCTION

Even amidst a pandemic, protests to reform criminal law proceeded apace across America.¹ Many reformers have called to reduce police funding (or defund the police)—to shrink the footprint of the criminal legal system to combat many ills,

1. Perhaps the source that best captures this moment is Lil Baby, *Lil Baby – The Bigger Picture*, YOUTUBE (June 12, 2020), https://www.youtube.com/watch?v=_VDGysJGNol.

central of which is institutional racism.² But these calls rarely extend to arguments for defunding *prosecutors*³—perhaps the most important players in the criminal legal process.⁴ To the contrary, volunteer prosecution—a phenomenon that has gone unnoticed by legal scholars—silently *increases* prosecutors’ resources. In so doing, volunteer prosecution allows prosecutors’ offices to evade the most meaningful restraint on their power—their limited budgets. Volunteer prosecutors often bring misdemeanor or petty offense cases that the government could otherwise not afford to bring. Because low-level offenses disproportionately ensnare poor people of color,⁵ volunteer prosecution exacerbates the racial disparities already endemic to criminal law. Without free labor, prosecutors’ offices might decline these low-level cases as unworthy of their limited resources.

Volunteer prosecution takes many forms. Justin Lee graduated from Georgetown University Law Center in 2008 and wanted to become a prosecutor.⁶ Three years after graduation he accepted a position as an unpaid Special Assistant United States Attorney (“SAUSA”) in the Eastern District of California.⁷ Lee worked as a volunteer federal prosecutor before obtaining a paid position in the office. Unlike Lee, most of the approximately twenty unpaid SAUSAs who worked in that office from 2010 to 2016 did not obtain paid employment there.⁸ And the Eastern District of California is hardly alone in this practice.⁹ Nor is this phenomenon limited to federal prosecutors.¹⁰ Some cities have large volunteer prosecutor programs. Until Floyd’s killing, for instance, a large Minneapolis-based law firm provided pro bono attorneys to the local prosecutor’s office—prosecuting hundreds of misdemeanor

2. See, e.g., Amna A. Akbar, *The Left Is Remaking the World*, N.Y. TIMES (July 11, 2020), <https://www.nytimes.com/2020/07/11/opinion/sunday/defund-police-cancel-rent.html>; *The Time Has Come to Defund the Police*, M4BL, <https://perma.cc/4R89-QKAR/> (last visited Feb. 6, 2022).

3. But see Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1388–89 (2021) (book review) (arguing that “keeping [prosecutor] offices in check or downsizing them should be a key goal” for progressive prosecution); Rory Fleming, *Don’t Forget Prosecutors When It Comes to Defunding*, FILTER (June 11, 2020), <https://filtermag.org/defund-prosecutors/> (linking defunding prosecutors to defunding police).

4. Hon. Stephanos Bibas, *Preface: Prosecutors’ Changing Roles at the Hub of Criminal Justice*, in THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION ix, x (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2021) (describing “[t]he prosecutor as the central actor in criminal justice” and explaining that American prosecutions “largely revolve around a central actor with tremendous power and discretion: the prosecutor”); see also generally Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 83 FORDHAM L. REV. 1673 (1998) (embracing prosecutorial power). But see Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y. U. L. REV. 171, 174, 176 (2019) (criticizing scholars’ overstating prosecutor power and arguing instead that prosecutors’ influence comes from their interest alignment with other actors).

5. See Sandra G. Mayson & Megan T. Stevenson, *Misdemeanors by the Numbers*, 61 B.C. L. REV. 971, 1017 (2020) (finding that misdemeanor charges disproportionately target Black people with case-filing per-capita rates four times larger for several offenses across several jurisdictions compared to white people).

6. *Wanted: Federal Prosecutors Willing to Work for Free*, DENVER POST (July 2, 2016), <https://www.denverpost.com/2016/07/02/wanted-federal-prosecutors-willing-to-work-for-free> [hereinafter *Wanted*].

7. *Id.*

8. *Id.*

9. See *infra* App.

10. See *id.*

cases each year against disproportionately Black defendants.¹¹ That program lasted for forty-two years.¹² Other volunteer prosecution occurs on an ad hoc basis. The most high-profile recent example, although somewhat atypical, was the team prosecuting Minneapolis police officer Derek Chauvin—the officer who killed George Floyd.¹³

The COVID-19 pandemic and its resultant economic repercussions bring volunteer prosecution into heightened relief because they add both supply and demand for volunteer prosecutors. On the labor supply side, the Class of 2020 graduated into the worst legal market in recent memory.¹⁴ And on the labor demand side, state and local government budgets have faced and will continue to face incredible strain from the pandemic.¹⁵ Prosecutors' offices have borne some of that strain, which has led to laying off and furloughing prosecutors.¹⁶ For prosecutors' offices that rely heavily on court fines and fees for funding, the situation is particularly dire because of court closures.¹⁷ COVID-19 has thus created a larger potential

11. Nicole Norfleet, *Minneapolis Law Firm Dorsey & Whitney Ends Prosecutorial Pro Bono Program After George Floyd Death*, STAR TRIB. (Minneapolis) (June 3, 2020), <https://www.startribune.com/minneapolis-law-firm-dorsey-whitney-ends-prosecutorial-pro-bono-program-after-george-floyd-death/570981522/>.

12. *Id.*

13. See Marie Fazio, *Who Are the Key Players in the Derek Chauvin Trial?*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/key-figures-derek-chauvin-trial.html>; Maslon Partner Steve Schleicher Continues Service as Special Assistant Attorney General on AG Ellison's Prosecution Team in the Trial of Derek Chauvin, MASLON (Apr. 9, 2021), <https://perma.cc/4ZDA-A5TT>; Press Release, Keith Ellison, Minnesota Att'y Gen., *Seasoned Attorneys Join AG Ellison's Team Pro Bono in George Floyd Case* (July, 13, 2020), https://www.ag.state.mn.us/Office/Communications/2020/07/13_FloydCaseAttorneys.asp.

14. See, e.g., *Law Firm Updates: COVID-19's Impact on the Business of Law*, THOMSON REUTERS INST. (July 20, 2020), <https://perma.cc/4ZNH-NNMA> (collecting law firms' announcements of layoffs, deferrals, and other measures meant to control costs because of COVID-19); Patrick Smith, *Legal Job Growth Sputters as COVID-19 Resurgence Dampens Outlook*, AM. LAW. (Aug. 7, 2020), <https://perma.cc/Z7P4-Y4NR> (describing layoffs, austerity measures, and a slow recovery).

15. See, e.g., David Lerman, *Coronavirus-Hammered State Budgets Worse Off Than Feared: Report*, ROLL CALL (D.C.) (Apr. 29, 2020, 5:00 AM), <https://rollcall.com/2020/04/29/coronavirus-hammered-state-budgets-worse-off-than-feared-report/> (reporting prediction from the Center on Budget and Policy Priorities that Coronavirus would cost state governments \$650 billion over the next three years).

16. See, e.g., Megan Crepeau, *County's Prosecutors, Others in Criminal Justice Deal with Budget Cuts After COVID-19 Hits Revenue*, CHI. TRIB. (July 16, 2020), <https://perma.cc/L5FZ-9JF7> (discussing Chicago prosecutors taking unpaid furlough to address budget cuts); Kevin Grasha, *Hamilton County Prosecutor Joe Deters Announces Pay Cuts, Furloughs in Wake of Budget Crisis*, CIN. ENQUIRER (Apr. 25, 2020), <https://www.cincinnati.com/story/news/2020/04/23/hamilton-county-prosecutor-joe-deters-announces-pay-cuts-furloughs/3014498001/> (reporting that the local prosecutor's office budget has been cut by ten percent and that this budget cut has led to salary decreases and furloughs); Jason Morton, *COVID-19, Flawed Funding Model Leads DA to Cut Jobs*, TUSCALOOSA NEWS (Ala.) (Apr. 30, 2020), <https://www.tuscaloosanews.com/story/news/coronavirus/2020/04/30/covid-19-flawed-funding-model-leads-da-to-cut-jobs/1265336007/> (explaining that Tuscaloosa County, Alabama had to lay off three prosecutors because of COVID-related budget shortfalls); Riley Newton, *Coronavirus: Clark County Departments Cut \$1.8M From Their Budgets*, SPRINGFIELD NEWS-SUN (Ohio) (May 6, 2020), <https://www.springfieldnewsun.com/news/local/coronavirus-clark-county-departments-cut-from-their-budgets/WqnAKqf1BIWlhXF4WhySLL/> (reporting that the local prosecutor's office agreed to an 8.5% cut).

17. See Brian Lyman, *As Covid-19 Closes Courts, Alabama Prosecutors Face Collapse in Revenues*, MONTGOMERY ADVERTISER (Apr. 30, 2020), <https://www.montgomeryadvertiser.com/story/news/2020/04/30/covid-19-closes-courts-alabama-prosecutors-face-collapse-revenues/3052219001/>.

workforce who will work without pay coupled with a governmental need to aggrandize budgets shrunken by reduced sales tax or court fee revenue.¹⁸ Such an arrangement seems good for everyone.¹⁹ But it isn't.

Prosecutors who hire volunteers explain plainly that they do so to bring more prosecutions than they otherwise could, given their limited budgets.²⁰ As great as increased efficiency may sound in many areas of law, it is troubling in criminal law to allow prosecutors to pursue more charges than those for which the legislature has appropriated money.²¹ Without the help of volunteers from a large local law firm, for instance, Minneapolis prosecutors could not afford to bring hundreds of misdemeanor cases each year for more than 40 years.²² The simple reason that budget discipline is such an important way to rein in American criminal law is that nothing else does: substantive criminal law sweeps incredibly broadly, and judicial review of prosecutors' charging decisions is essentially nonexistent. Aggrandizing prosecutors' budgets through free labor is thus troubling. Accordingly, increased efficiency in criminal law bears a pejorative name—net-widening.²³ And volunteer prosecution—much like other criminal law practices such as civil asset forfeiture, criminal fines and fees, and correctional free lunches—allows prosecutors to cast a wider net than their budgets would otherwise permit.

That many volunteer prosecutors bring misdemeanor and petty offense cases makes this wider net particularly effective at ensnaring people of color. Misdemeanor defendants are even more disproportionately people of color than are felony defendants.²⁴ The Los Angeles City Attorney's office, for instance, prosecutes only misdemeanors.²⁵ The City Attorney was transparent about the role of free labor: "If it wasn't for this [volunteer prosecutor] program, we wouldn't have

18. Unpaid internships become particularly appealing in economic downturns. See ROSS PERLIN, *INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY* 107 (2011) ("In the recent economic doldrums, internships have become a favored kind of purgatory, whether it's someone with a gap year before grad school cobbling together a résumé or the victim of a deferred offer or a hiring freeze treading water.").

19. See, e.g., Brian S. Carter, *Opinion, It's Not the Time to Abandon Minneapolis as Law Firm Did*, STAR TRIB. (Minneapolis) (June 9, 2020), <https://www.startribune.com/it-s-not-the-time-to-abandon-minneapolis-as-law-firm-did/571115432/> (describing a long-running pro bono prosecution program as an arrangement of mutual benefit).

20. See *infra* Part III.A.

21. See *infra* Part III.

22. Norfleet, *supra* note 11.

23. See, e.g., Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1059 (2015) ("Net-widening refers to reforms that make it easier to sweep individuals into the criminal process."); see also, e.g., Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 209–10 (2014) (explaining that efficiency in case-processing in criminal law yields the ability to prosecute more cases).

24. See Mayson & Stevenson, *supra* note 5, at 1017.

25. *City Attorney*, CITY OF L.A., <https://perma.cc/9YNC-X6HV> (last visited Feb. 7, 2020); see also Rick Orlov, *L.A. City Attorney Mike Feuer to Evaluate Volunteer Prosecutor Program*, L.A. DAILY NEWS (Sept. 13, 2013, 12:00 AM), <http://www.dailynews.com/government-and-politics/20130913/la-city-attorney-mike-feuer-to-evaluate-volunteer-prosecutor-program> (describing the volunteer prosecutor program and the misdemeanor cases that volunteer prosecutors bring).

a criminal division.”²⁶ Other large volunteer prosecutor programs are similarly limited to misdemeanors. In Houston, for instance, the volunteer prosecutor program is limited to offenses that cannot even result in jail time.²⁷ These Houston volunteer prosecutors quite explicitly exist to add prosecutors that the city government refused to fund.²⁸

This Article provides the first scholarly treatment of volunteer prosecutors. It seeks to better understand the nature of and motivations for volunteer prosecution by canvassing news stories and supplementing the news coverage with interviews with law school career services offices. Based on these sources this Article develops a typology of volunteer prosecution and unearths some of the places where volunteer prosecutors operate. It finds that volunteer prosecutors exist in at least thirty-one states and often in multiple counties in each state.²⁹ It divides volunteer prosecution into three forms: full-time entry-level, full-time experienced, and part-time volunteer prosecutors. In the first category, people work as volunteer prosecutors for their first job after law school. In the second category, people become prosecutors after practicing law—whether their previous practice was as a prosecutor or in a different sector of law. In the third category, many lawyers work part time pro bono as prosecutors in addition to their day job in another area of law practice.

Unpaid work is hardly unique to prosecution. To that end, this Article situates volunteer prosecution within the sociology of work literature regarding unpaid work and internships. It then analyzes the news coverage of volunteer prosecutors through the lens of that sociology literature to consider why someone would agree to work as a prosecutor without being paid.³⁰

The first and most obvious answer is the one impliedly offered in the Lee anecdote: for instrumental employment advantage. Some recent law school graduates will volunteer as prosecutors because they hope to get a paying job; the paid job may be with that particular prosecutor’s office, with another prosecutor’s office, or in a different type of legal employment entirely.³¹ And some law schools subsidize that work to help their alumni get started in the legal market, such as the sizable programs that Emory Law School developed with several local prosecutors’ offices.³² But even later

26. Alana Semuels, *Unpaid Internships Gain Popularity Among the Jobless*, L.A. TIMES (Mar. 14, 2011, 12:00 AM), <https://www.latimes.com/business/la-xpm-2011-mar-14-la-fi-old-interns-20110315-story.html>.

27. Samantha Ketterer, *Advocacy Groups Protest Harris County DA for Program Allowing Civil Lawyers to Prosecute Misdemeanors*, HOUS. CHRON. (Feb. 26, 2020, 8:36 PM), <https://perma.cc/9ERT-6747>.

28. *See id.* (District Attorney Kim Ogg “is unashamed to admit that she wants more attorneys to work in her office, arguing that they are drowning in massive caseloads that slow down the prosecution of cases.”).

29. *See infra* App.

30. *See infra* Part II.

31. Prosecutors are not the only lawyers who feel pressed to work for free to gain paid legal employment. But volunteer prosecutors are the focus of this Article because they raise additional concerns about government overreach that volunteer public defenders, for instance, do not.

32. Meredith Hobbs, *Cobb’s DA Office Seeks Apprentices*, DAILY REPORT (Fulton County, Ga.) (June 6, 2014, 12:00 AM), <https://plus.lexis.com/api/permalink/a37e63b9-547a-4262-a04c-be82fc3327f6/?context=1530671>.

in their careers people may volunteer as prosecutors (and sometimes as their full-time employment) for instrumental reasons such as building their credentials or signaling a commitment to public service as a path to seeking political or judicial office. Indeed, much of the news coverage of experienced volunteer prosecutors comes from stories recounting the background of an elected official or judge.

But as the sociology literature suggests in other unpaid positions, people do not volunteer as prosecutors solely for instrumental reasons. Rather, some volunteer as prosecutors because they want to help their communities promote public safety and perhaps clear a backlog of cases. They care about the cause. We could think of this as altruism, to mirror the language of some of the sociology literature.³³

Because of the nature of prosecutors' role and the American criminal legal system, however, labeling these motivations as altruism could obscure more troubling motivations.³⁴ We can see these potential motivations through a lens of psychological authoritarianism. Inflicting punishment—particularly on outgroup members, as most criminal defendants are—provides satisfaction by helping restore the order (or at least the perception of order) that authoritarians prize.³⁵

In addition to contributing concerns particular to prosecutors to the sociology of work literature, this Article contributes to the literature on prosecutor pay models.³⁶ The standard conception of a prosecutor is of a full-time public employee paid a salary from an appropriation to the prosecutor's office whose sole job is to represent the people in the jurisdiction's criminal courts. But scholars have identified deviations from the traditional conception of prosecutor hiring that are relevant here: (1) outsourcing the prosecution function to private lawyers, perhaps based on a bidding process and using various funding models and (2) part-time prosecutors who are paid by the government for their prosecution work but also work as private lawyers.³⁷ Volunteer prosecutors provide yet another model that scholars have not previously recognized.

33. *Infra* Part II.C.1.

34. *Infra* Part II.C.2; see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (describing the criminal legal system as a contemporary form of racial control).

35. So too does volunteer prosecution allow a private citizen to wield the power of the state, which is the ultimate goal of the "patriotic philanthropy" contributions that Maggie Lemos and Guy Uriel-Charles explicate. See generally Margaret H. Lemos & Guy-Uriel Charles, *Patriotic Philanthropy: Financing the State with Gifts to Government*, 106 CALIF. L. REV. 1129 (2018) (discussing the complexities of private contributions to government efforts and analyzing both their upsides and downsides). Financial contributions raise slightly different questions because of their potential for even greater inequality than labor contributions, but it is a related phenomenon nonetheless. *Id.* at 1183.

36. *Infra* Part I.

37. See generally, e.g., Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411 (2009); Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161, 182 (2017). Perhaps startlingly, at least as of 1999, about twenty-five percent of the state prosecutors in America were part-time prosecutors who are paid by the government for their prosecution work but also moonlight as attorneys in private practice. *Id.* at 419–21 & n.24. Other non-traditional models that this Article does not address in detail are: (1) salaried public prosecutors whose

Lastly, this Article draws on sociology literature to raise the concern that volunteer prosecution—like unpaid work in other economic sectors—favors those with wealth. Who, one might wonder, can afford to work for free after law school? One answer is individuals from wealthy families whose families subsidize such an opportunity for public service and professional advancement.³⁸ Neither the news nor the literature provides sufficient data to determine how prevalent this wealth-skewing concern is with volunteer prosecutors. So this Article does not analyze this topic in depth but rather explains normatively why skewing the prosecutor workforce based on wealth would raise more concerns than would the same practice in other industries.³⁹ Prosecutors wield massive discretion against largely poor defendants. Wealthier prosecutors may have a harder time identifying with largely poor defendants and may thus be overly punitive because they view the defendants as “other” rather than as people like themselves who made a mistake.

This Article does not seek to besmirch those who become volunteer prosecutors because that is the most promising route to paid prosecution work or because it allows them to do something useful and gain skills while seeking paid employment in other types of law practice. It is good that Rachael Rollins—a progressive woman of color who was once a volunteer prosecutor—became District Attorney in Boston and then U.S. Attorney.⁴⁰ Nor does it criticize law schools who provide stipends to their graduates to do unpaid public interest work—including prosecution—for a few weeks or months to help those graduates get a foothold in the legal market. Those practices have a lot to be said for them. This Article does, however, seek to temper enthusiasm for such programs by analyzing unrecognized costs.⁴¹

Thus, this Article argues that volunteer prosecutors pose normative concerns and are not the win-win that some have publicly claimed them to be.⁴² Nonetheless, volunteer prosecutors represent a complex phenomenon that offers

work is funded in part by private interests; (2) positions funded by outside grants; (3) private prosecution brought by victims; or (4) direct-file prosecutions by police.

38. This concern has received passing mention in news or other short forms, but it has not received detailed scholarly treatment. *See, e.g.*, W. David Ball, *Volunteer Prosecutors*, WASH. MONTHLY (May 10, 2016), <https://washingtonmonthly.com/2016/05/10/volunteer-prosecutors/>; Carrie F. Cordero, *Injustice in a Main Justice Program; DOJ's Unpaid Special Assistant U.S. Attorney Program is Demeaning for Young Law Graduates*, NAT'L L.J. (June 10, 2013), <https://www.law.com/nationallawjournal/almID/1202603160284/>.

39. Prosecutors working for free may also raise significant employment law issues. *See, e.g.*, David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 224–34 (2002) (analyzing employment law concerns with unpaid intern labor).

40. *See Meet District Attorney Rollins*, SUFFOLK CNTY. DIST. ATT'Y'S OFF., <https://perma.cc/7QJW-BXEP> (last visited Feb. 3, 2021) (explaining that before pursuing elected office, Rollins participated in an assistant district attorney rotation in Brockton District Court); *Meet the U.S. Attorney*, U.S. ATT'Y'S OFF. DIST. OF MASS., <https://www.justice.gov/usao-ma/meet-us-attorney> (last visited Apr. 21, 2022).

41. *Cf.* Charlotte Overgaard, *Rethinking Volunteering as a Form of Unpaid Work*, 48 NONPROFIT & VOLUNTARY SECTOR Q. 128, 129 (2019) (seeking to temper enthusiasm for volunteerism as a panacea for all ills by situating it as unpaid labor).

42. *See, e.g.*, Kara Scannell, *Justice Department Recruits Unpaid Prosecutors*, FIN. TIMES (Oct. 23, 2012), <https://www.ft.com/content/42ed2d82-1978-11e2-9b3e-00144feabdc0> (“‘Having another [special assistant] to handle cases just means we can do more cases. It’s a win-win,’ said Jerry Martin, the US attorney in Nashville.”).

important benefits to the volunteers—both instrumental and otherwise. The Article proceeds in four parts. Part I lays out a taxonomy of volunteer prosecutors and tells the stories of several people drawn from the news sources. It also situates volunteer prosecutors with other forms of prosecutor pay that vary from our standard conception of a full-time salaried prosecutor. Part II connects the sociology literature with the news coverage of volunteer prosecutors to consider why someone would prosecute crime for free. Part III then discusses volunteer prosecution as a net-widening phenomenon that allows the government to cast a broader net over its citizens—disproportionately its citizens of color—than it otherwise could. Lastly, Part IV briefly discusses potential wealth skewing and how wealth skewing would interact with prosecutors’ highly discretionary power over the bodies of poor people of color.

I. VOLUNTEER PROSECUTORS IN CONTEXT

Prosecutor pay takes many different forms.⁴³ The standard model is of full-time public employees who are paid a salary from a governmental appropriation.⁴⁴ That model is particularly prevalent in big cities.⁴⁵ Los Angeles County, for instance, is the largest prosecutor office in the country.⁴⁶ It employs approximately 1,000 salaried prosecutors.⁴⁷ The State’s Attorney’s Office in Cook County, Illinois (Chicago) employs more than 700 salaried prosecutors.⁴⁸ Offices with salaried prosecutors nonetheless vary widely as to size. Unlike Los Angeles or Chicago, nearly three-quarters of prosecutors’ offices serve 100,000 people or fewer.⁴⁹ Staffing in these smaller offices includes, on average, four prosecutors: one chief prosecutor and three assistants.⁵⁰

But other prosecutor offices do not adhere to that model. In some areas—particularly rural areas where crime levels and budgets cannot justify a full-time

43. Cf. Overgaard, *supra* note 41, at 137 (explaining that unpaid work should be analyzed in context with paid work in the same sector); John Wilson, Noemi Mantovan & Robert M. Sauer, *The Economic Benefits of Volunteering and Social Class*, 85 SOC. SCI. RSCH. 102368, at 85 (2020) (same).

44. Fairfax, *supra* note 37, at 416 (“[T]he traditional model of modern public prosecution features ‘[f]ull time government servants who are bureaucratically organized and paid according to a fixed salary schedule from appropriated funds [to] prosecute crimes.’”); see also Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 442 (2009) (“We take it for granted that most prosecutors receive flat, lockstep annual salaries tied to their years of seniority and experience, with civil-service protections.”).

45. See Fairfax, *supra* note 37, at 415–19; Romero, *supra* note 37, at 182.

46. *Office Overview*, L.A. CNTY. DIST. ATT’Y’S OFF., <https://da.lacounty.gov/about/office-overview> (last visited Jan. 31, 2022).

47. See *id.*

48. See *Organization Chart*, COOK CNTY. STATE’S ATT’Y, <https://www.cookcountystatesattorney.org/about/organization-chart> (last visited Jan. 31, 2022).

49. STEVEN W. PERRY & DUREN BANKS, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., PROSECUTORS IN STATE COURTS, 2007 - STATISTICAL TABLES, 2007 NATIONAL CENSUS OF STATE COURT PROSECUTORS 2 (Dec. 2011).

50. *Id.*

prosecutor—jurisdictions turn to private lawyers to prosecute crimes.⁵¹ The most recent Bureau of Justice Statistics data reports that fifteen percent of state prosecutors' offices had no full-time chief prosecutor.⁵² Full-time prosecutors in small jurisdictions are “a cost-prohibited luxury.”⁵³

This Section situates unpaid prosecutors in the context of other prosecutor pay models. Part A discusses the existing legal literature on prosecutor pay models: namely outsourcing criminal prosecution through contracting and part-time salaried public prosecutors.⁵⁴

Part B then contributes a previously unrecognized model to this prosecutor-pay literature—volunteer prosecutors. And it analyzes these volunteer prosecutors through the lens of the sociology of unpaid work. It uses the content analysis of news sources to develop a three-part taxonomy: (1) full-time entry-level prosecutors who have not practiced law before; (2) full-time prosecutors who have experience practicing law; and (3) part-time or pro bono prosecutors. It also relies on interviews with law school career offices to provide additional depth about these models.

51. Fairfax, *supra* note 37, at 417–18; *see also* PERRY & BANKS, *supra* note 49 (explaining and criticizing the turn to private prosecution in some American localities as raising concerns about sovereignty and running in tension with prosecutors' professional ethos); *cf. generally* Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515 (2016) (analyzing privatization of government litigation across different contexts including through outsourcing or private financial contributions to public actors).

52. PERRY & BANKS, *supra* note 49, at 2.

53. Fairfax, *supra* note 37, at 417–18.

54. This Article does not address the sources of funding for prosecutor pay, which include governmental appropriations—usually at the county but sometimes at the state level—occasionally payment by victims to subsidize some sorts of prosecutions, and funding from outside sources such as victims, and positions funded by a different level of government—likely the federal government. *See, e.g.,* *People v. Eubanks*, 927 P.2d 310, 312–14 (Cal. 1997) (invalidating payments by victim of trade secrets theft to subsidize a particular prosecution); Joseph E. Kennedy, *Private Financing of Criminal Prosecutions and the Differing Protections of Liberty and Equality in the Criminal Justice System*, 24 HASTINGS CONST. L.Q. 665–66 (1996) (analyzing victim-subsidized prosecution); Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. REV. 245, 282, 286 (2004) (explaining that six of the prosecutor positions in Vanderburgh County, Indiana were funded by federal grants, at least in the early 2000s); Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, 41 CRIME & JUST. 211, 224–27 (2012) (discussing grant-funded state and local prosecutor positions and noting that a small number of additional prosecutors can make a big difference); James D. Gingerich, *Out of the Morass: The Move to State Funding of the Arkansas Court System*, 17 U. ARK. LITTLE ROCK L.J. 249, 253 (1994) (explaining that the state took over funding a few prosecutor positions in one county); Rebecca A. Pinto, Note, *Public Interest and Private Financing of Criminal Prosecutions*, 77 WASH. U. L.Q. 1343 (1999) (discussing private funding of public prosecutions). Prosecutors obtaining campaign contributions is also beyond the scope of this Article. Nonetheless, it could, in many instances, trigger the same sorts of concerns as private contributions in the contexts described here if there is a connection to a particular case or type of litigation that the prosecutor understands. *See, e.g.,* Kennedy, *supra*, at 680 n.55 (“[C]ampaign contributions . . . can influence elected prosecutors.”). For more on campaign contributions to prosecutors, *see* Carissa Byrne Hessick, *The Prosecutors and Politics Project: Study of Campaign Contributions in Prosecutorial Elections* (UNC Working Paper, June 9, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3202875; Carissa Byrne Hessick, *Campaign Contributions in Prosecutorial Elections, 2014-2017* (2019), <https://dataverse.unc.edu/dataset.xhtml?persistentId=doi:10.15139/S3/D2GBVQ>.

A. *Non-Traditional Prosecutor Pay Models*

Existing scholarship focuses on two primary ways that prosecutor labor diverges from the traditional model of full-time, salaried, public officials: (1) contract prosecutors and (2) part-time salaried prosecutors.

1. Contract Prosecutors

Instead of tasking a public employee to prosecute municipal code violations, in 2006, the City of Davis, California, retained the prestigious Sacramento Law Firm of McDonough, Holland & Allen, PC to do so at a rate of \$180 per hour.⁵⁵ This is one example of a broader phenomenon of jurisdictions outsourcing some component of their criminal prosecutions to private lawyers or law firms.⁵⁶

In some jurisdictions, outsourcing begins with cities or counties issuing requests for proposals (“RFPs”) and then evaluating private attorneys’ competing bids before deciding to whom to award the contract.⁵⁷ These RFPs typically require a bidding attorney to specify their price term—whether hourly or on a flat-fee basis. So too do they require the attorney to explain things like how they will make themselves “readily accessible to City personnel, especially police officers,” and the attorney’s prior experience.⁵⁸ Prosecution contracts are then often awarded to the lowest bidder—the person who offers to charge the least amount of money—regardless of other aspects of the bid.⁵⁹ And in some ways that should not be surprising: Lowest price is a particularly easy way to compare competing bids; judging experience or the quality of competing references is more difficult.⁶⁰ And because saving money compared to full-time public employees is the primary impetus for outsourcing prosecution,⁶¹ so too is selection based on low cost unsurprising.⁶²

These contract prosecutors may serve for a term of years subject to either side having a right to terminate with notice or may simply serve as at-will employees that the city council can terminate at its sole discretion.⁶³

Prosecution service contracts take on various billing structures. Some provide a private lawyer with a flat fee for prosecuting all of the cases in the jurisdiction over a set period of time.⁶⁴ For instance, the town of Albany, Oregon paid a private firm

55. Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 281 (2010).

56. *See id.*; Fairfax, *supra* note 37, at 413; Romero, *supra* note 37, at 185.

57. Romero, *supra* note 37, at 188.

58. *Id.* at 190 (quoting an RFP from Lakeville, Minnesota).

59. *Id.* at 188.

60. *See id.*

61. Fairfax, *supra* note 37, at 417–18.

62. Fairfax, *supra* note 55, at 282 (explaining, based on an interview with a city manager, that “the desire to reduce costs and enhance efficiency . . . is a significant consideration” in the contracting process).

63. Romero, *supra* note 37, at 189–95.

64. Fairfax, *supra* note 37, at 417.

a flat fee of more than \$200,000 annually to handle all prosecutions in the area.⁶⁵ Other contracts pay the attorney a flat fee per case handled over the contracted period.⁶⁶ Sequim, Washington, for instance, pays private attorneys \$300 per criminal appeal.⁶⁷ And still others provide an hourly fee for the contract prosecutor.⁶⁸ Davis, California, for instance, employed that model.⁶⁹

2. Part-Time Prosecutors

Jack Gibbons was the District Attorney in Cooperstown, New York.⁷⁰ He spent most of his time doing that job but also maintained a private law practice just across the street from the Baseball Hall of Fame.⁷¹ Gibbons was then one of 10 part-time district attorneys in New York State.

Rather than outsourcing prosecution to private lawyers, some smaller jurisdictions instead hire or elect a public prosecutor like Gibbons who is paid a government salary but spends some of his work time pursuing a private practice.⁷² Because it would be cost-prohibitive or simply an undesired allocation of resources to pay someone as a full-time prosecutor, the jurisdiction instead pays that person to be a part-time public prosecutor.⁷³ In some respects, the part-time prosecutor resembles the contract prosecutor. Both balance public prosecution with their private practices.⁷⁴ But the part-time prosecutor is a government employee rather than an independent contractor; most are paid a fixed salary regardless of their prosecutor caseloads or hours spent. A few, however, are paid hourly.⁷⁵

B. Typology of Volunteer Prosecutors

This Article explicates another important model: volunteer prosecutors. At least some prosecutors' offices hire volunteer prosecutors. This section creates a typology of the forms of volunteer prosecution and unpacks the current evidence regarding the prevalence of each form. Some are new law school graduates who work as full-time prosecutors without pay. Some volunteer prosecutors are experienced lawyers, often working as prosecutors after retiring from paid law practice. Most common of all is part-time volunteer prosecution—or pro bono prosecution. Part-

65. Fairfax, *supra* note 55, at 281.

66. Fairfax, *supra* note 37, at 417.

67. Fairfax, *supra* note 55, at 281.

68. Fairfax, *supra* note 37, at 417.

69. Fairfax, *supra* note 55, at 281.

70. Jan Hoffman, *Otsego Prosecutor Tries to Avoid Trial Conflicts*, N.Y. TIMES, Aug. 27, 1996.

71. *Id.*

72. See Fairfax, *supra* note 37, at 419–21.

73. *Id.*

74. *Id.* at 426–27.

75. See, e.g., *Assistant District Attorney – (.75 FTE) Iowa County – Re-Announcement*, WISC.JOBS (archived by author) (listing an hourly wage rate for a part-time prosecutor position); *Assistant District Attorney (50% position) - Juneau County*, WISC.JOBS (archived by author) (listing an hourly wage rate for a part-time prosecutor position in another county).

time volunteer prosecution takes numerous different forms from ad hoc relationships to systematized programs that actively enlist the help of the private bar.

Prosecutors who speak publicly about unpaid prosecutors say that they hire volunteer prosecutors to prosecute more criminals than their budgets would otherwise allow.⁷⁶ Many prosecutors are quite explicit about this motivation. The Los Angeles City Attorney explained, “If it wasn’t for this [volunteer prosecutor] program, we wouldn’t have a criminal division.”⁷⁷ The United States Attorney in Nashville said that unpaid SAUSAs were valuable precisely because they “can do more cases” and called such an outcome “a win-win.”⁷⁸ King County, Washington (Seattle), for example, cleared a backlog of 512 felony cases by enlisting the help of pro bono counsel.⁷⁹ King County’s program developed to address a seventy percent jump in felony case filings, which prosecutors and judges attribute almost exclusively to drug cases.⁸⁰ The number of paid prosecutor positions rose by thirty-three percent—less than half the increase in filings.⁸¹ In Delaware, full-time volunteer lawyers handled 6,000 criminal cases per year without the state having to pay the usual \$55,000 plus benefits (in 2002 dollars).⁸² After a pro bono collaboration with a local law firm was cancelled, a Minneapolis Assistant City Attorney explained that the program had helped the city shoulder “its crushing load of misdemeanor prosecutions.”⁸³ Free labor is particularly appealing during a hiring freeze or when faced with a tight budget.

To understand the current state of volunteer prosecutors in enough detail to build out a taxonomy of its different forms, this Article relies primarily on existing news sources.⁸⁴ More specifically, a research assistant and I began with a somewhat narrow search of news on Lexis.⁸⁵ We then divided our searches between pre-2010

76. Volunteer prosecutors may also raise significant concerns for wage and hour laws as do many unpaid interns, but that topic is beyond the scope of this Article. See PERLIN, *supra* note 18, at 61–82 (articulating the wage and hour law concerns with unpaid internships). See generally Jessica L. Curiale, Note, *America’s New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531 (2010) (articulating a need for clearer standards about unpaid internships and wage and hour laws); Derek Thompson, *Work Is Work: Why Free Internships Are Immoral*, ATLANTIC, May 14, 2012 (explaining the basic test for when an unpaid internship complies with wage and hour laws).

77. Semuels, *supra* note 26.

78. Scannell, *supra* note 42; cf. Rebecca F. Taylor, *Rethinking Voluntary Work*, 53 SOCIO. REV. 117, 121 (2005) (criticizing that “the policy literature [on volunteering] rests on the assumption that volunteering is by definition a positive activity, ‘beneficial’ for the volunteer, those they help, and society at large”); PERLIN, *supra* note 18, at 23–24 (explaining that unpaid internships are often mistakenly described as a “win-win”).

79. See, e.g., Tim Klass, *Private Lawyers Work as Volunteer Prosecutors to Clear Drug Cases*, ASSOCIATED PRESS, Oct. 29, 1990.

80. Robb London, *Volunteer Prosecutors End Backlog of Drug Cases*, N.Y. TIMES, Aug. 23, 1990.

81. *Id.*

82. See, e.g., Mike Billington, *Volunteer Attorneys Pitch In*, NEWS J. (Wilmington, Del.), June 26, 2002.

83. Carter, *supra* note 19.

84. Because prosecution occurs (typically) at the county level, there will certainly be variation from one jurisdiction to the next. See, e.g., Wright, *supra* note 54, at 236 (describing the persistence of local variation in prosecutors’ offices despite efforts to make practices more uniform statewide). This Article discusses some of those differences but does not seek to capture the practices of every county across the country.

85. The narrow search string was: prosecutor! /25 ((unpaid OR volunteer) AND (hire OR hiring OR job)).

and from 2010 on. In the pre-2010 set, we ran another narrow search.⁸⁶ In the articles since the beginning of 2010, we broadened our search to look for other states in which we did not already have several hits.⁸⁷ We then coded each of the sources by State, Locality, and whether they described state or federal prosecutors' offices. As best we could, we sought to code whether each article discussed part-time or full-time volunteer prosecution. So as not to overrepresent the existence of volunteer prosecutors, we resolved doubts by coding as part time rather than full time. Within the full-time sources, we sought to identify whether the volunteer prosecutors were entry-level or experienced lawyers. Many news sources did not provide enough information for definitive categorization as to experience. We excluded any sources that discussed law student interns and others that were not actually relevant because they did not discuss volunteer prosecutors.⁸⁸ This Article supplements those news searches with a few interviews with law school career offices.⁸⁹

News searches reveal that programs involving full-time volunteer prosecutors—whether entry-level or experienced—have existed in at least twenty-two states and often in numerous counties within those states, which is likely a substantial undercount.⁹⁰ Those searches find part-time volunteer prosecutors in at least twenty-five states and often in numerous counties within those states.⁹¹ So too have federal prosecutors' offices used full-time volunteer prosecutors in at least thirteen states plus the District of Columbia.⁹² The interviews with law school career services suggest that these counts are quite underinclusive.⁹³

86. The search was: "volunteer prosecutor."

87. The broader search string was: (prosecutor! or "prosecuting attorney" or "district attorney" or "state's attorney" or "state attorney" or solicitor or "county attorney" or "commonwealth's attorney" or "attorney general") /5 (volunteer or "pro bono" or unpaid). We excluded California because we already had numerous articles from several different counties around the state. We then excluded from "Location by Publication" "AU," "International," and "NZ." We reviewed all remaining results from January 1, 2010 to May 31, 2020. Because of small changes to the Lexis platform, when we updated the search to include June 1 to December 31, 2020, we excluded only "International" from the "Location by Publication" filter. Some of the newspaper article citations in this Article have been changed from the versions found on Lexis news to news sources with the same content that are easier to locate.

88. Law student internships and law school prosecution clinics are other forms of unpaid work for prosecutors' offices that may raise some of the same sorts of issues discussed *infra*, but those are beyond the scope of this Article.

89. I conducted three interviews with individuals from three different law schools. Those interviews were not transcribed, but I took contemporaneous notes.

90. *See infra* App. It is often difficult to discern the nature of the time commitment based on these news sources, so I resolved ambiguity in favor of labeling ambiguous instances as part time. Similarly, many news sources do not have sufficient information to determine whether the volunteer prosecutors are entry level or experienced, so I have combined those totals here.

91. *See infra* App.

92. *See infra* App.

93. *Compare* Interview with Megan Walsh, Assistant Dean for Career Servs., Univ. Ala. Sch. L. (June 19, 2020) (mentioning alumni who have worked as volunteer prosecutors in Alabama), *and* Interview with Anthony E. Waller, Dir. Pub. Sector Career Advising & Bar Exam Success Programming, Univ. Ga. Sch. L. (June 19, 2020) (discussing volunteer prosecutors in several different geographic areas, including St. Louis and Chicago),

1. Entry-Level Full-Time Volunteer Prosecutors

The Introduction discussed the story of Justin Lee who worked after law school as an unpaid federal prosecutor in the Eastern District of California.⁹⁴ He ultimately obtained a paid position in the office. Most of the other approximately 20 unpaid federal prosecutors who worked in that office around the same time did not.⁹⁵ His story is hardly unique to the Eastern District of California nor is it confined to federal prosecutors.

Some of the news coverage about volunteer prosecutors focused on hiring volunteer *federal* prosecutors in the wake of the Great Recession.⁹⁶ A 2011 article about hiring in the District of New Jersey and the Eastern District of Pennsylvania during a hiring freeze describes this practice as “becoming a popular maneuver across the country.”⁹⁷ Between April 2011 and October 2012, 117 people had been hired as unpaid SAUSAs.⁹⁸ A 2013 article reported that there were then 96 unpaid SAUSAs across the country.⁹⁹ Several of the articles recount stories of those who worked as unpaid federal prosecutors, and those volunteer prosecutors describe their experience quite positively.¹⁰⁰ Some unpaid SAUSA positions specifically preclude the possibility of obtaining paid employment in that office at the conclusion of the unpaid term.¹⁰¹ Many of the unpaid SAUSA positions require a year’s commitment and prevent the prosecutor from obtaining income from any other legal work to avoid conflicts of interest.¹⁰² Others have shorter terms.¹⁰³

State prosecutors’ offices hire unpaid prosecutors too. DeKalb County, Georgia benefited from the increased supply of free labor (or free to them, at least) caused by a fairly prevalent practice in 2009 of big law firms paying many of their

and Fellowship Program, COOK CNTY. STATE’S ATT’Y, <https://www.cookcountystatesattorney.org/careers/fellowship-program-0> (last visited Feb. 20, 2022) (describing Cook County’s prosecutorial fellowship program), with App. (not listing Alabama, St. Louis, or Chicago as areas with news coverage of any volunteer prosecutors).

94. *Wanted*, *supra* note 6.

95. *Id.*

96. *See id.*; Barbara Boyer, *New Jersey’s U.S. Attorney’s Office Looks for Volunteer Help*, PHILA. INQUIRER, July 26, 2011; Joe Davidson, ‘Special’ Assistant U.S. Attorneys Work for Free, WASH. POST (July 18, 2013), <https://perma.cc/R7N3-C25M>; Scannell, *supra* note 42; *see also* David Lat, *Would You Work as a Federal Prosecutor—for Free?*, ABOVE THE LAW (May 18, 2011), <https://abovethelaw.com/2011/05/would-you-work-as-a-federal-prosecutor-for-free> (stating that in May 2011 the U.S. Department of Justice had postings for volunteer prosecutors in at least five different districts).

97. Boyer, *supra* note 96.

98. Scannell, *supra* note 42. The term “SAUSA” also refers to paid prosecutors who are seconded from one part of the Justice Department to another. This Article accordingly discusses only the unpaid SAUSAs.

99. Davidson, *supra* note 96. Although this is almost certainly a substantial undercount, a February 2020 search on the PSJD public interest database for attorney positions in prosecutor’s offices that are unpaid showed three positions currently open in three different U.S. Attorney’s Offices.

100. *Id.*; *Wanted*, *supra* note 6.

101. Cordero, *supra* note 38.

102. Boyer, *supra* note 96.

103. Lat, *supra* note 96.

associates half-salaries to defer for a year and practice in a public-interest setting.¹⁰⁴ But even after the DeKalb County office stopped receiving free labor from those being paid by law firms, it continued its unpaid apprenticeship program; it hired many of those apprentices into paid positions.¹⁰⁵ Nearby Cobb County, Georgia started a similar program in its District Attorney's Office of unpaid apprenticeships in 2014 seeking to recruit ten to fourteen apprentices for one-year positions.¹⁰⁶ It created that program in conjunction with Emory Law School's Center for Advocacy and Dispute Resolution.¹⁰⁷ Although the program in Cobb County is open to graduates from any law school, some law schools do not offer stipends to their graduates who take unpaid law jobs in the public sector.¹⁰⁸ Marin County, California—on the north side of the Golden Gate Bridge—began searching for unpaid prosecutors in 2010 to address local government budget problems.¹⁰⁹ Those jobs would otherwise have paid up to \$85,100;¹¹⁰ the posting clarified that the unpaid position would not lead to paid work in that office and that the employees could not practice law in any other context during their volunteer term.¹¹¹ New Jersey's Attorney General's Office had 149 Volunteer Associates in Public Service between September 2009 and July 2011—thirty-one of whom later obtained paid employment in that office by July 2011.¹¹² A post on the popular blog *Above the Law* explains that many other prosecutor offices around the country have such practices, or at least did in 2011.¹¹³

While some jurisdictions have formal unpaid apprenticeships or post-bar fellowship programs, other entry-level volunteer prosecution comes in a more ad hoc fashion. Formal fellowship programs exist in some larger jurisdictions including Chicago, Atlanta (and some nearby counties), and St. Louis County.¹¹⁴ But other volunteer prosecutors are recent law school graduates who want to work in a particular county as a prosecutor (perhaps their home, rural county), but the office has

104. Hobbs, *supra* note 32

105. *Id.*

106. *Id.*

107. *Id.*

108. A 2014 article that identified Emory as the only law school in Georgia with such a stipend program is not quite accurate. *Compare id.* (reporting that Emory was the only law school in Georgia that has such a stipend program), with Interview with Anthony E. Waller, *supra* note 93 (explaining University of Georgia's bridge-to-practice stipend program). But perhaps Emory and the University of Georgia are the only schools in the state with such programs.

109. Kevin Johnson, *Prosecutors Foregoing Pay for Experience*, USA TODAY (Aug. 2, 2010), https://usatoday30.usatoday.com/news/nation/2010-08-02-unpaidprosecutors02_ST_N.htm#.

110. *Id.*

111. Elie Mystal, *District Attorney Looking for Lawyers—Free Lawyers, of Course*, ABOVE THE LAW (June 25, 2010), <https://abovethelaw.com/2010/06/district-attorney-looking-for-lawyers-free-lawyers-of-course>.

112. Boyer, *supra* note 96.

113. Lat, *supra* note 96.

114. Interview with Anthony E. Waller, *supra* note 93; see also *Fellowship Program*, *supra* note 93 (describing Cook County's prosecutorial fellowship program).

no available funding or authority to hire a new prosecutor.¹¹⁵ So, sometimes at the encouraging of the district attorney, the graduate may volunteer for a while to be available when an opening arises, such as through retirement.

Some law schools have programs that fund their graduates for a limited time to undertake unpaid public legal work in government or nonprofits after passing the bar exam, including criminal prosecution. The time periods on these programs, and even their existence, varies from school to school. Emory's "bridge-the-gap" stipends pay up to \$1,500 per month for a year.¹¹⁶ The nearby University of Georgia provides \$4,000 for 6-8 weeks of work.¹¹⁷ Wake Forest's Launching Legal Practice program is limited to ten weeks and pays \$3000.¹¹⁸ The University of Wisconsin's program is limited to eight weeks with a \$1500 stipend for the totality of the program.¹¹⁹ By contrast, the University of Alabama, for instance, has no such program.¹²⁰ These programs are well intentioned and serve an important aim: to help students secure paid legal employment.¹²¹ But it is important to recognize the role that academic institutions play in facilitating this unpaid legal work, as they do with the proliferation of unpaid internships in other sectors.¹²²

2. Experienced Full-Time Volunteer Prosecutors

Elizabeth Fass retired from her practice representing New York City as a supervisor in family court matters in 1978.¹²³ Nearly two decades later, she worked as a volunteer prosecutor with the Brooklyn District Attorney's Office alongside a former New York Assemblyman and other retired or partly retired lawyers from all

115. Interview with Anthony E. Waller, *supra* note 93; Interview with Alvida Barrow, Assoc. Dir., Off. Career & Prof. Dev., Wake Forest Univ. Sch. L., in Winston-Salem, N.C. (June 3, 2019); *see also* Interview with Megan Walsh, *supra* note 93 (explaining that particularly in prosecutors' offices that cannot hire students before graduation, unpaid work after graduation provides an important route for those seeking paid work).

116. Hobbs, *supra* note 32.

117. Interview with Anthony E. Waller, *supra* note 93.

118. Interview with Alvida Barrow, *supra* note 115.

119. Jane Pribek, *Legal Cents: Wisconsin's Recent Graduates Look Out-of-the-Box*, WIS. L.J. (May 13, 2011, 9:25 AM), <https://wislawjournal.com/2011/05/13/recent-graduates-look-out-of-the-box/>.

120. Interview with Megan Walsh, *supra* note 93.

121. Cynics could quite plausibly argue that these programs arose during the Great Recession and were primarily meant to increase a law school's job statistics for purposes of U.S. News rankings. *See* Hobbs, *supra* note 32 (discussing a volunteer prosecutor program that one district attorney's office created in conjunction with Emory Law School and Emory's correspondingly higher jobs statistics than other law schools in the state). But the ABA adapted its reporting requirements so that jobs like these that are funded by the law school and jobs meant to last less than one year are reported separately from longer-term J.D. required or J.D. advantage jobs that are not funded by law schools. *See* Interview with Alvida Barrow, *supra* note 115. The persistence of these programs now that they no longer confer the same benefit to U.S. News rankings is not susceptible to that same critique.

122. PERLIN, *supra* note 18, at 83–98 (describing the role of academic institutions in the proliferation of internships).

123. Joseph P. Fried, *Prosecutors Who Still Haven't Rested*, N.Y. TIMES (May 25, 1997), <https://www.nytimes.com/1997/05/25/nyregion/prosecutors-who-still-haven-t-rested.html>.

sorts of law practice backgrounds.¹²⁴ Fass and others in her cohort worked a day or two each week in a program helping to investigate and prosecute crimes against the elderly; the program was designed to bring in lawyers who “can relate and be sensitive to someone of similar age”—the elderly victims.¹²⁵

Fass and her cohort in the Brooklyn District Attorney’s office demonstrate another dimension of volunteer prosecutors—a group comprised of experienced lawyers. Some experienced lawyers may become volunteer prosecutors as a retirement job, like Fass.¹²⁶ Delaware recruited retired and inactive attorneys to work as volunteer prosecutors, including a former Vice President of Conectiv.¹²⁷ Some paid prosecutors retire but continue to work with their former offices as volunteers.¹²⁸ In one particularly troubling instance, a former District Attorney worked after leaving office as a volunteer so that he could defend murder convictions that his office secured against accusations of prosecutorial misconduct.¹²⁹ Sometimes the time frames and commitments are flexible,¹³⁰ but other positions require at least a one-year commitment.¹³¹

Federal prosecutors’ offices that hire for unpaid positions sometimes require that the applicants have at least a year of post-graduation law practice experience.¹³²

124. *Id.*

125. *Id.* (quoting then-District Attorney Charles Hynes).

126. *See, e.g., id.*; *Volunteer Prosecutors Lending a Hand to DA*, SAN MATEO DAILY J. (Mar. 3, 2014), <https://perma.cc/36L3-J65Z> (describing a program in San Mateo, California with three volunteer prosecutors, one of whom is a retired prosecutor and the other two of whom are newly admitted lawyers); Billington, *supra* note 82 (describing a retired high-ranking executive becoming a volunteer prosecutor in Delaware); *District Attorney Interns and Volunteers Recognized*, TARGETED NEWS SERV., Aug. 10, 2012 (publicizing volunteer prosecutor opportunity for various groups including “retirees”); *Paid Notice: Deaths Bass, Franklin L.*, N.Y. TIMES, July 25, 2012 (remembering the former head of a real estate department at a large international law firm who in retirement served as a pro bono prosecutor in Brooklyn). Finding retirees as one source of unpaid labor tracks the sociology literature about unpaid work in other sectors. *See* Rebecca Taylor, *Volunteering and Unpaid Work*, in THE SAGE HANDBOOK OF THE SOCIOLOGY OF WORK AND EMPLOYMENT 119, 120 (2015); *see generally* Eddy Hogg, *The Demographic Opportunity: Volunteering in Older Age*, in VOLUNTEERING BETWEEN FREEDOM AND PROFESSIONALISATION (G. von Schnurbein, D. Widerkehr & H. Amman eds., 2013).

127. Billington, *supra* note 82.

128. *See, e.g.*, Jane Musgrave, *Prosecutor Fights Release of Epstein Grand Jury Details*, PALM BEACH POST, Dec. 8, 2019; Bart Pfankuch, *Hunter Residency Case Creates ‘Nightmare’ for Retired Combat Veteran*, FARM FORUM (Aberdeen, S.D.), Feb. 22, 2020; Tom Ragan, *New Drug Hotline in Carbon County*, STANDARD-SPEAKER (Hazelton, Pa.), Sept. 8, 2014; Todd Wellington, *Father Guilty of Toddler Assault; St. Johnsbury Jeffrey Gates Says He Was Just Spanking His Badly Bruised 3- Year-Old; A Jury Took 22 Minutes To Rule It Was Abuse*, CALEDONIAN-RECORD (Vt.), Oct. 2, 2014.

129. Bobby Dunn, *Another Day in Court for Retired DA; Capeless at SJC to Fight Appeal of Triple Murder Conviction*, BERKSHIRE EAGLE (Pittsfield, Mass.), Jan. 11, 2020.

130. *See, e.g.*, *District Attorney Interns and Volunteers Recognized*, *supra* note 126 (specifying in a news release from Yolo County, California that volunteers can work anywhere from ten hours per week to full time with a minimum commitment of three months); Billington, *supra* note 82 (discussing flexibility of time commitment).

131. *See, e.g.*, *Special Assistant United States Attorney*, W.D. OF PA. U.S. ATT’Y’S OFF., <https://www.justice.gov/legal-careers/job/special-assistant-united-states-attorney-18> (last visited Feb. 20, 2022) (requiring at least a one-year commitment).

132. *Uncompensated Special Assistant United States Attorney*, N. DIST. OF OKLA. U.S. ATT’Y’S OFF. (TULSA), <https://www.justice.gov/legal-careers/job/uncompensated-special-assistant-united-states-attorney-46>

3. Part-Time Volunteer Prosecutors

After two years in private practice, Jesse Franklin began volunteering part-time in the District Attorney's Office in Seattle where he had worked for pay previously.¹³³ In Seattle, forty-two lawyers in private practice worked with the district attorney's office on a pro bono, part-time basis to help clear up a backlog of 512 felony cases that the paid prosecutors alone had been unable to address.¹³⁴ Some of those lawyers were former prosecutors, while thirty were relatively new to the practice of law.¹³⁵ Seattle is hardly alone. San Diego has long enlisted members of the private bar as pro bono prosecutors, and similar programs exist in many places.¹³⁶ In Houston, Texas, the District Attorney built a program that enlists private lawyers to prosecute low-level misdemeanors.¹³⁷ One interesting example finds a lead prosecutor creating a community prosecution program that enlists volunteers from each district in South Bend, Indiana.¹³⁸ Whether ad hoc or through systematic programs, part-time or pro bono prosecution is quite common.

II. VOLUNTEER PROSECUTORS' MOTIVATIONS

Why would someone work as a prosecutor without pay, perhaps for years at a time in any of these various models? The available evidence from news searches and interviews squares with the insights from the sociology literature: Some motivations are instrumental—gaining an entry-point to paid employment, advancing into a different or more prestigious position, or keeping busy in retirement. Others fit what the sociology literature refers to as altruistic—contributing to a cause that the unpaid workers view as important. As we will see, however, this “altruism” can mean something deeply troubling when mapped onto criminal prosecution in America.

A. *Sociology Literature*

Over the past fifteen years, sociologists have incorporated unpaid work into the sociology of work literature.¹³⁹ The more recent literature thus encompasses

(requiring at least one year of experience); *Special Assistant U.S. Attorney (Uncompensated)*, N. DIST. OF CAL. U.S. ATT'Y'S OFF., <https://www.justice.gov/legal-careers/job/special-assistant-us-attorney-uncompensated-8> (same).

133. Klass, *supra* note 79.

134. *Id.*

135. *Id.*

136. *Id.* (discussing San Diego, the Delaware Attorney General's Office, and another program in Spokane, Washington).

137. Ketterer, *supra* note 27.

138. *Residents Volunteer for Prosecutor "Teams,"* S. BEND TRIB. (Ind.), Mar. 28, 1999. For more on community prosecution, see generally, e.g., Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321 (2002); Ronald F. Wright, *Community Prosecution, Comparative Prosecution*, 47 WAKE FOREST L. REV. 361 (2012).

139. Rebecca F. Taylor, *Extending Conceptual Boundaries: Work, Voluntary Work and Employment*, 18 WORK, EMP. & SOC'Y 29, 29–30 (2004). That broader definition to encompass unpaid work began in large part because of a challenge from second wave feminists to label unpaid domestic labor as work. *Id.*

domestic labor, volunteering outside the home, and other unpaid positions that more closely resemble traditional employment but do not provide a wage such as unpaid internships.¹⁴⁰

Some of this scholarship addresses the motivations for people to engage in unpaid work.¹⁴¹ Early scholarship on volunteering drew a binary of altruism versus instrumental volunteering. Although both altruism and instrumental objectives importantly motivate unpaid work,¹⁴² scholars have rightly criticized treating altruism and opportunism as a binary.¹⁴³ Some of the schemas sensibly recognize “multiple motivations simultaneously, change over time and allow for both individualistic and collective agendas to co-exist in various degrees.”¹⁴⁴

Donna Baines delineates “coerced” from “compelled” participation in unpaid work.¹⁴⁵ She defines coerced volunteering as “unwaged work that is performed by workers who fear that their employment or education will be jeopardized should they refuse to participate or fail to do a good job.”¹⁴⁶ By contrast, compelled unpaid work is driven by moral standards or pressure—perhaps a threat to one’s sense of self or identity—but not by instrumental aims.¹⁴⁷

Altruistic reasons for participating in unpaid work are typically described by interviewees using language like “kindness” or “generosity” and with an eye toward “community” or the “common good.”¹⁴⁸ Some people work without pay

140. See, e.g., John Wilson & Marc Musick, *Who Cares? Toward an Integrated Theory of Volunteer Work*, 62 AM. SOCIO. REV. 694, 695 (1997) (explaining that volunteering is not merely an act of leisure).

141. This Article focuses on the literature regarding unpaid market work as the closer comparison for volunteer prosecution rather than unpaid nonmarket work such as domestic housework or familial caretaking. Cf. Noah D Zatz, *The Impossibility of Work Law*, in THE IDEA OF LABOUR LAW 234–36 (Guy Davidov & Brian Langille eds., 2011) (describing the wide breadth of economic activity, including both market and nonmarket work).

142. See, e.g., Ash Amin, *Extraordinarily Ordinary: Working in the Social Economy*, 5 SOC. ENTER. J. 30, 44–45 (2009) (describing two types of volunteers in the social economy in Bristol, England: [1] those who seek to contribute to a good cause and retain a sense of self-worth and [2] those who seek to improve their job prospects).

143. See Itamar Y. Shachar, Johan van Essen & Lesley Hustinx, *Opening Up the “Black Box” of “Volunteering”: On Hybridization and Purification in Volunteering Research and Promotion*, 41 ADMIN. THEORY & PRAXIS 245, 252–53 (2019) (pointing to the “fragility of the dichotomy between ‘altruistic’ and ‘instrumental’ motivations to volunteer”); Paula McDonald & Deanna Grant-Smith, *Unpaid Work Experience and Internships: A Growing and Contested Feature of the Future of Work*, in THE FUTURE OF WORK AND EMPLOYMENT 35–36 (2020) (discussing the inadequacy of distinctions such as whether the employer or employee is the primary beneficiary of the work); see also Mihaela Kelemen, Anita Mangan & Susan Moffat, *More Than a ‘Little Act of Kindness’? Towards a Typology of Volunteering as Unpaid Work*, 51 SOCIO. 1239, 1244 (2017) (“[W]hile some people may be initially forced to volunteer, they soon realise that the experience can be instrumental in getting paid employment or indeed, they may start to enjoy giving something back to the community.”).

144. Kelemen, Mangan & Moffat, *supra* note 143, at 1243.

145. See Donna Baines, Ian Cunningham & John Shields, *Filling the Gaps: Unpaid (and Precarious) Work in the Nonprofit Social Services*, 37 CRITICAL SOC. POL’Y 625, 638 (2017).

146. Donna Baines, *Caring for Nothing: Work Organization and Unwaged Labour in Social Services*, 18 WORK, EMP. & SOC’Y 267, 286 (2004).

147. See Baines, Cunningham & Shields, *supra* note 145, at 286.

148. See Kelemen, Mangan & Moffat, *supra* note 143, at 1244.

because they want to do a particular thing and are not able to gain paid employment doing it; perhaps they lack the formal education necessary.¹⁴⁹ Others work without pay after retiring from paid employment,¹⁵⁰ just as we saw with some instances of volunteer prosecution.¹⁵¹ “Bob,” for instance, is a retired nurse who volunteers with a charity to provide hospital after care.¹⁵² “T” is a retired engineer who performs a variety of volunteer duties at Conservation Trust to help protect the environment because the cause is important to him.¹⁵³

An important instrumental motivation for people to participate in unpaid work is to help them get onto the career ladder.¹⁵⁴ In some industries—such as creative work—that foothold is viewed as an expected step necessary to gain entrance to paid work by allowing participants to build their profile and reputation.¹⁵⁵ In the music industry such internships are frequently thought to be required but nonetheless do not often lead to paid employment in the industry.¹⁵⁶ Similarly, in human rights and refugee work, graduates often must work without pay for extended periods of time and often for several different charities to build the experience to gain paid work.¹⁵⁷ A similar dynamic appears in the social economy where “L” volunteers at Conservation Trust having finished her master’s degree so that she can build her skills in the conservation field to earn a living working to protect the environment.¹⁵⁸

Instrumental reasons include not only seeking a route into paid employment but also a desire to learn new skills (that might, ultimately, be aimed toward securing employment, as with “L”).¹⁵⁹

Unpaid work also provides a way to improve job prospects even for those already in the paid workforce. Programmers, for instance, may give away their labor

149. See Overgaard, *supra* note 41, at 136.

150. See generally Hogg, *supra* note 126 (considering volunteerism amongst older individuals and its relationship to volunteerism earlier in those individuals’ lives); Taylor, *supra* note 126, at 490.

151. Billington, *supra* note 82; Fried, *supra* note 123; see also *supra* Part I.B.2.

152. Taylor, *supra* note 139, at 36.

153. Amin, *supra* note 142, at 44.

154. See, e.g., *id.* at 30–31; Kelemen, Mangan & Moffat, *supra* note 143, at 1246; Pauline Leonard, Susan Halford & Katie Bruce, “The New Degree?” *Constructing Internships in the Third Sector*, 50 *SOCIO.* 383, 390–91 (2016); Taylor, *supra* note 126, at 490, 493 (describing internships as “the domain of the unemployed graduate looking for a foot on the professional career ladder”).

155. See, e.g., Irena Grugulis & Dimitrinka Stoyanova, *The Missing Middle: Communities of Practice in a Freelance Labour Market*, 25 *WORK, EMP. & SOC’Y* 342, 343 (2011) (explaining that in the United Kingdom “TV production has long been distinguished by learning through participation” but arguing that freelancing has meant physical separation of the experts from the trainees such that training is undermined); Neil Percival & David Hesmondhalgh, *Unpaid Work in the UK Television and Film Industries: Resistance and Changing Attitudes*, 29 *EUR. J. COMM’N* 188, 196–197 (2014) (reporting that younger workers in TV and film in the United Kingdom view unpaid participation in their field as a necessary step much more so than do their more senior counterparts in their field); Taylor, *supra* note 126, at 493.

156. See Alexandre Frenette, *Making the Intern Economy: Role and Career Challenges of the Music Industry Intern*, 40 *WORK & OCCUPATIONS* 364, 389 (2013).

157. See Taylor, *supra* note 139, at 35, 42.

158. Amin, *supra* note 142, at 45.

159. *Id.*

for free by programming open source as a means of competing for status; such status can help facilitate movement between paid jobs.¹⁶⁰ The open source nature of the work allows greater visibility into the level of difficulty and creativity in each participant's coding than would be true if the coding occurred in a proprietary context.¹⁶¹ Somewhat similarly, people volunteer in the social economy in part to improve their job prospects, whether in the social economy or elsewhere, and only some of these participants are young people who lack work experience.¹⁶²

Unpaid work can help secure paid employment or increase earnings for a few reasons: (1) acquisition of skills and experience, (2) extension of social networks, and (3) ability signaling.¹⁶³

Sometimes unpaid work with an organization can lead to paid work with *that* organization.¹⁶⁴ Working without pay essentially provides a sort of audition—"a chance to demonstrate their reliability and trustworthiness to prospective employers"¹⁶⁵ or their "fit with an organization."¹⁶⁶ The unpaid period "amounts to a probationary period" prior to paid employment.¹⁶⁷

Other times unpaid work leads to paid work at a different organization.¹⁶⁸ Participants in the social economy—some of whom work as volunteers initially—who find permanent work typically do so in the same organization or in other ventures in the social economy.¹⁶⁹ At one nonprofit organization in the UK, researchers found that "[t]he younger volunteers all hope that their experience here will lead to paid work, either at [the organization where they volunteer] or elsewhere."¹⁷⁰

Because of the complicated relationships between paid and unpaid work, it typically makes more sense to think about unpaid work in any particular sector of the labor market and compare it to paid work in that sector rather than to think of unpaid work as a monolith across sectors.¹⁷¹ Or to put it slightly differently, the

160. See Josh Lerner & Jean Tirole, *Some Simple Economics of Open Source*, 50 J. INDUS. ECON. 197, 213–14, 218 (2002) (discussing economic incentives for open-source programmers including "signaling incentive," which encompasses both career-driven motivations and ego gratification); Taylor, *supra* note 126, at 494.

161. See Lerner & Tirole, *supra* note 160, at 216.

162. See Amin, *supra* note 142, at 45.

163. See Wilson et al., *supra* note 43, at 2 (collecting sources); see generally Vicki Smith, *Review Article: Enhancing Employability: Human, Cultural, and Social Capital in an Era of Turbulent Unpredictability*, 63 HUM. REL. 279, 291–92 (2010) (discussing the benefits of unpaid work to build human capital and social capital).

164. See Smith, *supra* note 163, at 292.

165. Wilson et al., *supra* note 43, at 2.

166. Smith, *supra* note 163, at 291.

167. *Id.* at 292.

168. See *id.* at 291–92; Wilson et al., *supra* note 43.

169. See generally Amin, *supra* note 142, at 46.

170. Susan Halford, Pauline Leonard & Katie Bruce, *Geographies of Labour in the Third Sector: Making Hybrid Workforces in Place*, 47 ENV'T & PLAN. A: ECON. & SPACE 2355, 2362 (2015). Unpaid work might supplement paid work even at the same organization if employees feel compelled to volunteer to work more than that for which they are paid because they view it as necessary to retain their employment. See Baines, *supra* note 146, at 287; Baines, Cunningham & Shields, *supra* note 145, at 630. Nothing in the news stories about volunteer prosecutors suggests that this dynamic is in play, however.

171. See Wilson et al., *supra* note 43, at 85.

better question is “why would anybody work for no pay *rather than for pay*” instead of “why would *anybody* volunteer.”¹⁷²

In sum, people engage in unpaid work for numerous reasons, some of which are grounded in altruism and some in instrumental objectives. Instrumental participation is driven largely by the desire to obtain paid work—whether with the same organization where one is working without pay or elsewhere. But so too may it be driven by a desire for someone who is already employed for pay to improve her employment prospects by developing additional skills, social contacts, and signaling their ability. Some work without pay because they feel good about contributing to an important cause or serving their community.

B. Instrumental Motivations

Consistent with the sociology of work literature, many of these volunteer prosecutors offer their labor without pay in part for instrumental reasons related to employment. But the nature of those employment-related motivations varies across the three different forms of volunteer prosecution. Entry-level volunteer prosecutors frequently seek to improve their chances of getting paid legal employment—typically, but not always, as prosecutors. Experienced full-time volunteer prosecutors may be seeking a change in the nature or geographic location of their employment or simply a way to keep busy doing something interesting in retirement. Part-time volunteer prosecutors may seek to build credentials that enable a change of position, perhaps to pursue elected or judicial office. These instrumental benefits of volunteer prosecution accrue for a few different reasons: prestige, added skills and experience, networking, and the opportunity to signal virtue or commitment to public service. Let us consider this all in more detail.

Many entry-level full-time volunteer prosecutors hope to obtain paid employment—frequently as a prosecutor in the particular office where they are volunteering¹⁷³ or another prosecutor’s office.¹⁷⁴ And some are quite successful. At the

172. Overgaard, *supra* note 41, at 137.

173. See, e.g., Semuels, *supra* note 26 (profiling a volunteer prosecutor in the Los Angeles City Attorney’s Office who volunteered in hopes of obtaining a position when one opened); *Wanted*, *supra* note 6 (explaining that Justin Lee worked as a volunteer federal prosecutor before obtaining a paid position in that same U.S. Attorney’s Office); *Two New Prosecutors Sworn*, TIMES-NEWS (N.C.) (Oct. 11, 2017), <https://www.thetimesnews.com/story/business/names-faces/2017/10/11/alamance-da-swears-in-two-new-prosecutors/18328517007/> (profiling a recent law school graduate who interned at the Alamance County District Attorney’s Office three times, is from Alamance County, and has accepted a full-time volunteer position—presumably with the hope of securing paid employment there eventually).

174. See, e.g., Boyer, *supra* note 96 (quoting the assistant dean for pro bono and public interest programs at Rutgers Law School in Camden saying that “[t]his is a way to get a toe in the door for a position that typically would have been available [in better economic times]” and explaining that volunteer prosecutor programs are particularly helpful for those who want to prosecute); Hobbs, *supra* note 32 (recounting the chief assistant district attorney’s position that the unpaid entry level prosecutor program that his office created provides “a way for aspiring prosecutors to get a foot in the door in a grim job market”); Dave Martinez, *Deputy DA Sworn into Office; DA Patridge Takes on Additional Workload*, HERALD & NEWS (Kalamath, Or.), July 26, 2013, at 4 (recounting the biography of a newly hired prosecutor in Klamath County, Oregon who had been working as a

University of Georgia, for instance, about 85% of students who avail themselves of the school's bridge to practice program and work as prosecutors go on to paid work in that same office or elsewhere as prosecutors.¹⁷⁵ Volunteering for some time after bar admission is simply "the tried and true known way to become a prosecutor" in many places.¹⁷⁶ But they may seek work in another sector of the legal profession entirely and simply view a prosecutor's office as a great place to get a lot of legal experience quickly.¹⁷⁷ Indeed, helping graduates improve their chances of securing paid legal employment is precisely the reason that several law schools subsidize this sort of experience for some period.¹⁷⁸ The fact that these programs, like the ones in Georgia, continue to hire entry-level volunteer prosecutors even after law firms stopped deferring their new hires evinces numerous law school graduates who remain willing to work without pay to gain trial experience and a foothold in a tough job market.¹⁷⁹ In some instances, this is quite explicitly an audition for when paid work becomes available in the particular office. The head of the Cobb County program explained, "[i]f they work for me for six months, I know what I've got," whereas a résumé or interview offers far less meaningful information.¹⁸⁰ That concept closely tracks the sociology literature: "When working unpaid in an organization, [some] volunteers are effectively auditioning for a role, getting the chance to demonstrate their reliability and trustworthiness to prospective employers."¹⁸¹

Experienced lawyers who have changed or seek to change geographic location, legal specialty, or type of position may also benefit instrumentally from serving as volunteer prosecutors.¹⁸²

Perhaps most obviously, volunteering as a prosecutor could lead to paid employment as a prosecutor and perhaps in a particular jurisdiction where a lawyer

volunteer prosecutor in a different county); *City Gets Lawyers to Work for Free; Legal: Program Gives Volunteers Experience and Helps Maintain Prosecution Levels*, DAILY NEWS L.A., at 4 (explaining that many volunteer prosecutors in Los Angeles have gone on to be hired as prosecutors elsewhere in the state in part because, as one participant put it, "[p]utting it on the resume is definitely the biggest flare that catches everybody's attention among the sea of applicants").

175. See Interview with Anthony E. Waller, *supra* note 93.

176. See *id.* (describing prosecutor hiring in many jurisdictions and especially in Georgia); accord Interview with Megan Walsh, *supra* note 93 (explaining that "being seen and being around" is the typical way to be hired in district attorney's offices in Alabama).

177. See Interview with Alvita Barrow, *supra* note 115; cf. Boyer, *supra* note 96 (describing a 2010 law school graduate who found limited employment opportunities when graduating during a recession and practiced employment law in the New Jersey Attorney General's Office as a way into paid employment).

178. See *supra* Part I.B.1.

179. See, e.g., Hobbs, *supra* note 32; see also, e.g., London, *supra* note 80 (quoting a District Attorney's Chief of Staff discussing young litigation associates from big law firms in the city participating as volunteer prosecutors because "[s]ome of them have rarely been in court and they're hungry for some real trial experience").

180. Hobbs, *supra* note 32.

181. Wilson et al., *supra* note 43, at 2.

182. See Boyer, *supra* note 96 (describing motivations of some volunteer prosecutors as "mov[ing] from the private to public sector or chang[ing] their specialty").

volunteers. Randolph Murdaugh volunteered as an Assistant Solicitor in South Carolina before he was elected to the lead post in which he served for twenty years.¹⁸³ After moving from out of state, Sara Clothier volunteered as a prosecutor in the District Attorney's Office in St. Lawrence County, New York for a few months until she was hired for a paid position in that office.¹⁸⁴ Tara McManigal left a \$170,000 per year salary in the private sector to volunteer as a prosecutor in Sacramento, California in hopes of obtaining paid employment as a prosecutor there or elsewhere.¹⁸⁵ Volunteer prosecution may also help facilitate transitions such as certification as a mediator,¹⁸⁶ and perhaps the experience enhances candidacies for partnership in a private law firm or external marketability.¹⁸⁷

Working as a volunteer prosecutor offers a particular set of experience and opportunity for skill development that few lawyers get, such as trial experience and plenty of stand-up-in-court time.¹⁸⁸ In the U.S. Attorney's Office for the Eastern District of Pennsylvania, for instance, a 2011 posting for a handful of unpaid full-time SAUSA positions returned thirty applications, including lawyers with a decade of practice experience.¹⁸⁹ Some of these volunteer prosecutors sought to use the position to gain a particular set of skills.¹⁹⁰ Lawyers who have participated in and created Houston's volunteer municipal prosecutor program spoke about the opportunity for thinking on your feet under pressure, stand-up time in court,

183. *Murdaugh Bestowed Order of the Palmetto*, BLUFFTON TODAY (July 12, 2018, 9:16 PM), <https://www.blufftontoday.com/story/news/local/hampton-county-guardian/2018/07/11/murdaugh-bestowed-order-of-palmetto/11554063007/>.

184. Sean Ewart, *Rain to Start Partially Staffed; Some Holdovers: New District Attorney to Take Her Time Hiring*, WATERTOWN DAILY TIMES (N.Y.) (Dec. 27, 2013), https://www.nny360.com/news/rain-to-start-partially-staffed/article_d26be693-99d5-58a2-a1b5-2516e3ee1518.html.

185. Semuels, *supra* note 26. Fortunately, she achieved that goal. *See Attorney Licensee Profile*, STATE BAR OF CAL., <https://apps.calbar.ca.gov/attorney/Licensee/Detail/252076> (last visited June 18, 2020) (showing a mailing address and email address in the Sacramento County District Attorney's Office).

186. *Cf., e.g., Attorneys Honored*, COLUMBIA STAR (S.C.) (June 5, 2015), <https://www.thecolumbiastar.com/articles/attorneys-honored-57/> (announcing that a law firm partner has been certified as a mediator and mentioning at the outset of a paragraph her work as a pro bono special prosecutor of criminal domestic violence cases).

187. *Cf. Manatt Grows National Litigation Practice in Los Angeles*, BUS. WIRE (Sept. 6, 2011, 12:00 PM), <https://www.businesswire.com/news/home/20110906006302/en/Manatt-Grows-National-Litigation-Practice-in-Los-Angeles> (mentioning in the announcement of a new lateral partner hire that she had served as a volunteer prosecutor); *Morgan Lewis Adds Houston Litigator William R. Peterson to Highly Ranked Appellate Team*, YAHOO! NEWS: MARKET WIRED (May 9, 2016), <https://www.yahoo.com/news/morgan-lewis-adds-houston-litigator-163626319.html> (same).

188. *See, e.g., Mary Flood, Young Lawyers at Big-Name Firms Volunteer for Municipal Court*, HOUS. CHRON. (Apr. 29, 2007), <https://www.chron.com/business/article/Young-lawyers-at-big-name-firms-volunteer-for-1803144.php> (describing a part-time pro bono volunteer prosecutor program where participants seek the experience of standing up in court and trying cases); Adina Genn, *Attorney Assists County in Sex-Offender Case*, LONG ISLAND BUS. NEWS, Nov. 11, 2016, at 11 (describing a volunteer program where pro bono prosecutors work with paid prosecutors to assist with appellate brief writing and oral argument); Klass, *supra* note 79 (discussing a large part-time volunteer prosecution program in Seattle where "[t]he attraction for most participants and their employers . . . is accelerated trial experience").

189. Boyer, *supra* note 96.

190. *Id.*

processing huge numbers of cases in a short time, and trying cases¹⁹¹—all a far cry from the typical experience of a junior or mid-level associate at a large law firm.¹⁹² One law firm not only had some of its associates participating in part-time prosecution but had two associates spend three months as full-time volunteer prosecutors to gain trial experience on a faster-paced docket.¹⁹³ That private law firms see fit to pay their associates while working as volunteer prosecutors furthers the notion that volunteer prosecutor positions afford valuable experience that is difficult to acquire for law firm associates.¹⁹⁴

The sociology literature discusses unpaid work as offering an opportunity to signal ability.¹⁹⁵ Similarly, having a job as a prosecutor on the volunteer's résumé will also send a corresponding signal about the candidate's ability, particularly when they have held extremely prestigious and competitive federal prosecutor positions.¹⁹⁶ To some extent, experienced volunteer prosecutors thus resemble the open-source programmers profiled in the sociology literature¹⁹⁷ insofar as they seek a huge reputation boost that improves future career prospects.¹⁹⁸

But in addition to signaling ability, unpaid prosecutor work offers an opportunity to signal virtue and commitment to public service. Such signaling will tend to prove most helpful for those who seek to advance political or judicial aspirations.¹⁹⁹ Indeed, a significant portion of the news coverage mentioning volunteer prosecutors appears in the background of a candidate for elected office, whether

191. See Flood, *supra* note 188.

192. See, e.g., Loren Korkin, *Confessions of an Associate Attorney: Besides Money, How Else Can You Keep Me?*, LEGAL INTELLIGENCER, Mar. 10, 2022 (describing a common experience of associates not being given experience in depositions or hearings).

193. *Id.*

194. There is also reason to think that law firms enjoy positive public relations from having their associates participate in such programs. See London, *supra* note 80 (quoting a public defender about a part-time volunteer prosecutor program: "It's great P.R. for the firms, which ultimately means it's good for their business development . . . They're betting that some added name recognition will bring paying clients in the door."). But the P.R. value is much more complicated in our present moment amidst calls to shrink criminal law enforcement. See Norfleet, *supra* note 11 (discussing the reasons that a law firm cancelled its volunteer prosecutor program amidst public concern with overpolicing communities of color)

195. Wilson et al., *supra* note 43, at 2.

196. See, e.g., Boyer, *supra* note 96 (discussing benefit to volunteer prosecutors of working in a prestigious office like the New Jersey Attorney General's Office); Sudhin Thanawala, *Unpaid U.S. Prosecutor Jobs Questioned*, DAILY PRESS (Newport News, Va.), July 5, 2016 (discussing prestige of federal prosecutor positions in the context of volunteer prosecutors).

197. See generally Lerner & Tirole, *supra* note 160.

198. *Id.* at 218.

199. See Jed Shugerman, "The Rise of the Prosecutor Politicians": Database of Prosecutorial Experience for Justices, Circuit Judges, Governors, AGs, and Senators, 1880-2017, SHUGERBLOG (July 7, 2017), <https://perma.cc/992Y-RBY2> (demonstrating that prosecutor is a very common entry point for those seeking political office); see also Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 329–30 (2004) (discussing federal prosecutor jobs as a pathway to elected office or judgeships). In some ways this is a broader version of the idea that those seeking to become prosecutors should work as interns for prosecutors' offices during law school because such work helps demonstrate their commitment. See, e.g., Yale Law School Career Development Office, *Criminal Prosecution*, YALE L. SCH. (Sept. 2015), https://law.yale.edu/sites/default/files/area/departments/cdo/document/cdo_criminal_prosecution_public.pdf (recommending that students wanting to

district attorney or otherwise. For instance, in the 2014 Michigan Attorney General race, the challenger touted his experience as a volunteer federal prosecutor, while the incumbent and his surrogates criticized the thinness of that part-time pro bono prosecution work for less than two years.²⁰⁰ An article discussing Angela Perkins's run for Borough Council in New Jersey highlighted her work as volunteer alternative prosecutor for the borough.²⁰¹ Grant Harvey, a judicial candidate in Harris County, Texas, cited his work as a volunteer special prosecutor as a campaign credential;²⁰² so did one of his opponents.²⁰³ Similarly, an article about challenges to a municipal judge in Wisconsin highlighted one candidate's work as a volunteer prosecutor.²⁰⁴ A successful candidate for district attorney elsewhere in Wisconsin got his start in prosecution as a volunteer.²⁰⁵ So too did the U.S. Attorney for the District of Massachusetts.²⁰⁶ And there are plenty of others.²⁰⁷ That volunteer prosecutor experience is discussed in profile pieces does not prove that anyone volunteered as a prosecutor for these instrumental reasons, but it at least prompts the question.

Prosecutorial experience can also provide an entry point into a judicial career.²⁰⁸ To take one example from the volunteer prosecutor news sources, George Bridges

work as prosecutors after graduation demonstrate their interest by interning in prosecutors' offices during law school).

200. Kathleen Gray, *A Low-Key Race is Suddenly Competitive*, DETROIT FREE PRESS, Oct. 12, 2014, at 6; see also, e.g., Bob Mercer, *Ravnsborg Puts Military Background to Use, Wins Republican Battle for Attorney General*, CAPITAL JOURNAL (Pierre, S.D.), June 25, 2018, at 4 (noting that the primary-winning candidate for attorney general had served not only in the military but also as a volunteer prosecutor); Meredith Shamburger, *Irvington School Board Candidate Camp Seeks Re-Election*, DAILY TARRYTOWN VOICE (N.Y.), May 11, 2012, at 4 (citing a school board member who credited her experience as a volunteer prosecutor as part of what qualifies her to serve on the school board).

201. Kimberly Redmond, *Republican Council Challenged by Newcomers*, PASCACK VALLEY CMTY. LIFE (Bergen, N.J.), Oct. 31, 2013, at 3.

202. Charles Kuffner, *Judicial Q&A: Grant Harvey*, OFF THE KUFF (Jan. 30, 2020), <http://www.offthekuff.com/wp/?p=93843>.

203. Charles Kuffner, *Judicial Q&A: Veronica Rivas-Molloy*, OFF THE KUFF (Feb. 22, 2020), <http://www.offthekuff.com/wp/?p=93843>.

204. Don Behm, *Race for State Schools Chief Tops Ballot*, MILWAUKEE J. SENTINEL, Feb. 21, 2017, at A3.

205. See Phillip Bock, *Sheboygan Prosecutor Haberman Announces Run for Calumet DA*, SHEBOYGAN PRESS (Wis.), Apr. 27, 2016, at 3 (discussing Haberman's background as a volunteer prosecutor); *District Attorney*, CALUMET COUNTY, WIS., <https://www.co.calumet.wi.us/143/District-Attorney> (last visited Apr. 3, 2022) (highlighting Haberman as the current district attorney).

206. *Meet the U.S. Attorney*, *supra* note 40.

207. See, e.g., Emily Brown, *Commonwealth's Attorney Candidates Participate in Forum*, NELSON CNTY. TIMES (Amherst, Va.), Oct. 12, 2016, at 4 (describing one DA candidate's work as a volunteer prosecutor); Tracy Harmon, *2 Running for DA in Colorado's 11th Judicial District*, PUEBLO CHIEFTAIN (Colo.), Feb. 18, 2020 (describing one DA candidate's work as Special Assistant United States Attorney while working at the Bureau of Prisons).

208. See, e.g., James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2111 (2000) (explaining that many trial judges began their careers as prosecutors); Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2001 (1988) ("Many state judges, in fact, begin their legal careers as prosecutors.").

volunteered as a prosecutor part time while serving as chief of police before he became a judge.²⁰⁹ There are numerous other examples.²¹⁰

In some sectors of the economy such as the creative industries, unpaid positions are seen as a necessary stepping stone to paid work.²¹¹ More modest versions of that claim fit the prosecution context: to secure an entry-level prosecutor position in many places, a lawyer must, it seems as a practical matter, work without pay for a prosecutor's office *while in law school*.²¹² Although I do not define work while in law school as volunteer prosecution, that practice highlights the importance in prosecutor hiring of showing commitment and auditioning. Moreover, those who want to be prosecutors in a specific location when that location has no funding or authority to hire a paid employee are typically quite well served to volunteer there after graduation until a position becomes available. Those individuals then benefit from having demonstrated their reliability and fit with the organization while working as a volunteer.²¹³ But even outside of those contexts in which working unpaid is essentially *necessary* to securing paid employment as a prosecutor, there is nonetheless plenty of reason to think that volunteering as a prosecutor after graduation will make it easier to get paid work as a prosecutor.

C. Non-Instrumental Motivations

As with the sociology literature on unpaid work, people work as volunteer prosecutors for reasons that are not purely instrumental. Rather, some people may feel good by serving their communities and ensuring that justice is done. So too are

209. Beth Kramer, *Bridges Elevated to Full Circuit Judge*, LAKE CNTY. NEWS-SUN (Ill.), June 23, 2012, at 8.

210. See, e.g., Shawn Feddeman, *Gov. Romney Nominates Trio to District Court*, US FED NEWS (Jan. 18, 2005), at 1 (recounting the background of a newly appointed judge who had previously served as a volunteer prosecutor); Lauren Mylo, *A Time to Judge; Court Candidates Make Case for Election*, HERALD (Sharon, Pa.) (Nov. 6, 2011), https://www.sharonherald.com/news/local_news/a-time-to-judge/article_1b593f25-5a0a-5def-8ec3-74b281dce20c.html (recounting the background of a judicial candidate who served as a full-time paid prosecutor until the 1980s and then served as a volunteer prosecutor for the next 20+ years); Kenneth Ofgang, *Los Angeles Superior Court Names Three as Commissioners*, METRO. NEWS ENTER. (L.A.) (May 1, 2006), <http://www.metnews.com/articles/2006/comm050106.htm> (discussing the career of the incoming Los Angeles Superior Court Commissioner and citing her experience as a volunteer prosecutor as providing experience in criminal law).

211. See, e.g., Grugulis & Stoyanova, *supra* note 155, at 343 (UK TV industry); Taylor, *supra* note 139, at 35, 42 (human rights and refugee service sector); see also Taylor, *supra* note 126 (stating the general proposition).

212. This Article does not seek to robustly defend that claim here but merely to offer it as an observation consistent with my own experience and with the relevant sources. See, e.g., Kevin Olsen '12 Looks to Make His Mark as Young Prosecutor, CHRISTIAN BROTHERS ACAD. (Jan. 22, 2020), <https://www.cbaincraoftnj.org/news/kevin-olsen-12-young-prosecutor/> (explaining that Wake Forest School of Law graduate Kevin Olsen spent two summers in law school working for the Forsyth County DA's office before being hired there after passing the bar exam); @CharMeckDA, TWITTER (Oct. 7, 2019, 1:46 PM), <https://twitter.com/CharMeckDA/status/1181264521765310467> (reporting that all three newly-hired assistant district attorneys worked as interns in that office during law school); see also President and Fellows of Harvard College, *Sizing Up the Prosecution: A Quick Guide to Local Prosecution*, HARVARD L. SCH. (2010), <https://hls.harvard.edu/content/uploads/2008/07/prosecution2010.pdf> (touting the benefits of working in a law student intern in a DA's office for those who seek post-graduate employment as ADAs); Yale Law School Career Development Office, *supra* note 199 (same).

213. See, e.g., Smith, *supra* note 163, at 291–92; Wilson et al., *supra* note 43, at 2.

volunteer prosecutors doing work that they think makes their communities safer. Part 1 addresses these altruistic justice and safety-driven motivations. But Part 2 addresses a much darker idea—that some people may want to prosecute criminals because of psychological authoritarianism and sadism: they enjoy wielding the supreme power of the State and doing so in ways that inflict harm on others, perhaps particularly so when those others are the poor people of color who comprise most of the defendants in the American criminal legal system.

1. Altruism and Promoting Public Safety

Much like the environmental worker “T” who works for free to help advance a cause that is important to him,²¹⁴ many people likely serve as volunteer prosecutors at least in part out of a commitment to public service and promoting justice.

There is no shortage of media statements from prosecutors—paid and unpaid—about this motivation for their work.²¹⁵ To choose a few examples involving volunteer prosecutors, a retired lawyer who spent most of his career handling complex civil litigation agreed to work as a volunteer prosecutor full time “to do something to be helpful to society,”²¹⁶ while another enjoyed “help[ing] people in distress.”²¹⁷ A former volunteer federal prosecutor said, “I looked at it as an opportunity to serve You’re helping your government.”²¹⁸ In particular, one prosecutor spoke about the opportunity to help first-time offenders get into programs that can help address their needs.²¹⁹ A district attorney candidate running against a volunteer prosecutor explained, “[m]y whole career has been based upon service—service to our country and to this county.”²²⁰ In Spokane, Washington, one law firm offered a steady supply of volunteer prosecutors to help address the seeming public need of helping clear a backlog created by filing more drug cases than the county could afford to prosecute.²²¹ A press release highlighting the creator of a volunteer prosecutor corps in Miami explained that he sought “to help the state move criminal cases more quickly and better protect the rights of witnesses and crime victims.”²²²

214. Amin, *supra* note 142, at 44.

215. There is, of course, reason to question the genuineness of statements like these from elected officials or when made during an election campaign.

216. Billington, *supra* note 82.

217. Fried, *supra* note 123; *see also, e.g.*, Paul Davenport, *Arizona County’s Use of Volunteer Prosecutor Raises Eyebrows*, ASSOCIATED PRESS STATE & LOCAL (June 15, 2017), <https://apnews.com/article/69e2ae49844149b798445d8c1bf3d638> (describing one volunteer prosecutor who participates because he enjoys the work).

218. Davidson, *supra* note 96.

219. Billington, *supra* note 82.

220. Brown, *supra* note 207. That candidate could not point to a volunteer prosecutor credential as grounding for his demonstrated commitment to public service. *Id.*

221. London, *supra* note 80.

222. Miami’s “Volunteer Prosecutor” Named “Trial Lawyer of The Year”; Stuart Grossman Honored for Trial Experience and High Ethical Standards, PR NEWSWIRE, June 23, 1995.

This notion of commitment to public service or indeed safety is often grounded in concern for or discussion of victims. One lawyer volunteered to help with only one particular child abuse prosecution because she sought to provide justice for the child-victim.²²³ Another volunteer prosecutor was motivated to participate in a volunteer prosecutor program for retired attorneys because his own parents had been elderly mugging victims.²²⁴

The prosecutor's minister of justice ethos and the obligation to be more than merely an advocate who seeks convictions likely adds to the opportunities to feel good serving justice on behalf of the people.²²⁵

Although these volunteer prosecutors may genuinely believe that they are positively serving their communities,²²⁶ it is not evident that they are actually always doing so.²²⁷ Indeed, some scholars criticize the minister of justice ethic because it leads to a sort of delusion.²²⁸ As Abbe Smith poignantly puts it, "too often righteousness becomes *self*-righteousness. Too often prosecutors believe that because it is their *job* to do justice, they have extraordinary in-born wisdom and insight. Too often prosecutors believe that they *and only they* know what justice is."²²⁹ In a similar light, Janet Hoeffel argues that the minister of justice ethic allows prosecutors to feel like they wear the "white hat" as the good guy.²³⁰ Sometimes they do wear the white hat, but that is unfortunately not always true.²³¹

223. See Joseph Brown, *Woman Receives Double Life Sentence for Raping Daughter*, ITEM (Dec. 3, 2019), https://www.itemonline.com/news/woman-receives-double-life-sentence-for-raping-daughter/article_09736648-15f1-11ea-bd71-0b6f16baa5b7.html.

224. Fried, *supra* note 123.

225. See MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2020) (articulating the minister of justice role as one that "carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons"); see also, e.g., Russell M. Gold, *Beyond the Judicial Fourth Amendment: The Prosecutor's Role*, 47 U.C. DAVIS. L. REV. 1591, 1635–38 (2014) (partially explaining prosecutors' minister of justice obligation); Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 612–18 (1999) (offering a more detailed explanation).

226. For instance, after a large local law firm canceled its pro bono collaboration with the Minneapolis City Attorney's Office, a member of that office wrote a newspaper article to defend his office's important work prosecuting such misdemeanors. Carter, *supra* note 19.

227. Cf. Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 250–53 (2019) (criticizing the notion that prosecutors are the community's sole representatives in criminal law).

228. See, e.g., Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN ST. L. REV. 1133, 1138–39 (2005). See generally Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

229. Smith, *supra* note 228, at 378 (footnotes omitted).

230. Hoeffel, *supra* note 228, at 1140.

231. See, e.g., *Connick v. Thompson*, 563 U.S. 51, 57 (2011) (recounting the government's concession that it violated the defendant's due process rights when it failed to disclose blood test results from sample found at crime scene).

2. Psychological Authoritarianism and Sadism

There is a far darker story about non-instrumental reasons why people might want to be prosecutors in America on at least a part time basis. It is a story grounded in authoritarian psychology and its concomitant desire to ensure conformity to rules, especially when those rules can be enforced against an outgroup such as poor people of color who have been accused of breaking laws. Yet it too is a story where its participants feel like they wear the white hat and are serving their community. This motivation for volunteer prosecution can be situated in what Baines refers to as “compelled” volunteering because it is in some respects designed to protect volunteers’ sense of self and identity.²³²

Before we consider how authoritarian psychology’s insights apply to prosecution or volunteer prosecutors, let us begin with a grounding in its ideas.

[T]he authoritarian individual values and follows rules. She is rigid, inflexible and intolerant of difference. The prototypical authoritarian person has a low tolerance for ambiguity, adopts conventional behaviors and beliefs and is prone to negative stereotyping Authoritarians are unlikely to have much empathy for the suffering or pain of others and are likely to be prejudiced against racial, religious and ethnic “outgroups.”²³³

For an authoritarian, order and obedience to authority are paramount.²³⁴ Obedience to commands is important simply because they are commands, regardless of the perceived goodness or rightness of such commands,²³⁵ because “the authoritarian likes to be in charge or wants everyone to conform to the commands of those who are.”²³⁶ An authoritarian’s desire for obedience is sufficiently strong that the authoritarian stands “read[y] to inflict interpersonal violence”²³⁷ to restore justice and fair play.²³⁸ Authoritarians favor more punitive means to control others’ behavior, particularly lawbreakers.²³⁹ Because ambiguity is threatening to obedience and

232. See Baines, *supra* note 146, at 286.

233. Lynne Henderson, *Authoritarianism and the Rule of Law*, 66 IND. L.J. 379, 393–94 (1991) (footnotes omitted); accord T. W. ADORNO, ELSE FRENKEL-BRUNSWIK, DANIEL J. LEVINSON & R. NEVITT SANFORD, *THE AUTHORITARIAN PERSONALITY* 361–64 (Norton abr. ed. 1982).

234. See ADORNO, FRENKEL-BRUNSWIK, LEVINSON & SANFORD, *supra* note 233, at 361; Richard Delgado, *Authoritarianism: A Comment*, 13 RUTGERS RACE & L. REV. 65, 75 (2011).

235. See Henderson, *supra* note 233, at 394; see also ERICH FROMM, *MAN FOR HIMSELF: AN INQUIRY INTO THE PSYCHOLOGY OF ETHICS* 148 (1947).

236. Delgado, *supra* note 234, at 72–73 (footnote omitted); accord ADORNO, FRENKEL-BRUNSWIK, LEVINSON & SANFORD, *supra* note 233, at 361–64.

237. Delgado, *supra* note 234, at 74.

238. See Donald P. Judges, *When Silence Speaks Louder than Words: Authoritarianism and the Feminist Antipornography Movement*, 1 PSYCH., PUB. POL’Y & L. 643, 661 (1995) (discussing the belief that ingroup (authoritarian) members are justified in undertaking “facially unjust measures” to respond to the outgroup “frustrat[ing] the processes of justice and fair play”).

239. *Id.* at 660.

authority, the authoritarian does not tolerate ambiguity.²⁴⁰

Authoritarian psychology is not only preoccupied with power and obedience but driven by rigidity, inflexibility, and ethnocentricity.²⁴¹ For authoritarians, the presence of an outgroup who they can blame *en masse* for non-compliance or disobedience is important to this pursuit of obedience without tarnishing their own ingroup.²⁴² Authoritarians paint outgroups—typically ones of “lower social status”²⁴³—as deviant in a stereotyped, categorical way such that people who do not conform to the authoritarians’ standards are either one-dimensionally good or bad.²⁴⁴

Authoritarianism is grounded in a sado-masochistic dynamic whereby the authoritarian must “masochistically obey[] those hierarchically above her and sadistically punish[] those beneath her or deviant from her.”²⁴⁵

In sum, authoritarianism is a deeply rule-bound and conformity-driven ethos. Those who subscribe to it enjoy seeing obedience enforced and indeed enjoy enforcing it themselves. Obedience is such an important objective that it justifies using violence to bring miscreants into obedience—typically by painting an entire outgroup as deviant and enforcing obedience against anyone in that group regardless of that individual’s actions.²⁴⁶

That psychology of authoritarianism might prompt one to become a prosecutor for non-instrumental reasons even without pay. Criminal defendants are all people who have been accused of disobeying a law. Crime is quite comfortably viewed as disobedience to legitimate authority.²⁴⁷ On that basis alone an authoritarian might view prosecuting defendants as doing her part to help right the system. That some defendants may be innocent plays no meaningful role from an authoritarian mindset because cases need not be evaluated individually; it is the group of charged

240. See, e.g., Camilo M. Ortiz, Note, *Latinos Nowhere in Sight: Erased by Racism, Nativism, the Black-White Binary, and Authoritarianism*, 13 RUTGERS RACE & L. REV. 29, 34–35 (2012).

241. See Henderson, *supra* note 233, at 396.

242. See ADORNO, FRENKEL-BRUNSWIK, LEVINSON & SANFORD, *supra* note 233, at 94 (discussing stereotyping and the inability of anti-Semitic authoritarians to view Jews as individuals but only as members of a group); Ortiz, *supra* note 240, at 60–61; see also Delgado, *supra* note 234, at 69 (“[R]acism is a means of preserving psychic and material advantage . . .”).

243. See Ortiz, *supra* note 240, at 61.

244. See ADORNO, FRENKEL-BRUNSWIK, LEVINSON & SANFORD, *supra* note 233, at 94, 361–64; Judges, *supra* note 238, at 656–58; see also Henderson, *supra* note 233, at 393–94 (discussing authoritarianism and stereotype as well as prejudice against outgroups).

245. Henderson, *supra* note 233, at 394.

246. The psychology literature dives more deeply into the motivations for one to embrace an authoritarian psychology, but that level of depth is unnecessary for present purposes.

Sexuality also plays a prominent role in the authoritarian psychology in a patriarchal way and provides an inclination to punish those who deviate from sexual norms. See Henderson, *supra* note 233, at 394; Judges, *supra* note 238, at 664–65. But the sexuality component of authoritarianism is not central to the focus of this argument.

247. See, e.g., Delgado, *supra* note 234, at 75.

defendants who warrants suffering to promote obedience. Lack of individuation fits particularly well in misdemeanor case processing.²⁴⁸

An authoritarian might also view themselves—particularly if they are a member of an ingroup—as deserving of the massive sovereign authority that prosecutors wield.²⁴⁹ Consider the news story about volunteer prosecutors stepping in to help address insufficient resources to enforce the law against war protestors.²⁵⁰ Lack of adequate enforcement would be quite troubling to an authoritarian—particularly if it meant prosecutors not bringing marginal cases—because it would result in ambiguity as to when lawbreakers actually face the force of the duly-enacted criminal law.²⁵¹ And volunteering as prosecutors would allow them an opportunity to eliminate (or at least reduce) such ambiguity in their communities and increase enforcement.²⁵²

And let us not forget the importance of outgroup dynamics for authoritarian psychology. Many criminal defendants are poor people of color.²⁵³ Such defendants belong to groups of lesser social status and can thus easily and comfortably be painted as rule breaking by an authoritarian. That they are rule breaking, for an authoritarian, justifies inflicting the physical violence that the criminal legal system, forcible incarceration, and miserable prison conditions entail. So too could

248. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315–17, 1321–50 (2012) (explaining that misdemeanor adjudication in the U.S. pays “scant attention to individualized cases” at numerous stages of policing, prosecution, and adjudication).

249. See, e.g., Bibas, *supra* note 4 (“Those millions of prosecutions [each year in America] largely revolve around a central actor with tremendous power and discretion: the prosecutor.”); Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940) (“The prosecutor has more control over life, liberty, and reputation than any other person in America.”); Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1415 (2010) (“In many [if not most] American jurisdictions, the prosecutor is the criminal justice system. For all intents and purposes, he makes the law, enforces it against particular individuals, and adjudicates their guilt and resulting sentences.”). *But see* Bellin, *supra* note 4 (arguing that scholars overstate the power of prosecutors). Regarding prosecutors as exercising sovereign power, see Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 L. & SOC. INQUIRY 387, 390 (2008).

250. Reynolds Holding, *Volunteer Prosecutors Will Remain*, S.F. CHRON., Apr. 11, 1991 (describing motivations of volunteer lawyers who agreed to help prosecute war protesters because they wanted to help resolve the large number of pending cases and knew the prosecutors sought help).

251. See, e.g., Henderson, *supra* note 233, at 393–94 (discussing authoritarians’ “low tolerance for ambiguity”); *id.* at 394 (explaining authoritarians’ demand to ensure obedience to the commands of authority).

252. See, e.g., Delgado, *supra* note 234, at 72–73 (“The authoritarian likes to be in charge or wants everyone to conform to the commands of those who are.”). One would imagine that a volunteer who comes to prosecution with an authoritarian psychology would bring cases quite broadly and without any meaningful exercise of discretion to decline cases, whether meritorious or not. But the potential effects of volunteer prosecution on case-level decision-making must be left for another day.

253. See, e.g., James Forman Jr., *The Black Poor, Black Elites, and America’s Prisons*, 32 CARDOZO L. REV. 791, 793 (2011) (“Blacks are about eight times as likely to go to prison as whites. . . .”); *id.* at 794 (“[P]rison has become the province of the poor and uneducated, even within the black community.”); Mayson & Stevenson, *supra* note 5, at 1017 (reporting the results of a large study of misdemeanors across eight diverse jurisdictions: “[T]he per-capita misdemeanor case-filing rate is higher for black people than for white people for every offense type, in every jurisdiction. For most offenses, the per-capita case-filing rate for blacks is two to four times that of whites.”).

inflicting suffering on outgroup members help reaffirm one's own membership in an ingroup.²⁵⁴ In this respect, the protection of one's own identity makes authoritarian psychological motivations a sort of compelled volunteering, in Baines's terminology.²⁵⁵ The sadistic piece of authoritarian psychology is the most troubling of all. Grounded in the concept of authoritarianism is the notion that some people might be willing to prosecute for free simply because it affords them the opportunity to inflict suffering on those who are unlike them—poor people of color. That suffering helps force a miscreant outgroup to obey and thus promotes order, the thinking goes.

Even a non-authoritarian observer might be tempted to say that criminal defendants—not because of but regardless of their race or class—are by and large guilty of a crime and thus are rule breakers against whom obedience can justifiably be enforced. But the political economy of American criminal law bears significantly on this question. Legislators operate in a context where they know that prosecutors have massive discretion.²⁵⁶ Against that backdrop of broad prosecutorial discretion, legislatures have long had an incentive to appear tough on crime by passing ever broader criminal laws that cover an even broader swath of conduct.²⁵⁷ If prosecutors exercise that discretion unwisely legislators can fault prosecutors' misuse of discretion.²⁵⁸ This alignment of interests helps create extraordinarily broad American criminal law; that breadth makes it difficult to justify the notion that anyone who violates any criminal law should be made to suffer.²⁵⁹

Lastly, it is worth considering the way in which all of these non-instrumental motivations may work together. For an authoritarian, the idea that they are inflicting suffering on a deviant outgroup and thus seeking to promote order may merely seem like serving the community and helping make it a safer and more orderly place. So it bears examining whether the seemingly pure motivations of serving the public that might lead one to become a volunteer prosecutor may be driven in part by an authoritarian impulse to inflict suffering on poor people of color.

In closing, I want to be quite clear that this Article does not claim that all who prosecute for free are authoritarians or that any specific individual fits that bill. Rather, it is meant to generate a hypothesis. It examines the theory behind authoritarian psychology and considers whether it may offer a non-instrumental (and

254. See, e.g., Delgado, *supra* note 234, at 69 (“[R]acism is a means of preserving psychic . . . advantage . . .”).

255. See Baines, *supra* note 146, at 286.

256. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001).

257. See *id.* at 547–49; see also Russell M. Gold, *Prosecutors and Their Legislatures, Legislatures and Their Prosecutors*, in THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION 327 (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2021) (discussing the “pathological politics” that characterize the relationship between prosecutors and legislatures).

258. Stuntz, *supra* note 256, at 548.

259. See William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549, 2560–62 (2004) (analogizing modern criminal codes to a “menu” off of which a prosecutor may order).

perhaps partial) explanation for why some individuals might become a prosecutor without pay.

III. NET-WIDENING

Volunteer prosecution also raises systemic concerns that unpaid labor in other sectors does not because of the unique nature of American criminal prosecution. Volunteer prosecutors, by design, increase budgetary efficiency. Improved budgetary efficiency in criminal law in turn broadens the system's capacity to bring in more offenders—a process that bears the pejorative label “net-widening.”²⁶⁰ Indeed, all of the press accounts of volunteer prosecution that discuss the purpose of such programs cite the ability to cast a wider net with existing prosecutorial resources or casting the same size net with fewer resources amidst a budget cut. These budget constraints may reflect considered legislative judgment to constrain the scope of enforcement, as Darryl Brown argues,²⁶¹ or merely an unwillingness to spend more for more enforcement (a related idea, to be sure). Regardless of legislators' intentions, budget constraints and properly aligned incentives pose the best prospect for combatting the pathological politics of criminal law and the “one-way ratchet” that they create.²⁶²

Fiscal pressure has been and continues to be an important force driving reforms toward less incarceration and more restrained use of prosecutorial power.²⁶³ But at present volunteer prosecution is one instance of many free lunches whereby prosecutors need not bear the full marginal costs of their enforcement decisions. Part A considers the descriptive evidence about the enforcement-capacity-expanding aims of volunteer prosecution. Part B frames these practices as net-widening—a troubling characteristic of American criminal law. Part C then situates volunteer prosecution in the context of other prosecutorial free lunches.

260. Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1479 (2004) (criticizing net-widening in drug courts, noting the “increased numbers of offenders” being brought into the system “many of whom have no criminal record and no record of addiction”); see also Brown, *supra* note 23, at 183 (explaining that improved case-processing efficiency enables prosecutors to bring more cases); Russell M. Gold, *Paying for Pretrial Detention*, 98 N.C. L. REV. 1255, 1284–89 (2020) (arguing that financial incentives surrounding pretrial detention make criminal prosecution too cheap).

261. Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 257 (2007).

262. See, e.g., Gold, *supra* note 257, at 327; Gold, *supra* note 260, at 1287–88.

263. In my view, the convergence of libertarian desires for fiscal restraint coupled with liberal desires to narrow the reach of the state in criminal law have enabled decarceral legal reforms such as bail reform. Cf. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (explaining the importance of interest convergence in generating reforms that help Black people and pointing to the seminal school desegregation case as an important example). The Movement for Black Lives plays an important role here, of course. To the extent that seeking out such interest convergence is prescriptive here, see Delgado, *supra* note 234, at 79, explaining that interest convergence can be more than just a tool to understand the past but also a way to marshal support for future reform.

A. *Why Hire Volunteer Prosecutors?*

Prosecutors' stated intentions in hiring volunteer prosecutors are clear and uniform across jurisdictions: prosecuting more cases than their limited resources afford, particularly misdemeanors. The Los Angeles City Attorney, for instance explained that "[i]f it wasn't for [the volunteer prosecutor] program, we wouldn't have a criminal division"²⁶⁴—a division that prosecutes misdemeanors and even less serious "infractions."²⁶⁵ The United States Attorney in Nashville said that unpaid SAUSAs were valuable precisely because they "can do more cases," calling such an outcome "a win-win."²⁶⁶ The California State Association of Counties conferred an award on Orange County for innovative cost savings to recognize its program that brings in practicing civil lawyers to work as volunteer misdemeanor prosecutors.²⁶⁷ The District Attorney announced a similar program in Harris County, Texas shortly after she had unsuccessfully sought funding for 58 new prosecutors—a program that the District Attorney said was meant to "lighten[] the workload for prosecutors assigned to [Justice of the Peace] courts, without costing taxpayers a dime."²⁶⁸ A volunteer prosecutor program in Houston more than a decade earlier similarly focused on traffic and other minor infractions.²⁶⁹ The pro bono prosecution in Minneapolis found lawyers from one of the city's large firms pitching in to prosecute misdemeanors and traffic court violations for free for more than 40 years.²⁷⁰ In Delaware, full-time volunteer lawyers handled 6,000 cases per year without the state having to pay the usual \$55,000 plus benefits (in 2002 dollars).²⁷¹ Even back in 1991, some San Francisco lawyers volunteered to prosecute 1500 people on misdemeanor charges in municipal court who were arrested while

264. Semuels, *supra* note 26.

265. *City Attorney*, *supra* note 25.

266. Scannell, *supra* note 42; cf. PERLIN, *supra* note 18, at 23–24 (explaining that unpaid internships are often mistakenly described as a "win-win"); Taylor, *supra* note 78, at 121 (criticizing the fact that "the policy literature [on volunteering] rests on the assumption that volunteering is by definition a positive activity, 'beneficial' for the volunteer, those they help, and society at large").

267. Press Release, Orange Cnty. Dist. Att'y, Orange County District Attorney Trial Attorney Partnership to Receive "California Counties Innovation Award" Recognizing Innovative County Service Programs in California (Nov. 22, 2010), <https://orangecountyda.org/press/orange-county-district-attorney-trial-attorney-partnership-to-receive-california-counties-innovation-award-recognizing-innovative-county-service-programs-in-california/>.

268. Press Release, Baker Botts LLP, Baker Botts Provides New Lawyers with Courtroom Experience in Partnership with Harris County DA's Office (Feb. 25, 2020), <https://www.bakerbotts.com/news/2020/02/baker-botts-provides-new-lawYERS-with-courtroom-experience-with-harris-county-das-office>; accord Ketterer, *supra* note 27; see also Barkow, *supra* note 3, at 1372–73, 1388–89 (arguing that restraining or shrinking the size of prosecutors' offices should be an important goal for progressive reformers, and criticizing the Harris County District Attorney for claiming to be progressive while at the same time seeking funding for more prosecutors.).

269. Flood, *supra* note 188.

270. Nicole Norfleet, *Sunday Conversation with Tiana Towns, a Dorsey & Whitney Associate on Assignment to the City*, STAR TRIB. (Minneapolis) (Mar. 31, 2018, 2:00 PM), <https://www.startribune.com/sunday-conversation-with-tiana-towns-a-dorsey-amp-whitney-associate-on-assignment-to-the-city/478330793/?refresh=true>.

271. Billington, *supra* note 82.

protesting The Gulf War.²⁷² King County, Washington cleared a backlog of 512 felony cases—largely drug crimes—by enlisting the help of pro bono counsel.²⁷³ The number of paid prosecutor positions in King County rose by thirty-three percent—less than half the increase in filings that these volunteers were hired to handle.²⁷⁴ The district attorney in Albuquerque, New Mexico has brought in forty private-sector lawyers to prosecute rape cases as the office has sought to clear a backlog of untested rape kits.²⁷⁵ In Albuquerque too the motivation was financial—getting free labor to do what the paid lawyers could not find time to do²⁷⁶—but the seriousness of the crimes to which volunteers are assigned is quite unusual. In sum, prosecutors’ offices hire volunteers so that they can bring more cases than their budgets otherwise permit.

B. *Volunteer Prosecution as Net-Widening*

These press statements about prosecuting more cases with the same governmental resources can be seen as touting increased production efficiency.²⁷⁷ In nearly every area of law we would applaud such an efficiency improvement. But improved production efficiency is not obviously good in criminal law.²⁷⁸ Rather, prosecuting more cases with the same resources likely causes “net-widening.”²⁷⁹ Casting a wider net than the one the legislature has provided jeopardizes political accountability and allows prosecutors to avoid bearing the full costs of their work; that wider net tends to yield prosecutions whose marginal costs exceed their benefit.²⁸⁰ Or even more simply, volunteer prosecutors provide the free labor to bring prosecutions that were previously thought of as more costly than beneficial, whether by prosecutors’ offices, the local governments that fund those offices, or both.

It is possible that prosecutors could use the increased resources from volunteers to screen and more thoroughly investigate their existing cases, as two scholars

272. Holding, *supra* note 250; see also CALIFORNIA COURTS, TRIAL COURT REPORT 19 (1998), <https://www.courts.ca.gov/documents/98sco-2.pdf> (explaining that the California municipal courts hear misdemeanor and infraction cases).

273. See, e.g., Klass, *supra* note 79; London, *supra* note 80.

274. London, *supra* note 80.

275. *Special Prosecutors in New Mexico to Focus on Rape Cases*, ASSOCIATED PRESS (Mar. 4, 2020), <https://apnews.com/article/2ac795525799f93446a6106d665dde85>.

276. *Id.*

277. See Brown, *supra* note 23, at 189–90 (explaining “production efficiency” in the criminal law context); DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW 164 (2016) (arguing that adjudicating cases more cheaply allows the government to prosecute more charges without paying for more prosecutors).

278. See generally Brown, *supra* note 23.

279. See, e.g., Natapoff, *supra* note 23, at 1059; see also *supra* note 258 and accompanying text.

280. Other “free lunches” such as the correctional free lunch—whereby states pay for prisons rather than counties who prosecute the crimes, civil forfeitures, fines and fees, and to a certain extent the financial incentives around money bail—allow prosecutors to evade their budget constraints as well. See Gold, *supra* note 260, at 1284–89.

have argued.²⁸¹ To put it differently, rather than take on additional cases, volunteers could simply add prosecutorial time to the office's existing cases.²⁸² But I share the skepticism of the ACLU and others that more labor will not amount to more prosecution. That skepticism has prompted protests over Houston's volunteer prosecutor program for low-level misdemeanors.²⁸³ The U.S. Attorney's Office for the Eastern District of California is looking for volunteers in two different offices to commit to at least a full year of unpaid federal misdemeanor prosecutions.²⁸⁴ Prosecutors seem to be telling the truth when they say they hire volunteer prosecutors to bring more cases:²⁸⁵ History has shown that more prosecutors do yield more charges, often disproportionately so, as the push for more efficient prosecution continues.²⁸⁶ State court data from 1974–2005 demonstrates a 400% increase in felony convictions with a 59% increase in prosecutors.²⁸⁷

There are a few instances in the press coverage of prosecutors using or discussing using free labor for means other than to prosecute cases that thus do not lead to net-widening. In Ingham County, Michigan, for instance, the lead prosecutor planned to enlist the help of a former prosecutor on a volunteer basis to help select cases in which to make commutation requests to the governor.²⁸⁸ The Lake

281. See generally Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261 (2011) (advocating increased funding for prosecutors to reduce caseload pressure).

282. See, e.g., Press Release, Baker Botts LLP, *supra* note 268 (noting that the partnership program is meant to lighten the existing workload on prosecutors rather than facilitate prosecuting more cases). Investigating whether adding volunteer prosecutors actually yields more cases would be a worthwhile empirical project.

283. Press Release, ACLU of Tex., ACLU of Texas Statement on Harris County DA Ogg's Plan to Use Private Attorneys as Prosecutors (Feb. 25, 2020), <https://www.aclutx.org/en/press-releases/aclu-texas-statement-harris-county-da-oggs-plan-use-private-attorneys-prosecutors> (criticizing the volunteer prosecutor program for "expanding the government's capacity to pursue misdemeanors"); see also, e.g., Ketterer, *supra* note 27 (describing the concerns of one local activist that the volunteer prosecutor program merely permits inexperienced attorneys to gain prosecutorial experience at the expense of the Black and Hispanic communities).

284. *Special Assistant U.S. Attorney (Uncompensated)*, E.D. OF CAL. U.S. ATT'Y'S OFF., <https://www.justice.gov/legal-careers/job/special-assistant-us-attorney-uncompensated-5> (Fresno); *Special Assistant U.S. Attorney (Uncompensated)*, E.D. OF CAL. U.S. ATT'Y'S OFF., <https://www.justice.gov/legal-careers/job/special-assistant-us-attorney-uncompensated-6> (Sacramento).

285. Klass, *supra* note 79 (explaining that volunteer prosecutors cleared a backlog of cases); Scannell, *supra* note 42 ("Having another [prosecutor] to handle cases just means we can do more cases."); Semuels, *supra* note 26 (City Attorney: "If it wasn't for this program, we wouldn't have a criminal division . . .").

286. See BROWN, *supra* note 277, at 164 (arguing that adjudicating cases more cheaply allows the government to prosecute more charges without paying for more prosecutors).

287. Brown, *supra* note 23, at 203–04; see also Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUST. 395, 397 (2017) (collecting sources tracking a huge increase in prosecutors coinciding with growing incarceration rates in the 1990s).

288. Kyle Kaminski, *Ingham County Murderers May Get Second Chance: Prosecutor Looks to Commute Certain Life Prison Sentences*, LANSING CITY PULSE (Mich.) (Jan. 30, 2020), https://www.lansingcitypulse.com/stories/ingham-county-murderers-may-get-second-chance,13789?fbclid=IwAR2ID-J4AH_2UU_snM6yeyqmuswDzZ6GLiAd-BTKHgIoNJdpeX8C9OVMtpM.

County, Illinois District Attorney created a task force of volunteer former prosecutors and judges to examine innocence claims.²⁸⁹

Budget constraints may be legislatures' *intentional* efforts to constrain criminal law enforcement. It is a standard (and accurate) story that criminal codes are broad and deep.²⁹⁰ Prosecutors can charge any given case from an extensive menu of options that affords them varying degrees of seriousness, different available (or even mandatory) sentencing ranges, and different collateral consequences. One might then be tempted to conclude that legislatures who pass these extensive criminal codes seek vast criminal law enforcement. But there is reason to think instead that the vast breadth of criminal law is an "insincere rule,"²⁹¹ and that legislatures instead choose budgets as their preferred way to constrain the reach of criminal law.²⁹² "What legislatures give with one hand—expansive, redundant codes—they restrict with the other by limiting prosecutors' resources, so that they cannot enforce every crime on the books," as Darryl Brown argues.²⁹³ Law enforcement officials could "crackdown" on particular types of cases at particular times,²⁹⁴ but they could not afford full enforcement of all criminal law.

But even if limited budgets are not *intended* to constrain criminal law, they nonetheless play that important role.²⁹⁵ As explained in greater detail below, fiscal pressure has been and continues to be an important force driving reforms toward less incarceration and prosecutorial restraint.²⁹⁶ Moreover, even for those who do not share my decarceral inclinations, there remains good sense to the notion that "[i]f there is not political will to pay for a given initiative out of public funds—to do it the hard way, as it were—perhaps it should not be done at all."²⁹⁷ There may be something useful about the public having to live with the consequences of our

289. Editorial, *It's the Final (Election Day) Countdown*, CHI. TRIB. (Nov. 2, 2020), <https://www.chicagotribune.com/opinion/editorials/ct-editorial-general-election-breen-batinick-nerheim-mwrd-20201102-hmitjou3ejh4rmlflksjbpq4-story.html>. A candidate for State's Attorney in Winnebago County, Illinois, proposed creating a similar wrongful conviction unit staffed in part on a volunteer basis by former prosecutors. See Kevin Haas, *Republicans Vow to Revamp State's Attorney's Office J. Hanley and David Gill Are Competing for GOP Nomination in March Primary*, ROCKFORD REGISTER STAR (Ill.) (Feb. 2, 2020), <https://www.rstar.com/story/news/politics/courts/2020/02/01/republicans-vow-to-revamp-state/1786836007/>.

290. See generally William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (discussing the depth and breadth of criminal codes and the resulting menu of options for prosecutors).

291. See Michael D. Gilbert, *Insincere Rules*, 101 VA. L. REV. 2185, 2206–12 (2015) (explaining "insincere rules" and their virtues for legislators, noting that the breadth of the criminal law on the books makes nearly everyone a felon).

292. Brown, *supra* note 261, at 257.

293. *Id.*

294. See generally Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31 (2017) (discussing the phenomenon of "crackdowns" and identifying normative principles for when crackdowns constitute good governance).

295. See, e.g., Gold, *supra* note 260; Gold, *supra* note 257.

296. Legislative sensitivity to cost is the most potent factor combatting the pathological politics of criminal law and its one-way ratchet toward increased criminalization. Gold, *supra* note 257, at 337–38.

297. Lemos & Charles, *supra* note 35, at 1185.

preferred levels of government spending so that we can make informed choices as to whether they are adequate.²⁹⁸

The fact that many volunteer prosecutors prosecute primarily misdemeanors or drug crimes exacerbates the net-widening concern.²⁹⁹ Misdemeanor prosecution entails huge numbers of cases churned with little due process protection and little effort expended to discern whether a particular defendant has committed the alleged crime.³⁰⁰ In turn, police discretion to arrest proves largely outcome-determinative of misdemeanor convictions, and policing decisions to concentrate enforcement casts a disproportionately large net over poor communities of color.³⁰¹ Reducing the ostensible stakes of a misdemeanor conviction, such as through decriminalization and elimination of jail time, permits criminal law to proceed with even less process and thus widens its net by allowing the same resources to be spread even further.³⁰² Bringing in more people to prosecute crime for free has a similar effect—affording more human resources over which the job of prosecution can be spread. Combining these phenomenon—less process for defendants and more prosecutors to bring these cases—means that prosecutors can bring cases that they otherwise would not have. That is net-widening.

In short, this free labor is directed at low-value prosecutions. Indeed, I have suggested elsewhere that a public better informed about the costs of prosecution would wish for fewer drug prosecutions and less spending in overpoliced neighborhoods, such as the \$11 million per year spent in a nine-block area of Phoenix's South Mountain neighborhood.³⁰³ The size of the net is hugely consequential in criminal law. To begin with, it would be awful if governments provided sufficient resources to prosecute *all* behavior that constitutes a crime under existing statutes.³⁰⁴ That prosecutors (and police) must prioritize their limited resources provides the most meaningful constraint on the reach of criminal law. But supplementing those

298. See *id.* at 1187.

299. See, e.g., Klass, *supra* note 79; London, *supra* note 80; see also *supra* Part III.A. Although the Albuquerque, New Mexico, volunteer prosecutor program focused on serious, violent felonies by tasking those folks with addressing a backlog of rape cases, that program deviates quite substantially from the norm. See *Special Prosecutors in New Mexico to Focus on Rape Cases*, *supra* note 275.

300. See Alexandra Natapoff, *The High Stakes of Low-Level Criminal Justice*, 128 YALE L.J. 1648, 1651 (2019) (describing misdemeanor processing as “[l]ight on due process, heavy on informal controls, and relatively uninterested in evidence or culpability”). See also generally Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014) (arguing that the misdemeanor system in New York abandoned an “adjudicative model” designed to discern individual guilt in favor of a “managerial model” that seeks to track and supervise particular populations).

301. See Natapoff, *supra* note 248, at 1317–18, 1365–72; see also Mayson & Stevenson, *supra* note 5, at 978–79 (arguing that while misdemeanor systems vary dramatically from place to place, they consistently burden poor communities of color at a disproportionately high rate).

302. See Natapoff, *supra* note 23, at 1059.

303. Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 114 (2011); see also Gary Fields, *Hidden Costs: Communities Pay Price of High Prison Rate; Phoenix Neighborhood's Missing Men*, WALL ST. J. (July 10, 2008), <https://www.wsj.com/articles/SB121565329254241389>.

304. See KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 164 n.4 (1969) (“Anything approaching full enforcement of present statutes would be unthinkable.”).

constrained resources with free labor might well yield more social harm than good, and legislative decisions not to allocate more money can quite reasonably be seen as supporting that notion.

Volunteer prosecutors are like some other prosecutor pay models insofar as they seek to help prosecutors' offices avoid bearing the full costs of their decisions. Grant-funded prosecutor positions provide labor that is free to the county employing the prosecutor because another entity (usually the federal government) is picking up the tab.³⁰⁵ Although they are not free, awarding prosecution contracts to the lowest bidder also helps limit the marginal cost of prosecution.³⁰⁶ These instances of increased resources likely yield more prosecutions than would paying more for labor, just as they were designed to do.³⁰⁷

C. *Volunteer Prosecution as Free Lunch*

Obtaining free or cheap labor is not the only troublesome feature of criminal law that allows prosecutors to avoid bearing the full marginal costs of their decisions.³⁰⁸ Criminal law finds misaligned incentives—or free lunches—in several contexts. The classic “correctional free lunch” describes the misalignment whereby counties fund prosecutors but states pay for prisons; that misalignment provides prosecutors with a “correctional free lunch” insofar as county prosecutors spend the state’s money to incarcerate convicted defendants.³⁰⁹ Another form of correctional free lunch appears even within county budgets.³¹⁰ Prosecutors’ offices do not control the jail budget even though both are pieces of the county’s budget, and thus prosecutors can consume more of the jail’s budget than they would if they

305. See Wright, *supra* note 54, at 227 (“It is common for a prosecutor’s office to obtain federal grant money or private grant funds to pay the salaries of ADAs or support staff who are devoted to particular enforcement efforts. . . . While these grants typically add one or two positions to an office only for a limited period of years, in the smaller offices one additional prosecutor or staff member can make an enormous difference.”).

306. See generally Romero, *supra* note 37.

307. See Stephanos Bibas, *Sacrificing Quantity for Quality: Better Focusing Prosecutors’ Scarce Resources*, 106 NW. U. L. REV. COLLOQUY 138, 138 (2011) (“Throwing money at this problem [of excessive prosecutor caseloads] would only pour fuel on the fire, encouraging prosecutors to widen their nets in the inexhaustible sea of potential cases.”); Josh Bowers, *Physician, Heal Thyself: Discretion and the Problem of Excessive Prosecutorial Caseloads*, A Response to Adam Gershowitz and Laura Killinger, 106 NW. U. L. REV. COLLOQUY 143, 154–55 (2011) (arguing that more funding for prosecutors would likely lead to more prosecutions).

308. See, e.g., Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 194–204 (2017) (discussing structural misalignment problems in criminal law); Beth A. Colgan, *Paying for Gideon*, 99 IOWA L. REV. 1929, 1931–32 (2014) (explaining that despite the purportedly simple promise that the government will pay for counsel for indigent criminal defendants, such defendants are frequently assessed fees for that counsel); Gold, *supra* note 260, at 1284–89 (adding financial incentives surrounding pretrial detention to the already-recognized ways that criminal law is too cheap).

309. FRANKLIN ZIMRING & GORDON J. HAWKINS, *THE SCALE OF IMPRISONMENT* 140 (1991) (coining the term “correctional free lunch”); see also Bierschbach & Bibas, *supra* note 308, at 194–204 (discussing structural misalignment problems in criminal law).

310. See, e.g., Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should the Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 680–81 (2016); Bierschbach & Bibas, *supra* note 308, at 198–204.

were consuming their own budget.³¹¹ Philadelphia District Attorney Larry Krasner has sought to mitigate the free lunch problem by requiring his prosecutors to state the cost of the sentence they seek and to justify that cost every time they seek incarceration of a defendant.³¹²

Prosecutors can also aggrandize their budgets through civil asset forfeiture.³¹³ In New York in particular, some offices draw huge amounts of revenue from such forfeiture: As of June 30, 2018, the Manhattan District Attorney's Office, for example, had forfeiture holdings of approximately \$734 million.³¹⁴ Those holdings outstrip the office's annual operating budget many times over.³¹⁵ Queens's forfeiture holdings were \$113.5 million.³¹⁶ That forfeiture revenue goes into prosecutors' office budgets and reduces the marginal cost of cases where forfeitures are available, which tends to over-incentivize drug prosecutions.

Similarly, criminal "justice" fees not only allow the government to shift some of the enforcement cost onto defendants, but indeed the proceeds sometimes come right back to the prosecutor's office and thus lower the marginal costs of prosecutions.³¹⁷ Criminal defendants are routinely charged fees for "law enforcement investigations, prosecutors' preparation for trial, issuance of arrest warrants, and impaneling of a jury."³¹⁸ Defendants are charged for the privilege of being detained pretrial and incarcerated postconviction.³¹⁹ "[M]illions of American defendants too poor to pay for an attorney [are] later required . . . to pay for their counsels'

311. Gershowitz, *supra* note 310, at 680–81.

312. EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 168 (2019).

313. See, e.g., Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 56 (1998) (discussing the perverse incentives created when prosecutors' offices recoup forfeiture proceeds); Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1195 (explaining how forfeiture money going back to prosecutors' offices or police affects appropriations). It is not my view that prosecutors seeking to aggrandize their budgets to better effectuate their public role is morally culpable, only that it evades an important democratic constraint.

314. Yoav Gonen, *Manhattan DA is Flush with Asset Forfeitures*, N.Y. POST (Feb. 14, 2018, 3:02 PM), <https://nypost.com/2018/02/14/manhattan-da-is-flush-with-asset-forfeitures/>.

315. *Id.*

316. *Id.*

317. See, e.g., STATE OF ALA., UNIFIED JUD. SYS., FEE DISTRIBUTION CHART, <https://www.alacourt.gov/docs/FEE%20DISTRIBUTION%20CHART.pdf> (providing a breakdown of where proceeds from various fees are distributed, including the "DA Fund"); see also ALA. CODE § 12-17-197 (2021) (preserving a separate "district attorney's fund" "for the payment of any and all expenses to be incurred by [the district attorney] for law enforcement and in the discharge of the duties of his office, as he sees fit"). This reasoning holds at least to the extent that these fees can be collected at all from largely indigent defendants.

For a more detailed explanation of criminal law fines and fees, see generally Beth A. Colgan, *Fines, Fees, and Forfeitures*, in 4 REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 205, 209, 211–12 (Erik Luna ed., 2017); Colgan, *supra* note 308, at 1931–32.

318. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 286 (2014). Alabama, for instance, fills the coffers of its "Fair Trial Tax Fund" by charging fees to criminal defendants collecting nearly \$2.5 million in 2017 alone. ALA. APPLESEED CTR. FOR LAW & JUST., UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA'S RACIAL WEALTH DIVIDE 17–19 (2018), <https://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf>.

319. Colgan, *supra* note 318, at 287–88; Logan & Wright, *supra* note 313, at 1192.

services.³²⁰ If they receive a sentence of probation or are released on parole, defendants pay for those privileges too.³²¹

Pretrial detention regulated largely by cash bail creates a sort of correctional free lunch by allowing the county to avoid bearing some of the financial risk of overusing pretrial incarceration as an interim restraint.³²² By way of comparison, parties seeking interim relief in the civil system must bear such financial risk to better align their incentives.³²³

Free lunches allow prosecutors' offices to overindulge in criminal prosecution in ways that evade democratic accountability.³²⁴ To be clear, I do not think that prosecutors skirting their budget constraints to do what they think is in the public interest is *morally* wrong. But it bears remembering that prosecutors largely control the spigot of prosecutions and can wield their discretion to charge fewer cases.³²⁵ If the budget constraint is indeed too tight to do the job of prosecution well, a more politically accountable approach than hiring free labor would be for prosecutors to seek increased funding from the legislature. Perhaps legislatures would be happy to increase the appropriation for the prosecutor's office and perhaps even with an avowed aim of pursuing more cases. But an increased budget is (obviously) not costless, and considering whether to incur higher costs helps constrain the expansion of criminal law.³²⁶ Such a conversation would entail stakeholders discussing priorities in criminal law and whether the benefit of more prosecutions would be worth its cost.³²⁷

320. Colgan, *supra* note 308, at 1929. Every jurisdiction in the country has recoupment authority to require defendants to pay fees for their own lawyers. *Id.* at 1931 n.4. Of the 28 states and the District of Columbia that have indigent defense systems, 23 require defendants to pay for their attorneys. SUZANNE M. STRONG, BUREAU OF JUST. STAT., U.S. DEPT. OF JUST., STATE-ADMINISTERED INDIGENT DEFENSE SYSTEMS, 2013, at 1, 7 (2016). The constitutionality of assessing public defender fees against the indigent is questionable. See Kate Levine, Note, *If You Cannot Afford a Lawyer: Assessing the Constitutionality of Massachusetts's Reimbursement Statute*, 42 HARV. C.R.-C.L. L. REV. 191, 193 n.12 (2007) (collecting sources).

321. Colgan, *supra* note 318, at 287–88.

322. See generally Gold, *supra* note 260.

323. *Id.*; see also Dan B. Dobbs, *Should Security Be Required as a Pre-Condition to Provisional Injunctive Relief?*, 52 N.C. L. REV. 1091, 1093–94 (1974) (discussing the reasoning underlying the injunction bond requirement in the civil system).

324. See Gold, *supra* note 260, at 1284–89.

325. Russell M. Gold, *Jail as Injunction*, 107 GEO. L.J. 501, 549 (2019); see also Bowers, *supra* note 307, at 145 (“[T]he prosecutor helps make the cases . . . [and] [t]hus . . . has a mechanism to ease her own pain—that is, prosecutorial discretion.”). Some jurisdictions allow police to file cases without prosecutor involvement. See, e.g., N.C. GEN. STAT. ANN. § 15A-302; Alexandra Natapoff, *A Stop Is Just a Stop: Terry's Formalism*, 15 OHIO ST. J. CRIM. L. 113, 125 (2017) (discussing police direct-file authority in some municipal courts). Occasionally, judges may refuse prosecutors' efforts to dismiss charges, in which cases prosecutors do not entirely control the spigot. See, e.g., *In re Underwood*, Nos. 190497 & 190498, 2019 WL 9078712, at *1 (Va. May 2, 2019).

326. See Brown, *supra* note 261, at 252; Ronald F. Wright, *The Power of Bureaucracy in the Response to Blakely and Booker*, 43 HOUS. L. REV. 389, 397 (2006); Gold, *supra* note 257, at 337–38.

327. See *Developments in the Law: Policing*, 128 HARV. L. REV. 1706, 1734 (2015) (discussing the accountability problem caused by circumventing “normal budgeting politics” through fees, probation supervision for profit, and forfeitures); Katherine Baicker & Mireille Jacobson, *Finders Keepers: Forfeiture Laws, Policing Incentives, and Local Budgets*, 91 J. PUB. ECON. 2113, 2135 (2007) (explaining that state and local legislatures account for forfeiture proceeds in their budgeting).

Ending or reducing these correctional free lunches holds substantial promise for combatting the pathological politics of criminal law that lead to increased enforcement power. Although legislatures typically have substantial institutional interests in increasing prosecutors' power by passing deeper and broader criminal laws with harsher penalties, cost concerns cut against those interests.³²⁸ Better interest alignment can and does yield greater restraint in criminal law.³²⁹

Cost concerns help mitigate the pathological politics of criminal law by adding a countervailing interest—at least on the state level.³³⁰ When forced to bear the full costs of their decisions, elected officials sometimes reduce criminal enforcement or at least criminal punishment. Sentencing law is the area in which cost pressures have made the most readily discernable difference in combatting the pathological politics.³³¹ One reason is that sentencing commissions add another institutional actor to the mix that can provide information to legislatures about costs of a particular reform through mechanisms like resource impact statements.³³² That cost information makes cost concerns more salient and provides “political cover” to “avoid soft-on-crime attacks.”³³³ Without institutional actors such as sentencing commissions, the public has no meaningful sense of how much the government spends on criminal law and how it spends that money.³³⁴ Cost concerns have led several states to eliminate mandatory minimums or reinstitute parole.³³⁵

The 1992 sentencing reforms in North Carolina provide an interesting example of the legislature rejecting proposed reforms from the state's sentencing commission because of cost concerns. Cost concerns by a state legislator on the sentencing commission led the commission to propose more modest increases in prison growth than many commissioners would have preferred.³³⁶ And even then the legislature declined to approve the sentencing commission's proposed reforms, requiring instead that the commission go back and craft a proposal that required no

328. See Gold, *supra* note 257, at 337–38.

329. See Bierschbach & Bibas, *supra* note 308, at 193–94 (explaining that “in some respects scarcity is a feature, not a bug” in criminal law and arguing for better-aligned structural incentives); Kathryn A. Sabbeth, *Simplicity as Justice*, 2018 WIS. L. REV. 287, 292 (explaining that streamlining eviction procedures reduces pressure to reform housing laws and promote affordable housing).

330. Cost concerns seem largely irrelevant in federal criminal law because Congress need not balance its budget and because corrections comprise a small portion of the federal budget. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 810–11 (2005); Wright, *supra* note 326, at 404.

331. Gold, *supra* note 257, at 337–38; see also Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina, 1980-2000*, 29 CRIME & JUST. 39, 40–41 (2002) (describing “a fiscal planner’s approach to sentencing” that recognizes “the public’s limited willingness to pay for” what it assumed to be a “public good” of longer prison terms).

332. Barkow, *supra* note 330, at 806.

333. *Id.* at 811.

334. See Brown, *supra* note 199, at 353; Gold, *supra* note 303, at 114–16.

335. See Nora V. Demleitner, *Is There a Future for Leniency in the U.S. Criminal Justice System?*, 103 MICH. L. REV. 1231, 1270 (2005); Ronald F. Wright, *Portable Minimalism in Sentencing Politics*, 2011 CARDOZO L. REV. DE NOVO 9, 10 (2011).

336. Wright, *supra* note 331, at 70–73.

growth above the then-current prison resources.³³⁷ Ultimately the sentencing commission provided a cost-neutral alternative to the legislature that the commission itself did not endorse, and the legislature passed it nearly unanimously.³³⁸

Outside the sentencing arena, recent empirical evidence shows that better aligning incentives can make a huge difference in reducing the number of prosecutions and combatting mass incarceration.³³⁹ One study considers the results of a natural experiment in which California devolved more of the cost of housing juvenile defendants to the county level rather than leaving it at the state level—an effort to better align incentives.³⁴⁰ That study found an estimated decrease in youth incarceration of at least 38% and perhaps as high as 63%—a huge decrease, particularly at a time when adult incarceration was increasing.³⁴¹ Opportunities to reduce mass incarceration in ways that continue to allow experienced actors like prosecutors to determine how best to deploy their scarce resources are particularly appealing. In short, cost matters, even in criminal law.³⁴²

At equilibrium, the government would pursue criminal cases only when the marginal social benefit of a prosecution exceeds the marginal social cost.³⁴³ There are many reasons why such an equilibrium is hard to actually achieve in practice.³⁴⁴ For instance, criminal law enforcement inflicts massive social costs on defendants, their loved ones, and their communities. Those costs are externalized and thus do not factor into governments' calculations of the right level of criminal enforcement absent some sort of Pigouvian tax—a politically unpalatable measure.³⁴⁵ Even if the government were to bear the complete financial costs of prosecution, criminal law enforcement would still be too cheap. But the perfect need not be the enemy of

337. *Id.* at 73.

338. *Id.* at 75–76.

339. Aurélie Ouss, *Misaligned Incentives and the Scale of Incarceration in the United States*, 191 J. PUB. ECON. 104285, at 12 (2020), https://aouss.github.io/ouss_incentives_justice.pdf (finding that criminal justice decisionmaking is highly cost sensitive insofar as devolving costs of juvenile incarceration in California has substantially reduced juvenile incarceration).

340. More specifically, counties had previously paid a flat \$25 per month fee to the state per incarcerated juvenile, but the California legislature raised those fees that the county bears significantly in 1996 and scaled them based on the severity of offense, with more serious offenses requiring a lower fee. *Id.* at 3–4.

341. *Id.* at 5.

342. See Russell M. Gold & Ronald F. Wright, *The Political Patterns of Bail Reform*, 55 WAKE FOREST L. REV. 743, 751 (2020) (explaining how cost concerns help forge coalitions of political interests that have facilitated bail reform).

343. See Gold, *supra* note 303, at 71.

344. Criminal cases impose substantial costs on defendants and their families that the government decisionmakers need not internalize. A prior proposal sought to encourage prosecutors to internalize the costs of criminal defense, *see generally id.*, but forcing internalization of the non-monetary costs facing defendants would be quite difficult.

345. *Cf. generally* Gold, *supra* note 325 (arguing that courts should explicitly consider the harm that pretrial detention inflicts on defendants and their families when deciding whether to impose it to increase salience of these externalized costs); Gold, *supra* note 303, at 82, 110 (seeking to increase the salience of the financial costs that the government already bears in criminal law).

the good; reducing misalignments is valuable nonetheless in moving towards a prosecutorial equilibrium.

To be clear, this Article's claims are systemic; it does not seek to vilify volunteer prosecutors or the offices that hire them. It is understandable that budgetary pressures have pushed offices to find ways to do more with their limited resources. On the federal level, for instance, the Great Recession-era forced budget cuts from sequestration and an accompanying hiring freeze prompted U.S. Attorney's Offices to look for free labor.³⁴⁶ So too has financial downturn and ensuing budgetary tightening prompted state prosecutors' offices to hire volunteer prosecutors.³⁴⁷ But these solutions merely provide a release valve that allows legislatures to evade having to resolve their budget disputes.

IV. WEALTH SKEWING

The sociology-of-work literature suggests that volunteer prosecutor positions may be more available to those who come from wealth. Although wealth skewing in the prosecutor workforce is a topic that warrants further study and analysis elsewhere, for present purposes it is worth noting that wealth skewing would be particularly troubling for prosecutors because of the nature of their work. Prosecutors wield immense discretionary authority over largely poor defendants and should deploy that power in a way that serves their community as a whole.³⁴⁸ If prosecutors come from wealth, they will be less likely to identify with most of the defendants who they could then choose to prosecute and may tend to be more punitive.³⁴⁹ Moreover, volunteer prosecutors are merely the lowest extreme of a generally meager pay scale.³⁵⁰ In that regard, volunteer prosecutors should prompt us to

346. See Katherine Newman, *The Great Recession and the Pressure on Workplace Rights*, 88 CHI.-KENT L. REV. 529, 536–37 (2013); Boyer, *supra* note 96; Davidson, *supra* note 96; Scannell, *supra* note 42.

347. See, e.g., Johnson, *supra* note 109; Orlov, *supra* note 25; *District Attorney Interns and Volunteers Recognized*, *supra* note 126; see also Billington, *supra* note 82 (describing a program of volunteer prosecutors built from retired lawyers to allow the office to prosecute more cases without affecting its budget).

348. Gold, *supra* note 303, at 114 (arguing that prosecutors should set enforcement priorities to serve their community as a whole).

349. See Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1111–12 & n.263 (2014) (noting that prosecutors' tendency to treat defendants with whom they identify less harshly may map onto race and class and thus systematically favor middle-class defendants); see also Lisa Frohmann, *Convictability and Discordant Locales: Reproducing Race, Class, and Gender Ideologies in Prosecutorial Decisionmaking*, 31 L. & SOC'Y REV. 531, 537, 552 (1997) (explaining how prosecutors' assessments of the likelihood of conviction at the charging stage constructs "locale" in a way that inadvertently reproduces race, class, and gender ideologies).

350. See *District Attorney Salaries*, BIGLAW INVESTOR, <https://www.biglawinvestor.com/district-attorney-salary/> [https://perma.cc/QAF5-8SEP] (last visited Jan. 11, 2022) (reporting salary data for prosecutor offices in 50 largest cities and the largest cities in each state). To the extent that volunteer prosecutors gain an advantage in permanent prosecutor hiring—the very reason that some graduates accept entry-level volunteer positions—the existence of entry-level volunteer prosecutor positions risks skewing the workforce of career prosecutors based on wealth.

The "volunteer prosecutors" who worked without pay from the government but received partial pay from law firms during the Great Recession did not pose the same concern about wealth skewing as do genuine volunteers.

consider more broadly the ways in which prosecutor salaries—and thus the opportunity cost of taking a prosecutor job—may filter that sector of legal employment by wealth, at least to some extent.³⁵¹

The most prominent normative concern in the literature and popular press about unpaid work is that it tracks and reinforces class divisions.³⁵² In its mildest version, the claim comes simply as a descriptive assertion that class and family income are higher amongst volunteers than non-volunteers.³⁵³ Other scholarship explains the causal mechanism that leads to far greater opportunity for the wealthy to participate in unpaid work than for those of lesser means and laments this disparity. Simply put, “[c]lass continues to shape choices about unpaid work, in part because of the resources that this work commands.”³⁵⁴ “[M]ost young Americans, in most circumstances, cannot afford to work for free or less than minimum wage for any appreciable period of time.”³⁵⁵ Upper class individuals, by contrast, “are able to

See supra note 104 and accompanying text. They did, however, raise the same net-widening concerns as other volunteer prosecutors because they do not cost the government anything.

351. *See* Email from Scott L. Cummings, Robert Henigson Professor of Legal Ethics, UCLA Sch. of L., to author (May 5, 2020, 12:59 pm EDT) (on file with author) (finding, based on a large survey encompassing a decade of graduates of six California law schools, that those law school graduates who remained prosecutors at least seven years after graduation—the study’s “current job” field—were less likely to be socioeconomically disadvantaged than respondents generally); *see also* Catherine Albiston, Scott L. Cummings, and Richard L. Abel, *Making Public Interest Lawyers in a Time of Crisis: An Evidence-Based Approach*, 34 GEO. J. LEGAL ETHICS 223, 244 (2021) (recounting that early entrants to the Federal Legal Services Program came from more privileged backgrounds, noting that this disparity is likely attributable to the low salaries and financial resources of those law school graduates).

352. *See, e.g.,* PERLIN, *supra* note 18, at 102 (quoting an interviewee: “internships enable those who already have some enabling”); Daniel Akst, *Unpaid Internships? File Under “Hypocrisy,”* L.A. TIMES (June 15, 2010), <https://www.latimes.com/archives/la-xpm-2010-jun-15-la-oe-akst-internships-20100615-story.html> (criticizing unpaid internships for perpetuating class privilege); Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (Apr. 2, 2010), <https://www.nytimes.com/2010/04/03/business/03intern.html> (same); McDonald & Grant-Smith, *supra* note 143, at 40–41 (same).

353. *See* PERLIN, *supra* note 18, at 165 (explaining that a straw poll at a summer intern lunch in DC found that more than 60% of the interns present had parents earning more than \$100,000 per year—a fact shared by only 20% of all families of college students); Taylor, *supra* note 126, at 488–89 (noting the “much higher rate” of volunteering among “those who are educated and with higher socio-economic status”); *see also id.* at 492 (recounting that GreenPeace volunteers largely come from the middle class).

354. Taylor, *supra* note 126, at 495; *see also, e.g.,* Leonard et al., *supra* note 154, at 392 (discussing scholarly work regarding the concern that “the ability to secure internships is unequally distributed [and] strongly mediated by social class”); Elaine Swan, *The Internship Class: Subjectivity and Inequalities – Gender, Race and Class*, in HANDBOOK OF GENDERED CAREERS IN MANAGEMENT 30, 34 (2015) (“[I]nternships exclude the young people who cannot afford them, or do not have . . . the contacts or the parental backing to take part.” (citations omitted)). *But see* Wil Hunt & Peter Scott, *Participation in Paid and Unpaid Internships Among Creative and Communications Graduates: Does Class Advantage Play a Part?*, in HIGHER EDUCATION AND SOCIAL INEQUALITIES: UNIVERSITY ADMISSIONS, EXPERIENCES, AND OUTCOMES 190, 199–200 (2018) (finding that those from more advantaged backgrounds were more able to secure *paid* internships but that there was no statistically significant connection between socioeconomic advantage and unpaid internships).

355. PERLIN, *supra* note 18, at 160; *see also, e.g.,* Debra D. Burke & Robert Carton, *The Pedagogical, Legal, and Ethical Implications of Unpaid Internships*, 30 J. LEGAL STUD. EDUC. 99, 123 (2013) (“Who but the economically advantaged can afford to pay tuition and living costs while working without remuneration?”); Smith, *supra* note 163, at 293 (“Those who are able to take advantage of unpaid internships are usually those who

undertake unpaid work because they have income from inherited wealth and property, which means they do not have to engage in [paid] employment.”³⁵⁶ It is far more plausible, for instance, for someone to work without pay if they can live for free in their family’s pied-à-terre, if they do not have loan payments because their parents paid for their college tuition and living expenses than for someone without those advantages.³⁵⁷ Internships can also amplify privilege because many unpaid jobs are obtained through familial connections, and the upper classes are far more likely to have such connections.³⁵⁸

These same concerns about unpaid work appear in legal scholarship, albeit to a much lesser extent.³⁵⁹

While there is plenty of reason to suspect it, there has not been sufficient news coverage to determine whether volunteer prosecution indeed skews opportunities toward the wealthy. That topic will thus have to be left for further study.³⁶⁰

If volunteer prosecution—or prosecution jobs more broadly—skews toward the wealthy, that dynamic raises different concerns than those about unpaid work in other sectors. Prosecutors exercise vast discretion over largely poor defendants and are supposed to act on behalf of their entire community. Wealth-filtering would make prosecutors less able to identify with and understand the majority of defendants over whom they exercise discretion and would ultimately tend to skew prosecutions in a punitive direction.³⁶¹

Prosecutors possess broad discretion in how to resolve cases, including whether and on what terms to offer plea bargains.³⁶² Of course, their authority is limited by

have other means of support, such as parents who are willing and able to cover the intern’s living expenses for a multi-month, unpaid position.”)

356. Taylor, *supra* note 126, at 490.

357. *See id.* at 496.

358. *See* PERLIN, *supra* note 18, at 99–112; Swan, *supra* note 354, at 34.

359. *See, e.g.,* Burke & Carton, *supra* note 355, at 123 (lamenting that unpaid internships for law students disproportionately burden students from lower socioeconomic classes); Yamada, *supra* note 39, at 218–19 (articulating concerns that the internship economy exacerbates class divides); Curiale, *supra* note 76 (arguing for changes to labor laws to address the concern that unpaid work acts as a gateway to paid work and stratifies workers based on wealth).

360. There have, however, been some quite plausible assertions that such a skew will occur, which suggests that further empirical investigation is warranted. *See, e.g.,* Cordero, *supra* note 38 (noting that unpaid Special Assistant U.S. Attorney positions “run the risk of excluding those students who have worked particularly hard to pay their own way through law school, or, as many do, have a substantial amount of debt,” and thus “likely are pulling in only those graduates who have the luxury of being able to rely on family or spouses to carry them yet another year financially”); Scannell, *supra* note 42 (“You’re radically restricting your pool if you’re looking to people who are able to take the year off and work without pay The nature of that population gets somewhat more troubling when you assume that people who worked at an office will have a leg-up when hiring starts.” (quoting Professor Daniel Richman, Colum. L. Sch.)); Ball, *supra* note 38 (raising similar concerns).

361. Concerns about wealth skewing recall arguments that white flight has left control of criminal law in the hands of voters for whom “crime is an abstraction, not a problem that defines neighborhood life” and who thus “have little stake in how the justice system operates.” WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 6–7 (2011).

362. *See* Fairfax, *supra* note 37, at 428.

defendants' willingness to accept those bargains,³⁶³ but the amount of leverage at prosecutors' disposal makes most defendants likely to plead guilty.³⁶⁴ Judges need to approve pleas, but that review is "highly deferential."³⁶⁵ Prosecutors are free to threaten and even bring a more serious charge to procure a guilty plea to a lesser charge.³⁶⁶ So too can prosecutors use the threat of the death penalty to secure a guilty plea.³⁶⁷ In sum, as Rachel Barkow puts it: "In the 95% of cases that are not tried before a federal judge or jury, there are currently no effective legal checks in place to police the manner in which prosecutors exercise their discretion to bring charges, to negotiate pleas, or to set their office policies."³⁶⁸ Rather, prosecutor accountability largely comes down to trusting prosecutors to do the right thing.³⁶⁹ But even for the most well-intentioned prosecutors, the ability to understand the defendant and her situation is crucial to making decisions that serve the often-competing aims of the criminal law.

Numerous scholars have described an empathy gap, whereby prosecutors are structurally impeded from identifying with defendants.³⁷⁰ Prosecutors tend to

363. See Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1231 (2016) ("[P]rosecutors can act strategically and add charges solely if a defendant insists on trial, and they can pressure defendants by leveraging circumstances such as limited defense resources, pretrial detention that disrupts work and family obligations, or the threat of prosecution against family members if defendants refuse to plead guilty." (footnotes omitted)).

364. See Natapoff, *supra* note 248, at 1343 ("The vast majority of U.S. criminal defendants—between 90 and 95 percent—plead guilty.").

365. Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 906 (2007); see also Russell M. Gold, "Clientless" Prosecutors, 51 GA. L. REV. 693, 714–17 (2017) (explaining this deferential review in more detail); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/> ("In actuality, our criminal justice system is almost exclusively a system of plea bargaining, negotiated behind closed doors and with no judicial oversight. The outcome is very largely determined by the prosecutor alone.").

366. See *Bordenkircher v. Hayes*, 434 U.S. 357, 358–59 (1978) (permitting reindictment on a habitual felon charge carrying a life sentence for defendant's crime of forging an \$88 check after defendant had the temerity to exercise his constitutional right to a trial rather than plead guilty).

367. See *Brady v. United States*, 397 U.S. 742, 751, 755 (1970).

368. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009).

369. See Gold, *supra* note 365, at 720 ("Accountability comes down to trusting prosecutors' commitment to public service and professional conscience in a regime where there are not well-established standards to guide them."); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 588 (2009) ("To some extent, we rely on the chief prosecutor's professional conscience: the prosecutor must remain individually committed to the ideal of responsible prosecution. Our most beloved descriptions of the job speak to the importance of a prosecutor doing the job well without any prompting from the outside."); Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUST. 395, 401 (2017) (describing "the prosecutor's sense of justice" as "an essential supplement to the rule of law in the American context").

Budget discipline is another important method of facilitating prosecutor accountability, but volunteer prosecutors tend to undermine that mechanism. See *supra* Part III.

370. See, e.g., Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 38 (1998); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 208–09 (1988); Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 483–87 (1999); Michael A. Simons, *Departing Ways: Uniformity, Disparity and Cooperation in Federal Drug Sentences*, 47 VILL. L. REV. 921, 945

interact with police, victims, and others who are likely to prefer more enforcement, rather than defendants or their loved ones who may desire less.³⁷¹

Prosecutors may nonetheless be able to identify with *some* defendants—particularly those who remind them of themselves³⁷²—but that ability to identify will likely benefit very few defendants. Most criminal defendants are strikingly poor:³⁷³ In 2014 dollars, 72% of incarcerated women between the ages of 27 and 42 earned less than \$22,500 before their incarceration.³⁷⁴ For men of the same age, 57% of the incarcerated earned less than \$22,500 before incarceration, and 78% earned less than \$37,500.³⁷⁵ If volunteer prosecution skews based on wealth (and familial wealth in particular), it will tend to exclude those who know what it is like to live in poverty. Volunteer prosecutors will thus be less likely to see defendants' legal transgressions as errors of judgment or driven by poverty; they may instead be more likely to see defendants as bad people.

For some white-collar defendants, however, wealth skewing for prosecutors would tend to yield lenience: Wealthy prosecutors may be more likely to forgive transgressions by wealthier defendants who work in a professional setting with whom they can more easily identify.³⁷⁶ That most white-collar defendants are also white will exacerbate the problem.³⁷⁷ White-collar crimes typically carry a scienter requirement, which affords doctrinal space for a prosecutor to decide that a trans

(2002); Wright & Levine, *supra* note 349, at 1111 & n.263. For a powerful telling of the role of “othering” and race in carceral narratives, see DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 10–11* (2019).

371. Fisher, *supra* note 370, at 208.

372. Cf. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 328–44 (1987) (discussing the identification phenomenon in the context of unconscious racial bias). Concern over identifying with the defendant based on demographic similarity also drives race-based jury strikes. See, e.g., Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 174 n.84 (1989); Cynthia Lee, *A New Approach to Voir Dire on Racial Bias*, 5 U.C. IRVINE L. REV. 843, 859 (2015); Little, *supra* note 370, at 486. Striking a juror based on race is of course unconstitutional, at least as a matter of black letter law. See *Batson v. Kentucky*, 476 U.S. 79, 97–98 (1986).

373. Forman, *supra* note 253, at 794 (“[P]rison has become the province of the poor and uneducated, even within the black community.”); Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POLICY INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> (finding that “in 2014 dollars, incarcerated people had a median annual income of \$19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages” and that “incarcerated people in all gender, race, and ethnicity groups earned substantially less prior to their incarceration than their non-incarcerated counterparts of similar ages” (emphasis omitted)).

374. Rabuy & Kopf, *supra* note 373 fig.4.

375. *Id.* fig.3.

376. Cf. Davis, *supra* note 370, at 34–38 (describing the empathy gap when prosecutors view defendants as unlike themselves).

377. Max Schanzenbach & Michael L. Yaeger, *Prison Time, Fines, and Federal White-Collar Criminals: The Anatomy of a Racial Disparity*, 96 J. CRIM. L. & CRIMINOLOGY 757, 772–73, 775 (tbl.1 (2006)).

gression made by someone like her was an honest mistake rather than the bad act of a bad actor.³⁷⁸

CONCLUSION

Although we think paradigmatically of prosecutors as full time, paid, government employees, prosecuting for free is not uncommon, particularly among civil lawyers who do *pro bono* prosecution work. The news sources documenting this phenomenon track the sociology of unpaid work literature well and help us understand the models of and motivations for prosecuting for free. Volunteer prosecutors—like unpaid workers in other sectors—are motivated by a combination of instrumental and non-instrumental motivations. The instrumental motivations typically involve improving job prospects, whether to gain an initial foothold in prosecution or the legal market more broadly or whether to set up a career transition later. The non-instrumental motivations center on serving communities and public safety. But one could discern a more concerning motivation too seen through a lens of authoritarian psychology—some people may be willing to prosecute for free because they take pleasure in locking up poor people of color.

As a normative matter, many see volunteer prosecution as a “win-win.” I do not. The practice has upsides: Volunteers gain wonderful experience trying cases and other stand-up time in court or perhaps the public-service-commitment signal that they seek for a future electoral campaign. One particularly compelling form is the entry-level volunteer prosecutor who gets to enter their chosen legal career. That law schools support their graduates to do so also feels good.

But volunteer prosecution raises concerns too. Providing prosecutors’ offices with free labor is troubling; not only does it risk exploiting volunteers, but it causes systemic repercussions unique to criminal law. Free labor allows prosecutors’ offices to cast a wider net to deprive more of its citizens of their liberty than the net the legislature has provided. Such net widening evades budget discipline—an important restraint on prosecutors who have few external accountability measures. Indeed, defunding police has proved a common refrain for reformers and protesters; volunteer prosecution does the opposite of defunding criminal law enforcement—providing more resources for criminal law enforcement that the public need not even pay for.

Some might think volunteer prosecution is less troubling because most volunteers prosecute misdemeanors that are by their nature less serious. I do not. One city attorney says that his office would have no criminal division without volunteers to staff it. But a perfectly sensible reply would be to recognize that the lack of funded positions means that elected officials have decided that misdemeanors are not worth their cost to pursue. Thus, the difficult cost-benefit conversation never happens that would come from prosecutors’ offices having to seek a budget

378. Prosecutors do not *require* doctrinal space to decline to bring charges, but having that space would seem to make a decision not to pursue charges even more likely.

increase if they needed to hire more prosecutors. Misdemeanors disproportionately target poor people of color, so political power is particularly unlikely to prompt this conversation otherwise.

The sociology literature also provides reason to think that volunteer prosecutor positions may be more available to the wealthy who can afford to do unpaid full-time work. That wealth (particularly if it is familial wealth that thus affected the prosecutor's upbringing) may tend to make it harder for prosecutors to identify with largely poor defendants. They will more likely see defendants as "other" rather than as like them.

My objective is not to pillory prosecutors or those willing and able to forgo pay to pursue their desired careers. Nor is it to criticize those who give freely of their time to do what they perceive as community service by prosecuting criminals. My objective is instead to recognize that the benefits of volunteer prosecution also come with overlooked systemic costs. And as with many things in the criminal legal system, those costs will fall disproportionately on poor people of color.

APPENDIX

Date of source	State	County or Municipality	State or Federal	Full Time or Part Time
6/16/2017	Arizona	La Paz County	State	Full Time
7/5/2016	California	Sacramento County	Federal	Full Time
7/3/2016	California	Sacramento County	Federal	Full Time
3/05/2014	California	City and County of San Francisco	State	Full Time
3/04/2014	California	San Mateo County	State	Full Time
5/18/2011	California	Marin County	State	Full Time
3/15/2011	California	Los Angeles	State	Full Time
3/15/2011	California	Sacramento County	State	Full Time
2/21/2011	California	Los Angeles City	State	Full Time
8/2/2010	California	Marin County	State	Full Time
6/25/2010	California	Marin County	State	Full Time
5/21/2011	Connecticut		Federal	Full Time
5/26/2002	Delaware	Statewide	State	Full Time
12/8/2019	Florida	Palm Beach	State	Full Time
6/6/2014	Georgia	Cobb County	State	Full Time
6/6/2014	Georgia	Fulton County	State	Full Time
6/6/2014	Georgia	DeKalb County	State	Full Time
8/1/2013	Georgia	Ware County	State	Full Time
5/18/2011	Georgia	N.D. Ga. and S.D. Ga.	Federal	Full Time

Continued				
Date of source	State	County or Municipality	State or Federal	Full Time or Part Time
7/18/2013	Illinois	S.D. Ill.	Federal	Full Time
12/21/2010	Iowa	Clayton County	State	Full Time
10/25/2012	Louisiana		Federal	Full Time
7/5/2016	Maryland	Statewide	Federal	Full Time
5/20/2011	Maryland		Federal	Full Time
8/2/2010	Maryland	Statewide	Federal	Full Time
10/23/2012	Massachusetts		Federal	Full Time
5/17/2012	Massachusetts	Norfolk County	State	Full Time
1/18/2005	Massachusetts	Essex County	State	Full Time
7/26/2011	New Jersey	Newark, Camden, Trenton	Federal	Full Time
7/26/2011	New Jersey	Statewide	State	Full Time
12/27/2013	New York	St. Lawrence County	State	Full Time
7/25/2012	New York	Kings County	State	Full Time
5/25/1997	New York	Kings County	State	Full Time
10/11/2017	North Carolina	Alamance County	State	Full Time
7/10/2017	North Carolina	Chatham County	State	Full Time
7/26/2013	Oregon	Multnomah County	State	Full Time
9/8/2014	Pennsylvania	Carbon County	State	Full Time
10/28/2012	Pennsylvania		Federal	Full Time

Continued				
Date of source	State	County or Municipality	State or Federal	Full Time or Part Time
7/26/2011	Pennsylvania	Eastern District of Pennsylvania	Federal	Full Time
2/22/2020	South Dakota	Brown County	State	Full Time
10/24/2012	Tennessee		Federal	Full Time
10/26/2012	Texas		Federal	Full Time
5/19/2011	Virginia		Federal	Full Time
8/2/2010	Washington, DC	n/a	Federal	Full Time
10/27/2012	West Virginia		Federal	Full Time
5/9/2016	Wisconsin	Waukesha County	State	Full Time
4/27/2016	Wisconsin	Waukesha County	State	Full Time
10/25/2014	Wisconsin	Milwaukee County	State	Full Time
9/30/2014	Wisconsin	Milwaukee County	State	Full Time
6/8/2013			Federal	Full Time
5/19/2011	Arizona	Maricopa County	State	Part Time
7/23/2019	California	San Francisco	State	Part Time
3/03/2014	California	San Mateo County	State	Part Time
6/18/2013	California	City of Inglewood	State	Part Time
11/23/2010	California	Orange County	State	Part Time

Continued				
Date of source	State	County or Municipality	State or Federal	Full Time or Part Time
11/23/2010	California	Orange County	State	Part Time
5/1/2006	California	Los Angeles	State	Part Time
4/11/1991	California	City and County of San Francisco	State	Part Time
10/29/1990	California	San Diego	State	Part Time
	California	Ventura County	State	Part Time
	California	Los Angeles County	State	Part Time
5/12/2009	Colorado	Boulder County	State	Part Time
9/30/2020	Colorado	Arapahoe, Douglas, Elbert, and Lincoln Counties	State	Part Time
10/29/1990	Delaware	Statewide	State	Part Time
6/23/1995	Florida	Miami Dade	State	Part Time
8/13/2013	Georgia	Ware County	State	Part Time
9/12/2015	Illinois	Ford County	State	Part Time
6/23/2012	Illinois	Lake County	State	Part Time
11/2/2020	Illinois	Lake County	State	Part Time
3/28/1999	Indiana	St. Joseph County (South Bend)	State	Part Time
12/15/2019	Louisiana	Caddo Parish	State	Part Time
3/4/1991	Massachusetts	Statewide	State	Part Time
11/4/2018	Massachusetts	Does not specify	State	Part Time

Continued				
Date of source	State	County or Municipality	State or Federal	Full Time or Part Time
5/20/2001	Massachusetts	Middlesex County	State	Part Time
3/04/1991	Massachusetts	Middlesex County	State	Part Time
3/04/1991	Massachusetts	Plymouth County	State	Part Time
3/04/1991	Massachusetts	Norfolk County	State	Part Time
3/04/1991	Massachusetts	Suffolk County	State	Part Time
5/27/2019	Michigan	Western District	Federal	Part Time
11/2/2014	Michigan	Western District	Federal	Part Time
10/12/2014	Michigan	Statewide	Federal	Part Time
10/12/2020	Michigan	Shiawassee County	State	Part Time
6/3/2020	Minnesota	Hennepin	State	Part Time
1/31/2014	Missouri	Marion County	State	Part Time
10/31/2013	New Jersey	Westwood	State	Part Time
3/4/2020	New Mexico	Bernalillo County	State	Part Time
11/11/2016	New York	Nassau County	State	Part Time
1/27/2014	New York	Nassau County	State	Part Time
5/11/2012	New York	Kings County	State	Part Time
1/16/2017	Pennsylvania	Luzerne County	State	Part Time
11/6/2011	Pennsylvania	Does not specify	State	Part Time
7/12/2018	South Carolina	Allendale, Hampton, Jasper, Beaufort and Colleton Counties	State	Part Time

Continued				
Date of source	State	County or Municipality	State or Federal	Full Time or Part Time
6/5/2015	South Carolina	Statewide	State	Part Time
5/20/2010	South Carolina	Statewide	State	Part Time
6/25/2018	South Dakota	Does not specify	State	Part Time
6/11/2014	Tennessee	Bradley County	State	Part Time
2/7/2018	Texas	Houston/ Arlington	State	Part Time
5/9/2016	Texas	Houston	State	Part Time
4/29/2007	Texas	Houston	State	Part Time
2/27/2020	Texas	Harris County	State	Part Time
1/30/2020	Texas	Harris County	State	Part Time
2/2020	Texas	Presidio County	State	Part Time
12/3/2019	Texas	Walker County	State	Part Time
10/2/2014	Vermont	Caledonia County	State	Part Time
10/12/2016	Virginia	Lynchburg Commonwealth	State	Part Time
6/13/2017	Washington	Clallam County	State	Part Time
9/25/1992	Washington	King County	State	Part Time
10/29/1990	Washington	King County	State	Part Time
8/23/1990	Washington	Spokane County	State	Part Time
2/21/2017	Wisconsin	Milwaukee County	State	Part Time
8/10/2012	California	Yolo County	State	Part Time or Full Time Available