

Dear colleagues,

This excerpt is from my book project, “The Rise of the Prosecutor-Politicians.” The book begins with the recent prosecution of police in Ferguson, Staten Island, and Baltimore, and connects the different outcomes to the politics of prosecutors. We take it as a given today that the office of prosecutor can be a stepping stone to higher political office, but in fact, it is a relatively recent phenomenon that emerged in the mid-twentieth century. This paper offers my introduction and overview of the planned chapters (p. 2-17).

I turn to an excerpt of my chapter “The Rise of Prosecutor-Politicians: Earl Warren, the Japanese Internment, and the 1942 Governor’s Race” (p. 18-32) on my new findings from his overlooked political and campaign papers in the California State Archive in Sacramento. Warren’s political rise reflects broader changes in American society that catapulted him to political power, particularly the increasing focus on organized crime, anti-Communism, racial targeting, and the centralization of law enforcement. Earl Warren was both an effect and a cause of the rise of the prosecutor-politician: an effect of the changes in American life that delivered political opportunities to prosecutors, which Warren took advantage of; and a cause by becoming an example to other ambitious young politicians who watched his rapid ascent from Oakland prosecutor to California attorney general to governor to vice-presidential nominee in 1948.

Historians have interpreted Warren’s role in managing the Japanese internment differently, with varying degrees of blame and excuses. However, this new research shows that Warren campaigned actively in 1942 on the “Japanese problem.” He was one of the most vocal leaders, and not a follower, in whipping up support for aggressive military-based policies against Japanese-Americans, as well as targeting Latinos. Warren highlighted his tough-on-crime, tough-on-minorities record on the campaign trail. This snapshot of a pivotal figure and a pivotal moment illustrates how prosecutors in mid-twentieth-century America took advantage of race, long before the rise of crime rates in the 1960s.

The Rise of the Prosecutor-Politicians

Introduction

On August, 9, 2014, police officer Darren Wilson shot and killed Michael Brown in Ferguson, Missouri. The facts of the shooting are still unclear, but it is clear that Prosecuting Attorney Bob McCulloch handled the case unlike the way prosecutors handle most cases. He brought the case to a grand jury before the police investigation was complete, he did not endorse any charges, and he presented a significant amount of exculpatory evidence, and called a large number of witnesses whose testimony benefited the defendant, all of which are highly unusual.¹ McCulloch even acknowledged that he knew that one of those pro-defendant witnesses was probably lying and had been discredited by investigators. A former judge has filed a bar complaint alleging professional misconduct by McCulloch and his staff.²

On July 17, 2014, in Staten Island, Officer Daniel Pantaleo, arrested Eric Garner for selling loose cigarettes illegally. After Garner swatted away Pantaleo's hand, Pantaleo put Garner in a choke hold for fifteen seconds, all captured on video. Garner repeated, "I can't breathe." Four or five officers stood by while Garner lost consciousness and did not perform CPR. Garner was dead on arrival at the hospital. Daniel Donovan, the Staten Island district attorney, brought the case to a grand jury, and the grand jury declined to indict on Dec. 3, just a few days after the Ferguson jury declined to indict. About one month later, Donovan declared his candidacy for Staten Island's seat in the U.S. Congress. He contends that he handed the case to his staff, and he never met with

¹ Dana Milbank, "Bob McCulloch's Pathetic Prosecution of Darren Wilson," (Op-Ed), Nov. 25, 2014; Jeffrey Toobin, "How Not to Use a Grand Jury," New Yorker, Nov. 25, 2014; Citron, Eric. "[Cases and controversies: Not your typical grand jury investigation](http://www.scotusblog.com/2014/11/cases-and-controversies-not-your-typical-grand-jury-investigation/)" <http://www.scotusblog.com/2014/11/cases-and-controversies-not-your-typical-grand-jury-investigation/>.

² Carol Daniel, "Bar Complaint Filed Against McCulloch," <http://stlouis.cbslocal.com/2015/01/05/bar-complaint-filed-against-mcculloch/>

witnesses or stepped into the grand jury chambers once.³ He has fought efforts by the Garner family and civil rights groups to have the grand jury transcript released. Polling showed that voters approved of Donovan's handling of the case by almost two to one.⁴ Soon after the grand jury declined to indict, Donovan won the House seat by about a 60% to 40% margin.

Meanwhile, after Freddie Gray died in the back of a police van in Baltimore, State's Attorney Marilyn Mosby indicted six police officers quickly after evidence suggested wrongdoing. Mosby's constituency is very different from McColloch's and Donovan's. Chief Judge Sol Wachtler of the New York Court of Appeals famously said that prosecutor could get a grand jury to "indict a ham sandwich," if he wanted to. The real question is whether he or she wants to, and that question often turns on whether the public wants to.

There are many layers to the crisis in policing in America, but it is important to note that one factor is that many prosecutors are unwilling to police the police. And there are many layers to that factor: prosecutors are generally in the same line of business as the police and sympathize with them; prosecutors need to work closely with police on a daily basis and need their cooperation; and prosecutors in almost all of the states have to run in popular elections.⁵ Prosecutors usually win re-election, but that success might be a reflection of how they have figured out how to steer clear of public backlash (sometimes called the *in terrorem* effect, because the fear of electoral punishment prevents the manifestation of the punishment).

But there is an additional factor that makes prosecutors so finely attuned to public opinion: the office of prosecutor has become a stepping stone to higher office in America. Thus, the office tends to attract a more political animal, a more ambitious type. Anecdotally, law students with political aspirations tend to gravitate towards prosecutors' offices. Then, the stakes in prosecutors' decisions are often higher than

³ Alexander Burns, "Daniel Donovan, Garner Case Prosecutor, Defense Record as He Runs for Congress." (Feb. 24, 2015), http://www.nytimes.com/2015/02/25/nyregion/staten-island-prosecutor-defends-his-record-as-he-seeks-house-seat.html?_r=0

⁴ Theodor Meyer, "Prosecutor in Eric Garner case nears election to Congress," <http://www.politico.com/story/2015/05/prosecutor-criticized-in-eric-garner-case-nears-election-to-congress-117622.html>

⁵ Only Delaware, New Jersey, Connecticut, Rhode Island and D.C. have maintained appointments for prosecutors.

simply whether one keeps a job as a prosecutor or moves into private practice.⁶ Life goals are in the balance. These ambitions exacerbate a number of underlying problems: the overzealous prosecutions of unpopular groups,⁷ conflicts of interest with campaign donations by corporations under criminal investigation,⁸ and the problem of unitary political control over U.S. Attorneys (see, e.g., former U.S. Attorney Chris Christie and the fired U.S. Attorneys in the Bush administration in 2006).⁹

⁶ I thank John Pfaff for our conversations on this question, starting with last year's Fordham Law School retreat. He elaborates on these questions in "Why Are So Many Americans in Prison? A Provocative New Theory"

http://www.slate.com/articles/news_and_politics/crime/2015/02/mass_incarceration_a_provocative_new_theory_for_why_so_many_americans_are.2.html; and "The Centrality of Prosecutors to Prison Growth: An Empirical Analysis" (working paper).

⁷ The politics can cut a variety of ways. Sometimes the victims of overzealous prosecution are privileged outsiders. In North Carolina, Crystal Magnum accused three Duke lacrosse players of rape. Local public opinion, generally unsympathetic to privileged Duke students, rushed to judgment, and Durham County District Attorney Mike Nifong prosecuted three students. Nifong lied to the public about the evidence against them, and he continued to press the case long after he knew the evidence against them had fallen apart. The state attorney general eventually took the case away from Nifong. A year after their indictment, the attorney general dropped all charges, and a few months later, Nifong was disbarred and convicted of criminal contempt. Without media scrutiny, the case easily could have ended with the students, not Nifong, facing jail time. Aaron Beard, "Judge Finds Duke Prosecutor in Contempt". Associated Press, August 31, 2007. Taylor, Stuart, & K.C. Johnson. *Until Proven Innocent: Political Correctness and the Shameful Injustices of the Duke Lacrosse Rape Case*. (2007).

⁸ Just last year, Texas companies donated \$1 million – including \$430,000 from the oil and gas companies – to the Texas attorney general who was responsible for enforcing the laws against those companies. The Los Angeles County district attorney was in the middle of prosecuting an energy company for violating state environmental laws, when he accepted a \$13,000 donation from that company. From 1996 to 2008, state attorneys general in California and Texas received total donations of about \$10 million and \$8 million, respectively, mostly from interest groups subject to their criminal jurisdiction. In Illinois, labor unions donated almost \$3 million, the parties donated almost \$1.5 million, and lobbyists and lawyers donated \$2.2 million. As these candidates relied more and more on expensive television advertising, these funds have become increasingly necessary. Phil Wilson, "Cooley Doesn't Plan to Give Back \$13,000 Received During Prosecution of Oil Company," *L.A. Times*, Oct. 23, 2010; Theodore Kim, "Texas Attorney General Race Donations Raise Conflict Questions," *Dallas Morning News*, Sept. 18, 2010; Rachel Goldstein, "Broad Prosecutorial Discretion and the Risks of Bias" (providing campaign donations data from followthemoney.org).

⁹ In 2006, around the same time as the Nifong/Duke scandal, eight federal U.S. Attorneys were relieved of their duties, too. A report by the Inspector General of the Justice Department concluded that "there was significant evidence that political partisan considerations were an important factor" in the firings. The allegations are that the Attorney General Alberto Gonzales and other White House officials fired three prosecutors for investigating Republican politicians, two others were fired for not investigating Democratic politicians, and a sixth, then-New Jersey U.S. Attorney Chris Christie (yes, that Chris Christie) avoided his firing by investigating Democrat Robert Menendez towards the end of his Senate Campaign (an investigation that resulted in no charges). Christie became governor three years later. Also in 2006, U.S. Attorney Steven Biskupic prosecuted Georgia Thompson, a career civil servant in Wisconsin for allegedly steering a state contract to a travel agency owned by supporters of Democratic Governor Jim Doyle. Thompson's conviction for mail fraud and misapplication of federal funds became a centerpiece in the Republican campaign against Doyle. A year later, the Seventh Circuit Court of Appeals overturned the conviction, finding that the prosecutions case was "preposterous" and without evidence, that the agency had submitted the lowest bid, that there was "not so much of a whiff" of impropriety," and that

The prosecutor-politician has been a fixture from late-twentieth century politics to today. The Kennedy family stands out as one example of the prosecutorial launching pad. Robert Kennedy established himself first in the Criminal Division of the DOJ, investigating Soviet spy cases and Communist infiltration of the federal government. Then he moved to the Eastern District of New York to prosecute fraud cases. As U.S. Attorney General, he captured public opinion by taking on organized crime and the Teamsters. When Teddy Kennedy needed to build up his resume before turning 30 and inheriting the Kennedy Senate seat, he headed straight towards the Suffolk district attorney's office— and he used that time to burnish a tough anti-crime record.¹⁰ Presidential candidates Bob Dole, John Kerry, Rudy Giuliani, and Chris Christie launched their political careers as prosecutors, and Richard Nixon, Ronald Reagan, and Bill Clinton (as Arkansas Attorney General) ascended to power on tough-on-crime platforms.

However, it hasn't always been this way. For most of American history, presidential candidates were in general (so to speak) military heroes and lawyers from private practice. There were more full-time academics who became president than long-serving prosecutors. The handful of presidential candidates who had experience as prosecutors were the exceptions that proved the rule: they seemed to stumble into the office of district attorney as young men looking for jobs, and then very quickly moved laterally to similarly low prestige jobs. Stephen Douglas, Lincoln's interlocutor, served one two-year term as a state's attorney, did not accomplish much, and then returned to private practice. Grover Cleveland and William McKinley both served one two-year term as district attorneys, and then flipped and made their names as criminal *defense* lawyers. Intriguingly, McKinley's prominent defense of labor activists won the attention of the anti-labor Republican Mark Hanna, who persuaded McKinley to flip against labor. William Taft served one term as a prosecutor straight out of law school, and then switched to the widely-beloved, upwardly mobile office of ... tax collector.

Thompson was "innocent." The Court ordered her immediate release. It turns out that, in 2005, U.S. Attorney Biskupic had been on a list of U.S. Attorneys to be considered for firing, compiled by the U.S. Attorney General's chief of staff for not bringing voter fraud cases against Democrats. After Biskupic indicted Thompson, his name came off of that list.

¹⁰ Adam Clymer, *Edward Kennedy, A Biography*, 33-35.

My state-by-state study of the governors and state attorneys general elected from 1870 to the present confirms this pattern. In the decades after the Civil War, very few governors had ever served as prosecutors, and a surprisingly small number of attorneys general had, either.¹¹ Few federal judges had significant background as prosecutors in the nineteenth century, too. The 1910s (the Progressive Era) suggest the beginnings of a shift.

Then two names leap off the page from this study, both in the 1930s, one in New York, one in California: Thomas Dewey (of “Dewey Defeats Truman” fame) and Earl Warren (of “Earl Warren” fame). Both were mediocre students, but were enthusiastic about public interest and passionate about fighting corruption. Neither one sought out the office of prosecutor when they began their legal careers in private practice. But both stumbled into their prosecutorial careers at a pivotal re-organization moment in American history: the rise of organized crime and organized labor, mixing with already organized (and increasingly corrupt) political machines. The administrative state and the police were also growing into a more organized power, and along with them, prosecutors gained more power, prestige, and funding. The media were also more organized and national, and the newspapers and movie reels sensationalized crime. They turned urban mobsters into powerful national anti-heroes, and turned local prosecutors into national heroes.

The older district attorneys at the time served at the pleasure of the party patronage machines that selected them, and especially in New York, the machines and the mob were deeply interconnected. Those prosecutors had neither the will nor the resources to confront organized crime. Dewey and Warren stood out for their boldness in taking on the party bosses, the crime bosses, and the labor bosses in the 1930s. The state-building of the Great Depression gave them new financial resources and an unusually large and talented applicant pool to be their public servants for lower wages. They both transformed the institutions they worked in: as an Oakland district attorney, Warren spearheaded a campaign to create California’s first state-wide law enforcement system, and Dewey transformed the offices of district attorney and special prosecutor in New

¹¹ The study so far covers New York, Connecticut, Pennsylvania, Maryland, California, Texas, Illinois, Iowa, Kansas, Georgia, Michigan, and Ohio. Maryland, Georgia and California have an increase in the 1900s (but California’s is only temporary). Ohio shifts in the 1910s, Texas in the 1920, and then Dewey and Warren lead the way in the 1930s. The goal is to complete all 50 states for Governor, Attorney General, and members of Congress.

York. They engaged in prosecution tactics that the Warren Court would later rule unconstitutional (if they weren't already illegal at the time). They were effective at connecting criminal cases with the media and with the public. They elevated their prosecutorial role onto a national stage, against organized crime, against Communists, and in Warren's case, against the Japanese (and Japanese Americans) during World War II. New archival research shows how Warren initiated the expansive Japanese internment program, and then aggressively campaigned on his leadership of the internment program. Warren and Dewey built their political careers as hard-working, aggressive, entrepreneurial, media-savvy prosecutors, all the way to the governorship of the two most important states in the country at the time, and then up to their union on the 1948 Republican ticket as presidential and vice-presidential nominees. Dewey and Warren are case studies in effect and cause: they are examples of the effects of changes in the 1920s and 1930s that propelled prosecutors into the spotlight, and they are causes – role models -- of younger ambitious politicians to follow their steps and launch their careers from prosecutors' offices. Their careers illustrate how the office of prosecutor transformed from local to state-wide to national -- and even national security – in just a few decades.

The American prosecutor is simultaneously more powerful and weaker than other American public officials and many other countries' prosecutors. On the one hand, they have unparalleled discretion in charging suspects and plea bargaining. About 95% of criminal cases are resolved by plea bargain in America, with only the thinnest of judicial supervision.¹² The public official that has the most discretionary power over any individual's life undoubtedly is the prosecutor. On the other hand, prosecutor's professional independence is weakened by partisan and political influences.

¹² Jacqueline Ross, "The Entrenched Position of Plea Bargaining in United States Practice," *The American Journal of Comparative Law* (2006).

Book Outline:

Chapter 1: The American Invention of the Public Prosecutor

Continental European countries developed a public prosecutor over the late medieval to early modern era (13th-16th centuries). However, the English did not have a public official specifically assigned as a prosecutor until they created Director of Public Prosecution in 1879. Until then, the role of prosecutor was imperfectly filled by justices of the peace (more of a judicial official than executive), sheriffs (more of a policeman), and private prosecutors, the victims or their families.¹³

Americans, by contrast, had local public prosecutors for about two centuries before the English. The Dutch colony of New Netherland covered what would become New York, New Jersey, Connecticut, Delaware and Pennsylvania in the early to mid-seventeenth century. The Dutch West India Company installed the *schout*, primarily a constable and fiscal agent. The schout began bringing criminal charges against defendants in New Amersterdam (which became New York City) in 1650, and in other areas of the colony in the 1650s.¹⁴ When the English took over the colony in 1665, they installed their legal system and changed the name from *schout* to *sheriff*. The sheriff continued to bring charges, and even though this power worried the English colonial authorities, they did not stop it. Some scholars have concluded that this schout/sheriff was the first public prosecutor in the English speaking world, but this sheriff was no more a specialized prosecutor than the English sheriff or JP. He was a local official with a combination of powers, and the prosecuting power was a small part of his portfolio. At this stage, the institutions in England and America were roughly the same.

The divergence comes in 1704, when Connecticut established the first specialized prosecutors. The Connecticut statute that created the position established that “henceforth, there shall be in every countie a sober, discreet and religious person appointed by the countie courts, to be attorney for the Queen to prosecute and implead in the law all criminals and to doe all other things necessary or convenient as an attorney to

¹³ John Langbein, “Origins of Public Prosecution in the Common Law”; John Langbein, *Prosecuting Crime in the Renaissance*; Patrick Devlin, *Criminal Prosecution in England* (1958)

¹⁴ Scott W. Alstyne, Jr. “The District Attorney – A Historical Puzzle.” *Wisconsin Law Review* 136 (1952).

suppress vice and immorality.”¹⁵ It is unclear whether this office was derived from the *schout*, and even if it was an extension of the *schout* rather than an American innovation, it was a decision to expand and specialize the public prosecutorial role, rather than cabin or curtail it. New York followed with turning the *schout*/sheriff into deputy attorneys general as more specialized prosecutors.¹⁶

Around the same time, Virginia’s attorney general was becoming more and more like a public prosecutor. In the late eighteenth century, the attorney general was appearing at all trials and had a small number of deputies handling all major criminal cases. In 1711, Virginia created an office of public prosecutor.¹⁷ Virginia was not a Dutch colony, so either Virginia was creating a new institution or borrowing from northern colonies.

It seems that the office of public prosecutor continued spreading throughout the colonies over the eighteenth century, but historians have not traced it yet nor explained it. First of all, it is important to note that private prosecution remained much more significant than public prosecution. During the eighteenth century, most complaints – both criminal and civil, as the distinction between these areas had not yet been established¹⁸ – were brought by the injured party (or her friends or family) before an informal court presided over by a trusted community member.¹⁹ The injured party argued its case and the accused made its defense, both without the assistance of counsel. After hearing both sides, the presiding magistrate meted out highly individualized penalties according to a “rough version of natural justice.”²⁰ Most of the cases brought before these courts were important only to the parties involved, not matters of great public import.²¹

15 Thomas J. Robinson, “Private Prosecution in Criminal Cases,” 4 *Wake Forest Intramural Law Review* 309 (1968).

16 Goebel and Naughton, *Law Enforcement in Colonial New York* 332-34 (1944)

17 Alstynne, “The District Attorney,” 136; Sidman, “The Outmoded Concept of Private Prosecution,” 25 *American University Law Review* 763 (1976).

18 Bruce Benson, “The Lost Victim and Other Failures of the Public Law Experiment,” 9 *Harvard Journal of Law and Public Policy* (1986).

19 Allen Steinberg, “The Spirit of Litigation’: Private Prosecution and Criminal Justice in Nineteenth Century Philadelphia,” 20 *Journal of Social History* 235 (1986).

20 *Id.*

21 *Id.*, 236.

Even if public prosecution had a relatively small docket, it was still an important development in the colonies. My hypothesis is that colonial life required more public order than the English homeland. This may seem obvious if one imagines a rough frontier, but by the eighteenth century, the colonies had settled into a commercial and urban society not so different on the surface from England. The key difference was that the colonies were becoming more ethnically diverse as it became more commercial and urban in these same decades.²² The new statistics on the different national origins of the colonists are surprising. Social mobility, displacement and diversity have explained another legal transformation from private to public. In the 14th century, the jury changed from a body of informal social knowledge to formal deliberation after the Black Plague, which forced English people to leave dying small town and move to larger surviving towns. Frontier existence would have explained a seventeenth century prosecutor, but the need to maintain order in a heterogenous urban existence is a better fit for the eighteenth century. Furthermore, the colonies had a number of morality laws (Sabbath observance, alcohol, etc.), which were victim-less crimes. If victims were the only enforcers of criminal laws, then who would prosecute a victim-less crime? In England's culturally homogenous towns, social norms might have been enough to enforce these laws. Some historians contend that these laws were decreasing in enforcement and were even repealed in the late eighteenth century,²³ but that would be reason to think that these laws were even more contested in the early eighteenth century by some social groups. With less social consensus about morality, the majority would have to rely more heavily on public enforcement. I would research colonial dockets to find out how much these morals laws were enforced in court, and if so, how often the cases were brought by public or private prosecutors. Even if these colonial prosecutors had a limited role, the bottom line is that this was a small but foundational step towards the powerful public official with broad discretion.

The story then shifts to the Founding Era and the Early Republic. In *Morrison v. Olson*, Justice Scalia dissented from the Court's ruling that the independent prosecutor statute did not violate the separation of powers. "Government investigation and

²² Jon Butler, *Becoming America* (2000).

²³ William Nelson, *The Americanization of the Common Law*

prosecution of crimes is a quintessentially executive function,” he wrote.²⁴ However, the Founding era did not make such a distinction. As it turns out, prosecutors were not always viewed as specifically executive officers. There is a lost history of the more judicial – and perhaps more judicious – prosecutor, a model resembling the continental European inquisitorial role that made prosecutors more independent from electoral politics. In the late colonial era, county prosecutors were selected by judges or nominated by judges. The Founding era constitutions often placed attorneys general and prosecutors under the judiciary article of their constitutions.²⁵ This practice continued into the early republic.²⁶ Some of the constitutions assigned the power of appointment to the legislature with no role for the governor,²⁷ and some assigned selection to the judges.²⁸ The office of Attorney General was created by the Judiciary Act of 1789, and the first draft of the Act gave the Supreme Court the power to appoint the Attorney General and gave district judges the power to appoint district attorneys. These provisions were deleted and not replaced, so the appointment reverted to the default under the Constitution: presidential appointment and removal. There is no record of discussion on this question in committee or in floor debate, so these decisions seem more haphazard than intentional. It certainly reflects that the role of the Attorney General and the U.S. Attorneys was unsettled and fluid in this period.²⁹

Once they were appointed, it seems that the state prosecutors were supervised directly by judges day-to-day, and according to some accounts, they were more like clerks working with the judges than the modern adversarial prosecutor. The question is

²⁴ *Morrison v. Olson*, 487 U.S. 654, 706 (1988)

²⁵ Delaware, Georgia, New Jersey, North Carolina. Maryland’s constitution did not have specific articles grouped the prosecutors with the judges.

²⁶ Tennessee, Ohio, Louisiana, Indiana Illinois, Michigan.

²⁷ NH, VA NC, NY, TN. There was another path not taken as a potential alternative in appointing an expanding system of public prosecutors. In 1777, New York created a Council on Appointments, which consisted of the governor and an annually rotating panel of four senators. The Council appointed all state officers, including justices of the peace, district attorneys, and sheriffs. The Council was designed to limit the governor’s control over the state bureaucracy, and also to limit popular democracy. From 1777 to 1821, the Council appointed 15,000 officers. It was heavily criticized, but if it had been designed better, I am curious if it could have been a successful model for a less partisan method of building a prosecutorial system. It certainly could have been a foundation for a more consensus-oriented, professionally-based system, as the council could have evolved to change the council membership but not the basic structure. On the other hand, any method of appointment might have succumbed to the Jacksonian democratic wave.

²⁸ GA, CT, VA.

²⁹ Julius Goebel, *Antecedents and Beginnings to 1801*, at 490; Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 *Harv. L. Rev.* 49, 108-09 (1923).

whether this arrangement created a more inquisitorial system in practice, with judges playing a more active role and working with the prosecutors directly. In the adversarial system, judges play a passive role, and prosecutors play a more aggressive role in seeking convictions. The Founding era prosecutors and judges may have resembled an inquisitorial/cooperative system because of these twists in institutional design. These inquisitorial patterns might also reflect the realities of technology and transportation: the prosecutors, it seems, were based in the courthouse, rather than the state capital or the sheriff's office, and they had more of a working relationship with judges than any other officers. These relationships may have fostered a more inquisitorial and cooperative system, until other institutions became more influential (specifically, the urban police departments from the mid-nineteenth century on).³⁰

Chapter 2: The Rise of Elected Prosecutors

The states switched to electing justices of the peace and district attorneys from the 1810s through the 1840s. Justices of the peace, who continued to mix prosecutorial powers with other judicial, policing, and administrative duties, became popularly elected gradually from the 1790s through the 1830s.³¹ The district attorneys switched to elections in the 1820s through the 1850s.³² Like judicial elections, this change may have been designed to make prosecutors more independent from other politicians and branches of government, more powerful, and more responsive to local public opinion.

Direct elections reduced the power of party machines, but they increased the power of local politics. This decentralization lay a foundation for today's decentralized state system of prosecutors. This change coincided with the Second Great Awakening in American Protestantism, which also led to a revival of state morals legislation on religion

³⁰ See Daniel Richman, "Prosecutors and their Agents, Agents and Their Prosecutors," 103 *Colum. L. Rev.* 749 (2003).

³¹ Edwin Surrency, "The Courts in the American Colonies," 11 *Am. J. of Legal History* 347 (1967).

³² Matthew J. Ellis, Note, "The Origins of the Elected Prosecutor," 121 *Yale Law Journal* 1528 (2012); Vermont Constitution of 1793, Ch. II, Sec. 9; Ohio Constitution of 1803; Georgia Constitution, Amendment of 1812; Indiana Constitution of 1816, Art. V, Sec. 12; New York, Amendment of 1826; Tennessee Constitution of 1834, Art. VI, Sec. 15; Arkansas Constitution of 1836, Art. VI, Sec. 15-17; Pennsylvania Constitution of 1838, Art. VI, Sec. 7. Rhode Island made its JPs elected in 1842, and New Jersey in 1844.

and alcohol prohibition/temperance.³³ As state populations grew and as immigration increased, different regions divided in their support for the renewed regulation of morality. Considering that these were victim-less crimes, the problem of underenforcement by private prosecution returned. The numbers of prosecutors grew, and so did their power, as well as their social significance. Thus, it became increasingly important to elect them. Elected prosecutors would be more responsive to local public opinion in the enforcement of these statutes, so that the level of enforcement would match the district. And if prosecutors decided to enforce these laws in their districts, they had more democratic legitimacy to support them.

Most importantly, the turn to direct elections locked the state prosecutor into a partisan system that increased the influence of public opinion and politics relative to the law. The move to elections also was a decisive shift from the “judicial” prosecutor to the “executive” prosecutor, but it was an unbundled executive prosecutor, separate not only from the judges but also from the governor. This move set a foundation for prosecutorial power and discretion. Thus, elections made prosecutors simultaneously weaker and stronger, relative to other political forces.

There is a growing literature in American political development about how and when the bureaucratic state emerged. The antebellum era has been characterized as a “state of courts and parties,” meaning that before the Civil War, American bureaucracy was weak and only an extension of party politics.³⁴ Electing prosecutors was another way to unite the power of courts and parties.

The election of prosecutors also preceded the increasing role of public prosecution. Elections may have legitimated the public prosecutors, emboldening them and incentivizing them to increase their power. Criminal prosecution had remained primarily private until the 1850s, but public prosecution was growing steadily along side it.³⁵ Although private prosecutors dominated their public counterparts in both prestige

³³ Louis Hartz, *Economic Policy and Democratic Thought*, 204-17; Alice Felt Tyler, *Freedom's Ferment*, 347; William Nelson, “The Changing Conception of Judicial Review,” 120 *Penn. L. Rev.* 1166, 1178 (1972).

³⁴ Stephen Skowronek, *Building a New American State* 24 (1982).

³⁵ Michael T. McCormack, “The Need for Private Prosecutors: An Analysis of Massachusetts and New Hampshire Law,” 37 *Suffolk University Law Review* 501 (2004). It is not clear, however, that “public prosecution” carried the same meaning it does today. Carolyn Ramsey, for instance, suggests that public prosecutions might not have been publicly funded: “before mid [nineteenth] century, activities like

and number, public prosecutors did the same sort of work in the same courts during the first half of the nineteenth century. One study of 19th century records from the New York Court of General Sessions shows that, despite “the explanation advanced by traditional commentators that trials [in this period] predominated in the absence of lawyers . . . all sources show that at least from 1810 onward, lawyers for both the prosecution and defense were present at trial [in General Sessions].”³⁶ The picture of the state criminal justice system in the first part of the nineteenth century is therefore a tiered-system, with informal and non-professional courts for disputes between citizens at the bottom, more formal, professional courts at the top, and various combinations in the middle. On each of the tiers, private prosecution was more common, but public prosecution was most significant on the higher tier with more salient, high-stakes cases.

Chapter 3: The Founding of the Department of Justice

The Department of Justice was founded in 1870 in the midst of Reconstruction. The traditional view is that Congress created the DOJ to increase the federal government’s capacity to litigate a growing docket as a result of the Civil War, and more recent scholarship contends that Congress created the DOJ to enforce Reconstruction and black civil rights. This chapter offers a new interpretation that the creation of the DOJ was surprisingly an effort to shrink and professionalize federal government – despite that this shrinkage would undermine Reconstruction – or perhaps because it would undermine Reconstruction. It has been overlooked that the DOJ bill eliminated about one third of federal legal staff. The founding of the DOJ had less to do with Reconstruction, and more to do with “retrenchment” (budget-cutting and fiscal conservatism) and anti-patronage, anti-party-machine reforms. The DOJ’s creation was contemporaneous with major professionalization efforts (especially the founding of modern bar associations) to make the practice of law more exclusive and more independent from partisan politics. A small

searching for evidence, drafting legal documents, and empaneling a jury corresponded to a fee schedule; the complaining witness paid the District Attorney for services rendered” (Ramsey, “The Discretionary Power”).

36 Mike McConville and Chester Mirsky, “The Rise of Guilty Pleas: New York, 1800-1865,” 22 *Journal of Law and Society* 453 (1995).

group of reformers worked on a combination of the DOJ bill, civil service reform, bureaucratic independence, and founding modern bar associations in the late 1860s through 1870.

Even though the DOJ was a professionalization/anti-patronage project, this chapter also explains why the Department of Justice did not include civil service reforms, even though the same reformers were fighting for broad civil service legislation at exactly the same time. The same Congressman who led the DOJ effort in 1870, Thomas Jenckes, was also known as “the father of the Civil Service” and simultaneously fought for civil service reform. Jenckes succeeded in passing a DOJ bill to professionalize government lawyers by reorganizing them under a more professional and independent Office of the Attorney General, rather than through civil service reform. Meanwhile, reformers fell short in their civil service campaign for other kinds of federal employees, reflecting a view that government lawyers were different from other government officials in the post-Civil War era.

In this new light, the DOJ’s creation conflicts with one historical trend, the growth of federal government’s size. Instead, it was at the very leading edge of two other major trends: the professionalization of American lawyers and the rise of bureaucratic autonomy and expertise. This story helps explain a historical paradox: how the uniquely American system of political control over law enforcement evolved alongside the norms and structures of professional independence.

After the creation of the DOJ, “Main Justice” in DC remained weak, because the DOJ lacked a building until 1934, and its lawyers remained geographically spread out in the same departments they had been located in before 1870. Most of the lawyers ostensibly under the “Department of Justice” remained more directly under the control of other departments in which they worked day to day.

The professional norms and prosecutorial power developed in U.S. Attorneys’ Offices spread out across the country – particularly in the Southern District of New York from 1870 through the 1930s. SDNY developed into a flagship of professionalism and independence in the federal government. By design, the centralization of the DOJ was supposed to separate federal lawyers from local partisan politics, and that dynamic seems to have played out in key places. In New York City, local Democrats and Tammany Hall

dominated city politics throughout the late nineteenth century and early twentieth century. A long chain of Republican presidents used SDNY to crack down on Democratic corruption and urban political machines. Republicans used the Department of Justice not as much to police the South as to police northern Democratic cities. Even though this dynamic was driven by partisan politics, the centralization of law enforcement reduced the political influence of local parties, and increased the role of national elites in law enforcement – a development that would shift the balance of power to more establishment lawyers and to a national professional class.

Chapter 4: District Attorney Jim Crow

There are signs that the South more quickly moved prosecutors up the political hierarchy. Maryland's governors starting around 1899 had been prosecutors, and Texas governors starting in the 1920s had been prosecutors. In Georgia, prosecutors were elected governors from 1915-27. Alabama had one district attorney ascend to the governorship in the 1910s. As I continue to research other Southern states, I will look for this pattern, and I will look for connections to segregation and cracking down on Southern blacks.

Georgia has another dark story. One of the prosecutors-turned-governors was Hugh Dorsey, who became famous years earlier for prosecuting and getting a capital conviction against Leo Frank, a Jewish businessman for a murder. Antisemitism was a large factor in this conviction. Two months after Governor Slaton commuted Frank's sentence, Frank was abducted from prison and lynched. Dorsey was immediately elected the next Governor, and the next three governors after him were all former prosecutors.

Chapter 5: Progressive Prosecution: The Rise of Federal Criminal Law

In the late nineteenth century, public prosecution overtook private prosecution. State judges criticized “trivial and malicious” private prosecution, and argued that exclusive public prosecution would be a better gatekeeper and manager of judicial resources. In Philadelphia, urban riots and crime united the legal profession and the

city's elites in calls for a strong public prosecutor. In New York City, the growth of the first urban police force led the way for public prosecutor to work in tandem with the police. States first increased the number of prosecutors and their funding, and then gave them more exclusive power, diminishing the role of private prosecution. This history has been underdeveloped, and I would focus on a few jurisdictions to chart this shift over the late nineteenth century.

This period witnessed a few other key developments:

- 1) the rise of the plea bargain. In 1800, about 20% of criminal defendants entered guilty pleas. By 1860, that rate grew to 50%, and then 75% by 1879, and eventually 88% by 1925. The public prosecutor was the key to this transformation.
- 2) The emergence of urban police shifted the center of gravity of public prosecutors from the courtroom to the police department. Increasingly, prosecutors seemed to work side-by-side with police, and less under the tutelage of judges. I speculate that this institutional change helped shift prosecutors further from whatever was left of the inquisitorial-like system, and towards a more adversarial role.
- 3) The doctrine of prosecutorial discretion solidified (especially in the 1870s-80s), rendering the prosecutors even more independent from judicial supervision. One question is whether this doctrine was simply the effect of an already established reality, or whether the doctrine created independence itself. Probably both are true.

The role of federal criminal law was minimal in the nineteenth century, limited to immigration, admiralty, and piracy. Reconstruction's Enforcement Acts were more notable for their non-enforcement. The Progressive Era permanently changed the scope and impact of federal criminal law. The first expansion was the Anti-Lottery Act of 1895, relying on interstate commerce power to criminalize interstate lotteries. Next, Congress passed the Pure Food and Drug Act in 1906, which included criminal penalties, and which was expanded by the Harrison Narcotics Tax Act of 1916. The Mann Act in 1910, also known as the White-Slavery Traffic Act, criminalized the transportation of women across state lines for "immoral purposes." In the same era, Congress also passed the National Motor Vehicle Theft Act, as well as anti-obscenity laws. Of course, Prohibition comes next in the 1920s, followed by the FBI and a major expansion of the federal role in criminal prosecution. This chapter would focus on the U.S. Attorneys and

their assistants in navigating this sea change. How many more prosecutors were added? How did a bureaucracy develop? How did the exploding docket create the space for more discretion? The rest of the twentieth century follows these trends in the war on drugs.

Chapter 6: The Rise of the Prosecutor Politicians: Earl Warren

Chapter 7: The Rise of the Prosecutor Politicians: Thomas Dewey, Organized Crime, Organized Labor, and Re-organized Politics in the 1930s

Chapter 8: The Kennedys, the Mob, and the Cold War

Chapter 9: Law and Order from Nixon to Clinton

Ch. 6: "The Rise of Prosecutor-Politicians: Earl Warren, the Japanese Internment, and the 1942 Governor's Race."

Earl Warren is a character study of contradictions. He was the tough-on-crime Oakland prosecutor who overstepped defendants' constitutional rights, and then was the Chief Justice who led the most decisive expansion of those rights. He was an anti-Communist cold warrior, and later expanded freedom of speech and freedom of the press. The most jarring contradiction is Chief Justice Earl Warren, the courageous desegregationist, vs. Earl Warren, Attorney General and Governor, the creator of the Japanese internment during World War II.

As first-year law students, we encountered this contradiction, and it was stunning. Many of us received the explanation was that circumstances – and the federal government -- had thrust the Japanese internment program onto Earl Warren, and he complied reluctantly. He just happened to be the wrong governor at the wrong time. Perhaps this received wisdom is the result of disbelief. It is impossible to imagine the Chief Justice hero of desegregation and civil liberties could also be the architect of the Japanese internment – that the Justice who gave us the civil rights canonical case of *Brown* also was the man behind the anti-canonical, anti-civil rights case of *Korematsu*.

His biographers are mixed in their interpretations of these events. Some blame him for taking a much more active role in planning the removal and internment behind the scenes. Warren also has his defenders and excusers, who emphasize the political climate and public opinion made such a reaction inevitable, and Warren did his best to manage it humanely. My research into Warren's overlooked political archives shows how Warren made the internment a centerpiece of his political campaigns. The archives contain some remarkable speeches and documents, including his campaign's actual "handbook." These archives show not only was he in fact the engineer behind the scenes, but that he even whipped up anti-Japanese public opinion on center stage of his political campaigns. Warren also targeted Mexicans and Chinese in his earlier campaigns. This aspect of Warren's rise in political power illustrates one way the office of prosecutor became higher visibility and a stepping stone. Warren's ascent to higher office – perhaps by highlighting his role in the Japanese internment – became a model for other aspiring

politicians. In his tough-on-crime rhetoric or targeting Mexicans and Chinese, I am not suggesting that Warren invented this brand of politics or was doing anything particularly unusual in California in the first half of the twentieth century. I am suggesting that his political campaigns are a case study, a snap shot into the politics of American law and order, a window for seeing how American life was changing to give prosecutors more political opportunities for popularity and consolidating power. However, his 1934 campaign for criminal justice reform, which catapulted him to the top, was a distinctive moment reflecting how criminal justice in America shifted from weak localism to stronger centralized power by playing on fear of crime. And the Japanese internment was a unique opportunity for a prosecutor with ambition, with a talent for building institutional power, and without too many qualms about minority rights. In one of his most striking political innovations, Earl Warren was ahead of his time in linking state prosecutorial power to national security long before the Cold War and the Global War on Terror, eventually riding this wave to the top of American law and politics. Then this chapter also notes that the 1942 campaign for Governor presages the modern American political attacks based on parole, recidivism, sexual violence, and child predators. From Earl Warren's actual playbook from the 1942 campaign for Governor, we can see the model for many of today's campaign playbooks.

In his memoirs, published posthumously in 1977, Earl Warren lamented the anti-Japanese prejudice in California during World War II. He blamed the military leadership from above and public opinion from below. He confesses that he played a role, but he was swept up in the widespread hysteria. He blamed "military intelligence" for exaggerating the dangers of the Japanese population, and he blamed public opinion and the consensus among public officials. "The atmosphere was so charged with anti-Japanese feeling that I do not recall a single public officer responsible for the security of the state who testified against the relocation proposal. After a conference with the law officers, who agreed unanimously, I testified for a proposal which was not to intern in concentration camps *all* Japanese, but to require them to move from what was designated as the theater of operations extending seven hundred and fifty miles inland from the

Pacific Ocean.”³⁷ Considering that the distance from Los Angeles to Albuquerque, New Mexico is about 750 miles, as is San Francisco to Salt Lake City, and considering that the Japanese-American population was mostly in the Pacific region, Warren’s proposal was tantamount to full removal and internment. Many people today assume that internment was only for Japanese nationals, and it seems like Warren is referring to “Japanese,” as Japanese nationals, rather than Japanese Americans. There is certainly a long-standing tradition of limiting the freedom or deporting the citizens of enemy nations in wartime. However, over 60 per cent of the relocated and incarcerated were American citizens of Japanese ancestry. The internment program became official after President Roosevelt’s order on February 19, 1942, but that move followed Attorney General Warren’s on-the-ground initiative and planning immediately after Pearl Harbor.

Warren conceded in his memoirs, “To the credit of the Japanese, not one incident establishing disloyalty occurred prior to the exclusion order, so far as I am aware. After the order, thousands of them renounced their loyalty to the United States and professed a desire to have Japan win the war. These [Japanese] were separated from the rest... but how many of them, if any, would have felt that way had it not been for the removal order can only be a matter of conjecture. I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens.”³⁸ Warren balanced out his *mea culpa* by noting that, around the same time, he wrote a formal opinion to the state personnel board that it could not strip Japanese-Americans from state civil service jobs, and that he defended Communists later in his career.³⁹

According to his memoirs, Warren merely testified in favor of relocation. His three major biographers detail a much more significant role behind the scenes, but they also take differing views of that role. Edward White⁴⁰ and Jim Newton⁴¹ were more critical of Warren’s active role. In a 1997 biography, Ed Cray was more sympathetic: “Warren cautioned against bigotry.”⁴² Cray blamed the panic in terms of inevitability:

³⁷ EARL WARREN, THE MEMOIRS OF EARL WARREN, 148

³⁸ EARL WARREN, MEMOIRS, 148-49.

³⁹ EARL WARREN, MEMOIRS, 149-50.

⁴⁰ G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE.

⁴¹ JIM NEWTON, JUSTICE FOR ALL (2006)

⁴² ED CRAY, CHIEF JUSTICE, 115 (1997).

“The clamor for evacuation of all people of Japanese descent was irresistible.”⁴³ Cray concludes the chapter with an all-things-considered measured approval of Warren’s handling of a difficult situation: Warren’s voice “was a voice of reason in a time of fear.”⁴⁴

These historians did not draw on Earl Warren’s papers at the California State Archives, which demonstrate Warren’s far more active role in whipping up fear of the Japanese. His main message in the 1942 campaign was that his opponent, incumbent Governor Culbert Olson, had done little to prepare for war, while Attorney General Warren and his supporters trumpeted how Warren had led the efforts to create a vigilant civilian force to fight the ever present threat of sabotage, arson, and a “fifth column” of a disloyal population. In case it was ever unclear who was the threat, Warren and his allies referred to the “Japs,” and they specifically advertised Warren’s leadership in designing the “evacuation” of California’s Japanese population.

These archives first show that, earlier in his career, Warren participated in racial politics and tough-on-crime campaigning that seems more familiar to the late twentieth-century and early twenty-first century. For example, in his campaigns for Oakland district attorney, he highlighted his crackdowns on the Mexican and Chinese communities. His opponent in 1926 criticized Warren’s frequent raids. Warren replied by emphasizing the menace of these particular immigrant communities, and how his raids yielded hundreds of arrests. “The particular raid that Mr. Higgins takes exception to is the one conducted last April in the unincorporated territory know as Alvarado and sometimes known as Little Tia Juana. The Chinese and Mexican settlement in Alvarado had long caused the people of that community much concern and, like all centers of vice, became worse rather than better as time went on.”⁴⁵

Higgins had criticized Warren for personally attending the raids and accused Warren of conducting raids just for photo opportunities. Higgins claimed that Warren’s focus on publicity and showy arrests jeopardized the actual investigations and

⁴³ CRAY 122.

⁴⁴ CRAY 123.

⁴⁵ Warren Campaign letter, Aug. 20, 1926, p. 3, in Warren District Attorney Race, 1926, in Warren Papers, California State Archives, Box F3640, File 1.

prosecutions, leading many of the suspects to be released.⁴⁶ Warren doubled down on taking credit for the raids, proclaiming proudly, “It is true that I personally conducted this raid,” and noting that the raids produced deportations: “Of those arrested, seven were deported from the United States as undesirable aliens.”⁴⁷

It is not shocking that a California politician played on anti-Mexican and anti-Chinese sentiment. Nevertheless, Warren was deft at playing on xenophobia for making a case against localism and for centralized criminal justice. In 1934, Earl Warren led a state-wide referendum campaign for criminal justice reform. Americans perceived a crime wave in the 1930s. This was the “Public Enemies” era of legendary Great Depression bank robbers, following the Prohibition era’s legendary gangsters (Al Capone, Bonnie and Clyde, John Dillinger, Baby Face Nelson, Ma Barker’s gang, leading to J. Edgar Hoover and the rise of the FBI).⁴⁸

In fact, it seems that there was no real increase in national crime rates in the Great Depression. Crime may have been decreasing around the country in the mid-1930s.⁴⁹ However, California had a more localized increase in crime in this period. Between the 1910s and the 1930s, California’s population had tripled, its felony conviction had quadrupled, and its crime costs had quintupled.⁵⁰ The state experienced its own series of murders, brutal crimes, and notorious armed robberies of trains in 1933-34 that made the crime issue even more salient.⁵¹ Warren, then an Oakland district attorney, was frustrated by the lack of resources for prosecutors and the weakness of the Attorney General’s office. The attorney general was a glorified part-time job. The office entailed merely giving legal advice to the governor and representing the state in civil suits. The state

⁴⁶ Higgins campaign letter, Aug. 2, 1926, Warren District Attorney Race, 1926, in Warren Papers, California State Archives, Box F3640, File 1.

⁴⁷ Warren Campaign letter, Aug. 20, 1926, p. 3, in Warren District Attorney Race, 1926, in Warren Papers, California State Archives, Box F3640, File 1.

⁴⁸ BRYAN BURROUGH, PUBLIC ENEMIES: AMERICA’S GREATEST CRIME WAVE AND THE BIRTH OF THE FBI, 1933-34 (2005).

⁴⁹ Paul and Patricia Brantingham, *Patterns in Crime* 190 (1984); David Rubinstein, “Don’t Blame Crime on Joblessness,” *Wall Street Journal*, Nov. 9, 1992 at A10; ERIC MONKKONEN; WILLIAM STUNTZ, *FIGHTING CRIME*, 27-28.

⁵⁰ “Crime Can Be Curbed,” California Committee on the Better Administration of Law, 1938, p. 7; Joseph Knowland, “California Girds for War on Crime,” *California Journal of Development*, July, 1934, p. 11

⁵¹ In two of these robberies in Northern California, the culprits could have been caught if there had been cooperation between two county police departments, but they failed to coordinate. Some felt that organized crime was moving west, and perceived that California was reverting back to the Old West lawlessness. Knowland, “California Girds for War on Crime”; WARREN, MEMOIRS 110

attorneys general maintained to their own private practice on the side. Earl Warren wanted the job, and he also wanted that job to be more powerful.⁵² To achieve both goals, he joined a new effort to centralized California criminal enforcement.⁵³

In 1933, he teamed up with the Chamber of Commerce and brought together a variety of groups -- police chiefs, business groups, bar leaders, women's organizations -- to plan a coordinated campaign. In January 1934, they formed the California Committee on Better Administration of Law, with a stated mission to propose legislation that would "curb crime in California."⁵⁴ The twelve-member board included Earl Warren, the chiefs of police of Los Angeles and San Francisco, and a representative of the Crime Problems Advisory Committee of California.

Warren's committee drafted four constitutional amendments comprising the "Curb Crime" package: switching from direct election of judges to a merit-style appointment system with retention elections, the first such model in the nation (Proposition No. 3); creating a state department of justice headed by the Attorney General as the chief law enforcement officer of the state, with power to coordinate and even to take over for a deficient county (Proposition No. 4); allowing judges to comment on the evidence at trial, and -- remarkably -- allowing judges and prosecutors to comment on a criminal defendant's failure to testify (which would later be a move that the Warren Court would prohibit) (Proposition No. 5); and permitting a defendant to plead guilty when he is first taken before a magistrate, rather than a judge (Proposition No. 6).

The "Curb Crime" campaign materials usually did not target racial minorities, but one of Warren's standard speeches for the State Department of Justice proposal was classic xenophobia:

If the population of this country were 98 per cent native born, as in London, or 92 per cent in Paris, instead of 66 per cent, as in New York, or 70 per cent in Chicago, our law enforcement task would be much easier. If families lived not only in the same city, but in the same house for generations, instead of migrating

⁵² WARREN, MEMOIRS 110.

⁵³ Malcolm Smith, "The California Method of Selecting Judges," 3 *Stan. L. Rev.* 571, 579 (1951).

⁵⁴ Smith at 579-80.

like gypsies from one side of the continent to the other, most of our major unsolved crimes could also be cleared up in a short period of time.⁵⁵

The total non-white population of California quadrupled from 1920 to 1930,⁵⁶ and minorities were playing a more powerful role in urban machines and at the ballot box. The state's most infamous crimes were not committed by racial minorities, but Warren was attempting to link minorities to the perceived crime wave, despite offering no specific examples. Warren's 1934 campaign also attacked Communists as a subversive threat.⁵⁷

As it turns out, the combined resources and political strategy of urban elites, business, professionals, and Republicans were more powerful than labor and Democrats, even in the midst of the Great Depression. Propositions 4, 5, and 6 – the measures giving the attorney general more power and changing criminal procedure -- passed by overwhelming majorities. Proposition No. 3 on merit selection passed by less than five percent.⁵⁸ Support for these propositions came chiefly from the urban counties of San Francisco, Los Angeles, San Diego and especially Alameda (home of Earl Warren and Oakland).

Warren benefited in multiple ways from his success in the Curb Crime campaign. First, it catapulted him into a successful long-term partnership with business leaders. Second, he became identified with law and order, and against corruption and the outsider criminal element. Third, the incumbent attorney general was aging, and he would inherit the state Department of Justice suddenly demanded enormous management skills, time, and energy. That attorney general declined to run again, and thus, Warren's success in creating the huge new department led to a powerful new opening in a state-wide office. Fourth, when Warren won the job, it was when the Attorney General's office was suddenly very powerful, and it was a brand new institution that Warren would shape – and exploit after Pearl Harbor. In Warren's campaign for Attorney General in 1938, he returned to the same themes for centralizing prosecutorial power. Mentioning the same

⁵⁵ "A State Department of Justice," p. 3, Campaign Speeches, 1934, F3640:286.

⁵⁶ U.S. Census Statistical Abstract, 1930

⁵⁷ Campaign Speeches, 1934, California State Archives, F3640:286, file 2.

⁵⁸ Malcolm Smith, "The California Method of Selecting Judges," 3 *Stan. L. Rev.* 571, 586 (1951).

factors of minority populations, migration, and immigration, Earl Warren argued, “Crime can no longer be treated strictly as a local matter.”⁵⁹ Little did he know in 1938 that World War II would also transform California criminal justice from local to state-wide and even nationalist.

California had a long history of anti-Asian bias and discrimination, starting with the Chinese in the mid-nineteenth century. It was passed along to the Japanese when they started arriving in the 1890s. In 1972, Warren reflected back on the Japanese immigration to California: “The whole minority development in our country has stemmed from the search for cheap labor... They brought the Japanese in ... for farm labor. [But the Japanese] were too smart, and they started owning the farms.”⁶⁰ In high school, Warren’s classes debated whether Japanese-Americans should be segregated in schools, and whether Japanese immigrants should be able to become naturalized citizens. As district attorney, Warren joined the Native Sons of the Golden West, an anti-Asian association.⁶¹

Even before the attack on Pearl Harbor, Earl Warren was preparing for war and civilian defense. In 1939, Warren hired Herbert Wenig to join his staff full-time and to investigate military law and domestic defense.⁶² Wenig was Warren’s point person with the military, coordinating between Warren’s office and General John DeWitt at the Presidio. After the attack, Earl Warren quickly endorsed the “evacuation” of California’s Japanese population to internment camps throughout the country. In January, Warren said, “the Japanese situation as it exists in this state today may well be the Achilles’ heel of the entire civilian defense effort.”⁶³ Warren then organized the decisive meeting was Feb. 2, called “Proceedings of Sheriffs and District Attorneys Called by Attorney General Warren on the Subject of Alien Land Law Enforcement.” Warren took the lead in passing the resolved: “All alien Japanese be forthwith evacuated from all areas in the state of California to some place in the interior.”⁶⁴ Warren explained that the evacuation process

⁵⁹ 1938 Speech: Members of the San Francisco Republican Assembly, P. 3, Warren Papers, California State Archives, Speeches 1938, F3640:286, Speeches, 1938 Campaign for Attorney General.

⁶⁰ White 68.

⁶¹ White 69.

⁶² White 70

⁶³ White 69, AP News Release, January 30, 1942; GRODZINS, AMERICANS BETRAYED, 94 (1949).

⁶⁴ White 70, Proceedings of Sheriffs and District Attorneys Called by Attorney General Warren on the Subject of Alien Land Law Enforcement, February 2, 1942, p. 156-57, Bancroft Library, University of California Berkeley.

would require federal military help, and he revealed that he had already begun coordinating removal plans with the U.S. Army and Navy.

On Feb 21, 1942, Earl Warren testified at a House committee on “National Defense Migration,” an Orwellian euphemism for removal and internment camps. As Warren explained why the government should remove the Japanese to camps, and not Germans and Italians, he relied on crass racial stereotypes. “[W]hen we are dealing with the Caucasian race, we have methods that will test the loyalty of them; and we believe we can, in dealing with the Germans and Italians, arrive at some fairly sound conclusions...” However, “when we deal with the Japanese, we are in an entirely different field and we cannot form any opinion... [because of their method of living.]”⁶⁵ Implicitly, he was concerned that their failure to assimilate also meant that white Americans could not interrogate them to discern their loyalties. One historian also noted that, as he sought to differentiate the Japanese threat from the German and Italian immigrants, Warren changed his story. At the California conference on Feb. 2, 1942, Warren was asked if he knew whether any Japanese turned over intelligence about sabotage plans by other Japanese residents of the U.S. Warren answered that “five of six” California sheriffs and district attorneys “said some individuals had dropped in to give them some information.” On Feb. 7, testifying before the California Joint Immigration Committee, Warren said no one had come forward. And in his testimony before the House Committee on Feb. 21, Warren more emphatically denied that any Japanese residents had turned over information to authorities.⁶⁶

In the midst of the removal and internment program, Warren was running for Governor against the Democratic incumbent Culbert Olson. The California State Archives hold the most illuminating document of the campaign: “Warren for Governor: Speaker’s Handbook.” This document was the playbook for the entire campaign, a 100 page collection of talking points, facts about Warren’s biography and positions, endorsements, and excerpts from his speeches and the speeches of his prominent

⁶⁵ Warren, Testimony Before the Select Committee Investigating National Defense Migration, U.S. Congress, House, 77th Cong., 2d Sess., February 21, 23, 1942, Part 29, 11015; White at 70.

⁶⁶ Proceedings of Sheriffs and District Attorneys Called by Attorney General Warren on the Subject of Alien Land Law Enforcement, February 2, 1942, p. 176, Bancroft Library, University of California Berkeley. Warren, Testimony Before the Select Committee Investigating National Defense Migration, U.S. Congress, House, 77th Cong., 2d Sess., February 21, 23, 1942, Part 29, 11015; White at 70.

supporters. From the foreword through the conclusion, the main message was the war effort: Olson's ineptitude, and Warren's vigilant record on homeland defense and promises for more.⁶⁷

The handbook's timeline of Warren's record highlights his leadership of the internment effort: "Feb. 2, 1942: Earl Warren, with County representatives, surveyed every County having a Japanese population; mapped all the lands owned, occupied or controlled by Japanese, showing the relation of these lands to vital war production and military installations... supplying Federal authorities with factual data necessary for the prompt evacuation of the Japanese from California."⁶⁸ The timeline section of the handbook then concludes in all caps:

"... BECAUSE THERE WAS A MAN A LEADER WITH THE FORESIGHT AND ABILITY TO TAKE THE INITIATIVE TO WORK QUIETLY AND WITHOUT FANFARE, WELDING THE BONDS OF DEFENSE, PUTTING A SOUND PLAN OF ACTION INTO THE HANDS OF THOSE WILLING EAGER MEN AND WOMEN... TO ORGANIZE AND COORDINATE THE INTRICATE MACHINERY INTO A DEFENSE WEAPON TO HELP KEEP OUR STATE AND OUR COUNTRY FREE."⁶⁹

The machinery was the Japanese removal and internment, and Warren is taking credit as the leader who created it, planned it, and executed it.

The handbook frequently calls for attacking Olson for his inaction on the "War Emergency," in contrast to Warren's actions – the highlight of which was the Japanese removal.⁷⁰ The handbook frequently discussed anti-sabotage plans, implicitly the risk of domestic sabotage by the Japanese population. The handbook also attacks Gov. Olson for vetoing a bill requiring students to pledge allegiance to the flag. A separate campaign document listing Earl Warren's pledges also emphasizes his proposal for a State Council

⁶⁷ Warren for Governor: Speakers' Handbook, Foreword, p. 30, and passim, F3640:540, Earl Warren's Papers –1942 Gubernatorial Campaign Files, California State Archives.

⁶⁸ Id. at p. 34.

⁶⁹ Id. at p. 34.

⁷⁰ Id. at 110-111, 30-34, 117

of Defense and Sabotage Prevention and a fire prevention service (explicitly to guard against arson by an internal threat).⁷¹

Warren's collection of speeches reveals the same strategy to focus on civilian defense, and often explicitly about the Japanese population. Some of the most illuminating speeches were by Warren's supporters in the summer around the time of the State Republican Convention. These speeches were typed and printed similarly and collected together, suggesting that they were either composed by the campaign or transcribed by the campaign for distribution. The state chairman of War Veterans' Committee, Warren for Governor, praised Warren in a major speech:

"More than a year before Pearl Harbor... [Warren] divided the state into nine defense regions and secured enactment of the uniform sabotage prevention act.... He mapped Jap-held and Jap-owned lands throughout the state immediately after Dec. 7th last year."⁷²

Another speech for Warren was by Thomas J. Riordan, the state director of veteran and military affairs, as the campaign began. Riordan warned that he "intend[ed] to take the gloves off" against Governor Olson. "This isn't politics this year. THIS IS WAR!" Then Riordan ran down a long list of Warren's accomplishments in the war effort, and emphasized Warren's role in "the prompt evacuation of the Japanese from California."⁷³ Warren invited other anti-Japanese speakers to join him on the campaign trail. Warren frequently brought actor Leo Carillo, his friend from their World War I service, on the campaign trail. Carillo was virulently anti-Japanese. "There's no such thing as a Japanese American," he allegedly said. "[I]f we ever permit those termites to stick their filthy fingers into the sacred soul of our state again, we don't deserve to live here ourselves."⁷⁴

In the summer of 1942, Warren addressed the Stanford Law Society in a talk titled, "Martial Rule in Time of War." This address reflects a deeper insight into Warren's self-conception, as well as the transformation of the role of attorney general in his lifetime, from barely more than a local prosecutor to a powerful state-wide office, and

⁷¹ "Pledges of Earl Warren as Candidate for Governor," p. 2. Campaign for Governor, 1942. California State Archives.

⁷² Speech, p. 4, in "Speeches by Others," Earl Warren Papers, California State Archive, F3640:541

⁷³ Radio Address by Thomas J. Riordan (Mutual Network, Aug. 17, 1942), p. 7.

⁷⁴ L. KATCHER, EARL WARREN: A POLITICAL BIOGRAPHY, 146 (1967).

then a national office managing wartime security. Warren was arguing for a remarkable expansion of martial law in California:

Martial rule is already partly in effect in California although most of us do not realize it... Today it is most important that we clarify our thinking, for it may become necessary for us to rely more upon martial rule in order to effectuate the defenses of our homefront... The present state of total war provides the fullest reason for the exercise of martial law.⁷⁵

Warren then goes on to argue that the Japanese removal was legitimate under martial law, even if common law authorities had restricted martial law to places where there was actual military conflict and where courts ceased to function because of war. “I believe that if the legality of the removal of persons [with Japanese ancestry] from California’s military areas is ever challenged in the courts, the majority view in the Milligan case that martial rule cannot be based upon a threatened invasion will be modified... The common law has always admitted that martial rule may properly be exercised in an area where war actually rages. In its never ending growth our common law will recognize that the concept of the theatre of war must expand with the progress in the means of destruction... Modern methods of sabotage make the homefront a theatre of operations. [The coastal area] is a combat zone.”⁷⁶

Warren referred to the new crisis of “total war” that would force the law of war to change drastically. To conclude, Warren shifted from legal abstractions to the specific problems in California:

The use of sabotage and fifth column activities as a technique of Axis warfare, the air raids, the need for the special handling of our alien enemy population, and even the possibility of gas and bacteriological warfare all bring problems that can hardly be solved through the processes of civil government.... The solution of these problems must be found in martial rule. For these reasons I have advocated

⁷⁵ “Martial Rule in Time of War,” p. 1-2, 4, Address to the Stanford Law Society, summer 1942 (undated, but placement in archive is among the summer 1942 speeches). California State Archives.

⁷⁶ “Martial Rule in Time of War,” Address to the Stanford Law Society, 1942, p. 11-12. California State Archives.

that the alien enemy problem here in California should be handled as a military rather than a civil problem.⁷⁷

In the collection of speeches from the fall of 1942, Warren repeatedly warned of sabotage, “subversive forces,” “fifth column activity” (a reference to the Spanish Civil War and internal sabotage).⁷⁸ He warned, “We are in graver danger today than in any other period in our history. California, today, is on America’s front line, and is in constant danger of enemy attack both from without and from within.”⁷⁹ But what was also striking was his frequent use of the slur “Japs.” In a strange juxtaposition on race and civil rights, Warren gave an “Address to Negroes,” vowing his support for equality for African Americans. But then he quickly turned that message against the Japanese: “You of the colored race have always been as much a part of this nation in war as you have been part of it in peace. Your people are on every front... We read of the Negro enlisted man who stood valiantly to his gun against the treacherous Jap attack at Pearl Harbor.”⁸⁰ On the one hand, the endorsement of black civil rights is commendable, but Warren was speaking to a black audience in an election campaign, so it was not worthy of badge of political courage. Moreover, this contrast plays into a history of pitting racial groups against each other. In another radio address about “the fifth column,” Warren again referred to “the Japs.”⁸¹ Even if the reference in context there was more concretely about the nation of Japan, the racial epithet easily crosses over as a slur against the domestic population of Japanese immigrants.

His radio address five days before the election proclaimed that “California is in graver danger than any other state in the Union. That we know. We must expect enemy attack here at any time... We must expect desperate attempts to sabotage our war

⁷⁷ Id. p. 30-32.

⁷⁸ Address of Earl Warren, Republican State Convention, Sacramento, Sept. 17, p. 2-3; Fifth column, Radio Address by Earl Warren, Aug. 24, 1942. p. 2, p. 6; “Accent on Unity,” Sacramento Address of Earl Warren; Earl Warren Radio Address, KSFO, June 23, 1942, P. 4; Radio Address by Earl Warren, Aug. 24, 1942, Oakland Homecoming Meeting, p. 5, Earl Warren Papers, California State Archives, Box 3640, Folder 541.

⁷⁹ Address of Earl Warren, Republican State Convention, Sacramento, Sept. 17, p. 2. California State Archives.

⁸⁰ Address to Negroes, p. 1

⁸¹ Earl Warren Radio Address, KSFO, June 23, 1942, P. 4.

industries.”⁸² He discussed sabotage several more times in the address. He referred to California as a combat zone, an echo of his argument in favor of martial law in California that he pitched to the Stanford Law Society that year.⁸³ He then proclaimed, “We will stamp out disunity.”⁸⁴

His final address on the eve of the election and his victory speech both emphasized the war – and his commitment to win the war -- far above any other theme or topic.⁸⁵ Of course, this theme is not surprising, but given his emphasis throughout the campaign on his role in the Japanese removal, these speeches implicitly reminded listeners of his concrete policies as attorney general. His final speech before the election attacked Governor Olson of being weak on war preparations. After listing all of the ways that California was the front line of the war in the Pacific, he observed, “I don’t think you care much tonight whether your Governor is a Republican or a Democrat. I think you are mainly concerned with whether he is a red-blooded American.”⁸⁶ Warren pledged “an all-out war basis, so that this war can be won as quickly as humanly possible.” Again, Warren warns of sabotage, and then immediately vows, in all-caps:

YOU WILL GET AN ADMINISTRATION DETERMINED TO BLOT OUT EVERY ELEMENT OF DISCORD AND DISUNITY; DETERMINED TO DO ITS UTMOST TO BRING ABOUT A UNITED CALIFORNIA WORKING TOWARD ONLY ONE OBJECTIVE – AND THAT OBJECTIVE? THE EARLIEST POSSIBLE VICTORY OVER OUR ENEMIES.⁸⁷

In addition to Warren’s use of race, terrorism, and national security in the 1942 race, he also connected crime, Communism, and sexual predators. One of Warren’s signature accomplishments as attorney general was the Point Lobos prosecution.

⁸² Earl Warren Radio Address, NBC, Oct. 30, 1942, p. 1, Earl Warren Papers, California State Archives, Box 3640, Folder 541.

⁸³ Earl Warren Radio Address, NBC, Oct. 30, 1942, p. 1-4, Earl Warren Papers, California State Archives, Box 3640, Folder 541.

⁸⁴ Earl Warren Radio Address, NBC, Oct. 30, 1942, p. 5, Earl Warren Papers, California State Archives, Box 3640, Folder 541.

⁸⁵ Earl Warren Radio Address, (Navy Day Address), Nov, 2, 1942, Earl Warren Papers, California State Archives, Box 3640, Folder 541; Earl Warren’s Victory Statement, Earl Warren Papers, California State Archives, Box 3640, Folder 541.

⁸⁶ Earl Warren Radio Address, (Navy Day Address), Nov, 2, 1942, p. 2, Earl Warren Papers, California State Archives, Box 3640, Folder 541.

⁸⁷ Earl Warren Radio Address, (Navy Day Address), Nov, 2, 1942, p. 2-3, in Earl Warren Papers, California State Archives, Box 3640, Folder 541.

Communist organizers had been active in the Oakland waterfront unions. A vocal critic of the Communists, George Alberts, was murdered, with no witnesses coming forward. Warren aggressively investigated and prosecuted the case using methods that the Warren Court would later prohibit, limit, or question.⁸⁸ He pursued Communist suspects and obtained four murder convictions in 1937. However, new facts emerged that led to questions about the convictions. In 1941, Governor Olson pardoned three of the convicts, perhaps because Olson depended heavily on union support. In the 1942 governors race, Warren attacked Olson's pardons with high-pitched rhetoric and alleging that the pardons revealed that Olson was tied to Communists. In a remarkable speech before a female audience less than two weeks from the election, Warren jumped from these particular pardons to a broader critique of pardons. Warren argued that recidivism was far more common among Olson's parolees, compared to earlier administrations. Warren then blamed this pattern on Olson pardoning more "sex degenerates" who cannot control themselves and are "unsafe to be turned loose on society." "Is it any wonder that we had an epidemic of sex crimes in California almost without parallel?... Do you wonder why it is unsafe to let your children out on the street after dark? That condition to me represents one of the darkest chapters in the history of the Olson administration – a blot on the name of California, and a threat to our homes and our children that simply must be eradicated." Warren listed a few infamous sex crimes, linked them back to Olson's paroles of the Communist murderers, and promised that if he were elected Governor, he would not tolerate "the reckless release of confirmed criminals and degenerates to prey on society."⁸⁹

How did the office of prosecutor change so quickly from a low prestige office to a political stepping stone to higher office? That's a complicated question, but Earl Warren's political biography offers some hints. The mid-twentieth century witnessed the transformation of prosecutors' offices from local, often part-time and weak to a centralized, more fully resourced, and more powerful. Warren helped institutionalize

⁸⁸ Those methods: using a confession obtained without counsel and through intimidation; electronic eavesdropping; the manipulation of negative pre-trial publicity; asking juries to decide both the voluntariness and the veracity of confessions; and the use of long delays between arrest and arraignment. White 41.

⁸⁹ Warren for Governor Day, Tea and Broadcast, St Francis Hotel, Oct. 22, 1942, p. 6-8. California State Archives.

those major changes, and then he took advantage of those tools and powers. His career (as well as Thomas Dewey's career in New York) demonstrate how quickly they transformed the role of prosecutor from local to state-wide to national and even national-security and martial or military-esque. Warren's address at Stanford during the 1942 campaign – buried in the archives until now -- shows how he conceived of his role as martial and military.

Warren took advantage of the early twentieth-century rise of organized crime and anti-Communism, and he was an early adopter of the scare tactics based on sex crimes and child predators. But perhaps most dramatically, he also manipulated race and terror. Before there was the modern War on Crime and the War on Drugs, prosecutors like Earl Warren crafted an ambitious role in real wars. Warren played that role to its maximum political potential with the Japanese internment. Warren didn't merely plan a massive Japanese internment program. He crafted a political campaign for higher office out of it. It is not an interpretive leap to connect the dots, and to recognize that an ambitious politician designed the internment program with the 1942 gubernatorial campaign in mind, and perhaps with even bigger campaigns down the road in mind.

The longer trend for prosecutors in the twentieth century was the creation of a prosecutor's central role in the national security state. Domestic prosecutions played a role from time to time in the Civil War and World War I, but the rise of "total war," the Cold War, and the Global War on Terror have put the prosecutor on the front lines – and along with that battle comes increased power and prestige. Warren was perhaps the most prominent entrepreneur of these prosecutorial politics of terror, race, and sexual predators in a dark moment in American history.