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Legislative Push Towards Supersession in Missouri: Why the State Attorney General Should Not Be Statutorily Granted Concurrent Jurisdiction with Locally Elected Prosecutors

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**LEGISLATIVE PUSH TOWARDS SUPERSESSION IN MISSOURI:
WHY THE STATE ATTORNEY GENERAL SHOULD NOT BE
STATUTORILY GRANTED CONCURRENT JURISDICTION WITH
LOCALLY ELECTED PROSECUTORS**

ABSTRACT

There is a current trend of electing progressive or “reform-minded” prosecutors over “tough-on-crime” prosecutors in local elections across the country. Traditionally, prosecutors have possessed wide discretion over which cases to prosecute or not, and the law presumes that “prosecutors make discretionary decisions disinterestedly, unaffected by their own self-interest or the interest of others.” However, recently in Missouri, state officials have pushed for providing the state attorney general with concurrent jurisdiction over certain cases. In particular, the Missouri Senate passed a provision through an amendment to House Bill 2 (“HB2”) that would allow the State Attorney General to take over homicide cases in St. Louis City after ninety days if the Circuit Attorney has not filed charges or by request from “the chief law enforcement officer of the investigative agency for the alleged criminal offense or offenses.” Proponents of the measure say understaffed and inexperienced prosecutors require this kind of assistance to fight the “crime epidemic” in St. Louis City.

The proposed HB2 would drastically change Missouri’s historical practice of allowing the local prosecutor to exercise wide discretion in their roles. The election of progressive prosecutors in various cities and counties across the country is not something that has happened by chance. These communities are making the active choice to elect someone as prosecutor who feels the same way they do about the justice system. Voters who elect progressive prosecutors expect them to take many of the actions discussed throughout this Note, such as reduced prosecution of drug crimes or infrequent attempts to pursue the death penalty. While this issue is somewhat new in Missouri, similar proposals and discussions concerning a local prosecutor’s level of discretion have arisen across the country. This author suggests that the best resolution is for local legislatures to reject bills like HB2, which intentionally transfer local power away to the state level.

INTRODUCTION

There is a current trend of electing progressive or “reform-minded” prosecutors over traditional “tough-on-crime” prosecutors in local elections across the country.¹ This is even more true in liberal, urban communities, such as St. Louis.² Traditionally, prosecutors have possessed wide discretion over which cases to prosecute or not, and the law presumes that “prosecutors make discretionary decisions disinterestedly, unaffected by their own self-interest or the interest of others.”³ However, recently in Missouri, state officials have pushed for providing the state attorney general with concurrent jurisdiction over certain cases. While this issue is somewhat new in Missouri, similar proposals and discussions concerning a local prosecutor’s level of discretion have arisen across the country.⁴

In particular, the Missouri Senate passed a provision on September 2, 2020, through an amendment to House Bill 2 (“HB2”).⁵ This provision would allow the State Attorney General to take over homicide cases in St. Louis City after ninety days if the Circuit Attorney has not filed charges or by request from “the chief law enforcement officer of the investigative agency for the alleged criminal offense or offenses.”⁶ Proponents of the measure say understaffed and inexperienced prosecutors require this kind of assistance to fight the “crime epidemic” in St. Louis City.⁷ They believe St. Louis requires this help now

1. Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW360 (Apr. 7, 2019), <https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor> [<https://perma.cc/ETH4-2H3H>].

2. *Id.* (Wesley Bell, newly elected Prosecuting Attorney in St. Louis, “represents part of a new wave of progressive prosecutors taking office . . . across the country”).

3. Bruce Green & Rebecca Roiphe, *Rethinking Prosecutors Conflicts of Interest*, 58 B.C.L. REV. 463, 466 (2017).

4. See Kayla Sullivan, *Bill Allowing State Attorney to Supersede County Prosecutor Passes Committee*, FOX 59 (Jan. 28, 2020), <https://fox59.com/news/politics/bill-allowing-state-attorney-to-supersede-county-prosecutor-passes-committee/> [<https://perma.cc/HQ5V-EX5P>] (Indiana bill proposing legislation to allow the attorney general to prosecute cases that a local prosecutor has a blanket policy not to pursue); Carly Sitrin, *Attorney General Just Says ‘No’ to Decriminalizing Marijuana in Jersey City*, NJ SPOTLIGHT NEWS (July 23, 2018), <https://www.njspotlight.com/2018/07/18-07-22-attorney-general-just-says-no-to-decriminalizing-marijuana-in-jersey-city/> [<https://perma.cc/9JKG-4CA5>] (New Jersey Attorney General arguing that municipal prosecutors cannot use their powers of discretion to refuse to criminally prosecute particular classes of cases).

5. Rebecca Rivas, *Republican State Senators Pass Provision that ‘Usurps’ Circuit Attorney Kimberly Gardner’s Authority*, MISSOURI PROSECUTORS SAY, ST. LOUIS AM. (Sept. 3, 2020), http://www.stlamerican.com/news/republican-state-senators-pass-provision-that-usurps-circuit-attorney-kimberly-gardner-s-authority-missouri-prosecutors/article_0a050270-ee30-11ea-aa88-efbca5ecef46.html [<https://perma.cc/69D8-TFMD>].

6. *Id.*

7. Jack Suntrup, *In Early-Morning Maneuver, Missouri Senate Pushes Through Bill Aimed at Gardner*, ST. LOUIS POST DISPATCH (Sept. 3, 2020), <https://www.stltoday.com/news/local/>

because of the many lawyers that Kim Gardner's office has lost, coupled with her more lenient approach of prosecutions for certain offenses.⁸ St. Louis is also an isolated target because Gardner is the first true progressive prosecutor in Missouri. Passage of the provision raised immediate opposition from a variety of parties, including St. Louis Mayor Lyda Krewson, the Missouri Prosecuting Attorneys Association, the Public Safety Director, former local judges, the St. Louis City NAACP President, and more.⁹ These groups believe HB2 is an attack on the prosecutor's discretion and the electorate's voice, and likely violates the Missouri Constitution.¹⁰

Missouri's proposed HB2 is not the only recent attempt to supersede local prosecutors' powers. A similar bill, Senate Bill 5, proposed by Missouri State Senator Andrew Koenig, attempted to establish concurrent jurisdiction in St. Louis by granting the Missouri Attorney General the authority to hear and make decisions on homicide and carjacking cases in the city.¹¹ While this bill was focused solely on the city of St. Louis, Senator Koenig expressed hope for statewide expansion in the future.¹²

The proposed HB2 would drastically change Missouri's historical practice of allowing the local prosecutor to exercise wide discretion in their roles. On its website, the Office of the Missouri Attorney General details that its involvement "is limited to those cases where our office has been appointed to assist at the request of a local prosecutor and by direction of the Governor . . . or are appointed as special prosecutors by a court when local prosecutors have a conflict of interest . . ."¹³ The Office goes on to state that it "is not able to independently initiate or take over a case from a local law enforcement agency or from a local prosecutor unless specifically authorized to do so."¹⁴ Most often this occurs when the governor directs the attorney general to aid a prosecuting attorney, or when the prosecuting attorney has a conflict of interest.¹⁵

crime-and-courts/in-early-morning-maneuver-missouri-senate-pushes-through-bill-aimed-at-gardner/article_f4b3b783-a53d-5bf3-bf24-92e59e688090.html [https://perma.cc/WB5Q-FUKZ].

8. Joel Currier, *470 Years of Experience Gone: Kimberly M. Gardner Has Lost More Lawyers Than She Had When She Took Office*, ST. LOUIS POST DISPATCH (Sept. 12, 2019), https://www.stltoday.com/news/local/crime-and-courts/470-years-of-experience-gone-kimberly-m-gardner-has-lost-more-lawyers-than-she-had/article_c5b70e30-d3c3-551c-8a90-d1f03b47c1e3.html [https://perma.cc/LH43-96QF].

9. See Rivas, *supra* note 5.

10. *Id.*

11. Cameron Gerber, *Koenig: Violent Crime in St. Louis Requires 'All Hands on Deck Approach'*, MO. TIMES (Aug. 3, 2020), <https://themissouritimes.com/koenig-violent-crime-in-st-louis-requires-all-hands-on-deck-approach/> [https://perma.cc/8DQG-3LTN].

12. *Id.*

13. *FAQ's*, MO. ATT'Y GEN., <https://ago.mo.gov/criminal-division/public-safety/faq's> [https://perma.cc/3LCX-YFV2] (last visited Feb. 21, 2021).

14. *Id.*

15. MO. REV. STAT. §§ 27.030; 56.110.

From an external perspective, some believe these moves by Missouri officials and others across the country are a form of backlash against the rise of progressive prosecutors.¹⁶ This sort of hostile response to reform-minded prosecutors is not just a local issue either, with U.S. Attorney General William Barr criticizing progressive prosecutors' efforts to pull back punitive criminal justice policies.¹⁷ In an August 2019 speech to a police group, Barr went as far as to call progressive prosecutors "anti-law enforcement" and "dangerous to public safety."¹⁸

In order to better understand the motivation behind a bill such as HB2, it is important to first consider how progressive prosecutors operate compared to traditional prosecutors of the past. It is also critical to recognize the heightened tension between these progressive prosecutors and their state officials. The recent legislative attempts to undermine Kim Gardner must be recognized as part of a broader retaliation against progressive prosecutors. This Note provides that surrounding framework and argues that, even when disregarding possible partisan motivations, these attempts to shift jurisdiction away from local prosecutors are both bad as a matter of policy and as a matter of law.

Part I of this Note analyzes this recent shift towards reform-minded prosecutors, details how these progressive prosecutors differ from the traditional tough-on-crime prosecutors of the past, and concludes by looking at other jurisdictions with similar conflicts between progressive prosecutors and other criminal justice system actors over the legality of their reform methods. Part II will discuss specific arguments from parties on both sides of the issue in Missouri based on recent proposals, such as HB2, to have the Missouri Attorney General supersede the local prosecuting attorney's discretionary powers. Finally, Part III recommends the best model for Missouri moving forward, based on an approach of respecting prosecutorial discretion, while still serving the interests of justice for everyone within the community.

I. THE SHIFT TOWARDS THE "PROGRESSIVE PROSECUTOR"

Throughout the United States, reform-minded prosecutors have been winning elections by running campaigns focused on committing to public safety

16. Christopher Smith, *Reform-Minded Prosecutors—Especially Black Women—Face Pushback*, VERA, <https://www.vera.org/state-of-justice-reform/2019/prosecution> [<https://perma.cc/DK5A-55BE>] (last visited Mar. 25, 2022).

17. German Lopez, *The Trump Justice Department's War on Progressive Prosecutors, Explained*, VOX (Aug. 16, 2019), <https://www.vox.com/policy-and-politics/2019/8/16/20807544/william-barr-larry-krasner-philadelphia-trump-justice-department> [<https://perma.cc/X89W-6B YA>].

18. William P. Barr, U.S. Att'y Gen., Remarks at the Grand Lodge Fraternal Order of Police's 64th Nat'l Biennial Conference (Aug. 12, 2019).

and reducing mass incarceration.¹⁹ These “progressive prosecutors” pursue a range of policies from bail system reform, curbed enforcement of low-level marijuana offenses, increased diversion programs, not seeking the death penalty, pledges to end mass incarceration, and more.²⁰ In Missouri, for instance, Progressive Prosecutor Kim Gardner became the first African-American woman elected as Circuit Attorney in St. Louis City, winning her election with a focus on reforms, such as refusing to issue charges for low level marijuana offenses and implementing diversion programs as a way to prevent crime while also helping people and their families.²¹

Understanding the unique composition and inclinations of a progressive prosecutor is important in order to fully comprehend why their rise has been met with backlash. In Missouri, HB2 is a prime example of jurisdictional backlash by shifting power away from Kim Gardner, but this is just one form of backlash. Before looking at the progressive prosecutor approach and backlash on that movement, it is essential to recognize historical prosecutorial methodology.

A. *Departing from the Historical Approach of Tough-on-Crime*

The late 1960s to early 1970s was the start of an era where conservative politicians capitalized on public opinion favoring stricter crime control.²² Politicians utilized this public opinion to enact many “tough-on-crime” policies, such as mandatory minimum sentences, which dramatically increased incarceration rates across the country.²³ While proponents of law and order legislation were often viewed favorably by the public, opponents faced a tough battle and were often perceived as “soft.”²⁴

This trend continued into the 1980s, which saw a further increase in the tough-on-crime movement via the “war on drugs.”²⁵ Over a twenty-year stretch

19. Allison Young, *The Facts on Progressive Prosecutors*, CTR. FOR AM. PROGRESS (Mar. 19, 2020), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/19/481939/progressive-prosecutors-reforming-criminal-justice/> [https://perma.cc/3TQW-2X5J].

20. Allan Smith, *Progressive DAs Are Shaking Up the Criminal Justice System. Pro-Police Groups Aren't Happy*, NBC NEWS (Aug. 19, 2019), <https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-n1033286> [https://perma.cc/CBM4-9BYF].

21. Nicholas Phillips, *Will St. Louis Circuit Attorney Kim Gardner Get Four More Years to Upend the Criminal Justice System?*, ST. LOUIS MAG. (July 5, 2020) <https://www.stlmag.com/news/circuit-attorney-kim-gardner-longform-profile-2020-primary/> [https://perma.cc/FY92-QW6D].

22. Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 BERKELEY J. AFR.-AM. L. & POL'Y 3, 12 (2013).

23. *Id.*

24. *Id.* at 16.

25. Marc Mauer, Symposium, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV 9, 10 (1999).

from 1980 to 2000, the number of drug arrests almost tripled from 580,900 to 1,579,566.²⁶ The proportion of drug offenders in state prisons rose from 6.4% to 22.7%,²⁷ while the federal system saw drug offenders go from comprising 25.2% of the inmate population to 59.9% over a similar period.²⁸

While this increased effort on drug offenders seems to be the result of the legislative branch, prosecutors were not innocent bystanders. The passing of mandatory minimum penalties resulted in a shift in power from judges to prosecutors, who accordingly used their discretion to ramp up mass incarceration.²⁹ By the early 1990's, the increasingly higher prosecution numbers were merely a reflection of public desire at the time. In 1992, 83% of Americans believed the criminal justice system was "not tough enough," with only 2% finding it to be "too tough."³⁰ However, these beliefs slowly began to trend the opposite way. By 2003, the "not tough enough" segment was down to 65%, and by 2016, only 45% of Americans still believed the criminal justice system was "not tough enough."³¹

Despite the number of crimes and arrests falling between 1994 and 2008, the filing of felony cases rose significantly. As the 2000's progressed into the 2010's, fewer Americans wanted a harsher system, with an increasing number of people wanting reform from the tough-on-crime past.³² As a result, there has been a recent bipartisan shift from the traditional tough-on-crime mentality to instead being "smart on crime."³³ This new approach made the birth of the progressive prosecutor movement possible, as seen by the wave of progressive

26. See FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORT 1980 (1981); FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORT 2000 (2001).

27. See BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 160091, CORRECTIONAL POPULATIONS IN THE UNITED STATES 1994, at 11 (1996) [hereinafter CORRECTIONAL POPULATIONS 1994]; BUREAU OF JUST. STAT., U.S. DEP'T OF JUSTICE, NCJ-163916, CORRECTIONAL POPULATIONS IN THE UNITED STATES 1995, at 10 (1997) [hereinafter CORRECTIONAL POPULATIONS 1995].

28. See CORRECTIONAL POPULATIONS 1994, *supra* note 27, at 13; CORRECTIONAL POPULATIONS 1995, *supra* note 27, at 12.

29. See MICHAEL TONRY, SENTENCING MATTERS 134–35 (1996) (tracing history and parameters of certain mandatory sentencing laws).

30. Justin McCarthy, *Americans' Views Shift on Toughness of Justice System*, GALLUP (Oct. 20, 2016), <https://news.gallup.com/poll/196568/americans-views-shift-toughness-justice-system.aspx> [<https://perma.cc/BJ39-K8BF>].

31. *Id.*

32. Colleen Long & Hannah Fingerhut, *AP-NORC Poll: Nearly All in US Back Criminal Justice Reform*, AP NEWS (June 23, 2020), <https://apnews.com/article/ffaa4bc564afcf4a90b02f455d8fd03> [<https://perma.cc/5Z59-BMXA>].

33. Madison McWithey, *Taking a Deeper Dive into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography: Part One: Internal Constraints*, 61 B.C.L. REV. E. SUPP. I.-32, I.-33 (2020).

district attorneys elected across the country.³⁴ This progressive movement has not arisen unchallenged though, with opposition finding creative ways to attack progressive prosecutors.³⁵

B. *The Progressive Approach & Opposition Response in Missouri*

The term “progressive prosecutor” has many accepted meanings and does not refer only to prosecutors of one particular political party.³⁶ Despite many recent election wins, reform-minded prosecutors remain a tiny fraction of district attorneys, with one estimate finding fewer than 100 out of 2,400 identifying as progressive.³⁷ Progressive prosecutors are reformers who establish practices that scale back or divert the punitive measures which were overly enforced by traditional prosecutors.³⁸ Reformers believe electing these types of prosecutors can reverse the “punitive trends of the past several decades . . . to harness the prosecutorial power which helped to create our system of mass incarceration in order to dismantle it.”³⁹

Progressive prosecutors have taken a variety of approaches when it comes to reform. As prosecutor, they can dismiss cases to quash discriminatory laws, offset racial or socioeconomic imbalances in law enforcement, or minimize harsh punishments by declining to trigger them.⁴⁰ Many reduce prosecutions of

34. Kim Foxx was elected in the Chicago area (2016); Larry Krasner was elected in Philadelphia (2017); Rachael Rollins was elected in the Boston area (2018); other progressive prosecutors have also won in places such as Brooklyn, Kansas City, and Dallas. See Emily Bazelon & Miriam Krinsky, *There’s a Wave of New Prosecutors. And They Mean Justice.*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html> [<https://perma.cc/EFB5-WUXA>]; Mark Berman, *These Prosecutors Won Office Vowing to Fight the System. Now, the System is Fighting Back.*, WASH. POST (Nov. 9, 2019), <https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-e2%80%A6/> [<https://perma.cc/AL99-25EA>].

35. Berman, *supra* note 34.

36. See Liane Jackson, *Change Agents: A New Wave of Reform Prosecutors Opens the Status Quo*, ABA J. (June 1, 2019), <http://www.abajournal.com/magazine/article/change-agents-reform-prosecutors> [<https://perma.cc/U5FQ-TJMS>] (discussing newly-elected prosecutors as “progressive,” including Melissa Nelson, a Republican Florida Prosecutor); Andrew Patanzi, *Jacksonville State Attorney Melissa Nelson Files for Re-election*, FLORIDA TIMES (Feb. 5, 2020), <https://www.jacksonville.com/story/news/local/2020/02/05/jacksonville-state-attorney-melissa-nelson-files-for-re-election/112269508/> [<https://perma.cc/28YH-KWH5>].

37. Paul Butler, *Prosecutors’ Role in Causing—and Solving—the Problem of Mass Incarceration*, WASH. POST (Apr. 19, 2019), <https://www.washingtonpost.com/outlook/prosecutors-role-in-causing—and-solving—the-problem-of-mass-incarceration/2019/04/19/d370d844-5c93-11e9-a00e-050dc7b82693> [<https://perma.cc/9CJP-XL3P>].

38. See Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 751–52 (2018).

39. Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1541–42 (2020).

40. Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1248 (2020).

lower-level crimes and pursue punishment alternatives for drug crimes, such as diversion and treatment programs.⁴¹

In St. Louis City, which HB2 specifically seeks to effect, Kim Gardner is the first African-American to head the St. Louis Circuit Attorney's Office and was recently reelected with over sixty percent of the vote in her 2020 Democratic Primary.⁴² Gardner campaigned on a reform platform, to take over an office which she said was primarily focused on charges, cases, and convictions based on the traditional "tough-on-crime" approach, skyrocketing incarceration without actually reducing crime.⁴³

This prompted a response from those who opposed Gardner. A month after Gardner's Democratic Primary win, Republican Missouri State Senators passed HB2, "a move widely seen as a rebuke of the city's first Black prosecutor."⁴⁴ St. Louis Republican Senator Bob Onder said Gardner is "not doing her job" and is "too busy prosecuting the McCloskey's and the former governor while children are dying."⁴⁵ St. Louis Democrats believe this illustrates how Gardner has faced particularly harsh criticisms as a progressive, while Republicans who are unhappy with her decisions attempt to take power away from her.⁴⁶ Other Missouri Democrats went as far as to call Republicans' passing of HB2 as "an attack and affront on Democracy and the voters in St. Louis and across Missouri."⁴⁷ Gardner is not the only progressive prosecutor in the country facing backlash for embracing progressive reforms, as others across the country increasingly find themselves at odds with opposition groups.⁴⁸

41. See Young, *supra* note 19.

42. See Rivas, *supra* note 5. In St. Louis City, the winner of the Democratic Primary race is largely understood to be the winner of the overall race, as seen by Gardner's general election win with seventy-four percent of the vote.

43. KIM GARDNER RE-ELECTION CAMPAIGN, <https://votekimgardner.com/> [<https://perma.cc/TVF2-BQRZ>] (last visited Feb. 21, 2021); Joel Courier, *Voters Reelect St. Louis Circuit Attorney Gardner, Treasurer Jones and Sheriff Betts*, ST. LOUIS TODAY (Nov. 3, 2020), https://www.stltoday.com/news/local/govt-and-politics/voters-reelect-st-louis-circuit-attorney-gardner-treasurer-jones-and-sheriff-betts/article_9ec75961-2362-51aa-878c-bb0b12770df3.html [<https://perma.cc/JX5B-Q4FR>].

44. Summer Ballentine, *Senate Passes Bill Targeting Black St. Louis Prosecutor*, AP NEWS (Sept. 3, 2020), <https://apnews.com/article/15327f7c4a8f26398e9e076ce128a10b> [<https://perma.cc/2V5W-PBJX>].

45. *Id.* State Senator Onder's reference to the McCloskeys is discussed further later in this Note.

46. *Id.* St. Louis Democratic Senator Jamilah Nasheed stated, "[t]his is about a young African American female who dared to challenge a Republican governor of a wrongdoing and bad behavior."

47. *Id.* (quoting Kansas City Democratic State Senator Lauren Arthur).

48. TCR Staff, *Prosecutors on the Firing Line: Backlash Against 'Progressives' Grows*, CRIME REP. (June 24, 2019), <https://thecrimereport.org/2019/06/24/prosecutors-on-the-firing-line-backlash-against-progressives-grows/> [<https://perma.cc/3YZY-S8L3>] ("So called 'progressive'

C. *Similar Conflicts in Other Jurisdictions*

The shift towards progressive prosecution is not unique to Missouri as “reformers” are being elected in various states across the country, such as California, New York, Illinois, Florida, Massachusetts, and more.⁴⁹ Just like in Missouri, these reform-minded prosecutors increasingly face opposition and criticism from their own state officials despite more and more communities electing prosecutors who prioritize reforming the criminal justice system.⁵⁰

As Florida’s first ever Black State Attorney, Aramis Ayala, declared she would never seek the death penalty as “there is no evidence that death sentences actually protect the public.”⁵¹ In response, Florida Governor Rick Scott requested Ayala recuse herself from all pending first-degree murder cases.⁵² After Ayala refused, Governor Scott transferred over twenty capital cases to a different prosecutor who favored capital punishment.⁵³ Ayala then sued, believing Scott lacked the authority to transfer the cases,⁵⁴ leading to a Florida Supreme Court battle. In a 5–2 decision, the Florida Supreme Court ultimately sided with Governor Scott, calling Ayala’s blanket refusal policy against the death penalty to be “at best, a misunderstanding of Florida law.”⁵⁵ After losing the case, Ayala set up a death penalty review panel to evaluate when capital punishment is appropriate.⁵⁶

In Suffolk County, Massachusetts, Rachael Rollins won eighty percent of the vote to become the first Black woman elected to her position as District Attorney.⁵⁷ Rollins enacted a number of bold changes, including a proposal not

prosecutors around the country are coming under renewed attack from critics who say their policies are encouraging crime.”).

49. See Allan Smith, *supra* note 20; see also Young, *supra* note 19.

50. See *id.*

51. Andrew Cohen, *Reformist Prosecutors Face Unprecedented Resistance From Within*, BRENNAN CTR. (June 19, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/reformist-prosecutors-face-unprecedented-resistance-within> [<https://perma.cc/DR5D-LYTA>].

52. Steve Bousquet, *Orlando Prosecutor Defends Stance Against Death Penalty*, MIAMI HERALD (June 28, 2017), <https://www.miamiherald.com/news/politics-government/state-politics/article158614209.html>.

53. *Id.*

54. *Id.*

55. Bernie Woodall, *Florida Supreme Court Sides with Governor in Squabble Over Death Cases*, REUTERS (Aug. 31, 2017), <https://www.reuters.com/article/us-florida-prosecutor/florida-supreme-court-sides-with-governor-in-squabble-over-death-cases-idUSKCN1BB2BI> [<https://perma.cc/A5P9-QTHF>].

56. Allison Ross, *Florida’s First Black State Attorney Defends Opposition to Death Penalty*, TAMPA BAY TIMES (Feb. 12, 2020), <https://www.tampabay.com/florida-politics/buzz/2020/02/12/floridas-first-black-state-attorney-defends-opposition-to-death-penalty/> [<https://perma.cc/R9FT-4FT5>].

57. See Christopher Smith, *supra* note 16.

to prosecute fifteen minor offenses, like drug possession or shoplifting.⁵⁸ This was met with pushback from Massachusetts Governor Charlie Baker, who believes Rollins' position makes the community more dangerous.⁵⁹ The governor was not the only one to take aim at Rollins' methods, as one municipal court judge refused Rollins' request to dismiss charges against protestors, instead attempting to continue the prosecution over her objections.⁶⁰ Rollins made an appeal to the state's high court, later winning a judgment finding the judge's refusal to be an overstep of his authority.⁶¹

Meanwhile in Philadelphia, Progressive Prosecutor Larry Krasner has pushed to end prosecution for marijuana and sex worker offenses, reduce the use of cash bail, and exonerate a number of individuals wrongly convicted by his predecessors.⁶² Krasner also declined to prosecute certain nonviolent cases of illegal gun possession,⁶³ which resulted in state legislators adding a Philadelphia-specific provision to a bill giving the attorney general's office concurrent jurisdiction over certain gun-related crimes.⁶⁴ Pennsylvania Governor Tom Wolf signed the bill into law despite critics' complaints, such as State Representative Chris Rabb saying the bill "has yet again punished Philadelphia for fighting on its own behalf, and will supplant the widely embraced priorities of a duly elected district attorney with the backroom agenda of the special interest groups who feel most threatened by his reforms."⁶⁵

Parisa Dehghani-Tafti won her election for prosecutor in Northern Virginia based on a reform agenda, promising not to prosecute lower-level drug offenses.⁶⁶ Just two months into her term, judges created a new mandate

58. *DA Rollins Fires Back After Critique by Gov. Baker*, WCVB (Apr. 5, 2019), <https://www.wcvb.com/article/baker-takes-issue-with-das-proposal-not-to-prosecute-some-drug-crimes/27054776> [<https://perma.cc/YU8H-SUBZ>].

59. *Id.*

60. Gal Tziperman Lotan & John Ellement, *Judge Refuses to Dismiss Charges Against Protesters at Straight Pride Parade*, BOS. GLOBE (Sept. 3, 2019), https://www.bostonglobe.com/metro/2019/09/03/judges-refuse-dismiss-assault-charges-against-protesters-straight-pride-parade/eNe0W4pgOc6gPbVgOmxU6O/story.html?p1=Article_Inline_Text_Link [<https://perma.cc/JRY2-WYFL>].

61. Berman, *supra* note 34.

62. Alex Yablon, *Larry Krasner's Lonely, Radical Crusade to Solve America's Gun Problem*, TRACE (Jan. 28, 2020), <https://www.thetrace.org/2020/01/larry-krasner-gun-violence-reform-philadelphia-district-attorney/> [<https://perma.cc/U96E-6KW4>].

63. *Id.*

64. Chris Palmer & Samatha Melamed, *Could a New Pa. Law Strip Control Over Gun Prosecutions From Philly DA Larry Krasner?*, PHILA. INQUIRER (July 8, 2019), <https://www.inquirer.com/news/philadelphia-district-attorney-larry-krasner-attorney-general-josh-shapiro-gun-law-20190708.html> [<https://perma.cc/KNZ9-PHKH>].

65. *Id.*

66. Matthew Barakat, *Prosecutors Push to Maintain Discretion on Dropping Charges*, AP NEWS (Aug. 14, 2020), <https://apnews.com/article/virginia-courts-u-s-news-7811bd8c2c45f248b476fe8c86415801> [<https://perma.cc/C7ZA-FNPL>].

requiring prosecutors to file a written brief with detailed facts explaining their reasoning for any plea bargains or dropped charges.⁶⁷ Dehghani-Tafti believes this order is both time-consuming and potentially damaging in cases where the motivations for dropping a case should remain private.⁶⁸ Over sixty current and former prosecutors, including Missouri's Kim Gardner, signed on to a "friend-of-the-court brief" supporting Dehghani-Tafti's August petition asking the court for relief from this demanding new order by the judges.⁶⁹

The above situations do not encompass all of the current progressive prosecutors facing backlash for their new methods, but these examples do highlight that Missouri is not alone, with state-level officials around the country looking for new ways to counteract local prosecutorial discretion and independence.

II. RECENT MISSOURI PROPOSAL: HOUSE BILL 2

The HB2 proposal would, as previously mentioned, allow for the State Attorney General to take over homicide cases in St. Louis after ninety days if the Circuit Attorney has not filed charges or by request from "the chief law enforcement officer of the investigative agency for the alleged criminal offense or offenses."⁷⁰

There is a strong political element to the proposed HB2, as Missouri Republicans have some adverse history with Gardner beyond her identification as a progressive prosecutor.⁷¹ As soon as Gardner took office in 2017, she inherited a highly controversial case against Jason Stockley, a white police officer later acquitted of killing twenty-four year old Anthony Smith.⁷² Later, in February of 2018, Gardner filed a felony invasion-of-privacy charge against then-Missouri Republican Governor Eric Greitens, which led to his eventual resignation in March of 2019.⁷³ More recently, Gardner angered Missouri Republicans by charging the McCloskey family for pulling guns on protestors in their neighborhood.⁷⁴

Missouri Governor Mike Parson and Attorney General Eric Schmitt both spoke out to denounce Gardner on the McCloskey case and attempted to flip the focus on Gardner by blaming her for issuing charges in just thirty-three of the

67. *Id.*

68. *Id.*

69. *Id.*

70. *See* Rivas, *supra* note 5.

71. *See* Doyle Murphy, *Republicans' War on Kim Gardner*, RIVERFRONT TIMES (Aug. 26, 2020), <https://www.riverfronttimes.com/stlouis/republicans-war-on-kim-gardner/Content?oid=34048143> [<https://perma.cc/9U95-6CC8>].

72. *Id.* The Stockley case was the first of many actions by Gardner that created major conflict and disagreement among the St. Louis Police Union and herself.

73. *Id.*

74. *Id.*

161 homicides in the city at that time.⁷⁵ This statement was an attempt to discredit Gardner but was grossly misleading as it leaves out the fact that there were only forty-four arrests for those 161 homicides.⁷⁶ Some opponents believe the tumultuous history between Gardner and Missouri Republicans is part of the motivation behind the current push to pass HB2.

Proponents of the bill push for “law and order,” traditional strict enforcement of our laws, and also argue that the bill is necessary in order to fight a “crime epidemic” in the city of St. Louis.⁷⁷ Opponents disagree and believe HB2 is a part of a larger pushback against the progressive prosecutor movement. They argue that such a bill would go against Missouri’s long-standing precedent of prosecutorial discretion, undermine voters’ voices, and ultimately be an attack on progressive prosecutors’ efforts to instill criminal justice reform. Additionally, opponents believe there is a winning argument to be made that the current language of the bill is contrary to the Missouri Constitution⁷⁸ by violating the single-subject rule and being considered a “special law.”⁷⁹

A. *Proponents of HB2: Traditional Enforcement & Fighting the Crime Epidemic*

1. Traditional Enforcement of Laws

Proponents of proposals like HB2 may argue that it is the prosecuting attorney’s duty to initiate proceedings against parties known to have committed crimes.⁸⁰ Validated by the Missouri Supreme Court’s 1939 decision in *McKittrick v. Wymore*, proponents argue that a prosecutor’s ability to exercise discretion “cannot excuse neglect of duty on his [sic] part.”⁸¹ Additionally, while endowed with discretion, it is still the duty of the prosecuting attorney “to exercise his discretionary powers in good faith.”⁸²

Based on the traditional prosecutor viewpoint, proponents of bills such as HB2 believe progressive prosecutors fail to meet the higher responsibility

75. *Id.*

76. Murphy, *supra* note 71. Parson gives the false implication that Gardner was “sitting on a backlog of 128 murders,” when really, she had issued charges in thirty-four cases among the forty-four people arrested. “Explained another way, prosecutors can’t charge murder cases they never see.”

77. See Suntrup, *supra* note 7.

78. Christine Woody, *We Can Defeat House Bill 2, But We Need Your Help*, EMPOWER MO. (Sept. 10, 2020), <https://empowermissouri.org/we-can-defeat-house-bill-2-but-we-need-your-help/> [<https://perma.cc/47Y2-BMML>].

79. *Id.*

80. State, on Inf. *McKittrick v. Wymore*, 132 S.W.2d 979, 981 (1939).

81. See *id.* at 986.

82. See *id.*

required of elected representatives, compared to private attorneys.⁸³ They believe a willful breach of this higher responsibility for political reasons “causes irreparable harm to the judicial system because it breeds contempt for the rule of law, emboldens the criminal element, and flouts prosecutorial obligations to the victims of crime.”⁸⁴

Supporters of HB2 and other similar legislation tend to find progressive prosecutors to be “rogue” and detrimental to the traditional role of prosecutors.⁸⁵ They believe that independent prosecutors must uphold the law as written, or else there is no guarantee that the law will be enforced or that charges will be filed.⁸⁶ There is fear among those with the traditional viewpoint that progressives’ goals of “dismantl[ing] the criminal justice system” will eliminate traditional prosecutors who follow the law.⁸⁷ Along with their concern for upholding traditional methods of prosecutors, proponents of HB2 believe the bill is necessary in order to fight the “crime epidemic” in St. Louis City.⁸⁸

2. Fighting the “Crime Epidemic”

Advocates of measures such as HB2 believe that prosecutors who act as “social justice reformers” are actually demoralizing and undercutting law enforcement, while also threatening public safety.⁸⁹ However, advocacy groups such as Empower Missouri, a group which advocates for basic human needs and equal justice, argue that HB2 would actually be more harmful to public safety, wasting taxpayer resources and taking away from struggling essential programs, such as K-12 and higher education, public health, and mental health.⁹⁰

Missouri State Senator Bob Onder, who proposed this amendment to HB2, said that St. Louis Circuit Attorney Kim Gardner “is badly understaffed” with “little experience in her office,” and that the measure could be very valuable for fighting against “the crime epidemic, the murder epidemic, in the city of St.

83. Craig Trainor, *Taking on “Progressive Prosecutors,”* CITY J. (Feb. 7, 2021), <https://www.city-journal.org/taking-on-progressive-prosecutors> [https://perma.cc/R47N-A2FF].

84. *Id.*

85. Charles Stimson & Zack Smith, “*Progressive” Prosecutors Sabotage the Rule of Law, Raise Crime Rates, and Ignore Victims,* HERITAGE FOUND. (Oct. 29, 2020), <https://www.heritage.org/crime-and-justice/report/progressive-prosecutors-sabotage-the-rule-law-raise-crime-rates-and-ignore> [https://perma.cc/V8Z5-5U3Z].

86. *Id.*

87. *Id.*

88. *See* Suntrup, *supra* note 7.

89. Samantha Michaels, *Attorney General William Barr Slams Progressive Prosecutors as “Dangerous,”* MOTHER JONES (Aug. 12, 2019), <https://www.motherjones.com/politics/2019/08/attorney-general-william-barr-slams-progressive-prosecutors-as-dangerous/> [https://perma.cc/3G EA-UKHN].

90. *See* Woody, *supra* note 78.

Louis.”⁹¹ Other proponents, such as State Senator Andrew Koenig, argue there is a correlation between a rising murder rate and decreasing conviction rates and prosecutions.⁹² While the St. Louis murder rate has slightly increased during Gardner’s tenure,⁹³ there is no evidence to suggest this is caused by a change in conviction rates. Koenig believes a concurrent jurisdiction law would allow the State Attorney General to prosecute crimes, like murder, to “get convictions and get these violent criminals off the streets.”⁹⁴

Missouri Governor Mike Parson believes the HB2 proposal “is not about taking away authority,” but instead “is about fighting violent crime, achieving justice for victims, and making our communities safer.”⁹⁵ While there has been a surge in violent crime during the pandemic, this is true across twenty-nine cities, including St. Louis, and is unlikely a result of Gardner’s actions.⁹⁶ Despite Governor Parson’s claim that HB2 is “not a personal attack” on Gardner, it is widely seen as targeted pushback at Gardner’s progressive approach, with opponents wondering why other counties in Missouri are not also included in the bill.⁹⁷

B. *Opponents of HB2: Prosecutorial Discretion & Criminal Justice Reform*

Opponents of proposals such as HB2 believe giving a state official concurrent jurisdiction over local matters is a direct attack on the local prosecutor’s discretionary powers. This attack, they maintain, is completely detrimental to the community and disrespects the voters’ choices in who they want to represent their area as prosecutor. Additionally, opponents believe

91. See Suntrup, *supra* note 7. Despite Senator Onder’s concern for fighting the “crime epidemic,” there have been no discussions or proposals to provide additional funding to Gardner’s office.

92. See Gerber, *supra* note 11.

93. *Homicides in St. Louis, 1970–2021*, ST. LOUIS POST DISPATCH (Jan. 4, 2022), https://www.stltoday.com/online/50-years-of-st-louis-homicides/table_5e4f1d5c-0808-57be-b4cf-1ad8fa7acc62.html [<https://perma.cc/6HTG-W7B9>]; see also Lauren Trager, *Records Show Trial Conviction Rate for Circuit Attorney’s Office Has Fallen Nearly 20% in 2 Years*, KVIA (Feb. 26, 2020), <https://kvia.com/regional-news/2020/02/26/records-show-trial-conviction-rate-for-circuit-attorneys-office-has-fallen-nearly-20-in-2-years/> [<https://perma.cc/2S5E-H73C>] (Gardner spokesperson arguing that including plea agreements, Gardner’s overall conviction rate is around 95% as opposed to KMOV’s assertion that it was 51% in 2018 and 54% in 2019).

94. See Gerber, *supra* note 11.

95. See Murphy, *supra* note 71.

96. See RICHARD ROSENFELD ET AL., COUNCIL ON CRIM. JUST., PANDEMIC, SOCIAL UNREST, AND CRIME IN U.S. CITIES: 2020 YEAR-END UPDATE (Jan. 2021).

97. Katie Moore, *Gov. Parson Introduces Proposal Allowing AG to Prosecute Murders in St. Louis*, KANSAS CITY STAR (Aug. 10, 2020), <https://www.kansascity.com/news/local/crime/article244861797.html> (Former U.S. Senator Claire McCaskill opposes HB2, calling it a “political circus” and asking, “[w]hy not Jackson County that also has record homicides?”).

proposals like HB2 are just a way to strike back at the recent movement of progressive prosecutors and their attempts to reform the criminal justice system.

There is also a belief from opponents that this law would be unconstitutional, as lawmakers are not allowed to amend bills onto unrelated legislation, yet the amendment added to HB2 involving concurrent jurisdiction for the attorney general was unrelated to HB2's purpose regarding the admissibility of witness testimony.⁹⁸ Furthermore, opponents believe HB2 violates the section of Missouri's Constitution prohibiting the legislature from passing "any local or special law . . . where a general law can be made applicable."⁹⁹

1. Prosecutorial Discretion

It is a deeply rooted legal principle that prosecuting attorneys have the sole discretion concerning against whom, when, and how criminal laws are enforced.¹⁰⁰ Missouri courts have long found that it is unquestionably the responsibility and duty of the prosecuting attorney to thoroughly commence prosecution of criminal offenses until the conclusion.¹⁰¹ The prosecuting attorney has been vested with the responsibility to "manage and conduct all criminal cases" over which the court has jurisdiction.¹⁰² This responsibility includes the decision of whether or not to prosecute or bring charges before a grand jury,¹⁰³ and the prosecutor's decisions are seldom subject to judicial review.¹⁰⁴

Historically, studies of attorney general practice have found it rare for attorneys general to intervene in local prosecutions.¹⁰⁵ In fact, almost every state has made a conscious choice to defer to local prosecutors over a statewide prosecutor.¹⁰⁶ Even in states where attorneys general have broader authority to

98. See Woody, *supra* note 78.

99. MO. CONST. art. III, § 40(30).

100. State ex rel. Lodwick v. Cottey, 497 S.W.2d 873, 880 (Mo. Ct. App. 1973).

101. State ex rel. Dowd v. Nangle, 276 S.W.2d 135, 137 (Mo. 1955) (en banc).

102. *Id.*

103. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

104. State v. Gardner, 8 S.W.3d 66, 70 (Mo. 1999) (en banc) (citing State v. Massey, 763 S.W.2d 181, 183 (Mo. Ct. App. 1988)).

105. Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 552 n.149 (2011) (citing NAT'L ASS'N ATT'YS GEN. COMM. ON THE OFF. OF THE ATT'Y GEN., POWERS, DUTIES AND OPERATIONS OF STATE ATTORNEYS GENERAL 107 (Oct. 1977) ("There is little statistical data on how frequently Attorneys General initiate prosecutions, but it appears that this power is infrequently exercised."); Earl H. De Long, *Powers and Duties of the State Attorney-General in Criminal Prosecution*, 25 AM. INST. CRIM. L. & CRIMINOLOGY 358, 395 (1935) ("Although the attorney-generals of most of the forty-eight states are authorized to conduct criminal prosecutions . . . the extent of state participation in this phase of criminal law enforcement is negligible.").

106. Barkow, *supra* note 105, at 154.

intervene in local prosecutions, almost every attorney general opts not to use this broad discretionary power except in rare cases.¹⁰⁷

While not dealing specifically with the attorney general interfering with a prosecutor's discretion, the Missouri Supreme Court found in *State v. Honeycutt* that a trial judge does not have the inherent authority to dismiss a criminal case for failure to prosecute.¹⁰⁸ The court found that recognizing such an authority “would interfere with the long-recognized discretion of a prosecutor to determine when and whether to bring charges”¹⁰⁹ *Honeycutt* went further on to say “the discretion vested in him [sic] by law places in him the sole power to determine when he should proceed with a prosecution or dismiss it.”¹¹⁰

Honeycutt was not the first case regarding prosecutorial discretion in Missouri, as the Missouri Supreme Court ruled similarly in *State ex rel. Griffin v. Smith*.¹¹¹ In *Griffin*, the court determined “that the prosecuting attorney has the discretion and authority, without the consent or permission of the circuit court or anyone else, to enter the State's *nolle prosequi* or dismissal in a pending criminal cause”¹¹² While *Honeycutt* found a judge had no authority to force dismissal of charges on a prosecutor, *Griffin* further ruled that a judge had no authority to force a prosecutor to move forward with a prosecution.¹¹³ With *Griffin* dating back to 1953 and the *Honeycutt* ruling fifty years later in 2003, it seems clear that Missouri courts are very reluctant to allow anyone to interfere with a prosecuting attorney's inherent discretionary authority.

The United States is the only country in the world where citizens elect prosecutors.¹¹⁴ Supporters of electing local prosecutors argue that elections provide citizens with greater control over government and increase the responsiveness of prosecutors to the problems within their community.¹¹⁵ It is vital for a prosecutor to remain free before trial to exercise the broad discretion entrusted to the position to ascertain the extent of societal interest in a prosecution.¹¹⁶

107. *Id.* at 550.

108. *State v. Honeycutt*, 96 S.W.3d 85, 89 (Mo. 2003) (en banc).

109. *Id.* at 88.

110. *Id.*

111. *State ex rel. Griffin v. Smith*, 258 S.W.2d 590, 594 (Mo. 1953) (en banc).

112. *Id.* at 495.

113. *Id.*

114. See Michael Tonry, *Determinants of Penal Policies*, 36 CRIME & JUST. 1, 35 (2007) (“Only in the United States are judges and prosecutors elected”); see also Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 512 (1975) (“In most American states, public prosecutors are locally elected officials with surprisingly great and virtually uncontrolled authority.”).

115. Michael Ellis, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1531 (2012).

116. *State ex rel. Becker v. Wood*, 611 S.W.3d 510 (Mo. 2020) (en banc) (citing *United States v. Goodwin*, 457 U.S. 268, 381 (1982)).

Gardner's utilization of her discretion causes HB2 advocates to claim she does not prosecute enough crimes.¹¹⁷ However, Gardner believes HB2 reveals how a powerful few continue to fight against her reforms since being elected.¹¹⁸ She argues that the people in the city of St. Louis voted for her overwhelmingly in support of enacting her proposed reforms to the criminal justice system.¹¹⁹

2. Criminal Justice Reform

Across the country, there is a developing belief that prosecutors, given their autonomy and discretion, can be the key to criminal justice reform.¹²⁰ Prosecutors should want to ensure fairness and increase public safety, and by using their discretion appropriately, they can lead the effort to “reduce mass incarceration, to address racial disparity in the system, [and] to look for alternatives to oppressive sanctions.”¹²¹ However, HB2 and similar concurrent jurisdiction laws interfere with a prosecutor's discretion and can prevent prosecutors from effectively reducing mass incarceration.

As of today, the United States is still imprisoning its citizens at a higher rate than any other Western democracy,¹²² which many people see as a major problem. One argument against prosecutors acting to reform the criminal justice system is that reducing the mass incarceration rate comes at the cost of public

117. Kurt Erickson, *Parson Targets St. Louis Prosecutor, Saying Gardners Not Doing Enough to Combat Crime*, ST. LOUIS POST-DISPATCH (Aug. 11, 2020), https://www.stltoday.com/news/local/crime-and-courts/parson-targets-st-louis-prosecutor-saying-gardner-not-doing-enough-to-combat-crime/article_7505776b-2d36-57d2-a9f9-d089ce20279c.html [<https://perma.cc/36KK-PAFH>].

118. David Greenwald, *State of Missouri Threatens Prosecutorial Independence of Kim Gardner*, DAVIS VANGUARD (Aug. 16, 2020), <https://www.davisvanguard.org/2020/08/state-of-missouri-threatens-prosecutorial-independence-of-kim-gardner/> [<https://perma.cc/Q856-3P3Y>].

119. *Id.*

120. Tanya Decendario & Linhchi Nguyen, *Michigan Prosecutor Conducts Listening Tour, Announces Criminal Justice Reforms*, DAVIS VANGUARD (Jan. 5, 2021), <https://www.davisvanguard.org/2021/01/progressive-prosecutor-series-michigan-prosecutor-conducts-listening-tour-announces-criminal-justice-reforms/> [<https://perma.cc/N687-CBGY>] (Michigan prosecutor announces criminal justice reforms); Sandy Hausman, *Progressive Prosecutors Want Big Legal Changes*, WVTF (Jan. 5, 2021), <https://www.wvtf.org/post/progressive-prosecutors-want-big-legal-changes#stream/0> [<https://perma.cc/WZ69-AMK6>] (Virginia prosecutors ask state lawmakers to make changes to reduce the state's prison population, assure justice for all people, and save tax dollars in the long run); Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, ATLANTIC (May 18, 2016), <https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/> [<https://perma.cc/JU9J-2RE9>].

121. Lantigua-Williams, *supra* note 120.

122. *Highest to Lowest—Prison Population Rate*, WORLD PRISON BRIEF, https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All [<https://perma.cc/U269-3NRE>] (last visited Feb. 21, 2021).

safety, however, between 2007 and 2017, thirty-four states proved this wrong by reducing both imprisonment and crime rates simultaneously.¹²³

Americans seem to be largely united around the idea that action is needed to reform the criminal justice system.¹²⁴ An Associated Press poll in June of 2020 found 29% of Americans think the criminal justice system needs “a complete overhaul,” 40% believe “major changes” are needed, 25% say only “minor changes” are necessary, and just 5% think “no changes” are needed at all.¹²⁵ A separate poll by the American Civil Liberties Union in 2017 found 91% of Americans to support criminal justice reform.¹²⁶

According to the U.S. Supreme Court, the prosecutor’s interest in a criminal case is “not that it shall win a case, but that justice shall be done.”¹²⁷ Progressive prosecutors believe justice can be achieved through the wise exercise of discretion while simultaneously reducing incarceration rates. Bills like HB2 attempt to help state actors who want to curb a prosecutor’s discretionary powers, which in effect will frustrate efforts by progressive prosecutors to end mass incarceration.

3. Missouri Constitutional Challenges

Opponents of Missouri’s HB2 also believe the current version of the bill violates the single subject rule and the special law prohibition specifically called out in the Missouri Constitution.¹²⁸ Additionally, despite Missouri law allowing the governor to direct the attorney general to *aid* a local prosecutor,¹²⁹ the common belief is that the law is predicated on a request for aid coming from the local prosecutor,¹³⁰ which Kim Gardner has not requested.

An act satisfies the single subject requirement of Article III, Section 23 of the Missouri Constitution if “all its provisions fairly relate to the same subject, have a natural connection therewith or are incidents or means to accomplish its

123. Cameron Kimble & Ames Grawert, *Between 2007 and 2017, 34 States Reduced Crime and Incarceration in Tandem*, BRENNAN CTR. (Aug. 6, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/between-2007-and-2017-34-states-reduced-crime-and-incarceration-tandem> [<https://perma.cc/KF42-VFRM>].

124. See Long, *supra* note 32.

125. *Id.*

126. Press Release, 91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds (Nov. 16, 2017), <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds> [<https://perma.cc/XB39-F5B9>].

127. *Berger v. United States*, 295 U.S. 78, 88 (1935).

128. See Woody, *supra* note 78.

129. MO. REV. STAT. § 27.030.

130. David Lieb, *Analysis: Missouri Attorney General Koster Has Limited Prosecutorial Powers*, MISSOURIAN (Oct. 20, 2013), https://www.columbiamissourian.com/news/state_news/analysis-missouri-attorney-general-koster-has-limited-prosecutorial-powers/article_5502dfa6-9882-5efe-8786-de4035bb3c2f.html [<https://perma.cc/943K-WT8L>].

purpose.”¹³¹ A single “subject” may include any matter that falls within or reasonably relates to the general core purpose of the proposed legislation.¹³²

The Missouri Supreme Court’s test for determining if a bill violates the single subject requirement of Article III, Section 23, has “remained virtually the same since 1869.”¹³³ A bill does not violate the single subject requirement as long as “the matter is germane, connected, and congruous.”¹³⁴ The test to ascertain if “a bill contains more than one subject is whether all provisions of the bill fairly relate to the same subject, have natural connection therewith or are incidents or means to accomplish its purpose.”¹³⁵ Any matters which are considered to be “incongruous, disconnected, and without any mutual relation to each other must not be joined in one bill.”¹³⁶

The phrase “one subject” is to be broadly read, but not so broadly that the phrase becomes meaningless.¹³⁷ The Missouri Association of Prosecuting Attorneys (“MAPA”) believes the senate ignored this single subject requirement, instead grafting concurrent jurisdiction to the Attorney General within a bill that was supposed to relate to “the admissibility of certain witness statements.”¹³⁸ If a court agreed, this could jeopardize any conviction the attorney general might obtain.¹³⁹ MAPA strongly opposes any measure for concurrent jurisdiction, noting that throughout Missouri’s entire history as a state, “the Attorney General has never had the power to prosecute homicide cases without the request and consent of the local prosecutor.”¹⁴⁰

Aside from the Constitutional “one subject” rule argument, there is also an argument to be made that HB2 would be considered a “special law,” which also violates the Missouri Constitution.¹⁴¹ Challengers of HB2 argue that the specific targeting of St. Louis City by the proposed law thus violates the Missouri Constitution by applying to only one jurisdiction, but not others, without valid cause.¹⁴² While proponents of HB2 may argue that such valid cause exists via

131. *Rizzo v. State*, 189 S.W.3d 576, 579 (Mo. 2006) (en banc).

132. *Id.*

133. *Hammerschmidt v. Boone Cty.*, 877 S.W.2d 98, 102 (Mo. 1994) (en banc).

134. *Id.* (quoting *State v. Mathews*, 44 Mo. 523, 527 (Mo. 1869)).

135. *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 6 (Mo. 1984) (en banc).

136. *State ex rel. Attorney Gen. v. Miller*, 100 Mo. 439, 13 S.W. 677, 678 (Mo. 1890).

137. *Hammerschmidt*, 877 S.W.2d at 102.

138. Statement of the Mo. Ass’n of Prosecuting Attorneys on Concurrent Jurisdiction Following Passage of HB2 in Senate (Sept. 3, 2020), <https://www.prosecutors.mo.gov/files/MAPA%20Statement%20on%20Concurrent%20Jurisdiction%20Proposals%209-3-2020.pdf> [<https://perma.cc/PS8F-MCQQ>].

139. *Id.*

140. *Id.*

141. MO. CONST. art. III § 40.

142. *See Woody*, *supra* note 78.

the crime epidemic in St. Louis City, this would likely be challenged further and decided by the courts.¹⁴³

III. BEST SOLUTION: RESPECT PROSECUTORIAL DISCRETION & THE INTERESTS OF JUSTICE

Given the differing views of this issue, any given model of prosecutorial supersession will leave some groups of people dissatisfied. Furthermore, many views on prosecutorial discretion are dependent on whether that individual's political party is in power, which is a harmful ingredient when trying to discern the best possible model for all people regardless of their political beliefs. However, such partisan factors should ultimately have no effect on the operation of our criminal justice system.

While full discretion is vital, one aspect progressive prosecutors should be careful around is authorizing blanket refusals to prosecute. As previously discussed, Florida's Supreme Court ruled that Aramis Ayala did not have the power to declare she would refuse to seek the death penalty in any cases. Blanket policies, as opposed to general guidelines, take prosecutors beyond the element of discretion and into a potential separation of powers argument.¹⁴⁴ As the former president of the Florida Prosecuting Attorneys Association said, "if [Ayala] wants to change the law," she should "run for the Legislature."¹⁴⁵

For St. Louis voters, this sort of argument does not necessarily apply towards Kim Gardner, who does not have any per se blanket policies of non-enforcement.¹⁴⁶ However, any constituents who are forced to have the state attorney general take over local affairs are able to make their own argument about separation of powers. The Missouri Constitution requires the power of government to be divided between the legislative, executive, and judicial departments, and further states that "no person . . . charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others."¹⁴⁷ Gardner believes HB2 is not legal for this very reason, saying "you have to really think about . . . the governor and

143. *Id.*

144. See generally Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603 (2020).

145. See Jessica Pishko, *Prosecutors Are Banding Together to Prevent Criminal-Justice Reform*, NATION (Oct. 18, 2017), <https://www.thenation.com/article/archive/prosecutors-are-banding-together-to-prevent-criminal-justice-reform/> [<https://perma.cc/5HGF-L8J6>] (quoting former Florida Prosecuting Attorneys Association President Glenn Hess).

146. Even in Gardner's new policy of not prosecuting cases under 100 grams, she states the caveat that this only applies if there are no aggravating circumstances. See Sarah Fenske, *St. Louis Will No Longer Prosecute Marijuana Possession Under 100 Grams*, RIVERFRONT TIMES (June 13, 2018), <https://www.riverfronttimes.com/stlouis/st-louis-will-no-longer-prosecute-marijuana-possession-under-100-grams/Content?oid=20121463> [<https://perma.cc/E3RL-UPKZ>].

147. MO. CONST. art. II § 1.

the issues of separation of powers, injecting the executive branch into the judicial branch.”¹⁴⁸ As previously discussed, the local prosecutor’s discretion is well established, and state officials have seldom been able to single-handedly take over.

With bills such as HB2 and others being proposed, now is the time to protect the discretion of local prosecutors who are rightfully elected by their constituents. State level officials, such as the attorney general, should not override local communities’ votes by stealing power away from local prosecutors. The best solution going forward is to reject proposals such as HB2, and instead preserve the prosecutorial discretion which has existed at the local level for a long time. Any concerns regarding a prosecutor’s blanket refusal to act on certain matters should be resolved knowing that the state supreme courts stand ready to hear challenges on those matters.

CONCLUSION

The role of the prosecutor in the United States is unique but holds some important powers. In the past, prosecutors have used these powers to be “tough-on-crime,” which became a key factor in America’s over-incarceration problem within the criminal justice system. In recent years, this trend has begun to reverse with the increasing popularity of progressive prosecutors. The rise of these progressive prosecutors has been met with backlash by those who believe in the traditional approach of prosecutors, most often with attacks on the ability of the prosecutor to utilize their discretionary powers when deciding how to handle their cases.

Prosecutorial discretion is deeply rooted in the American criminal justice system. As such, any attempt to take away such discretion should not be taken lightly. As locally elected officials, prosecutors have been purposely chosen by their constituents. Voters make these decisions carefully, based on whichever candidate shares similar beliefs, especially regarding the operation of the criminal justice system. Providing full discretion empowers local prosecutors to pursue criminal convictions based on the beliefs and values of the community who elected them. Any measure which provides the state attorney general concurrent jurisdiction to act on matters previously under the sole discretion of the local prosecutor counteracts the local community’s voice and voting power.

The election of progressive prosecutors in various cities and counties across the country is not something that has happened by chance. These communities are making the active choice to elect someone as prosecutor who feels the same way they do about the justice system. Voters who elect progressive prosecutors expect them to take many of the actions discussed throughout this Note, such as

148. See Greenwald, *supra* note 118.

reduced prosecution of drug crimes or infrequent attempts to pursue the death penalty.

Proponents of HB2 and similar bills believe there is a crime epidemic, and the only way to fix it is through the traditional approach of acting tough on crime. Opponents find this reasoning to be a part of the overall problem of mass incarceration and other racial inequalities existing within the criminal justice system. Furthermore, they believe it is a direct encroachment on the prosecutorial discretion that local prosecutors have traditionally held.

The best resolution is for local legislatures to reject bills, such as HB2, which intentionally transfer local power away to the state level. State governments need to respect traditional norms of discretion and leave it to the state's highest court to decide when prosecutors have gone beyond their granted powers. Retaliation at the valid elections of progressive prosecutors in any form is wrong, and it is especially wrong to directly override constituents' voices by attempting to shift the local prosecutor's power to a state official. Measures that attempt to do this, and specifically HB2, are bad as a matter of policy, and likely not valid as a matter of law.

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