

The Wickersham Commission and Local Control of Criminal Prosecution

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THE WICKERSHAM COMMISSION AND LOCAL CONTROL OF CRIMINAL PROSECUTION

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I.	INTRODUCTION	1199
II.	THE LOCAL-TO-STATE THEME IN THE COMMISSION REPORT.....	1201
	A. <i>Removal from Politics and Attendant Corruption</i>	1203
	B. <i>Creation of Genuine Accountability</i>	1205
	C. <i>Application of Expertise</i>	1205
	D. <i>Responsiveness to Changing Threats and Conditions</i>	1206
	E. <i>State Versus Federal Centralization</i>	1207
III.	SELECTIVE CENTRALIZATION	1208
	A. <i>Where State Influence Grew</i>	1211
	B. <i>Where Local Control Persisted</i>	1213
IV.	REFLECTIONS ON THE STAYING POWER OF LOCAL CONTROL.....	1217

I. INTRODUCTION

The National Commission on Law Observance and Enforcement, also known as the Wickersham Commission, embodied a moment when Americans took a deep breath and reopened some basic questions about criminal law enforcement. This blue-ribbon commission started its work after years of experimentation in the use of criminal laws to suppress alcohol. Prompted by the turmoil of Prohibition, the Commission surveyed, with a rational and professional eye, the organic institutions of criminal law enforcement. The Commission found much room for improvement.

Much of that improvement, in the view of the Commission, could happen if governments would reassign jobs in the system, changing who

* Needham Y. Gulley Professor of Criminal Law, Wake Forest University. I appreciate the helpful reactions to these ideas that I received from Beverly Gage, Rachel Harmon, Tracey Meares, Michael O'Hear, and the other participants in the Marquette University Law School "Conference on America's First National Crime Commission and the Federalization of Law Enforcement." Katie Hughes and Tori Kepes provided excellent research assistance.

controls criminal investigation, prosecution, and adjudication. In particular, the Commission wanted to reduce local control over criminal prosecution.

If local actors were to play a lesser role in criminal enforcement, who would take the reins in their place? The Prohibition context for the Commission reports led to extended investigations of the federal role in criminal law enforcement. The Commission documented the costs of federal involvement in criminal justice and offered some conflicting recommendations on the federal role. This discussion of federal law enforcement attracted the most attention from readers over the years.

The Commission, however, was clear in its preference for state control over local control of criminal prosecution. This local-to-state theme in the Commission reports proved to be a more important proposal than the local-to-federal theme that held our attention all along.

In this essay, I focus on the Commission's reasons for preferring state control. The report embodied a view of political accountability that was typical of the day. The influence of politics in criminal enforcement, for the Wickersham Commission, was tantamount to corruption. Political influence meant the willingness to ignore technical competence and the power to achieve favorable outcomes for the privileged few. Put more bluntly, the Commission viewed local political control of criminal justice as irrational and corrupt.

After excavating the views of the Wickersham Commission on shifting control from local government to state government, I ask how much of the Commission's vision eventually became a reality. The two-part answer begins with this: some parts of the criminal justice machinery have in fact slipped away from local government and into the hands of state government. Indeed, the growth of state influence in criminal justice has been more important than the more celebrated "federalization" of criminal law.

The second part of the answer is that certain components of the criminal justice system have remained under local control, despite the powerful forces that could have uprooted them. In particular, while courts and corrections have become primarily state-level functions, prosecution and policing have stayed within local control.

The staying power of local control—and the fact that local actors held onto prosecution and police functions but not to other parts of the criminal justice machinery—reflects a change in our understanding of politics in criminal justice. The Wickersham Commission's account of

political influence as corrupt and irrational no longer carries the same persuasive weight. Instead, local voters pull the strings precisely in those areas of criminal justice where we have the least confidence in the constraining power of law. Local control shows that we act today on the basis of a benign view of politics. We still recognize the power of politics to achieve responsive and constrained criminal justice.

II. THE LOCAL-TO-STATE THEME IN THE COMMISSION REPORT

The Commission published its *Report on Prosecution*, report number 4, in April 1931.¹ While some of the Commission's reports were iconoclastic, this volume embodied the conventional wisdom of the day among academics and reform-minded lawyers. This was a consensus document.

The report and a long appendix were drafted with heavy involvement from commissioner Roscoe Pound, the dean of the Harvard Law School, and long-time advocate for modernization of criminal justice at the local level.² Pound, along with his colleague Felix Frankfurter, led an empirical assessment of the criminal justice system in Cleveland ten years before the Wickersham Commission published its report.³ One of the researchers and authors in the Cleveland project, Alfred Bettman, also took a leading role in the Wickersham Commission.⁴ He authored an appendix to accompany the Commission's *Report on Prosecution*. The appendix summarized the court and prosecution materials from a collection of recently published study reports from eighteen jurisdictions around the country, including Baltimore, Chicago, Cincinnati, Cleveland, Memphis, Philadelphia, and twelve different states.⁵ These reports were part of a coordinated national effort to update the institutions and practices of local criminal justice to adapt them to the

1. NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON PROSECUTION (1931) [hereinafter REPORT ON PROSECUTION].

2. *See id.* at 38.

3. *See* RAYMOND FOSDICK ET AL., CRIMINAL JUSTICE IN CLEVELAND: REPORTS OF THE CLEVELAND FOUNDATION SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN CLEVELAND, OHIO (Roscoe Pound & Felix Frankfurter eds., 1922).

4. *Id.* Bettman was a Cincinnati lawyer best known for his work in land use planning. Early in his career he worked as a prosecutor in Ohio. *See* Laurence C. Gerckens, *Bettman of Cincinnati*, in THE AMERICAN PLANNER: BIOGRAPHIES AND RECOLLECTIONS 120, 122, 136 (Donald A. Krueckeberg ed., 1983).

5. *See* ALFRED BETTMAN, CRIMINAL JUSTICE SURVEYS ANALYSIS: BEING AN ANALYSIS OF THE SURVEYS OF THE ADMINISTRATION OF CRIMINAL JUSTICE RELATING TO THE SUBJECTS OF PROSECUTION AND COURTS FOR NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT 47-49 (1931).

increased volume and other challenges of modern systems.⁶ The Commission described its objectives, in the field of criminal prosecution, as restating the consensus among experts and reform-minded lawyers, as reflected in those combined surveys assembled over the previous decade:

We conceived that an analysis of the information and recommendations contained in these surveys and a statement of the lessons which could be drawn from their data and discussions would afford the most effective means of giving to the American public something in the nature of a summary of the existing authoritative knowledge on these subjects and of establishing a starting point from which some conclusions might be drawn as to the directions of reform of the administration of criminal justice, accompanied by an indication of subjects appropriate for additional research.⁷

Although federalism is a recurring theme in the overall work of the Commission, it plays only a subdued role in the volume on prosecution. The Wickersham Commission was skeptical of Prohibition, documenting many of the unanticipated costs that resulted from the sudden criminalization of a widespread activity.⁸ At the same time, the Commission was enthusiastic about federal system organization.

The report holds up the centralized organization of the Department of Justice as a model for state court prosecutors: “Nowhere is [state] prosecution as well organized as in the Federal Government, and by and large the State systems are much less efficient and much less satisfactory.”⁹

The report analogizes the Attorney General in each state to the United States Attorney General under the 1789 statute that established an earlier and less effective organization of the Department of Justice.¹⁰ Under this loose organizational scheme, the chief prosecutor in the jurisdiction holds no effective control over prosecutions: “There is seldom any effective central superintendence and control of

6. *See id.* at 45–46; SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 147–48 (2d ed. 1998).

7. REPORT ON PROSECUTION, *supra* note 1, at 3.

8. *See* NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES 44–60 (1931) [hereinafter PROHIBITION REPORT].

9. REPORT ON PROSECUTION, *supra* note 1, at 9.

10. *Id.* at 9–10.

prosecutions.”¹¹ A decentralized prosecutorial service in a state, leaving effective control of case-level prosecution decisions to the local office, leads to “[w]ant of adequate system and organization in the office of the average prosecutor.”¹²

Instead of this decentralized system, the Wickersham Commission suggests that prosecutors in each state should answer to the state Attorney General, giving the chief prosecutor in the state the authority to organize local offices, to set policies for those offices, and to make case-level decisions. What worked for the federal prosecutors would also work for a unified state prosecutorial service.

What would centralization of prosecutors at the state level accomplish? The Wickersham Commission offers several answers.

A. *Removal from Politics and Attendant Corruption*

First, the report says, a centralized statewide prosecutorial service removes the local prosecutor from politics. Local prosecutors, the Commission asserts, “are likely to be deep in politics.”¹³ In particular, the report expresses concern about prosecutors in large cities who obtain the job through local elections: the “direct primary has had a noticeably bad effect upon this office.”¹⁴

The election of prosecutors affects the quality of the attorneys who hold the position. Competent members of the bar are unwilling to undergo the “ordeal” of nomination, and the voters—at least those in “the ordinary large city”—are in no position to judge the professional qualifications of the candidates.¹⁵ As a result, political machines rather than voters are the true gatekeepers to the ranks of prosecutors: they are chosen based on the “exigencies of political organizations rather than with reference to the tasks of law enforcement.”¹⁶

The report equates this “political” environment with outright corruption. Criminal organizations can bribe prosecutors through the electoral process because “[c]ampaign funds are derived from what amounts to licensed violations of law.”¹⁷ The prosecutor is easy for political organizations to control while remaining out of sight: “Thus the

11. *Id.* at 10.

12. *Id.* at 11.

13. *Id.* at 11.

14. *Id.*

15. *Id.*

16. *Id.* at 15.

17. *Id.*

prosecutor's office, with its enormous power of preventing prosecutions from getting to trial, its lack of organization, its freedom from central control, and its ill-defined responsibility, is a great political prize."¹⁸

The opportunities for corruption multiply in a world where trials are disappearing. The key power of the prosecutor is the dismissal, which goes unnoticed more often when dismissals and negotiated guilty pleas are more common than trials.¹⁹

Defense attorneys, in the view of the Wickersham Commission, are the agents of this corruption. New prosecutors are "in no position to cope with experienced and resourceful professional defenders."²⁰ The "habitual practitioner in criminal cases [has] connection with local politics [and the ability to pressure] those whose political tenure is uncertain and dependent upon politics."²¹ The "habitual defenders of criminals" learn that the *nolle prosequi* power exercised by assistant prosecutors who answer to no responsible organization "lends itself to the quiet choking off of prosecutions under political influence."²²

The association of elections with local corruption was familiar territory for reform-minded professionals of the era. For more than a generation, the Progressive agenda pursued electoral reforms to limit the occasions for voters to direct government functions; these reforms included the city manager form of government (endorsed as an alternative to mayoral elections), the short ballot, and other measures designed to insulate expert public administrators from uninformed voters.²³

18. *Id.*

19. *See id.* at 11, 15. While many commenters of the day treated plea negotiations as an illegitimate method to dispose of criminal charges, the Commission took no position on the necessity or desirability of guilty pleas. *See* Justin Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1 (1927); Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97 (1928).

20. REPORT ON PROSECUTION, *supra* note 1, at 13.

21. *Id.*

22. *Id.* at 19, 21.

23. *See* Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 21–22 (1997) (discussing the use of short ballots); Richard J. Stillman II, *The City Manager: Professional Helping Hand, or Political Hired Hand?*, 37 PUB. ADMIN. REV. 659 (1977) (discussing city manager form of government); Larry Walker, *Woodrow Wilson, Progressive Reform, and Public Administration*, 104 POL. SCI. Q. 509, 516, 523 (1989) (referencing the short ballot).

B. Creation of Genuine Accountability

A second benefit of centralizing local prosecutors into a single state organization relates to transparency. Centralization promotes true accountability by creating visible lines of responsibility for routine matters within an organization. Prosecutors who answer to their supervisors at the state level bypass the murkier influences of the local power structure. When a prosecutor drops a case against a privileged defendant, those who object can make a more well-informed direct appeal to voters; even better, they can ask for rational bureaucratic action within the prosecutor's office.

Prosecutors who do not answer to the local electorate are less inclined to throw up distracting and spectacular cases to confuse voters about their actions in more routine cases. A system of frequent elections “does not so much require that the work of the prosecutor be carried out efficiently as that it be carried out conspicuously.”²⁴ Given this “desire for publicity and the fear of offending those who control local politics, the temptation” for an elected prosecutor is to create an “ineffective perfunctory routine for everyday cases with spectacular treatment of sensational cases.”²⁵

The short terms of office that are available to prosecutors who face frequent elections (while receiving low salaries) keep the local offices disorganized. Simply put, there is no time to organize the office adequately. And without proper organization and records, the public cannot have “definitely located responsibility.”²⁶ The many assistants have no clearly defined powers and duties. A larger statewide organization, with a rational bureaucratic structure and defined powers, allows the public to see more clearly where the blame lies when a prosecutorial decision goes badly.

C. Application of Expertise

A third benefit of a centralized prosecutorial service, according to the Wickersham Commission, is that it enables prosecutors to apply their expertise, particularly to achieve the rehabilitative treatment of the offender—the central goal of criminal justice.²⁷ With stable leadership, a prosecutorial service can make the assistants permanent and remove

24. REPORT ON PROSECUTION, *supra* note 1, at 15.

25. *Id.*

26. *See id.* at 12–13.

27. *Id.* at 5.

political patronage from the hiring process. Greater stability allows for accumulation of experience, specialization, and a division of labor.²⁸

In the view of the Commission, the primary aim of public agencies dealing with crime is “to discover the offender at an age and time when he may still be in the formative stage as regards his personality and character and to apply to each individual case that disposition or treatment which fits that individual’s problem and gives promise of the desired results.”²⁹ Rehabilitation requires a long-term perspective and the patience to monitor the offender’s progress throughout the treatment. Such a long-term perspective is easier to attain when assistants remain on the job for longer periods, have clearer assignments, and have better record-keeping routines.³⁰

This faith in the expertise of a stable bureaucracy was a staple of reformist thinking at the time.³¹ In 1938, James Landis (a Frankfurter student and successor to Roscoe Pound as Dean of Harvard Law School) published his influential book, *The Administrative Process*; it was the high-water mark of faith in scientific expertise as a guide and source of legitimacy for administrative action.³²

D. Responsiveness to Changing Threats and Conditions

Another benefit of centralized prosecutors discussed in the Wickersham Commission report is adaptability to modern conditions, especially the changing needs of criminal justice in large cities. Decentralized local prosecution may have been appropriate for a pioneer rural society, but a fragmented prosecutorial service is ill suited to “the great urban industrial centers and unified country of to-day” where law and order are much more than a local concern.³³

In the formative era of the nation, it was appropriate to address fears about centralized governmental power. But after a long period of urbanization, an overly decentralized prosecutorial service may be

28. *Id.* at 12.

29. *Id.* at 5.

30. *Id.* at 12. In local offices, responsibility for conducting prosecutions may fall between “a corps of more or less independent assistants with no record to show exactly who did what” in an ineffective presentation of case between outgoing and incoming prosecutor and assistants. *Id.* at 14.

31. See Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614 (1927).

32. See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1675–78 (1975).

33. REPORT ON PROSECUTION, *supra* note 1, at 11.

“quite as bad,” given the modern conditions of transportation and facilities for the coming and going of organized crime. The “State is as natural a unit as the county or town was a century ago.”³⁴ Centralized organization of prosecutors became one piece of the Commission’s overall reform program to streamline antiquated criminal procedures that were no longer useful in a more complex industrial society. The Commission catalogued the various points in the process where “mitigating devices” designed in other eras created discretionary power to dismiss or block prosecutions, making them subject to the “pressure of politics.”³⁵ These outmoded mitigating devices included a preliminary hearing before a magistrate, grand jury indictment, the general verdict after trial, judicial discretion at sentencing, a motion in mitigation after sentence, and the executive power of pardon.³⁶

E. State Versus Federal Centralization

In light of the benefits of removing prosecutors from local electoral control and placing them into a larger, more stable and rational bureaucracy, did the Wickersham Commission therefore endorse the federalization of criminal prosecution? Many other volumes of the Commission’s reports detailed the ill effects of an expanded federal presence in criminal enforcement.³⁷ It is not surprising, then, that the Commission preferred state government control over prosecution rather than federal involvement.

The Commission explored in great detail the recent and remarkable expansion of federal criminal law enforcement.³⁸ It treated the newfound federal role as a natural response to a dysfunctional system, and as a stopgap measure.³⁹ It is little wonder, the report opines, that “more than one large city” now relies on the federal prosecuting machinery to maintain local law and order.⁴⁰ Federal criminal legislation can even reach larcenies and receipt of stolen property. Some states at one time enforced their own prohibition laws, but now

34. *Id.* at 13.

35. *Id.* at 20–21.

36. *Id.* at 21–22.

37. *See generally* NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON THE CHILD OFFENDER IN THE FEDERAL SYSTEM OF JUSTICE (1931); NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE DEPORTATION LAWS OF THE UNITED STATES (1931); PROHIBITION REPORT, *supra* note 8.

38. *See* REPORT ON PROSECUTION, *supra* note 1, at 16.

39. *Id.*

40. *Id.*

they leave this enforcement to federal authorities.⁴¹ This is all understandable, given the failure of local prosecution to adapt to current challenges. But it is not sustainable, given the dislocation and unanticipated failures that come from a larger federal presence.

In the end, the Commission recommended a transplantation of the federal model of a centralized prosecutorial service to the state level.⁴² The Commission acknowledged that at the time of the report, some state criminal systems allowed the state Attorney General to prosecute some cases upon the local prosecutor's failure to enforce state laws.⁴³ The report, however, treated this as a "crude substitute" for central control of prosecution "beyond the reach of local politics."⁴⁴ The removal power reached so few cases that it left the shortcomings of local control untouched.

A more complete shift of power to the state level was necessary. The Attorney General of each state should assume control for a single prosecutorial organization, with the power to set policy and make case-level determinations for prosecutions around the state. A "director of public prosecutions" with secure tenure and defined responsibility would offer "systematized control of prosecutions in [the] [s]tate."⁴⁵ Local offices would be staffed by long-term assistant prosecutors with clearly defined duties and specialties.⁴⁶ This structure emphasizes expertise and bureaucratic accountability rather than frequent elections; additionally, it prizes "good government" over prosecutors who are "amenable to public opinion."⁴⁷

III. SELECTIVE CENTRALIZATION

The Wickersham Commission *Report on Prosecution* did not trigger widespread changes in practice. Certain parts of the Commission's output, including its report on policing and its survey of changes in federal criminal enforcement, gained attention and remained topics of conversation and interest for many years.⁴⁸ The *Report on Prosecution*,

41. *Id.*

42. *See id.* at 37–38.

43. *See id.* at 14.

44. *Id.*

45. *Id.* at 38.

46. *Id.* at 12.

47. *Id.*

48. *See* WALKER, *supra* note 6, at 154–55; Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119 (2013); David Alan Sklansky, *Police and*

however, faded out of sight quickly.

The *Report on Prosecution* is sometimes noted in historical accounts of the development of the American prosecutor's role, both for its general description of the importance of prosecutorial discretion,⁴⁹ and for its recognition of the growing importance of plea negotiations in criminal practice.⁵⁰ The report also gets mentioned because of its observation that prosecutors' offices are designed for accountability to voters.⁵¹ The report periodically receives attention on the peripheral topic of streamlining procedures like grand jury indictments.⁵² But as for the report's central programmatic recommendation—shifting control of the prosecutor's office from the local level to a director of public prosecutions at the state level—the response has been the sound of

Democracy, 103 MICH. L. REV. 1699, 1730 (2005); Franklin E. Zimring, *The Accidental Crime Commission: Its Legacies and Lessons*, 96 MARQ. L. REV. 995 (2013).

49. See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 452–53 (2001); Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1265 n.82 (2011); Bennett L. Gershman, "Hard Strikes and Foul Blows:" Berger v. United States 75 Years After, 42 LOY. U. CHI. L.J. 177, 187–89 (2010); Joan E. Jacoby, *The American Prosecutor's Discretionary Power*, THE PROSECUTOR, Nov.–Dec. 1997, at 25, 26–27; Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 728–31 (1996); John L. Worrall, *Prosecution in America: A Historical and Comparative Account*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 3, 8 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008) (noting report's discussion of growth in prosecutorial power); Wayne A. Logan, Comment, *A Proposed Check on the Charging Discretion of Wisconsin Prosecutors*, 1990 WIS. L. REV. 1695, 1704 (1990).

50. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 31 (1979); Catherine M. Coles, *Evolving Strategies in 20th-Century American Prosecution*, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR 177, 182–83 (John L. Worrall & M. Elaine Nugent-Borakove eds., 2008) (summarizing Commission's view of plea bargaining as an indication of inadequately trained prosecutors or "political interference"); Jerold H. Israel, *Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom*, 48 FLA. L. REV. 761, 769 (1996) (discussing prosecutor caseloads); Donald J. Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 780, 781 (1956); Samuel Walker, *Origins of the Contemporary Criminal Justice Paradigm: The American Bar Foundation Survey, 1953–1969*, 9 JUST. Q. 47, 53–54 (1992) (critiquing the Wickersham Report on Prosecution for its reflexively negative view of negotiated pleas).

51. See Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing There Will Be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 375 & nn.34–35 (2000); Jonas A. Myhre, *Conviction Without Trial in the United States and Norway: A Comparison*, 5 HOUS. L. REV. 647, 656 (1968) (citing the report for its recognition of connection between bargaining practices and political context of prosecutor's office).

52. See George H. Dession, *From Indictment to Information—Implications of the Shift*, 42 YALE L.J. 163, 163, 165 (1932); Theodore M. Kranitz, *The Grand Jury: Past-Present-No Future*, 24 MO. L. REV. 318, 328–29 (1959).

crickets.⁵³

On one level, this lack of impact is surprising. The report crystallized a growing consensus among elite analysts of criminal justice that traditional institutions of the criminal courts no longer performed very well and that greater expertise could produce better results.⁵⁴ Drawing strength from over a decade of “surveys” of the criminal courts in a wide range of cities and states,⁵⁵ the Wickersham Commission *Report on Prosecution* appeared to have a great deal of momentum. While government commission reports virtually never cause policy change by themselves, a report such as this one, which captures an enduring and widespread consensus about a reform proposal, very often amplifies a movement that produces real change.

On another level, the minimal impact of the *Report on Prosecution* was predictable. The consensus among criminal justice experts only reflected the views of elite insiders to the system.⁵⁶ Efforts to remove functions of government from popular control are typically more appealing to experts than to the public at large.⁵⁷ Just as the efforts to remove judges from the electoral process achieved very little success over the years, the effort to insulate prosecutors from the control of local voters was always a quixotic cause.

The failure of the Wickersham Commission’s recommendations for prosecutors is especially interesting when one notes that the shift from

53. See Newman F. Baker & Earl H. DeLong, *The Prosecuting Attorney and Reform in Criminal Justice*, 26 J. AM. INST. CRIM. L. & CRIMINOLOGY 821, 823 (1936) (noting that the Wickersham recommendations were ignored); Robert B. Reich, *Solving Social Crises by Commissions*, 3 YALE REV. L. & SOC. ACTION 254, 258 (1972–1973) (discussing how the Wickersham report “vanished” from government discourse and how the ABA President in 1934 stated that the report “now gathers dust on the shelves of college libraries”); cf. Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons From History*, 38 AM. U. L. REV. 275, 289 (1989) (referring to the report as an unsuccessful executive effort to centralize federal prosecution and law enforcement functions); Henry S. Ruth, Jr., *To Dust Ye Shall Return?*, 43 NOTRE DAME L. REV. 811, 816–17, 820–21 (1968) (noting that Wickersham argued for centralized prosecution systems at state level, but legislators and the public disregarded the recommendation); Daniel L. Skoler & June M. Hetler, *Governmental Restructuring and Criminal Administration: The Challenge of Consolidation*, 58 GEO. L.J. 719, 734 & nn. 67–69 (1969–1970) (noting that the Wickersham Commission called for centralization, but few states follow the model).

54. See REPORT ON PROSECUTION, *supra* note 1, at 3, 37–38.

55. *Id.* at 3.

56. See generally STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012).

57. See Thurman W. Arnold, *Apologia for Jurisprudence*, 44 YALE L.J. 729, 747 (1935) (mentioning Wickersham recommendation to remove politics from prosecutor selection, but ultimately dismissing this suggestion as a common recommendation to improve government functions).

local to state control has succeeded in some other criminal justice settings. In particular, state governments control two of the three major courtroom actors, as judges and defense attorneys now answer to state authorities more often than they did in decades past.⁵⁸ With prosecutors, however, local polities have remained in firm control.

A. *Where State Influence Grew*

The shift from local control to governance at the state level has been noteworthy for criminal courts and judges. Early in the twentieth century, a conglomeration of local courts heard criminal cases.⁵⁹ These courts, including Municipal Courts and Police Courts, were based on the English precedent of a profusion of local courts with overlapping jurisdictions.⁶⁰ Specialized juvenile courts, family courts, and courts for misdemeanor and ordinance violations operated separately, at least from an organizational standpoint, from courts of general jurisdiction.

Reformers set out to prune this organic collection of courts, replacing them with “a unified court system.”⁶¹ The unified system would eliminate overlapping jurisdictions, both geographical and subject matter; adopt a hierarchical and centralized state court governance; place the Chief Justice at the top of the system; operate under unitary budgeting and finance at the state level; and create a single personnel system, run by a state court administrator.⁶²

Roscoe Pound, a central figure in the Wickersham Commission, also adopted the unified court system as one of his reformist projects.⁶³ Unlike state level control of prosecutors, his goals for unified court systems bore fruit in many states. The American Bar Association and

58. See G. ALAN TARR, *WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES* 92–96 (2012) (listing mechanisms for other branches of state government to control the judiciary).

59. See BETTMAN, *supra* note 5, at 158–59.

60. See Mark H. Haller, *Historical Roots of Police Behavior: Chicago, 1890–1925*, 10 *LAW & SOC'Y REV.* 303, 308–09 (1976) (discussing the Police Courts and Municipal Courts used in Chicago in the early twentieth century); R. Stanley Lowe, *Unified Courts in America: The Legacy of Roscoe Pound*, 56 *JUDICATURE* 316, 316 (1973); Mary Roberts Smith, *The Social Aspect of New York Police Courts*, 5 *AM. J. SOC.* 145, 146 (1899) (outlining the structure of New York City Police Courts in the late nineteenth and early twentieth century).

61. See Larry C. Berkson, *The Emerging Ideal of Court Unification*, 60 *JUDICATURE* 372, 373–75 (1977).

62. See Geoff Gallas, *The Conventional Wisdom of State Court Administration: A Critical Assessment and an Alternative Approach*, 2 *JUST. SYS. J.* 35, 35 (1976).

63. See Lowe, *supra* note 60; Roscoe Pound, *Principles and Outline of a Modern Unified Court Organization*, 23 *J. AM. JUDICATURE SOC'Y* 225, 225 (1940).

other organizations of the legal establishment embraced the cause,⁶⁴ and it took hold to various degrees in many states.⁶⁵

Today, while there are still many courts that are controlled and funded at the local level, state government dominates the organization and operation of criminal courts in most states. Compared to the situation in 1931, courts today (even those with specialized missions such as Drug Courts) operate within larger bureaucracies, answering to a single coherent set of personnel policies, performance standards, and disciplinary authorities.⁶⁶ The shift from local control to state control has produced more visible lines of authority and bureaucratic accountability, just as the Wickersham Commission hoped.

A similar pattern applies to public defense attorneys. Some public defender organizations began as local organizations, answerable to the bar and the courts of major cities.⁶⁷ Over time, prompted by changes in the law regarding the government's obligation to provide legal counsel for indigent defendants,⁶⁸ public defender offices spread to more jurisdictions, including some smaller cities and rural areas. Some of these offices are quite small, and certain legal specialties or support functions are not available in every office. Thus, over time, some states have merged local offices into statewide organizations to create performance standards, training programs, and support functions for the local public defender offices.⁶⁹ At least some of the funding for these offices still often comes from city or county government, but over time more of the funding burden has migrated to the state level.⁷⁰ The shift

64. STANDARDS RELATING TO COURT ORG. § 1 cmt. (1974) (introducing a chapter, which discusses the position of the American Bar Association); Allan Ashman & Jeffrey A. Parness, *The Concept of a Unified Court System*, 24 DEPAUL L. REV. 1, 2–3, 9–19 (1974).

65. See Larry Berkson, *Unified Court Systems: A Ranking of the States*, 3 JUST. SYS. J. 264, 275 tbl.5 (1977).

66. See generally Patricia M. Wald, *Bureaucracy and the Courts*, 92 YALE L.J. 1478 (1983).

67. See REPORT ON PROSECUTION, *supra* note 1, at 30–32; see also PAUL B. WICE, PUBLIC DEFENDERS AND THE AMERICAN JUSTICE SYSTEM 30–31 (2005) (discussing the “traditional” public defender programs in New York City and Cook County).

68. See *Alabama v. Shelton*, 535 U.S. 654, 674 (2002); *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

69. See Ronald F. Wright, *Padilla and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515, 1525, 1535 (2011).

70. See, e.g., OFFICE OF THE STATE PUBLIC DEFENDER, 2012 ANNUAL REPORT 2, available at <http://will.state.wy.us/slpub/reports/Public%20Defender.pdf> (showing that the state funds 85% of the Wyoming Public Defender's budget). Compare LYNN LANGTON & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, US DEP'T OF JUSTICE, NCJ 228229, *State Public Defender Programs, 2007*, at 4–5 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf> (stating that in 2007, about 15% of state

from local control to state control is becoming a reality for publicly funded defense attorneys.⁷¹

B. Where Local Control Persisted

While judges and public defense attorneys have morphed from local organizations to state organizations, prosecutors have by and large remained under local control. One can see this continuity through several different measures.

First, think of the sheer number of prosecutors' offices. In 1934, there were 2,150 prosecuting attorneys in the United States.⁷² By 2005, there were 2,344 prosecutors' offices with jurisdiction over felony cases in state court.⁷³ While many of those offices have grown a great deal over the years,⁷⁴ we have not seen any large-scale consolidation of prosecutor offices since the days of the Wickersham Commission.

Next, consider the selection process for the chief prosecutor in each of those offices. As of 1934, forty-six of the forty-eight states chose their chief prosecuting attorneys at the city, county, or district level.⁷⁵ Only Rhode Island and Connecticut provided for governance of prosecutors

judicial and legal expenditures went to public defender offices and the average state public defender program had a budget of about \$33 million), with DONALD J. FAROLE, JR., & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, US DEP'T OF JUSTICE, NCJ 231175, *County-based and Local Public Defender Offices, 2007*, at 4 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf> (noting that in 2007, county-based public defender offices had a budget of about \$708,000).

71. That is not to say that the Wickersham Commission endorsed public defenders controlled at the state level. REPORT ON PROSECUTION, *supra* note 1, at 31–32. The Commission only expressed a tepid interest in public defenders and did not endorse this delivery model over the appointment of individual lawyers. *Id.* at 33. This is surprising, given the Commission's views about the corruption at work among "habitual defenders" of criminals; the logic of removal from local control to address the ill effects of political influence would seem to apply to defenders as much as to prosecutors. *Id.* at 19.

72. See Newman F. Baker & Earl H. DeLong, *The Prosecuting Attorney and His Office*, 25 J. AM. INST. CRIM. L. & CRIMINOLOGY 695, 696 (1934–1935) (excluding county attorneys in states with district attorneys from the count of prosecuting attorneys).

73. See STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, US DEP'T OF JUSTICE, NCJ 213799, PROSECUTORS IN STATE COURTS, 2005, at 1 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/psc05.pdf>.

74. See Wright, *supra* note 69, at 1522–23 (noting that in 2001, the average small prosecutor's office has ten staff members, while the largest offices have an average of 440 staff members). In 1934, Baker and DeLong estimated that "at least three-fourths of the offices in the United States contain less than ten persons and only a small number indeed will have more than twenty-five." Baker & DeLong, *supra* note 72, at 696.

75. See Baker & DeLong, *supra* note 72, at 696–97 (noting that thirty states select prosecuting attorneys at the county or city level, while sixteen select them at the district or county level).

at the state level.⁷⁶ By 1969, only five states (now including Alaska, Delaware, and New Jersey) placed responsibility for criminal prosecutions at the state rather than the local level.⁷⁷ Today, these same five states continue to select and control prosecutors at the state level, while forty-five keep the traditional local governance model.⁷⁸

This negligible movement toward a state governance model took place in an atmosphere of strong elite consensus favoring state control. A continuing endorsement of the Wickersham Commission proposal took the form of a “Model Department of Justice Act,” created in 1952 by the National Conference of Commissioners on Uniform State Law and a special American Bar Association Committee.⁷⁹ The Model Act declared that the state attorney general should supervise the prosecuting attorneys of the state, promulgate uniform enforcement policies, and provide assistance in particular cases at the request of local prosecutors.⁸⁰ The same sentiment appeared in the landmark report of President Johnson’s Commission on Law Enforcement and Administration of Justice.⁸¹ The first edition of the ABA’s Standards for Criminal Justice in 1970 also embraced the concept of state governance, although the standards allowed for some flexibility in how the statewide integration of prosecutors would happen.⁸² In the end, this

76. *See id.* at 697.

77. *See* Skoler & Hetler, *supra* note 53, at 734 n.69 (listing Alaska, Delaware, and Rhode Island). I retain Connecticut in this group because its legal status did not change between the Baker and DeLong survey of 1934 and the Skoker and Hetler listing in 1969. *See* CONN. CONST. art. IV, § 27 (providing for the appointment of state’s attorneys for each judicial district by a commission composed of gubernatorial appointees, including judges, which was added to Connecticut’s Constitution in 1984, CONN. CONST. amend. art. XIV); Adams v. Rubinow, 251 A.2d 49, 59 n.4 (Conn. 1968) (noting the practice of judicial appointment of state’s attorneys in Connecticut). An amendment to the New Jersey Constitution in 1947 provided that county prosecutors are “nominated and appointed by the Governor with the advice and consent of the Senate,” for five-year terms. N.J. CONST. art. VII, § 2, cl. 1.

78. *See* Skoler & Hetler, *supra* note 53 and accompanying text.

79. MODEL DEP’T OF JUSTICE ACT (1952).

80. *Id.* §§ 1, 7.

81. *See* PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 148–49 (1967) (recommending that increased State government involvement will lead to uniform policies of law enforcement and procedure, and noting how such a recommendation is similar to those of the Wickersham Commission and the American Bar Association Model State Department of Justice Act); HENRY RUTH & KEVIN R. REITZ, THE CHALLENGE OF CRIME: RETHINKING OUR RESPONSE 47–48 (2003) (discussing how the Johnson Commission called for a better knowledge and information assessment system in criminal prosecution).

82. *See* STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEF. FUNCTION §§ 2.1–.10 (Tentative Draft 1970).

long-term advocacy at the highest levels of the profession amounted to very little change in governance of prosecutors.

Putting aside the governance of prosecutors' offices in routine criminal matters, there are certain specialized subjects that the states have placed in the hands of state-level prosecutors, normally in the office of the Attorney General.⁸³ These areas include public corruption, election fraud, federal benefits fraud, environmental crimes, antitrust crimes, securities violations, and tax violations.⁸⁴ They also have authority over cases that present conflicts of interest for the local prosecutor or that involve multi-jurisdictional crimes.⁸⁵ Typically, statutes also allow the local prosecutor to request support from the state in designated cases, based on Wickersham-friendly criteria such as the need for expertise or insulation from the local political structure.⁸⁶

The statutory authority for state-level prosecution in these areas—sometimes displacing local authority and sometimes complementing it—has grown somewhat over the years. But this legal authority has historically produced only a small number of cases; assessments from 1934 and 1977 indicate low levels of usage.⁸⁷ The same remains true today.⁸⁸

Next, consider the question of local or state control of prosecution from the vantage point of who is spending the money and supervising the employees. We have reasonably consistent expenditure numbers since 1982, the last three decades of the post-Wickersham period.⁸⁹ It is difficult to distinguish spending on prosecution from spending on other aspects of criminal adjudication. It is possible, however, to compare adjudication expenses to police and corrections spending.

83. See Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 545 (2011).

84. See *id.* at 545–48.

85. *Id.* at 549–50.

86. *Id.* at 546–55.

87. See Earl H. DeLong, *Powers and Duties of the State Attorney-General in Criminal Prosecution*, 25 J. AM. INST. CRIM. L. & CRIMINOLOGY 358, 395 (1934) (concluding that as of 1934, there had been “negligible” participation by attorneys general in conducting prosecutions of their own); NAT'L ASS'N OF ATTORNEYS GEN. COMM'N ON THE OFFICE OF THE ATTORNEY GEN., POWERS, DUTIES AND OPERATIONS OF STATE ATTORNEYS GENERAL 107 (1977) (noting that in 1977, attorney generals infrequently initiated prosecutions).

88. See Barkow, *supra* note 83, at 552–56.

89. See TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 236218, *Justice Expenditures and Employment, FY 1982–2007—Statistical Tables* (2011), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jee8207st.pdf>.

During this time, it appears that spending shifted more than employment at different levels of government. In general, local government's share of criminal justice *employment* remained almost unchanged, while its share of *expenditures* dropped a small amount.⁹⁰ This could have happened either because state and federal governments awarded grants or other transfer payments to local government, or because expenditures per employee increased more slowly in the local systems. For instance, in the category of judicial and legal services, local government employment levels have decreased at a lower rate than local expenditures.⁹¹ As Table 1 indicates, for the period 1982–2009, local expenditures moved down by 9.4%, but local employment only moved down by 3.4%.⁹²

Table 1: Local, State, and Federal Shares of Spending On Criminal Adjudication, Policing, and Corrections: 1982–2009 (%)

	1982	1987	1992	1997	2002	2009	Change
Judicial and Legal Services							
Local Expenditures	49.4	49.7	48.2	46.7	42.2	40.0	-9.4
State Expenditures	34.1	32.8	31.5	30.6	36.3	38.0	+3.9
Federal Expenditures	16.4	17.5	20.3	22.7	21.5	22.0	+5.6
Local Employment	56.2	56.5	56.0	54.3	54.1	52.8	-3.4
State Employment	32.2	32.1	30.4	33.1	33.7	35.3	+3.1
Federal Employment	11.5	11.4	13.6	12.6	12.2	12.0	+0.5
Police							
Local Expenditures	75.4	73.7	72.3	71.9	70.0	67.0	-8.4
State Expenditures	13.2	12.8	12.1	11.7	12.4	10.1	-3.1
Federal Expenditures	11.4	13.6	15.6	16.4	17.5	22.9	+11.5
Local Employment	81.6	79.8	79.7	80.2	79.3	76.4	-5.2
State Employment	10.7	11.0	10.1	9.9	10.4	8.9	-1.8
Federal Employment	7.7	9.2	10.2	9.9	10.3	14.7	+7.0

90. *See id.* at 5 tbl.1, 7 tbl.7.

91. *Id.* at 5 tbl.2, 7 tbl.9.

92. *Id.* at 5 tbl.3, 6 tbs.4 & 5, 7 tbl.9, & 8 tbs.10 & 11; TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 237913, *Justice Expenditure and Employment Extracts, 2009—Preliminary*, tbs.1 & 2 (2012), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=4335> (follow "Comma-delimited format (CSV)" hyperlink; then open "jeee09p01" & "jeee09p02" files).

Corrections							
Local Expenditures	33.1	33.6	32.8	29.7	30.7	33.3	+0.2
State Expenditures	61.8	61.3	59.8	62.7	61.8	57.9	-3.9
Federal Expenditures	5.1	5.1	7.4	7.6	7.5	8.8	+3.7
Local Employment	35.2	34.1	34.4	31.1	33.2	34.6	-0.6
State Employment	61.5	62.9	61.4	64.7	62.2	60.8	-0.7
Federal Employment	3.4	3.1	4.2	4.2	4.6	4.6	+1.2

Local governments lost a few police jobs (down by 5.2%) and state governments did not make up the difference, as they too lost police jobs (down by 1.8%). The big story for policing appears to be the growing federal presence, both for expenditures and for employment. Finally, in the category of corrections expenditures and employment, there is almost no movement in the local share of corrections spending or employment.⁹³

These expenditure figures, covering only the last three decades of the post-Wickersham period, suggest only a modest shift in control away from the local level when it comes to policing and adjudication, while the local role in corrections remains unchanged. Despite the Wickersham Commission's articulation of a stable elite consensus in favor of centralized state control, criminal justice remains today, as it was in 1931, a function of local government.

IV. REFLECTIONS ON THE STAYING POWER OF LOCAL CONTROL

What might we make of this modest trend line, this non-event over the decades after the advocacy of the Wickersham Commission? The persistence of local control over the prosecutor's office might be a political economy story. Legislators from the local district want prosecutors who see things as their constituents do. Voters who are content with criminal law enforcement are less inclined to replace incumbents (including incumbent legislators) with challengers on Election Day. When local demographics and priorities change, district boundaries need to change as well. Thus, legislators want prosecutors answering to the same public that they do.⁹⁴

93. Here the federal government has displaced some state-level spending; the federal share of employment in the corrections category remains steadier.

94. See Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, in 41 *CRIME & JUSTICE: A REVIEW OF RESEARCH* 211, 214–16 (Michael Tonry ed.,

The persistent local flavor of criminal prosecution also suggests that state actors are not too worried about local corruption. Indeed, our conception of unseemly “political” influence has changed in the criminal justice world over the decades.⁹⁵ The political issue that worried the Wickersham Commission was improper responsiveness to local political leaders, not to voters. The political issue that worries elites today is improper responsiveness to “bloodthirsty” voters.

Perhaps a changing media landscape has neutralized the Wickersham Commission concerns about prosecutors who are overly sensitive to the wishes of other local officials. Local prosecutors might be reluctant to file charges in police misconduct cases, but they appear to have every political incentive to prosecute cases against the politically powerful. Such prominent cases reliably become part of the next election campaign if the prosecutor handles them badly.⁹⁶

Similarly, the Wickersham Commission’s concerns about the small scale and attendant lack of specialized expertise in the local prosecutor’s office no longer seem to apply. Although the number of local offices remains as high as ever, the median size of the prosecutor’s office has grown over the years.⁹⁷ Clearer job descriptions and lines of responsibility are now common in local prosecutors’ offices. Improved data management makes it possible to monitor individual prosecutor choices as they happen, or to audit them after the fact.

Moreover, in those settings where more specialized legal skills are important (for instance, for arson or child sex abuse crimes), statewide professional organizations of prosecutors now offer training and networking for attorneys who handle these cases at the local level. For those unusual cases where the local prosecutor has no time or interest in developing the needed expertise through these networking opportunities, assignment of special counsel from the State Attorney General can remedy the problem. The development of joint law

2012) (discussing changes in prosecutorial district boundaries over time to “reflect the preferences of local politicians for electoral control over district attorneys”).

95. For discussions of the variety of functions that the notion of “accountability” can serve, see Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 30–31 (1997); Edward Rubin, *Hyperdepoliticization*, 47 WAKE FOREST L. REV. 631, 633, 659, 669 (2012); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2097 (2005); Note, *Deweyan Democracy and the Administrative State*, 125 HARV. L. REV. 580, 580–82 (2011).

96. See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582, 602 (2009).

97. See *supra* note 74 and accompanying text.

enforcement task forces also puts specialized skills into the district when necessary.

The persistence of local control might also tell us about the power of *legal* standards—as compared with other forms of organizational control—to prevent abuse of authority. The elite consensus embodied in the Wickersham Commission was modestly successful in moving courts (but not prosecutors) away from local control. Apparently, the uniform legal standards that judges must apply, combined with consistent statewide ethical norms for judges, bureaucratic rules about assignment of cases, and norms for advancement within the judicial profession, were adequate replacements for tight political control and funding of the courts at the local level. General legal standards and bureaucratic monitoring performed better than the ballot box to achieve the kind of judging that the public demanded.

On the other hand, the Wickersham Commission's call for a shift from local to state control of prosecutors went nowhere. Legal standards and statewide bureaucratic controls have not displaced local political control over the prosecutor. Consistency in the application of state law matters little to voters when it comes to prosecutorial charging and resolution of cases; indeed, the public seems to prefer *inconsistency*. They want prosecutors to tailor the broad reach of the criminal code to fit local priorities. It appears that the expertise that counts for prosecutors is knowledge about local priorities for public safety. What worries local voters? So long as local prosecutors know how to answer that, they won't be losing influence to the state capital.