The Discretionary Power of "Public" Prosecutors in Historical Perspective

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ARTICLES

THE DISCRETIONARY POWER OF "PUBLIC" PROSECUTORS IN HISTORICAL PERSPECTIVE

Carolyn B. Ramsey*

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History makes a fleeting appearance in recent debates about reforming the prosecutor's office. Opponents of the way discretion is currently exercised often contend that because a prosecutor is a public servant, he ought to protect defendants' rights as well as convict the guilty. When this position is couched in historical terms, it appeals to a prosecutorial self-image, purportedly rooted in the past, to promote fairness and to curtail the excesses of the adversary system. Bruce Green asserts, for example, that the "prosecutor's duty to 'seek justice' . . . dates back well over a century." Advocates of victims' rights and the re-privatization of criminal justice also tend to assume that private prosecution in early America gave way to impartial, or even defendant-protective, government control. This com-

1. See Bennett L. Gershman, The Prosecutor’s Duty to Truth, 14 Geo. J. Legal Ethics 309, 337 (2001) (arguing that, as “a minister of justice to protect innocent persons from wrongful convictions,” the prosecutor has “a duty to make an independent evaluation of the credibility of his witnesses, the reliability of forensic evidence, and the truth of the defendant’s guilt” beyond that imposed by the codes); Bruce A. Green, Why Should Prosecutors “Seek Justice”? 26 Fordham Urb. L.J. 607, 636 (1999) (contending that prosecutors have “a heightened duty to ensure the fairness of the outcome of a criminal proceeding from a substantive perspective—to ensure both that innocent people are not punished and that the guilty are not punished with undue harshness”); H. Richard Uviller, The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit, 68 Fordham L. Rev. 1695, 1697 (2000) (“Neutrality . . . puts the prosecutor in the position of advocate for all the people—including the person against whom the evidence has been accumulating.”). See also Charles D. Breitel, Controls in Criminal Law Enforcement, 27 U. Chi. L. Rev. 427, 430 (1960) (maintaining that, while prosecutorial discretion is inevitable and even desirable, the type of discretion that is justified is that which “can only save . . . [but] never kill”).

2. Green, supra note 1, at 612. See also Steven K. Berenson, Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?, 41 B.C. L. Rev. 789, 792 (2000):

[C]ourts and commentators from the earliest days of the American legal system to the present have viewed pursuit of the public interest as a critical function of the public prosecutor. It has long been the view in American law that the prosecutor’s paramount duty is to serve justice, rather than to secure a conviction in a given case.

Matthew S. Nichols, No One Can Serve Two Masters: Arguments Against Private Prosecutors, 13 Cap. Def. Dig. 279, 284-86, 287 (2001) (disputing view that “the private prosecutor is a right deeply embedded in Virginia common law” and contending that public model, which supposedly dates from the seventeenth-century, “prevent[s] vengeance from replacing justice”).

Angela Davis subscribes to the view that the American system of public prosecution arose from discontent with the abuses and inefficiency of private prosecution. See Angela Davis, The American Prosecutor: Independence, Power, and the Threat of Tyranny, 86 Iowa L. Rev. 393, 449-50 (2001). She argues that the architects of the public system desired to make it fair; however, she believes that they failed in this endeavor because they did not “adequately consider the private nature of prosecutorial decisions and the lack of public access to information about how and why prosecutors make decisions.” Id. at 448.

mon narrative is largely a myth. Instead, public prosecution evolved from a private model in a slow, uneven manner in response to fears of social disorder. The dominant view in the second half of the nineteenth century urged public prosecutors to seek convictions with zeal, leaving the responsibility to protect the rights of the accused to defense counsel. Plea-bargaining aroused criticism, not because it deprived defendants of a jury trial, but because prosecutors accepted guilty pleas to charges that the public viewed as insufficient to fit the defendants’ crimes.4

This Article presents a legal and cultural history of the public’s relationship to criminal prosecution that participates in two scholarly conversations. It adds a historical dimension to the current debate about the duties of the modern prosecutor. The centrality of the term “public” in almost any discussion of prosecutorial discretion highlights the need to explore the evolving relationship between prosecutors and the people. My research also contributes to a growing body of legal history on criminal justice administration in the United States that includes work by Lawrence Friedman, George Fisher, and Allen Steinberg.5

One must be cautious about invoking the origins of public prosecution either to supplant the goal of “winning” with a greater commitment to fairness or to criticize the state’s failure to protect the crime victim. When, in 1935, the Supreme Court distinguished ordinary law practice from the sovereign interest in insuring that “justice shall be done” in criminal cases,6 it articulated a standard that is now

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4. See infra text accompanying notes 155-61, 410-12.
5. See infra note 16.
6. Berger v. United States, 295 U.S. 78, 88 (1935) (holding that “while [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one”).
threatened by careerism, error, and proposals to re-privatize some aspects of criminal prosecution. Modern scholars like Green sometimes invoke this standard and the prosecutorial self-image that it implies. But "justice" and the "public interest" are mutable abstractions: in the late nineteenth century, both were equated with high conviction rates.

The historical narrative offered in this Article thus suggests a weakness in modern reform efforts. Relying on prescriptions for prosecutors to serve the public may do little to bridle discretionary power if the public does not share legal theorists' concerns. This Article does not seek to rebut criticisms of excessively adversarial decision-making or argue for an expanded role for crime victims. Rather, by setting the historical record straight, this Article urges scholars of modern prosecutorial ethics to provide a more precise analysis of the relationship between their normative agendas and public attitudes toward crime control.

Although the seeds of the modern position that a prosecutor should adopt a neutral stance, similar to that of a judge, were sown by the late nineteenth century, this was not the inevitable or even the dominant view. To the extent that such sentiments existed, they tended to be confined to judges and law professors, while the weight of public opinion favored a heated battle in which prosecutors strove fervently for convictions. In the 1880s and 1890s, as today, prosecutors were accused of failing to be accountable for pre-trial decisions. The press made demands for consistency, principle, and visibility similar to those articulated

7. For examples of proposals to allow greater participation by private citizens in the modern criminal justice system, see BENSON, supra note 3, at 127-68, 188-91, 287-91 (proposing an incentive-based, privatized system of law enforcement, including private prosecution, to serve primary goal of providing restitution to victims); Cardenas, supra note 3, at 358 (arguing, largely on basis of secondary research, that history supports re-introduction of victim participation in criminal justice process); Cassell, supra note 3, at 1380-81 (presenting a favorable view of the Utah Victim's Rights Amendment).

8. See Green, supra note 1, at 614, 634 (citing Berger case for proposition that prosecutor's role is to ensure fairness and reliability of criminal process and its outcomes). See also Berenson, supra note 2, at 792-93 (citing Berger opinion, but indicating that "do justice" standard originated in early 1800s or even in colonial period); Gershman, supra note 1, at 317 (describing Berger as "the seminal case defining the prosecutor's legal and ethical role as a minister of justice"); Walker A. Matthews, III, Note, Proposed Victim's Rights Amendment: Ethical Considerations for the Prudent Prosecutor, 11 GEO. J. LEGAL ETHICS 735, 737, 739 (1998) (associating "[t]he prosecutor's role as an impartial administrator of the state's case" with Berger decision, but stating that "public prosecution provided the normal framework in the criminal judicial process . . . as early as the middle of the seventeenth century").

9. See Gershman, supra note 1, at 339 (arguing that "the prosecutor is much better qualified than the jury at judging the factual and legal truth of a case" and that he should not bring a case to trial unless convinced beyond reasonable doubt of defendant's guilt); Green, supra note 1, at 633-35 (discussing prosecutor's quasi-judicial role as representative of sovereign); Uviller, supra note 1, at 1715-16 (contending that "in the performance of the quasi-judicial role, the prosecutor should be sufficiently detached from his prospects as an advocate to reach a dispassionate appraisal of the interests of justice").

10. James Vorenberg's concern about discretionary acts that occur before trial exemplifies the modern liberal position. Vorenberg writes that "[t]he trial is open to the public both to protect the defendant against prejudice and abuse and to serve the public's interest in knowing how officials deal with those accused of crime." JAMES VORENBERG, DECENT RESTRainment OF PROSECUTORIAL POWER, 94 HARV. L. REV. 1521, 1523 (1981). However, because prosecutors make the bulk of their discretionary decisions before trial, public scrutiny does not check their
during the past few decades; however, the late-nineteenth-century press, like modern voters, often espoused objectives contrary to those urged by many legal theorists. The newspapers desired to impose accountability upon the District Attorney’s office to ensure that defendants did not escape the heavy punishments that the public thought they deserved.12

In addition to providing insights to the modern debate, this Article makes three contributions to historical scholarship on criminal justice. First, it presents detailed information about the operation of the District Attorney’s office in “the American metropolis” during the nineteenth century. New York County, which had the same boundaries as New York City and Manhattan Island prior to 1898, is often recognized as a leader in experimenting with public-sector criminal justice—the model that eventually spread to the rest of the nation.14 New York County’s large size, consistent administrative boundaries,15 and wealth of records also make it worth studying. Yet no historian has written a full-length account of prosecution in

powers. See id. at 1524. For discussion of nineteenth-century arguments for greater accountability, see infra text accompanying notes 152-62, 209-17, 230-49, 410-12.

11. Like law review articles proposing restraints on prosecutorial discretion, modern “press accounts have described cases in which innocent individuals were convicted of serious crimes, including capital murder,” and blamed “prosecutorial excesses” for these unjust outcomes. Green, supra note 1, at 611. Some legal scholars suggest that public opinion may provide an effective check on the power of prosecutors in the twenty-first century. See Leslie C. Griffin, The Prudent Prosecutor, 14 GEO. J. LEGAL ETHICS 259, 281 (2001) (arguing that “[t]he other remedy for prosecutorial misconduct is public oversight. Elected prosecutors may be constrained by public opinion and may be removed from office if too many voters disapprove of their practices”) (internal quotations and citations omitted); William T. Pizzi, Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform, 54 OHIO ST. L. J. 1325, 1338-40 (1993) (asserting that elected local prosecutors have greater political accountability than unelected officials like state Attorney General ); Fred C. Zacharias, The Professional Discipline of Prosecutors, 79 N.C. L. REV. 721, 765 (2001) (hereinafter Zacharias, The Professional Discipline of Prosecutors) (discussing positive role media and voters may play in checking prosecutorial misconduct). However, other observers identify public opinion as a potentially negative influence on prosecutorial decision-making. See, e.g., Green, supra note 1, at 642 (contending that unreasonable public expectations may undermine legitimate government aims); William Stuntz, The Pathological Politics of Criminal Law, 100 MICH. L. REV. 505, 509, 533-39 (2002) (arguing that public opinion may have negative effect upon prosecutorial discretion by encouraging prosecutors to seek public approval in place of justice or fairness). In the present day, lack of clarity about the role of public attitudes toward prosecution hampers effective reform. For a more complete discussion of these issues, see infra text accompanying notes 42-48.


14. See, e.g., BENSON, supra note 3, at 224 (noting that New York City established “the first true public police force” in America in 1844); History of the Public Prosecutor, 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1287 (Sanford Kadish et al. eds., 1983) (stating that although Mississippi became first state to elect its District Attorneys, Dutch brought public prosecution to region that is now New York as early as 1650s); W. Scott Van Alstyne, Jr., Comment, The District Attorney—A Historical Puzzle, Wis. L. REV. 125 (1952) (claiming there is evidence for existence of district attorneys as early as eighteenth-century).

15. See MONKKONEN, supra note 13, at 136 (noting that New York City had population of 60,000 inhabitants by 1800 and one-third of a million by 1840). Moreover, because the boundaries of New York City changed only once, with the addition of the five boroughs in 1898, studying its administration is relatively uncomplicated.
New York in the second half of the nineteenth century. Based on the archival papers of the District Attorney's office for New York County, including indictment records and newspaper scrapbooks, this Article lays the groundwork for a complete understanding of how prosecutors conducted their work. Second, legal historians such as Fisher have focused primarily on statutory changes and institutional power relations due to the relative dearth of information about popular attitudes toward plea-bargaining. Drawing on the extensive newspaper clippings preserved among the District Attorney's papers, this Article enhances knowledge of interactions between prosecutors and the public. Although it is unclear why the District Attorneys saved press articles related to their office, these clippings represent a remarkably wide social and political spectrum and often express strong criticism of prosecutorial policies. Indeed, analysis of the scrapbooks shows that plea-bargaining occurred despite the public's hostility to reduced penalties and


17. The District Attorney indictment records typically contain the Coroner's Inquisition, Police Court records, miscellaneous affidavits, trial strategy notes, and some appellate material, as well as the indictment itself.

18. The New York Municipal Archives houses a collection of newspaper scrapbooks maintained by the Office of the New York County District Attorney. This important collection contains 340 volumes of clippings from New York newspapers from 1882 to 1940. The scrapbooks have also been preserved on forty-nine rolls of microfilm. I studied seventeen rolls of film containing newspaper clippings from 1882 to 1893. Because the individuals who compiled the scrapbooks did not always provide clear citations for the clippings, the footnotes in this Article give approximate dates and probable newspaper sources for some press reports. Researchers using these footnotes are encouraged to rely on the microfilm roll numbers and article titles.

19. George Fisher consulted 2200 pages of Massachusetts newspapers in the mid-to-late nineteenth-century, but found "little to suggest that the public had any real awareness of plea bargaining." Fisher, supra note 16, at 928-29 and n.264.
non-jury dispositions. Finally, by focusing on discretionary decisions in murder cases, the second half of the Article responds to the question of why the District Attorney's office pursued the death penalty, rather than a guilty plea, in certain cases.

I develop my argument in three Parts. Part I briefly discusses modern views of public prosecution and the dearth of accurate historical analysis underpinning them. Part II analyzes the history of the District Attorney's office in New York County and its relationship to the public and concludes that the late-nineteenth-century New York press, both Republican and Democrat, used the language of accountability to spur the District Attorney's office to achieve higher conviction rates. Part III offers a case study of the complex relationship between public attitudes and the realities of prosecutorial discretion in murder cases. Part III can be summarized as follows: Although the District Attorney's office used plea-bargains in the face of public opposition, analysis of murder cases shows that external pressure from the political machine and the press affected decision-making. Prosecutors sought the death penalty for marginal individuals, especially "unmanly" domestic killers, and sometimes spared defendants with ties to the political bosses. Thus, prosecutors tried to appease the public's desire for retribution and deterrence by pursuing uncontroversial targets. However, news reports overestimated the extent to which murder indictments were dismissed or plea-bargained. Although prosecutors often accepted guilty pleas to lesser charges than those on the face of the indictment, they nevertheless brought more murder cases to trial than they processed through other means. Criticisms of prosecutorial discretion in the late nineteenth century thus appear to have been hyperbolic. The distortions, biases, and cultural conflicts evident in press accounts of the cases call into question any simple identification of public opinion with the public good and underscore the limitations of lay scrutiny as a mechanism for ensuring fairness.

The Conclusion returns to normative assumptions about public prosecution embedded in modern scholarship. Rather than repeating the mantra that a prosecutor plays a different role than does a private attorney, this Article underscores tensions between public opinion, scholarly prescriptions, and the actual policies of

20. See infra text accompanying notes 155-61, 410-12.
22. See infra Figure 1.
23. See, e.g., Fred C. Zacharias & Bruce A. Green, The Uniqueness of Federal Prosecutors, 88 Geo. L.J. 207, 226-28 (2000) (describing unique and "higher obligation" that prosecutors—particularly, federal prosecutors—must uphold). Although Zacharias and Green focus on the reasons that federal prosecution is different, such
the District Attorney's office. In deciding whether (or how) to check prosecutors' adversarial instincts, it is necessary to keep this history in mind.

I. MODERN VIEWS OF PUBLIC PROSECUTION

Among the recent changes in the study of criminal procedure, increased scrutiny of prosecutorial discretion stands to benefit the most from historical inquiry. A brief analysis of disparate modern reform agendas demonstrates that those that devote any attention to history share common myths about the early days of public prosecution.

Critics of the status quo often identify the invisibility of prosecutorial decision-making and the unprincipled nature of prosecutors' choices, inconsistencies in policy, lack of judicial review or repercussions for misconduct, and a culture of winning as practices that cry out for reform. With notable exceptions, however, dissatisfaction with public prosecution has not translated into an impulse to eliminate it. Relatively few commentators want to return to the primary justice of the American colonial period, when lawyers were scarce, or even to the early

writers as Angela Davis urge the extension of new rules to state and local prosecutors, whom existing state ethical codes do not adequately constrain. See Davis, supra note 2, at 460.

24. See Davis, supra note 2, at 410 (listing vindictive prosecution as one type of misconduct of which prosecutors are accused), 412 (“Like so many other prosecutorial acts, misconduct often occurs in private and never becomes public.”); Vorenberg, supra note 10, at 1555 (calling prosecutorial discretion a “hidden system of adjudication”), 1533 (emphasizing prosecutorial discretion in plea-bargaining).


26. See Davis, supra note 2, at 408 (“The Supreme Court has consistently upheld the broad exercise of prosecutorial discretion . . . .”); Griffin, supra note 11, at 275-76 (stating that separation-of-powers doctrine and difficulty of proving constitutional violations impede judicial oversight); James S. Liebman, The Overproduction of Death, 100 COLUM. L. REV. 2030, 2126-27 (2000) (noting that prosecutors who engage in misconduct in death-penalty cases rarely receive more than slap on wrist because neither money damages nor injunctions can be imposed upon them); Vorenberg, supra note 10, at 1538-40 (describing courts’ deference toward prosecutors in areas such as plea-bargaining and selective prosecution); Zacharias, The Professional Discipline of Prosecutors, supra note 11, at 749-50 (attributing failure of third parties to make effective complaints against prosecutors to diffuse nature of prosecutors’ clientele and reluctance of defense attorneys to antagonize lawyers whom they regularly see in court).

27. See William T. Pizzi, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT 119 (1999) (“When [advocates in a criminal case] ‘win,’ colleagues will congratulate them for a victory that depended on them. When they ‘lose,’ friends are likely to console them, but they are also susceptible to attack for having ‘blown it’ by having adopted the wrong strategy . . . .”); Liebman, supra note 26, at 2129 (contending that public and institutional pressures to secure convictions in death cases lead prosecutors to cut corners); Abbe Smith, Can You Be a Good Person and a Good Prosecutor?, 14 GEO. J. LEGAL ETHICS 355, 388-89 (2001) (claiming that institutional culture of prosecutors’ offices gives attorneys incentives to “proudly” convict the innocent).

nineteenth century, when crime victims in New York and Philadelphia often settled their cases out of court. Rather, several legal scholars have expressed alarm at recent proposals to resurrect the system of private criminal justice.

The current critique of discretionary power reveals normative assumptions about the value of public prosecution. Aggregating these assumptions, one can begin to sketch a model prosecutor: a government employee who engages in truth-seeking and whose actions are constrained by rules that ensure fairness to defendants. Proposals for achieving this ideal include exposing prosecutorial decisions to public scrutiny, articulating specific policies to regulate plea-bargaining, expanding judicial review, and imposing professional discipline for misconduct. However, while scholars like Rory Little and Fred Zacharias (noting small size of "professional cadre capable of serving as judges and counsel" in American colonies, including eighteenth-century New York). John Langbein contends that no lawyers appeared for either the prosecution or the defense in ordinary English felony trials until the second half of the eighteenth-century. See John H. Langbein, The Criminal Trial Before the Lawyers, 45 U. Chi. L. Rev. 263, 263, 282-83 (1978).

30. See John D. Bessler, The Public Interest and the Unconstitutionality of Private Prosecutors, 47 Ark. L. Rev. 551, 569 (1994) (arguing that potential for misconduct by private prosecutors especially acute because of nearly unbridled power that prosecutors wield); Richard Epstein, Crime and Tort: Old Wine in New Bottles, in ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 231, 254-55 (R. Barnett & J. Hagel eds., 1977) (contending that, because of their dissimilar objectives, criminal and civil law have developed procedures that preclude blending two systems); Ahmed A. White, Victim's Rights, Rule of Law, and the Threat to Liberal Jurisprudence, 357 Ky. L.J. 357, 413-14 (1999) ("For private vindication, there remains the civil tort, but there is not a place for victims in the criminal justice process."). But see supra notes 3, 7 and accompanying text and infra notes 50-53, 62 and accompanying text (presenting arguments by advocates of victims' rights and re-privatization of criminal justice).

31. See Davis, supra note 2, at 462 (proposing creation of Public Information Departments to inform public about how prosecutors' offices work); Vorenberg, supra note 10, at 1531, 1565 (raising concerns about lack of public scrutiny and proposing that prosecutors be required to generate records of their plea-bargaining decisions).

32. See Vorenberg, supra note 10, at 1563-64 (contending that specific guidelines should be drafted to define charging and plea-bargaining policies); Fred C. Zacharias, Justice in Plea Bargaining, 39 WM. & MARY L. REV. 1121, 1183, 1188 (1998) [hereinafter Zacharias, Justice in Plea Bargaining] (urging prosecutors' offices to develop uniform model of plea-bargaining under which their staffs would operate).

33. See Cynthia K.Y. Lee, From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures, 50 Rutgers L. Rev. 199, 249-50 (1997) (arguing that her proposed guidelines for substantial assistance departures must be coupled with expanded judicial review); Vorenberg, supra note 10, at 1572 (proposing system under which judge could review prosecutor's decision for compliance with prevailing practices); see also Robert Heller, Comment, Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion, 145 U. PA. L. REV. 1309, 1349-50, 1358 (1997) (describing need for judicial control over selective prosecution to eliminate racial bias and arguing that such review should be based on prosecutor's fiduciary duty to all American people, including defendant).

34. See Zacharias, The Professional Discipline of Prosecutors, supra note 11, at 738 (indicating that such findings are properly limited to "pretrial and trial conduct that is specifically forbidden in the codes").
have devoted substantial energy to promoting guidelines,\textsuperscript{35} discretion can never be completely formulaic. Holes will exist even in the tightest net of legal and ethical rules—holes that must be filled by the attorney’s own judgment.\textsuperscript{36}

Thus, another group of scholars, including Laurie Levenson, H. Richard Uviller, and Leslie Griffin, have discussed appropriate sources of prosecutorial judgment.\textsuperscript{37} For these latter theorists, the belief that the public prosecutor should be guided in her discretionary decisions “by an honest effort to discern public needs and community concerns” constitutes a key aspect of the ideal.\textsuperscript{38} As Levenson puts it, “Morally, prosecutors must consider whether a conviction is ‘consistent with the public interest,’ in conjunction with their personal sense of the defendant’s culpability for the crime . . . .”\textsuperscript{39} Griffin calls this imperative “public moral judgment” and contrasts it with moral entrepreneurship, in which the decision-maker follows his “own substantive theories of justice.”\textsuperscript{40} These prescriptions are earnest and thoughtful, but it is difficult to translate them into practice. Confusion about the most desirable reform strategy persists, in part, because the unstable concept of the public interest often substitutes for a satisfactory explanation of what prosecutors should do in concrete situations.\textsuperscript{41}

\textsuperscript{35} See Rory K. Little, Proportionality as an Ethical Precept for Prosecutors in the Investigative Role, 68 FORDHAM L. REV. 723, 737 (1999) (calling for new model rule requiring proportionality of judgment in investigation phase); Zacharias, Justice in Plea Bargaining, supra note 32, at 1183, 1188 (advocating rules governing plea-bargains); see also Lee, supra note 33, at 246-51 (proposing adoption of nationwide prosecutorial guidelines governing motions for substantial assistance departures under United States Sentencing Guidelines).

\textsuperscript{36} See supra notes 36, 11 and infra note 38.

\textsuperscript{37} H. Richard Uviller, The Virtuous Prosecutor in Quest for an Ethical Standard: Guidance from the ABA, 71 MICH. L. REV. 1145, 1153 (1973) [hereinafter Uviller, The Virtuous Prosecutor].

\textsuperscript{38} See supra notes 36, 11 and infra note 38.

\textsuperscript{39} Levenson, supra note 36, at 558.

\textsuperscript{40} Griffin, supra note 11, at 307.

\textsuperscript{41} Zacharias criticizes the admonition to “do justice” on similar grounds. He contends that the ethical codes and interpretive literature “provide remarkably little guidance on its meaning.” Fred C. Zacharias, Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?, 44 VAND. L. REV. 45, 46 (1991) [hereinafter Zacharias, Structuring the Ethics of Prosecutorial Trial Practice]. See also Smith, supra note 27, at 377 (“And what does it mean to ‘seek justice?’ The concept could not be more ambiguous and subject to multiple interpretations.”). However, according to Zacharias, “the noncompetitive approach to prosecutorial ethics is inconsistent with the professional codes’ underlying theory.” Zacharias, Structuring the Ethics of Prosecutorial Trial Practice, supra, at 52. Given the ambiguity of the “do justice” standard, Zacharias urges prosecutors neither to exploit the state’s superior resources nor to take advantage of other weaknesses in the adversary system, such as ineffective defense counsel. See id. at 70-74. He argues that prosecutors must be especially sensitive to power differentials, ethical rules, and evidentiary indications of innocence because norms of justice and the public interest are difficult to discern.

Green agrees that exhorting prosecutors to seek justice may lead to ambiguity, See Green, supra note 1, at 622. However, he attempts to clarify the issue with a “role-based” conception of duty that he considers superior to Zacharias’ “power-based” model. Id. at 631-35. For Green, a public prosecutor’s special duty arises not from unequal resources, but from the public prosecutor’s role as the representative of the sovereign. Id. at 633-34
Empirical scholarship on the relationship between public opinion and criminal justice has not focused primarily on prosecutorial ethics.\textsuperscript{42} Instead of examining public attitudes toward prosecutors, such studies typically target the death penalty, racial discrimination in policing, and the disjuncture between public perceptions and criminal law doctrine.\textsuperscript{43} Thus, a gap remains between studies of public

(defined “goal . . . paramount in importance” with regard to criminal law as that of “avoiding punishment of those who are innocent of criminal wrongdoing . . . ”).


However, such studies place relatively little emphasis on attitudes toward prosecutorial practices like plea-bargaining. Roberts and Stalans discuss public views of the adversary system in one brief chapter; they conclude that the American public prefers the adversary system to inquisitorial procedure because the public thinks that the former ensures greater fairness. See ROBERTS \& STALANS, supra, at 182. AMERICANS VIEW CRIME AND JUSTICE also devotes just one chapter to the criminal courts. That chapter mentions public hostility toward plea-bargaining, but it does not explore the issue in detail. See Laura B. Myers, Bringing the Offender to Heel: Views of the Criminal Courts, in AMERICANS VIEW CRIME AND JUSTICE, supra, at 46. Another essay in the same anthology notes, “the public strongly supports efforts to reduce what is perceived to be excessive delay and leniency in processing cases in the court system. Efforts to reduce or eliminate . . . plea bargaining for serious offenders . . . would be strongly supported.” Timothy J. Flanagan, Public Opinion and Public Policy in Criminal Justice, in AMERICANS VIEW CRIME AND JUSTICE, supra, at 158.

Scholars occasionally rely on victims’ rights legislation, rather than survey results, for evidence that citizens dislike plea-bargaining. See Craig M. Bradley \& Joseph L. Hoffman, Public Perception, Justice, and the “Search for Truth” in Criminal Cases, 69 S. CAL. L. REV. 1267, 1292 (1996) (describing plea-bargaining as “[p]erhaps the least popular facet of the criminal justice system in the eyes of the American public” and citing California Victims’ Bill of Rights, which imposed limits on plea-bargaining, as evidence of that dislike); cf. CANDACE MCCOY, POLITICS AND PEA BARGAINING: VICTIMS’ RIGHTS IN CALIFORNIA xii-xiii (1993) (contending that California Victims’ Bill of Rights may have arisen from “manipulation of public opinion by a dedicated group of law and order conservatives” who generated “politically constructed version of what victims demand”).

\textsuperscript{43} For recent survey information on the death penalty, compare AMERICANS VIEW CRIME AND JUSTICE, supra note 42, at 93-108 (indicating that, although Americans increasingly supported death penalty after 1970, recent data shows trend toward greater public uncertainty about appropriateness of capital punishment) and ROBERTS \& STALANS, supra note 42, at 223-46 (concluding that public support for death penalty is overstated and that minorities, who are more likely to face capital punishment if convicted of murder, are less likely to endorse death penalty) with Samuel R. Gross, Update: American Public Opinion on the Death Penalty—It’s Getting Personal, 83 CORNELL L. REV. 1448, 1449 (1998) (reporting that public support for death penalty has remained high over time, despite fluctuations in crime rates). For empirical work on views held by racial minorities, see generally Richard R.W. Brooks, Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities, 73 S. CAL. L. REV 1219 (2000) (contending that survey data indicates that minority communities do not desire broad police discretion or disproportionately harsh punishments); Ronald Weitzer, Racialized Policing: Residents’ Perceptions in Three Neighborhoods, 34 LAW \& SOC’Y REV. 129, 151-52 (2000) (concluding that, despite wide agreement in three sample communities that police give blacks disparate treatment, respondents diverged in their perceptions of problem in their own neighborhoods); Scot Wortley et al., Just Des(erts)? The Racial Polarization of Perceptions of Criminal Injustice, 31 LAW \& SOC’Y REV. 637 (1997) (discussing how public identification of minority groups as criminally deviant creates conflict). For analyses of
attitudes and prescriptions for reform. Several scholars nevertheless believe that
the media and the vote exercise a positive influence on the decisions that District
Attorneys and their deputies make. Zacharias writes, for example:

The other main remedy for prosecutorial misconduct [besides administrative
supervision, trial court control, and appellate review] is public oversight. State
district attorneys typically are elected officials. Misconduct within their
offices—even by lawyers whom they have not directly supervised—becomes
an issue during elections. Accordingly, media attention and political review by
the voters may provide a deterrent or, at least, a reason for district attorneys to
take corrective steps when misconduct is brought to their attention. 44

Other commentators display a more conflicted attitude toward the voting public.
For example, Green believes that the media opposes the conviction and execution
of innocent people. According to his review of newspaper articles on wrongful
convictions, "[t]he press has characterized the problem as widespread and has
generally attributed [it] to prosecutorial excesses." 45 However, Green also coun-
sels resistance to unreasonable public attitudes, 46 and, similarly, Uviller qualifies
his exhortation to heed public morality by saying:

I do not suggest that the honorable prosecutor be the slave of his electorate.
Indeed, in many matters his duty clearly lies in the defiance of community
pressures. But within the confines of the law, I would rather see his discretion
guided by an honest effort to discern public needs and community concerns
than by personal pique or moralistic impertinence. 47

Skepticism about the electorate is warranted, for it is not clear that the modern
public embraces norms of fairness or that it is sensitive to defendants' relative lack
of resources. 48

public knowledge about criminal law doctrine, see generally ROBINSON & DARLEY, supra note 42, at 6-7 (arguing
that incongruity between criminal codes and community norms undermines moral power of conviction and
punishment); see also John M. Darley et al., The Ex Ante Function of the Criminal Law, 35 LAW & SOC'Y REV
165, 165 (2001) (arguing that people do not know what law makes criminal, but that they "make guesses about
what their state law holds by extrapolating from their personal view of whether or not the act in question ought
to be criminalized").

44. Zacharias, The Professional Discipline of Prosecutors, supra note 11, at 765. See also Pizzi, supra note 11,
at 1339 ("If someone is to decide which laws will be enforced it makes sense that the person who has to answer to
the voters will make those determinations.").
45. Green, supra note 1, at 611.
46. Id. at 642-43.
47. Uviller, The Virtuous Prosecutor, supra note 38, at 1152-53. Griffin's own skepticism about the lay public
is implicit in her argument that "[p]ublic moral judgment is developed through training by more experienced
prosecutors and through consultation with peers and supervisors." Griffin, supra note 11, at 306. In short, she
appears to favor internal review over direct monitoring of voter preferences.
48. See Myers, Bringing the Offender to Heel, in AMERICANS VIEW CRIME AND JUSTICE, supra note 42, at 48
("The public . . . places unrealistic expectations on courts to expedite justice and do more to protect society.").
Myers compares several studies, at least two of which indicate that the public shows disregard for defendants'
rights and believes that "the courts undo the work of the police to get criminals off the street." Id. Recent studies of
History teaches us an important lesson: In the 1800s, the “public” nature of prosecution did not translate into a commitment to neutrality and fairness to defendants, nor did American voters demand such a commitment. Citing nineteenth-century appellate opinions and legal theory, Green describes the imperative to protect the innocent as a “reminder of the traditional understanding” of public prosecution in the 1800s. Here, Green conjures a mythical past. Even if it were clear that the twenty-first-century public embraces defendant-protective norms, my historical research shows that this understanding of the prosecutor’s role is anything but “traditional.”

Advocates of re-privatization share the erroneous view that, for more than a century, public prosecution has subordinated victims’ interests to the goal of preventing wrongful convictions. Charting the expansion of constitutional protections for defendants, for example, Paul Cassell states that “the peculiar evolution of the office of the public prosecutor ... explains, at least in part, why crime victims have been neglected, particularly in federal and state constitutions.” In his view, when public prosecution supplanted primary justice, it also destroyed the victim’s status as a party to the case and silenced her voice in court without adding constitutional protections for victims’ rights. Bruce Benson similarly argues that crimes often go unreported because the injured party has little confidence that the accused will ever come to trial or suffer the appropriate punishment. Noting that the Warren Court in Miranda v. Arizona “referred to the rape victim simply as ‘the complaining witness,’” Benson asserts that “[t]his view of victims is regrettably prominent in the public-sector criminal justice system.”

While Cassell refers to the past in a few brief sentences, Benson devotes more space to historical analysis. According to Benson’s account of history, the state assumed control from private individuals to fill its own coffers and then appealed to the public good as an ex post justification for its actions. Juan Cardenas, public opinion conclude that racial minorities tend to be more concerned about defendants’ rights than are whites. See ROBERTS & STALANS, supra note 42, at 141 (“The majority of African-Americans, but only 29 percent of Whites held the view that disregarding a defendant’s rights was a problem.”).

49. Green, supra note 1, at 642 (emphasis added).
50. Cassell, supra note 3, at 1380.
51. See id. Cassell opines that this imbalance justifies constitutional amendments granting victims the right to equal participation in the criminal justice system. See id. at 1375-76, 1457.
52. Benson discusses flight, dismissal, and plea-bargaining as the principal reasons that perpetrators are not satisfactorily convicted and punished. See BENSON, supra note 3, at 54-71.
53. Id. at 55. In Benson’s view, a private model in which victims have the right to restitution represents the best way to control crime because it provides the greatest incentives to victims “to participate in or employ specialists for pursuit, prosecution, and effective collection of restitution debts.” Id. at 316. He believes that whether such specialists are for-profit entities or voluntary groups, they will conduct law enforcement more efficiently than public police and prosecutors currently do. See id.
54. Cassell criticizes the detrimental effect that the advent of public prosecution had on victim’s rights, but he does not offer any historical explanation for the shift from private to public prosecution. He simply describes the change as an unsolved riddle. See Cassell, supra note 3, at 1380 & n.25.
55. See BENSON, supra note 3, at 223.
another proponent of re-privatization, gives the public-good rationale more cre-
dence than does Benson, identifying concerns about victims’ bias as a catalyst in
the rise of state prosecution. Cardenas cites the writings of Jeremy Bentham, Sir Robert Peel, and Cesare Beccaria to show that English and Continental
theory provided an intellectual framework for distinguishing the alleged partisan-
ship of private prosecutors from societal interest. Colonists who arrived on North
American shores brought with them a tradition of allowing crime victims to initiate
and prosecute their own cases. However, “the colonies began to experiment with
forms of publicly funded prosecution” because “[t]he system of private prosecu-
tion was criticized as elitist, inefficient, and vindictive.” Thus, despite his
victims’-rights orientation, Cardenas recounts a version of history similar to the
one to which Green refers. Cardenas traces the public model to an earlier time, but
he places comparable emphasis on the quasi-judicial norms underpinning it.

While the formal rules send mixed signals about whether prosecutors should
engage in adversarial or neutral conduct, twenty-first-century commentators
typically favor one model over the other. The most extreme position jettisons
governmental control for a private system based on victim restitution. Yet
regardless of political bent, the few works that offer any historical background for
their arguments share the assumption that public prosecution has been grounded in
a quasi-judicial self-image for more than a century. My research refutes this
assumption by showing that, in the late 1800s, norms of state protection for the
accused had not yet gained ascendency. Instead, the government was expected to
give in the vigorous prosecution of all defendants.

Not all modern observers wax enthusiastic about the influence of the public.

56. See Cardenas, supra note 3, at 369.
57. See id. at 362 & n.24 (citing WORKS OF JEREMY BENTHAM (1843)).
58. See id. at 362 (mentioning Peel, who spearheaded 1829 police reform bill in England, as critic of private
prosecution).
59. See id. at 369 & n.59 (stating that “Beccaria’s Essay on Crimes and Punishments (1764) was the most
influential legal theory work of the time”).
60. Id. at 369.
61. Green quotes the state Attorney General in Miranda v. Arizona, who asserted before the Supreme Court:
“Our adversary system, as such, is not completely adversary even at the trial stage in a criminal prosecution
because . . . the duty of the prosecution is not simply to go out and convict, but it is to see that justice is done.”
Green, supra note 1, at 614-15. Several commentators note the confusion of neutral and adversarial norms in the
current system. See Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 FORDHAM L. REV. 2117,
2128 (1998) (arguing that discretionary power over plea-bargaining often makes system more inquisitorial than
adversarial, but that “in the final analysis the prosecutor is part of a law enforcement complex that shares policy
goals with the police”); Kevin C. McMunigal, Are Prosecutorial Ethics Standards Different?, 68 FORDHAM L.
REV. 1453, 1463-68 (2000) (noting that prosecutorial disclosure rules, such as those imposed by Brady decision
and Jencks Act, still allow prosecutors to adopt a more adversarial posture than civil litigators); William T. Pizzi,
The American Adversary System?, 100 W. VA. L. REV. 847, 848 (1998) (“Can a system be an adversary system on
some days of the week but not others?”); Vorenberg, supra note 10, at 1557 (“It is customary to note that while
prosecutors act as the government’s representative in the adversary system, they are expected to be more (or is it
less?) than an adversary . . . ”).
Indeed, pessimism about popular attitudes toward criminal justice leads some scholars to question the election of District Attorneys, who may blindly seek results that the public desires. Although concern about pernicious voter influence is not groundless, my research indicates that historically the relationship between popular attitudes and prosecutorial discretion has been more complex and attenuated. Nineteenth-century prosecutors sometimes bowed to the public’s demand for harsh punishments, typically selecting weak and friendless killers for the death penalty. But, as we shall see, plea-bargaining became a prevalent strategy for resolving criminal cases despite public hostility toward out-of-court dispositions.

II. A History of Prosecution in New York County

Advocates of greater involvement by victims in the litigation of criminal cases contend that their agenda taps into an Anglo-American tradition of private prosecution that was destroyed by the state. New York participated in this tradition much longer than is often recognized. However, by focusing on economic and egalitarian impulses for the rise of public prosecution, commentators who favor private initiative, as well as those who urge greater neutrality and fairness, overstate the degree to which governmental power eclipsed the interest of private citizens in suppressing crime.

A better explanation for the onset of state control over criminal justice than either camp offers is that the so-called respectable classes accepted public police forces and the rise of District Attorneys because they feared that the alternative was escalating violence and even social revolution. The importance of this motive for state-sponsored criminal justice becomes clearer when one recognizes that the fully public model dates from the mid-nineteenth century, a period when increasingly complex and industrialized societies in England and in the United States

63. See Vorenberg, supra note 11, at 1558 (expressing concern that “political influences will enter into the decisions prosecutors make and that they may deal harshly or gently with particular individuals for political reasons”). See also Stuntz, supra note 11, at 533-39 (discussing potentially negative impact of voter preferences on prosecutorial behavior).

64. See infra text accompanying notes 374-77, 387-97.

65. See infra text accompanying notes 155-61 (discussing public disapproval of plea-bargaining) and 121-24, 294 (describing rise of plea-bargaining).

66. See Cardenas, supra note 3, at 359 (“The practice of allowing crime victims to initiate private prosecutions is a long-held English tradition, based on the common belief that the surest method of bringing a criminal to justice is to leave the prosecution in the hands of the victim and his family.”). Relying on secondary sources, Cardenas discusses medieval precedents, such as a Norman procedure in which the victim initiated an “appeal” accusing another individual of a crime. See id. at 359-60.

67. See infra text accompanying notes 80-89.

68. For the historical explanations that Benson, Cardenas, and other proponents of re-privatization offer, see supra text accompanying notes 54-60.

69. For the views and supporting historical narratives offered by reformers who want to insure fairness within the public model, see supra text accompanying notes 2, 31-40, 44-49.
demanded greater state involvement than they previously had.\footnote{70}

The analysis of newspaper sources offered below suggests that crime-control objectives shaped the paradigm of public prosecution in the nineteenth century. Data on the actual disposition of murder cases presented in Part III reveals a more conflicted reality in which District Attorneys attempted to satiate the public’s appetite for convictions by targeting defendants who lacked political and cultural influence. Taken together, these two aspects of this Article demonstrate that defendant-protective aspirations for public prosecution are relatively new and that popular opinion has exercised a capricious influence on prosecutorial behavior.

In addition to correcting the myths that influence modern reform arguments, this Article offers a different view of the relationship between the public and the rise of plea-bargaining than do several historians of nineteenth-century criminal justice. Whereas Michael McConville and Chester Mirsky argue that non-jury dispositions increased because voters desired this change,\footnote{71} this Article shows that the opposite was true. Public opinion generally favored a powerful response to crime, but associated plea-bargaining with undue lenience toward defendants.

**A. Private Prosecution in Early New York**

W. Scott Van Alstyne, Jr. pioneered the influential thesis that the District Attorney had Dutch (rather than English) origins and that New York led the way to state control over prosecution.\footnote{72} An official called the *schout*, who doubled as a constable and fiscal agent for the Dutch West India Company, brought criminal

\footnote{70. See Steinberg, \textit{supra} note 16, at 119-20 (linking state prosecution in Philadelphia to need to quell unprecedented riots and street violence of 1840s); \textit{see also} McConville & Mirsky, \textit{supra} note 16, at 460 (discussing reasons that “aggregate justice” supplanted individual justice in New York in middle of nineteenth century); Wilbur R. Miller, \textit{Cops and Bobbies: Police Authority in New York and London, 1830-1870}, at 23 (1973) (making similar argument about rise of organized public police force in New York); David Philips, “A New Engine of Power and Authority”: The Institutionalization of Law-Enforcement in England, 1780-1830, in \textit{Crime and the Law: The Social History of Crime in Western Europe Since 1500}, at 155, 182 (V.A.C. Gattrell et al. eds., 1980) (describing resistance to creation of public police force in Britain and arguing that 1829 police reform bill triumphed because fears of “growing crime wave, ... public disorder and social revolution” outweighed other concerns). Cardenas displays more awareness of these forces than many other legal scholars; for instance, he notes that concerns about the inefficiency of private prosecution contributed to its demise. See Cardenas, \textit{supra} note 3, at 368-69. However, he fails to appreciate the extent to which public crime-control arguments reflected the interests of individuals who collectively comprised the “respectable” classes.


72. See Van Alstyne, \textit{supra} note 14, at 128-29. Several scholars, especially those providing basic historical background for modern arguments, have relied heavily and somewhat uncritically on Van Alstyne’s work. \textit{See, e.g.}, Benson, \textit{supra} note 3, at 96 (relying on schout thesis without attributing it to Van Alstyne); \textit{see also} History of the Public Prosecutor, 3 \textit{Encyclopedia of Crime and Justice}, \textit{supra} note 14, at 1287 (stating that Dutch brought public prosecution to colonies in form of schout); Thompson, \textit{supra} note 3, at 351 (discussing influence of Dutch schout on public prosecution in colonies); Gittler, \textit{supra} note 3, at 128 (describing Dutch schout in colony of New Netherland as “possible source of public prosecution” in America). \textit{But cf.} Joan E. Jacoby, The
charges against defendants as early as 1653 in New Netherland, the colony that later became New York, New Jersey, Connecticut, Delaware, and Pennsylvania.\(^7\)

Even after the English seized control of the colony and imposed their laws in 1665, the *schout* continued to bring cases. He now bore the designation of sheriff, and his efforts to exercise prosecutorial power engendered some concern; however, according to Van Alstyne, the English made no serious effort to halt the *schout*’s activities.\(^7\) Van Alstyne sees a causal link between the *schout* and the advent of prosecuting attorneys before the end of the eighteenth century in the American states that formerly comprised New Netherland.\(^7\)

In New York, a lawyer with the title of District Attorney performed at least limited public functions in criminal cases from 1777.\(^7\)

Van Alstyne correctly contends that the English were late-bloomers in replacing private prosecution with a public model.\(^7\)

The English did not create a Director of Public Prosecution until 1879, nor did they have a national body that handled criminal cases until the Crown Prosecution Service was formed in 1985. Although English Justices of the Peace began to perform some investigative functions and to bind witnesses for trial in the mid-sixteenth century,\(^7\) English influence on public prosecution in America was very slight. However, that is about as far as the *schout* thesis takes us.

Despite his careful research, Van Alstyne fails to distinguish a local official who occasionally prosecuted defendants, while pursuing other business on the side, from “a state agent concerned with orchestrating outcomes to further social-control objectives.”\(^7\)

New York waited until at least the mid-nineteenth century for an attorney who approximated the latter.\(^7\) The idea that public prosecution had become firmly established as the American system by 1789\(^7\) does not bear scrutiny. In most colonies, private citizens initiated the process by bringing a

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\(^7\) See Van Alstyne, *supra* note 14, at 131, 137.

\(^7\) See id. at 136-37.

\(^7\) See id. at 134-37.

\(^7\) See Miller, *supra* note 70, at 79.

\(^7\) See Van Alstyne, *supra* note 14, at 127.


\(^7\) McConville & Mirsky, *supra* note 16, at 453.

\(^7\) See infra text accompanying notes 91-104.

\(^7\) See generally J.M. Kress, *Progress and Prosecution*, 423 *ANNALS AM. ACADE. POL. & SOC. SCI.* 99, 100 (1976) (describing development of criminal prosecution system starting with common law tradition); see Jacoby, *supra* note 72, at 16 (arguing that “private prosecution failed to root in the American colonies” and that at least one colony abandoned it in favor of public model by early eighteenth century).
complaint before the Justice of the Peace.\textsuperscript{82} The Attorney General in colonial New York was sometimes forced to drop a case because the prosecuting witness refused to cooperate.\textsuperscript{83}

Indeed, private citizens continued to initiate and litigate criminal prosecutions in New York until the 1840s or 1850s,\textsuperscript{84} and even as late as 1891, relatives of a murder victim might urge the District Attorney to charge an individual whom they suspected.\textsuperscript{85} Before mid-century, activities like searching for evidence, drafting legal documents, and empanelling a jury corresponded to a fee schedule; the complaining witness paid the District Attorney for services rendered. Moreover, in the early 1800s, private lawyers (rather than the District Attorney) commonly presented criminal cases in New York courts—sometimes representing the victim in one matter and the defendant in another.\textsuperscript{86}

Neither state nor local jurisdictions kept official statistics on crime rates or case disposition in the early 1800s, for justice was individualized and entrepreneurial, and crime control was not viewed as part of the state interest.\textsuperscript{87} Perhaps because the mantle of the state did not rest firmly on the New York County District Attorney’s shoulders during the early nineteenth century, prosecutorial misconduct

\textsuperscript{82} See Steinberg, supra note 16, at 6-7; Steinberg, supra note 28, at 571; see also Julius Goebel, Jr., & T. Raymond Naughton, Law Enforcement in Colonial New York 340-41, 347-48 (1944) (discussing private complaints brought before magistrates in colonial New York).

\textsuperscript{83} See Goebel & Naughton, supra note 82, at 368 (noting Attorney General might enter a \textit{nolle prosequi} “because a case had been compounded and the prosecuting witness desired a discontinuance”); see also Douglas Greenberg, Crime and Law Enforcement in the Colony of New York 184-85 (1974) (making similar observations).

\textsuperscript{84} See McConville & Mirsky, supra note 16, at 447, 465 (stating that “the prosecutorial function relied heavily on the initiative of the private citizen and the local bar” in early 1800s and “by mid-century the District Attorney had become the sole representative of that state in prosecutions for indictable offenses”).

\textsuperscript{85} In the case of Carlyle Harris, a medical student who went to the electric chair in 1893 for poisoning his young wife, the victim’s mother repeatedly visited the District Attorney’s office to urge investigation of Harris. See Mrs. Potts Repeats Her Charge: She Still Holds That Harris Caused Her Daughter’s Death, N.Y. Recorder, Mar. 24, 1891, microformed on District Att’y Newspaper Clipping Scrapbook (N.Y. Mun. Archives) [hereinafter DA Scrapbook] at Roll 10; Young Harris Accused: Mrs. Potts Thinks He Deliberately Killed Her Daughter, N.Y. Recorder, Mar. 23, 1891, microformed on DA Scrapbook, supra, at Roll 10. General information about the case can be found in People v. Harris, 33 N.E. 65 (N.Y. 1893). For other examples of cases initiated by victims or their families at the end of the 19th century, see Letters from Monroe Williams to District Att’y Olney and Recorder Smyth, People v. Chacon, Sept. 2, Sept. 23, & Nov. 13, 1884, Folder 1454, Box 141, District Att’ys Indictment Papers, N.Y. Mun. Archives [hereinafter DA Papers] (1884) (containing letters from victim’s husband urging District Attorney to expedite case and subpoena certain witnesses); Prosecuted by a Woman: Jeannette Conger Charges James McNab Clark with Extortion, N.Y. Star, Dec. 29, 1888, microfilmed on DA Scrapbook, supra, at Roll 7 (reporting that, after New Jersey widow complained to District Attorney’s office that defendant threatened to “blast her good character” if she tried to recover on loan, District Attorney Fellows had defendant arrested).

\textsuperscript{86} See McConville & Mirsky, supra note 16, at 452-53 (noting that, in this situation, attorneys were bound by attorney-client privilege).

\textsuperscript{87} See id. at 448-49 (stating that in first half of nineteenth-century New York City justice system was entrepreneurial and that there was no “independent state interest in the rate of acquittals and convictions and the aggregate number of dispositions”).
“infrequently attracted criticism and adverse comment . . . .”88 Unlike the newspapers of the 1880s and 1890s,89 the early-nineteenth-century press did not seek to impose public accountability on the District Attorney.90

B. The Beginnings of Public Prosecution

Private lawyers ceased to represent victims at trial when the District Attorney became an elected official in 1846.91 Private settlements were also eliminated.92 A complainant might approach the District Attorney to urge investigation and prosecution; however, by the second half of the nineteenth century, the District Attorney possessed sole discretion over whether to present the victim’s charges to the grand jury.93

Why did these changes occur? In his manifesto of re-privatization, Benson offers a financial explanation for the rise of public prosecution. He argues that the English Crown wielded the criminal law to its monetary benefit as early as the twelfth century: “criminal causes referred to offenses that generated revenues for the king or the sheriffs rather than payment to a victim.”94 Private initiative ultimately waned, according to Benson, because the government’s appropriation of the financial fruits of prosecution left no incentive for citizens to pursue their own cases.95

This thesis has some resonance in New York, but there is still little reason to think that public prosecution was established primarily as a fundraising device. When the New York Constitution was revised in 1846, its drafters did not engage in any explicit discussion of the need to replace private bias with public spirit in the prosecution of criminal cases. Yet the Convention did address financial considerations: the Secretaries required all District Attorneys to divulge the fees that they

88. Id. at 453 (explaining that infrequent criticism of District Attorney was usually centered on District Attorney’s refusal to introduce exculpatory statements made by defendants).

89. See infra text accompanying notes 151-61, 410-12 (analyzing nineteenth-century criticisms of plea-bargaining) & notes 185-204 (discussing role of press) and 210-17, 235-49 (providing more examples of public censure of District Attorneys).

90. See McConville & Mirsky, supra note 16, at 453 (noting that “adverse comment [concerning District Attorney conduct] was muted”). For the press’ critical stance toward public prosecutors in the last two decades of the nineteenth century, see infra text accompanying notes 151-61, 185-204, 233-49, 410-12.

91. N.Y. CONST. of 1846, art. X, § 1; see McConville & Mirsky, supra note 16, at 464-65 (explaining that transformation of District Attorney from an appointed position to an elected position “affected the degree of control the state exercised over the criminal process as a whole”).

92. McConville & Mirsky, supra note 16, at 465 (stating that private parties no longer settled cases in absence of formal adjudication).

93. After Mrs. Potts complained that Carlyle Harris murdered her daughter, for example, “[t]he District Attorney said he would give the case the fullest investigation, and if he found sufficient evidence would place it before the Grand Jury.” Young Harris Accused, supra note 85.

94. See BENSON, supra note 3, at 210 (emphasis omitted).

95. See id. at 10, 223 (concluding that evolutionary path of England’s criminal justice system, including kings’ elimination of victims’ “property rights” to restitution, weakened private citizens’ incentives to voluntarily participate in law enforcement).
received from bail bonds and recognizances during the past year. Thus, the legislators appear to have been concerned about the costs associated with criminal litigation.

Money, however, was not the only or even the primary motive behind alterations in the prosecutor’s role. The election of District Attorneys represented a small part of the move to subject a variety of local officials, including sheriffs and coroners, to the vote. The change ostensibly arose from a desire to increase accountability to the voters. But in a climate of increasing political, social, and ethnic conflict, such accountability had little to do with protecting defendants from the arbitrariness of private prosecutors and much to do with the desire of the “respectable” classes to suppress crime.

Steinberg’s research on criminal justice in nineteenth-century Philadelphia corroborates this view. Although Philadelphia jurists “often advised aldermen not to encourage trivial and malicious litigation” by alleged victims, criticism of the private system was not unanimous. Indeed, the legal profession and other municipal elites failed to unite behind professionalization until riots and gang violence in the 1840s raised the specter of a total breakdown in public order. Even then, reform occurred in a piecemeal fashion; the first election of a District Attorney in Philadelphia did not occur until 1850. New York preceded Philadelphia in bringing prosecutors under state control, but similar motivations were at work in both cities. When the law-abiding citizens of Gotham decided to wage an organized assault on corruption and violence, they saw government intervention as the best way to achieve that goal.

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97. See N.Y. Const. of 1846, art. X, § 1 (providing for election of “[s]heriffs, clerks of counties, including the register and clerk of the city and county of New York, coroners, and district attorneys”); see also Debates and Proceedings in the New York State Convention for the Revision of the Constitution 120 (S. Croswell & R. Sutton eds., 1846), microformed on N.Y. (State) Const. Convention (1846), Reel C(2) unit 2, title 1 (resolving to consider “the expediency of providing in the constitution for the election by the people, of county treasurers, district attorneys, and surrogates”).

98. See Constitutional Developments in New York, 1777-1958, at 30 (Ernest Henry Breuer ed., 1958) (“The debates and decisions of [the 1846] convention reflected the aroused public interest in popular election of most of the higher officers of State government, short terms of office to guarantee public responsibility and a greater participation of the people in their government.”).


100. Steinberg, supra note 16, at 42.

101. See id. at 119-20 (explaining that riots in 1840s forced Philadelphia’s legal professionals and other municipal elites to augment apparatus of state prosecution and increase support for professional police force).

102. See id. at 120 (stating that development of state prosecution emerged piecemeal “primarily through the haphazard growth of the authority of the police”).

103. See id. at 158.

104. See McConville & Mirsky, supra note 16, at 460 (discussing rise of elected District Attorneys in New York); see also Miller, supra note 70, at 23 (discussing impetus for public policing in New York).
Some vestiges of the old system remained. As late as 1896, statutory law empowered the District Attorney to hire private counsel to assist in criminal trials. Such employment could only occur with leave of court and at the expense of the county in which the indictment was returned. Newspaper reports indicate that the practice sometimes caused tension. For example, in the summer of 1890, two of District Attorney Fellows' subordinates—Assistant District Attorney Bedford and Deputy Assistant District Attorney Dawson—got into a dispute about the way Bedford conducted a murder trial. Among other grievances, Dawson complained about Bedford's refusal to hire Dawson's friend to assist in the case. The New York Times disparagingly remarked that, "[t]he difficulty between [the two assistants] appears to have grown out of the system of employing needy favorites as 'extra counsel.'"

This situation was not unique to New York County. Furthermore, at the end of the nineteenth century, at least fifteen states also allowed privately funded attorneys (as opposed to associates paid with public funds) to help with criminal prosecutions. Such arrangements were especially common in murder trials. For example, in Boston in 1850, the family of Dr. George Parkman, who was allegedly slain by Harvard University professor John White Webster, retained a lawyer to help the Massachusetts Attorney General prosecute the case.

Poorer folk also attempted to control the outcome of criminal litigation. Although the District Attorney and the police had usurped the citizen's power to pursue or drop charges after the initial complaint, late-nineteenth-century cases testify to the resilience of private initiative at the bottom of the socioeconomic

105. N.Y. REV. STAT. art. 10, § 204 (Collin 1896).
106. Fellows' Aides at War: The Fiery Dawson Makes Charges Against Ex-Judge Bedford, N.Y. TIMES, June 5, 1890, microformed on DA Scrapbook, supra note 85, at Roll 9. New York was not the only state that allowed private attorneys to assist in criminal cases. See, e.g., Commonwealth v. Williams, 56 Mass. 582, 583-85 (2 Cush. 1849) (explaining that although not ordinarily permitted, in certain cases, at request of public prosecutor and with leave of court, additional private counsel may aid public prosecutor in a case).
108. Id. at 46 (stating that slain Dr. Parkman's family hired one of most prominent criminal lawyers in Boston to assist Attorney General John H. Clifford in prosecution).
109. In the earliest phases of the criminal process, the police might dismiss a case. Although New York desk officers were not officially entrusted with the power to discharge prisoners, they exercised that power extra-legally. See Miller, supra note 70, at 69, 71 (stating that although Metropolitan Police regulations specified that captains, sergeants, policemen and doormen were not authorized to discharge prisoners, desk officers did discharge prisoners in station house). Moreover, all criminal cases, including murder, officially began in the police courts, which conducted a preliminary investigation to determine whether the suspect should be bound over or confined until a jury trial could be held in a higher court. See id. at 58-59 (explaining that "Justices of the Peace in the overcrowded police courts did not take time to investigate cases fully . . . "); id. at 94-95 (stating Justices of the Peace "were accused by critics of pocketing fines and letting off known thieves for a price"). Coroners seem to have taken a more active role in murder cases than did police. However, the police exercised substantial discretionary powers at an early stage of other criminal cases.
scale. For example, in 1884, Monroe Williams, the African-American husband of a woman fatally shot by her lover, not only urged the District Attorney to “get my case on as soon as possible” but also asked him to subpoena three witnesses. Williams was especially anxious for prosecutors to “bring forward [his] trial” because he was confined in the House of Detention for Witnesses. While Williams wanted to be released, many other complainants simply desired to end the criminal wrongdoing or to have the satisfaction of knowing that the real perpetrator would be punished. Private involvement continued, within new bounds, even though victims did not receive financial restitution. Contrary to Benson’s thesis, money did not rank highly among the motivations of crime victims or their families.

Uncertainty did attend the initiation of criminal charges; complainants were sometimes frustrated in their goals. In 1886, for example, John Wheaten complained to the police that Wheaten’s brother-in-law had stabbed him in an argument about his sister. After listening to contradictory evidence, the police dismissed the complaint against the brother-in-law, but they ordered Wheaten and his friend John Brown to answer a robbery charge made against them by John Bischoff. Bischoff accused Wheaten and Brown of robbing him of a gold watch and chain that same evening. Like squabbles over the use of private lawyers to assist in criminal cases, the misadventures of Williams, Wheaten, and other complainants indicate that, although New York created a system of public

110. Letters from Monroe Williams to District At’y Olney, Sept. 2, 1884, People v. Chacon, DA Papers, supra note 85 (asking District Attorney “to bring” his “case up as soon as possible”). For other cases in which the victim or her family played a key role, see supra note 85.

111. See Prosecuted by a Woman: Jeannette Conger Charges James McNab Clark with Extortion, supra note 85 (describing female complainant who sought District Attorney’s aid in extortion case). Steinberg notes the utility of private prosecution to interrupt patterns of bullying and minor physical assaults in Philadelphia. See STEINBERG, supra note 16, at 44, 46-48 (explaining that charges of assault and other similar crimes were most common private prosecutions, that “women regularly brought these charges against men for assault,” and that because magistrates were receptive to these charges, “battered wives had somewhere to go to exert some control over men who exceeded their authority in the home”). In particular, battered women often sought to scare their husbands, on whom they depended financially, rather than having them imprisoned. See id. at 69.

112. This seems to have been especially true of Mrs. Potts’ desire to secure the conviction of her daughter’s murderer. See Mrs. Potts Repeats Her Charge, supra note 85 (reporting that Mrs. Potts paid another visit to District Attorney and consulted with him concerning her accusation that Harris gave her daughter an overdose of morphine); Young Harris Accused, supra note 85 (reporting that Mrs. Potts related her belief in Harris’ guilt to District Attorney and said that she was “anxious for his whole truth to come out,” as “[t]he coroner’s verdict left her daughter’s name under a cloud”).

113. See BENSON, supra note 3, at 223 (indicating that private citizens abandoned their role in criminal cases because lack of restitution made their participation too costly).

114. See A Complainant Made Defendant, Sun (N.Y), June 22, 1886, microformed on DA Scrapbook, supra note 85, at Roll 3 (reporting that Wheaten appeared as complainant against his sister’s husband, Louis Wolff, alleging that after a conversation about his sister, Wolff stabbed him).

115. See id. This incident had a similar outcome to scenarios occasioned by the filing of criminal cross-bills in nineteenth-century Philadelphia. See STEINBERG, supra note 16, at 46 (describing practice whereby defendants sought to gain control of criminal process by becoming private prosecutors themselves).
prosecution before Philadelphia did, the transition from private to public in both cities was slow and uneven.

C. Collectivized Crime Control and the Rise of Plea-bargaining

1. Scholarly Views

Despite the fact that private citizens usually initiated prosecutions in the early 1800s, McConville and Mirsky dispute the idea that criminal trials were amateur affairs before mid-century. Their analysis of the District Attorney’s files and printed case reports for the early 1800s demonstrates the presence of trained lawyers in the courtroom. What was missing in New York before mid-century was a collectivized interest in crime control, not formal legal training or modern procedures like voir dire and judicial enforcement of evidentiary rules.

McConville and Mirsky attribute the relative lack of plea-bargaining in early-nineteenth-century New York to the private nature of the criminal process. Their data indicates that, in the first decade of the 1800s, only about one-fifth of all defendants entered guilty pleas, a number that stands in sharp contrast to Raymond Moley’s figures for the beginning of the twentieth century. Moley estimated that by 1925, as many as eighty-eight percent of all defendants in New York City pled guilty, either to the face of the indictment or to a lesser charge.

The shift toward plea-bargaining preceded the end of the nineteenth century, however. It became the dominant method of case disposition by the 1860s, and by 1879, more than seventy-five percent of all New York County cases resulted in plea-bargains. Moreover, the nature of the pleas themselves changed overwhelm-
ingly to charge-bargains from defendants’ earlier practice of pleading guilty to the face of the indictment. Charge-bargaining thus appears to have gained a firm foothold in New York much earlier than it did in Massachusetts. Seventy percent of guilty pleas in New York in 1865 were to a lesser offense, whereas Fisher finds that less than nine percent of bargains involved reduced charges in Massachusetts’ middle-tier courts at mid-century.

Although McConville and Mirsky present little evidence about public views of the New York County District Attorney’s work and no data on the staffing of his office, they attribute the rise of plea-bargaining to three factors. The first was a new concern with the state’s responsibility to secure guilt determinations in a county divided by ethnic and class tensions. The second factor was the increasingly heavy criminal docket, which grew exponentially between 1839 and 1865. The third factor was that, by 1846, the District Attorney had evolved from a prominent private lawyer and court official who shepherded victims’ cases through the system to an elected state agent subject to pressure from the voting public. According to McConville and Mirsky, these three factors spurred prosecutors to accept guilty pleas to lesser charges: “[t]he interest in securing individual justice for the private prosecutor and the defendant came to be displaced by a political concern with maximizing the rate of conviction through reliance on guilty pleas to lesser offenses.” In their view, plea-bargaining triumphed because the public liked it.

This Article questions McConville and Mirsky’s theory by arguing that press reports on the District Attorney’s handling of cases in late-nineteenth-century New York County reveal public disagreement with prosecutorial discretion. In particular, critics of the District Attorney’s practices distinguished plea-bargains from convictions earned at trial and expressed concern that defendants who pled guilty to lesser charges were shielded from the punishments they deserved. Tensions...
produced by immigration and a new, positivist criminology obsessed with crime statistics did foster concern about the "dangerous classes." But rather than urging prosecutors to dispose of their heavy caseloads without trial, the press chastised the District Attorney's office for using covert means to grant penalty discounts, or even outright dismissals, to the enemies of "respectable" citizens. The increased power and incentive of New York prosecutors to negotiate guilty pleas seems to have stemmed from case pressure, judicial complicity, and the statutory grading of crimes starting in 1829, not from widespread public support for plea-bargaining.

McConville and Mirsky may be closer to the truth when they briefly identify plea-bargaining as a political strategy that "avoided the discontent that imprisonment would engender among the immigrant underclass, who . . . had become part of the newly formed electorate." Unfortunately, they fail to develop this argument.

I make a similar point in Part III, when I discuss the acceptance of guilty pleas from Irish defendants and the commutation of death sentences for prisoners provides cultural evidence for Fisher's hypothesis that the public disapproved of plea-bargaining and related practices. See id. at 930, 935 (arguing that there is "some evidence of disapproval of practices related to plea bargaining" (emphasis in original) and that political advantage gained by prosecutors from reports of high conviction rates suggests that "public preferred severity to leniency and full convictions to plea bargains").

130. McConville & Mirsky, supra note 16, at 460-61 (stating that once race and ethnicity of defendants changed, "the foreign-born came to be viewed as criminogenic and dangerous" and that new concern was manifested by statistics published by Secretary of State that "attempted to quantify criminal cases in terms of outcome and to classify criminal defendants in terms of demographic characteristics").


Of course, prosecutors could reduce their caseload through other means. For example, before 1881, the Attorney General could enter a nolle prosequi on an indictment, and the District Attorney could do so with leave of court. 1881 N.Y. Laws, ch. 7, § 672 (vol. 2); see N.Y. Code Crim. Proc. § 672 (Parker 1905) (1881 N.Y. Laws, ch. 442, as amended by 1882-1905 N.Y. Laws) (discontinuing nolle prosequi); George Fisher, Plea Bargaining's Triumph: A History of Plea Bargaining in America (forthcoming 2002 or 2003). Fisher suggests that the abolition of the District Attorney's unilateral power to enter a nolle prosequi in 1829 failed to curtail charge-bargaining because New York judges cheerfully agreed to the necessary nol prosses. See Fisher, supra. For more information about the formal nolle prosequi power and the mystery of its abolition, see infra notes 302-03 and accompanying text.

132. See Fisher, supra note 16, at 1032-33 (discussing impact of 1829 criminal code on plea-bargaining). The legislature did not divide murder into degrees until 1862. See 1862 N.Y. Laws, ch. 197 (creating degrees for murder charges); see also infra notes 296-301 and accompanying text (showing that homicide grading increased prosecutors' potential leverage in plea-bargaining).

133. McConville & Mirsky, supra note 16, at 466 (emphasis added).

134. See infra text accompanying notes 430-36.
with ties to ethnic communities. However, two caveats are needed. First, respectability and criminality transcended class and ethnic boundaries; not all immigrants had reason to favor leniency toward defendants. Second, pressure from the so-called criminal classes was insufficient to explain plea-bargaining’s rise, for “respectable” New Yorkers were at least as vocal in exhorting the District Attorney to prosecute on the most serious charges possible.

2. Case Pressure in New York County

In the 1880s and 1890s, the New York County District Attorney’s office toiled under a heavy load of cases. Whereas only three lawyers worked for the District Attorney in Alameda County, California, in 1885 and six in 1901, District Attorney De Lancey Nicoll boasted five or six assistants and seven deputy assistants in New York in 1891 and 1892. However, when population data is considered, it becomes evident that prosecutors in New York County were stretched very thin. According to decennial census records, New York County’s population of more than one million in 1880 dwarfed that of Alameda County, in which only 62,976 people resided. Ten years later, New York County had 1,515,301 inhabitants, compared to just 93,864 in Alameda County. New York prosecutors received better pay than their counterparts in California. In contrast to the meager $2500 per year that the Alameda County District Attorney earned until 1897 and the salaries of approximately $2000 or less that his assistants took home, Nicoll’s assistants made $7500 per year, and his deputy assistants pocketed between $3000 and $5000. But the larger salaries

135. See infra notes 291-93 and accompanying text (discussing immigrant pressure for lenient sentencing).
136. See infra text accompanying note 183 (discussing Joseph Pulitzer as representative of immigrants who favored rigorous crime control).
137. See infra text accompanying notes 155-62, 410-12 (showing vigorous press opposition to plea-bargaining). The press generally represented the voice of “respectable” New Yorkers.
138. FRIEDMAN & PERCIVAL, supra note 16, at 50.
139. Nicoll Names His Aids [sic], WORLD (N.Y.), Jan. 1, 1891, microformed on DA Scrapbook, supra note 85, at Roll 10 (listing six assistants and seven deputy assistants); Public and Private Pay, PRESS (N.Y.), Apr. 14, 1892, microformed on DA Scrapbook, supra note 85, at Roll 12 (listing same staff as Nicoll Names His Aids [sic], supra, but with one fewer assistant).
141. INTER-UNIV. CONSORTIUM FOR POL. AND SOC. RESEARCH, supra note 140 (reporting data from ELEVENTH DECENNIAL CENSUS OF THE UNITED STATES, 1890: VOLUME I, POPULATION, PART ONE (D.C.: 1892-97)); see also FRIEDMAN & PERCIVAL, supra note 16, at 21 (reporting population of Alameda County, California, in 1890).
142. FRIEDMAN & PERCIVAL, supra note 16, at 50 n.19.
143. Public and Private Pay, supra note 139. The session laws show that the District Attorney earned $12,000 per year in New York County in 1875. 1875 N.Y. Laws, ch. 480; see also 1885 N.Y. Laws, ch. 239 (indicating that annual salary remained $12,000 in 1885). The 1885 law also allowed the District Attorney to have five assistants,
that New York prosecutors received must have been little solace for their crushing workload.

The New York County District Attorney’s office constantly complained that it was swamped with indictments. For example, District Attorney Randolph Martine reported that there were between 3600 and 4000 Grand Jury indictments in 1885 and admitted that about 1000 of these would be pigeon-holed—that is, placed in a large safe, where they remained indefinitely without further action taken in the case.\(^{144}\) In other words, prosecutors disposed of only 2600 to 3000 of the nearly 4000 indictments in 1885. Despite his reputation for laxity, District Attorney John Fellows disposed of more cases than Martine—2910 in 1887 and 4221 in 1888.\(^{145}\) The zealous De Lancey Nicoll pushed more than 5000 cases through the system in 1892.\(^{146}\) The number of indictments processed does not tell the whole story, however, for the District Attorney’s office did not bring all of its cases before the Grand Jury. In 1889, for instance, Fellows decided not to seek indictments in 2265 of the 5855 cases received from the Police Court.\(^{147}\) Case pressure may have resulted in unfairness to poor defendants. Faced with more cases than the system could handle, Nicoll noted that rich defendants went practically unpunished, while poor defendants who could not post bail were penalized because the law required the District Attorney to bring them to trial within two court terms.\(^ {148}\)

Not only did the press criticize prosecutors for the backlog, but the mounting caseload caused Nicoll and the bench to butt heads over whether the solution lay in an increase in the number of courts or in greater efficiency on the part of the District Attorney’s office. Judges were accused of taking too many vacations; in return, they and other members of the bar censured prosecutors for arriving at work late, requesting unnecessary continuances, and pursuing private legal practice on the side.\(^ {149}\)
3. Nineteenth-century Criticisms of Plea-bargaining

If case pressure gave judges and prosecutors mutual self-interest in accepting guilty pleas, as Fisher argues that it did in Massachusetts, the New York County District Attorney’s office nevertheless failed to satisfy demands for high conviction rates by expediting cases with charge-bargains. The press, “[t]he greatest organ of the public sphere,” complained about lagging attention to criminal matters in the 1880s and 1890s. From barbed remarks about prosecutorial sloth during the tenure of ailing District Attorney John McKeon to disapproval of the volume of private litigation that Nicoll’s assistants pursued, the newspapers chimed the refrain: “Public officers must be made to do the work that people pay them for.”

The press rarely saw plea-bargaining as an appropriate part of that work. For example, in December 1882, the *New York Daily Tribune* castigated McKeon for accepting a guilty plea to first-degree manslaughter in the case of a Polish cigar-maker who killed his wife under circumstances showing “unusual premeditation and careful preparation.” Informed that an Assistant District Attorney said that “justice would be accomplished by accepting the plea,” the Tribune raged:

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supra note 85, at Roll 10 (reporting Nicoll’s view that existing judges could give up vacation time to staff new criminal court); *Public and Private Pay*, supra note 139 (prosecutors criticized for pursuing private legal practice); *The Extra Criminal Court: District-Attorney Nicoll Says the Increased Expense Will be Slight*, WORLD (N.Y.), Mar. 2, 1891, *microformed on DA Scrapbook*, supra note 85, at Roll 10 (discussing Nicoll’s opinion that existing judges could staff new criminal court); *Wants More Work: Recorder Smyth Says District-Attorney Nicoll Sights His Court*, MORNING J. (N.Y.), Feb. 9, 1891, *microformed on DA Scrapbook*, supra note 85, at Roll 10 (reporting view that new court would be unnecessary if prosecutors worked more diligently in existing courts); *Why Indictments Accumulate*, SUN (N.Y.), Mar. 15, 1891, *microformed on DA Scrapbook*, supra note 85, at Roll 10 (same). In the previous decade, at least one newspaper attributed the backlog to the need for more Assistant District Attorneys. See *A New Court Room Needed*, N.Y. DAILY TRIB., Apr. 30, 1885, *microformed on DA Scrapbook*, supra note 85, at Roll 2.


152. See *Criminal Business Delayed*, N.Y. HERALD, Nov. 22, 1883, *microformed on DA Scrapbook*, supra note 85, at Roll 1 (quoting Chief Justice Davis of Court of Oyer and Terminer, who complained that “the general criminal business of the county . . . is nearly all behindhand”); *District Attorney’s Neglected Work*, N.Y. TIMES, Nov. 4, 1882, *microformed on DA Scrapbook*, supra note 85, at Roll 1 (reporting that one murder trial and one assault case were continued because no representative of District Attorney’s office appeared in court for sentencing); *The District Attorney’s Office—Shameful Neglect of Duty*, SUN (N. Y.), Dec. 24, 1882, *microformed on DA Scrapbook*, supra note 85, at Roll 1 (reporting judicial displeasure with repeated failure of public prosecutors to appear for court dates).

153. See *Big Pay for Little Work*, supra note 149 (complaining that assistant spent one week trying civil case); *Public and Private Pay*, supra note 139 (detailing Assistants’ pay from private sources).

154. *The District Attorney’s Office—Shameful Neglect of Duty*, supra note 152. For a discussion of the political and social composition of the newspapers excerpted in the District Attorney scrapbooks, see infra text accompanying notes 185-204.

"What does this mean?"156

The Tribune's view that prosecutors should follow the letter of the statute making premeditated murder a capital crime157 was shared by other newspapers in other cases. Perhaps the most controversial of these bargains was the second-degree murder plea that District Attorney Martine's office accepted from William Conroy, an on-duty police officer who brutally murdered a bar patron during a drunken spree. After the Supreme Court, General Term, overturned Conroy's first-degree murder conviction,158 the prosecutor decided to accept a plea rather than hold a new trial. The New York Herald lamented: "When a crime so atrocious can go unpunished for nearly two years and the criminal finally escape the penalty he ought to be made to pay, the administration of justice in this city must be discredibly and even dangerously amiss."159 The Register echoed these sentiments, opining that "a more wanton and unprovoked murder cannot be found."160 Even the sentencing judge thought "the sentence he was about to pass was not adequate punishment for the offence [sic]."161 As was often the case during the last decades of the nineteenth century, discretion exercised to secure leniency incited public outrage.162

D. Machine Politics and Public Criticism of the District Attorney's Office

Prosecutorial discretion in the second half of the nineteenth century sometimes benefited machine politics and served self-interested ends. The elected nature of the District Attorney's post after 1846 made prosecutors beholden to the voters, but in the decades surrounding the Civil War, politicized gangs began to bully people at the polls.163 The vote did not transparently reveal public preferences.

156. An Absurd End to a Murder Case, supra note 155; see also infra text accompanying notes 410-12 (describing conditions under which District Attorney's office accepted Siebert's guilty plea and press hostility to that decision).
157. An Absurd End to a Murder Case, supra note 155. For information of the statutory grading and penalties for homicide, see infra notes 295-301 and accompanying text.
158. See People v. Conroy, 97 N.Y. 62, 81 (N.Y. 1884) (affirming Supreme Court, General Term's order of new trial).
159. Failure of Justice, N.Y. HERALD, Apr. 23, 1885, microformed on DA Scrapbook, supra note 85, at Roll 2. Disagreement with the outcome of this case arguably had more to do with the fact that the defendant got drunk and violent while on duty as a police officer than with the other details of the incident, which began as a saloon fight. See Conroy, 97 N.Y. at 73-74 (describing facts of case). This Article later argues that male-on-male violence generally attracted less concern than the murder of women by male family members and lovers. See infra Part III.C. Plea-bargains in cases of male honor-killing rarely attracted as much outrage as Conroy's guilty plea did. See infra Part III.C.2. Conroy's status as an on-duty police officer explains the greater controversy.
161. Id.
162. See infra text accompanying notes 270-71.
163. See MILLER supra note 70, at 144 (noting that political bosses used New York City's rough elements to intimidate voters and start brawls at polls); MONKKONEN, supra note 13, at 120-21 (stating that it was common for men to fight and murder to get Tammany Hall's support).
Indeed, the nineteenth-century public often existed in opposition to the elected government. To assess criticism of the District Attorney’s office, it is necessary to discuss the nature of the public and the newspapers that catered to it in the second half of the nineteenth century. The meaning of the word “public” changes from discipline to discipline. Economists use the term to mean interventionist or non-market—the aspects of the economy that the state controls. Urban planners designate physical spaces like parks, town squares, or streets as “public.” In politics, the term has several meanings as well. It sometimes refers to state power or to institutions that the government runs. However, when historians and political theorists talk about the public sphere, they refer to something external to the state itself.

In this sense, the public refers to the “political expression of diverse interests.” It does not inevitably imply either consensus or bi-polarity, but rather, to paraphrase Thomas Bender, the public is “an arena where different interests, commitments, and values collide and resolve themselves” into a civic sense that is constantly being questioned and reconstituted. Reliance on Bender’s term “arena” does not imply that I view the public as a physical space or an assembly of citizens in a meeting hall. Rather, the press played the most important role in the creation of the public sphere. In late-nineteenth-century New York, newspapers took the lead in articulating concern about the perceived shortcomings of the District Attorney’s office: its softness on crime and its indebtedness to the political bosses.

1. Political Bosses and the Public

Founded in the early 1800s as a fraternal organization of artisans, Tammany Hall consolidated its power over the political machine in the 1870s and 1880s. Although young professionals and second-generation immigrants sought to oust

165. Id. at 264.
166. See ETHINGTON, supra note 151, at 15 (borrowing from Jürgen Habermas’ view that “the public sphere came into being in the late eighteenth century, when private persons came together to contest the governing relations of the state and society”); see also generally JüRGEN HABERMAS, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger & Frederick Lawrence trans., MIT Press 1989) (describing formation of public as space between state and society).
167. Bender, supra note 164, at 264; see also ETHINGTON, supra note 151, at 15, 412 (stating that public’s “location in the print media was more important than its location in a physical public space, like the Plaza”).
168. Bender, supra note 164, at 264; see also ETHINGTON, supra note 151, at 15 (discussing role of communication and action in formation of public).
169. See ETHINGTON, supra note 151, at 15, 19-24 (noting that public sphere arose primarily through political journalism which allowed for criticism of state authorities; stating that republican political process cannot exist without free press; and comparing modern newspaper to Greek Agora).
170. See McConville & Mirsky, supra note 16, at 460; Martin Shefter, Political Incorporation and Containment: Regime Transformation in New York City, in POWER, CULTURE, AND PLACE, supra note 164, at 135.
machine politicians during the 1890s, the reformers could not break the grip of the bosses. The fact that late-nineteenth-century prosecutors served the state failed to make their discretionary power more enlightened than that of private citizens using the fee system in the early 1800s. Nevertheless, the main conflict that this Article documents was a battle between a normative vision of governmental responsibility for deterring crime and the less-than-perfect reality of urban politics—not a struggle between a new public model and the old private one.

By the last decades of the nineteenth century, New York had begun to shed its dependence on Atlantic trade and the rise of industry resulted in economic trouble for the artisans whom Tammany Hall was founded to represent. By the 1880s and 1890s, two-thirds of all immigrants to the United States arrived via Castle Garden or Ellis Island and temporarily settled on the Lower East Side. Foreign-born individuals, many of them desperately poor, outstripped the native population by mid-century in the Western Hemisphere’s largest city. Ethnic conflict bloodied New York’s streets and divided lower Manhattan into rival territories, controlled by Irish or Jewish gangs.

Tammany Hall owed its ascendance, in part, to its cultivation of these gangs. The New York political bosses reflected the “hard-fisted” style of the working class, but unlike their counterparts in other cities, they rejected a nativist program. Instead, they sometimes courted immigrant votes. According to several revisionist historians, machine politics neither arose from nor produced stark ethnic and class polarities. Rather, Tammany Hall’s resilience in the face of reform indicates that it enjoyed some support from the upper and middle classes and was able to garner a working-class following without completely antagonizing business interests.

The deepest conflict pitted “respectable” New Yorkers, a category not solely defined by class or ethnicity, against groups associated with violence, shady

171. See Shefter, supra note 170, at 142, 146.
173. Shefter, supra note 170, at 136.
174. Bridges, supra note 172, at 58; McConville & Mirsky, supra note 16, at 459.
175. See Shefter, supra note 170, at 136-37.
176. Bridges, supra note 172, at 63.
177. See id. at 65. But see Shefter, supra note 170, at 139 (contending that, although machine politicians supported downtown Jewish saloon- and brothel-keepers in 1880s, neither Republicans nor Democrats made concerted effort to mobilize immigrants before 1890s).
178. See Bender, supra note 164, at 267; Bridges, supra note 172, at 63, 65. But see EDWARD BANKFIELD & JAMES Q. WILSON, CITY POLITICS 40-41 (contending that urban machine politics had its roots in immigrant values that conflicted with those of middle-class WASPs).
179. See Shefter, supra note 170, at 141.
180. Recent historical work on urban culture in nineteenth-century New York City suggests that neither respectability nor vice inhered in any one social class. For example, Timothy Gilfoyle states that “neither the benefits of privilege nor the trappings of wealth discouraged visits to the whorehouse” during this period.
income, and disrespect for law. While the newspapers often voiced the concerns of the former, machine politicians were identified with the latter. This opposition eventually solidified in the 1930s, in the New York of Mayor Fiorello LaGuardia, when the machine represented a “special interest” locking horns with the “public interest.”

Although class and ethnic tensions and efforts to impose top-down social control were realities in New York, “respectability” resisted the bourgeoisie’s attempts to claim it as their own. Just as rich and poor men consumed illegal commercial sex and engaged in other vices, New Yorkers from a variety of socioeconomic and ethnic backgrounds shared a desire to promote orderliness and to oust corrupt politicians. The stereotypical identification of immigrants and unskilled workers with street violence did not mean that these individuals always favored prosecutorial leniency. Nor was the native-born middle class the only army in the battle against crime, as Joseph Pulitzer’s career exemplifies. Born in Mako, Hungary, in 1847, Pulitzer was an immigrant Jew and also one of the most ardent crusaders against gambling and political corruption during the last few decades of the nineteenth century. “Respectable” values transcended political parties as well. As we shall see, newspapers aimed at Democratic and Republican audiences, at tenements and elite addresses, shared similar concerns about prosecutorial leniency toward criminals.

2. The Role of the Press

Like Tammany Hall’s supporters and public culture itself, New York newspapers have been characterized as a pastiche. Joseph Pulitzer of the World was one of the first publishers to realize that as the profit model shifted from sales to advertising, “a successful newspaper must appeal to many different kinds of readers.” Low prices attracted the working class, and by 1900, even the high-brow New York Times had cut its price to one penny to attract the less

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TIMOTHY J. GILFOYLE, CITY OF EROS: NEW YORK CITY, PROSTITUTION, AND THE COMMERCIALIZATION OF SEX, 1790-1920, at 103 (1992). But see CHRISTINE STANSELL, CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789-1860, at 219 (1986) (describing dichotomies of class in New York City that were blurred only in rare instances that working-class individuals conformed to standards imposed by urban elites).

181. Bender, supra note 164, at 267; Shefter, supra note 170, at 148-50.

182. See GILFOYLE, supra note 180, at 19. Gilfoyle argues that “[e]ven the supposedly sharp distinction between those who frequented [prostitutes in] the Bowery and those who went to Broadway, often seen by contemporaries and later historians as indicative of class divisions, was in fact quite fluid ....” Id. at 107. For my discussion of norms of masculine honor that transcended class and ethnicity, see infra text accompanying notes 339-48.


184. See infra text accompanying notes 201-04, 232-33.

185. See WILLIAM R. TAYLOR, IN PURSUIT OF GOTHAM: CULTURE AND COMMERCE IN NEW YORK 81 (1992) (noting that daily newspapers began to diversify their content to attract broad range of readers).

186. Id. at 81.
affluent. The *Morning Journal* was known as the “washer-woman’s gazette” because its one-penny price appealed to readers in the tenements. While cost determined the poorer end of a paper’s readership, nothing prevented wealthy people from buying a cheap news-sheet. For example, both working men and “the polo-playing, yacht-racing groups” may have read the *New York Herald*.

Just as the newspapers strived to reach a broad spectrum of New Yorkers with their prices, they also published a variety of articles—political opinion, fashion, sports, household advice, and of course, coverage of crimes and trials. The *World*, the *Herald*, and the *Morning Journal* were particularly prone to covering salacious news and adopting a sensational tone when reporting on crime. In its early days, the *Herald* “reigned supreme in shock treatment to attract readers” but softened its tone in the 1840s. Nonetheless, its “reputation for the tawdry remained for decades.” The *World* became “the people’s paper” in the last two decades of the nineteenth century by offering “stories of sex, money, murder, and success; stories of the powerful and the rich who dealt in corruption; stories of the weak who were not always right and whom [Pulitzer] could frown upon but champion.”

In contrast, the *Times* and the *Sun* tended to be more high-brow. Although the *Sun* began as a “nonpartisan tabloid . . . earthy enough to be understood by the man laying gas pipes in the Bowery,” editor Charles Anderson Dana “injected . . . a literary style” when he acquired the paper in 1868. By the end of the nineteenth century, the *Sun* gave its sophisticated flair priority over coverage of all the news; it specialized in exposing scandal and fraud. The *Times* took a more

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187. Turner, supra note 183, at 146. Turner describes why the price cut was greeted with surprise: “No other conservative daily in the city charged less than three [cents], and it was assumed that only a yellow sheet would sell for a penny.” Id. The *Times* insisted that it had changed its price but not its quality. See id.

188. Id. at 119. It focused primarily on gossip until William Randolph Hearst assumed control in 1895 and added political crusading and the depiction of scantily-clad women to the *Journal*’s menu. See id. at 123-26.

189. Id. at 144. Some scholars depict the *Herald* as a primarily working-class, penny newspaper that, from its inception under Irish editor James Gordon Bennett, specialized in sensational crime reporting. See id. at 10-26. However, due to the lack of market research and the fact that the *Herald* was sold by newsboys, not by subscription, we cannot be sure of its readership. See James L. Crouthamel, Bennett’s *New York Herald* and the Rise of the Popular Press 158 (1989). It seems reasonable to assume that the *Herald* appealed to a broad audience that transcended class. Politicians in Washington, including the president of the United States, read it, and it had enjoyed “the largest circulation in Europe of any American newspaper” in the 1830s. Id. Crouthamel speculates that, based on the nature of the advertising contained within its pages, the *Herald* enjoyed a universal appeal. See id. at 159.

190. See Taylor, supra note 185, at 81.

191. Turner, supra note 183, at 26

192. Id. at 31; see also Crouthamel, supra note 189, at 28-31, 37-39, 100-01 (describing *Herald*’s sensational crime coverage).

193. Turner, supra note 183, at 106.

194. Id. at 4.

195. Id. at 85.

196. See id. at 144.

197. See id. at 86.
intellectual approach than other Democratic publications, but it reported more news than did the literary Sun.\footnote{198} William Taylor argues that, because the press offered a pastiche, it failed to dominate public thinking. Readers could pick and choose according to their own tastes, rather than allowing the newspaper to control values and preferences.\footnote{199} However, Taylor’s “culture of pastiche” model has limited utility in describing late-nineteenth-century New York. Public attitudes were not completely incoherent or unmanageable.\footnote{200} Indeed, with few exceptions, the newspaper scrapbooks that the District Attorney’s office maintained reveal a critical view of the prosecutors. The potential for the District Attorney to become a pawn of corruption and violence lies at the heart of press reports within the scrapbooks’ pages. Remarkably, this perspective seems to have transcended class and party. While powerful editors often claimed that their newspapers maintained political independence, this was rarely true.\footnote{201} Nevertheless, a populist, widely-circulated paper like the World\footnote{202} and a Republican Party organ like the Tribune\footnote{203} could agree upon the need to prosecute corrupt aldermen and send murderers to a speedy execution.\footnote{204}

3. Norms of Public Prosecution in the Late Nineteenth Century

The meaning of “public” prosecution was still contested at the end of the nineteenth century and arguably remains so today. For example, late-nineteenth-century newspapers debated whether the District Attorney should pursue a case that the victim wanted to drop, an issue that continues to be controversial in our own time, especially in domestic violence cases.\footnote{205} In 1882, the Evening Telegram

\footnote{198}{See Turner, supra note 183, at 144-47.}
\footnote{199}{See Taylor, supra note 185, at 82.}
\footnote{200}{See Bender, supra note 164, at 265-66. Bender writes:}

[W]e must not go from bi-polarity to bricolage. Historiography, like the city itself, may become simply unmanageable if one too enthusiastically multiplies such distinctions. . . . [T]he focus on public culture seems to offer a means of acknowledging complexity in a relational sense without being overwhelmed by it. The focus on the construction of the public realm allows the scholar to approach what is “common” without sacrificing the fact and the fundamental significance of difference.

\footnote{201}{See, e.g., Ethington, supra note 151, at 22 (discussing partisan stance that Bennett’s New York Herald adopted on issues like banking and labor, despite its claims of political independence).}
\footnote{202}{The World enjoyed the largest circulation of any New York newspaper in the 1890s, eclipsing the Sun, which claimed that honor in 1883. See Turner, supra note 183, at 98, 106, 124-25. The World’s low price, sensational coverage, and the nature of its editorials attracted a mostly working-class audience. Turner describes its publisher, Joseph Pulitzer, as a vigorous champion of the rights of “the masses.” Id. at 106.}
\footnote{203}{See id. at 144 (stating that Tribune “catered to a small, sturdy, wealthy Republican following and was the party’s foremost organ in the nation”).}
\footnote{204}{See infra text accompanying notes 232-33, 238-49.}
\footnote{205}{Compare Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 Harv. L. Rev. 1849, 1907-09 (1996) (“[L]eaving the choice of prosecution to the victim—and rationalizing that decision on the basis of feminist theory—creates more problems than it solves.”), with Linda G. Mills, Killing Her Softly: Intimate Abuse and the Violence of State Intervention, 113 Harv. L. Rev. 550, 554}
complained about the willingness to prosecute in the victim’s absence. By contrast, the New York Herald opined:

In many cases the victim will make no complaint, will even try to thwart the prosecution. It is none the less the duty of the authorities to bring the offender to justice . . . . Whether an offender shall be tried and punished is not simply an issue between him and his victim, but between him and society.

Although the relationship between the complainant and the state was still unsettled in the 1880s, acute interest in the activities of the District Attorney’s office demonstrated that an ideal of public prosecution was emerging. Unlike the normative vision of the public prosecutor espoused by twenty-first-century law professors, the prescriptions that “respectable” New Yorkers urged upon the District Attorney were those of adversary and crime-fighter. According to the prevalent view, the prosecuting lawyer should pursue social-control objectives greater than the victim’s grievance, while the rights of the defendant should be left to defense lawyers. As the New York Daily Tribune argued in 1887:

It is the [District Attorney’s] function and his duty in each criminal case to present every fact and circumstance that can be brought forward on behalf of the people. The prisoner’s counsel may be trusted to present every fact in favor of his client . . . . [T]he plea of mercy is one with which the District-Attorney has little or nothing to do.

Newspapers expressed concern that the District Attorney’s office was neglecting to perform its adversarial role. The fact that public prosecutors owed allegiance to Tammany Hall was often identified as the cause of this failure. Press reports criticized the District Attorneys of the 1880s and 1890s for making partisan appointments, allegedly underpinned by covert deals with the Tammany bosses, and attributed pigeonholed indictments and plea-bargains to political entangle—

(1999) (“I argue . . . that such policies as mandatory arrest, prosecution, and reporting, which have become standard legal fare in the fight against domestic violence and which categorically ignore the battered woman’s perspective, can themselves be forms of abuse.”). See also Deborah Epstein, Procedural Justice: Tempering the State’s Response to Domestic Violence, 43 WM. & MARY L. REV. 1843, 1865-69 (2002) (discussing arguments for and against no-drop policies and other forms of mandatory state intervention in domestic abuse).

206. According to the New Code, EVENING TELEGRAM (N.Y.), Aug. 17, 1882, microformed on DA Scrapbook, supra note 85, at Roll 1 (“The new Code seems to operate to the prejudice of criminals, or of persons accused of being criminals, even where the complainant takes flight and fails to substantiate his charges.”).

207. Prosecution Without Complaint, N.Y. HERALD, June 20, 1888, microformed on DA Scrapbook, supra note 85, at Roll 6 (defending decision to prosecute in case in which victim duped by supposed Spiritualist declined to make complaint).

208. Earlier, this Article faulted modern critics of prosecutorial discretion for failing to provide a convincing discussion of the extent to which the public subscribes to their views of fairness and justice. See supra text accompanying notes 42-48.

209. The District-Attorney’s Proper Functions, N.Y. DAILY TRIB., Nov. 26, 1887, microformed on DA Scrapbook, supra note 85, at Roll 5.

210. See infra text accompanying notes 234-35, 246-47.
ments. Few District Attorneys escaped such allegations. For example, John McKeon was eulogized on his death in November 1883 for opposing machine politics at many points in his career.\textsuperscript{211} However, there was a general belief that, afflicted with illness during his final term as District Attorney, McKeon succumbed to pressure from the political bosses to appoint partisan subordinates who made unscrupulous choices about whom to prosecute. McKeon's assistants were accused of pursuing charges by disreputable complainants while turning a blind eye to election fraud and gambling.\textsuperscript{212} The \textit{Times} opined:

\begin{quote}
[The less able or honest of McKeon's assistants] were forced upon [him] by the halls, not a little to the scandal of the public, and were what the choice of Tammany and Irving Hall might have been expected to be, being distinguished rather for factious zeal than for professional skill or standing. The result has been that the office has been managed [according to the] interests of the criminal classes.\textsuperscript{213}
\end{quote}

John Fellows, whose tenure as District Attorney is described in detail below, battled even more hostile reports. The newspapers charged that, during Fellows' term, the machinery of justice was not set in motion "when the offenders happened to be politicians with 'pull'"\textsuperscript{214} and labeled Fellows "a man of infinite excuses" for not trying important cases.\textsuperscript{215}

In contrast, the prosecutors for whom the press expressed the greatest admira-


\textsuperscript{212} See \textit{The District Attorney's Duty}, \textit{N.Y. Daily Trib.}, Dec. 4, 1882, \textit{microformed on DA Scrapbook}, supra note 85, at Roll 1. The \textit{Tribune} complained:

\begin{quote}
There has been a signal failure to punish a single one of the many leading lottery managers whom Mr. McKeon has indicted. The unwarrantable assertions before election that false registration was being carried out to an enormous extent have been followed, after election, by suspicious inactivity in prosecuting those accused.
\end{quote}

\textit{Id.} The \textit{New York Times} seconded concerns about the "[p]eculiar difficulties [that] seem to hedge about the conviction of the lottery men." \textit{Untitled}, \textit{N.Y. Times}, May 17, 1883, \textit{microformed on DA Scrapbook}, supra note 85, at Roll 1. It also raised suspicions that, in exchange for a fee, then-Assistant District Attorney John Fellows secured the pardon of "a criminal undergoing a well-deserved sentence." \textit{Id.} In the \textit{Times'} view, there was "reason to fear that the [District Attorney's] office badly needs overhauling." \textit{Id.}

\textsuperscript{213} \textit{John M'Keon's Work Done}, supra note 211. In a similar vein, the \textit{Tribune} complained:

\begin{quote}
His assistants, with hardly an exception . . . were unfit by their lack of experience, by political entanglements and by private obligations for doing their full duty . . . . We regret to add also that Mr. McKeon did not on entering office act upon the ideas which he had approved when advanced in his support [i.e., his supposed opposition to boss rule], but made partisan appointments of some men whom he knew to be incompetent, and others of whom he had proof that they were not scrupulously honorable.
\end{quote}


\textsuperscript{214} \textit{The District Attorney's Neglect}, \textit{World (N.Y.)}, June 22, 1889, \textit{microformed on DA Scrapbook}, supra note 85, at Roll 8.

tion were those who appeared to rise above the political machine. When Wheeler Peckham was appointed to fill McKeon's vacant spot after his sudden death in 1883, the Times noted with approval that "the new District Attorney has not 'fixed things with the boys' before his appointment, and there is, therefore, reasonable ground for hope that he will fix things in a manner which will not suit the boys, and which, therefore, will suit respectable citizens."  

When journalists used terms like "judicial" and "impartial," they referred to independence from boss rule and the so-called criminal classes, not to evenhandedness toward victims and defendants.

This was not a monolithic view. Whereas the public in the second half of the nineteenth century favored a bitterly adversarial system, some judges and legal theorists began to articulate norms of fairness and neutrality. For example, the Supreme Court of Wisconsin offered the following interpretation of an 1887 statute that precluded private attorneys from prosecuting criminal cases:

The laws have clearly provided that the district attorney, who is the officer provided by the laws of the state to initiate and carry on such trials, shall be unprejudiced and unpaid except by the state, and that he shall have no private interest in such prosecution. He is an officer of the state, provided at the expense of the state for the purpose of seeing that the criminal laws of the state are honestly and impartially administered, unprejudiced by any motives of private gain, and holding a position analogous to that of the judge who presides at the trial. . . . [T]he duty of the prosecuting attorney [is] to proceed with all fairness in presenting the cause of the state to the jury, and in prosecuting the whole case, even though parts of the case as presented should make in favor of the innocence of the accused.

In addition to citing judicial opinions urging prosecutorial neutrality, Green notes that an 1854 essay upon which the American Bar Association modeled its first ethics code described the office of Attorney General as "a public trust, which involves . . . the exertion of an almost boundless discretion, by an officer who

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216. Mr. M'Keon's Successor: Wheeler H. Peckham Appointed District Attorney by the Governor, N.Y. Times, Dec. 1, 1883, microformed on DA Scrapbook, supra note 85, at Roll 1 (describing fact that Peckham had "[n]o affiliation with any Tammany ring" as his chief virtue).

217. For example, the Tribune's comment that "the office is judicial" was paired with criticism of the political partisanship that McKeon's assistants displayed with their leniency toward certain defendants. The District-Attorney, supra note 213.

218. Biemel v. State, 37 N.W. 244, 247 (Wis. 1888) (emphasis added); see Meister v. People, 31 Mich. 99, 103-04 (Mich. 1875) (opining that similar law was "designed to secure impartiality from all persons connected with criminal trials" and analogizing public prosecutors to judges); see also People v. Cahoon, 50 N.W. 384, 385 (Mich. 1891) (reprimanding public prosecutor for using innuendo to discredit witness in violation of quasi-judicial duties of his office); People v. Chuck, 20 P. 719, 723 (Cal. 1889) (censuring prosecutor for introducing inadmissible evidence and reminding him that adversarial zeal must be tempered by duty, shared "[e]qually with the court," to ensure that defendant received fair and impartial trial).
stands as impartial as a judge."\textsuperscript{219} The ABA did not publish its code until 1908, but the author of this essay, George Sharswood, was a respected member of the legal profession in the mid- to late-nineteenth century. He taught law at the University of Pennsylvania from 1850 to 1868. In 1879, he donned the robes of the Chief Justice of the Pennsylvania Supreme Court and still sat on the Pennsylvania bench when his \textit{Essay on Professional Ethics} appeared in print.\textsuperscript{220}

However, despite the existence of judicial and academic writings supporting Green's view, we should not assume that the public prosecutor's quasi-judicial role was a nineteenth-century tradition.\textsuperscript{221} Judges in Philadelphia failed to stifle practices associated with private prosecution during Sharswood's days as a law professor in that city.\textsuperscript{222} And the views that Sharswood espoused had not gained acceptance in New York even a few decades later. The New York District Attorney scrapbooks rarely express a desire for prosecutors to be more solicitous of defendants' rights, although such scrapbooks contain articles from a wide variety of newspapers, many of them strongly critical of the District Attorney's office. Ironically, the \textit{New York Star}, a tabloid that may have been on Boss Tweed's payroll in the early 1870's,\textsuperscript{223} was one of the few periodicals to state what many of us today consider axiomatic: "Success or failure in securing a conviction in every proceeding is not a fair standard of the merit of a public prosecutor. Our courts exist for the protection of the innocent as well as for the punishment of the guilty. District Attorneys are not bloodhounds."\textsuperscript{224}

\begin{footnotes}
\item \textsuperscript{219} Green, \textit{supra} note 1, at 612 (quoting George Sharswood, \textit{AN ESSAY ON PROFESSIONAL ETHICS} 94 (F.B. Rothman 5th ed., 1993) (1854)).
\item \textsuperscript{221} See Green, \textit{supra} note 1, at 635 (suggesting that "[l]atter day writings" continue to espouse this view of prosecutor's function).
\item \textsuperscript{222} See \textsc{Steinberg}, \textit{supra} note 16, at 182-87 (describing inability of bench to eradicate private prosecution in Philadelphia in 1850s and 1860s).
\item \textsuperscript{223} See \textsc{Turner}, \textit{supra} note 183, at 88. Other periodicals that Boss Tweed bribed included the \textit{Tribune, Herald, World}, and \textit{Commercial Advertiser}. \textit{Id.} Of the newspapers excerpted in the District Attorney's scrapbooks, only the \textit{Times} "ceaselessly attacked Tweed or other Ring members." \textit{Id.} at 89. However, by the 1880s, many of the papers formerly silenced by the Ring took an adversarial stance toward boss politics. For instance, Charles Anderson Dana's \textit{Sun} helped defeat a mayoral candidate that Tammany boss, "Honest" John Kelly, backed in 1878. \textit{See id.} at 97. And, of course, in the 1880s, the \textit{World} emerged as a leading mouthpiece for denouncing municipal corruption. \textit{See id.} at 102-18; \textit{see also supra} text accompanying note 183-86 (discussing Pulitzer's career).
\item \textsuperscript{224} A \textit{Decisive Fact}, \textit{N.Y. STAR}, Oct. 17, 1887, \textit{microformed} on DA Scrapbook, \textit{supra} note 85, at Roll 5 (defending then-District Attorney candidate John Fellows against allegations that he won fewer cases than his rival, De Lancey Nicoll); \textit{see The District Attorney, N.Y. STAR, Apr. 5, 1888, microformed} on DA Scrapbook \textit{supra} note 85, at Roll 5 (using almost identical language and adding that "[i]t is not the part of the District Attorney to exult in a conviction or to deplore an acquittal"); \textit{see also Why Not a Public Defender?}, \textit{DAILY MERCURY} (N.Y.), May 10, 1893, \textit{microformed} on DA Scrapbook, \textit{supra} note 85, at Roll 15 (expressing need for public defender to combat rapaciousness of District Attorney's office). Forecasting modern criticisms of prosecutors, the \textit{Mercury} contended:
\end{footnotes}
The New York bench sometimes exhorted the District Attorney’s office to give defendants the benefit of the doubt when exercising prosecutorial discretion, but judges more frequently espoused crime-control objectives, censuring prosecutors for indolence and jurors for lenient verdicts. The fact that a few judges, attorneys, and news reporters voiced aspirations to prosecutorial impartiality did not make those views representative of the legal profession or the press. Nor did such sporadic expressions of a fairness norm constitute a tradition in which the public participated. Although the view that the District Attorney must safeguard defendants’ rights was sometimes expressed, it still lacked deep roots in American legal culture at the end of the nineteenth century.

E. A Tale of Two Prosecutors: John Fellows and De Lancey Nicoll

No rivalry more clearly crystallized late-nineteenth-century norms of public prosecution than the struggle between John Fellows and his successor De Lancey Nicoll. Although the case study presented in Part III focuses on murder, much of the criticism directed at public prosecutors in the last decades of the nineteenth century related to the fate of municipal officials accused of corruption. Bribery, not murder, seems to have been Public Enemy Number One. Indeed, in an open letter lambasting District Attorney Fellows for his failure to prosecute aldermen and assemblymen for bribing voters, the Reform Club explicitly asserted that “even the crime of murder must be less abhorrent to the citizen as a citizen [than election bribery].” Neither crime, however, can be viewed in isolation because a District Attorney might hold show trials of murderers to deflect criticism away from his non-prosecution of machine politicians, lottery men, and liquor sellers.

Fellows and Nicoll served together as Assistant District Attorneys under

It has come to be the purpose of the district attorneys to secure as many verdicts of “guilty” as possible. They strive to convict at all hazards and by any means within their power. They try to “make a record,” just as a policeman does, and reckon their efficiency by the number and severity of sentences imposed by the courts in which they plead. Facts coming to the knowledge of the public prosecutor which would tell in favor of a prisoner are not communicated to the defense, and the accused is left to his own resources and those of the counsel employed by him, or assigned to him by the bench.

Id. The Mercury’s concerns lend support to the idea that the dominant norms of public prosecution—the norms with which the Mercury disagreed—pushed the District Attorney to more zealously pursue convictions.

225. See, e.g., People v. Conroy, 97 N.Y. 62, 72 (N.Y. Gen. Term 1884) (urging District Attorney’s office not to oppose new trial order in William Conroy’s case). For more information on this controversial case, which ultimately resulted in a plea-bargain, see supra text accompanying note 158-61.

226. See supra note 149 and accompanying text.

227. See infra text accompanying note 308.

228. See infra text accompanying notes 230-45.

Randolph Martine from 1884 to 1887. During Martine's tenure, the prosecutor's office took on the Boodlers—a group of aldermen bribed by railway owner Jacob Sharp to support the construction of a streetcar line on Broadway. Nicoll was credited with zealously preparing the Boodle cases for trial, although Fellows actually delivered many of the closing arguments. When Nicoll opposed Fellows for District Attorney in 1887, the weight of "respectable" opinion, both Republican and Democrat, appeared to favor Nicoll. According to newspapers like the Times, which voiced "respectable" values, Nicoll's victory would ensure "that the Aldermanic bribery trials may go on."

In contrast, such papers depicted Tammany-backed Fellows as sympathetic toward criminals and raised "the apprehension that as District Attorney he would take it upon himself . . . to see that no one received criminal punishment, except in accordance with his particular views and wishes." In short, they feared that Fellows would exercise the District Attorney's significant discretion in favor of leniency and personal bias.

Distaste for Fellows stemmed, in part, from his involvement with the Tweed ring in the late 1860s and from concern that his corrupt ties would impede crime control. Nicoll became the Republican candidate after failing to secure the Democratic nomination and was subsequently defeated in the 1887 election. However, his loss should not be equated with diminished hostility toward boss power on the part of "respectable" New Yorkers; some last-minute votes were
unprincipled decisions that had little to do with the public’s generally positive view of Nicoll. The losing candidate groused that he was “defeated in the boodlers’ districts,” and the World counted convicts like Sharp among Fellows’ supporters. In short, Nicoll loyalists depicted Fellows’ victory as a triumph for boss rule.

Fellows proved to be a very unpopular District Attorney. Even newspapers that supported him in 1887 reversed their loyalties because of his dismissal of Boodle indictments and his practice of pigeon-holing cases that he did not want to try. The Herald complained, for example: “He can give a perfectly convincing reason for not doing any duty except that of drawing his salary... His theory is that no one ought ever to be prosecuted for crime.” The Times put it even more strongly, reporting that when Fellows argued several important Boodle motions, he “practically appeared for the defense.” Fellows’ claim that he intended to reserve scarce resources for trials that he thought he could win fell on deaf ears.

Thus, criticisms of Fellows associated cooperative or lenient behavior on the part of the public prosecutor’s office with crooked politics, whereas Nicoll’s adversarial stance was described as “manly, vigorous, unflinching, and impartial.” In this context, impartiality meant independence from boss politicians and their constituents among the so-called dangerous classes, rather than concern for defendants’ rights. After Nicoll finally became District Attorney in 1891, the Herald assured its readership that statistics on increased convictions in New York

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236. For example, the Sun switched its allegiance to Fellows largely because its editor, Charles Anderson Dana, quarreled with Nicoll supporter Joseph Pulitzer over Pulitzer’s aggrandizement of the evening journal market. See Turner, supra note 183, at 111-12.

237. At the District Attorney’s Office, SUN (N.Y.), Nov. 10, 1887, microformed on DA Scrapbook, supra note 85, at Roll 5 (reporting Nicoll’s reaction to losing election).

238. Untitled, WORLD (N.Y), Oct. 17, 1887, microformed on DA Scrapbook, supra note 85, at Roll 5.

239. The World was livid when its party, the Democrats, failed to nominate Nicoll: “When the news of the nomination of the New York Democrats reached Montreal [where several prominent Boodlers were exiled] Keenan and Moloney doubtless cracked an extra bottle of champagne and sent a congratulatory message to ‘Boss Power.’” See id. (suggesting that Fellows’ victory was supported by boss rule).

240. Our Genial District Attorney, supra note 215 (demonstrating Fellows’ unpopularity as District Attorney because of his failure to try certain cases).

241. Col. Fellows’s Farce, N.Y. TIMES, June 13, 1890, microformed on DA Scrapbook, supra note 85, at Roll 5 (emphasis added) (illustrating public disapproval of Fellows for his failure to prosecute criminals zealously).

242. See Boodle Cases Ended, N.Y. STAR, Feb. 1, 1890, microformed on DA Scrapbook, supra note 85, at Roll 9 (explaining Fellows’ decision to dismiss indictments against several major Boodlers); Surcease of Sorrow for the Aldermanic Boodlers, MORNING J. (N.Y.), Feb. 1, 1890 (quoting Fellows’ view that “no prosecuting officer is justified in spending... money [to bring witnesses from as far away as California and Minnesota] unless there is some reasonable assurance that results can be reached”).

243. Mr. Nicoll’s Triumph, WORLD (N.Y.), Nov. 5, 1890, microformed on DA Scrapbook, supra note 85, at Roll 10 (emphasis added) (demonstrating popular public approval of Nicoll’s election to District Attorney). Also note the reference to Nicoll’s masculinity, which purportedly was revealed by his industry and toughness on crime. See also Nicoll Makes Fair Promises, PRESS (N.Y.), Jan. 5, 1891, microformed on DA Scrapbook, supra note 85, at Roll 10 (celebrating Nicoll’s election to District Attorney’s post in 1891, at end of Fellows’ term).
demonstrated Nicoll's success in protecting the people.\textsuperscript{244} Indeed, Nicoll appears to have been best known for processing indictments that accumulated in the pigeonholes of "two mammoth safes" during Fellows' term.\textsuperscript{245}

However, Nicoll did not escape criticism during his tenure as District Attorney either. The attacks the press aimed at him sounded common themes of public concern about the prosecutorial role. For example, because Nicoll finally obtained his post in 1891 with the blessings of Tammany Hall, he bore Tammany's taint. His longtime champion, the \textit{Tribune}, worried that he had made a deal with the liquor interests to secure his election.\textsuperscript{246} The Republican paper increasingly expressed the view that, because Tammany Hall backed Nicoll, he negotiated plea-bargains in policy cases, so that the defendant only suffered a fine; engaged in the selective non-prosecution of excise violators by allowing the statute of limitations to lapse; and even failed to secure the conviction of murderers.\textsuperscript{247} The discretion not to prosecute was identified with the strategies of boss rule.

In addition, Nicoll's policy of allowing his subordinates to pursue private legal

\textsuperscript{244} Clearing House for all Crimes, N.Y. HERALD, May 7, 1893, microformed on DA Scrapbook, supra note 85, at Roll 15 (asserting that increase in convictions was caused by Nicoll's performance as District Attorney).

\textsuperscript{245} Overhauling Old Indictments: The Pigeonholes of the District Attorney's Office Giving Up Their Dead, SUN (N.Y.), Jan. 3, 1891, microformed on DA Scrapbook, supra note 85, at Roll 10 (proposing that Nicoll successfully finished work that Fellows was unwilling to complete); see also An Army of Criminals at Large, supra note 148 (describing Nicoll's campaign to inventory and dispose of untried cases); cf. Praise for Nicoll, N.Y. RECORDER, July 16, 1893, microformed on DA Scrapbook, supra note 85, at Roll 15 (quoting Judge Cowing as saying, toward end of Nicoll's term, that District Attorney "has kept the machinery of criminal law in rapid motion, and by his efforts the city prisons are almost empty" of individuals awaiting trial); The District-Attorney Busy, WORLD (N.Y.), Dec. 23, 1891, microformed on DA Scrapbook, supra note 85, at Roll 12 (reporting case-disposition statistics and noting that "the District Attorney has kept the machinery of criminal law in rapid motion, and by his efforts the city prisons are almost empty" of individuals awaiting trial).

\textsuperscript{246} See Mr. Nicoll's Staff, N.Y. DAILY TRIB., Jan. 1, 1891, microformed on DA Scrapbook, supra note 85, at Roll 10 (reporting "open claims of the liquor dealers that they had secured from Mr. Nicoll the pledge of [former] Judge Bedford's appointment [as an Assistant District Attorney] as the price of their support"); Tammany Protection, N.Y. DAILY TRIB., Oct. 28, 1891, microformed on DA Scrapbook, supra note 85, at Roll 12 (reporting rumors of explicit or tacit deal in which liquor interests supported Nicoll in exchange for protection of persons charged with excise violations).

\textsuperscript{247} See He Has a Tammany "Pull", N.Y. DAILY TRIB., July 27, 1893, microformed on DA Scrapbook, supra note 85, at Roll 15 (predicting that murder defendant with Tammany influence would not be vigorously prosecuted); Untitled, N.Y. DAILY TRIB., Apr. 23, 1892, microformed on DA Scrapbook, supra note 85, at Roll 12 (reporting judicial censure of Nicoll for accumulation of policy cases); Tammany Protection, supra note 246 (alleging that thousands of excise cases never reached jury during Nicoll's term). The \textit{Tribune} was not the only newspaper that became convinced of Nicoll's deference to Tammany Hall. For example, the \textit{New York Recorder} blamed boss power for the District Attorney's failure to fund the capture of criminals who fled to other states. The \textit{Recorder} contended that Tammany Hall was willing to pay the salaries of its factotums in the District Attorney's office but not "to secure the return of criminals who, with their friends, are perhaps among the strongest constituents of Tammany." New York the Criminal Mecca, N.Y. RECORDER, Dec. 18, 1891, microformed on DA Scrapbook, supra note 85, at Roll 12.
practice raised conflict-of-interest concerns. The press explicitly worried about leniency to defendants, as opposed to victims’ influence over the criminal process. Among three salient concerns, two involved the improper influence of criminal defendants, leading to the ineffective prosecution or dismissal of cases.

Although Fellows played the villain more often than did Nicoll, both men trod a thin line between the demands of the press and those of the political factions that put them into the District Attorney’s office. We should not uncritically equate the newspapers with the public, for the press’ influence on public opinion may have been more ambiguous than some historians indicate. Yellow journalism, blazing with lurid details of “sex, crime, and tragedy,” dominated Park Row in the late nineteenth century. Yet given fierce competition for readers, newspapermen presumably wrote about subjects that interested New Yorkers and expressed views with which a critical mass of their readership agreed. Moreover, while exposing corruption was part of the sensationalistic formula, there is reason to believe that newspapers also attacked the political machine with the objective of fostering reform.

By the end of the nineteenth century, two of the most important features of the prosecutor’s office were the elected nature of its chief attorney and the interest the public took in its operations. Concern about the practices of the District Attorney were often expressed in language familiar to us today—the language of accountability and impartiality. Yet in the 1880s and 1890s, the evolution of public prosecution toward greater sensitivity to defendants’ rights lay far down the road.

The question of when and how norms of fairness began to affect criminal justice remains for further research. This Article simply indicates that defendant-protective goals had no appreciable impact on the paradigm of public prosecution in the nineteenth century.

248. See Big Pay for Little Work, supra note 149 (complaining that Nicoll allowed his assistants to conduct private work in addition to state criminal work); Public and Private Pay, supra note 139 (listing Nicoll’s attorneys’ salaries and asserting that they were overpaid because of their supplemental income from private practice).

249. See Big Pay for Little Work, supra note 149. The three concerns were that: (1) an unethical prosecutor might not zealously pursue a criminal case in consideration for employment in a civil suit by a friend of the criminal defendant; (2) even an ethical prosecutor might fail to vigorously prosecute a criminal case if he were litigating a civil case for a friend of the criminal defendant; and (3) the jury might give more weight to arguments of a civil litigant represented by an Assistant District Attorney, who ostensibly represented the interests of the public. See id.

250. See Ethington, supra note 151, at 19 (“It is impossible to overestimate the role of the press as the central institution of the public sphere.”). While I generally accept Ethington’s views about the primacy of newspapers in the public sphere, the sensationalism of late-nineteenth-century journalism warrants mention.


III. PROSECUTORIAL DISCRETION AND THE FATE OF FIRST-DEGREE MURDER DEFENDANTS

A. Rationale and Methodology for the Case Study

Why use murder as a window for observing prosecutorial discretion? Lawrence Friedman and Robert Percival have suggested that murder may be less worthy of research than other crimes because capital defendants are subject to show trials and afforded greater procedural protections than ordinary defendants enjoy. However, precisely because alleged murderers risk the ultimate penalty, their cases provide rich information about the intersection of prosecutorial behavior and public attitudes.

Prosecutorial discretion causes alarm in capital cases for the obvious reason that the stakes are staggeringly high. James S. Liebman contends that the current death penalty regime encourages trial-level actors to mete out death sentences, regardless of justice and suggests that the Supreme Court attacks procedural protections for capital defendants on the rationale that “death is different in the amount of delay it foists on the system.” Laxly supervised by the courts, prosecutors may seek death sentences with impunity, counting on post-trial review to spare innocent prisoners without penalizing the state’s lawyer for misconduct.

Nineteenth-century commentators also believed that the death sanction made murder cases especially worthy of scrutiny. For instance, respected Philadelphia attorney David Paul Brown urged the private bar not to take “blood money,” but rather to leave the prosecution of great public wrongs, such as murders and riots, to the government. Although Brown’s statement indicates concern about fairness, the nineteenth-century view that capital crimes required the intervention of the state was not synonymous with modern liberal distaste for extremely adversarial tactics where a death sentence may result.

The late-nineteenth-century press urged public prosecutors to adopt a hawkish stance toward alleged murderers and decried strategies for avoiding trial. There was no public defender’s office, and appointed counsel with little experience in criminal cases sometimes represented the accused. A lawyer subsequently

254. See Liebman, supra note 26, at 2155 (standing for proposition that current capital punishment procedures do not effectively serve substantive goal of sending only deserving criminals to death penalty).
255. Id. at 2046 (emphasis in original).
256. See id. at 2078-81, 2111, 2121, 2126.
257. STEINBERG, supra note 16, at 81.
258. See infra text accompanying notes 263-64.
259. For example, the court appointed young Stephen Baldwin to represent first-degree murder defendant John Osmond in 1891. Baldwin was only twenty-seven years old, and what little trial experience he possessed was in civil causes. In a motion for continuance, he expressed concern about representing a death-penalty defendant and indicated that he sought a more experienced criminal lawyer to help him with the case. First, he tried to associate Frederick House, who, at least ostensibly, fell ill. He then asked Charles Brooke, who claimed to have taken sick,
indicted for practicing without admittance to the New York Bar appeared for at least three capital defendants whose death sentences appellate courts still affirmed.\textsuperscript{260} Despite this inequality of resources, the newspapers were filled not with demands for a level playing field, but with exhortations to the District Attorney to kick the ball harder for the People.\textsuperscript{261}

Public views of sentencing were similarly harsh. The movement to abolish capital punishment enjoyed "widespread enthusiasm and evangelical fervor" in New York in the 1830s and 1840s; however, the Civil War "hardened and blunted" public attitudes toward severe sentences.\textsuperscript{262} By the last decades of the nineteenth century, a prominent view held that capital defendants should be executed as quickly as possible to ensure the maximum deterrent effect.\textsuperscript{263} Delays of a year or

\textsuperscript{260} See Heinzelman's [sic] Defense: He Took Cases Because They Came His Way and He Needed Clients, \textsc{sun} (n.y.), July 1, 1891, microformed on DA Scrapbook, supra note 85, at roll 11 (reporting indictment of defense attorney John R. Heinzelman for misdemeanor of practicing law without being admitted to New York Bar). Before his crime was discovered, Heinzelman represented James Slocum, Harris Smiler, Martin Loppy, and Schihiok Jugigo, all of whom were executed for first-degree murder.

For Heinzelman's involvement in the Slocum case, see \textit{People v. Slocum}, 26 N.E. 311, 311 (n.y. 1891) (recording Heinzelman as Slocum's lawyer); Indictment Coversheet, People v. Slocum, Folder 3570, Box 383, DA Papers, supra note 85 (1890) (same); \textit{Hope for Murderers}, \textsc{telegram} (n.y.), Mar. 6, 1891, microformed on DA Scrapbook, supra note 85, at roll 10 (reporting that Slocum brought habeas corpus petition alleging deficient counsel). For the Smiler case, see \textit{People v. Smiler}, 26 N.E. 312, 312 (n.y. 1891) (recording that Heinzelman represented Smiler on appeal); \textit{Respite for Two Murderers: Heinzelman, Who Defended Smiler and Slocum, Was Never Admitted to the Bar, n.y. herald, Mar. 13, 1891, microformed on DA Scrapbook, supra note 85, at roll 10; Death Came Painlessly to the Four, n.y. herald, July 7, 1891, microformed on DA Scrapbook, supra note 85, at roll 11 (reporting that Ambrose Purdy applied for writ of habeas corpus on behalf of Smiler, based on violation of right to counsel); \textit{Delayed by a Quibble, n.y. recorder, Mar. 12, 1891, microformed on DA Scrapbook, supra note 85, at roll 10 (stating that Purdy wrote to every county clerk in state of New York to confirm that Heinzelman was not admitted to Bar). For the Loppy case, see Indictment Coversheet, People v. Loppy, Folder 3766, Box 407, DA Papers, supra note 85 (1890) (recording Heinzelman as Loppy's lawyer); \textit{Three Shocks Killed Martin D. Loppy, \textsc{telegram} (n.y.), Dec. 7, 1891, microformed on DA Scrapbook, supra note 85, at roll 12 (same). For the Jugigo case, see \textit{He Bowed for the Axe: Singular Scene at the Opening of the Jap's Trial for Murder, \textsc{morning J. (n.y.), Dec. 5, 1889, microformed on DA Scrapbook, supra note 85, at roll 8 (reporting that Heinzelman represented Jugigo).}

\textsuperscript{261} See infra notes 263-64, 272 and accompanying text.

\textsuperscript{262} David Brion Davis, \textit{The Movement to Abolish Capital Punishment in America, 1787-1861}, 63 am. hist. rev. 23, 46 (1957).

\textsuperscript{263} The \textit{Star}, which was often more sympathetic to defendants than other papers, asserted:

\textit{It is perhaps a hard thing to write, and may by the sensational humanitarians be deemed unfeeling, that the laws [sic] vindication of human justice should be prompt and effective; that the murderer—that is, the calm and cool and cautious murderer—is best out of the way of society; that if example and not vengeance be the object of capital punishment, the more prompt it is the more effective it will be.}

\textit{Hovey to Die at Sunrise, n.y. star, Oct. 19, 1893, microformed on DA Scrapbook, supra note 85, at roll 1. Celebrating the Supreme Court's decision that capital defendants must appeal directly to the Court of Appeals, without first going to the Supreme Court, the \textsc{Sunday Union and Catholic Times} predicted:}
two were considered unsupportable, a sentiment that seems odd today.

Through intensive analysis of 405 first-degree or common-law murder indictments between 1879 and 1893, this case study seeks not only to illuminate public attitudes toward prosecutorial discretion, but also to provide data on how the District Attorney's office actually disposed of capital cases. Lack of research on prosecutorial discretion in late-nineteenth-century New York makes the 1880s and 1890s an attractive choice. The few extant studies either stop during the

Hereafter there will be less roundabout devices at the disposal of condemned criminals to evade or postpone punishment. The appeal now lies direct to the Court of Appeals, and the man who commits a murder and receives sentence for it, will not have so many chances to cheat the gallows.

\[O \text{ Murderers Must Really Hang, Sunday Union & Cath. Times (N.Y.), Aug. 19, 1888, microformed on DA Scrapbook, supra note 85, at Roll 6.}\]

264. For example, the Mail and Express complained:

\[\text{[T]he tardiness of [the prisoner's] execution greatly diminishes its effect upon the criminal class. The average time in New York from the commission of a murder to its expiration on the gallows is not less than a year, and it is not infrequently that more than two years intervene between the crime and its penalty of death.}\]

\[\text{Delays of the Gallows, Mail & Express (N.Y.), Oct. 19, 1883, microformed on DA Scrapbook, supra note 85, at Roll 1. Lamenting the promulgation of code provisions in 1888 allowing a defendant to ask the Court of Appeals for a new trial based on newly discovered evidence, the Evening Post opined:}\]

\[\text{It is nothing more or less than new machinery for taking the case of every condemned murderer to the Court of Appeals. "Newly discovered evidence" is something which almost every man condemned to be hung can find in greater or less quantities . . . . Such a system as this has never been tried, so far as we know, in any civilized state, and would work well for no one but murderers.}\]

\[\text{The Hovey Case, Evening Post (N.Y.), July 26, 1888, microformed on DA Scrapbook, supra note 85, at Roll 1. The Herald commented in a similar vein in 1889 that "it seems to us that the real defect of our system is not in the penalty, but rather in the procrastinating methods of our courts. If the law is to have terrors for criminally disposed men and women it must be executed swiftly and surely." Crime and Capital Punishment, N.Y. Herald, Aug. 24, 1889, microformed on DA Scrapbook, supra note 85, at Roll 8; see also Law in Aid of Crime, World (N.Y.), Aug. 24, 1889, microformed on DA Scrapbook, supra note 85, at Roll 8 (arguing that delays in punishment were responsible for high rate of murder). The following year, the Herald decried defense counsel’s ability to file a habeas corpus petition and then appeal the denial of that petition to the United State Supreme Court: "[T]he law of capital punishment in every State of the Union may be travestied and paralyzed at the will of any condemned murderer or notoriety seeking attorney." What the Attorney for Any Murderer May Do, N.Y. Herald, Dec. 3, 1890, microformed on DA Scrapbook, supra note 85, at Roll 10.}\]

265. Modern defendants usually spend about eleven years on death row while their cases are vetted for errors.

\[\text{Liebman, supra note 26, at 2056.}\]

266. The records of the District Attorney’s Office in the New York Municipal Archives contain 405 entries for first-degree murder for the 1879-93 period. Each entry corresponds to the name of a defendant listed on an indictment coversheet. The District Attorney’s office noted the disposition of the case in ink or pencil on the coversheet of each indictment. Such notations included the entry of guilty pleas, convictions, acquittals, insanity determinations, dismissals, nolle prosequi, superseding indictments, and instances where the defendant was “discharged on his own recognizance” due to insufficient evidence. However, some of the names merely bore the designation “N/A,” which might mean that no indictment was ever obtained. For the purposes of this Article, each entry is treated as an indictment, but the ones labeled “N/A” and others for which the notation was ambiguous appear under the category “Disposition Unclear” in Figure 1.
aftermath of the Civil War\textsuperscript{267} or fail to provide detailed information about the culture of the District Attorney’s office at the end of the nineteenth century.\textsuperscript{268} There are practical reasons for choosing this time frame, as well. The fourteen-year period from which the data is drawn offers unusually bountiful sources—indictment papers, newspaper clippings, appellate opinions, and other raw materials for constructing a computer database to quantify research results. Because this case study stems from such rich archival material, it shows what happened to more than 400 murder defendants once their cases fell into the hands of the District Attorney.

While newspapers help us identify late-nineteenth-century views of the public prosecutor’s role, they are less reliable in providing information about case disposition. Accordingly, the bulk of quantitative material on the outcome of murder cases is drawn from notations that the District Attorney’s personnel made on the coversheet of each indictment. That information has been supplemented by press reports and appellate opinions, especially in cases where a first-degree murder conviction was obtained. Very few prosecutorial misconduct claims were advanced on appeal.\textsuperscript{269} Hence, the case study concerns itself with how the District Attorney’s office disposed of cases and what the public thought of such practices, rather than with specific rules violations.

The picture of prosecutorial behavior that emerges suggests that the newspapers published hyperbolic reports. Despite the press’s outrage at the alleged failure to prosecute defendants, slightly more than half of all first-degree murder cases proceeded to a jury trial.\textsuperscript{270} The District Attorney’s office did, however, make discretionary decisions about whom to prosecute for first-degree murder, and such decisions implicated cultural conflict in a county torn by ethnic and class rivalries. Drunken, shiftless men accused of domestic murders—rather than “toughs” aligned with machine politics and streetwise norms of masculine valor—made uncontroversial candidates for the death penalty. Although the latter were sometimes executed, the former predominated among capital convictions despite evidence that male-on-male homicides outnumbered the killing of women.\textsuperscript{271} Spurred by the press to account for its use of public funds, the District Attorney’s office selectively pursued capital punishment for defendants who violated prevalent norms of masculinity.

\begin{itemize}
\item \textsuperscript{267} See generally Kuntz II, supra note 131; McConvile & Mirsky, supra note 16, at 466; Monkkonen, supra note 21, at 527-29.
\item \textsuperscript{268} See generally Monkkonen, supra note 13; Moley, supra note 16.
\item \textsuperscript{269} Indeed the only real claim of prosecutorial misconduct—as opposed to trial errors, such as the admission of prejudicial evidence—involved a closing argument. See People v. Rohl, 33 N.E. 933, 935 (N.Y. 1893) (summarizing appellant’s objection to District Attorney’s statement that, because victim was war veteran, he could not have insulted appellant’s wife).
\item \textsuperscript{270} See infra Figure 1.
\item \textsuperscript{271} See infra Figure 5 and text accompanying notes 317-22.
\end{itemize}
B. The Disposition of Murder Cases

1. Hyperbolic Views of Prosecutorial Leniency

The press complained vociferously about public prosecutors' failure to secure convictions, even under the stewardship of De Lancey Nicoll, whose industry was widely contrasted with Fellows' sloth. The District Attorney scrapbooks are replete with exaggerated news reports about well-connected murderers eluding justice. For instance, the Mail and Express summarized Nicoll's record by alleging that "influential offenders against the law are in slight danger of suffering merited punishment, while friendless persons must suffer the full extent." There was some truth to these allegations, but they overstated the prosecutors' culpability. Fears that murder defendants with political connections would escape a jury trial were often unfounded. At least three of the twenty-four first-degree murder defendants from the sample used in this Article who were executed for their crimes led the notorious Whyo gang, which was at the height of its power and influence in the 1880s and early 1890s. Michael McGloin, Daniel Driscoll, and Daniel

271. Mr. Nicoll's Methods, Mail & Express (N.Y.), June 16, 1893, microformed on DA Scrapbook, supra note 85, at Roll 15. The Tribune faulted Nicoll for "repeated and numerous failures to convict in criminal cases of the most serious nature." The Jury-box a Nursery of Crime, N.Y. Daily Trib., Mar. 26, 1892, microformed on DA Scrapbook, supra note 85, at Roll 12. Although the title of this newspaper article indicates that the Tribune castigated the jury for acquitting culprits or convicting them of lesser offenses, that sentiment usually emanated from the bench, not the press. See infra notes 308-09 and accompanying text. The Tribune laid the blame at the door of the District Attorney's office, commenting that "District Attorney Nicoll must realize himself that his office is sinking lower and lower every week in the opinion of this community" due to losses in serious felony cases. Id.

272. For information on McGloin's case, see People v. McGloin, 91 N.Y. 241, 252-55 (N.Y. 1882) (affirming defendant's conviction for first-degree murder of Louis Hanier during burglary attempt and describing salient facts); Affidavit of Police Inspector Byrne, Coroner's Inquisition, People v. McGloin, Folder 681, Box 60, DA Papers, supra note 85 (1882) (recording that defendant led gang of thieves); The McGloin Gang, N.Y. Times, Mar. 12, 1883, microformed on DA Scrapbook, supra note 85, at Roll 1 (calling McGloin "the leading spirit" of gang of thieves that continued to commit robberies after McGloin's arrest); see also Herbert Asbury, The Gangs of New York: An Informal History of the Underworld 225, 227 (1928) (identifying McGloin as early Whyo and describing Whyos' power in New York in last two decades of the nineteenth century).

273. For more on Daniel Driscoll, see generally People v. Driscoll, 14 N.E. 305 (N.Y. 1887) (affirming Driscoll's conviction for transferred-intent killing of his girlfriend, who got in line of fire during attempted shooting of Driscoll's rival); People v. Driscoll, Folder 2209, Box 225, DA Papers, supra note 85 (1886) (including evidence in first-degree murder case, recorder's charge to jury, and complaints in prior criminal actions involving Driscoll); A Bullet Ended Her Spree, N.Y. Star, June 27, 1886, microformed on DA Scrapbook, supra note 85, at Roll 3 (describing Driscoll as member of "notorious Whyo gang that terrorized the Five Points" and noting that about fifty members of gang crowded into police court to show their support for him); Trying to Kill McCarthy, Sun (N.Y.), June 27, 1886, DA Scrapbook, supra note 85, at Roll 3 (identifying Driscoll as "a Sixth ward desperado and the leader of the notorious Whyo gang"); see also Asbury, supra, at 228 (calling Driscoll and Lyons greatest Whyo leaders).

274. For the details of the Lyons case, see generally People v. Lyons, 17 N.E. 391 (N.Y. 1888) (affirming Lyons' conviction for premeditated murder of rival); Coroner's Inquisition, People v. Lyons, Folder 2614, Box 272, DA Papers, supra note 85 (1887) (preserving frequently dubious affidavits of disreputable persons with whom Lyons associated); Lyons Gains Four Days, N.Y. Star, Aug. 12, 1888, microformed on DA Scrapbook, supra note 85, at Roll 6 (quoting governor's comment, that Lyons was of "notoriously bad character"); see also Asbury, supra, at
Lyons each committed offenses before the killings that led them to the gallows.274 However, particularly in Driscoll’s case, the press believed that “politicians of power [were] behind him and frequently and openly [got] him out of [scrapes],” and “ascribed his success in having indictments against him pigeon-holed” to his political relationships.275 Referring to Driscoll’s role in intimidating voters, one newspaper commented that “[h]e has never worked in his life, except on election day, and he did not intend to [once he was arrested for killing Bridget Garrity]. His influence would set him all right again without any exertion on his part.”276 Nevertheless, the District Attorney’s office vigorously prosecuted all three Whyos on capital charges. The trials and executions occurred despite threats of retaliation and the crowds of “toughs” who gathered to support their heroes.277

These three Whyo cases are not the only examples of successful prosecutions

228-29 (stating that Lyons was “probably the most ferocious gangster of his period” and one of first gang leaders to be pimp for prostitutes).

274. See McGloin, 91 N.Y. at 245 (noting that police inspector saw defendant steal barrel of whiskey night before the murder); see also generally Driscoll, Folder 2209, Box 225, DA Papers, supra note 273 (containing dismissed or withdrawn complaints in earlier cases involving Driscoll); A Bullet Ended Her Spree, supra note 273 (describing numerous violent fights and shootings in which Driscoll was allegedly involved); Defending Himself with a Pistol, N.Y. DAILY TRIB., Nov. 21, 1883, microform on DA Scrapbook, supra note 85, at Roll 1 (reporting incident in which Driscoll and Green wounded each other with pistols after dispute at lodging house); Died Like a True Tough, N.Y. STAR, Aug. 22, 1888, microform on DA Scrapbook, supra note 85, at Roll 6 (indicating that Lyons had been in prison for stealing); Lyons Gains Four Days, supra note 273 (reporting that Lyons previously had served terms in State reformatory and state prison); Trying to Kill McCarthy, supra note 273 (mentioning Driscoll’s alleged attempt to shoot police detective).

275. Leader of the Whyo Gang, WORLD (N.Y.), date unclear, microform on DA Scrapbook, supra note 85, at Roll 3. Another paper reported that Driscoll’s “ability to spirit away complainants enabled him to get out of other shooting and stabbing scrapes, and he even shot at Detective Woods, then of the Central Office, in Chatham Square five or six years ago without coming to great grief.” Trying to Kill McCarthy, supra note 273.

276. Driscoll is a Murderer, WORLD (N.Y.), date unclear, microform on DA Scrapbook, supra note 85, at Roll 3.

277. For the McGloin case, see McGloin, 91 N.Y. at 255 (affirming McGloin’s first-degree murder conviction); Funerals of Hanged Men, EVENING TELEGRAM (N.Y.), Mar. 18, 1883, microform on DA Scrapbook, supra note 85, at Roll 1 (reporting that thousands of people turned out for McGloin’s funeral procession); Twice Fired: The M’Gloin Gang Attempt to Burn the House Where Hanier Was Killed, TRUTH (N.Y.), May 14, 1883, microform on DA Scrapbook, supra note 85, at Roll 1 (reporting threats to set arson fires if McGloin were executed).

For the Driscoll case, see Driscoll, 14 N.E. at 312 (affirming Driscoll’s conviction); A Bullet Ended Her Spree, supra note 273 (reporting that fifty Whyos, including one who had escaped from courtroom by jumping through window, were evicted from police court proceedings in Driscoll case); Life and Lived and Died a Whyo, WORLD (N.Y.), Jan. 24, 1888, microform on DA Scrapbook, supra note 85, at Roll 5 (“There were many threats made against politicians who ‘had allowed Danny to be sacrificed,’ and the Whyos were liberal in promises to get even.”); The Whyo Hanged, N.Y. STAR, Jan. 24, 1888, microform on DA Scrapbook, supra note 85, at Roll 5 (describing “ugly” confrontation between police and Whyos who came to undertaker’s office to view Driscoll’s body after his execution).

For the Lyons case, see Lyons, 17 N.E. at 396 (affirming Lyons’ conviction); Life for Life, MORNING J. (N.Y.), Aug. 22, 1888, microform on DA Scrapbook, supra note 85, at Roll 6 (describing “rough” crowd of about 1000 people that gathered in front of undertaker’s establishment after Lyons was hanged). But see Lyons Met Death Coolly, WORLD (N.Y.), Aug. 22, 1888, microform on DA Scrapbook, supra note 85, at Roll 6 (reporting that only about fifty “hard-faced men and tawdry women,” including “members of the Chain Gang and the Whyos” gathered after Lyons’ execution).
that raised the fear of retaliation. For example, when Peter Smith was executed for shooting a man who bested Smith’s friend in a saloon fight, “prison officials feared that a rattling at the gate [of the Tombs prison] was Smith’s rescuing party,” but it was only the undertaker’s wagon.  

Politically connected defendants in less celebrated cases also felt the sting of the criminal law. In 1891, the Tribune predicted that Burton Webster, a racing-man with Tammany influence, would never be tried for the murder of Charles E. Goodwin, Jr. Yet De Lancey Nicoll brought the case to trial and secured a first-degree manslaughter determination. Webster’s conviction for a lesser-included offense likely stemmed from the jury’s leniency rather than from prosecutorial light-handedness. Moreover, Webster did not fail to pay a price, as the judge sentenced him to nineteen years in state prison.

In tandem with its coverage of the Webster case, the Tribune reported that Michael Gallivan’s friends in Tammany Hall would spare him from trial for murdering a man during an argument over a canary. Unlike Webster, Gallivan was acquitted. Yet even this acquittal shows that the District Attorney’s office did not always dismiss, plea-bargain, or pigeon-hole charges against Tammany men. Rather, when killers got away with murder, such leniency was often attributable to juries and, to a lesser extent, the governor’s power to commute death sentences.

Eric Monkkonen notes that nineteenth-century New York juries appeared reluctant to convict defendants in felony cases; he estimates that ten to twenty-five percent of all felonies reaching trial during the Civil War period resulted in acquittal. This statistic is similar to an acquittal rate of about twenty-two percent in first-degree murder trials from 1879 to 1893. Gubernatorial clemency also spared death-penalty prisoners, although the number of commutations in the 1880s was much lower than that between 1830 and 1860. According to my count, the governor commuted slightly less than one-fifth of the thirty-four capital sentences

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278. Smith Meets His Doom, SUN (N.Y.), May 6, 1887, microformed on DA Scrapbook, supra note 85, at Roll 4.

279. See Tammany Protection, supra note 246.

280. See Indictment Coversheet, People v. Webster, Folder 4151, Box 451, DA Papers, supra note 85 (1892) (recording Webster’s conviction on Oct. 3, 1892).

281. See id.

282. See Tammany Protection, supra note 246.

283. See Indictment Coversheet, People v. Gallivan, Folder 3939, Box 427, DA Papers, supra note 85 (1891) (recording Gallivan’s acquittal on December 3, 1891).

284. See Monkkonen, supra note 21, at 527.

285. See Figure 1. For Monkkonen’s calculation of acquittals in the Civil War period, see id. For the acquittal rate for first-degree murder defendants brought to trial between 1879 and 1893, see infra Figure 1. The latter rate might be higher if insanity acquittals were counted.

286. See Monkkonen, supra note 21, at 528 (stating that twenty-four out of forty-three capital sentences were commuted in the 1830-60 period).
to life imprisonment between 1879 and 1893.287

Although several of these cases presented serious mitigating circumstances,288
the commutation of other death sentences revealed the influence of various
pressure groups, especially those based on ethnicity. For example, in the case of
James Minnaugh, who killed a man for insulting and physically assaulting him, the
murder occurred after a cooling period and "without new provocation."289 The
presiding judge stated that he never knew of such a clear case of "deliberate,
premeditated, and intentional killing."290 Yet the governor commuted Minnaugh's
sentence to life imprisonment, at least in part because "[s]everal prominent Irish
Catholics interested themselves in the prisoner, who had become very devout and
repentant during his confinement in the Tombs."291 Even cases presenting compel-
ling mitigating factors, such as Chiara Cignarale's murder of her abusive husband,
bore the stamp of pressure from immigrant communities.292

Gang members and other defendants with political or ethnic connections thus

287. See Figure 2.

288. The case of Italian immigrant Chiara Cignarale, who killed her abusive husband, constitutes one example. See People v. Cignarale, 17 N.E. 135, 138-39 (N.Y. 1888) (noting that Cignarale killed her husband after thirteen years of physical abuse and threats by him); Cignarale's Life Spared, SUN (N.Y.), July 28, 1888, microformed on DA Scrapbook, supra note 85, at Roll 6 (quoting governor's memorandum, which explained that commutation of defendant's sentence was based on circumstances of her marriage, her ill health, weakness of evidence against her, and fact that, as new immigrant, she might not understand American laws). The District Attorney himself recommended clemency for Cignarale. See Col. Fellows for Mrs. Cignarale: Clemency Recommended in Consideration of her Accepted Plea, N.Y. STAR, July 27, 1888, microformed on DA Scrapbook, supra note 85, at Roll 6 (reporting District Attorney's recommendation of clemency); Pleading for Cignarale, N.Y. TIMES, July 18, 1888, microformed on DA Scrapbook, supra note 85, at Roll 6 (describing then-Assistant District Attorney Nicoll's role in seeking clemency). For a discussion of the unusual procedural history of People v. Cignarale, see infra note 319.

The case of Adolph Reich, whose wife allegedly committed adultery and then attacked him when he chastised her for it, also presented compelling mitigating factors. See People v. Reich, 18 N.E. 104, 105 (N.Y. 1888) (noting that victim allegedly provoked defendant by engaging in adultery and physically assaulting him); A Big Petition in Behalf of Reich, N.Y. DAILY TRIB., Nov. 21, 1888, microformed on DA Scrapbook, supra note 85, at Roll 7 (reporting that campaign urging governor to commute Reich's death sentence was based on his advanced age and his wife's alleged infidelity); Reich's Neck is Saved, N.Y. HERALD, Jan. 5, 1889, microformed on DA Scrapbook, supra note 85, at Roll 7 (reporting commutation of Reich's sentence due to his age and existence of provocation); Reich Not to Hang, MORNING J. (N.Y.), Jan. 5, 1889, microformed on DA Scrapbook, supra note 85, at Roll 7 (same); Trying Hard to Save Reich's Neck: Two Petitions to be Presented to Governor Hill for Executive Clemency, N.Y. DAILY TRIB., Nov. 23, 1888, microformed on DA Scrapbook, supra note 85, at Roll 7 (contending that Reich, who spoke no English, had been coerced by his incompetent lawyer into arguing self-defense, instead of provocation).

Finally, the governor seemed convinced that the evidence in Charles Giblin's case was too weak to sustain a death sentence. See Giblin Escapes the Death, WORLD (N.Y.), Nov. 22, 1889, microformed on DA Scrapbook, supra note 85, at Roll 8 (reporting that governor found too much doubt in robbery-murder case of Charles Giblin to inflict death penalty).


290. Minnaugh's Sentence Commuted: Gov. Flower Changes His Punishment from the Death Chair to Imprisonment, SUN (N.Y.), Mar. 15, 1892, microformed on DA Scrapbook, supra note 85, at Roll 12.

291. Id.

292. See, e.g., No Gallows for Chiara, MORNING J. (N.Y.), July 23, 1888, microformed on DA Scrapbook, supra note 85, at Roll 6 (indicating that Cignarale case became somewhat of an Italian cause celebre); Trying
exerted considerable pressure on various arms of the state—the District Attorney's office, the court, and the governor. The material on guilty pleas presented later in this Article also suggests some correlation between Irishness and the ability to bargain, arising from close ties between the police, the District Attorney, and the Irish immigrant community. Yet we should be wary of concluding that these influential murderers always escaped punishment, or that when they did, public prosecutors were to blame.

2. Bringing Murderers to Trial

The statistics from the sample period do not indicate a marked failure on the part of the District Attorney's office to bring first-degree murder defendants to trial. In contrast to the high percentage of total cases that New York prosecutors processed through bargaining (more than seventy-five percent by 1879), murder cases were slightly more likely to go to trial than to be resolved through other means. Furthermore, among defendants indicted for first-degree murder between 1879 and 1893, convictions at trial outstripped plea-bargains by 152 to 103 (see Figure 1). Only about one-quarter of all first-degree murder indictments resulted in plea-bargains in New York County, compared with thirty-five percent to more than fifty percent of Massachusetts murder cases after 1870. These relatively low numbers raise questions, given the substantial bargaining power that statutory grading gave the New York County District Attorney's office. In both New York and Massachusetts, the grading of homicide provided prosecutors with leverage comparable to that created by the United States Sentencing Guidelines.

Because types of homicide were graded and first-degree murder bore a mandatory death sentence, a prosecutor could either explicitly or implicitly promise a defendant a penalty discount if he pled guilty to a lesser offense. Defendants

Hard to Save Reich's Neck, supra note 288 (reporting that, among supporters of clemency for Reich, committee of prominent Jews signed petition). 293. See infra text accompanying notes 430, 434. See also Miller, supra note 70, at 140 (discussing Republican fears that police were dominated by Democrats who relied on Irish votes). 294. See Moly, supra note 16, at 108. 295. According to Fisher, the number of plea-bargains in murder cases mushroomed after the statutory division of murder into degrees in Massachusetts in 1858. Charge-bargaining in capital cases emerged around 1841 in that state and accounted for nearly half of all murder cases by the 1870s; thirty-five percent in the 1880s; and as many as sixty-one percent in the 1890s. See Fisher, supra note 16, at 885-93, 1031. 296. See Fisher, supra note 16, at 868, 1072-74. 297. The legislature first divided murder into two degrees in 1862. First-degree murder encompassed premeditated killings and homicides perpetrated "by any act imminently dangerous to others, and evincing a depraved mind regardless of human life, although without any premeditated design . . . ." 1862 N.Y. Laws, ch. 197. This grading of murder continued to be in force in the 1880s, with the addition of killings "perpetrated by a person engaged in the commission of any felony" to the definition of first-degree murder. N.Y. REV. STAT., part 4, ch. 1, tit. 1, § 5 (Thorp 1882); see N.Y. CODE CRIM. PROC. §§ 183, 183a (Parker 1905) (1881 N.Y. Laws, ch. 676, as amended by 1882-1905 N.Y. Laws). First-degree murder was punishable by death in 1862, see 1862 N.Y. Laws, ch. 197, and this penalty remained mandatory throughout the 1880s. See N.Y. CODE CRIM. PROC. § 186 (Parker 1905) (1881 N.Y. Laws, ch. 676, as amended by 1882-1905 N.Y. Laws); N.Y. REV. STAT., part 4, tit. 1, § 1
### Figure 1: Disposition of First-degree Murder Indictments, 1879-93

<table>
<thead>
<tr>
<th>Disposition</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>First-degree murder charges</td>
<td>405</td>
</tr>
<tr>
<td>Other convictions (not first-degree murder)</td>
<td>118</td>
</tr>
<tr>
<td>Plea-bargains without trial</td>
<td>99</td>
</tr>
<tr>
<td>Acquitted</td>
<td>47</td>
</tr>
<tr>
<td>First-degree murder convictions</td>
<td>34 (+1 reversal)</td>
</tr>
<tr>
<td>Indictment dismissed</td>
<td>27</td>
</tr>
<tr>
<td>Discharged on own recognizance</td>
<td>24</td>
</tr>
<tr>
<td>Incompetent to stand trial or acquitted by reason of insanity</td>
<td>24</td>
</tr>
<tr>
<td>Disposition unclear</td>
<td>13</td>
</tr>
<tr>
<td>Indictment superseded</td>
<td>5</td>
</tr>
<tr>
<td>Plea-bargains after hung jury</td>
<td>3</td>
</tr>
<tr>
<td>Indictment dismissed after hung jury</td>
<td>3</td>
</tr>
<tr>
<td>Died before trial</td>
<td>3</td>
</tr>
<tr>
<td>Nolle prosequii (before abolished)</td>
<td>2</td>
</tr>
<tr>
<td>Indictment dismissed and defendant convicted of another crime</td>
<td>1</td>
</tr>
<tr>
<td>Plea-bargains after reversal of first-degree murder conviction</td>
<td>1</td>
</tr>
<tr>
<td>Convicted of other charges after hung jury</td>
<td>1</td>
</tr>
</tbody>
</table>

Risking trial automatically received a death sentence if convicted of first-degree murder or life imprisonment for second-degree murder, and few of those convicted of the capital crime could hope realistically for gubernatorial clemency. Whereas the governor commuted just seven New York County death sentences to life imprisonment during the relevant period (see Figure 2), eighty-two of the 103 defendants who pled guilty entered pleas to some degree of manslaughter (see Figure 3), for which sentences usually ranged from one year to about twenty-five years in state prison.

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(Throop 1882). In addition to first- and second-degree murder, the statutes provided for four degrees of manslaughter. See N.Y. REV. STAT., part 4, ch. 1, tit. 2, art. 1, §§ 6-8, 10-19 (Throop 1882).

298. In 1873, the legislature provided a mandatory penalty of life imprisonment for second-degree murder—a provision that stayed in force throughout the 1880s. 1873 N.Y. Laws, ch. 664; N.Y. REV. STAT., part 4, ch. 1, tit. 1 (Throop 1882); see N.Y. CODE CRIM. PROC. § 187 (Parker 1905) (1881 N.Y. Laws, ch. 676, as amended by 1882-1905 N.Y. Laws).

299. See N.Y. REV. STAT., part 4, ch. 1, tit. 2, art. 1, § 20 (Throop 1882). For the defendants in my sample who pled to first-degree manslaughter, twenty years in state prison was a common penalty. A second-degree
Relatively few defendants pled guilty to second-degree murder because it carried a mandatory life sentence.\(^3\) The most common plea, first-degree manslaughter, had a possible sentencing range of seven years to life, with sentences of about twenty years constituting the typical outcome.\(^3\) Thus, defendants stood to gain from bargaining, and case pressure should have given prosecutors an incentive to accept guilty pleas.

Why, then, do the District Attorney’s papers reveal comparatively low numbers for plea-bargaining in first-degree murder cases? The least likely answer is that the prosecutors had other means of disposing of indictments besides jury trials and plea-bargaining. Although District Attorneys lacked the unilateral power to initiate

\(^{300}\) Supra note 298 (noting second-degree murder carries a mandatory life sentence). See infra Figure 3 (illustrating that out of 405 first-degree murder indictments, 103 of which resulted in plea-bargains, there were only ten guilty pleas to second-degree murder).

\(^{301}\) See infra Figure 3 (illustrating that for first-degree murder indictments, majority of pleas were for first-degree manslaughter).
dismissals, they could still employ this strategy with leave of court.\textsuperscript{302} After 1881, the court could also dismiss an indictment \textit{sua sponte}.\textsuperscript{303} Thirty murder indictments were simply dismissed (including two \textit{nolle prosequis} in 1880), and twenty-four defendants were discharged on their own recognizance due to insufficient evidence.\textsuperscript{304} About fourteen percent of the 405 indictments were resolved through such means. Another three defendants’ cases were dismissed after a trial jury failed to reach a verdict.\textsuperscript{305} As Figure 1 demonstrates, there were twice as many plea-bargains as dismissals, \textit{nolle prosequis}, and discharges (combined) between 1879 and 1893. Thus, it seems unlikely that the District Attorney’s office preferred these tactics to plea-bargaining, especially because dismissals required the judge’s agreement.

The leniency of nineteenth-century juries offers a slightly better explanation for the relatively low number of plea-bargains in murder cases compared to other crimes.\textsuperscript{306} Despite public pressure for vigorous prosecution, individual jurors faced with the daunting decision to send a defendant to his death often balked at returning a capital verdict. First-degree murder defendants may have realized that...
even if they were not acquitted, they were likely to receive a manslaughter determination if they went to trial. Slightly more first-degree murder defendants were convicted of first-degree manslaughter than entered guilty pleas to this lesser offense (compare Figures 3 and 4). Juries sometimes recommended mercy in sentencing, in addition to convicting the defendant of a crime that carried a lighter penalty.\textsuperscript{307}

There is reason to suspect that defendants knew about jury leniency because judges railed about acquittals and convictions for lesser offenses. For instance, Judge Martine complained that the acquittal of David Ramsey on an attempted murder charge encouraged similar shootings.\textsuperscript{308} Moreover, although the press tended to blame prosecutors for losing cases due to partisanship and sloth, newspapers also publicized and condemned jury leniency. The \textit{New York Daily Tribune}, for example, complained: “There is a growing indisposition on the part of juries to convict of murder in the first degree. Jurors seem to think their function is

\begin{table}[h]
\centering
\begin{tabular}{|l|c|}
\hline
Total convictions & 152 \\
First-degree manslaughter & 42 \\
Second-degree murder & 40 \\
First-degree murder & 34 (+1 reversal) \\
Second-degree manslaughter & 28 \\
Third-degree manslaughter & 3 \\
Arson & 2 \\
Assault & 1 \\
Fourth-degree manslaughter & 1 \\
Disposition unclear & 1 \\
\hline
\end{tabular}
\caption{Convictions of Defendants Charged with First-degree Murder, 1879-93}
\end{table}

\textsuperscript{307} See, e.g., Indictment Coversheet, People v. Albert, Folder 4413, Box 427, DA Papers, \textit{supra} note 85 (1892) (noting that first-degree manslaughter conviction included recommendation of mercy); Indictment Coversheet, People v. Schilling, Folder 2900, Box 305, DA Papers, \textit{supra} note 85 (1888) (noting first-degree manslaughter conviction included recommendation of mercy); Indictment Coversheet, People v. Reich, Folder 2529, Box 263, DA Papers, \textit{supra} note 85 (1887) (noting first-degree murder conviction included recommendation of mercy). Such recommendations were especially significant in manslaughter verdicts, considering the broad sentencing ranges for this type of homicide.

\textsuperscript{308} See \textit{The Jury-box a Nursery of Crime}, \textit{supra} note 272 (noting that Judge Martine blamed jurors who refused to convict defendants despite evidence of increasing crime rates). In contrast, another judge praised the jury for convicting African-American defendant John Lewis of the first-degree murder of Lewis' lover: “The newspapers are filled with accounts of shootings of this fatal kind, and it is only by verdicts of the character you have found in this case that their number can be diminished.” \textit{A Salutary Verdict: Judge Cowing Hopes the Conviction of Lewis Will Lessen the Number of Murders}, source unclear, Dec. 17, 1888, microformed on DA Scrapbook, \textit{supra} note 85, at Roll 7.
that of counsel for the defence [sic]—to get the prisoner off if possible.\textsuperscript{309} The possibility of jury leniency, however, sometimes exerted pressure against going to trial. Analysis of guilty pleas in a subsequent section of this Article\textsuperscript{310} suggests that the likelihood of conviction for a lesser offense tended to bring the parties to the bargaining table.

The most plausible explanation for the low percentage of guilty pleas is that public prosecutors felt reluctant to enter plea agreements in first-degree murder cases in light of the criticism they faced. It was often more politically palatable to achieve a conviction at trial. Press reports offer anecdotal evidence that the District Attorney’s office refused to accept guilty pleas from several defendants in cases where premeditation was relatively easy to prove. For example, John Fellows rejected a second-degree murder plea by Patrick Packenham,\textsuperscript{311} a drunken wife-abuser who fatally slashed his wife with a razor after serving a prison term for stabbing her.\textsuperscript{312} Betting on a capital conviction rather than bargaining the case away for a life sentence probably seemed like the best option, especially since Packenham’s own son, an eyewitness to the brutal murder, agreed to take the stand.\textsuperscript{313}

Going to trial also may have accorded with the District Attorney’s sense of justice in such cases.\textsuperscript{314} If the mandatory life sentence for second-degree murder made a defendant unwilling to plead to an offense greater than manslaughter, a bargain under-punished his crime. The Osmond case in 1891 presented exactly this dilemma.\textsuperscript{315} Counsel for double-murderer John Osmond attempted to get District Attorney Nicoll to accept a guilty plea to first-degree manslaughter. Nicoll refused and instead took the case to trial on the first-degree murder indictment, securing a capital conviction.\textsuperscript{316} It is unclear whether he acted out of principle or merely

\textsuperscript{309} Convictions Too Rare, N.Y. Daily Trib., Mar. 7, 1892, microformed on DA Scrapbook, supra note 85, at Roll 12. Other aspects of my research indicate that jury leniency sometimes exerted pressure against going to trial. My analysis of plea-bargains, discussed infra Part III.C.2, suggests that prosecutors accepted plea-bargains when they suspected that a jury would not convict the defendant of first-degree murder.

\textsuperscript{310} See discussion infra Part III.C.2 (analyzing plea-bargains in murder cases).

\textsuperscript{311} See Couldn’t Save his Mother: Sixteen-year-old Robert Packingham [sic] Tells How His Father Slew Her, World (N.Y.), Nov. 3, 1888, microformed on DA Scrapbook, supra note 85, at Roll 7.

\textsuperscript{312} People v. Packenham, 21 N.E. 1035, 1035 (N.Y. 1889) (recounting facts of case); Murdered by a Drunken Husband, N.Y. Daily Trib., Apr. 3, 1888, microformed on DA Scrapbook, at Roll 6 (same); Indictment, People v. Packenham, Folder 2897, Box 304, DA Papers, supra note 85 (1888) (charging defendant with using razor to commit first-degree murder of Margaret Packenham).

\textsuperscript{313} See Couldn’t Save His Mother, supra note 311 (noting prosecution refused Packenham’s plea to murder in second degree after Packenham’s agreed to testify against him).

\textsuperscript{314} Fisher offers a similar explanation for the comparative rarity of charge bargains in murder cases, as compared to liquor cases, in Massachusetts. See Fisher, supra note 16, at 889.

\textsuperscript{315} See Motion for Continuance, People v. Osmond, supra note 259, at 4 (noting that defendant unsuccessfully sought to enter a guilty plea to first-degree manslaughter); see also Letter from Stephen Baldwin to DA Delancey Nicoll, Mar. 21, 1892, People v. Osmond, Folder 4180, Box 454, DA Papers, supra note 85 (1891) (indicating that defense counsel sought acceptance of guilty plea).

\textsuperscript{316} Indictment Coversheet, People v. Osmond, Folder 4180, Box 454, DA Papers, supra note 85 (1891) (recording disposition of case).
worried that accepting a manslaughter plea would constitute political error, but it is likely that the two motivations combined to increase his zeal.

C. Manly Violence and Unmanly Violence

1. First-degree Murder Convictions

One of the most mysterious aspects of the first-degree murder cases in the 1879 to 1893 time-period is the relatively large number of men executed for killing female lovers, wives, or other female family members. In his sociology of murder based on New York sources, Monkkonen shows that nineteenth-century killings usually represented the assertion of dominance by one man over another.317 Although wife-killing accounted for only fourteen percent of nineteenth-century homicides committed by men in New York,318 seventeen of the thirty-four males convicted of first-degree murder from 1879 to 1893 killed female intimates (see Figure 5).

The sole woman convicted of first-degree murder shot her abusive husband in a public street; her sentence was commuted to life imprisonment.319 The governor denied clemency for all but two of the seventeen men who committed the premeditated killing of female intimates (see Figure 5).320 Another of these men, John Carpenter, committed suicide in prison (see Figures 5 and 6).321

Thus, the killing of opposite-sex intimates accounted for more than half of the first-degree murder convictions on indictments returned between 1879 and 1893 and resulted in fourteen out of twenty-four state-sponsored executions. The exclusively male gender of the executed prisoners and the fact that more than half of them were domestic killers is surely remarkable considering that the last two

317. See MONKKONEN, supra note 13, at 73.
318. See id. at 75.
319. See People v. Cignarale, 17 N.E. 135, 136-40 (N.Y. 1888) (describing circumstances of murder); Chiara Cignarale's Life Spared, THE PRESS (N.Y.), July 23, 1888, microformed on DA Scrapbook, supra note 85, at Roll 6 (reporting governor's grant of clemency). Chiara Cignarale's case is unusual, and arguably should count as a plea-bargain, because the defendant initially pled guilty to second-degree murder. The District Attorney accepted the plea, but Cignarale then withdrew it. On appeal of her first-degree murder conviction, she claimed that the withdrawn plea to second-degree murder precluded subsequent conviction for the capital crime. The New York Court of Appeals disagreed and affirmed her conviction. See Cignarale, 17 N.E. at 142. However, the case's anomalous history became grounds for the District Attorney to recommend clemency. See Colonel Fellows For Ms. Cignarale: Clemency Recommended in Consideration of Her Accepted Plea, supra note 288 (reporting District Attorney's letter recommending clemency).
320. The prosecutor's office did not record the commutation on the coversheet of the indictment, but the two commutations can be tracked through newspaper sources. See Fanning's Sentence Commuted, N.Y. TIMES, May 14, 1892, microformed on DA Scrapbook, supra note 85, at Roll 13 (reporting that governor commuted Fanning's sentence to life imprisonment after citizens of Utica brought petition on his behalf); Reich's Neck is Saved, supra note 288 (reporting governor's clemency decision in Reich case).
321. See Carpenter Kills Himself, N.Y. DAILY TRIB., Apr. 20, 1886, microformed on DA Scrapbook, supra note 85, at Roll 3 (reporting that prisoner committed suicide with razor after appellate court affirmed his conviction).
Figure 5: First-degree Murder Convictions by Type of Victim, 1879-93

<table>
<thead>
<tr>
<th>Type of Victim</th>
<th>Number of Defendants</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of first-degree murder convictions</td>
<td>35</td>
<td>24 executions, 7 sentences commuted, 2 deaths during escape, 1 suicide, 1 reversal</td>
</tr>
<tr>
<td>Total female intimates:</td>
<td>17</td>
<td>14 executions, 2 sentences commuted, 1 suicide</td>
</tr>
<tr>
<td>Wife</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>Female domestic partner</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>Female lover</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Other female family member</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Total male intimates:</td>
<td>1</td>
<td>1 sentence commuted</td>
</tr>
<tr>
<td>Husband</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Male rival</td>
<td>9</td>
<td>6 executions, 1 sentence commuted, 1 death during escape, 1 reversal</td>
</tr>
<tr>
<td>Robbery Victim</td>
<td>5</td>
<td>3 executions, 1 sentence commuted, 1 death during escape</td>
</tr>
<tr>
<td>Other</td>
<td>3</td>
<td>1 execution, 2 sentences commuted</td>
</tr>
</tbody>
</table>

decades of the nineteenth century had low murder rates for female victims.322

The relatively large number of domestic murderers who were tried, convicted, and executed in late-nineteenth-century New York County sharply contrasts with the modern tendency to seek the death penalty for murders committed in the course of a felony like robbery, but not for intimate homicides.323 At the end of the 1900s,

322. See Monkkonen, supra note 13, at 64 (describing 1820s, 1830s, part of 1840s, and 1883-1903 as troughs in wave pattern of woman-killing).

323. See Samuel R. Gross & Robert Mauro, Death and Discrimination: Racial Disparities in Capital Sentencing 45 (1989) (stating that over eighty percent of death penalties in Florida and Georgia and seventy-five percent of death penalties in Illinois occurred in murder cases involving another felony); The Death Penalty in America: Current Controversies 30 (Hugo Adam Bedau ed., 1997) (noting that murder committed during robbery is type of crime most likely to result in death sentence); William C. Bailey & Ruth D. Peterson, Murder, Capital Punishment, and Deterrence: A Review of the Literature, in The Death Penalty in America: Current Controversies, supra, at 149 ("Felony murders and suspected felony murders constitute a quarter to a third of
Figure 6: Outcomes for Defendants Convicted of the First-degree Murder of Opposite-Sex Intimates, 1879-93

<table>
<thead>
<tr>
<th>Defendant</th>
<th>Sex of Defendant</th>
<th>Type of Victim</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Leighton</td>
<td>Male</td>
<td>Female lover</td>
<td>Executed</td>
</tr>
<tr>
<td>Majone</td>
<td>Male</td>
<td>(Estranged) wife &amp; her mother</td>
<td>Executed</td>
</tr>
<tr>
<td>Hovey</td>
<td>Male</td>
<td>Sister-in-law, who shielded D’s abused wife</td>
<td>Executed</td>
</tr>
<tr>
<td>Carpenter</td>
<td>Male</td>
<td>(Estranged) wife</td>
<td>Suicide in prison</td>
</tr>
<tr>
<td>Chacon</td>
<td>Male</td>
<td>Female lover</td>
<td>Executed</td>
</tr>
<tr>
<td>Cignarale</td>
<td>Female</td>
<td>(Estranged) husband</td>
<td>Commuted to life imprisonment</td>
</tr>
<tr>
<td>Reich</td>
<td>Male</td>
<td>Wife</td>
<td>Commuted to life imprisonment</td>
</tr>
<tr>
<td>Carolin</td>
<td>Male</td>
<td>Female domestic partner</td>
<td>Executed</td>
</tr>
<tr>
<td>Packenham</td>
<td>Male</td>
<td>Wife</td>
<td>Executed</td>
</tr>
<tr>
<td>Nolan</td>
<td>Male</td>
<td>(Former) female domestic partner</td>
<td>Executed</td>
</tr>
<tr>
<td>Lewis</td>
<td>Male</td>
<td>(Former) female domestic partner</td>
<td>Executed</td>
</tr>
<tr>
<td>Smiler</td>
<td>Male</td>
<td>(Estranged) wife</td>
<td>Executed</td>
</tr>
<tr>
<td>Loppy</td>
<td>Male</td>
<td>Wife</td>
<td>Executed</td>
</tr>
<tr>
<td>Slocum</td>
<td>Male</td>
<td>Wife</td>
<td>Executed</td>
</tr>
<tr>
<td>Fanning</td>
<td>Male</td>
<td>(Former) female domestic partner</td>
<td>Commuted to life imprisonment</td>
</tr>
<tr>
<td>Osmond</td>
<td>Male</td>
<td>(Estranged) wife &amp; her lover</td>
<td>Executed</td>
</tr>
<tr>
<td>Harris</td>
<td>Male</td>
<td>Wife</td>
<td>Executed</td>
</tr>
<tr>
<td>Buchanan</td>
<td>Male</td>
<td>Wife</td>
<td>Executed</td>
</tr>
</tbody>
</table>

homicides annually, and they also account for the large majority of death sentences and executions.”); Elizabeth Rapaport, *Capital Murder and the Domestic Discount: A Study of Capital Murder in the Post-Furman Era*, 49 SMU L. REV. 1507, 1510 (1986) (indicating that about seventy-five percent of death row prisoners committed murder in course of another serious felony); cf. Deon Brock et al., *Arbitrariness in the Imposition of Death Sentences in Texas: An Analysis of Four Counties by Offense Seriousness, Race of Victim, and Race of Offense*, 28 AM. J. CRIM. L. 43, 65 (2000) (“As expected, given the statutory definition of capital murder, the presence of a contemporaneous felony was the best predictor of a death sentence, with sexual assaults being over-represented among death sentences by a ratio of twenty-five to one.”).
less than twelve percent of men sentenced to death were domestic murderers. In contrast, predatory killings of strangers constitute the type of crime most likely to result in capital punishment. Elizabeth Rapaport argues that domestic homicides result in more lenient treatment for defendants than predatory crimes because modern American society assigns less moral outrage to wife-killing.

What explains the execution of domestic killers in New York County in the 1880s and 1890s? Historians of societal attitudes toward intimate violence note that the 1880s represented one of two peaks in reformist activity. Puritan laws against beating wives and children, enacted in the American colonies between 1640 and 1680, comprised the first peak. Linda Gordon and Elizabeth Pleck identify a second peak in the 1880s, when societies against cruelty to children reluctantly adopted the cause of battered women. A comprehensive historical treatment of the prosecution of domestic killers lies beyond the scope of this Article. At the very least, however, my data corroborates the existence of a late-nineteenth-century spike in concern about intimate violence. It may also indicate that historians underestimate nineteenth-century public abhorrence for lethal violence against women, perhaps because such abhorrence did not stem from feminist impulses.

Moreover, comparing intimate violence cases that resulted in capital punishment with the more controversial prosecution of “toughs” who killed other men in late-nineteenth-century New York County tells us a great deal about the operation of prosecutorial discretion. Although Monkkonen argues that murders in New York often went unpunished, the allegedly indolent District Attorney John Fellows once sent four men who killed their wives or lovers to the gallows on a single day. In fact, Fellows secured the capital convictions of seven domestic murderers, compared to Nicoll’s four, and was responsible for the largest number of death sentences of any District Attorney during the 1879 to 1893 time frame.

The tension between Fellows’ reputation for leniency and the capital convic-
tions for first-degree intimate killings that were achieved on his watch merits closer attention. Fellows prosecuted one tough who killed a police officer during a robbery, but more than half of the capital convictions that he obtained were for murders of female intimates and involved defendants who often violated gender norms with their unemployment, alcoholism, and cowardice.

334. DA Papers, supra note 85 (1888) (same); Indictment Coversheet, People v. Packenham, supra note 312 (same). Discussion of these defendants’ domestic killings appears in notes 358-66, 368-69 and accompanying text.

In addition to the seven domestic murderers, Fellows achieved first-degree murder verdicts in the cases of Schihiok Jugigo, Joseph Wood, Henry Carlton, and Charles Giblin. See Indictment Coversheet, People v. Jugigo, Folder 3494, Box 373, DA Papers, supra note 85 (1889) (recording defendant’s first-degree murder conviction); Indictment Coversheet, People v. Wood, Folder 3478, Box 373, DA Papers, supra note 85 (1889) (same); Indictment Coversheet, People v. Carlton, Folder 3105, Box 327, DA Papers, supra note 85 (1888) (same); Indictment Coversheet, People v. Giblin, Folder 2851, Box 299, DA Papers, supra note 85 (1888) (same). For more information on Giblin’s case, see supra note 288 and accompanying text.

The other two defendants in male-on-male murder cases were non-whites: Wood—a black man—was convicted of first-degree murder for killing a male rival. See Affidavit of Officer John Pepper, Police Court Records, People v. Wood, Folder 2897, Box 304, DA Papers, supra note 85 (1889) (describing incident); Testimony of Joseph Gillespie, Patrick Timberlake, and Joseph Bland, Coroner’s Inquisition, People v. Wood, supra (describing circumstances of murder); Death Came Painlessly to the Four, supra note 260 (reporting nature of murder); Five Murderers Waiting: Joseph Wood Will Be “Next” in the Electric Chair, WORLD (N.Y.), Mar. 13, 1890, microformed on DA Scrapbook, supra note 85, at Roll 9 (same); Joseph Wood, a Mulatto, Accused of Murder, Says That He Shot in Self-Defence, N.Y. DAILY TRIB., Mar. 12, 1890, microformed on DA Scrapbook, supra note 85, at Roll 9 (detailing murder and highlighting Wood’s race); Murderer Wood Confronts His Death, N.Y. HERALD, NOV. 28, 1890, microformed on DA Scrapbook, supra note 85, at Roll 10 (describing events leading up to Wood’s execution).

The second non-white killer of a male was the Japanese sailor, Schihiok Jugigo. Jugigo fatally stabbed a rival who took his place on a fishing vessel. See Examination of Schihiok Jugigo, Police Court Records, People v. Jugigo, Folder 3494, Box 373, DA Papers, supra note 85 (1889) (recording defendant’s statement that he was born in Japan and worked as a sailor); Examination of Schihiok Jugigo, Coroner’s Inquisition, People v. Jugigo, supra (same). For testimony about the murder of Jugigo’s rival, see Testimony of Charles Eymoto, Police Court Records, People v. Jugigo, supra (describing murder and preceding events); Testimony of Officer J. Courtlander, Charles Eymoto, Sagara Coursabe, Nora Gara, Hano Noko (a.k.a. Kogano), Coroner’s Inquisition, People v. Jugigo, supra (providing similar account). Unsinged Statement of Josephine Eymoto, People v. Jugigo, supra (providing similar account). This Article discusses possible racial bias in the prosecution and conviction of alleged murderers, infra text accompanying notes 389-97, 434-36; however, my data is too sparse to reach a definite conclusion on this issue.

Nicoll was responsible for the convictions of domestic killers Robert Buchanan, Henry Fanning, Carlyle Harris, and John Osmond. See Indictment Coversheet, People v. Buchanan, Folder 4415, Box 483, DA Papers, supra note 85 (1892) (recording defendant’s conviction for first-degree murder); Indictment Coversheet, People v. Fanning, Folder 4026, Box 437, DA Papers, supra note 85 (1891) (same); Indictment Coversheet, People v. Harris, Folder 4030, Box 437, DA Papers, supra note 85 (1891) (same); Indictment Coversheet, People v. Osmond, supra note 316 (same). For details of the killings committed by Buchanan and Harris, see infra notes 357, 378-86 and accompanying text. For details of the Fanning murder, see infra note 371 and accompanying text. The Osmond case is further described at notes 364 and 369, infra.

333. See Carlton’s Death on the Scaffold, N.Y. HERALD, Dec. 6, 1889, microformed on DA Scrapbook, supra note 85, at Roll 8 (indicating defendant Henry Carlton was white); Carlton Weakens in Court, WORLD (N.Y.), Dec. 14, 1888, microformed on DA Scrapbook, supra note 85, at Roll 7 (describing murder that Carlton committed); The Carlton Murder Trial, PRESS (N.Y.), Dec. 14, 1888, microformed on DA Scrapbook, supra note 85, at Roll 7 (offering nearly identical report).

334. Seven out of ten first-degree murder convictions during Fellows’ term as District Attorney were male killers of female intimates. See supra note 332.
Despite the fact that the state executed several male gang leaders, the dangerous behavior that they exemplified was not universally condemned. Many in New York’s streets revered the bravado and violence of the Five Points335 “tough,” who was often of Irish heritage. For instance, in 1883, the funeral for the Whyo leader McGloin turned into such a spectacle of mourners, “flowers and strings of carriages”336 that legislation was introduced “to suppress ovations to the memory of departed murderers.”337 However, “[t]he chances of escape involved in the law’s delay [still gave an] opportunity for an encouraging hero worship.”338

The killing of male rivals, the second largest category of capital convictions (see Figure 5), tapped into the norms of a masculine street culture in which men defended their honor with bloodshed and refused to withstand an insult without physical retaliation.339 Daniel Driscoll mistakenly killed his paramour with a bullet intended for a male rival. Peter Smith shot a night watchman for beating his co-defendant, Patrick Sweeney, in a bar-room brawl. Thomas Pallister fatally stabbed a policeman who accidentally ran into him and knocked him down,340 and McGloin, who killed a robbery victim, rather than a rival, purportedly exclaimed at the time of the murder, “Now I’m a tough!”341

Besides a death sentence, these men also shared “an ethos of toughness, defense

335. Since the early nineteenth century, this neighborhood in Lower Manhattan had housed poor laborers, immigrants, and prostitutes in “small, cramped, uncomfortable apartments, [that] appeared ‘ready to tumble together in a vast rubbish heap.’” GILFOYLE, supra note 180, at 38. Located on a landfill where the former Collect Pond once stood, “Five Points was considered by a wide range of observers to be the most notorious slum in the Western Hemisphere.” Id. at 36, 38.


337. Funerals of Hanged Men, supra note 277. The same newspaper worried that “the extraordinary scenes that followed the execution [of McGloin] probably created a greater admiration for deeds of bloodshed among the vicious class, whose sole hope of distinction is in the line of crime.” Murder Repeated, supra note 336.

338. Hovey to Die at Sunrise, supra note 263 (making veiled reference to McGloin case).


340. For details of the Driscoll case, see Testimony of Officer John Mulholland, Officer Peter J. Monahan, John McCarthy, Daniel Driscoll, Police Court Records, People v. Driscoll, Folder 2209, Box 225, DA Papers, supra note 85 (1886). See also Affidavit of Margaret Sullivan, People v. Driscoll, supra (describing victim’s dying declaration that Driscoll killed her); and discussion of the case, supra notes 274-77 and accompanying text.

Regarding the Smith case, see generally Trial Transcript, People v. Sweeney, Folder 1795, Box 177, DA Papers, supra note 85 (1889) (presenting evidence of Smith’s role in murder, of which Sweeney was acquitted); Coroner’s Inquisition, People v. Smith, Folder 1795, Box 177, DA Papers, supra note 85 (1885) (same).

Information about the Pallister case can be found in People v. Pallister, 33 N.E. 741, 742 (N.Y. 1893); see also Two Murderers Escape from Sing Sing, TELEGRAM (N.Y.), Apr. 21, 1893, microformed on DA Scrapbook, supra note 85, at Roll 14 (providing details of murder and Pallister’s subsequent escape from prison).

of territory, and masculine honor.\textsuperscript{342} When the state executed Daniel Lyons for murdering a former Whyo who hit him with a cane, the *Star* commented: "Unquestionably the man displayed great physical courage; and men admire courage. Among the young men who really knew Dan Lyons and cared anything about his fate the prevailing thought to-day is that Dan was a hero."\textsuperscript{343}

Elliot Gorn argues that this all-male subculture transcended ethnicity but existed in diametrical opposition to bourgeois values.\textsuperscript{344} However, he overlooks ways in which the middle and upper classes reinforced male-on-male violence by showing reluctant esteem for it. "Respectable" New Yorkers condemned desperados "[u]n-educated to self denial or self restraint . . ." and susceptible to "passion for revenge,"\textsuperscript{345} but news reports describing cases of male-on-male violence nevertheless offered an odd mixture of praise and denunciation. While murder was condemned, physical displays of courage were not. For example, the normally anti-defendant *Herald* contrasted McGloin's stoic death with that of whimpering, drug-addicted Edward Hovey, who was executed in October 1883 for murdering his sister-in-law:

Unlike the man who preceded him on the same gibbet, Hovey was not a "tough" in the local acceptance of the term. His misdeeds were of a weak, characterless kind, and, unlike those of McGloin, entailed little personal risk. The element of danger, which seems to add a charm to "toughness," did not excite his weak spirit, and an accidental drunk gave society the opportunity of finally ridding itself of a character in many respects more dangerous than a more vigorous criminal.\textsuperscript{346}

New York County wanted its condemned men to die bravely, chins high and voices steady. The worst insult that could be made about an execution was the remark that the prisoner did not die like a man.\textsuperscript{347} In this sense, "creature[s] of

\textsuperscript{342} Gorn, *supra* note 339, at 408 (making this observation about murder of saloonkeeper William Poole in 1855).

\textsuperscript{343} *A Hero of the "Toughs,"* N.Y. *STAR,* Aug. 22, 1888, *microformed on* DA Scrapbook, *supra* note 85, at Roll 6 (lamenting corrosive effect of such hero-worship on deterrent impact of capital punishment: "It leads the young "tough" to feel that crime is a matter of little moment, and that a plucky death on the gallows is as sure a road to glory as the death of the soldier in battle.").

\textsuperscript{344} See Gorn, *supra* note 339, at 403, 408-09.

\textsuperscript{345} *The Lesson of an Execution,* *PRESS* (N.Y.), Aug. 21, 1888, *microformed on* DA Scrapbook, *supra* note 85, at Roll 6 (arguing death penalty deters crime, especially among adolescent males).

\textsuperscript{346} *Society Well Rid of Him: Edward Hovey Quietly and Expedientiously Put Out of the Way,* N.Y. *HERALD,* Oct. 20, 1883, *microformed on* DA Scrapbook, *supra* note 85, at Roll 1. This nineteenth-century view of the contrast between the wife-killer Hovey and the "tough" McGloin supports Monkkonen's argument that spousal murder is different from murders over honor, assets, and political power. See *MONKKONEN,* *supra* note 13, at 132.

\textsuperscript{347} During the quadruple execution in 1889, John Lewis purportedly snarled at Ferdinand Carolin, with whom he shared the gallows, "What's the matter with you? Can't you die like a man?" See *Four Murderers Hanged,* *supra* note 332. Three years before, Miguel Chacon "indignantly denied the assertion that he had been moved to tears [by the news that he would hang]." The statements of a prison guard, corroborating Chacon,
dogged courage\(^{348}\) like the gang leaders achieved a measure of glory distinguishing them from domestic killers. Not only did toughs enjoy influence in the Five Points slum, they also inspired the grudging admiration of New Yorkers who otherwise subscribed to norms of hard work and domestic tranquility.

The contrast between McGloin and Hovey hints at a preliminary answer to the question of why intimate murder constituted the single largest category of crime punished by death. Domestic killers went to the gallows or to the electric chair because they were marginal figures that a broad spectrum of New Yorkers reviled. Their prosecution for capital murder was thus uncontroversial—a safe discretionary decision.

Nineteenth-century American society tolerated a certain level of violence in the home.\(^{349}\) Historians disagree over precisely what level was deemed unacceptable. According to Pamela Haag:

> The ubiquitous judgment that a man “ill uses” his wife alluded to property prerogative in and of itself, insofar as it identifies the husband’s transgression not as a morally offensive belief in his right to “use” his wife \(^{350}\) at all, but simply in his mis-appropriation of an assumed right of ownership, articulated implicitly as a right to use a wife within limits.

In contrast, Reva Siegel asserts that, “[b]y the 1870s, there was no judge or treatise writer in the United States who recognized a husband’s prerogative to chastise his wife.”\(^{351}\) Nevertheless, in Siegel’s view, the shift from patriarchal authority based on corporal punishment to the ideal of the affective marriage masked a serious failure to prevent or punish wife-beating. She argues:

> [F]or a century after courts repudiated the right of chastisement, the American legal system continued to treat wife beating differently from other cases of assault and battery. While the authorities denied that a husband had the right to

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348. Lyons Met Death Coolly, supra note 277. Whereas this article in the World described Lyons as “a pest,” other newspapers adopted the more common tone of admiration for the prisoner’s final show of grit. See Died Like a True Tough, supra note 274 (quoting sheriff as saying, “I never knew anything like his nerve. . . . Yesterday he coolly examined the gallows and even offered a few suggestions as to the proper weight to be used”); The Death of Lyons, N.Y. Daily Trib., Aug. 22, 1888, microformed on DA Scrapbook, supra note 85, at Roll 6 (“[H]is demeanor was so remarkable as almost to be unique. There was neither stolidity nor bravado in his case, but simple serenity. He died asking to be forgiven . . . .”). Even the World seemed to approve of Lyons’ possibly apocryphal last words to the hangman: “Now, Joe, will you lower me down easy, and put me in the coffin nice? There will be a good many friends at my funeral.” Lyons Met Death Coolly, supra note 277.

349. See Pamela Haag, The “Ill-Use of a Wife”: Patterns of Working Class Violence in Domestic and Public New York City, 1860-1880, J. Soc. Hist. 447, 463 (1992); See also Pleck, supra note 327, at 84 (stating that New York Society for the Prevention of Cruelty to Children remained reluctant to help battered women because its agents were “convinced that drunken, slothful, or adulterous wives provoked beatings”).


beat his wife, they intervened only intermittently in cases of marital violence:

Men who assaulted their wives were often granted formal and informal immunities from prosecution, in order to protect the privacy of the family and to promote "domestic harmony."\(^{352}\)

Late-nineteenth-century New Yorkers generally accepted that murdering one's wife (or even one's lover) transgressed acceptable limits.\(^{353}\) Furthermore, even in non-fatal wife-beating cases, the "respectable" classes from which the District Attorney and his assistants hailed\(^{354}\) were willing to police the behavior of immigrants and unskilled workers, whom they considered dangerous.\(^{355}\)

Thus, the fact that at least twelve of the seventeen men convicted of first-degree domestic murders during 1879 to 1893 were working-class or unemployed comes as no surprise.\(^{356}\) The only clearly middle- or upper-class men convicted of killing

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352. Id. at 2118.

353. See infra text accompanying note 387. See also Haag, supra note 349, at 462 (noting that a disproportionate number of domestic violence cases that appeared in New York courts were murder cases).

354. A newspaper article describing Nicoll's appointment of his assistants indicated that most of these men came from affluent backgrounds. Nine out of thirteen assistants and deputy assistants attended prestigious private law schools like Harvard, Yale, and Columbia. The remaining four obtained their degrees at public schools or Catholic universities. At least one was an immigrant: Wauhope Lynn came to New York from Ireland at age ten and attended the Cooper Union Night School before getting his law degree. However, others were much more white-shoe. For example, Nicoll and Gunning S. Bedford traced their "descent from Knickerbocker and Revolutionary times." Nicoll Names His Aids \[sic\], supra note 139.

355. See GORDON, supra note 328, at 20 (arguing that late-nineteenth-century child protection movement associated family violence with hard-drinking immigrants); PLECK, supra note 327, at 89 (stating that increased governmental intervention in family became possible after Civil War due to "public fear of the violent and dangerous classes"); id. at 109 (associating whipping-post campaign against wife-beating with desire to control lower classes); Siegel, supra note 351, at 2134 ("While the courts pointed to the prevalence of domestic violence among the 'coarser' classes as a reason for restricting poor women's access to divorce, during the Reconstruction Era this same belief was offered as a reason for intensifying the criminal prosecution of poor men who beat their wives."); see also Haag, supra note 349, at 449 (noting that laborers and semi-skilled workers disproportionately appeared as defendants in domestic violence cases in New York courts because they could not buy their way out of prosecution).

356. For defendants who identified themselves as working-class when questioned by the authorities, see Examination of Harris Smiler, Police Court Records, People v. Smiler, Folder 3661, Box 393, DA Papers, supra note 85 (1890) (newspaper folder and mailer); Examination of Miguel Chacon, Police Court Records, People v. Chacon, Folder 1454, Box 141, DA Papers, supra note 85 (1884) ("tobacconist"); Testimony of Pasquale Majone, Coroner's Inquisition, People v. Majone, Folder 679, Box 60, DA Papers (1882) (railroad laborer); Examination of Augustus Leighton, Coroner's Inquisition, People v. Leighton, Folder 185, Box 15, DA Papers, supra note 85 (1880) (waiter). Many of the domestic killers lacked steady work. For information about the cases of unemployed defendants Edward Hovey, Patrick Packenham, Ferdinand Carolin, James Nolan, John Osmond, and Henry Fanning see infra notes 359-65 and accompanying text.

There is some question about the occupation of three defendants, but these men nevertheless seem to have come from the working class. John Lewis' occupation is variously reported as miner and aqueduct laborer. See Examination of John Lewis, Coroner's Inquisition, People v. Lewis, Folder 3084, Box 325, DA Papers, supra note 85 (1888) (miner); Shot Down by Her Lover, WORLD (N.Y.), July 18, 1888, microformed on DA Scrapbook, supra note 85, at Roll 6 (laborer on Croton Aqueduct). James Slocum's statement to the Coroner's Inquisition about his occupation is barely legible, but it does not indicate, as numerous press articles do, that he was a semi-employed baseball player. Compare Examination of James Slocum, Coroner's Inquisition, People v. Slocum, Folder 3570, Box 383, DA Papers, supra note 85 (1890) (giving occupation as "truck driver") with Killed His Wife, N.Y. STAR,
female intimates were poisoners, and there is little evidence that they engaged in wife-beating prior to the murders.\(^{357}\)

More than half of the men convicted of deliberately killing female intimates shared two traits: they drank heavily and relied on the meager earnings of women. All of the men executed in the quadruple hanging during Fellows’ term as District Attorney fit this profile. John Lewis spiraled into a pattern of escalating violence toward his former lover and then killed her “because she would not support him any longer.”\(^{358}\) In a drunken rage, Patrick Packenham slit the throat of hard-working Margaret, from whom he continually demanded cash.\(^{359}\) James Nolan shot his former domestic partner “because she would no longer share with him the wages of her prostitution.”\(^{360}\) The fourth prisoner executed with Nolan, Packenham, and Lewis was an unemployed German carpenter named Ferdinand Carolin.

Jan. 3, 1890, *microform* on DA Scrapbook, *supra* note 85, at Roll 9 (reporting that Slocum was a baseball player) and *Slocum’s Ghastly Crime: He Murdered His Wife and Then Went to Hear the Trinity Chimes, PRESS (New York), Jan. 3, 1890, *microform* on DA Scrapbook, *supra* note 85, at Roll 9 (reporting that defendant “played ball for a New England team in the summer and hung around the downtown saloons in the Fourth Ward in winter”). Martin Loppy described himself as an engineer and machinist. See Examination of Martin D. Loppy, Police Court Records, People v. Loppy, Folder 3766, Box 407, DA Papers, *supra* note 85 (1890). However, press reports indicate that he was a “tug-boat man.” See *Loppy Convicted of Murder, N.Y. DAILY TRIB.,* Nov. 25, 1890, *microform* on DA Scrapbook, *supra* note 85, at Roll 10.

357. The Harris case was anomalous, both for the relatively high status of the defendant and the method that he employed to kill his young wife: poison. Carlyle Harris was a medical student from a reputable, but not wealthy, family. See *Helen Potts’ Death, PRESS (N.Y.),* Feb. 3, 1891, *microform* on DA Scrapbook, *supra* note 85, at Roll 10 (noting that Harris’ grandfather was a professor of medicine at Bellevue Hospital); *Will Be a Famous Case, SUNDAY ADVERTISER (N.Y.),* Jan. 24, 1892, *microform* on DA Scrapbook, *supra* note 85, at Roll 12 (“[F]or the first time . . . in a quarter of a century a man was on trial for his life charged with the awful crime of murder by poison. The accused was a young man of good family, finely educated, and with a good social position and excellent prospects.”). The Buchanan case proved to be a copycat crime, in which another doctor poisoned his inconvenient wife to get her out of the way. See People v. Buchanan, 39 N.E. 846, 848, 850 (N.Y. 1895) (recounting facts of 1893 murder).

The occupation of two domestic killers remains hazy. Adolph Reich’s occupation could not be identified. Carpenter’s is also unclear. The appellate opinion in People v. Carpenter, 6 N.E. 584, 584 (N.Y. 1886), indicates that Carpenter may have been a cobbler because he attacked his wife with a shoemaker’s knife. See id.

358. *A Harvest Day for the Tombs Gallows Coming, SUN (N.Y.),* June 29, 1889, *microform* on DA Scrapbook, *supra* note 85, at Roll 8; see also *Slain By Her Dusky Lover, N.Y. DAILY TRIB.,* July 18, 1888, *microform* on DA Scrapbook, *supra* note 85, at Roll 6 (reporting that Lewis drank, beat his lover, and wounded her in the ankle before killing her).

359. *Such Brutes Die Hard, N.Y. STAR,* Apr. 3, 1888, *microform* on DA Scrapbook, *supra* note 85, at Roll 6 (reporting that defendant killed his wife because of “domineering look in [her] eyes”). Packenham formerly worked as a painter. See Coroner’s Inquisition, People v. Packenham, Folder 2897, Box 304, DA Papers, *supra* note 85 (1888); *His Dying Day Named, WORLD (N.Y.),* Nov. 13, 1888, *microform* on DA Scrapbook, *supra* note 85, at Roll 7. However, when Packenham killed his wife, he had just completed a prison term on Blackwell’s Island for stabbing her with a pair of shears. While incarcerated, he threatened to murder her upon release. See *Murdered by a Drunken Husband, supra* note 312. Margaret worked to support the family, and the children also contributed their meager wages. See id.

360. *A Harvest Day for the Tombs Gallows Coming, supra* note 358; see also *Chasing a Murderer, N.Y. HERALD, Nov. 20, 1888, microform on DA Scrapbook, supra note 85, at Roll 7 (reporting that Nolan was unemployed). But cf. Examination of James Nolan, Police Court Records and Coroner’s Inquisition, People v. Nolan, Folder 3158, Box 334, DA Papers, *supra* note 85 (1888) (indicating that Nolan identified himself as express wagon driver).
At least one newspaper took a somewhat sympathetic view of him, noting that he "saved what little money he earned at odd jobs."361 However, he may have killed his partner, Bridget, because he suspected her of infidelity with her employer.362 Hence, it is clear that she was a breadwinner.363

In total, at least nine of the seventeen men who killed female intimates demanded money from them, often for drink.364 Three other domestic killers

361. Two Wife Murders, N.Y. STAR, Mar. 16, 1888, microformed on DA Scrapbook, supra note 85, at Roll 5 (discussing Ferdinand Carolin's case); see also With a Shingling Hatchet: Bridget Carolin Killed by Her Husband in Stanton-Street, N.Y. TIMES, Apr. 6, 1888, microformed on DA Scrapbook, supra note 85, at Roll 5 (noting that defendant had not worked for several months, aside from shoveling snow for his landlady, and that several pawn tickets were found in apartment); Examination of Ferdinand Carolin, Coroner's Inquisition, People v. Carolin, Folder 2878, Box 302, DA Papers, supra note 85 (1888) (recording that defendant was carpenter who immigrated from Germany).

362. See Two Wife Murders, supra note 361 (indicating motive for crime as Bridget's alleged infidelity with man who hired her to do some cleaning).

363. See Three Drunken Murderers: Their Victims Were Women, Two of Whom Were Wives, WORLD (N.Y.), Mar. 16, 1888, microformed on DA Scrapbook, supra note 85, at Roll 5 (stating that Bridget supported her partner, Ferdinand Carolin).

364. The following are the details of the other five domestic murders that clearly fall under this category: Edward Hovey—whose cowardice on the scaffold was contrasted with Lyons' bravery—sponged off his sister-in-law, took meals at her home, and then killed her for sheltering his battered wife. He appears to have been an unemployed painter. See Examination of Edward Hovey, Coroner's Inquisition, People v. Hovey, Folder 751, Box 67, DA Papers, supra note 85 (1882) (recording dying woman's complaint that defendant "never supported me" and her brother's testimony that Hovey "was in the habit of getting drunk and then his wife would come to us and Fannie, my wife [i.e. the victim], would hide her"); Hovey to be Hanged, TRUTH (N.Y.), June 5, 1883, microformed on DA Scrapbook, supra note 85, at Roll 1 (stating that defendant was a "man of bad habits" who "contributed nothing toward the support of his wife"); Society Well Rid of Him: Edward Hovey Quietly and Expedi tiously Put Out of the Way, supra note 346 ("Hovey seems to have been without a redeeming virtue. He not only neglected his old mother, but he also brutally maltreated his wife, and finally killed the one woman in the world whose patience his criminal conduct had not been able to tire.").

John Carpenter drank hard and "beat [his wife, Mary Ambrose] when she could not supply him with money to continue his [drunken] orgies." Found Worthy of Death, SUN (N.Y.), July 24, 1884, microformed on DA Scrapbook, supra note 85, at Roll 11. He fatally stabbed Mary on Third Avenue after being released from Sing Sing for the attempted murder of a woman whom he mistook for his wife. See Carpenter Kills Himself, supra note 321.

After he lost his job as a tugboat fireman, Martin Loppy "was dissipated, as well as idle, and had no means of obtaining the money necessary to enable him to indulge his vices, except from his wife," who was a finisher of pantaloons. People v. Loppy, 28 N.E. 600, 601 (N.Y. 1891); see also Loppy is Awaiting His Death, PRESS (N.Y.), Dec. 7, 1891, microformed on DA Scrapbook, supra note 85, at Roll 12 (reporting that defendant's wife supported him by sewing).

Former baseball player James Slocum's wife supported him when he was unable to get odd jobs. See Killed His Wife, supra note 356; see also Slocum's Ghastly Crime, supra note 356 (reporting that defendant worked as baseball player in summer, but was habitual frequenter of saloons during off-season).

John Osmond "absented himself from ... home ... in carousal, debauchery and excessive drinking" and subjected his wife to horrific physical abuse before finally shooting her and her alleged lover. Divorce Papers of Mary and John Osmond, People v. Osmond, Folder 4180, Box 454, DA Papers, supra note 85 (1891); see also Affidavit of Catherine O'Brien, People v. Osmond, Folder 4180, Box 454, DA Papers, supra note 85 (1891) (stating that, after he married Mary, defendant started "drinking beer with loafers and idlers"); Osmond was Jealous: He Had Threatened His Wife Before He Killed Her and Birchell, N.Y. HERALD, Apr. 13, 1892, microformed on DA Scrapbook, supra note 85, at Roll 12 (reporting that defendant had been kept away from work by illness).
Besides those executed in the quadruple hanging of 1889 lacked reputable employment. Another—the bigamist, Harris Smiler—had a good job, but he did not spend his wages on any of his wives.

A final characteristic of the capital domestic murders was the estranged relationship between the defendants and their victims. At least seven of the seventeen cases constituted revenge for the woman's attempt to leave the relationship. Pasquale Majone killed his mother-in-law, as well as his wife, because he believed the older woman was trying to break up his marriage. Smiler shot his spouse when she fled to another woman's home. The victims in the Nolan, Lewis, and Osmond cases were murdered when they sought refuge from abusive relationships by starting romances with other men. Miguel Chacon shot his lover after she returned to her husband. Finally, Henry Fanning killed Emily

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365. Augustus Leighton had been evicted from the house where his victim, Mary Deane, lived because he failed to pay rent and because his residence there “was against the wishes of [Mary’s] mother.” See Testimony of Maggie Howard, Coroner’s Inquisition, People v. Leighton, Folder 185, Box 15, DA Papers, supra note 85 (1890). I have counted the Leighton case as a domestic murder because there are indications that Leighton and Mary Deane were lovers. The testimony at the Coroner’s Inquisition about whether they slept together does not resolve the question. See id. (“I cannot tell whether Mrs. Deane and Latham [i.e. Leighton] (the prisoner) ever slept together, but I believe she kept company with him.”).

Pasquale Majone fatally shot both his estranged wife and her mother. His wife had accused him of being unable to support her because he faced imprisonment on an assault charge. See Coroner’s Inquisition, People v. Majone, supra note 356. Sources on the Majone case list his employment as railroad laborer. See id.

Finally, the appellate opinion in People v. Fanning states that “defendant was out of work, and had no means to support [his mistress], and they were behind in their rent, and had been notified to ‘pay or leave.’” People v. Fanning, 30 N.E. 569, 569 (N.Y. 1892).

366. See Smiler Had Three Wives: His Defense For Killing One of Them is Insanity, MORNING J. (N.Y.), June 7, 1890, microformed on DA Scrapbook, supra note 85, at Roll 9; Smiler Was a Bluebeard: He Had Three Wives and Decided to Kill Them Off, MORNING J. (N.Y.), June 6, 1890, microformed on DA Scrapbook, supra note 85, at Roll 9; Took His Wife’s Life, N.Y. STAR, Apr. 4, 1890, microformed on DA Scrapbook, supra note 85, at Roll 9; see also generally Coroner’s Inquisition, People v. Smiler, Folder 3661, Box 393, DA Papers, supra note 85 (1890) (recording testimony indicating that victim feared Smiler because he beat her).

367. See Testimony of Pasquale Majone, Coroner’s Inquisition, People v. Majone, supra note 356 (recording defendant’s statement that his wife sought divorce with her mother’s encouragement).

368. See Testimony of Ella Wilson, Coroner’s Inquisition, People v. Smiler, supra note 356 (indicating that Margaret Smiler was killed at home of Ella Wilson, with whom she was living).

369. See People v. Osmond, 33 N.E. 739, 740 (N.Y. 1893) (indicating that Mary Osmond was having an affair with her boarder, John Burchell, whom Osmond also killed); Divorce Papers of Mary and John Osmond, People v. Osmond, supra note 364 (showing that Osmond’s victim sought a divorce); Chasing a Murderer, supra note 360 (reporting that Nolan’s victim had broken off their relationship due to constant physical abuse and that she had new lover); Shot Down by Her Lover, supra note 356 (indicating that Lewis’ victim had recently begun co-habiting with another man).

370. See People v. Chacon, 6 N.E. 303, 304 (N.Y. 1886) (stating that evidence showed that Chacon planned to kill deceased woman if and when her husband returned from long absence); Chacon Must Hang: Governor Hill Refuses to Interfere—The News Not Told to Chacon Last Night, SUN (N.Y.), July 6, 1886, microformed on DA Scrapbook, supra note 85, at Roll 3 (reporting that governor refused to commute death sentence, even though Chacon arguably killed his lover by mistake during attempt to murder her husband); Chacon Will Hang: The Governor Notified that No Good Reason Exists for Clemency, N.Y. STAR, July 2, 1886, microformed on DA Scrapbook, supra note 85, at Roll 3 (same).
Taylor when she separated from him. 371

The severity of punishment for domestic murders thus had one parallel to the modern situation: men who killed women who tried to leave them predominated on the gallows. In the present day, a man is less likely to be punished severely for slaying a woman who lives with him than for committing a separation murder. 372

The decreased likelihood that a male defendant will get a domestic discount for killing a female who attempts to leave stems, in part, from the doctrinal emphasis on the cooling-off period. It is more difficult for a man who stalks an estranged partner to obtain "heat of passion" mitigation. 373

Thus, drunkenness, financial dependence on women, and separation emerge as the salient aspects of domestic homicides for which the District Attorney's office obtained capital convictions. These factors merit attention because they help explain why the domestic killers appeared more deserving of capital punishment than other defendants. In nineteenth-century New York, violence against women may have attracted less opprobrium than a man's failure to support his family financially. Haag contends that women who survived brutality in the home frequently charged non-support, rather than assault, because the legal regime took the former failing more seriously. 374 There are other explanations for women's preference for raising economic grievances—not the least of which is the financial hardship a wife would have endured if her husband were imprisoned for assaulting her. 375 Yet when a man depended upon his wife's earnings, he strayed far from accepted norms of masculinity, 376 especially if his indolence were combined with

371. See People v. Fanning, 30 N.E. 569, 569 (N.Y. 1892).

372. See Rapaport, supra note 323, at 1517 (noting that almost half of male domestic killers on death row during 1979-89 "killed in retaliation for a woman's leaving a sexual relationship"); see also, Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1, 6 (1991) (coining phrase "separation assault" to describe great danger that woman faces when attempting to leave violent male partner).

373. See Rapaport, supra note 323, at 1518 (stating that separation murders differ from other domestic killings in that they are planned). Yet Rapaport notes that, for some appellate courts, "however cold-blooded or premeditated the execution of a defecting spouse may be, such crimes are also passionate, and by definition, time-honored and pervasive, passion mitigates." Id. at 1519. In modern New York, the extreme emotional disturbance doctrine makes homicides committed after stalking more likely to qualify for mitigation. See People v. Casassa, 404 N.E.2d 1310, 1314 (N.Y. 1980) (suggesting doctrine may apply when significant mental trauma has affected defendant's mind for substantial period of time).

374. See Haag, supra note 349 at 467.

375. Steinberg notes that "[b]ecause of their economic dependency, most [Philadelphia women who pursued criminal assault convictions] wanted only to scare their husbands, not to put them in prison." Steinberg, supra note 16, at 69.

376. Press reports on the killing of female intimates in the 1880s and 1890s almost universally characterized the male perpetrators in terms that emasculated them. See Another Murderer Sentenced, N.Y. Herald, Nov. 28, 1890, microformed on DA Scrapbook, supra note 85, at Roll 10 (describing Loppy as a "small, repulsive-looking man"); Death Came Painless for the Four, supra note 259 (opining that Smiler was "not a very manly man"); Gloating Over His Crime, N.Y. Star, Nov. 21, 1888, microformed on DA Scrapbook, supra note 85, at Roll 7 (stating that Nolan was a "worthless and disease-ridden fellow"); Thinks Osmond was Crazy, N.Y. Recorder, Apr. 14, 1892, microformed on DA Scrapbook, supra note 85, at Roll 12 (reporting that Osmond was "a weak
a penchant for drink.\footnote{377} A wife-murderer’s failure to fulfill his role as the economic provider for his household thus played an aggravating role in the public’s perception of him. Without the greater glory of combat with another male, the defendant’s drunken sloth became, in the “respectable” worldview, an additional abhorrent circumstance in his killing of a presumptively weaker individual.

Some New Yorkers condemned all wife-killers, but anecdotal evidence suggests that robust men inspired popularity, despite their ill deeds. Young medical student Carlyle Harris, who appeared to be headed for a successful professional career, became one of the few popular murderers of women when he poisoned his secret wife, Helen Potts. Curious crowds stampeded to the trial.\footnote{378} One newspaper reported that “[w]ell-dressed women who had never spoken to Harris in their lives before haunted the court room, and tendered their sympathy to the prisoner during recess and after adjournment.”\footnote{379} When a jury convicted Harris of first-degree murder, the public was bitterly divided over his guilt and whether he should die in the electric chair.\footnote{380} One of Harris’ supporters even stood on a street corner wearing a sandwich board to drum up signatures for the clemency petition.\footnote{381} So conflicted were contemporary views of the case that the governor appointed a special commissioner to help him decide how to respond to the clemency young man”); see also supra note 364 (discussing Hovey’s cowardice when facing death); supra note 347 (discussing Carolin’s cowardice on gallows).

\footnote{377} Gordon and Pleck both associate campaigns against family violence in the 1880s with the temperance movement. See Gordon, supra note 328, at 20; Pleck, supra note 327, at 98.

\footnote{378} See Carlyle W. Harris on Trial, N.Y. Recorder, Jan. 15, 1892, microformed on DA Scrapbook, supra note 85, at Roll 12 (reporting that “extra guards were required to keep people out of Part III, Court of General Sessions”). Both Harris and the Assistant District Attorneys who prosecuted him wrote books about the case. A Book About the Carlyle W. Harris Trial, N.Y. Daily Trib., Mar. 12, 1892, microformed on DA Scrapbook, supra note 85, at Roll 12 (discussing prosecutors’ book); Petitions for Harris, Telegram (N.Y.), Mar. 22, 1893, microformed on DA Scrapbook, supra note 85, at Roll 14 (noting that Harris dictated his biography for book to help pay costs of his defense).

\footnote{379} Harris to Testify, Morning J. (N.Y.), Jan. 31, 1892, microformed on DA Scrapbook, supra note 85, at Roll 12); see Will be a Famous Case, supra note 357 (“An unusual number of women, for the most part young and pretty . . . fought day after day, with feminine persistence, for an opportunity to listen the tragic story . . . ”).

\footnote{380} Compare, e.g., Carlyle Harris Found Guilty of Murder, N.Y. Herald, Feb. 2, 1892, microformed on DA Scrapbook, supra note 85, at Roll 12 (denouncing Harris as self-confessed libertine who planned to eliminate his inconvenient wife) with The Harris Verdict, N.Y. Recorder, Apr. 22, 1892, microformed on DA Scrapbook, supra note 85, at Roll 12 (reporting that Recorder received hundreds of letters, both supporting and condemning Harris, but agreeing with majority that said “the verdict should have been, if not absolute acquittal, of ‘not proven’”). After Harris was executed on May 8, 1893, protesting his innocence to the bitter end, his mother accused prosecutors of succumbing to Tammany pressure. See Carlyle W. Harris is Dead, N.Y. Times, May 9, 1893, microformed on DA Scrapbook, supra note 85, at Roll 15; see also Harris’s Last Word, World (N.Y.), May 9, 1893, microformed on DA Scrapbook, supra note 85, at Roll 15 (publishing Harris’ last written statement, which made similar allegations).

\footnote{381} Harris Goes to Sing Sing To-day, N.Y. Herald, Mar. 23, 1893, microformed on DA Scrapbook, supra note 85, at Roll 14; see Petitions for Harris, supra note 378 (noting that Harris claimed he was receiving fifty letters per day and that there were five hundred active petition distributors).
campaign.\textsuperscript{382}

Harris, however, was not a typical domestic murderer, both because he came from an educated, middle-class family and because his case did not reveal a familiar pattern of drinking, beatings, and violent death.\textsuperscript{383} He was considered by many to be a rising star—physically attractive and full of financial potential.\textsuperscript{384} The poisoning led to one of the most sensational trials of the nineteenth century in part because the defendant embodied many aspects of middle-class male ambition. Yet Harris, too, fell short of the ideal. The otherwise sympathetic Recorder opined that “[s]ecret marriage is cowardly.”\textsuperscript{385} In describing the justice of his execution, the Commercial Advertiser noted, “He lacked the essential quality of a popular hero, manliness along heroic lines...”\textsuperscript{386}

With the notable exception of Harris, the domestic murderers were marginal ne’er-do-wells whose cases incited little controversy. Rapidity of jury deliberation provides one indicator of the unanimity of distaste for these men.\textsuperscript{387} Moreover, domestic murder cases did not inspire the threats that accompanied the prosecution of gang leaders, and the public seemed relatively uninterested in watching the proceedings.\textsuperscript{388} By comparison, male-on-male violence implicated discordant norms and pitted various constituencies in New York—political bosses, gangs, and “respectable” observers—against one another in a way that made prosecution of these cases riskier for the District Attorney’s office. Thus, while the press exaggerated the prosecutors’ ineffectiveness in convicting toughs, the relatively

\begin{itemize}
\item \textsuperscript{382} See Point for Carlyle W. Harris, N.Y. Times, Apr. 22, 1893, microformed on DA Scrapbook, supra note 85, at Roll 14.
\item \textsuperscript{383} See supra note 357 (discussing Harris case).
\item \textsuperscript{384} See Helen Potts’ Death, supra note 357; Will Be a Famous Case, supra note 357.
\item \textsuperscript{385} The Trial of Harris, N.Y. Recorder, Feb. 2, 1892, microformed on DA Scrapbook, supra note 85, at Roll 12.
\item \textsuperscript{386} The End of Harris, N.Y. Com. Advertiser, May 9, 1893, microformed on DA Scrapbook, supra note 85, at Roll 15.
\item \textsuperscript{387} For example, Hovey’s jury reportedly deliberated for fifteen minutes. See Hovey to Die in Nine Days, Sun (N.Y.), Oct. 10, 1883, microformed on DA Scrapbook, supra note 85, at Roll 1. Juries decided to convict Smiler and Osmond of first-degree murder in an hour. See Murder in the First Degree, N.Y. Times, Apr. 15, 1892, microformed on DA Scrapbook, supra note 85, at Roll 12 (reporting Osmond verdict); Smiler Convicted of Murder: He Hears the Verdict with Imperturbable Calmness, N.Y. Star, June 11, 1890, microformed on DA Scrapbook, supra note 85, at Roll 9. John Lewis’ jury took forty-five minutes to reach a first-degree murder verdict. See A Salutary Verdict, supra note 308.
\item \textsuperscript{388} See Chacon Pays the Penalty: An Orderly and Speedy Execution in Tombs Yard, N.Y. Times, July 10, 1886, microformed on DA Scrapbook, supra note 85, at Roll 3; Dying of Strangulation: Edward Hovey’s Death Upon the Gallows in the Tombs, Sun (N.Y.), Oct. 20, 1883, microformed on DA Scrapbook, at Roll 1 (“So small a gathering had been known before at a hanging in New York city [sic] ... [T]here was not much demand for passes, as comparatively little interest had been taken in the doomed man.”); New York’s Last Hanging, N.Y. Star, Nov. 10, 1888, microformed on DA Scrapbook, supra note 85, at Roll 7 (“The Packenham case was bereft of any fancied romance, the victim and the murderer being of the most degraded classes... [Packenham’s] crime was common in this great city, and the public forgot it.”). But see A Triple Execution Soon to Take Place in the Tombs, World (N.Y.), July 10, 1889, microformed on DA Scrapbook, supra note 85, at Roll 8 (“Such an event as the sentencing of three men [Nolan, Lewis, and Packenham] to death at the same time drew a curious crowd...”).
\end{itemize}
homogenous attitude toward domestic killers like Hovey and Packenham explains their prevalence among the executions of the 1880s and 1890s. Staging events like the quadruple execution of intimate murderers in 1889 failed to deflect criticism away from the District Attorney’s alleged leniency toward political corruption. Nevertheless, such a goal may have influenced the decision to prosecute.

The limited racial analysis that the records allow reveals another way that selective prosecution and conviction resonated with the social marginality of certain defendants. Of the thirty-four indictments for which death sentences were initially obtained, at least eight defendants were either black or Japanese. Three of these eight men received capital punishment due to Fellows’ efforts, and his zeal in prosecuting them harmonized with societal biases. According to Monkkonen, the likelihood of arrest and trial for blacks was twice as high as for non-blacks during the nineteenth century; blacks were also six times more likely to be hanged.

Newspaper accounts of cases involving non-white defendants reveal a disturbing tendency to infer mental states from stereotyped racial characteristics. For example, the *New York Herald* described the Japanese prisoner, Schihiok Jugigo, in the following manner:

389. Between 1879 and 1893, District Attorney’s office obtained the indictments of eight non-whites who were subsequently convicted of capital murder. These men were Augustus Leighton, Miguel Chacon, John Lewis, Joseph Wood, Schihiok Jugigo, Noah Richards, Matthew Johnson, and David Hampton. I compiled information on the execution of non-whites using a database on capital punishment created by M. Watt Espy and John Ortiz Smykla. This database contains such variables as crime, race, and occupation, as well as jurisdiction and date of execution. Unfortunately, this source does not record information about first-degree murder defendants who were not convicted of the capital crime, or whose death sentences were commuted to life imprisonment. See generally M. WATT ESPY & JOHN ORTIZ SMYKLA, EXECUTIONS IN THE UNITED STATES, 1608-1991: THE ESPY FILE (Inter-university Consortium for Pol. & Soc. Res. ed., 1994). Information on the race, crime, and conviction of Noah Richards does not appear in the Espy File because the governor commuted his sentence to life imprisonment. See Richards’ Sentence Commuted: He Will Spend His Life in Prison and the County Saves $1,000, *Sun* (N.Y.), Jan. 19, 1893, microformed on DA Scrapbook, supra note 85, at Roll 14. All of the eight defendants were black, except for Schihiok Jugigo, who was Japanese. One of the black men, Miguel Chacon, was also a Cuban immigrant. See Examination of Miguel Chacon, Police Court Records, People v. Chacon, supra note 356 (recording that Chacon was born in Cuba).

390. The three non-white defendants executed during Fellows’ tenure as District Attorney were John Lewis, Joseph Wood, and Schihiok Jugigo. For the Jugigo case, see Examination of Schihiok Jugigo, Police Court Records, supra note 332, and Coroner’s Inquisition, People v. Jugigo, supra note 321 (recording that Jugigo was Japanese); Jugigo Guilty of Murder: Convicted by an Oyer and Terminer Jury After a Short Deliberation, *N.Y. Star*, Dec. 6, 1889, microformed on DA Scrapbook, supra note 85, at Roll 8 (same); Murderer Jugigo Convicted, *N.Y. Herald*, Dec. 6, 1889, microformed on DA Scrapbook, supra note 85, at Roll 8 (same). For information on Wood’s race, see *Joseph Wood, a Mulatto, Accused of Murder*, supra note 332 (indicating that Wood was black). For information on Lewis’ race, see Splashed with Her Blood: Jack Lewis Coolly Butchers His Former Paramour, *Morning J.* (N.Y.), July 18, 1888, microformed on DA Scrapbook, supra note 85, at Roll 6 (noting that Lewis was black).

391. Monkkonen, supra note 13, at 148. I have not been able to compile comparable statistics for 1879-93 due to the scarcity of records for cases in which the defendant pled guilty or was not convicted of capital murder for some other reason.
The hair was jet black, the unshaven chin repulsive. The forehead was low and retreating. The eyes were sullen and cruel in a marked degree. They did not look like those of one insane, but intelligence of the lowest degree shone from them. He looked like a natural occupant of the murderer's chair, this sailor from Japan. 392

The press described blacks in similarly offensive terms. For instance, on the eve of Joseph Wood's execution in the electric chair, the Herald speculated about whether "the thick skull of the Negro would make him more difficult to kill." 393 The Morning Journal opined that African-American defendant John Lewis, who murdered his estranged lover, had "a head shaped like that of an ape" and praised his female victim for being "much lighter in color" than the defendant. 394

Combined with Monkkonen's statistics, these blatantly racist newspaper articles indicate that the press and the criminal justice system may have treated non-white defendants differently than whites, as well as punishing domestic killers more severely than other murderers. If disparate treatment of non-whites occurred, then it arguably hinged on the defendants' lack of support among voters with political clout—not on white New Yorkers' fear of being killed by a person of color.

Studies indicate that the race of the victim is a significant factor in modern death-penalty determinations, 395 but at least half of the non-white defendants convicted of first-degree murder in late-nineteenth-century New York killed members of racial minorities. 396 While the race of the victim does not seem to have determined the outcome of such cases, the racial identity of the defendant assumed importance. For instance, when the killer of a male rival was a person of color, public empathy for masculine bravado rarely seems to have spared him—as the case of Jugigo, the Japanese sailor who killed a Japanese competitor for a fishing job, demonstrates. 397 Marginal figures, as opposed to politically con-

392. Death Came Painless to the Four, supra note 260 (emphasis added); see also He Bowed for the Axe, supra note 260 ("In general [Jugigo's] face is a good living representation of that of a hideous Chinese or Japanese idol.").

393. Death Came Painless to the Four, supra note 260.

394. Splashed with Her Blood, supra note 389.

395. David C. Baldus et al., Race Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 398 (James R. Acker et al. eds., 1988) (quoting a General Accounting Office report for finding that "[i]n 82% of the studies [conducted in the 1970s and 1980s], race of the victim was found to influence the likelihood of being charged with capital murder or receiving a death sentence, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks"). The same findings are published as David C. Baldus et al., Race Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia, 83 CORNELL L. REV. 1638, 1659 (1998).

396. See Coroner's Inquisition, People v. Jugigo, supra note 332 (Japanese victim); Coroner's Inquisition, People v. Wood, supra note 332 (black victim); Coroner's Inquisition, People v. Lewis, supra note 356 (black victim); Copy of Arrest Record from 29th Precinct Police Blotter, People v. Chacon, Folder 1454, Box 141, DA Papers, supra note 85 (1884) (black victim).

397. See Indictment Coversheet, People v. Jugigo, supra note 332 (recording Jugigo's death sentence and describing his lethal response to being rejected for position on fishing vessel); see generally Coroner's Inquisition,
nected desperados, comprised the majority of the condemned men in New York County.

2. Plea-bargains

To see what types of cases resulted in plea-bargains, this Article examines all of the guilty pleas in first-degree murder cases in 1882, 1886, 1888, and 1891. These sample years provide an indication of plea-bargaining practices under four District Attorneys: McKeon, Martine, Fellows, and Nicoll. This analysis yields preliminary conclusions about the nature of the cases deemed suitable for non-jury disposition and penalties based on reduced charges. The types of killings for which guilty pleas were entered contrast with those for which capital verdicts appeared both desirable and likely. Most importantly, the data gleaned from plea-bargains supports my hypothesis that domestic killers were treated more harshly than men who killed other men.

Because first-degree murder carried a mandatory death sentence, all defendants who pled guilty sought to enter pleas to lesser charges than those on the face of the indictment. Both plea-bargains and convictions obtained at trial show the prevalence of working-class defendants. Racial factors could not be analyzed with precision because the District Attorney’s papers often failed to give any indication of the race of American-born defendants and there was relatively little press coverage of plea-bargained cases. However, the regularity with which defendants

People v. Jugigo, supra note 332 (describing defendant’s lethal response to being rejected for position on fishing boat).

Of the eight documented executions of non-whites, three defendants—Augustus Leighton, Miguel Chacon, and John Lewis—killed female intimates. See People v. Lewis, 21 N.E. 1062, 1062 (1889) (describing Lewis’ crime); People v. Chacon, 6 N.E. 303, 303 (1886) (describing Chacon’s murder of Maria Williams); Statement of Monroe Williams, Police Court Records, People v. Chacon, Folder 1454, Box 141, DA Papers, supra note 85 (1884) (indicating that Williams was Chacon’s estranged lover, who had returned to her husband); Testimony of Louise Hill, Sarah Wiggins, and Leopold Goldschauser, M.D., Coroner’s Inquisition, People v. Leighton, Folder 185, Box 15, DA Papers, supra note 85 (1880) (recording testimony about Leighton’s murder of his lover); see also Testimony of Maggie Howard, Coroner’s Inquisition, People v. Leighton, supra. Five non-white defendants, including Jugigo, murdered men in quarrels or robberies. For the Jugigo case, see the citations supra. For the other three, see People v. Hampton, 39 N.E. 5, 6 (1894) (describing robbery-murder of Hampton’s landlady); People v. Johnson, 35 N.E. 604, 605-06 (1893) (describing fatal quarrel between Johnson and male co-worker); Affidavit of Officer John Pepper, Police Court Records, People v. Wood, supra note 332 (describing fatal shooting of male victim); Five Murderers Waiting, supra note 332 (stating that Wood killed victim after quarrel in which they called each other names). The final black defendant, Noah Richards, fatally stabbed a police officer who came to his home on a drunk-and-disorderly call. Richards’ sentence was commuted to life imprisonment. See Richards’ Sentence Commuted, supra note 389 (describing murder and reporting commutation of death sentence).

398. The two doctors, Carlyle Harris and Robert Buchanan, were the only educated, professional men to be convicted of first-degree murder. See supra note 357 and accompanying text (describing doctors’ backgrounds and crimes). Among thirty-one plea-bargains from four non-consecutive years, I counted six laborers, two waiters, two boat-hands, two domestics, two carpenters, two cigar-makers, one baking-soda factory worker, one paper-folder, one packer, one engineer, one former night-watchman, one jewelry peddler, one baker, one seaman, one coach driver, one fireman, one butcher, one housekeeper, one porter, and two defendants whose occupations I could not discern.
answered questions about their country of origin allowed me to track immigrant status, as well as the type of killing and the sex of the persons involved.

The most salient factor in the plea-bargains that I examined was the gendered nature of the homicides. For example, in 1882, twelve out of fifteen plea-bargains were entered in cases of men slaying other men. The three remaining indictments involved male defendants who killed their wives. In at least one of these three cases, however, the victim flouted societal norms by spending her husband's wages on alcohol. Immediately prior to her death, Ellen Mooney bought liquor with money earmarked to purchase chairs for the family home. and was described by the defendant as "stupidly drunk."—conduct that, in an age of temperance reform, seems to have partially excused or partially justified the homicide.

Although the temperance movement championed the cause of women brutalized by drunken husbands, a female's drunkenness may have been considered more unusual and disreputable than a man's. In nineteenth-century America, consumption of alcohol in saloons and at work became a common way for men to express democratic citizenship, while "expectations of virtue and restraint" barred women from "active participation in the public world of drink and fraternity." Indeed, "serious drinking was considered a male prerogative, and the American saloon, except for hangers-on like prostitutes, was almost exclusively a male institution." Perhaps for this reason, temperance reform efforts led by women attacked drunkenness as a predominantly male vice. Literary evidence suggests, by contrast, that "[m]en who wrote temperance stories often depicted women

399. See Transcribed Testimony of Robert Mooney, People v. Mooney, Folder 659, Box 58, DA Papers (1882). The victim's twelve-year-old son testified that she spent about twenty cents on drinks out of $9.25 in wages that the defendant gave her to buy some chairs. According to the boy, this action provoked a beating that resulted in the victim's death. See id. A female boarder named Annie Foley confirmed under oath that both Mooney and his wife "were under the influence of liquor" and that they got into a quarrel when Mooney refused to give his wife some whiskey. Transcribed Testimony of Annie Foley, People v. Mooney, Folder 659, Box 58, DA Papers, supra note 85 (1882).

400. See Affidavit of John Mooney, Coroner's Inquisition, People v. Mooney, Folder 659, Box 58, DA Papers, supra note 85 (1882). The defendant's allegations about his wife's intemperance were qualified by his admission that he had several drinks with her on the night of the fatal beating. See id.

401. See BARBARA LEE EPSTEIN, THE POLITICS OF DOMESTICITY: WOMEN, EVANGELISM, AND TEMPERANCE IN NINETEENTH-CENTURY AMERICA 102 (1981) (discussing temperance crusaders' arguments about victimization of women by men who drank); THOMAS R. PEGRAM, BATTLING DEMON RUM: THE STRUGGLE FOR A DRY AMERICA, 1800-1933, at 53, 69-70 (1998) (indicating that late-nineteenth-century women's temperance activism, exemplified by Woman's Christian Temperance Union, was more "home protection" than philanthropy); PLECK, supra note 327, at 49-66 (describing temperance movement as "first American reform campaign to depict for the public the cruelty of domestic violence"); see also RUTH BORDIN, WOMAN AND TEMPERANCE: THE QUEST FOR POWER AND LIBERTY, 1873-1900, at 7 (1981) ("The nineteenth-century drunkard's reputation as a wife-beater, child abuser, and sodden, irresponsible nonprovider was not undeserved.").

402. See PEGRAM, supra note 401, at 11.

403. BORDIN, supra note 401, at 7.

404. Id. at 7, 13; see EPSTEIN, supra note 401, at 100 ("Though [temperance crusaders] occasionally admitted that there were some unfortunate cases of drinking women, they believed that for the most part it was men who drank and women who suffered from men's drinking.").
Some poor urban women did drink and were punished with imprisonment; a Brooklyn physician even proposed sterilization for female alcoholics. Thus, murder victim Ellen Mooney may have run afoul of cultural perceptions linking relatively rare cases of female drunkenness "to promiscuity and neglect of home and hearth." A female victim's vices did not often suggest the appropriateness of a plea bargain with her male killer, however. The press became enraged at McKeon's decision to accept a first-degree manslaughter plea in the Siebert case (another domestic killing in 1882). While Louisa Siebert's sexual infidelity arguably placed her in the category of fallen women for whom the public lacked sympathy, the file indicates that her husband knew about her adulterous affair for almost a month before the murder. This fact may explain the newspapers' fury at the decision to accept a first-degree manslaughter plea in the case. The press suspected that Siebert coldly plotted the murder, despite several affidavits attesting to his good character and another indicating that he acted "erratic" and even "crazy.

406. See MARIAN SANDMAIER, THE INVISIBLE ALCOHOLICS: WOMEN AND ALCOHOL 42 (2d ed. 1992) (indicating that "no less than eight thousand women were arrested for drunkenness in New York City" in 1899). The Irish—the ethnic group to which murder victim Ellen Mooney belonged—seem to have constituted an exception to the rule that "men drank in this period far more than did women." PEGRAM, supra note 401, at 53.
407. SANDMAIER, supra note 406, at 42.
408. Id. at 27; see id. at 27-57 (discussing taboo against female drunkenness throughout western society). Linda Gordon contends that "women who deviated visibly from the norms of maternalism, women who worked, drank, yelled, were dirty, remained unmarried—these women were not only considered bad mothers, they were cast outside the boundaries of true womanhood. They were denied sympathy, let alone help." GORDON, supra note 328, at 253. Newspaper accounts of the domestic murders in New York undermine Gordon's argument that respectable society always condemned working women for transgressing norms of femininity by pursuing employment. In the case of women whose husbands drank and otherwise led profligate lives, female work might be necessary to sustain the children. Hence, the press generally spoke sympathetically of mothers like Margaret Packenham, who became a breadwinner because her spouse shirked his duties. See, e.g., Murdered by a Drunken Husband, supra note 312 (commenting favorably on Margaret Packenham's brave efforts to support herself and her children in face of her husband's drunkenness, violence, and criminal convictions). However, although Gordon's conclusions about the stigmatic implications of women's work do not find support in the New York evidence, her insight about drunken women remains helpful.
409. Recall, for example, that the state executed James Nolan for the first-degree murder of his female lover, who worked as a prostitute. See A Harvest Day for the Tombs Gallows Coming, supra note 358.
410. See supra notes 155-57, and accompanying text. This fact may explain the newspapers' outrage at the decision to accept his first-degree manslaughter plea, despite the fact that defense counsel mustered several affidavits testifying to Siebert's good character. See infra note 412.
411. See Affidavit of Michael Lederman, People v. Siebert, Folder 791, Box 71, DA Papers, supra note 411. For press reports criticizing the District Attorney's decision to accept a guilty plea to a lesser charge, see supra notes 155-61 and accompanying text. For good character affidavits in the Siebert case, see Affidavit of Frank E. Kafka (describing defendant as a "quiet, industrious and kindly-disposed person" with "numerous friends"), Affidavit of Charles Jomersbach (swearing to defendant's temperance, sociability, and "abhorrence of notorious living and hilarity"), and Affidavit of Joseph Nepivoda (testifying that defendant was "an honest, industrious and hardworking young man"), People v. Siebert, supra note 411. For evidence that Siebert may have been mentally or emotionally unstable for weeks prior to the murder, see Affidavit of Michael Lederman, supra
The outrage surrounding the Siebert plea-bargain corroborates my view that not only could the District Attorney count on communal support for prosecuting domestic killers, but also that the public exerted pressure in that direction. In contrast, the relatively uncontroversial nature of guilty pleas arising from male-on-male killings suggests that ambivalent public attitudes toward power struggles between men sometimes made plea-bargaining the most prudent option in such cases.

Plea-bargains from the other sample years reveal a similar pattern of leniency toward defendants who slew male rivals. In 1886, Martine’s office recommended the acceptance of pleas to lesser charges from six men, five of whom killed male victims. The seventh plea-bargain that year involved a woman, Kate Sullivan, who committed infanticide by abandoning her two infant daughters in a water closet. The District Attorney’s office allowed Sullivan to plead guilty to second-degree manslaughter only after a jury failed to reach a verdict as to her guilt.\textsuperscript{413}

Similarly, four out of seven plea-bargains in 1888 involved male-on-male homicides. The remaining three cases were domestic murders, but in at least one of them, Fellows accepted a guilty plea from a defendant whose victim allegedly abused him. Michael Sheehy’s wife appears to have been a chronic alcoholic who threw a cup at his head right before the homicide.\textsuperscript{414} The Sheehy file contains several affidavits to the defendant’s good character, indicating that despite his drunkenness at the time of the killing, his employers perceived him to be an “honest and trustworthy” man trapped in a disastrous marriage.\textsuperscript{415} Such affidavits rarely appear in the files of defendants convicted of first-degree murder at trial.

In the last sample year, 1891, District Attorney Nicoll supervised plea-bargains arising from only two first-degree murder indictments. Both cases involved men who killed other men. In the first case, William Lloyd decided to withdraw his plea of “not guilty” after a jury convicted his co-defendant of second-degree manslaughter. The District Attorney’s office approved Lloyd’s guilty plea to the same offense, which enabled him to trade a possible death sentence for seven years and six months in state prison.\textsuperscript{416} In the second case, William Langeheine entered a guilty plea to second-degree manslaughter for the fatal shooting of another German male
in a dispute over the installation of some restaurant windows. As in the Lloyd case, Langeheine’s co-defendant was convicted of the offense to which Langeheine subsequently pled guilty. The chronology of these cases thus suggests that, after the trials of Lloyd’s and Langeheine’s co-defendants, prosecutors doubted that a jury would view the fatal incidents as first-degree murder.

None of the killings described above clearly involved a robbery or other felony. Rather, the most common scenario for male-on-male violence was a lethal response to an insult or minor physical assault, which resonated deeply with nineteenth-century conceptions of masculine honor. Charles Warren’s murder of a billiards opponent in 1882 exemplifies the seriousness with which men regarded trifles like the loss of a game. Communal tolerance, or at least ambivalence, toward such incidents reduced the likelihood that prosecutors could obtain a conviction; instead, the District Attorney’s office allowed Warren to plead guilty to third-degree manslaughter.

Few cases implicated the core meaning of provocation at common law: “extreme assault or battery upon the defendant; mutual combat; defendant’s illegal arrest; injury or serious abuse of a close relative of the defendant’s; or the sudden discovery of a spouse’s adultery.” In 1882, for example, District Attorney McKeon accepted a first-degree manslaughter plea from Terence McQuaide, who fatally shot a young boy for pelting him with stones while he rounded up stray dogs. However, the young victim’s rock-throwing arguably did not constitute the “extreme assault or battery” necessary to reduce the charge from murder. Many

417. See Trial Testimony of Gustav Scheuerman and William Langeheine, People v. Koenigsberger, Folder 4035, Box 438, DA Papers, supra note 85 (1891) (testifying that shooting resulted from dispute over installation of windows); Testimony of Officer Michael Bissert, Gustave Edwards, and Gustav Scheuerman, Coroner’s Inquisition at 5-7, 8-9, 26-37, People v. Koenigsberger, Folder 4035, Box 438, DA Papers, supra note 85 (1891) (same). Koenigsberger, who was convicted of second-degree manslaughter, was Langeheine’s co-defendant. See infra text accompanying note 418.

418. See Indictment Coversheet, People v. Koenigsberger, Folder 4035, Box 438, DA Papers, supra note 85 (1891) (recording Charles Koenigsberger’s conviction and Langeheine’s subsequent guilty plea).

419. See Testimony of Ferdinand Frankenburg and Jacob Duttenhofer, Coroner’s Inquisition, People v. Warren, Folder 900, Box 81, DA Papers, supra note 85 (1882) (describing circumstances surrounding murder).


421. Girouard v. State, 583 A.2d 718, 720 (Md. 1991) (listing traditional common-law categories of provocation sufficient to mitigate murder to voluntary manslaughter). New York clearly followed these common law precepts in the 1880s and 1890s. See People v. Conroy, 97 N.Y. 62, 76 (N.Y. 1884) (noting that distinctions between homicide committed after deliberation and homicide arising from immediate provocation “are not the creation of our statute, but were considered essential elements of the crime at common law.”). In the twentieth-century, New York modified its penal laws to broaden the meaning of provocation. See People v. Walker, 473 N.Y.S.2d 460, 463 (N.Y. 1984) (stating that New York legislature followed Model Penal Code formulation to avoid “the strictures of early precedents” and “to abandon preconceived notions of what constitutes adequate provocation and to submit that question to the jury’s deliberation”); People v. Casassa, 404 N.E.2d 1310, 1316 (N.Y. 1980) (discussing test for mitigation on ground of extreme emotional disturbance).

422. See Testimony of Patrick Hernon and Charles O’Donnell, Coroner’s Inquisition, People v. McQuaide, Folder 859, Box 77, DA Papers, supra note 85 (1882) (describing stone-throwing incident). But see Testimony of
other cases involved simple verbal taunts or no provocation at all. In 1886, a
jewelry peddler named George Curtiss pled guilty to first-degree manslaughter
after slaying a bartender. The bartender’s only mistake seems to have been his
passivity while other patrons taunted Curtiss and jokingly hid his wares. Yet the
file leaves the impression that the District Attorney’s office took Curtiss’ humili-
ation, as well as his possible insanity, into consideration when approving his plea
to a lesser charge.

Where the initial aggressor in a fight was unclear, prosecutors may have been
swayed by communal support for the accused, as the Kennedy case suggests. Irish
immigrant James Kennedy killed an Englishman in a saloon fight in 1886. However,
aired with affidavits confirming Kennedy’s good character and the deceased’s violent nature and penchant for drink, Kennedy pled guilty to first-degree manslaughter and was sentenced to just eight years and eleven months in state prison. In several cases, the defense marshaled an even more imposing array of affidavits regarding the fine character of the accused. For example, six deponents swore that Charles Still—indicted for killing his brother in 1886—possessed a reputation for “peace and quietness.” One also testified that “he [came] from a good and respectable family.” These affidavits, combined with a sworn statement that Still periodically acted insane after a childhood fall from Barnum’s Circus wagon, may have convinced Martine to accept a plea to first-degree manslaughter.

Other factors, in addition to empathy for defendants displaying masculine
bravado, may have influenced pleas to lesser charges. The District Attorney’s
office frequently justified its participation in plea-bargains on the ground that it
lacked proof of premeditated murder. In several cases, deficiencies in the evidence

Edward Kelly, Coroner’s Inquisition, People v. McQuaide, supra (stating that he saw some of boys chase
dogcatcher’s wagon but that he did not see any of boys throw stones).

423. See generally Coroner’s Inquisition, People v. Curtiss, Folder 2089, Box 210, DA Papers, supra note 85
(1886) (describing circumstances of killing).

424. See Letters from Allan Lane Hamilton, M.D. to Roger A. Pryor and District Attorney Randolph B.
Martine, Mar. 25, 1886, supra note 420 (opining that Curtiss was insane); Memorandum by Albert Leffingwell,
M.D., May 7, 1886, supra note 420 (same); Letters from A.E. MacDonald, M.D., to District Att’y Randolph B.
Martine, July 20, 1886, People v. Curtiss, supra note 420 (same).

425. See Affidavit of Phillip Divers (opining that because Kennedy was “peaceable” man, homicide must have
been committed in self-defense), Affidavit of Charles Leonard (describing Kennedy as “a sober decent industrious
man, a good citizen, fond of his wife and children and respectful in his manner and address”), Affidavit of Patrick
O’Shea (stating that Kennedy “was possessed of a nicer sense of honor than is usually found in men in his position
of life”), People v. Kennedy, Folder 2319, Box 238, DA Papers, supra note 85 (1886).

426. Affidavit of George H. Winter, People v. Kennedy, supra note 425 (stating that “when we heard [the
deceased] approach, it was customary to lock and bolt our doors”).

427. See Indictment Coversheet, People v. Kennedy, Folder 2319, Box 238, DA Papers, supra note 85 (1886)
(noting disposition of case).

428. See Miscellaneous Affidavits, People v. Still, Folder 2222, Box 227, DA Papers (1886) (swearing to
defendant’s good character).

allegedly arose from the collusion of the police and the urban community in protecting the defendant. New York policemen were widely suspected of shielding "toughs," especially those of Irish descent who served as partisan bullies at the polls, and this deference may have extended to non-political crimes that the policemen's favorites perpetrated. For example, when Thomas and Bridget Healy killed a man who called Bridget foul names, a female witness complained that an officer who patrolled the neighborhood "told her that she had better know nothing of it" and placed her and others in "mortal fear" with his threats. In 1886, Assistant District Attorney Semple hinted of similar misconduct in the Hunt case:

There is to my mind an irrepressible suspicion of suppression and concealment which nothing could remove but a more thoroughly conducted investigation. This suspicion is strengthened by the defendant's offer of a plea of manslaughter in the first degree, for the evidence in our possession is not of such a character as to justify the offer of such a plea. The conclusion is irrepressible that the defendant fears that we know more of the truth than we really do.

Under Martine's supervision, Semple nevertheless accepted the plea, rather than proceeding to trial on flimsy evidence or pigeon-holing the case while he sought proof of a more serious crime.

Finally, the files sometimes betray the scent of ethnic favoritism on the part of the prosecutors themselves. It seems remarkable, for instance, that eleven out of fifteen plea-bargains in 1882 involved immigrant defendants—six of whom shared Irish heritage with District Attorney McKeon. In contrast, only nine out of

430. MILLER, supra note 70, at 150. See also id. at 20 ("The police tended to reflect and act out community conflicts instead of trying to establish and maintain standards which transcended conflicts.").


432. Letter from Assistant District Attorney McKenzie Semple to District Attorney Randolph Martine, Jan. 19, 1887, People v. Hunt, Folder 2345, Box 241, DA Papers, supra note 85 (1886).

433. See id. (describing Semple's inclination to accept plea "[i]f the evidence we have now is all we can get"); see also Indictment Coversheet, People v. Hunt, Folder 2345, Box 241, DA Papers, supra note 85 (1886) (recording defendant's guilty plea to first-degree manslaughter).

434. See Examination of Christian Graive, Coroner's Inquisition, People v. Graive, Folder 943, Box 86, DA Papers, supra note 85 (1882) (German); Examination of Bridget Healy, Coroner's Inquisition, People v. Healy, supra note 431 (Irish); Examination of Thomas Healy, Coroner's Inquisition, People v. Healy, supra note 431 (Irish); Examination of Terence McQuaide, Coroner's Inquisition, People v. McQuaide, supra note 422 (Irish); Examination of Patrick O'Carew, Coroner's Inquisition, People v. O'Carew, Folder 844, Box 75, DA Papers, supra note 85 (1882) (Irish); Examination of Charles Siebert, Coroner's Inquisition, People v. Siebert, supra note 411 (Polish); Examination of Joseph Carroll, Coroner's Inquisition, People v. Carroll, Folder 768, Box 69, DA Papers, supra note 85 (1882) (Irish); Examination of Michael Cooney, Coroner's Inquisition, People v. Cooney, Folder 697, Box 62, DA Papers, supra note 85 (1882) (Irish); Examination of John Briganto, Coroner's Inquisition, People v. Briganto, Folder 695, Box 61, DA Papers, supra note 85 (1882) (Italian); Examination of Rocco Dillasio, Coroner's Inquisition, People v. Dillasio, Folder 695, Box 61, DA Papers, supra note 85 (Italian); Examination of Robert Mooney, Coroner's Inquisition, People v. Mooney, Folder 659, Box 58, DA Papers, supra note 85 (1882) (Irish). For McKeon's cultural background, see The Death of John McKeon: His Illness and Last Hours, N.Y. DAILY TRIB., Nov. 23, 1883, microformed on DA Scrapbook, supra note 85, at Roll 1 (stating that McKeon was of Irish stock); Death of John M'Keon: A New York Citizen Who Was Many Years in Public Life, SUN
thirty-five first-degree murder convictions appear to have involved immigrant defendants, and only one of these individuals was Irish.\textsuperscript{435} Irish immigrants may have engaged in more male-on-male violence than other defendants. However, these figures, combined with explicit allegations that the police suppressed evidence in the \textit{Healy} case,\textsuperscript{436} indicate that decisions to approve guilty pleas sometimes stemmed from ethnic loyalties, as well as from evidentiary concerns or norms of masculine behavior.

Where strong public attitudes toward ethnicity and gender were involved, the District Attorney’s office faced substantial pressure in its discretionary decisions. If the police empathized with the accused, prosecutors might not even be able to ferret out the material evidence needed for trial. Defendants for whom other citizens felt loyalty or admiration thus enjoyed a better chance of pleading guilty to lesser charges than did marginal individuals. The reasons that influential defendants did not always seek acquittal at trial remain unclear. However, the contested nature of masculinity and the fact that accused men occasionally received the death penalty for killing male rivals suggest that asserting one’s jury rights carried sufficient risks to make a guilty plea attractive. The plea-bargaining decisions of the District Attorney’s office thus bore a complex relationship to public pressure. While the public criticized prosecutors’ efforts to avoid trial, societal biases and sympathies seem to have shaped the calculations of both sides in considering whether to place a case before a jury.

Discretion is a neutral concept that can be exercised for good or ill;\textsuperscript{437} the same is true of public opinion. In addition to its deterrent function, the death penalty was used to express communal condemnation of premeditated killings, but this anti-violence norm was not consistently applied. While the men executed for killing female intimates certainly deserved severe punishment, the unequal re-
sponse to their transgressions, compared to male-on-male homicides, suggests the potential for caprice and conflict in popular influence on criminal justice policy. The concept of "public moral judgment[,]" even when instilled through professional training and experience, thus may prove to be an unstable baseline for gauging the rightness of prosecutorial decisions.

CONCLUSION

By analyzing the history of the New York County District Attorney's office, this Article demonstrates the fallacy of equating the rise of public prosecution with norms of neutrality and fairness to defendants. The private model, in which crime victims brought their own cases, waned slowly. Starting in the mid-nineteenth century, counsel retained by the victim disappeared from court; that function began to be performed exclusively by the District Attorney and his assistants. By the late 1800s, the private complainant could do no more than call the government's attention to the crime and appear as a witness. Despite these changes, however, neither the actual system of public prosecution nor prevalent normative views of it resembled the defendant-protective ideal that has become an overriding principle of liberal jurisprudence.

Public prosecutors, buried under a growing mountain of indictments, increasingly disposed of cases through plea-bargaining as the nineteenth century progressed. Yet close analysis of news reports indicates that the New York public favored vigorous prosecution on the most severe charges possible. Plea-bargaining in murder cases meant that defendants often escaped with twenty years' imprisonment or less for manslaughter, as opposed to a mandatory death sentence for first-degree murder. The public knew of and opposed such tactics. Indeed, the press associated plea-bargains and dismissals with leniency toward the corrupt political machine that ruled New York City: prosecutors who did not win enough convictions were labeled factotums of the political bosses.

While the newspapers excerpted in the District Attorney scrapbooks do not provide a transparent window on public views, they nevertheless appealed to a broad cross-section of New Yorkers. Many of the papers were one-penny publications read in the tenements, as well as by more affluent citizens. Thus, they seem to have voiced norms of respectability not solely identified with the upper class and bourgeoisie. Moreover, the denunciation of pre-trial tactics allowing defendants to go free or to be punished for lesser offenses was not limited to late-nineteenth-century New York or articulated only by the press. Indeed, as late as 1922,

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438. Griffin, supra note 11, at 304-07 (arguing that prosecutors must represent the people, rather than implementing personal morality, and that they must obtain "public moral judgment" through training and experience).

439. Although Fisher found little evidence that the public was aware of plea-bargaining, he does cite several newspaper articles from Boston in the 1860s criticizing out-of-court settlements in which defendants received no
Roscoe Pound complained about the “loose” and “dangerous” system under which prosecutors decided not to try cases and proposed that daily written reports be required to curb prosecutorial lenience.440

Close scrutiny of late-nineteenth-century murder cases affords a chance to compare norms of public prosecution with the realities of the District Attorney's office. Felix Frankfurter once commented that “[w]hen life is at hazard at trial, it sensationalizes the whole thing almost unwittingly . . . .”441 Yet sensation leaves a paper trail in the archives. Murders are the grist of news reports, for they arouse laypeople's interest. In a time when few legal records were kept,442 potential capital cases generated a wealth of material. Studying murder indictments, as opposed to the regulation of small-time vice, thus provides insights into public attitudes toward the prosecutor's role and the pressures that bore on the District Attorney.

This study of 405 murder indictments between 1879 and 1893 demonstrates that, although public prosecutors plea-bargained more cases than the press liked, they nevertheless disposed of a greater number at trial. The nature of the first-degree murder convictions obtained during this period reveals much about the interplay of prosecutorial discretion and public opinion. The decisions of the District Attorney's office reflected the conflicts and values of lay society. Men who killed female lovers, wives, and other family members comprised the largest category of convicted first-degree murderers. These marginal individuals—many of them unemployed drunks who depended on the earnings of the women they butchered—transgressed widespread norms. Hence, their convictions were easier to obtain and justify than those of men who enjoyed ties to Tammany Hall and whose bravado inspired admiration.

Reporting on the controversial Harris case in 1892, the Herald noted: “There

punishment at all. See Fisher, supra note 16, at 930-33. He and Wilbur Miller also quote New York newspaper articles from the mid-nineteenth century, indicating that hostility toward plea-bargaining pre-dated the 1880s and 1890s. See Miller, supra note 70, at 80 (stating that, in the press' view, plea-bargaining impeded effective policing because first-degree murderer could plead to lesser charges and then be free to “'shoot or dirk the next man that crosses his path'”); Fisher supra note 16, at 931 (quoting New York Times article from 1865 that blamed prosecutors for fact that “criminals seldom receive the punishment due to their crimes”).

440. CRIMINAL JUSTICE IN CLEVELAND: REPORTS OF THE CLEVELAND FOUNDATION SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN CLEVELAND, OHIO 206-08 (Roscoe Pound & Felix Frankfurter eds., 1922). Elsewhere, Pound declared:

Where the number of prosecutions each year has become enormous—far beyond the possibilities of trial—the common-law unlimited power of nol. pros. becomes a public means of selection of those to be prosecuted, of which politicians have not been slow to take advantage. Originally this was a check upon private prosecutions. Now, it is not a check upon a power, but a power needing check, and thus far the statutory checks provided in some of our states have operated perfunctorily and achieved little.

ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 1887 (1930).

441. Liebman, supra note 26, at 2082 (quoting Frankfurter (internal citations omitted)).

442. There are no criminal trial transcripts, except for cases in which the defendant could afford to appeal and even then, such records are limited to the very end of the nineteenth-century.
are two juries in every trial of this kind—'the sworn twelve,' who are specially instructed to look for reasonable doubt . . . and the jury of the public, who are not constrained by legal technicalities, but reach a decision through channels which are ruled out of court." The concept of the public as a second jury is applicable to the twenty-first century. Several commentators urge that the shroud of secrecy be lifted from the pre-trial process, so that the public knows what prosecutors do. And another contends, "the virtuous prosecutor pursues the morality of the public he serves—public (not personal) morality." However, beneath many of these arguments lies the dubious, implicit assumption that the public today favors a criminal justice regime in which prosecutors are at least neutral, if not active, in the promotion of defendant's rights. Despite the sensitivity of a few scholars to the interplay of law and cultural norms, critics of prosecutorial discretion rarely address the nature of the public that prosecutors supposedly serve, or assess conflicts between popular opinion and the social good. Instead, vague references to the public nature of the office have become shorthand for exhorting evenhandedness toward victims and defendants.

The history of prosecution contained in this Article reveals the historical inaccuracy of such shorthand. In late-nineteenth-century New York, the second jury—the jury of public opinion—usually urged the District Attorney to deter crime with the speedy conviction and punishment of offenders; the rights of the accused were left for defense counsel to champion. The desire for vigorous crime control—the strongest force behind the rise of the District Attorney's office in the nineteenth century—now seems to be associated primarily with the victims' rights or re-privatization camp, whereas those dedicated to preserving public prosecution are also concerned about fairness to defendants. However, as long as proposals for reform invoke the public interest without adequately defining and justifying that term, or explaining whether it differs from what the modern public desires, confusion will continue to afflict the exercise of prosecutorial power.

443. Some Peculiarities of the Harris Trial, N.Y. HERALD, Feb. 3, 1892, microformed on DA Scrapbook, supra note 85, at Roll 12 (emphasis added).
444. See, e.g., Vorenberg, supra note 10, at 1531, 1565; cf. Lee, supra note 33, at 238-39 (criticizing lack of public proceedings attending federal prosecutor's decision about whether to make substantial assistance motion).
445. Griffin, supra note 11, at 304.
446. Paul H. Robinson contends that, for the law to have normative power over society, the criminal justice system must give some deference to laypeople's notions of justice. See ROBINSON & DARLEY, supra note 42 at xv-xvi; Paul H. Robinson, Why Does the Criminal Law Care What the Layperson Thinks is Just? Coercive Versus Normative Crime Control, 86 Va. L. REV. 1839, 1841, 1864 (2000). According to William J. Stuntz, a legal victory fails to result in a triumph in the realm of public opinion if law and lay morals conflict. See William J. Stuntz, Self-defeating Crimes, 86 Va. L. REV. 1871, 1889 (2000). The influence of popular norms on the exercise of prosecutorial discretion may not be beneficial or desirable, however, as James Liebman suggests in his discussion of communal pressure on prosecutors to obtain death sentences. See Liebman, supra note 26, at 2078-79; see also Stuntz, supra note 11, at 533-39 (discussing influence of public opinion on prosecutorial decision-making); supra note 48 and accompanying text.