

NEIGHBORHOOD ACCOUNTABILITY BOARDS: A CASE STUDY ON THE PROMISE AND LIMITATIONS OF PROSECUTOR-LED REFORM

Kate Brubacher Murphy*

As the failings of the criminal justice system are revealed in stark terms, prosecutors emerge as agents of reform. This Article is an original case study of one prosecutor-led pilot reform project, which the Author directed. In 2017, the Jackson County, Missouri Prosecuting Attorney's Office began a diversion for felony-level cases using restorative justice and functioning completely outside of the criminal justice system. A limited number of cases, including some involving violence, such as the case discussed here, were either dismissed or never filed and instead were sent to Neighborhood Accountability Boards. These panels were composed of individuals who live in high-crime communities and who work under the leadership of a restorative justice professional. They understand the damage crime causes, but also the pain wrought by the traditional system of addressing it. While restorative justice has long been used for lower-level crimes, the novelty of this program is in its willingness to divert felonies, including violent crimes, outside of the court system, and in its highly localized approach to confronting crime. The program has resulted in improved trust between the community and the prosecutor's office. It also achieved justice in the specific case discussed here, as agreed by all parties: the victim, the defendant, and representatives of the community.

However, the success of the case discussed here also highlights the limitations of this type of program and indeed of prosecutor-led reform broadly. Prosecutors can make important gains in reforming the criminal justice system, but constitutional and institutional limitations ensure that systemic change cannot be the role of the prosecutor.

* Assistant Prosecuting Attorney and Director of the Innovative Prosecution Solutions Grant, Jackson County (Missouri) Prosecuting Attorney's Office; Member of the Pre-Trial Research Advisory Board, Arnold Ventures, LLC; J.D., Yale Law School; M.A.R., Yale Divinity School; M.A., Stanford University; B.A., Stanford University. The views set forth herein are the personal views of the author and do not reflect those of the Jackson County Prosecuting Attorney's Office.

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INTRODUCTION: PROSECUTOR-LED REFORM

The criminal justice machine is broken.¹ This statement has become one of few bipartisan refrains in these otherwise fractured times.² Over two million people are currently incarcerated in the United States, giving our country the highest per capita jailed population in the world.³ Against that backdrop, gun violence is on the rise, a drug epidemic thrives, states lack funding to properly staff, maintain, and build prisons, and the racial disparity of those punished in the system impugns our most dearly held notions of equality under the law. As criminal law scholar William Stuntz observed years ago, “the criminal justice system is doing none of its jobs well: producing justice, avoiding discrimination, protecting those who most need the law’s protection, keeping crime in check while maintaining reasonable limits on criminal punishment.”⁴

The vast majority of systemic failures are seen in the state, not federal, system. Of the 2.3 million individuals currently incarcerated, only 226,000 of them are in federal jails and prisons, accounting for less than ten percent of those incarcerated.⁵ This relative importance of the state system has shone a spotlight on one of its most powerful players: the local prosecutor.

The local prosecutor wields considerable power in the criminal justice system. From the bloated body of criminal statutes, she chooses what to charge, whom to charge, and what punishment to pursue. Because so few cases go to

1. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 64, 85 (2011) (“If our criminal justice system is a ‘machine that would go of itself,’ the machinery is broken.”) (quoting James Russell Lowell).

2. Notable bipartisan reform efforts are taking place across the country. For example, Koch Industries partnered with the American Civil Liberties Union and other liberal groups on criminal justice reform efforts such as the Coalition for Public Safety. *See, e.g.*, Jake Miller, *An Unlikely Alliance Forms Between Koch Brothers and Liberal Groups*, CBS NEWS (Feb. 19, 2015), <https://perma.cc/46EQ-8JZG>. And the FIRST STEP Act was enacted in December 2018 to reduce mandatory minimums and expand rehabilitative programming, among other things, with broad bipartisan support. Ames Grawert & Tim Lau, BRENNAN CTR. FOR JUSTICE, *How the FIRST STEP Act Became Law—and What Happens Next* (Jan. 4, 2019), <https://perma.cc/S692-6F8T>.

3. Wendy Sawyer & Peter Wagner, PRISON POLICY INITIATIVE, *Mass Incarceration: The Whole Pie 2020* (Mar. 24, 2020), <https://perma.cc/HUA4-4XTL>.

4. STUNTZ, *supra* note 1, at 2.

5. Sawyer & Wagner, *supra* note 3.

trial, the prosecutor also frequently confers punishment by controlling the plea-bargaining process and setting the terms of a guilty plea.⁶ None of these discretionary decisions have meaningful review since the courts cannot question what or whom a prosecutor has chosen not to charge; nor do state courts frequently review plea deals, instead deferring to the agreement of the parties.⁷ Calls for transparency and accountability are transforming the role of the prosecutor from an individual who once operated solely in the courtroom to one who actively engages with the community and law enforcement and puts forth policy ideas. Placed in this new light, prosecutors have begun to take the lead on many reform efforts, including adopting new programs that can serve as alternatives to the traditional criminal justice system.

This Article considers one such reform effort. In 2017, Prosecuting Attorney Jean Peters Baker of Jackson County, Missouri, implemented a program that diverts certain felony cases, including some involving violence, outside of the system and into Neighborhood Accountability Boards for resolution.⁸ The Neighborhood Accountability Board (“NAB” or “Board”) in Jackson County is made up of individuals from high-violence communities who are trained in restorative justice principles and who work under the leadership of a restorative justice professional. Cases are diverted to the program prior to charging, so that the participant not only avoids punishment administered by the state, but also any charge or conviction on their record and the collateral consequences that follow. Instead of incarceration or some form of state supervision, Boards prescribe programs that address the causes of the criminal behavior such as anger management, substance abuse treatment, and mediation. Boards also work with the offender to help them recognize the harm they caused, and, if the victim is willing, often apologize directly to the person who was harmed.

6. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RESEARCH CTR.: FACT TANK (June 11, 2019), <https://perma.cc/A45L-56AY> (“Statistics about trial rates in state courts are harder to come by because each state runs its own court system and no standardized record-keeping system covers all states. But trial rates in criminal cases tend to be very low in the states for which data is available. . . In 2017 – the year with the most recent data – jury trials accounted for fewer than 3% of criminal dispositions in 22 jurisdictions with available data, including Texas (0.86%), Pennsylvania (1.11%), California (1.25%), Ohio (1.27%), Florida (1.53%), North Carolina (1.66%), Michigan (2.12%) and New York (2.91%)”).

7. There is a lack of data on how prosecutorial discretion works in practice and what outcomes it creates. Arnold Ventures recently released a prosecutorial discretion research agenda to focus resources on understanding prosecutorial discretion as it relates to justice outcomes. ARNOLD VENTURES LLC, *Prosecution Research Agenda Summary*, <https://perma.cc/EPB4-ACD2>.

8. Jean Peters Baker was appointed Prosecuting Attorney in 2011 and then elected to the office in 2012 and 2016. JACKSON CTY. PROSECUTING ATTORNEY’S OFFICE, *About Prosecutor Jean Peters Baker*, <https://perma.cc/62TA-VHG4> (last visited Dec. 2, 2020); JACKSON CTY. PROSECUTING ATTORNEY’S OFFICE, *Prosecutor Jean Peters Baker*, <https://perma.cc/ZFT8-6U59> (last visited Dec. 9, 2020).

One case resolved by the NAB, *State v. Samuel Gillis*,⁹ typifies a scenario where alternatives to the criminal justice system can achieve better outcomes for the community, the victim, and the defendant. A discussion of the success of the Gillis case, however, reveals the limitations of the NAB program specifically and prosecutor-led reform generally.

I. NEIGHBORHOOD ACCOUNTABILITY BOARDS: A NOVEL APPROACH IN THE CHANGING LANDSCAPE OF PROSECUTION

Prosecutors have long used diversions to screen cases out of the courthouse and into what they deem more appropriate venues. Since at least the 1960s, various treatment courts, whether for juveniles or segments of the adult population, have been offered to offenders instead of proceeding on the traditional path.¹⁰ Drug Courts, Veteran Courts, Mental Health Courts, and juvenile diversion programs are now common in jurisdictions across the country.¹¹ Despite the prevalence of diversions, eligibility is generally constrained. Those considered good candidates are often young, with little or no criminal history, and with substance abuse or some treatable ailment at the root of the activity.¹² Or they are members of a special class such as veterans or individuals diagnosed with a mental illness. Very few diversions are designed for defendants charged with violent crimes or who have significant criminal histories.

Neighborhood Accountability Boards offer an alternative.¹³ They are grounded in the philosophy and practice of restorative justice, which focuses on the harm caused by the offense and requires that the offender take part in healing the damage.¹⁴ It is a practice that can be implemented in various ways but always prioritizes accountability of the offender, something the criminal justice system frequently avoids altogether. Both components—healing the harm and holding individuals accountable—are essential to healthy communities and ultimately public safety, and they are starkly absent from the traditional system, which confers only punishment.

9. Although the program was designed to divert cases prior to charging, Mr. Gillis's case was charged before it was identified for the NAB. The case was dismissed as soon as Mr. Gillis, through his public defender, agreed to participate in the program.

10. CTR. FOR HEALTH AND JUSTICE, TREATMENT ALTS. FOR SAFE CMTYS. (TASC), *No Entry: A National Survey of Criminal Justice* 23 (Dec. 2013), <https://perma.cc/PYY7-CKQL>.

11. *Id.* at 24. There are over 3,000 drug courts in the United States. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *Drug Courts* 1 (Nov. 2020), <https://perma.cc/H3CF-6L48>.

12. CTR. FOR HEALTH AND JUSTICE, *supra* note 10, at 28.

13. See generally Mara Schiff, Gordon Bazemore & Martha Brown, *Neighborhood Accountability Boards: The Strength of Weak Practices and Prospects for a "Community Building" Restorative Model*, 36 WASH. U. J. L. & POL'Y 17 (2011), <https://perma.cc/DQ2G-XTUW>.

14. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 24 (2015).

Communities have long addressed crime more holistically than has our criminal justice system. The concept of the NAB can be connected to much older tribal or communal practices where all stakeholders took part in responding to crime. Crime does not affect a single victim or a dehumanized state; it harms individuals as well as the systems and persons around those individuals. Similarly, there are many factors that lead to criminal behavior. Those variables must be addressed if prevention is a goal. Mere punishment rarely stops the behavior. Something similar to the NAB took place as early as the 1930s when New Jersey juvenile courts diverted cases to New Jersey Youth Aide Panels comprised of community members trying to better support troubled juvenile offenders.¹⁵ Over the past 30 years, hundreds of NAB programs have been implemented across the United States in multiple jurisdictions. They typically function at the city ordinance or misdemeanor level, often for juveniles or first-time offenders.¹⁶ These practices and their value *vis-à-vis* the American criminal justice system are not new. The innovation is in their expanded use.

Practitioners understand the inadequacy of the system in which they operate. In 2016, Jean Peters Baker's office received an Innovative Prosecution Solutions Grant from the federal Bureau of Justice Assistance.¹⁷ The grant, which I oversaw, provided funding to launch programs Prosecutor Baker had long thought important for Kansas City. Prosecutor Baker used the resources to implement geographic prosecution in five hot-spots of violence as well as to partner with police and community in various strategies to reduce gun violence, including addressing abandoned housing, funding an expungement clinic at the University of Missouri-Kansas City School of Law, and increasing services to crime victims. But like most cities with painful histories of racism and segregation, Kansas City had deep issues with community distrust of law enforcement. Nothing could be accomplished without addressing that foundational erosion.

Prosecutor Baker said that she saw the system failing the community and failing individual victims of crime. After 25 years of experience as a prosecutor she knew that many cases would benefit from a "process that was more compelling and restorative for victims."¹⁸ She also needed buy-in from the community. NABs had been used in Kansas City at the city court level since around 2013 with some success.¹⁹ Prosecutor Baker was impressed with the model and

15. Schiff et al., *supra* note 13, at 19.

16. *See id.* at 24-27.

17. JACKSON CTY. PROSECUTING ATTORNEY'S OFFICE, *Smart Prosecution*, <https://perma.cc/X3QA-GJH7>. This grant program was formerly known as the "Smart Prosecution Initiative." *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, *Smart Prosecution Initiative: Award Information (Awardee—Jackson County Missouri Prosecutor's Office)*, <https://perma.cc/73HR-C3R5> (last visited Dec. 9, 2020).

18. Interview with Jean Peters Baker, Jackson County Prosecuting Attorney (June 15, 2020).

19. Lindsey Foat, *Finding Justice Outside the Court System*, FLATLAND KC (Feb. 19, 2016), <https://perma.cc/AVA4-TK3D>.

thought it could be expanded in a bold way to include felony crimes and to function outside of the court system. She engaged the Center for Conflict Resolution to partner on a pilot project, sending a small number of felonies from Kansas City's east side to Neighborhood Accountability Boards where community members would meet with the offender, work with them on taking responsibility for the behavior, and help them make amends to the community for the offense.²⁰ Prosecutor Baker's program was novel in at least two ways. First, it operated entirely outside of the court system. The offender's case was either never filed or, if identified after charges had been filed, the charges were dismissed. This meant that the case would never appear on an offender's criminal history, and the offender did not have to manage the logistics of courtroom appearances. Second, Prosecutor Baker was willing to select candidates facing felony-level charges.²¹ These two commitments placed a considerable amount of trust in the community and the idea that restorative practices could achieve better justice outcomes in certain cases.

In Kansas City, NABs rely on volunteers, ideally from the community where the offense before them took place, who have received training from restorative justice professionals. The process operates under the aegis of a restorative justice organization. The Board gains an understanding of the case through files from the police and prosecutor's office, as well as through discussion with the offender and, when they wish to participate, the victim. The Board helps the participant understand what communal relationships have been broken, in juxtaposition to the courtroom focus solely on what laws have been violated. The goal is to understand both the harm suffered and what led to the harmful behavior so that the Board and offender can then determine how to start healing that injury.

The NAB devises a program of requirements that the offender must complete. These may include an apology to the victim, community service, substance abuse treatment, and counseling. There might also be recommendations that are not required but that the Board believes will help the offender, such as mediation with third parties causing strife in the offender's life. After the offender signs an agreement to participate in the process and follow the Board's directives, the Board and/or the restorative justice organization facilitates the different program steps and ensures that each requirement is completed. The process is over only when the entire agreement is fulfilled and the Board releases the offender from the program.

As originally designed, only low-level non-violent felonies from offenders with zero to minimal criminal history would be accepted for NAB resolution. A man named Sam Gillis helped change those guidelines.

20. The Center for Conflict Resolution is a restorative justice organization founded in 2000, located in Kansas City, Missouri. CTR. FOR CONFLICT RESOLUTION, *Mission, Method & Motive*, <https://perma.cc/6AHM-VQP3> (last visited Dec. 8, 2020); CTR. FOR CONFLICT RESOLUTION, *Who We Are*, <https://perma.cc/Y86Z-Z9NJ> (last visited Dec. 9, 2020).

21. Interview with Jean Peters Baker, *supra* note 18.

II. STATE OF MISSOURI V. SAMUEL E. GILLIS

Samuel Gillis is an African American man who came before a Neighborhood Accountability Board in his early 40s. He spent his younger years living a life in which, as he said during the NAB hearing, “all I did was fight.”²² It resulted in a notable criminal history, including two violent assault convictions that put him in prison for five years. But Mr. Gillis said prison changed his life, and he was determined to never go back. With the exception of a couple of city tickets, Mr. Gillis had no police contact for 11 years. He was a father, working in a trade, just living his life. But his relationship with the mother of his older children dissolved and she restricted access to them. His anger increased proportionally. “I grew up without a father,” Mr. Gillis said, “and my strongest will is to not allow that to happen to my own children.”²³ One night, when he was not able to see his children, he started drinking with friends. Mr. Gillis became so intoxicated he has almost no memory of the events that evening. As he was driving away from the bar, he was upset. He passed a homeless shelter whose parking lot was also a local hangout. Mr. Gillis stopped the car, exited, and began beating one of the social workers employed at the shelter. When Mr. Gillis finished and drove away, the victim was covered in blood and rushed to the emergency room with a deviated septum requiring multiple surgeries to repair. The victim had to take considerable time off of work to recover, though the shelter let him keep his job. Although Mr. Gillis did not know the victim, he was friends with some of the people who spent time at the shelter. Those individuals identified him to police. The entire incident was also caught on video, and Mr. Gillis was eventually arrested for the crime. As is routine, he was taken from his jail cell to give a statement to detectives.

What followed was a primer in accountability, honesty, and remorse. Mr. Gillis said he had little recollection of the evening, beyond being angry about family issues and going out drinking. When he awoke the next morning, his knuckles were sore—but he did not discover what he had done until friends told him over the following months. Mr. Gillis said he was sure he did it. He asked if he could apologize to the victim and said calmly and repeatedly how sorry he was that this had happened, and how different his life was from what his early criminal history reflected.²⁴ Even the hardened detective commented that she appreciated Mr. Gillis’s willingness to speak honestly.²⁵ As the detective got up to leave, Mr. Gillis said, “If you get a chance to talk to [the victim], I sincerely

22. Mr. Gillis’s NAB hearing was recorded by Laura Ziegler, a journalist with KCUR, the public radio station in Kansas City. All quotations from the NAB hearing are taken from Ziegler’s recording (on file with author).

23. *Id.*

24. Kansas City Police Department Detective interview with Sam Gillis (July 22, 2017), CRN 17-010566 (on file with author).

25. *Id.*

apologize.”²⁶ And so the detective wrote in her probable cause statement, “suspect stated he was remorseful and wanted to apologize to the victim for the assault.”²⁷ Within hours, Mr. Gillis was charged with Assault in the First Degree, a Class A felony in Missouri carrying a ten-year mandatory minimum.²⁸ He spent the next 46 days in the county jail before being released on supervision.²⁹

Mr. Gillis’s story is typical of many cases that cycle through a prosecutor’s office. A person who has been in the system and is seemingly on a good trajectory experiences a setback which threatens to derail any progress. What happened to Mr. Gillis, though, is anything but typical of the system.

When the case came across my desk, Mr. Gillis stood out. As the assistant prosecutor directing the Innovative Prosecution Solutions grant, I was looking for cases to send to the NAB. The assault took place in one of the high-crime areas on which I was focused, and in which I had spent considerable time with residents. The case had been correctly charged as Assault in the First Degree, which in the State of Missouri requires that one “knowingly causes . . . serious physical injury.”³⁰ Even if Mr. Gillis pled down the charge, he still would have faced significant prison time and ongoing probation given his violent history. Despite the seriousness of this offense, I knew that Mr. Gillis was not a problem in the neighborhood. One difficulty in exercising prosecutorial discretion for a diversion is how little information prosecutors have about a defendant, particularly if the defendant invokes their right to remain silent. But Mr. Gillis provided all of the information for his own deliverance. His remorse was clear; he was already accountable and asking for a chance to address the harm that he caused. He had also already identified the root causes of his violent behavior—drinking and anger issues—that could be addressed outside of the criminal justice system. I also spoke with the victim to get his opinion on sending the case to the NAB. He was a social worker at a shelter, someone who had turned his own life around after heroin addiction, and knew that people needed second chances. He was upset about his injury, but said that he had no objection to Mr. Gillis’s case being diverted out of the courts and into a NAB. However, the victim also declined to participate in the process, a disappointment to the Board and to Mr. Gillis, who sincerely wanted the opportunity to apologize.

Mr. Gillis went before a Board of four individuals who live and work in the community where the incident occurred. Karen Slaughter, a member of his Board, said that Mr. Gillis “presented himself as a person who understood he had created harm.”³¹ Mr. Gillis discussed the crime with the Board as well as the factors that led to the crime. Ms. Slaughter was “completely impressed” with Mr.

26. *Id.*

27. Probable Cause Statement, *State v. Samuel Gillis*, No. 1716-CR03167 (Mo. 16th Judicial Cir. July 22, 2017) (on file with author).

28. Complaint, *Gillis* (Mo. 16th Judicial Cir. July 22, 2017) (on file with author).

29. *Id.*; Bail Bond, *Gillis* (Mo. 16th Judicial Cir. Sept. 7, 2017) (on file with author).

30. MO. REV. STAT. § 565.050 (2017).

31. Interview with Karen Slaughter (Feb. 2020) (on file with author).

Gillis and understood the opportunity his coming before the Board presented for him.

The Board listened to Mr. Gillis describe the assault and the factors that brought him to that point. They listened to his regret and his struggles with alcohol and family. In the end, they put forth a program for Mr. Gillis that included anger management and a substance abuse assessment, among other requirements. They also suggested that he attend mediation with the mother of his children, something that the Board could help facilitate if the mother was willing. Mr. Gillis and the Board members felt happy with the process. Ms. Slaughter felt that Mr. Gillis was heard and understood, but also made to confront his problems and take responsibility for the harm he caused. Mr. Gillis felt as though the program was a gift. His only regret was that the victim did not also participate, telling the Board, “I wish he was here today. I wanted to really apologize to him.”³²

The individuals who sat on Mr. Gillis’s Board understood what violence does to communities. They also understood the damage wrought by sending away all offenders to prison. “We have lost so much,” Karen Slaughter said.³³ Ms. Slaughter, a neighborhood association president and resident of Kansas City’s east side for around 50 years, described the devastating changes that the community had undergone over the past decades—crack cocaine, the transition of owner-occupied homes to rentals with absentee owners, gangs, and the Kansas City Public Schools’ loss of accreditation, which led to an exodus from the neighborhood and a housing market crash, leaving vacant homes as eyesores and magnets for criminal activity. In the midst of these profound losses, Ms. Slaughter said, “we need both restorative justice and the criminal justice system desperately.”³⁴ The community needs a system that is responsive to its needs. It also seeks equality and dignity in the control of its streets. While measures of such internal control used to take place through natural neighborhood interaction, much of that is gone. Ms. Slaughter recalled her own experiences with those internal controls. She grew up in her neighborhood and remembers them keeping a close eye on her. As a teenager she once skipped a pep rally during high school. She was home for less than ten minutes before her mother called asking why she left school. A neighbor had seen her walk by at an early hour and immediately picked up the phone to report to her mother. According to Ms. Slaughter, these networks no longer exist. “We lost the front porch,” she laments. Healthy environments foster communication and accountability. Ms. Slaughter believes the NAB brings back a measure of those elements. Having an individual such as Ms. Slaughter assess offenses in her neighborhood provides a type of localism often lacking in our current system. Communities most affected by crime have been alienated from the system through which that crime is addressed.³⁵ The legal,

32. Ziegler recording, *supra* note 22.

33. Slaughter interview, *supra* note 30.

34. *Id.*

35. STUNTZ, *supra* note 1, at 61.

economic, and political landscape have resulted in a system where “black crime is mostly governed by white judges and white politicians, and by the white voters who elected them.”³⁶ By contrast, the NAB is highly localized. It gives power back to individuals who are most affected by both the level of crime in a particular area and the damage that can be wrought on individuals and communities through the criminal justice system.

Months after Mr. Gillis completed the program, he got the chance to apologize to the victim in his case. Local media took interest in the NAB as a criminal justice reform and wanted to speak to some participants.³⁷ Both Mr. Gillis and the victim agreed to meet and be interviewed. They gathered with the reporters, the NAB facilitator, and members of the prosecutor’s office. In what turned into an emotional afternoon, the victim described the phases he went through after his injury, including feeling sorry for himself that he was randomly singled out for the violent assault. But he said he was excited to get to meet Mr. Gillis, and he talked about how his past included a period of drug addiction where he had done a lot of bad things and people gave him a second chance. He felt it was only right that he give Mr. Gillis a second chance. The victim admitted he actually would have felt guilty if Mr. Gillis went to prison for ten years. Both men said they had been looking forward to the meeting. After the men talked for a bit, Mr. Gillis got his wish. Through tears, he said, “I apologize with all my heart, and soul, and might.”³⁸ The room was silent, except for a sob from Mr. Gillis. The victim paused a moment and replied, “I appreciate that man, I really do.”³⁹ When the process was complete, both Mr. Gillis and the victim said they felt “grateful.”⁴⁰

III. THE LIMITS OF SUCCESS

The NAB from which Mr. Gillis benefitted, like all prosecutor-led reforms, is highly contingent on political and institutional factors. Mr. Gillis’s disposition was a success. The State’s duty to the public was met and the needs of the stakeholders were meaningfully addressed. The system saved resources. Why is this not the type of reform for which so many hope? Despite the general agreement on the need for change, and the obvious success in certain cases, there are formidable institutional and legal barriers to this type of prosecutor-led reform. They are typified in the case of Sam Gillis.

Institutionally, prosecutors are mostly elected officials who serve four-year

36. *Id.*

37. Glenn E. Rice, *Jackson Co. Prosecutor Has New Way to Empower Victims, Reduce Crime Without Jail Time*, KANSAS CITY STAR (Apr. 12, 2019), <https://perma.cc/8SYP-CT5T>. See also Andrea Tudhope, *No Court, No Conviction—How Jackson County Prosecutors Are Handling Some Felony Cases*, KCUR (Apr. 15, 2019), <https://perma.cc/K4SX-SUSB>.

38. Rice, *supra* note 37 (video accompanying *Kansas City Star* article).

39. *Id.*

40. *Id.*

terms before facing election, though the length of term can vary between jurisdictions as can the application of term limits.⁴¹ This restrains their ability to enact broad-scale, sustainable change. While they can unilaterally make policy in office, proposals are largely incremental, small-scale, and last only as long as their elected term.⁴² Programs such as the NAB are predicated on the will of the prosecutor, the capacity of her staff to identify cases, the strength of the community partner to recruit and train capable Boards, and the financial resources to keep the diversion running. Moreover, elected officials face political challenges. While there has been considerable cultural change surrounding over-incarceration, most constituencies do not assess a prosecutor on the number of cases diverted or victims who feel “grateful.” If one person given leniency goes on to commit a violent crime, the prosecutor’s career may well be over—regardless of how many positive changes she enacted. Kansas City, long suffering from violent crime, is undergoing a surge in gun violence. In 2019 it posted violence statistics among the worst in its history,⁴³ and its homicide rate that year was one of the highest of major U.S. cities.⁴⁴ In that tragic context, it is no comfort to the public that one man’s assault was redeemed. The political incentives are stacked against mercy.

In addition to the institutional challenges, there are at least two types of legal concerns raised by prosecutor-led reform. These warrant considerable attention from legal scholars. The first legal barrier is most formidable, because it concerns the foundations of criminal justice in the United States. There is a fundamental theoretical opposition between a system which privileges procedural justice and one which seeks substantive justice. Diversions such as the NAB seek substantive justice—that is, a focus on the actual harm caused by the offense and a ne-

41. Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1549-50 (2020).

42. The case of Suffolk County is interesting here. Suffolk County District Attorney Rachael Rollins implemented a policy of no longer charging 15 low-level crimes. SUFFOLK CTY. DIST. ATTORNEY’S OFFICE, *The Rachael Rollins Policy Memo*, App. C (Mar. 2019), <https://perma.cc/VU3V-DVXW>. Although the policy appeared radical, Rollins contended that the crimes were almost never charged in the previous administration. Catherine Elton, *The Law According to Rachael Rollins*, BOSTON MAG. (Aug. 6, 2019), <https://perma.cc/4L42-2PCQ>. That is to say, the policy was incremental. This then also revealed how difficult it is for policies to be implemented in the bureaucracy of a prosecutor’s office. CourtWatchMA found that despite Rollins’s no-charging policy, those crimes were still being filed and prosecuted by her office. See Emma Whitford, *Suffolk County D.A. Rachael Rollins’s Office is Still Prosecuting Cases She Pledged to Drop*, THE APPEAL (Feb. 6, 2019), <https://perma.cc/FU75-S3YQ>.

43. KANSAS CITY POLICE DEP’T, *2019 Annual Report* 33 (2019), <https://perma.cc/UT4F-8C6C>; KANSAS CITY POLICE DEP’T, *Daily Homicide Analysis* (Dec. 31, 2019), <https://perma.cc/7MPH-5VZ9> (comparing the city’s 2019 homicide statistics to prior years).

44. Francesca Mirabile & Daniel Nass, *What’s the Homicide Capital of America? Murder Rates in U.S. Cities, Ranked*, THE TRACE (Sept. 30, 2020), <https://perma.cc/V92W-WZ2N> (finding, based on FBI Uniform Crime Reporting data for 2019, that Kansas City’s homicide rate ranked fifth among U.S. cities with more than 250,000 residents).

cessity that the offender not only admit guilt but even try to reckon with the normative implications of their actions. In juxtaposition to this type of thick justice, prosecutors function in a system that privileges procedural justice above all else, including actual guilt, accountability, and victim satisfaction. Protecting the constitutional rights of the accused trumps whether the suspect actually committed the crime in question. In that system, a suspect is always best served by invoking their *Miranda* rights and remaining silent when questioned by police. Conversely, a case cannot be assessed for a restorative justice diversion without the offender openly taking responsibility for their actions, i.e., confessing. As such, selection for and effectiveness in a NAB is predicated on waiver of the offender's constitutional rights, specifically those under the Fifth Amendment. To benefit in one system is to preclude success in the other. This fundamental theoretical opposition—one path where accountability is essential, one where it is destructive—places real limits on the extent to which restorative justice-based diversions can be implemented, and the amount of good they can therefore achieve in a larger structure set over and against them.

The other legal barrier concerns the constitutional limitations of prosecutorial discretion. The power of the prosecutor is generally understood to be an extension of the executive branch and the discretion afforded in Article II, Section 3 of the U.S. Constitution, conferring the duty to “take care” that the laws be executed.⁴⁵ State constitutions and county charters grant general power to prosecuting attorneys,⁴⁶ but no constitutional interpretation, statute, or case law precedent fully accounts for the amount of power the prosecutor exercises over what is enforced in the United States and against whom. This used to be seen as a problem, but now discretion is widely regarded as the vehicle through which meaningful reform can be achieved.

Recently elected prosecutors stand to test the limits of discretion, explicitly nullifying rolls of democratically enacted statutes and effectively beckoning a constitutional clarification of the separation of powers. Does the Constitution allow for prosecutors to overturn statutes? To vacate convictions without review?⁴⁷ To set up proxy justice systems and choose who gets their benefit? These are among the legal questions that bear consideration. While it is effective to recognize the power of prosecutorial discretion, show the ways that it has been used for ill, and bring about pressure to use it for good, the perils are no less present. No new mechanisms of review have been added to ensure that bias is any less exhibited.

45. U.S. CONST. art. II, § 3.

46. See, e.g., MO. CONST. art. VI, § 1 (recognizing counties as separate legal subdivisions in the state); JACKSON CTY. (MISSOURI) CHARTER art. V, §§ 1-5 (establishing the Prosecuting Attorney as an elected Charter Officer).

47. Some district attorneys are setting up Conviction Integrity Units which conduct internal review of past convictions and then petition the court to vacate convictions which fail to hold up. See NAT'L REGISTRY OF EXONERATIONS, *Conviction Integrity Units*, <https://perma.cc/A3US-TZ88> (last visited Dec. 2, 2020).

CONCLUSION

Prosecutors have emerged as leaders, working for solutions in a system they see failing to serve the people. The focus on the power of the prosecutor is a positive development; she is a power-holder and her choices can bring about good or ill. The great success of Neighborhood Accountability Boards, and Mr. Gillis's case specifically, highlights the limits of those efforts. The NAB achieved an unequivocally superior outcome than what would have resulted in the traditional criminal justice system. The State saved resources, public safety was not threatened, the defendant had to take accountability for his actions and work to make them better, and the victim felt satisfied with the outcome. But those gains were achieved only because the Jackson County Prosecuting Attorney exercised broad discretion and was willing to take considerable political risks for a small program. Perhaps most significantly, Mr. Gillis had the opportunity to benefit from the NAB because he waived his constitutional rights. These contingencies ensure that programs such as Jackson County's Neighborhood Accountability Board, even with great success, remain rare.

Prosecutors must address the injustices of the system in which they operate, but the hope for widespread and lasting reform cannot be placed in their hands. Ultimately, systemic change cannot be the role of the prosecutor. She is limited by institutional and legal boundaries that will discount her successes and thwart her victories. If we want certain and sustainable changes to our system, we must reform the boundaries within which prosecutors operate. Those boundaries—a bloated criminal code, harsh sentencing statutes that hinder a judge's ability to grant mercy, and a culture focused on punishment—must be recalibrated so that our criminal justice system better reflects our democratic ideals.

