From: THE OXFORD COMPANION TO AMERICAN LAW, Kermit Hall, editor in chief (New York: Oxford University Press, 2002), pp. 675-77.

The Supreme Court closely reviewed such legislation, but sustained workers' compensation laws and statutes limiting the working hours of women. Even as the Court accommodated a degree of heightened control of economic life, though, it continued to treat unfavorably laws that regulated labor-management relations (see LABOR LAW: LABOR RELATIONS), imposed barriers to new businesses, or set minimum wages.

Land use controls gained popularity in the early decades of the twentieth century. In *Buchanan* v. *Warley* (1917) the Supreme Court voided residential *segregation laws as a deprivation of property without due process, and some state courts in the early 1920s were initially hostile to *zoning ordinances as an interference with owners' use of their land. Yet the Supreme Court sustained the constitutionality of comprehensive zoning in *Village of Euclid* v. *Ambler Realty Co.* (1926). In practice, zoning tended to stabilize neighborhood property values, and put a premium on majority preferences, not the rights of individual owners. For decades after *Euclid* most courts deferred to the regulation of land use by local governments.

As states more vigorously controlled land use, the Supreme Court also ruled that a regulation might be so severe as to effectuate a *taking of property for which compensation was required. Thus, Justice *Holmes stated in *Pennsylvania Coal Co.* v. *Mahon* (1922): "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The Court, however, proved reluctant to apply this doctrine for decades.

The Great Depression and the political triumph of the New Deal marked a watershed in the constitutional protection accorded property rights. The New Deal hoped to alleviate economic distress and promote general social welfare by enlarging governmental responsibility and redistributing wealth. The Supreme Court, adhering at first to the traditional constitutional values of limited government and respect for private property, invalidated a number of New Deal measures in 1935 and 1936. Under great political pressure, however, several justices changed their position and looked more favorably on expanded governmental control of the economy.

Even more significant, the Supreme Court relegated property rights to a secondary position in the constitutional order. In *United States* v. *Carolene Products Co.* (1938), the justices fashioned a dichotomy between property rights and other personal liberties, and established a higher level of judicial review for the preferred category of personal rights. The dubious distinction between property rights and other liberties represented a sharp break with the Constitutional framers' belief that economic rights and political freedom were inseparable. But the upshot was that property rights were virtually removed from the constitutional agenda for years.

The concept of constitutionally protected property rights evolved in seemingly contradictory ways after World War II. Governmental regulation of business expanded, and the drive for *environmental protection generated new and often sweeping restrictions on land use. State and federal courts upheld a broad exercise of eminent domain power to achieve public purposes. The Supreme Court, in *Nollan* v. *California Coastal Commission* (1987), began to scrutinize land use regulations and to put teeth into the regulatory takings doctrine. Likewise, a number of states enacted laws that mandate the payment of compensation when governmental action has diminished the value of property under certain circumstances. At the start of the twenty-first century judges and legislators continued to adjust the perceived need to regulate economic behavior with the Constitution's express protection of property ownership. Although property receives less constitutional protection than at earlier times in American history, private ownership still enjoys a degree of judicial solicitude.

• Stuart Bruchey, "The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic," *Wisconsin Law Review* (1980): 1135–58. Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain*, 1985. Jennifer Nedelsky, *Private Property and the Limits of American Constitutionalism*, 1990. James W. Ely Jr., *The Chief Justiceship of Melville W. Fuller, 1888–1910*, 1995. Carol M. Rose, "Property as the Keystone Right," *Notre Dame Law Review* 71 (1996): 329–66. James W. Ely Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 2nd ed., 1998. Gregory S. Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought*, 1776–1970, 1997. Richard Pipes, *Property and Freedom*, 1999.

—James W. Ely Jr.

PROPERTY TAX. *See* Taxation: Property Taxes.

PROPRIETORSHIP, SOLE. *See* Business Organizations.

PROSECUTOR. The prosecutor occupies a unique position in the American criminal justice system. She is expected to serve both the victim and the accused and adhere to the formal rules of the legal system while also reflecting state and local values.

Charged with formal responsibilities in the administration of justice, the prosecutor necessarily also weighs the social and political implications of decisions.

Though much of American law descends from the British *common-law tradition, the English system relied on private prosecution, a practice never adopted in the American colonies. Early in American history, and continuing throughout the seventeenth century, the authority to bring criminal actions in the thirteen colonies was vested in the *attorney general. After the Revolutionary War, the system became increasingly professional, as all states (beginning in the 1830s) established a generally elected office of public prosecutor. A connection between prosecutors and the electorate promoted both local control of the administration of justice and the nation's geographic expansion

As the nation grew in size, population, and complexity, so too did the domain of the prosecutor, thus allowing, indeed *requiring*, increased prosecutorial discretion. *Police and prosecutors eventually replaced *judges and juries as the essential agents of case disposition in the twentieth century. The expanded prosecutorial role, and consequent passivity of judges, has been criticized by some scholars, but this transfer of power—enlarging the domain of authority, increasing discretion, and demarcating the prosecutor as an active and visible legal/political figure in the community—is essential to understanding the modern prosecutor as the central actor in the criminal justice system.

Moreover, to appreciate the position and influence of the American prosecutor, we must note that the United States has nearly 3,000 prosecutorial systems—an office in each of the ninety-four federal districts (varying widely in size, structure, and values: compare the U.S. attorney's office in Wyoming with that in the Southern District of New York), a system in each of the fifty states (as most cases involve violations of state law), and 2,700 offices at the county level. Consistent with American *federalism, and in contrast to, for example, the French system of public prosecution as a nationwide service, prosecutorial duties in the United States are divided between the U.S. attorneys (and the two thousand assistant U.S. attorneys), who address violations of federal law (mostly drug, white-collar, and corruption cases); the state attorneys general, whose powers and prosecutorial agendas vary across states and political environments; and the multitude of prosecutors at the county level, who process the large majority of cases. Given that prosecutors are generally elected officials at the county and state level (except in New Jersey and Connecticut), and bearing in mind that each state has an elected attorney general and that federal prosecutors (appointed by the U.S. attorney general's office) can be replaced with a change of executive administration, the office of prosecutor—and the motives, behavior, obligations, and decisions of the actors themselves—must be understood in a legal and political sense.

Charged with the responsibility to prosecute all crimes and civil actions to which the local, state, or federal government may be party, American prosecutors enjoy considerable freedom of choice in the day-to-day execution of their official duties. Thus, in contrast to the German system, for example, in which prosecutors are required to prosecute all offenders, the American system both permits and promotes a regulated degree of prosecutorial autonomy. And thus, although the American system is an amalgam of European models—and the American prosecutor shares some characteristics with European officers—the discretion, localism, and authority inherent to the office ensure that the prosecutor in the United States has no exact or even approximate counterpart in the world.

In carrying out their duties, prosecutors receive much of their education "on the job." Pledged to the enforcement of the law, but increasingly aware of the realities of the system, prosecutors learn that they not only must depend on the cooperation of the police and other actors in the system but must also, at times, perform the function of the judge or law-enforcement agents. Thus, in their perceived responsibility to satisfy competing interests, in their capacity to set the agenda, frame the issues, and shape the values of their office and of the community in general, prosecutors are the principal agents in the administration of justice. Prosecutors specify what charges to file (if any), what charge revisions to accept during the *plea-bargaining process, what kinds of cases to concentrate on, and, by their rhetoric, disposition, and actions, what the "complex of values" in their office (and community) will be.

Yet, like any public official, prosecutors are also shaped by the communities in which they serve—feeling, for example, the need to be the voice of the community's demand for retribution—as they take cues from, and structure policies consistent with, perceived social roles and responsibilities. This discretion, like any imprecise grant of authority, is subject to potential abuse; but nonetheless, this concern is "trumped" by the gains associated with affording prosecutors substantial

discretion—discretion that is essential if the prosecutor is to facilitate the disposition of cases by encouraging negotiated settlements.

In general, then, discretion, if used "correctly," allows for the exercise of prudence and judgment at the intersection of competing social values, interests, roles, and the formal law. (Consider, for example, the practice of "plea bargaining," an essential method of "extralegal" negotiation in the criminal justice system, considered and sanctioned by the United States Supreme Court in *Santobello* v. *New York* (1971) and *Bordenkircher* v. *Hayes* (1978).) Only by understanding the exercise of prosecutorial discretion can we appreciate the centrality of the prosecutor to the American criminal justice system. And only by evaluating how this discretion is used can we assess the consequences and propriety of the enormous power exercised by prosecutors in both the state and federal systems.

[*See also* Criminal Law Principles]

• Milton Heumann, *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys*, 1977. Joan Jacoby, *The American Prosecutor: A Search for Identity*, 1980. George Cole, *The American System of Criminal Justice*, 7th ed., 1995. David Johnson, "The Organization of Prosecution and the Possibility of Order," *Law and Society Review* 32 (1998): 247–308. H. W. Perry Jr., "United States Attorneys—Whom Shall They Serve?" *Law and Contemporary Problems* 61 (1998): 129–48. Lara Beth Sheer, "Prosecutorial Discretion," *Georgetown Law Journal* 86 (1998): 1353–65.

—Milton Heumann and Brian K. Pinaire

PROSECUTORIAL DISCRETION. *See* Procedure, Criminal.

PROSSER, WILLIAM. William Prosser was born in New Albany, Indiana in 1898. He graduated Harvard College in 1918 and the University of Minnesota Law School in 1928. Between 1928 and 1948, he practiced law and taught at the University of Minnesota and Harvard Law Schools. In 1948, he accepted the deanship at the University of California–Berkeley Law School, a position he held until 1961. When he retired from Berkeley in 1963, he joined the Hastings College of Law, where he taught until his death in 1972.

Prosser was the most influential *torts scholar of his generation. His first major publication, a treatise titled *Handbook of the Law of Torts* (1941), won an immediate following. His casebook, *Cases and Materials on Torts* (1952), was one of the most widely adopted teaching tools in legal education. His articles on intentional infliction of mental distress, *strict liability for defective products, and the right of privacy, are among the most frequently cited law review articles ever written. Prosser also substantially reconceptualized and redirected American tort law as the Reporter for the *American Law Institute's Restatement (Second) of Torts from 1955 to 1970.

Part of Prosser's influence was due to his personal qualities and abilities as a prose stylist. He was a gifted teacher and natural showman. His wide-ranging interests, talents, and humor placed him at the center of every group. In an era of turgid and technical academic prose, Prosser's writing was lucid, lively, and vivid. In Prosser's writings, striking examples frequently complement abstract statement.

Most of his eminence, however, flowed from the way his approach to torts meshed with the jurisprudence of mid-century America. Prosser blended the insights of *Legal Realism with the legal profession's reemerging interest in comprehensive doctrinal frameworks. As a Realist, he treated tort doctrine as judicially created law that sought to promote social welfare by providing accident victims with fair compensation. As a doctrinalist, he presented tort law as an evolving set of formulas whose application was sufficiently rigid to allow lawyers to predict case outcomes, yet sufficiently flexible to do justice in the every case. In Prosser's view, legal doctrine distilled the wisdom of countless cases and reflected the consensus of American society on problems of accident law. What distinguished Prosser was his formulation of tort law as an expression of America's distinctive and widely held values at a time when the search for consensus values dominated many areas of American intellectual life.

[*See also* Educator, Legal]

• G. Edward White, *Tort Law in America: An Intellectual History*, 1980 (139–79). David Jung, "Commentary on William Lloyd Prosser, Strict Liability to the Consumer in California," *Hastings Law Journal* 50 (1999): 681–99.

—Stephen A. Siegel

PROSTITUTION. *See* Morality, Ethics, and Crime; Morals Offenses; Organized Crime; Victimless Crimes.

PROTEST, PUBLIC. *See* Civil Disobedience.

PSYCHOLOGY AND LAW. With the publication of Hugo Munsterberg's *On the Witness Stand* (1908), modern scientific psychology entered the courtroom. However, it was not until the late 1960s that the discipline of psychology and law began to flourish. The field now has its own journals, *Law and Human Behavior* and *Psychology,*