

TRANSFORMING THE PROGRESSIVE PROSECUTOR MOVEMENT

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It is a near universally accepted principle that prosecutors are the most powerful actors in the criminal system. In response, a new movement has emerged: its proponents argue that, by electing progressive district attorneys, we can use the power of prosecutors to end mass incarceration and bring fairness to the criminal system without changing a single law. They propose to accomplish these goals primarily by declining to prosecute certain low-level crimes, expanding diversion programs, and replacing hardline assistants with reform-minded outsiders. Academics, activists, presidential candidates, and even a Supreme Court Justice have endorsed this movement as the key to change. With little sustained scrutiny of this development, this Article takes the progressive prosecutor movement’s objectives as they are and asks whether, as currently framed, it is likely to achieve them. The conclusion is simple: no.

This movement acknowledges the “breathtaking” power that prosecutors yield, then asks its candidates to use that power for good and trusts them to do so. This Article offers a more efficacious prescription: if you are a prosecutor truly committed to transforming the criminal system, relinquish your power. Do not trade the rhetorical appeal of being tough on violent crime for political capital to spend on lenience for those who commit low-level offenses. Advocate for the reallocation of funds from prosecutors’ offices—rather than the expansion of diversion programs—to social services to keep the mentally ill, substance-addicted, and poor out of the criminal system. Rather than hoping to prevent wrongful convictions and over-punitiveness by changing who works in your office, lobby for a stronger indigent defense system and more external limits on prosecutorial power. To combat racial inequities in the criminal system, support efforts to strengthen defendants’ equal protection rights, instead of simply publishing statistics. Through these shifts, we can harness this moment where criminal justice reform tops the national agenda and implement truly transformative change.

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INTRODUCTION

Law students interested in criminal practice are frequently asked whether they plan to be a public defender or a prosecutor. In the last several years, many of these budding lawyers are hearing a different question (frequently posed with more enthusiasm): have you thought about going to work for a progressive prosecutor? The story that prosecutors wield more power than any other actor in the criminal system is old.¹ Recently, though, a rising sense holds that prosecutors *are* the system.² In response, a new movement³ has emerged: its proponents argue that, by electing progressive district attorneys, we can use the power of prosecutors to end mass incarceration and restore fairness to the criminal system “without changing a single law.”⁴

Discussion of this movement is omnipresent in the corridors of legal academia. Symposia, conferences, and lunch events draw the movement’s primary personalities to law schools across the country, where they speak

1. See, e.g., Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940) (“The prosecutor has more control over life, liberty, and reputation than any other person in America.”).

2. See, e.g., John F. Pfaff, *Criminal Punishment and the Politics of Place*, 45 FORDHAM URB. L.J. 571, 575 (2018) (“It is hard to [over]state the power of prosecutors. Granted nearly-unfettered and nearly-unreviewable discretion, prosecutors determine almost every aspect of a defendant’s case”); Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—and What Can Be Done About It*, 111 NW. U. L. REV. 1429, 1436 (2017) (“[F]or the immediate future at least, prosecutors . . . will be the real rulers of the American criminal justice system.”).

3. This Article is focused on progressive prosecution as a political movement—a coordinated, cross-jurisdictional effort at changing the nature and occupants of a political office—rather than a social movement. Social organizing has been critical to the success of the progressive prosecutor movement, perhaps most notably through the #ByeAnita campaign that succeeded in replacing Anita Alvarez with Kim Foxx in Chicago. See Jenn M. Jackson, *A Discussion with Mariame Kaba on the #ByeAnita Campaign and Grassroots Organizing*, BLACK YOUTH PROJECT (Nov. 29, 2016), <http://blackyouthproject.com/a-discussion-with-mariame-kaba-on-the-byeanita-campaign-and-grassroots-organizing> [https://perma.cc/5CL2-AF5Q]. These social movements, however, are generally focused on removing certain prosecutors, rather than on electing others. E.g., Mae Rice, *The Team Behind #ByeAnita Tells Us Why They Don’t Support Kim Foxx, Either*, THE CHICAGOIST (Mar. 16, 2016), https://chicagoist.com/2016/03/16/the_organizers_who_ousted_anita_alv.php [https://perma.cc/4VRW-RB43].

4. See EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION xxvii (2019).

to large groups of tomorrow's lawyers.⁵ Students who began law school hoping to become public defenders are signing up to be foot soldiers in this movement. They follow in the steps of those who have been public defenders their entire careers and are now switching teams, running for district attorney positions under the "progressive prosecutor" moniker. Some of the most prominent scholars writing about prosecutors—including Jeffrey Bellin,⁶ Angela J. Davis,⁷ David Sklansky,⁸ and Abbe Smith⁹—have dedicated entire articles to applauding these reform-minded district attorneys.

This movement has attracted broad attention outside law schools as well. Bernie Sanders endorsed Chesa Boudin for District Attorney in San Francisco.¹⁰ When Boudin won, Supreme Court Justice Sonia Sotomayor sent him a congratulatory video applauding his "strength and commitment to reforming and improving the criminal justice system."¹¹ And perhaps the most notable endorsement of the label came from Vice President Kamala Harris, who characterized herself as a progressive prosecutor during her campaign for the 2020 Democratic presidential nomination.¹²

Journalist Emily Bazelon champions this movement in her recent book, *Charged: The New Movement to Transform American Prosecution*

5. See, e.g., Symposium, *Progressive Prosecution: Legal, Empirical, and Theoretical Perspectives*, J. CRIM. L. & CRIMINOLOGY, <https://jclcl.law.northwestern.edu/symposium> [<https://perma.cc/AV3Z-CPDW>] (last visited Feb. 13, 2021).

6. See Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707, 707 (2020).

7. See Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. ONLINE 1 (2018), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1018&context=flo> [<https://perma.cc/53HF-AEU2>]; Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1 (2019).

8. See David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647 (2017) [hereinafter *Changing Political Landscape*]; David Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25 (2017) [hereinafter *Progressive Prosecutor's Handbook*].

9. See Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. L. 411 (2019).

10. Zak Cheney-Rice, *Chesa Boudin's Election Is an Opportunity for San Francisco. Will They Embrace It?*, N.Y. MAG.: INTELLIGENCER (Nov. 11, 2019), <https://nymag.com/intelligencer/2019/11/chesa-bousin-wins-sf-da-election.html> [<https://perma.cc/A5S9-BAQY>].

11. See Mark Joseph Stern, *Sonia Sotomayor Celebrates San Francisco's New Progressive District Attorney*, SLATE (Jan. 9, 2020, 7:12 PM), <https://slate.com/news-and-politics/2020/01/chesa-boudin-sonia-sotomayor-san-francisco-district-attorney.html> [<https://perma.cc/K7W9-DE4T>].

12. See Kate Zernike, *'Progressive Prosecutor': Can Kamala Harris Square the Circle?*, N.Y. TIMES (Feb. 11, 2019), <https://www.nytimes.com/2019/02/11/us/kamala-harris-progressiveprosecutor.html> [<https://perma.cc/Y5ZQ-MMWE>].

and End Mass Incarceration.¹³ The most comprehensive and persuasive coverage of this effort to date, *Charged* documents the history, progress, and promise of the effort to elect reform-minded district attorneys. The book has received wide acclaim, including the 2020 Silver Gavel Award from the American Bar Association.¹⁴

The progressive prosecutor movement, moreover, has effected real change. The recent pandemic offers only one illustration of this. There are 2.3 million people in American prisons, and millions more pass through county and city jails each year.¹⁵ As COVID-19 tears through these facilities, defense lawyers, community groups and activists, and family and friends have scrambled to figure out how to get people released, sometimes from detention centers where shockingly high percentages of inmates have tested positive.¹⁶ Their best hope is that a prosecutor will have mercy—by dismissing a case, agreeing to pre-trial release without bail, consenting to release on parole, or in some other way. In some jurisdictions, prosecutors have cooperated en masse. San Francisco’s jail population has fallen by 33% since the city’s shelter-in-place order went into effect.¹⁷ Across the bay, Contra Costa reduced its jail population by more than 30% and had almost 90% of those remaining in a cell by

13. See BAZELON, *supra* note 4.

14. 2020 *Gavel Award Winners*, A.B.A., https://www.americanbar.org/groups/public_education/programs/silver_gavel/silver_gavel_2020/gavel-award-winners/ [<https://perma.cc/R9AH-JZGW>] (last visited Feb. 13, 2021).

15. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE n.2 (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/HJH2-2Z85>].

16. See, e.g., Sarah Stillman, *Will the Coronavirus Make Us Rethink Mass Incarceration?*, NEW YORKER (May 18, 2020), <https://www.newyorker.com/magazine/2020/05/25/will-the-coronavirus-make-us-rethink-mass-incarceration> [<https://perma.cc/9LTY-GL3J>] (describing how 85% of women at Elayn Hunt Correctional Center in Louisiana have tested positive for the coronavirus).

17. *COVID-19 Criminal Justice Responses to the Coronavirus Pandemic*, VERA INST. JUST., <https://www.vera.org/projects/covid-19-criminal-justice-responses/covid-19-data> [<https://perma.cc/W3U6-LGCT>] (last visited Feb 13, 2021); see also Chesa Boudin, Opinion, *Op-Ed: I’m Keeping San Francisco Safer by Emptying the Jail. My Father Should Be Freed Too*, L.A. TIMES (May 6, 2020), <https://www.latimes.com/opinion/story/2020-05-06/mass-incarceration-san-francisco-coronavirus> [<https://perma.cc/BY9A-UYMZ>].

themselves by April 2020.¹⁸ Boulder has reduced its jail population by 41% since February.¹⁹ All three cities have progressive district attorneys.²⁰

But not everyone is excited about reform. Former United States Attorney General William Barr accused progressive prosecutors of “undercutting the police, letting criminals off the hook and refusing to enforce the law.”²¹ Texas Governor Gregg Abbott has said that Dallas County District Attorney John Creuzot’s policies—which are tame compared to those of figures like his Philadelphia counterpart Larry Krasner—“abandon the rule of law and . . . could promote lawlessness.”²² At a press conference with the Chicago Police Department, then-mayor Rahm Emmanuel called District Attorney Kim Foxx’s decision not to prosecute actor Jussie Smollett “a whitewash of justice.”²³ And the National Police Association filed a bar complaint against Suffolk County District Attorney Rachael Rollins before she even took office, claiming that her campaign announcement of non-prosecution policies violated her ethical responsibilities.²⁴

18. See Bay City News, *Coronavirus: Jail Population Reduced in Richmond, Martinez*, PATCH (Apr. 15, 2020, 12:16 PM), <https://patch.com/california/pinole-hercules/coronavirus-jail-population-reduced-richmond-martinez> [https://perma.cc/6ULX-RSLP]. Contra Costa County does not report jail data, so it is unclear how its jail population has changed since April. See *COVID-19 Criminal Justice Responses to the Coronavirus Pandemic*, *supra* note 17 (reflecting no jail population data for Contra Costa County).

19. See *COVID-19 Criminal Justice Responses to the Coronavirus Pandemic*, *supra* note 17.

20. Dozens of progressive prosecutors also signed two joint statements urging state and local officials to reduce jail and prison populations in response to the pandemic. See *Open Letter to Our Nation’s Governors*, FAIR & JUST PROSECUTION (July 17, 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/07/Open-Letter-to-Our-Nations-Governors-FINAL.pdf> [https://perma.cc/E9TG-F3GS]; *Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of Those In Custody*, FAIR & JUST PROSECUTION (Mar. 25, 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf> [https://perma.cc/LTJ9-Y5GE].

21. Richard A. Oppel Jr., *These Prosecutors Promised Change. Their Power Is Being Stripped Away.*, N.Y. TIMES (Nov. 25, 2019), <https://www.nytimes.com/2019/11/25/us/prosecutors-criminal-justice.html> [https://perma.cc/9WPJ-8GTC].

22. Catherine Marfin, *Texas Prosecutors Want to Keep Low-Level Criminals Out of Overcrowded Jails. Top Republicans and Police Aren’t Happy*, TEX. TRIB. (May 21, 2019, 12:00 AM), <https://www.texastribune.org/2019/05/21/dallas-district-attorney-john-cruezot-not-prosecuting-minor-crimes> [https://perma.cc/6ZXE-6EUW].

23. *Mayor Emanuel on Jussie Smollett Charges Being Dropped: ‘This Is a Whitewash of Justice,’* ABC7 EYEWITNESS NEWS (Mar. 26, 2019), <https://abc7chicago.com/jussie-smollett-update-kim-foxx-rahm-emanuel-charges-dropped/5218433> [https://perma.cc/HV8C-8HFL].

24. See *National Police Association Files Bar Complaint Against District Attorney Elect Rachael Rollins*, PR NEWswire (Dec. 27, 2018, 8:33 AM), <https://www.prnewswire.com/news-releases/national-police-association-files-bar>

This Article scrutinizes the progressive prosecutor movement from a different angle. While I acknowledge that this movement as currently framed has the capacity to make (and has already made) progress toward its goals, I have profound doubts about whether it will lead to the transformation its proponents promise. For decades, the only rational platform for a district attorney candidate was being tougher on crime than their opponent.²⁵ Against this historical backdrop, the policies that come standard with the progressive prosecutor platform—declining low-level charges, increasing the use of diversion programs, and replacing hardline assistants with would-be public defenders—are undeniably a trend in the right direction. But, for the reasons I explore in this Article, I fear that they will only lead to meager reforms. This movement must go much further to stand any real chance of achieving its goals.

This moment in history is particularly suitable to ask more of prosecutors who pledge their allegiance to reform. The remarkable demonstrations against police violence following George Floyd’s death calling to “defund” police departments have been heeded in some areas and are being seriously considered in several others.²⁶ Like police, prosecutors’ offices are an integral part of a criminal system that tolerates and perpetuates everyday injustices against citizens. Thus, we should also be radically rethinking what we ask of those who say they want to change it. As I argue in this Article, we are not asking them to shrink their offices’ footprints nearly enough. The success of the progressive prosecutor movement is a once-in-a-generation opportunity for fundamental reform of the criminal system.

There is a small but burgeoning literature focused on progressive prosecutors.²⁷ But there has been little sustained interrogation of this

complaint-against-district-attorney-elect-rachael-rollins-300770768.html
[<https://perma.cc/RW3N-JC8R>].

25. See James Forman Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993, 993 (2010) (“[P]oliticians make careers out of being tough on crime, only to lose elections to those who are yet tougher . . .”).

26. See, e.g., Igor Derysh, *Did We Defund the Police? No, but “Big Changes Are Happening” Even After Protests Die Down*, SALON (Dec. 25, 2020, 11:00 AM), <https://www.salon.com/2020/12/25/did-we-defund-the-police-no-but-big-changes-are-happening-even-after-protests-die-down> [<https://perma.cc/9VMK-RYCP>] (documenting significant reductions in police budgets in Denver, Los Angeles, San Francisco, and Seattle, as well as the end of school policing operations in Oakland, California and Portland, Maine).

27. See, e.g., *Progressive Prosecution: Legal, Empirical, and Theoretical Perspectives*, *supra* note 5; Heather Pickerell, Note, *How to Assess Whether Your District Attorney Is a Bona Fide Progressive Prosecutor*, 15 HARV. L. & POL’Y REV. (forthcoming 2021); Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415 (2021); Kay L. Levine, *Should Consistency Be Part of the Reform Prosecutor’s Playbook?*, 1 HASTINGS J. CRIME & PUNISHMENT 169 (2020); Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement’s Promise*, 64 N.Y.L. SCH. L. REV. 69 (2020).

movement from those who nevertheless support its objectives. To date, this limited criticism has focused on whether reform is viable outside of urban areas²⁸ and whether any prosecutor can be truly progressive.²⁹ I share these concerns. But I am less worried about wasting our time believing in this movement at all than about being too easily satisfied with its current agenda and squandering this moment when criminal justice reform tops the national agenda to implement meaningful, transformative change.³⁰

Before I turn to my argument, I want to be clear about my overarching point. For that, I think it is important to state the angle from which I am approaching it. I am a line public defender. I believe that this movement's goals, to say nothing of the policies by which it seeks to accomplish them, do not go far enough. At the same time, because I come face-to-face with the damage the criminal system causes each day, I am thankful for every ounce of leniency towards my clients, even if it is inconsistent and in limited supply. I acknowledge that a defendant being prosecuted by a progressive district attorney's office is generally more likely to receive mercy than one who is not.

This Article, however, does not advance my own first order views about what is wrong with the criminal system and how to fix it. Instead, I take this movement's goals as they are and ask whether it is likely to achieve them. For the reasons discussed herein, my answer is: no.

Why am I scrutinizing a movement that I acknowledge is a net improvement over the status quo? As a public defender, my job is to do what is best for my clients. If a prosecutor offers one of my female clients a plea deal that is more favorable than one a male client would receive, I do not tell her to refuse it because it perpetuates gender discrimination. If a client wants to enroll in mental health court, I do not dissuade him on the grounds that problem-solving courts pull treatment otherwise properly provided by social services within the criminal system's web. I advocate for my clients to be released without cash bail, even if it means they will

28. See, e.g., Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803 (2020).

29. See, e.g., Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748 (2018). This criticism traces its lineage to a question, answered most notably by Paul Butler and Abbe Smith, about whether good people can be good prosecutors. See PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 120 (2009) ("Those who work inside [the criminal system] can tinker with the punishment regime, but they probably cannot overhaul it."); Abbe Smith, *Can You Be A Good Person and A Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 396–97 (2001) (arguing that prosecutors necessarily perpetuate a broken criminal system and therefore cannot be "good people").

30. See Note, *supra* note 29, at 759 ("[F]airer policies . . . may create a perception of progress that 'mollifie[s] communities of color and sap[s] the energy needed for a continued push' toward encouraging deeper transformation.") (alterations in original) (quoting Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1467 (2016)).

have to wear ankle monitors that I believe are unnecessary and demeaning abridgements of their liberty. I am not in the business of systemic change; I am in the business of helping clients choose off a menu of case outcome options given to us by prosecutors. In short, that we have the right strategy for reforming prosecutorial power *defines* what I can achieve for my clients.

To that end, this Article proceeds in four parts. Part I documents the short history of this movement, including how it began, what it hopes to accomplish, and where it has spread. Part II explores the movement's strengths, contrasting it with the political economy³¹ of prosecution as it has existed for decades. In Part III, I outline several shifts that the movement must undergo in order to achieve its goals. First, district attorneys who seek to end mass incarceration should speak differently about violent crime, rather than simply advocating lenience for those accused of low-level offenses. Second, those who hope to "decriminalize" mental illness, addiction, and poverty should go beyond bail reform and diversionary programs by supporting the "defunding" of their office to endow social services and treatment that does not take place in the shadow of the criminal system. Third, because prosecutors' place in the adversarial system means that changes in hiring practices and office culture will not prevent wrongful convictions and bring fairness to sentencing, those committed to change must support a more robust indigent defense system and legal limitations on prosecutorial power. Fourth, to combat racial inequities, district attorneys should support efforts to strengthen defendants' equal protection rights, instead of simply publishing statistics. Finally, in Part IV, I discuss how prosecutorial elections are a flawed mechanism to usher in this transformation and why the movement's supporters should consider pursuing "defund and abolish" efforts.

I. HISTORY OF THE MOVEMENT

There are over 2,400 chief prosecutors in the United States, most of whom are locally elected officials.³² Prosecutors have notoriously broad power over the criminal system. They decide whether to bring charges, what to charge, what pre-trial release conditions to request, whether to offer a plea deal, what to ask for at sentencing, and whether to consent to

31. I use the term "political economy" in the sense that William J. Stuntz did. See Michael Klarman, David Skeel & Carol Steiker, *Introduction: Appreciating Bill Stuntz*, in *THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ* 8 (2012).

32. George Coppola, *OLR Research Report: States that Elect Their Chief Prosecutors*, OFF. LEGIS. RSCH: CONN. GEN. ASSEMBLY (Feb. 24, 2003), www.cga.ct.gov/2003/rpt/2003-R-0231.htm [<https://perma.cc/Q8HW-STMJ>] (explaining that "47 states elect their chief prosecutors and three (Alaska, Connecticut, and New Jersey) appoint them").

release on parole, among many other things.³³ Suburban voters have long had the greatest influence over these elections, despite the fact that prosecutors exercise most of their power over urban communities composed primarily of people of color.³⁴ This power imbalance is even greater because almost all felony convictions are obtained through guilty pleas and therefore without input from a jury drawn from citizens of those communities.³⁵ As crime rates in cities rose through the 1970s and 1980s, these phenomena and others contributed to unprecedented rates of incarceration and punishment.³⁶ For years, district attorney candidates ran (in the unlikely event that the election was contested³⁷) on being tougher on crime than their opponents.³⁸

Falling crime rates throughout the last two decades have created space in the public imagination for prosecutors to run on a different type of platform.³⁹ The dynamics of these elections are as varied as the geographies in which they take place, making it difficult to define the “progressive prosecutor” label with any precision.⁴⁰ It is perhaps most easily understood by reference to the progressive prosecutor *movement*.

The progressive prosecutor movement began in earnest in 2015. Several prosecutors who are frequently discussed as being part of the movement were elected before that time,⁴¹ including Dan Satterberg in

33. See Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 305 (2017).

34. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 7 (2011).

35. *See id.*

36. *Id.* at 28.

37. *Tipping the Scales: Challengers Take on the Old Boys’ Club of Elected Prosecutors*, REFLECTIVE DEMOCRACY CAMPAIGN 3 (Oct. 2019), <https://wholeads.us/research/tipping-the-scales-elected-prosecutors/> [<https://perma.cc/TUUL-7R7E>] [hereinafter *Tipping the Scales*] (noting that 80% of prosecutors run for office unopposed).

38. See Forman, *supra* note 25.

39. JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 3–4 (2017); Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 542 (2020) (discussing how a community’s views on the desirable balance between security and liberty vary over time according to various factors, including the crime rate).

40. See Levin, *supra* note 27, at 1415–17.

41. Prosecutors from an even earlier time, like Robert Morgenthau, could also be characterized as “progressive.” Robert D. McFadden, *Robert Morgenthau, Longtime Manhattan District Attorney, Dies at 99*, N.Y. TIMES (July 21, 2019), <https://www.nytimes.com/2019/07/21/nyregion/robert-morgenthau-dead.html> [<https://perma.cc/Q39X-KAX9>] (“[T]hroughout his tenure [Morgenthau] opposed the death penalty, arguing that it was inhumane and was ineffective as a deterrent.”); see also BUTLER, *supra* note 29, at 118–19 (characterizing Robert Johnson and Terence Hallinan, former district attorneys in the Bronx and San Francisco, respectively, as “progressive head prosecutors”); Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 4 J. CRIM. L. & CRIMINOLOGY 719, 746–62 (2020)

Seattle (2007),⁴² Cyrus Vance Jr. in Manhattan (2009),⁴³ John Choi in Minneapolis (2011),⁴⁴ Kenneth Thompson in Brooklyn (2013),⁴⁵ and Marilyn Mosby in Baltimore (2014).⁴⁶ But this went from being an ad hoc occurrence in a few cities to a movement in 2015, when it became a coordinated effort. That year, billionaire philanthropist George Soros reached out to Whitney Tymas, then-Director of Vera's Prosecution and Racial Justice Program, to see how the two could work together to identify and back reform-minded prosecutors with the goal of ending mass incarceration.⁴⁷ Their Safety and Justice political action committees (PACs) backed three district attorneys in their first year: Scott Colom in Mississippi's Sixteenth District and James Stewart in Caddo Parish, Louisiana were seeking election and Robert Shuler Smith in Hinds County, Mississippi was seeking re-election.⁴⁸ All three won.⁴⁹ Since then, these PACs have donated to district attorney races across the country.⁵⁰ Their efforts have been joined by other PACs, most prominently Real Justice and Color of Change.⁵¹

(comparing progressive prosecutor movement to Progressive Era criminal justice reform movement from late nineteenth and early twentieth centuries). Others have tried to label themselves as progressive after the fact, most notably Kamala Harris. *See* Levin, *supra* note 27, at 1415–17.

42. *See* Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 12–15 (2019).

43. *See* Chip Brown, *Cyrus Vance Jr.'s 'Moneyball' Approach to Crime*, N.Y. TIMES MAG. (Dec. 3, 2014), <https://www.nytimes.com/2014/12/07/magazine/cyrus-vance-jrs-moneyball-approach-to-crime.html> [<https://perma.cc/BPN2-RXYF>].

44. *See* *Biography*, RAMSEY CNTY. ATT'Y'S OFF., <https://www.ramseycounty.us/your-government/leadership/county-attorneys-office/meet-john-j-choi/biography> [<https://perma.cc/Y7EN-YBYU>] (last visited Feb. 14, 2021).

45. *See* Sklansky, *Changing Political Landscape*, *supra* note 8, at 647.

46. *See id.* at 647–48.

47. Nick Tabor, *What If Prosecutors Wanted to Keep People Out of Prison?*, N.Y. MAG. INTELLIGENCER (Mar. 27, 2018), <https://nymag.com/intelligencer/2018/03/what-if-prosecutors-wanted-to-keep-people-out-of-prison.html/> [<https://perma.cc/4R7M-FABM>].

48. *See* Scott Bland, *George Soros' Quiet Overhaul of the U.S. Justice System*, POLITICO (Aug. 30, 2016, 5:25 AM), <https://www.politico.com/story/2016/08/george-soros-criminal-justice-reform-227519> [<https://perma.cc/42JY-BHLQ>].

49. *Id.*

50. *See, e.g.*, Gary Craig, *PAC Led by George Soros Buys \$800K in Ads for Mitchell in Monroe County DA Race*, DEMOCRAT & CHRON. (Oct. 20, 2019, 10:25 PM), <https://www.democratandchronicle.com/story/news/2019/10/20/sandra-doorley-shani-curry-mitchell-monroe-county-district-attorney-race-george-soros-pac-buys-ads/3978724002/> [<https://perma.cc/YB9M-63ER>] (explaining a George Soros PAC helped finance Democratic Monroe County district attorney candidate Shani Curry Mitchell).

51. Justin Miller, *The New Reformer DAs*, AM. PROSPECT (Jan. 2, 2018), <https://prospect.org/health/new-reformer-das> [<https://perma.cc/3SBX-23SY>]; Matt Ferner, *George Soros, Progressive Groups to Spend Millions to Elect Reformist Prosecutors*, HUFFPOST (May 12, 2018, 7:00 AM), https://www.huffpost.com/entry/george-soros-prosecutors-reform_n_5af2100ae4b0a0d601e76f06 [<https://perma.cc/UH5U-YA2A>].

The push to get progressive prosecutors elected has generally been successful. In the last five years, dozens of prosecutors running on platforms of reform around the country have won election, and a few have already been re-elected.⁵² Counties and cities in Alabama,⁵³ Arizona,⁵⁴ California,⁵⁵ Colorado,⁵⁶ Florida,⁵⁷ Georgia,⁵⁸ Illinois,⁵⁹ Indiana,⁶⁰

52. See, e.g., CBS 2 Chicago Staff, *Democratic Cook County State's Attorney Kim Foxx Wins Second Term, Defeating GOP Challenger Pat O'Brien*, CBS 2 CHI. (Nov. 3, 2020, 11:01 PM), <https://chicago.cbslocal.com/2020/11/03/democratic-cook-county-states-attorney-kim-foxx-holds-double-digit-lead-over-gop-challenger-pat-obrien/> [<https://perma.cc/34F7-LPKX>].

53. See, e.g., Ivana Hryniw, *Danny Carr Wins Jefferson County District Attorney Race*, AL.COM (Nov. 7, 2018), <https://www.al.com/news/birmingham/2018/11/jefferson-county-district-attorney-race-live-updates.html> [<https://perma.cc/H4KK-P9CZ>] (Danny Carr in Jefferson County).

54. See, e.g., Daniel Nichanian & Anna Simonton, *How Criminal Justice Reform Fared at the Ballot Box on Tuesday*, THE APPEAL (Nov. 5, 2020), <https://theappeal.org/politicalreport/criminal-justice-reform-2020-election-results/> [<https://perma.cc/L6UZ-67VM>] (Laura Conover in Pima County).

55. See, e.g., *id.* (George Gascón in Los Angeles); Janis Hashe, *Diana Becton Shakes Up the DA's Office*, OAKLAND MAG. (July 8, 2019), <http://www.oaklandmagazine.com/July-2019/Diana-Becton-Shakes-Up-the-DAs-Office> [<https://perma.cc/S4TK-SGAM>] (Diana Becton in Contra Costa); Elizabeth Weill-Greenberg, *Public Defender Chesa Boudin Wins San Francisco D.A. Race in Major Victory for Progressive Prosecutor Movement*, THE APPEAL (Nov. 9, 2019), <https://theappeal.org/public-defender-chesa-boudin-wins-san-francisco-da-race-in-major-victory-progressive-prosecutor-movement> [<https://perma.cc/4TB2-L3DA>] (Chesa Boudin in San Francisco).

56. See, e.g., Nichanian & Simonton, *supra* note 54 (Alexis King in Jefferson County, Gordon McLaughlin in Larimer County, and Alonzo Payne in San Luis Valley); Mitchell Byars, *Boulder County DA Announces Bid for Reelection*, DAILY CAMERA (Jan. 15, 2020, 7:05 PM), <https://www.dailycamera.com/2020/01/15/boulder-county-damichael-dougherty-announces-bid-for-reelection> [<https://perma.cc/N7QC-WTE9>] (Michael Dougherty in Boulder); Maurice Chammah, *These Prosecutors Campaigned for Less Jail Time – and Won*, MARSHALL PROJECT (Nov. 9, 2016, 6:14 AM), <https://www.themarshallproject.org/2016/11/09/these-prosecutors-campaigned-for-less-jail-time-and-won> [<https://perma.cc/J2Y4-QN8L>] (Beth McCann in Denver).

57. See, e.g., Nichanian & Simonton, *supra* note 54 (Monique Worrell in Orange County); Chammah, *supra* note 56 (Aramis Ayala in Orange County and Andrew Warren in Hillsborough County).

58. See, e.g., Chammah, *supra* note 56 (Darius Pattillo in Henry County).

59. See, e.g., *id.* (Kim Foxx in Cook County).

60. See, e.g., Matt McKinney, *Marion County Could Be Forced to Prosecute Marijuana Cases, Despite Prosecutor Ryan Mears' Policy*, WRTV INDIANAPOLIS (Jan. 28, 2020, 2:57 PM), <https://www.wrtv.com/news/politics/marion-county-could-be-forced-to-prosecute-marijuana-cases-despite-mears-policy> [<https://perma.cc/3YMX-EYAD>]

Kansas,⁶¹ Louisiana,⁶² Maine,⁶³ Massachusetts,⁶⁴ Michigan,⁶⁵ Mississippi,⁶⁶ Missouri,⁶⁷ New Mexico,⁶⁸ New York,⁶⁹ North Carolina,⁷⁰

61. See, e.g., Rory Fleming, *Prosecutors: What Makes a Reformer?*, THE APPEAL (Oct. 17, 2017), <https://theappeal.org/prosecutors-what-makes-a-reformer> [https://perma.cc/T39C-7EC9] (Mark Dupree in Wynadotte County).

62. See, e.g., Bland, *supra* note 48 (James Stewart in Caddo Parish).

63. See, e.g., Bill Pearson, *Natasha Irving Bringing Lessons Learned as a Defense Attorney to DA's Office*, PENOBSCOT BAY PILOT (Jan. 24, 2020, 10:45 PM), <https://www.penbaypilot.com/article/natasha-irving-bringing-lessons-learned-defense-attorney-da-s-office/129535> [https://perma.cc/M796-FRVJ] (Natasha Irving in the Sixth Prosecutorial District).

64. See, e.g., Josh Landes, *Berkshire DA Harrington Promises Reform at Swearing-In*, WAMC (Jan. 2, 2019), <https://www.wamc.org/post/berkshire-da-harrington-promises-reform-swearing> [https://perma.cc/BZU4-LVEP] (Andrea Harrington in Berkshire County); Zaid Jilani, *Underdog Criminal Justice Reformer Rachael Rollins Wins District Attorney Primary in Boston's Suffolk County*, THE INTERCEPT (Sept. 7, 2018, 2:00 AM), <https://theintercept.com/2018/09/07/boston-suffolk-county-district-attorney-rachael-rollins> [https://perma.cc/5SWR-8QLV] (Rachael Rollins in Suffolk County).

65. See, e.g., Nichanian & Simonton, *supra* note 54 (Eli Savit in Washtenaw County); Mark Cavitt, *Karen McDonald Begins First Week as Oakland County Prosecutor, Eyeing Policy Reforms*, THE OAKLAND PRESS (Jan. 5, 2021), https://www.theoaklandpress.com/news/karen-mcdonald-begins-first-week-as-oakland-county-prosecutor-eyeing-policy-reforms/article_161ab156-4f6d-11eb-989b-af331f9bf496.html [https://perma.cc/R3EM-A6N5] (Karen McDonald in Oakland County).

66. See, e.g., Daniel Nichanian, *Voters Beyond Big Cities Rejected Mass Incarceration in Tuesday's Elections*, THE APPEAL (Nov. 7, 2019), <https://theappeal.org/politicalreport/voters-beyond-big-cities-rejected-mass-incarceration-in-tuesdays-elections> [https://perma.cc/SNK3-NSVW] (Shameca Collins in the Sixth District).

67. See, e.g., Richard A. Oppel Jr., *The St. Louis Prosecutor Went After the Establishment. Now the Tables Are Turned.*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/us/st-louis-prosecutor-kim-gardner.html> [https://perma.cc/5MQ2-SYK6] (Kimberly Gardner in St. Louis city); Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW360 (Apr. 7, 2019, 8:02 PM), <https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor> [https://perma.cc/3N3Q-H9U6] (Wesley Bell in St. Louis County).

68. See, e.g., Edmundo Carrillo, *Serna Settling in at District Attorney's Office*, ALBUQUERQUE J. (Jan. 13, 2017, 12:02 AM) <https://www.abqjournal.com/926954/serna-settling-in-at-district-attorneys-office.html> [https://perma.cc/5C2J-XTBW] (Marco Serna in Santa Fe).

69. See, e.g., Alan Feuer, *Brooklyn District Attorney Turns to Experts for Ideas on Reform*, N.Y. TIMES (Jan. 23, 2018), <https://www.nytimes.com/2018/01/23/nyregion/brooklyn-da-eric-gonzalez-reform.html> [https://perma.cc/PYZ6-DBMM] (Eric Gonzalez in Brooklyn).

70. See, e.g., Erin Williams, *Satana Deberry and the Quest to Reform Justice in Durham*, INDY (Dec. 27, 2019, 4:04 PM), <https://indyweek.com/news/ninth-street-journal/satana-deberry-and-the-quest-to-reform-justice-in-durham/> [https://perma.cc/B4JZ-CPM5] (Satana Deberry in Durham County).

Ohio,⁷¹ Pennsylvania,⁷² Tennessee,⁷³ Texas,⁷⁴ Vermont,⁷⁵ Virginia,⁷⁶ and others have elected progressive prosecutors. Some of these candidates

71. See, e.g., Cory Shaffer, *Michael O'Malley Topples Cuyahoga County Prosecutor Timothy McGinty*, CLEVELAND.COM (Mar. 16, 2016), https://www.cleveland.com/metro/2016/03/michael_omalley_topples_cuyaho_1.html [https://perma.cc/M5E2-EV6J] (Michael O'Malley in Cuyahoga County).

72. See, e.g., Alex Rose, *Dem Stollsteimer Upends Incumbent GOP D.A. Copeland*, DAILY TIMES (Nov. 6, 2019), https://www.delcotimes.com/news/dem-stollsteimer-upends-incumbent-gop-d-a-copeland/article_ce37c532-004d-11ea-bcf7-f38b58f19cc3.html [https://perma.cc/9D3Q-ET3H] (Jack Stollsteimer in Delaware County); Chris Brennan & Aubrey Whelan, *Larry Krasner Wins Race for Philly DA*, PHILA. INQUIRER (Nov. 7, 2017, 9:11 PM), <https://www.inquirer.com/philly/news/politics/city/larry-krasner-wins-race-for-philly-da-20171107.html> [https://perma.cc/4HBD-FUXB] (Larry Krasner in Philadelphia).

73. See, e.g., Opper, *supra* note 21 (Glenn Funk in Nashville).

74. See, e.g., Nichanian & Simonton, *supra* note 54 (José Garza in Travis County); Chammah, *supra* note 56 (Kim Ogg in Harris County); Ariel Ramchandani, *A Texas Prosecutor Fights for Reform*, ATLANTIC (Oct. 24, 2019), <https://www.theatlantic.com/politics/archive/2019/10/can-john-creuzot-reform-texas-prosecution/600592> [https://perma.cc/VW3T-JVCJ] (John Creuzot in Dallas County); Christopher Hooks, *Is the Best Offense a Good Defense Lawyer?*, TEX. MONTHLY (Nov. 2016), <http://www.texasmonthly.com/politics/best-offense-good-defense-lawyer> [https://perma.cc/YT4G-R3A8] (Mark Gonzalez in Nueces County).

75. See, e.g., Aidan Quigley, *Amid a New Generation of Prosecutors, Sarah George Stands Out*, VT DIGGER (July 7, 2019), <https://vtdigger.org/2019/07/07/amid-a-new-generation-of-prosecutors-sarah-george-stands-out> [https://perma.cc/H8CW-FHU6] (Sarah George in Chittenden County).

76. See Nichanian, *supra* note 66 (Amy Ashworth in Prince William County, Buta Biberaj in Loudon County, Steve Descano in Fairfax County, Parisa Dehghani-Tafti in Arlington County, Jim Hingeley in Albermarle County, and Stephanie Morales in Portsmouth).

have lost, however, including in Arizona,⁷⁷ California,⁷⁸ Colorado,⁷⁹ Illinois,⁸⁰ Kansas,⁸¹ New York,⁸² Ohio,⁸³ Pennsylvania,⁸⁴ South Carolina,⁸⁵ and Texas.⁸⁶

77. See, e.g., Caren Morrison, *Progressive Prosecutors Scored Big Wins in 2020 Elections, Boosting a Nationwide Trend*, THE CONVERSATION (Nov. 18, 2020, 8:22 AM), <https://theconversation.com/progressive-prosecutors-scored-big-wins-in-2020-elections-boosting-a-nationwide-trend-149322> [<https://perma.cc/3HG5-N46Z>] (Julie Gunnigle in Maricopa County); Rebekah L. Sanders, *Question in Maricopa County Attorney's Race: Has the Office Been Reformed or Mismanaged?*, AZ CENTRAL (Oct. 14, 2016, 2:32 PM), <https://www.azcentral.com/story/news/politics/elections/2016/10/14/maricopa-county-attorney-election-bill-montgomery-diego-rodriguez/91921540/> [<https://perma.cc/NZ5E-QYVS>]; Diego Rodrigues (Arizona), BALLOTPEdia, [https://ballotpedia.org/Diego_Rodriguez_\(Arizona\)](https://ballotpedia.org/Diego_Rodriguez_(Arizona)) [<https://perma.cc/AHY7-WJU8>] (last visited Feb. 15, 2021) (Diego Rodriguez in Maricopa County).

78. See, e.g., Darrell Smith, *Sacramento Judge Rejects Noah Phillips' Bid to Throw DA's Office Off Murder Case*, SACRAMENTO BEE (July 1, 2018, 8:30 AM), <https://www.sacbee.com/news/local/article214116244.html> (Noah Phillips in Sacramento County); *Voters Choose Nancy O'Malley Over Pamela Price for Alameda County District Attorney*, KTVU FOX 2 (June 6, 2018), <https://www.ktvu.com/news/voters-choose-nancy-omalley-over-pamela-price-for-alameda-county-district-attorney> [<https://perma.cc/L2JG-6CY2>] (Pamela Price in Alameda County); Greg Moran, *DA Race: Stephan Easily Defeats Challenger Jones-Wright, Earns Full Term*, SAN DIEGO UNION-TRIB. (June 6, 2018, 5:50 AM), <https://www.shawlocal.com/2020/11/02/with-unofficial-results-in-amato-looks-to-be-first-dekalb-county-states-attorney-to-serve-2nd-term-since-2008/a1ap4t1/> [<https://perma.cc/H294-4G77>] (Geneviève Jones-Wright in San Diego County).

79. See, e.g., Chammah, *supra* note 56 (Jake Lilly in Jefferson County).

80. See, e.g., Kelsey Rettke, *With Unofficial Results in, Amato Looks to Be First DeKalb County State's Attorney to Serve 2nd Term Since 2008*, DAILY CHRON. (Nov. 10, 2020, 2:55 PM), <https://www.shawlocal.com/2020/11/02/with-unofficial-results-in-amato-looks-to-be-first-dekalb-county-states-attorney-to-serve-2nd-term-since-2008/a1ap4t1> [<https://perma.cc/VQ57-43KV>] (Anna Wilhelmi in DeKalb County).

81. See, e.g., Morrison, *supra* note 77 (Zack Thomas in Johnson County).

82. See, e.g., *Sandra Doorley Beats Shani Curry Mitchell for Monroe County District Attorney*, ROCHESTER FIRST (Nov. 6, 2019, 10:23 AM), <https://www.rochesterfirst.com/local-politics/sandra-doorley-beats-shani-curry-mitchell-for-monroe-county-district-attorney/> [<https://perma.cc/9D57-ZNWY>] (Shani Curry Mitchell in Monroe County); Vivian Wang, *Tiffany Cabán Concedes Queens D.A. Race, Dashing Progressives' Hopes*, N.Y. TIMES (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/nyregion/tiffany-caban-queens-da-concedes.html> [<https://perma.cc/UGC8-2AKB>] (Tiffany Cabán in Queens).

83. See, e.g., Cara Bayles, *A New Class of Prosecutors: Reformers Win Races Nationwide*, LAW360 (Nov. 8, 2020, 8:02 PM), <https://www.law360.com/articles/1326594/a-new-class-of-prosecutors-reformers-win-races-nationwide> [<https://perma.cc/5KJZ-5NF7>] (Fanon Rucker in Hamilton County).

84. See, e.g., *Allegheny County District Attorney Stephen Zappala Defeats Challenger Turahn Jenkins in Primary*, PITTSBURGH'S ACTION NEWS 4 (May 22, 2019, 7:35 AM), <https://www.wtae.com/article/allegheny-county-district-attorney-stephen-zappala-defeats-turahn-jenkins-democratic-primary/27547120> [<https://perma.cc/98MX-8RCR>] (Turahn Jenkins in Allegheny County).

85. See, e.g., Fleming Smith, *Wilson Defeats Pogue, Keeps Seat as Top Prosecutor for Charleston and Berkeley Counties*, POST & COURIER (Nov. 4, 2020), <https://www.postandcourier.com/news/wilson-defeats-pogue-keeps-seat-as-top->

Despite great diversity in the geographies where these candidates run, the tools in the progressive prosecutor toolkit are fairly standardized. This coordination comes from the top: the three primary PACs backing this movement articulate the type of candidates they are looking for in similar ways. Real Justice looks for “prosecutors who will make a material impact on people’s lives by helping end discriminatory policing, eliminating money bail, and rolling back practices that lead to mass incarceration.”⁸⁷ Tymas has said that the Safety and Justice PACs are looking for candidates focused on reducing mass incarceration and ending discrimination, including by opposing cash bail, filing lesser charges for non-violent offenses, implementing diversionary programs, prosecuting police misconduct, and considering collateral consequences as part of their charging process.⁸⁸ Color of Change makes six “demands” of prosecutors who want its backing:

[T]o be transparent; to hold police accountable for overreaches and unnecessary violence; to treat kids like kids; to exercise their discretion and decline to prosecute petty and poverty-related offenses (like marijuana possession); to avoid the use of bail as leverage to incarcerate poor people before trial; and to avoid partisan prosecutions connected to immigration, the death penalty, and abortion.⁸⁹

The commonality of goals among these supporters translates into a relatively uniform platform across candidates. The platforms of Chesa Boudin, Kim Foxx, and Larry Krasner—three of the most prominent

prosecutor-for-charleston-and-berkeley-counties/article_566c7c9e-1e8a-11eb-afba-dbdd9fd4812.html [https://perma.cc/Y7LX-J9VZ] (Ben Pogue in the Ninth Circuit).

86. See, e.g., Tasha Tsiaperas, *Dallas County DA Candidate Says Voter Fraud Cost Her Democratic Primary, Sues Winner and Election Officials*, DALL. MORNING NEWS (Mar. 26, 2018, 8:54 PM), <https://www.dallasnews.com/news/2018/03/27/dallas-county-da-candidate-says-voter-fraud-cost-her-democratic-primary-sues-winner-and-election-officials/> [https://perma.cc/E4CG-A2R5] (Elizabeth Frizell in Dallas County).

87. REAL JUSTICE, <https://realjusticepac.org> [https://perma.cc/6XWK-G2KG] (last visited Feb. 15, 2021).

88. See Angela J. Davis & Whitney Tymas, *How Criminal Justice Reformers Should Confront Justice Kennedy’s Retirement*, THE APPEAL (Aug. 3, 2018), <https://theappeal.org/how-criminal-justice-reformers-should-confront-justice-kennedys-retirement> [https://perma.cc/5W2V-B57S]; Megan Harris, *What Inspired A Career Attorney to Wade into Local Elections?*, WESA (Nov. 9, 2017), <https://www.wesa.fm/post/what-inspired-career-attorney-wade-local-elections#stream/0> [https://perma.cc/85WA-KQNK].

89. Arisha Hatch & Terri Gerstein, *Re-Envisioning the Roles of Prosecutors and Attorneys General to Make the Justice System Work for Everyone*, STAN. SOC. INNOVATION REV. (Winter 2020), https://ssir.org/articles/entry/re-envisioning_the_roles_of_prosecutors_and_attorneys_general_to_make_the_justice_system_work_for_everyone [https://perma.cc/6Y5J-CG9K].

members of this movement—are illustrative. All three list taking on violent crime, declining to prosecute low-level offenses, providing treatment for mental illness and substance abuse through diversion programs, decreasing reliance on money bail, preventing wrongful convictions, and tackling racial disparities as priorities on their campaign websites.⁹⁰ Other common promises from these and other reform-minded district attorney candidates include the prosecution of police misconduct, the creation or strengthening of conviction integrity units, the refusal to seek the death penalty, and the elimination of prosecutorial misconduct.⁹¹

Bazelon eloquently summarizes this movement’s thesis in *Charged*. “American prosecutors have breathtaking power” and, to date, “they have mostly used it to put more people in prison, contributing to the scourge of mass incarceration, which continues to rip apart poor communities, especially if they are mostly black or brown”⁹² The *right* prosecutors, however, can use this power to “protect against convicting the innocent . . . guard against racial bias . . . [and] curtail mass incarceration.”⁹³ In other words, “prosecutors also hold the key to change.”⁹⁴

II. VALUE OF THE MOVEMENT

The progressive prosecutor movement as it exists today has several positives. It recognizes that, while prosecutors’ power is not unlimited, it is arguably greater than that of any other actor in the criminal system. The consequences of their decisions determine not only whether a citizen will have their liberty taken away but also the collateral consequences that will follow. They do not regulate police, but they can prosecute police wrongdoing.⁹⁵ They can also decline to prosecute cases where police acted

90. See *Issues*, CHESA BOUDIN FOR DIST. ATT’Y 2019 (Jan. 1, 2020), https://www.chesaboudin.com/mental_health [https://web.archive.org/web/20200101125701/]; *Priorities*, KIM FOXX COOK COUNTY STATE’S ATT’Y, <https://www.kimfoxx.com/priorities> [https://perma.cc/8UC9-Q7PL] (last visited Feb. 15, 2021); *On the Issues*, KRASNER FOR DIST. ATT’Y, <https://krasnerforda.com/platform> [https://perma.cc/X229-M8LL] (last visited Feb. 15, 2021).

91. See, e.g., BAZELON, *supra* note 4, at 156 (creation of conviction integrity units); Note, *supra* note 29, at 754–55 (police accountability); *Wrongful Convictions Unit*, CHESA BOUDIN DISTRICT ATT’Y 2019 (April 30, 2019), https://www.chesaboudin.com/wrongful_convictions [http://web.archive.org/web/20200101141322/] (wrongful convictions unit, prosecutorial misconduct); KRASNER FOR DIST. ATT’Y, *supra* note 90 (death penalty and police misconduct).

92. BAZELON, *supra* note 4, at xxv.

93. *Id.* at xxvii.

94. *Id.*

95. For a thoughtful discussion of the challenges with this movement’s focus on prosecuting police officers, see Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. (forthcoming 2021).

legally but, in the prosecutor's view, discriminatorily.⁹⁶ Reform-minded district attorneys generally take the place of a person less—and in some cases, much less—inclined to exercise this power and discretion with an eye towards equity and leniency.⁹⁷ Thus, even if every criticism I level below is true, the fact that these prosecutors are in office is likely better, and almost certainly no worse, than the alternative for the hundreds of individuals their offices process each day. For example, Kim Foxx and Larry Krasner substantially decreased their county jail populations even before the COVID-19 outbreak.⁹⁸

Some progressive prosecutors, moreover, have pushed beyond the movement's standard platform. Rather than only reducing his office's reliance on money bail, within two weeks of taking office, Boudin prohibited his assistants from requesting money bail absent "extraordinary circumstances."⁹⁹ Krasner and Eric Gonzalez administer diversion programs for individuals accused of gun possession, taking a small step toward lenience for those accused of "violent" crime—the third rail of criminal law politics.¹⁰⁰ Sarah George has dismissed charges in several

96. See *infra* note 306 and accompanying text.

97. See, e.g., Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 *YALE L.J.F.* 848, 926–28 (2019), <https://www.yalelawjournal.org/forum/the-punishment-bureaucracy> [<https://perma.cc/P5PS-QZXZ>] (comparing Kim Foxx, Kim Ogg, and George Gascón to their predecessors).

98. See *Cook County 2020 Safety and Justice Challenge Fact Sheet*, SAFETY + JUSTICE CHALLENGE, <http://www.safetyandjusticechallenge.org/wp-content/uploads/2020/02/Cook-County-2020-SJC-Fact-Sheet.pdf> [<https://perma.cc/69ER-8WQK>] (noting 30% decrease in Cook County jail population since 2016); Bobby Allyn, *After Year One, Philly DA Larry Krasner Earns Praise from Reformers, Scorn from Victim Advocates*, *WHYY* (Feb. 5, 2019), <https://whyy.org/articles/after-his-first-year-philly-d-a-larry-krasner-earns-praise-from-reformers-scorn-from-victim-advocates> [<https://perma.cc/9KDF-U5LR>] (reporting an approximately 30% decrease in Philadelphia city jail population during Krasner's first year in office).

99. See *Policy Directive: San Francisco District Attorney's Office Pretrial Detention and Release Conditions*, CITY & CNTY. OF S.F. OFF. OF THE DIST. ATT'Y (Jan. 22, 2020), <https://sfdistrictattorney.org/wp-content/uploads/2020/11/Pretrial-Detention-and-Release-Conditions.pdf> [<https://perma.cc/5FNV-YNV8>] [hereinafter *Policy Directive*]. Gascón's line prosecutors may not request money bail "for any misdemeanor, non-serious felony, or non-violent felony offense." Memorandum from George Gascón, *Special Directive 20-06* at 4 (Dec. 7, 2020), <https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-06.pdf> [<https://perma.cc/WP7L-MPL9>].

100. See *BAZELON*, *supra* note 4, at 30–31 (describing Youth and Congregations in Partnership diversion program for young people accused of gun possession in Brooklyn); Alex Yablon, *Larry Krasner's Lonely, Radical Crusade to Solve America's Gun Problem*, *THE TRACE* (Jan. 28, 2020), <https://www.thetrace.org/2020/01/larry-krasner-gun-violence-reform-philadelphia-district-attorney/> [<https://perma.cc/WCK6-4XE3>] (recounting the uptick in gun possession cases sent to Accelerated Rehabilitative Disposition under Krasner).

serious cases based on the strength of the accused's defenses, including murder charges against three defendants who claimed insanity.¹⁰¹

The movement also has impacts beyond the policies that any given district attorney puts in place. The mere fact that it has been so widespread and successful is democracy-enhancing.¹⁰² Most district attorney elections are uncontested, and therefore do not really serve as a referendum on a candidate's policies or as a check on their power.¹⁰³ The possibility of being called out during an election for being more punitive than voters want should make incumbents more responsive to their constituents' preferences.¹⁰⁴ And the fact that progressive candidates have won their races not only in liberal, urban areas like San Francisco¹⁰⁵ but also in conservative, rural and suburban ones like Nueces, Texas,¹⁰⁶ signals that whether criminal defendants should be treated fairly does not depend on where they live.

The movement is spreading not only geographically but also to other elected offices. In most states, judges are either elected outright or face retention elections.¹⁰⁷ These races have also traditionally been a referendum on who will be tougher on crime.¹⁰⁸ And in some jurisdictions,

101. See Quigley, *supra* note 75. All three defendants were instead placed in the custody of the Department of Mental Health. See Aidan Quigley, *George Defends Insanity Case Dismissals Amid Public Safety Worries*, VT DIGGER (June 6, 2019), <https://vtdigger.org/2019/06/06/george-defends-insanity-case-dismissals-amid-public-safety-worries> [https://perma.cc/GZ7R-BDFW].

102. For an argument that progressive prosecutors' nonenforcement policies are a form of wholesale, democratically backed nullification, see Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. (forthcoming April 2021).

103. See *Tipping the Scales*, *supra* note 37.

104. For example, Los Angeles District Attorney Jackie Lacey released a campaign ad intended to push back on challenger George Gascón's allegations that she was not "progressive." See Jeremy B. White, *California DA Race a Major Test for Criminal Justice Reform Movement*, POLITICO (Nov. 7, 2019, 11:50 AM), <https://www.politico.com/states/california/story/2019/11/07/california-da-race-a-major-test-for-criminal-justice-reform-movement-1226372> [https://perma.cc/8D6X-REWB].

105. Elizabeth Weill-Greenberg, *Public Defender Chesa Boudin Wins San Francisco D.A. Race in Major Victory for Progressive Prosecutor Movement*, THE APPEAL (Nov. 9, 2019), <https://theappeal.org/public-defender-chesa-boudin-wins-san-francisco-da-race-in-major-victory-progressive-prosecutor-movement> [https://perma.cc/Y8XJ-DJJ6] (Chesa Boudin in San Francisco).

106. Justin Jouvenal, *From Defendant to Top Prosecutor, This Tattooed Texas DA Represents a New Wave in Criminal Justice Reform*, WASH. POST (Nov. 19, 2018, 5:25 PM), https://www.washingtonpost.com/local/public-safety/from-defendant-to-top-prosecutor-this-tattooed-texas-da-represents-a-new-wave-in-criminal-justice-reform/2018/11/19/e1dca7cc-d300-11e8-83d6-291fceed2ab1_story.html [https://perma.cc/KUY2-JT6U].

107. See *Judicial Selection: An Interactive Map*, BRENNAN CTR. FOR JUST., <http://judicialselectionmap.brennancenter.org/?court=Trial> [https://perma.cc/7LR4-GSDJ] (last visited Feb. 6, 2021).

108. See Patrick Veasy, *Voting Against Judicial Independence: The 2010 Elections and the Threat to the Judiciary*, 35 CHAMPION 47, 48 (2011).

judges have hampered progressive prosecutors' efforts to fulfill their campaign promises. For example, Philadelphia judges have openly chastised Krasner's line prosecutors as too lenient, even appointing a special prosecutor in a case where one refused to charge a probation violation for a new arrest.¹⁰⁹ A Missouri judge sided with the state's Attorney General in refusing to let Kim Gardner's office give a new trial to a man sentenced to life in prison after her office concluded he was innocent.¹¹⁰ More recently, Nashville District Attorney Glenn Funk reduced the death sentence of a man convicted of a fatal stabbing after decades of litigation about prosecutorial misconduct at his trial; although the trial court already accepted the plea, the Tennessee Attorney General convinced a state appeals court to overturn the decision.¹¹¹ As a result, activists are targeting judicial elections as an opportunity to sweep in more progressive judges. In 2018, all 59 contested seats in civil, criminal, family, juvenile, and probate courts in Harris County, Texas, flipped from Republican to Democrat.¹¹² San Francisco elected two public defenders as judges in 2019 after a failed attempt by four public defenders to unseat four Republican-appointed judges in 2018.¹¹³ New Orleans elected two public defenders to be judges in 2020.¹¹⁴ Similar efforts in Nevada have had mixed results.¹¹⁵

109. See Allyn, *supra* note 98.

110. See Oppel, *supra* note 73.

111. See Chas Sisk, *Tennessee Appeals Court Strikes Down Deal to Spare Abur'Rahman from Death Penalty*, WPLN NEWS (Dec. 1, 2020), <https://wpln.org/post/tennessee-appeals-court-throws-out-deal-to-spare-abdurrahman-from-death-penalty>.

112. Josh Hersh & Mimi Dwyer, *Progressives Unseated All 59 Republican Judges Up for Re-Election in Houston in the Midterms*, VICE (Nov. 14, 2018, 8:52 AM), https://www.vice.com/en_us/article/pa5b8z/progressives-unseated-all-59-republican-judges-up-for-re-election-in-houston-in-the-midterms [<https://perma.cc/F2Y5-ZU38>].

113. Michael Babra, *SF Voters Electing Three New Judges to Serve on the Bench*, S.F. EXAM'R (Mar. 3, 2020, 8:45 PM), <https://www.sfexaminer.com/news/sf-voters-electing-three-new-judges-to-serve-on-the-bench> [<https://perma.cc/Z6CP-DSV7>]; Erin Allday & Bob Egelko, *SF Public Defenders' Challenge to Republican-Appointed Judges Fails*, S.F. CHRON. (June 5, 2018, 11:59 PM), <https://www.sfchronicle.com/bayarea/article/Public-defenders-challenges-to-12970921.php> [<https://perma.cc/Y2C2-KVMP>].

114. Katie Jane Fernelius, *Two New Orleans Public Defenders Elected Judge in a Push to "Flip the Bench"*, THE APPEAL (Nov. 4, 2020), <https://theappeal.org/politicalreport/new-orleans-public-defenders-elected-judge> [<https://perma.cc/LP2M-2F3M>].

115. Carli Kierny, a public defender, was elected in Nevada's Eighth Judicial District. See *Carli Lynn Kierny*, BALLOTPEDIA https://ballotpedia.org/Carli_Lynn_Kierny [<https://perma.cc/JM5H-SZAL>] (last visited Feb. 6, 2021). Meanwhile, public defender Fikisha Miller did not even make it out of her primary in the same district. See *Fikisha Miller*, BALLOTPEDIA https://ballotpedia.org/Fikisha_Miller [<https://perma.cc/V8D2-DWYC>] (last visited Feb. 6, 2021); see also Michael Lyle, *Public Defenders Run for Judge Seats to Bring 'A More Balanced Bench'*, NEV. CURRENT (May 15, 2020),

Police officers have also thrown up significant obstacles for progressive prosecutors. In some cases, they have resisted efforts to shape their arrest patterns. In Baltimore, police continue to arrest individuals for marijuana possession even though Mosby says her office will not prosecute them.¹¹⁶ Police have also undermined efforts to prosecute misconduct within their ranks. Mosby attributed her inability to secure convictions against the officers who killed Freddie Gray in part to the fact that she had to rely on the Baltimore police to investigate their own officers.¹¹⁷ Some police departments have even sought to break out of their bilateral monopoly with state prosecutors by sending cases to their federal counterparts. For example, Brooklyn police referred gun cases to federal prosecutors when they felt Thompson was not doing enough to enforce the city's strict gun laws.¹¹⁸ Activists have had a more difficult time achieving change on this front—in no small part because most police chiefs are appointed rather than elected¹¹⁹—but they have still been able to oust a small number of county sheriffs.¹²⁰ These races have not yet received the amount of attention—from the public or donors—that district attorney elections have, but there is no reason to think the movement could not replicate its successes in these and other law enforcement elections.

III. TRANSFORMING THE MOVEMENT

In arguing that this movement should set its sights on more fundamental transformation, I do not claim that the movement cannot make *any* progress towards its objectives as currently framed. On the other

<https://www.nevadacurrent.com/2020/05/15/public-defenders-run-for-judge-seats-to-bring-a-more-balanced-bench> [<https://perma.cc/4L67-EE5M>] (Nevada).

116. See, e.g., Ethan McLeod, *Baltimore Plays Catch-and-Release for Weed Arrests*, BLOOMBERG NEWS (Mar. 22, 2019, 9:46 AM), <https://www.bloomberg.com/news/articles/2019-03-22/baltimore-plays-catch-and-release-for-weed-arrests> [<https://perma.cc/TV6V-NYAV>].

117. Kevin Rector, *Charges Dropped, Freddie Gray Case Concludes with Zero Convictions*, BALT. SUN (July 27, 2016, 8:57 PM), <https://www.baltimoresun.com/news/crime/bs-md-ci-miller-pretrial-motions-20160727-story.html> [<https://perma.cc/Q9Y9-LBV6>].

118. BAZELON, *supra* note 4, at 55.

119. Gaby Del Valle, *The Police We Vote For: How Americans Can Shape Criminal Justice with a Ballot*, GUARDIAN (June 26, 2020, 8:00 AM), <https://www.theguardian.com/us-news/2020/jun/26/us-police-americans-polls-criminal-justice> [<https://perma.cc/S3ZG-L8PF>].

120. In 2020, progressive challengers won in several counties, including in the South, but others lost. See Nichanian & Simonton, *supra* note 54. In Los Angeles, progressives backed Alex Villanueva, who successfully ousted incumbent Jim McDonnell in 2018—though Villanueva has proven to be less interested in reform than they had hoped. See Jason McGahan, *Meet Sheriff Alex Villanueva, the Donald Trump of L.A. Law Enforcement*, L.A. MAG. (July 19, 2019), <https://www.lamag.com/citythinkblog/sheriff-alex-villanueva-interview> [<https://perma.cc/W2L4-4WMT>].

hand, I also do not argue that the progressive prosecutor movement does not go far enough based on my own views of what reforms are necessary. There is very little consensus among those who support “criminal justice reform” about what said reform should look like.¹²¹

Instead, my central claim is that, while we have the political will to do so, we should push this movement further. Progressive prosecutors’ core objectives are important and desperately needed, but the policies by which they seek to attain them cannot accomplish as much as they hope, nor as much as others could. As I argue in the following sections, we should use this opportunity to transform the political economy of prosecution in a way that will materially advance the movement’s goals.

A. Ending Mass Incarceration

Reducing mass incarceration is one of progressive prosecutors’ central promises. In recent years, reducing the prison population has gained bipartisan support.¹²² It is also a goal that most Americans say they support.¹²³

When reform-minded prosecutors talk about mass incarceration, they start with a common narrative: There are too many people spending too much time in prison for low-level drug offenses.¹²⁴ This story about how the United States came to have 2.3 million people incarcerated—the

121. See generally Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018).

122. See Molly Ball, *Do the Koch Brothers Really Care About Criminal-Justice Reform?*, ATLANTIC (Mar. 3, 2015), <https://www.theatlantic.com/politics/archive/2015/03/do-the-koch-brothers-really-care-about-criminal-justice-reform/386615> [<https://perma.cc/9N73-Z7QF>].

123. See *Smart Justice Campaign Polling on Americans’ Attitudes on Criminal Justice*, ACLU, <https://www.aclu.org/report/smart-justice-campaign-polling-americans-attitudes-criminal-justice> [<https://perma.cc/4LPQ-JBVX>] (last visited Feb. 6, 2021) [hereinafter *ACLU Survey*] (71% say it is somewhat or very important to reduce the prison population); *An Overview of Public Opinion and Discourse on Criminal Justice Issues*, OPPORTUNITY AGENDA 1, 31 (Aug. 2014), https://www.prisonpolicy.org/scans/2014.08.23-CriminalJusticeReport-FINAL_0.pdf [<https://perma.cc/U4H5-6Z84>] [hereinafter *Public Opinion on Criminal Issues*] (51% believe there are too many people in prison).

124. For example, Krasner begins his new hire training program by asking the lawyers if they have read Michelle Alexander’s *The New Jim Crow*, which popularized this narrative. See Jennifer Gonnerman, *Larry Krasner’s Campaign to End Mass Incarceration*, NEW YORKER (Oct. 22, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration> [<https://perma.cc/4ERL-C4DC>]; see also Miller, *supra* note 51 (“It’s become increasingly common for district attorneys to use books like *The New Jim Crow*, which details the rise of mass incarceration via the war on drugs, as props to prove their progressive bona fides.”). Foxx’s website lists “Righting the Wrongs of the War on Drugs” among her top priorities. See KIM FOXX COOK COUNTY STATE’S ATT’Y, *supra* note 90; see also BUTLER, *supra* note 29, at 46 (“The War on Drugs is the single most important explanation for mass incarceration. . . . In addition to dramatically stepping up enforcement, lawmakers increased sentences.”).

largest incarceration rate in the world¹²⁵—is intuitive. In the 1970s, our prison population was only one-fifth the size it is now.¹²⁶ Ronald Reagan declared the War on Drugs in the 1980s, and then Congress and states began enacting harsher sentencing schemes—including mandatory minimums and three strikes laws—in the 1980s and 1990s.¹²⁷ Progressive prosecutors cite this as the origin story of mass incarceration, as have prominent politicians including President Barack Obama,¹²⁸ Senator and former presidential candidate Bernie Sanders,¹²⁹ and Senator John Conyers, Jr.¹³⁰ And Americans report that those convicted of non-violent drug offenses make up a considerable portion of the incarcerated population and are subject to overly punitive sentences.¹³¹

Consistent with their views on the causes of mass incarceration, reform-minded district attorneys have committed to reducing the number of individuals charged with low-level, non-violent crimes in the system in a variety of ways.¹³² They promise diversion, treatment, and other alternatives to incarceration for these defendants.¹³³ They even pledge not

125. Joseph E. Stiglitz, *Foreword* to Oliver Roeder, Lauren-Brooke Eisen & Julia Bowling, *What Caused the Crime Decline?*, BRENNAN CTR. FOR JUST. 1, 1 (Feb. 12, 2015), <https://www.brennancenter.org/publication/what-caused-crime-decline> [<https://perma.cc/HDH8-ZM82>].

126. See PFAFF, *supra* note 39, at 1.

127. *Id.* at 52–53; John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L. & POL’Y REV. 377, 379–80 (2013); Note, *Winning the War on Drugs: A “Second Chance” For Nonviolent Drug Offenders*, 113 HARV. L. REV. 1485, 1485–86 (2000).

128. See PFAFF, *supra* note 39, at 51–52.

129. See EJ Dickson, *Bernie Sanders’ Marijuana Legalization Plan Goes Furthest of Any Candidate*, ROLLING STONE (Oct. 25, 2019, 11:43 AM), <https://www.rollingstone.com/culture/news/bernie-sanders-marijuana-weed-plan-legalization-903726> [<https://perma.cc/A8HP-2P65>].

130. See Conyers, *supra* note 127, at 379.

131. See *Crime*, GALLUP, <https://news.gallup.com/poll/1603/crime.aspx> [<https://perma.cc/HU5M-K8WN>] (last visited Feb. 6, 2021) (25% say sentencing guidelines for routine drug crimes are about right and 38% say too tough); *Public Opinion on Criminal Issues*, *supra* note 123, at 31 (80% believe that imprisoning people who commit non-violent drug offenses contributed “a lot” or “somewhat” to large prison numbers).

132. See, e.g., Matt Daniels, *The Kim Foxx Effect: How Prosecutions Have Changed in Cook County*, MARSHALL PROJECT (Oct. 24, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/10/24/the-kim-foxx-effect-how-prosecutions-have-changed-in-cook-county> (noting that “Foxx campaigned on ‘end[ing] frivolous prosecutions of non-violent drug offenses’”).

133. See, e.g., KIM FOXX COOK COUNTY STATE’S ATT’Y, *supra* note 90 (discussing diversion programs for “drug offenders, non-violent, and the mentally ill”); Memorandum from Larry Krasner, *New Pol’ys Announced Feb. 15, 2018* at 2 (Feb. 15, 2018), <https://www.documentcloud.org/documents/4415817-Philadelphia-DA-Larry-Krasner-s-Revolutionary-Memo.html> [<https://perma.cc/NP8J-ZBH5>] (listing crimes such as possession with intent to deliver as eligible for diversion).

to prosecute very minor crimes, like marijuana possession,¹³⁴ driving with a license suspended for failure to pay fines or fees,¹³⁵ frivolous trespass cases,¹³⁶ and prostitution.¹³⁷ But these policies are based on a portrait of who is incarcerated now—and therefore who must be incarcerated less frequently in order to meaningfully reduce incarceration—that is empirically inaccurate.

Today, only 20% of those in state and federal prisons and jails are incarcerated for drug offenses.¹³⁸ This is not to say that drug laws are insignificant—they still are the cause of incarceration for more than

134. See, e.g., Jonah Meadows, *No Cook County Charges for Possessing Up to 30 Grams of Marijuana*, PATCH (May 6, 2019, 4:18 PM), <https://patch.com/illinois/skokie/no-cook-county-charges-possessing-30-grams-marijuana> [https://perma.cc/U63N-JBF3]; Sandra Jordan, *Wesley Bell Explains Interim Policy Changes in Prosecution that Were Leaked to Media*, ST. LOUIS AM. (Jan. 9, 2019), http://www.stlamerican.com/news/local_news/wesley-bell-explains-interim-policy-changes-in-prosecution-that-were-leaked-to-media/article_7b49565c-145c-11e9-9384-9b11cc222827.html [https://perma.cc/GBV4-DUXQ]; Interim Off. Pol'ys to St. Louis Cnty. Assistant Prosecuting Att'ys (effective Jan. 2, 2019), <https://bloximages.chicago2.vip.townnews.com/stlamerican.com/content/tncms/assets/v3/editorial/c/9d/c9d3b51a-145c-11e9-8245-cfc48d6090eb/5c3673d90c7cc.pdf.pdf> [https://perma.cc/D4CU-GVWQ]; Owen Daugherty, *Baltimore to No Longer Prosecute Marijuana Possession*, THE HILL (Jan. 29, 2019, 12:45 PM), <https://thehill.com/homenews/state-watch/427470-baltimore-will-no-longer-prosecute-marijuana-possession-regardless-of> [https://perma.cc/4RH5-HLNT]; Press Release, Manhattan Dist. Att'y's Office, Tomorrow: D.A. Vance Ends Prosecution of Marijuana Possession and Smoking Cases (July 31, 2018), <https://www.manhattanda.org/tomorrow-d-a-vance-ends-prosecution-of-marijuana-possession-and-smoking-cases>; see also Letter from John Creuzot to the People of Dallas County (Apr. 11, 2019), https://docs.google.com/viewerng/viewer?url=https://www.texasobserver.org/wp-content/uploads/2019/04/Official-DACreuzotPoliciesLetter_April2019.pdf [https://perma.cc/P6PS-TJCC] (instituting policy of declining to prosecute “misdemeanor possession of marijuana cases for first-time offenders whose offenses do not occur in a drug-free zone, involve the use or exhibition of a deadly weapon, or involve evidence of delivery”).

135. See, e.g., Sarah Willets, *Durham County Dismisses Hundreds of Traffic Fines as Part of a License Restoration Effort*, INDY WK. (Jan. 15, 2019, 2:12 PM), <https://indyweek.com/news/durham/durham-county-dismisses-hundreds-of-traffic-fines> [https://perma.cc/3AYV-GPPP] (noting dismissal of fines and fees for those “whose licenses have been suspended for at least two years and people without ‘high-risk’ charges, such as DWI and fleeing arrest”); Yolanda Jones, *Shelby County DA's Office Won't Prosecute Many Revoked Driver's License Cases*, DAILY MEMPHIAN (Oct. 20, 2018, 4:00 AM), <https://dailyMemphian.com/article/789/Shelby-County-DAs-office-wont-prosecute-many-revoked-drivers-license-cases> [https://perma.cc/U5NW-E497] (noting policy of not prosecuting driving on a suspended license in cases if the license was suspended or revoked for nonpayment of fines and fees).

136. See, e.g., Creuzot, *supra* note 134 (declining to prosecute “all misdemeanor criminal trespass cases that do not involve a residence or physical intrusion into property”).

137. See, e.g., Krasner, *supra* note 133, at 1.

138. Sawyer & Wagner, *supra* note 15.

450,000 people.¹³⁹ But it means that even eliminating drug laws would not seriously reduce mass incarceration.

Meanwhile, more than 40% of all those incarcerated are serving time for “violent” offenses.¹⁴⁰ 55% of those in state prisons are incarcerated for violent crimes—about a quarter each for robbery, sexual assault, and murder, and almost 20% for assault.¹⁴¹ And those convicted of violent crimes serve longer sentences, further reducing the extent to which leniency for those accused of non-violent crimes will have on the prison population.

The amount of time that people actually serve in jail and prison, moreover, is likely much shorter than the public believes.¹⁴² The median amount of time served for drug crimes is fourteen months, only one month longer than for property crimes.¹⁴³ The median sentence an individual serves for a violent crime is 2.4 years.¹⁴⁴

In other words, prosecutors must treat “violent” crime differently in order to seriously reduce the number of people in prisons and jails. But that is decidedly *not* on the progressive prosecutor agenda.¹⁴⁵ Instead, reform-minded prosecutors frequently engage in what Marie Gottschalk calls a “split policy verdict”:¹⁴⁶ while promising lenience for defendants accused of non-violent crimes, they pledge to go after “violent criminals,” often calling out sexual assault in particular.¹⁴⁷ They highlight that they

139. *Id.*

140. *Id.* There is no single way to define “violent” offenses, but they typically include those in which an individual was harmed or threatened with harm. *Violent Crime*, NAT’L INST. OF JUST., <https://nij.ojp.gov/topics/crimes/violent-crime> [<https://perma.cc/6U2S-C37P>] (last visited Feb. 1, 2021) (“In a violent crime, a victim is harmed by or threatened with violence. Violent crimes include rape and sexual assault, robbery, assault and murder.”).

141. Sawyer & Wagner, *supra* note 15. This level of detail is unavailable for county jail and federal prison and jail populations.

142. PFAFF, *supra* note 39, at 55.

143. Danielle Kaebler, *Time Served in State Prison, 2016*, BUREAU OF JUST. STAT. U.S. DEP’T OF JUST. 2 tbl.1 (Nov. 2018), <https://www.bjs.gov/content/pub/pdf/tssp16.pdf> [<https://perma.cc/YR35-7VVN>].

144. *Id.*

145. As noted above, Gonzalez and Krasner have deviated slightly from this trend. *See supra* note 100 and accompanying text. It is certainly possible that at least some progressive prosecutors are taking an incremental approach, but that is problematic for the reasons I discuss below. *See infra* notes 169–170 and accompanying text.

146. MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 167 (2015).

147. *See, e.g.*, Alix Martichoux, *10 Things You Might Not Know About Chesa Boudin*, *San Francisco’s New District Attorney*, SFGATE (Nov. 20, 2019, 6:43 AM), <https://www.sfgate.com/local-politics/article/chesa-boudin-sf-da-bill-ayers-weather-underground-14839134.php> [<https://perma.cc/DRT4-UTK3>] (noting pledge to test every rape kit); Meagan Day, *Chesa Boudin Wants to Transform San Francisco’s Criminal Justice System*, JACOBIN MAG. (May 2, 2019), <https://www.jacobinmag.com/2019/05/chesa-boudin-san-francisco-district-attorney>

have succeeded in these goals during their re-election campaigns.¹⁴⁸ Discussion of how violent crimes should be treated is notably absent from the PAC statements discussed in Part I and even from aspirational platforms for progressive district attorney candidates.¹⁴⁹

Promising to prosecute more people for violent crime is a predictable complement to the progressive prosecutor's commitment to charging some crimes less frequently or not at all. The days when district attorney candidates had to be "tough on crime" may be over, but these sorts of candidates are still running to be chief prosecutors. And the job of a prosecutor is still fundamentally to seek punishment for those who commit crimes.¹⁵⁰ So, if you do not believe in punishing one group of people, you are out of a job unless you are interested in punishing another.¹⁵¹ Progressive prosecutors view those who commit violent crimes as legitimate targets.

Here too, the movement is in line with public opinion. Less than half of Americans think rehabilitation is a worthwhile effort for violent

[<https://perma.cc/K3SN-7E83>] (Chesa Boudin: "My message throughout is that I want to focus resources on serious and violent crimes."); Landes, *supra* note 64 (Andrea Harrington: "As the first female district attorney, I promise to commit the resources of my office to prosecute cases of sexual and gender based violence."); *see also* WASHTENAW CTY. OFF. PROSECUTING ATT'Y, POLICY DIRECTIVE 2021-01: POLICY ELIMINATING "ZERO TOLERANCE" POLICIES AND SETTING STANDARDS FOR PLEA BARGAINING CONDUCT AND DIVERSIONARY OPPORTUNITIES 3–4 (Jan. 1, 2021), [hereinafter POLICY DIRECTIVE 2021-01] (rescinding all prior policies prohibiting line prosecutors from "offering or accepting a particular plea bargain or case resolution," except the one governing domestic violence charges).

148. *See, e.g.*, Daniel Tucker, Bianca Martin, Stephanie Kim & Libby Berry, *Chicago's Top Prosecutor Kim Foxx on Seeking a Second Term*, NPR (Nov. 27, 2019), <https://www.npr.org/local/309/2019/11/27/783068143/chicago-s-top-prosecutor-kim-foxx-on-seeking-a-second-term> [<https://perma.cc/GES4-2E7B>] (Foxx: "[W]e've reallocated our resources to go after violent crime.").

149. The two primary such platforms are written by Emily Bazelon, in conjunction with Fair and Just Prosecution, and David Sklansky. *See 21 Principles for the 21st Century Prosecutor*, BRENNAN CTR. FOR JUST. (2018) https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf [<https://perma.cc/G4MS-ADZW>]; *Progressive Prosecutor's Handbook*, *supra* note 8.

150. Jeffrey Bellin argues that a better normative theory of prosecution follows a servant-of-the-law model, which complements rather than contradicts the progressive prosecutor movement. *See* Jeffrey Bellin, *Theories of Prosecution*, 108 CAL. L. REV. 1203, 1211–15 (2020).

151. *See* Ben Austen, *In Philadelphia, A Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, N.Y. TIMES MAG. (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> [<https://perma.cc/W47H-VBMB>] ("In June, Krasner's office released a statement that it had secured guilty verdicts or guilty pleas in 70 of the 85 homicide cases it tried in court, as if it were necessary to point out that the D.A. was still fighting crime.").

individuals.¹⁵² Nearly the same percentage believe that the criminal system does not do an effective job of imprisoning dangerous individuals.¹⁵³ More concerning still, a significant majority believe that the criminal system does not do an effective job of “keeping criminals off the streets” or ensuring that “criminals receive punishments that are morally right and fully deserved.”¹⁵⁴ Americans may not really want fewer people incarcerated; they might just want different people incarcerated.¹⁵⁵

This perspective is mirrored at the organizer level in the progressive prosecutor movement. The ACLU’s Campaign for Smart Justice has received \$50 million from Soros.¹⁵⁶ Its director told Bazelon he was disappointed that their legislative reforms in some states—to decriminalize or reclassify drugs and raise the threshold for felony property offenses—did not reduce the incarcerated population as much as they had hoped.¹⁵⁷ The progressive prosecutor movement is simply repeating the mistake of targeting crimes that contribute a small percentage to the incarceration but still expecting to make a big impact.

To end mass incarceration, district attorneys should change how they talk about violent crime. Scholars have assumed that public punitiveness is driven by fear of violent crime or past victimization—even though empirical research resoundingly rejects the latter theory and has produced mixed results about the former¹⁵⁸—and that these sentiments would consequently diminish if Americans could recognize that crime is falling rather than rising.¹⁵⁹ But new research suggests that, at least for violent crime, people’s perspectives on punishment may actually be driven by broader ideas about social organization, individual responsibility, and perceived group differences.¹⁶⁰ Therefore, in order to gain broad political support for the type of measures that would decrease mass incarceration,

152. See *Public Opinion on Criminal Issues*, *supra* note 123, at 20 (noting that 49% of people disagree with the statement: “In most cases of adult, violent prisoners, efforts to rehabilitate are a waste of time and money”).

153. See *id.* at 23 (50% of respondents assigned the criminal justice system a “just fair” or “poor” rating at “[p]utting dangerous criminals in prison.”).

154. *Id.*

155. See Elisabeth Epps, *Amber Guyger Should Not Go to Prison*, THE APPEAL (Oct. 7, 2019), <https://theappeal.org/amber-guyger-botham-jean> [<https://perma.cc/3XT2-MGCK>] (“If your strategy to end mass incarceration is putting more white collar criminals in prison and freeing folks caged only on petty drug offenses, then you don’t want fewer people in prison, you just want different people in prison.”).

156. BAZELON, *supra* note 4, at 83.

157. *Id.*

158. See Michael O’Hear & Darren Wheelock, *Violent Crime and Punitiveness: An Empirical Study of Public Opinion*, 103 MARQ. L. REV. 1035, 1044 (2020).

159. See BAZELON, *supra* note 4, at 86–87; RACHEL ELISE BARKOW, PRISONERS OF POLITICS 106 (2019) (“If one has direct experience with crime or the criminal justice system, that experience will tend to shape one’s view of an appropriate policy response.”).

160. See O’Hear & Wheelock, *supra* note 158, at 1037–38.

advocates should start a meaningful conversation with their constituents about these issues. Specifically, they should resist the urge to paint with a broad brush when speaking about and setting policies for the prosecution of those who commit violent crime. The actions of these individuals, and, accordingly, the extent to which they deserve punishment or rehabilitation, must become part of the public conversation about the link between social circumstances—including conditions such as poverty and abuse—and crime.

Dan Satterberg's effort to overturn Washington Supreme Court decisions requiring judges to consider youth when sentencing juveniles illustrates how some progressive prosecutors oversimplify violent crime in order to justify their expansive power. The U.S. Supreme Court has recognized that judges must consider youth when sentencing juveniles to life sentences¹⁶¹ and may not sentence them to death.¹⁶² In doing so, the Justices recognized that "children are constitutionally different from adults for purposes of sentencing."¹⁶³ The Washington Supreme Court subsequently held that judges must consider children's youth when sentencing them as adults¹⁶⁴ and made its decision retroactive. Satterberg has asked the U.S. Supreme Court to overrule his state's highest court, arguing not only that judges need not consider age in all juvenile cases, but that they should not have discretion to sentence children below presumptive sentencing ranges.¹⁶⁵ In his petition to the Court, he repeatedly highlighted the sensational details of some juveniles' crimes.¹⁶⁶

161. See *Miller v. Alabama*, 567 U.S. 460, 465 (2012); *Graham v. Florida*, 560 U.S. 48, 74 (2010). In *Jones v. Mississippi*, No. 18-1259 (argued Nov. 3, 2020), the Court will decide what such a consideration must entail.

162. See *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

163. *Miller*, 567 U.S. at 471.

164. See *State v. Houston-Sconiers*, 391 P.3d 409, 420 (Wash. 2017).

165. See Petition for a Writ of Certiorari, *Ali*, No. 20-830 (filed Dec. 16, 2020). Although Satterberg is technically appealing the case in which the Washington Supreme Court held that *Houston-Sconiers* is retroactive, he has been explicit that his challenge is to *Houston-Sconiers*—a case litigated in a different county and therefore that he could not appeal—itsself. *Id.* at 11 n.7 ("The State challenges the Washington court's conclusion that the Eighth Amendment demands strict proportionality when sentencing all juvenile offenders in adult court. It does not seek review of the state court's retroactive application of *Houston-Sconiers* under *Teague v. Lane*, 489 U.S. 288 (1989).").

166. See, e.g., *id.* at 13 (lamenting the reversal of a juvenile's "20-year sentence for multiple counts of child rape and child molestation"). When called on (by a former judge and a former prosecutor) to stop charging children as adults because of racial disparities in the practice, Satterberg justified the practice on the grounds that some children commit violent crimes and thus deserve long sentences, rather than by addressing the racial implications of his charging decisions. See Dan Satterberg, *Juvenile Justice in King County: The Most Violent Crimes Don't Present Easy Answers*, SEATTLE TIMES (Feb. 18, 2021, 7:38 AM), <https://www.seattletimes.com/opinion/juvenile-justice-in-king-county-the-most-violent-crimes-dont-present-easy-answers> [https://perma.cc/98YT-NQ8J]; J. Wesley Saint Clair & Stephan M. Thomas, *End the Cruel, Racist Practice of Prosecuting Children in Adult Court*, SEATTLE TIMES (Feb. 10, 2021, 2:54 PM),

He did so in a way that disguises a question about the sentencing floor for juveniles—whether judges can mitigate sentences based on age—as one about their ceiling—whether some of those who commit very violent crimes can be severely punished despite their youth. This mirage, moreover, obscures an effort to preserve his own power over juvenile defendants. Because prosecutors effectively set sentencing ranges for those individuals by choosing to charge them as adults, what plea deals to offer, and what sentences to request, his effort to curb judicial discretion is fundamentally an attempt to prohibit judges from deciding that a child's youth justifies imposing less punishment than *he* (and less progressive prosecutors in other jurisdictions) deems fair.

There are a few progressive prosecutors, however, who have deviated from the traditional stance on violent crime, but only in limited circumstances. Krasner and Gonzalez operate diversion programs that admit individuals charged with firearm possession.¹⁶⁷ In Vermont, Sarah George has dismissed cases—including murder charges—against a handful of defendants with strong self-defense or insanity claims.¹⁶⁸ It is significant that these prosecutors have developed nuance in their prosecutorial policies regarding punishment for those accused of violent crimes. The next step is for them to incorporate this view into their public positions and discussions on this issue.

This shift in the rhetoric of violent crime must happen quickly. By promising to double-down on efforts to punish those who commit violent crimes, prosecutors may in fact *add* to the prison population.¹⁶⁹ And if we leave these individuals behind while there is political momentum for reform, it will be difficult to come back for them, pitching leniency exclusively for them rather than for criminal defendants as a class. Finally, the incremental approach—starting with the most politically viable reform and working our way up to violent crime—simply does not appear to be working. Activists and politicians have been pushing for reform of drug and other low-level offenses for over a decade, but how to treat violent offenses is still not part of the national conversation.¹⁷⁰

<https://www.seattletimes.com/opinion/end-the-cruel-racist-practice-of-prosecuting-children-in-adult-court>.

167. See Yablon, *supra* note 100 and accompanying text 101.

168. See Quigley, *supra* note 75.

169. See Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 629–30 (2016).

170. See PFAFF, *supra* note 39, at 23–24.

B. Decriminalizing Mental Illness, Addiction, and Poverty

Another priority for progressive prosecutors is ending the “criminalization” of mental illness, addiction, and poverty.¹⁷¹ Aside from declining to prosecute certain low-level charges commonly driven by these problems,¹⁷² there are two primary ways reform-minded prosecutors propose to achieve this goal. The first is by requesting money bail—which effectively means that whether a defendant will be detained while awaiting resolution of their case depends on their wealth—less frequently than their predecessors.¹⁷³ The second is by increasing the use of alternatives to incarceration, namely diversion and probation.¹⁷⁴ Diversion programs can

171. See, e.g., *The Revolution in Prosecutors’ Offices*, BRENNAN CTR. FOR JUST. (Apr. 15, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/podcasts/revolution-prosecutors-offices> [<https://perma.cc/P3MF-RGM9>] (Miriam Krinsky, Executive Director of Fair and Just Prosecution: “How do we embrace thinking around treating rather than criminalizing individuals who are struggling with mental illness, with substance use disorder, with poverty?”); *21 Principles for the 21st Century Prosecutor*, *supra* note 149, at 2 (listing “Encourage the Treatment (Not Criminalization) of Mental Illness,” “Encourage the Treatment (Not Criminalization) of Drug Addiction,” and “Move Toward Ending Cash Bail” among principles); Christopher Moraff, *Meet America’s New Most Reform-Minded DA: A Q&A with Rachael Rollins*, FILTER MAG. (Nov. 9, 2018) (Rachael Rollins: “People recognize that criminalizing poverty, mental illness, and addiction doesn’t work.”).

172. See, e.g., SUFFOLK CTY. DIST. ATT’Y, THE RACHAEL ROLLINS POLICY MEMO 26 (Mar. 2019) (“I identified 15 charges that in most cases are best addressed through diversion or declined for prosecution entirely. In addition to being low-level, non-violent offenses with minimal long-term impact, they are most commonly driven by poverty, substance use disorder, mental health issues, trauma histories, housing or food insecurity, and other social problems rather than specific malicious intent.”).

173. See, e.g., Hatch & Gerstein, *supra* note 89 & accompanying text; Arisha Hatch & Terri Gerstein, *Representing the People*, STAN. SOC. INNOVATION REV. 13 (Winter 2020) (demanding that progressive prosecutors “avoid the use of bail as leverage to incarcerate poor people before trial”); *21 Principles for the 21st Century Prosecutor*, *supra* note 149, at 6 (encouraging progressive prosecutors to “Move Toward Ending Cash Bail,” including by “[p]ublicly support[ing] the elimination of money bail” and “[w]here there are no alternatives to bail, support[ing] alternative methods of payment”); Allyn, *supra* note 98 (noting Krasner’s policy of not seeking money bail for certain offenses); Interim Off. Pol’y to St. Louis Cnty. Assistant Prosecuting Att’ys, *supra* note 134 (directing line prosecutors not to request cash bond for misdemeanor or the lowest two felony offenses without approval from a supervisor); Press Release, Brooklyn District Att’y’s Off., Brooklyn Records the Lowest Number of Homicides in 2018 as Detentions on Bail & Prosecutions of Drug Offenses Decline Dramatically (Dec. 27, 2019), <http://www.brooklynda.org/2018/12/27/brooklyn-records-the-lowest-number-of-homicides-in-2018-as-detentions-on-bail-and-prosecutions-of-drug-offenses-decline-dramatically> [<https://perma.cc/T4JP-64B9>] (noting policy of not requesting money bail in most misdemeanor cases).

174. Progressive prosecutors discuss diversion much more than probation. But because diversion eligibility is generally available only for individuals with particular problems (e.g., mental health challenges or substance abuse) who have little or no criminal history, probation is the only available alternative to incarceration—other than no sentence whatever—for most individuals convicted of crimes.

be “pre-plea” (where the defendant’s performance influences what type of plea deal and sentence he will ultimately get, or in some jurisdictions, whether his case will be dismissed) or “post-plea” (requiring defendants to plead guilty upfront, with some jurisdictions permitting defendants who succeed to then withdraw their guilty pleas and have their cases dismissed).¹⁷⁵ Many diversion programs are administered through “problem-solving courts,” in which defendants are signed up for treatment plans based on the underlying problem that is believed to have contributed to the charged criminal conduct.¹⁷⁶ These commonly focus on issues like drug or alcohol addiction, mental health, veteran status, youth, or domestic violence.¹⁷⁷ These “courts” are overseen by a judge and commonly staffed with a prosecutor, defense lawyer, probation or community supervision officer, and, sometimes, a treatment specialist.¹⁷⁸

Fiona Doherty calls pre-trial release, diversion, probation, and other similar schemes “testing periods” because their purpose is to prescribe rules for defendants in order to determine the appropriate degree of punishment based on their performance.¹⁷⁹ They have remarkably similar structures. Eligibility is determined based on defendants’ characteristics, alleged criminal conduct, and criminal history.¹⁸⁰ Defendants who access these programs must give up a lot of rights to do so. They must generally permit police to search their persons, car, and house, based on only

175. CATHERINE CAMILLETI, DEP’T OF JUST., BUREAU OF JUST. ASSISTANCE, PRETRIAL DIVERSION PROGRAMS 2–3 (Oct. 25, 2010), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PretrialDiversionResearchSummary.pdf> [<https://perma.cc/QEN4-GCR9>]. Most diversion programs are post-plea. See Wendy Davis, *Diversion Sentencing May Offer an Alternative Path to Justice—But How Fair Is It?*, A.B.A. J. (July 2, 2019, 6:30 AM), <https://www.abajournal.com/web/article/examining-the-equity-of-diversion-sentencing> [<https://perma.cc/3ZVW-GAHW>]; see also DOUGLAS B. MARLOWE, CAROLYN D. HARDIN & CARSON L. FOX, NAT’L DRUG CT. INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURTS IN THE UNITED STATES 40 (June 2016), <https://www.ndci.org/wp-content/uploads/2016/05/Painting-the-Current-Picture-2016.pdf> [<https://perma.cc/UA4L-VZ53>] [hereinafter PAINTING THE CURRENT PICTURE] (noting that only 6% of adult drug courts are pre-plea).

176. See Paul A. Haskins, *Problem-Solving Courts: Fighting Crime by Treating the Offender*, NAT’L INST. OF JUST., Nov. 2019, <https://www.ojp.gov/pdffiles1/nij/252735.pdf> [<https://perma.cc/B8L2-EFJJ>]. The other way of doing diversion is to permit a defendant to complete a rehabilitative program administered outside the courts without being on any court supervision. Progressive prosecutors do not much discuss that model, however.

177. PAINTING THE CURRENT PICTURE, *supra* note 175, at 64–67.

178. *Id.* at 11.

179. Fiona Doherty, *Testing Periods and Outcome Determination in Criminal Cases*, 103 MINN. L. REV. 1699, 1700–01 (2019).

180. See *id.* (“[T]he locus of the punishment inquiry shifts towards the results of a forward-looking test—and away from a backward-looking evaluation of the facts of the criminal charge.”).

reasonable suspicion or even no suspicion at all.¹⁸¹ They must also undergo extensive supervision and comply with numerous conditions, often including abstaining from drugs and alcohol and submitting to regular urinary tests, not getting re-arrested, avoiding particular people and places, and regularly calling and visiting their supervision officer.¹⁸² Some defendants on pre-trial release must also undergo electronic monitoring;¹⁸³ for example, so many of the individuals released from Cook County Jail as part of its COVID-19 response were required to wear electronic monitors that the sheriff's office ran out of the devices.¹⁸⁴ Diversion and probation generally also require defendants to seek out or maintain employment and complete a treatment program selected based on their charged offense.¹⁸⁵ Defendants, moreover, must often pay to be subjected to these types of supervision.¹⁸⁶

Testing periods are billed as giving individuals a chance to prove that they do not deserve to be incarcerated.¹⁸⁷ Incarceration is the norm, and anything else is an opportunity. Within that framework, progressive prosecutors' promises to use pre-trial detention less and use alternatives to incarceration more are consistent with their goals: they want to give more

181. See *Griffin v. Wisconsin*, 483 U.S. 868, 872 (1987) (upholding regulation permitting search of probationer's home based only on reasonable suspicion); Doherty, *supra* note 179, at 1724, 1743 (describing probation conditions in U.S. drug courts); Melanie D. Wilson, *The Price of Pretrial Release: Can We Afford to Keep Our Fourth Amendment Rights?*, 92 IOWA L. REV. 159, 175–79 (2006) (discussing warrantless searches as a condition of pre-trial release).

182. HARV. L. SCH., CRIM. JUST. POL'Y PROGRAM, MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 17–18 (Oct. 2016) [hereinafter BAIL PRIMER]; Doherty, *supra* note 179, at 1752–53.

183. See BAIL PRIMER, *supra* note 182, at 17.

184. See Megan Crepau, *Devices for Electronic Monitoring Run Out in Cook County Amid Efforts to Drastically Reduce Jail Population*, CHI. TRIB. (May 7, 2020, 6:32 PM), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-electronic-monitoring-supply-20200507-ke26y6te4zay3jt4gq366heue-story.html> [https://perma.cc/534C-9CR4].

185. Doherty, *supra* note 179, at 1753.

186. See Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1176; see also Rebecca Burns, *Diversion Programs Say They Offer a Path Away from Court, but Critics Say the Tolls Are Hefty*, PROPUBLICA ILL. (Nov. 13, 2018, 4:00 AM), <https://www.propublica.org/article/diversion-programs-illinois-criminal-justice-system-bounceback-correctivesolutions> [https://perma.cc/5QSQ-B6BV] (reporting \$250 fees for diversionary programs administered by a for-profit company); Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html> [https://perma.cc/8SXW-VYZP] (reporting that, of almost 200 defense lawyers surveyed about diversion, two-thirds said fees were a barrier for their clients); BAIL PRIMER, *supra* note 182, at 17 (“[I]n all states except Hawaii and the District of Columbia, defendants are charged a fee for electronic monitoring. Defendants may also be charged a monthly fee for pretrial services supervision, drug or alcohol testing, or participation in counseling or anger management classes.” (footnotes omitted)).

187. Doherty, *supra* note 179, at 1710.

chances. Although testing periods reduce the rate at which individuals are punished, and maybe even convicted, for crimes arising from mental illness, addiction, and poverty,¹⁸⁸ they may not do so meaningfully.

The first reason to be skeptical about testing periods doing much to “decriminalize” these statuses is the onerous conditions that they impose on defendants. Extensive research shows that intense supervision is ineffective and often undermines compliance with testing periods.¹⁸⁹ Similarly, arduous requirements result in low success rates on diversion and probation.¹⁹⁰ For example, a review by the Vera Institute of Justice of the Seattle Municipal Court¹⁹¹ Probation Services concluded: “Too many people are under probation supervision . . . and for many, the length of time under supervision is counterproductive.”¹⁹² More than one-fourth of the individuals on probation were terminated unsuccessfully, most for only technical violations.¹⁹³

The individuals that progressive prosecutors set out to help with these policies—the poor and those who struggle with mental illness and addiction—will have a particularly difficult time succeeding under supervision.¹⁹⁴ Those who lack stable housing, employment, transportation, and social support will struggle to do things like make

188. See *21 Principles for the 21st Century Prosecutor*, *supra* note 149, at 4.

189. See Jennifer L. Doleac, *Study After Study Shows Ex-Prisoners Would Be Better Off Without Intense Supervision*, BROOKINGS: UP FRONT (July 2, 2018), <https://www.brookings.edu/blog/up-front/2018/07/02/study-after-study-shows-ex-prisoners-would-be-better-off-without-intense-supervision> [https://perma.cc/Y8RF-L4HL] (summarizing research concluding that “reducing the intensity of community supervision for those on probation or parole is a highly cost-effective strategy”); BAIL PRIMER, *supra* note 182, at 17–18 (noting that drug testing and electronic monitoring do not result in higher court appearance rates).

190. See Cecelia Klingele, *What Are We Hoping for? Defining Purpose in Deterrence-Based Correctional Programs*, 99 MINN. L. REV. 1631, 1639 (2015) (“[T]he sheer number of requirements makes compliance with all of them nearly impossible for many probationers . . .”).

191. This is the court in which I practice. The prosecutor’s office in Seattle Municipal Court is the Seattle City Attorney’s Office. Like King County District Attorney Dan Satterberg, Seattle City Attorney Pete Holmes claims to be progressive. See *About Pete Holmes*, SEATTLE CITY ATT’Y, <https://www.seattle.gov/cityattorney/about-us/about-pete-holmes> [https://perma.cc/W68V-87BA] (last visited Dec. 25, 2020) (touting policies such as declining to prosecute marijuana possession and reducing prosecutions for driving with a suspended license).

192. VERA INST. JUST., REPORT TO SEATTLE MUNICIPAL COURT PROBATION SERVICES ON STRATEGIES FOR IMPROVING POLICIES AND PRACTICES 8 (June 2020), <https://www.vera.org/downloads/publications/seattle-municipal-court-response-to-vera-institute-of-justice-report.pdf> [https://perma.cc/CK8R-JCCL].

193. *Id.* at 20.

194. See *21 Principles for the 21st Century Prosecutor*, *supra* note 149, at 4; Klingele, *supra* note 190, at 1638–39.

regular supervision visits and keep an electronic monitor charged.¹⁹⁵ And those who have difficulty following directions because of a disease that impairs their thinking may not be able to understand or remember all the relevant restrictions.¹⁹⁶ It is unsurprising, then, that graduation rates are below 50% in many mental health courts.¹⁹⁷ Drug court participants generally fare better, but not by much.¹⁹⁸ (There are also significant race disparities in those rates, with whites being much more likely to graduate than Black or Hispanic individuals.¹⁹⁹) Probation is even worse, with only 35% of individuals completing their sentence without being reincarcerated.²⁰⁰ Indeed, the data we have suggests that probation revocation is the leading cause of incarceration in the United States.²⁰¹

The second problem with testing periods is that they perpetuate the wealth discrimination that partially motivates progressive prosecutors to adopt them in the first place because they are functionally inaccessible to the poor.²⁰² An individual who cannot afford the fees owed to be on supervision, have an ankle monitor, take bi-weekly drug tests, or undergo treatment cannot stay out of jail or prison if compliance with those

195. See Klingele, *supra* note 190, at 1638–39 (listing competing demands for low-income probationers’ time and resources).

196. See *id.* at 1639 (noting that compliance with conditions is particularly difficult for “those whose ability to follow directions is already compromised by learning difficulties, mental health challenges, and poor education”).

197. See E. Lea Johnston & Conor P. Flynn, *Mental Health Courts and Sentencing Disparities*, 62 VILL. L. REV. 685, 706 (2017) (reporting most recent graduation rate for Erie County mental health court as 37.5%).

198. See PAINTING THE CURRENT PICTURE, *supra* note 175, at 45 (reporting average graduation rate of 59%, with most graduation rates ranging from 50% to 75%).

199. *Id.* at 46; Doherty, *supra* note 179, at 1744 (reporting graduation rates from New Haven and Danielson drug courts of 55% and 49%, respectively); U.S. GOV’T ACCOUNTABILITY OFF., GAO-05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 6 (2005) (reporting completion rates from 27% to 66%).

200. See PAINTING THE CURRENT PICTURE, *supra* note 175, at 45.

201. Doherty, *supra* note 179, at 1787.

202. See, e.g., *A Message from District Attorney Eric Gonzalez*, JUST. NEWS: THE BROOKLYN DIST. ATT’Y’S OFF. NEWSL., Feb. 2018, at 3, <http://www.brooklynda.org/wp-content/uploads/2018/03/January-2018-Edition-Page-Order.pdf> [<https://perma.cc/G52Y-ZG9H>] (“We also won’t criminalize poverty by keeping people in jail just because they can’t afford to pay bail.”).

conditions is required.²⁰³ In short, poor defendants may not be able to “buy a pseudo-incarceration.”²⁰⁴

Attempting to complete diversion or probation, moreover, is not a “free” option in yet another way: those who do not graduate from diversion typically receive considerably longer sentences than do those who do not attempt it at all because they failed the “test.”²⁰⁵ Even those who succeed at diversion are often under court supervision much longer than if they had been sentenced in a traditional manner, leading many defense lawyers to question whether enrollment is in their clients’ best interest.²⁰⁶ The same dynamic exists with probation.²⁰⁷ That these programs are more often *precursors* than *alternatives* to incarceration means that they are not really a means of “decriminalizing” these statuses.²⁰⁸

A third, related problem is that invasive government supervision expands, rather than contracts, the criminal system’s reach over individuals.²⁰⁹ Testing periods have long been a tool for incentivizing

203. See Ava Kofman, *Digital Jail: How Electronic Monitoring Drives Defendants into Debt*, PROPUBLICA (July 3, 2019, 5:00 AM), <https://www.propublica.org/article/digital-jail-how-electronic-monitoring-drives-defendants-into-debt> [https://perma.cc/YV33-XQA6] (noting increased use of pre-trial imposition of monitoring devices and documenting difficulty defendants have affording monitoring fees); Eric Markowitz, *Chain Gang 2.0: If You Can’t Afford This GPS Ankle Bracelet, You Get Thrown in Jail*, INT’L BUS. TIMES (Sept. 21, 2015, 7:55 AM), <http://www.ibtimes.com/chain-gang-20-if-you-cant-afford-gps-ankle-bracelet-you-get-thrown-jail-2065283> [https://perma.cc/HY3T-95EF] (discussing widespread use of electronic monitoring as a condition of release and recounting one defendant’s decision to turn himself in for arrest because he was unable to keep up with fees).

204. William Saletan, *Get Out of Jail Unfree*, SLATE (June 1, 2011, 11:11 AM), <https://slate.com/technology/2011/06/dominique-strauss-kahn-s-gps-ankle-monitor-should-we-let-defendants-trade-jail-for-electronic-tracking.html> [https://perma.cc/2UB9-3ZK9]; see also Joseph Neff & Keri Blakinger, *Michael Cohen and Paul Manafort Got to Leave Federal Prison Due to COVID-19. They’re the Exception.*, MARSHALL PROJECT (May 21, 2020), <https://www.themarshallproject.org/2020/05/21/michael-cohen-and-paul-manafort-got-to-leave-federal-prison-due-to-covid-19-they-re-the-exception> [https://perma.cc/LHE9-NBH6] (observing reliance on home confinement in deciding who to release from federal prison during the COVID-19 pandemic).

205. See Johnston & Flynn, *supra* note 197, at 717–28, 688 n.18 (listing studies that find participants who fail to complete various types of specialty courts receive longer sentences than do non-participants).

206. See, e.g., *id.* at 687 n.11 (listing studies that find mental health court supervision may exceed possible incarceration time on related offense).

207. See Klingele, *supra* note 190, at 1639 (“[S]tudies have repeatedly shown that many individuals experienced with the criminal justice system would prefer a short term of incarceration to a longer period of probation.”)

208. See *id.*

209. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 108–10 (2002) (describing early judicial practices of imposing probation for low-level crimes that, absent probation, might not have been punished at all); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479, 1551–61 (2005) (discussing drug courts’ net-widening effects).

defendants to plead guilty in exchange for efficiency and immediate release from custody.²¹⁰ And while they may appear less punitive than incarceration, they still incapacitate.²¹¹ Intense government supervision also increases the likelihood that low-risk behaviors that would have otherwise gone unnoticed will be both seen and punished.²¹² Thus, increasing the use of rehabilitative programs within the criminal system expands the ways in which we use the criminal system to respond to what are fundamentally social and economic problems.²¹³

Progressive prosecutors and their supporters recognize the need to shrink the criminal system's footprint and claim that they are doing so by declining cases.²¹⁴ But they also advocate (sometimes even in the same breath)²¹⁵ for court- and prosecutor-administered diversion programs, which expand the system—and their power—on defendants' dimes.²¹⁶ The social and economic problems that drive crime cannot be fixed by the criminal system and so should not be addressed within it. One who supports treatment-based alternatives to incarceration necessarily recognizes that crime is caused in part by these issues. Then tethering these individuals to the criminal system, rather than giving them the opportunity to focus on treatment and stabilization, is no solution at all.

Rather than requesting additional resources to build out these programs, progressive prosecutors should advocate for decreasing their offices' budgets. Increases in prosecutorial funding and staffing have historically been used to prosecute more crime. Indeed, according to John Pfaff, this was one of the main drivers of mass incarceration.²¹⁷ Now, some progressive district attorneys are requesting larger staffs to support their reform efforts, including diversionary programs.²¹⁸ But it is difficult to

210. See ROTHMAN, *supra* note 209, at 102, 110.

211. Eaglin, *supra* note 169, at 632.

212. See *id.* at 631–32.

213. *Id.* at 632.

214. See *21 Principles for the 21st Century Prosecutor*, *supra* note 149, at 3.

215. See *The Revolution in Prosecutors' Offices*, *supra* note 171 (quoting Gonzalez as stating that he is “trying to shrink the system” but also touting his office's diversion program for individuals charged with gun possession offenses).

216. See, e.g., *21 Principles for the 21st Century Prosecutor*, *supra* note 149, at 2 (listing “Make Diversion the Rule” and “Shrink Probation and Parole” among principles). While prosecutors generally only get to make recommendations with regard to pre-trial release or sentencing, they generally exercise veto power over a defendant's admission to diversion. See David Noble, *Mapping the Landscape of Prosecutor-Led Pretrial Diversion*, 11 CRIM. L. PRAC. 8, 14 (2020) (describing prosecutors' roles in pre- and post-plea diversion programs).

217. See PFAFF, *supra* note 39, at 135.

218. See, e.g., Udi Ofer, *Defunding Prosecutors and Reinvesting in Communities: The Case for Reducing the Power and Budgets of Prosecutors to Help End Mass Incarceration*, 2 HASTINGS J. CRIME & PUNISHMENT 31, 57–58 (2021) (documenting staff and budget increases by Vance and Krasner justified as facilitating expansion of diversion programs and other justice-oriented initiatives); Keri Blakinger, *Harris County DA Again*

track how prosecutors spend their time. And if these district attorneys are voted out of office, their successors may repurpose those employees to bring more cases. Progressive prosecutors are right to prioritize treatment over punishment, but they will struggle to accomplish much as long as that treatment takes place in the shadow of the criminal system.

Instead, they should advocate that prosecutorial resources be reallocated to, among other things, expanded access to mental health, addiction, and other social services.²¹⁹ Activists have long sought to “defund” police departments by reallocating large portions of their budgets to the types of programs that address the same factors that progressive prosecutors recognize as driving crime—mental illness, substance abuse, and poverty.²²⁰ In the wake of George Floyd’s death, this proposal is finally being implemented in some jurisdictions.²²¹ We have expanded the criminal system far too much to address social ills, and this is just as true of prosecutors’ offices as it is of police forces.

At least one progressive prosecutor acknowledges and embraces shrinking their office. When asked about how defunding police departments would affect her office, Stephanie Morales in Portsmouth, Virginia, said: “If the community wants to defund the police, that means that the entire criminal legal system will hopefully shrink. That means that

Asks for More Prosecutors to Deal with Fallout from Botched Drug Raid, HOUS. CHRON. (July 26, 2019, 8:11 PM), <https://www.houstonchronicle.com/news/houstontexas/houston/article/Harris-County-DA-again-asks-for-more-prosecutors-14189247.php> [https://perma.cc/S2ZR-VGV6] (“Ogg justified [a requested \$21 million budget] . . . expansion by citing overwhelming caseloads in both the felony and misdemeanor trial bureaus. With more staff, she argued, prosecutors would be able to look at cases more quickly to identify which might be dismissed or diverted.”).

219. The cost differential between providing these services outside the court system and either providing them inside the court system or incarcerating people will vary by jurisdiction and the type of service at issue, among other factors. More research is needed about these relative costs. But already, there is considerable evidence that social services are much cheaper than incarceration in some areas. For example, studies performed across the country have concluded that supportive housing programs—which provide housing and social services to individuals who would otherwise be homeless—offer significant cost savings over incarceration. *See, e.g.*, NAT’L L. CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 9 (2014), https://nlchp.org/wp-content/uploads/2019/02/No_Safe_Place.pdf [https://perma.cc/TVN2-NXV3] (listing studies from Central Florida, New Mexico, and Utah); LEWIN GRP., COSTS OF SERVING HOMELESS INDIVIDUALS IN NINE CITIES (Nov. 19, 2004), https://d155kunxf1aozz.cloudfront.net/wp-content/uploads/2011/12/Report_CostforIndividuals1.pdf [https://perma.cc/CFG7-TL5T] (comparing daily cost of supportive housing with jail in Atlanta, Boston, Chicago, Columbus, Los Angeles, New York, Phoenix, San Francisco, and Seattle).

220. *See* Philip V. McHarris & Thenjiwe McHarris, Opinion, *No More Money for the Police*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/2020/05/30/opinion/george-floyd-police-funding.html> [https://perma.cc/P5J8-7PG7].

221. *See supra* note 26.

my office will lose resources, and I am perfectly fine with that. . . . We should not want the footprint of this system on people's lives."²²²

In Manhattan, however, Cyrus Vance Jr. has used "slush funds" to instead grow the criminal system's footprint. He has had the opportunity to give away hundreds of millions of dollars in asset forfeiture funds and penalties, mostly from settlements with international banks.²²³ A portion of this money has gone to initiatives aimed at helping criminal defendants, such as college programming in state prisons, mental health initiatives for individuals involved in the criminal system, and pre-trial supervised release.²²⁴ Some of it has even gone to programs intended to keep people out of the system entirely, like programs aimed at linking young people to jobs and resources like educational support.²²⁵ But a large portion of that money has been allocated to enhancing law enforcement efforts, such as \$90 million for the purchase of smartphones and tablets for police officers and \$38 million for law enforcement agencies in other jurisdictions (including other states) to test rape kits.²²⁶

Existing diversion and probation programs provide a suitable springboard for shrinking prosecutor offices. Allegra McLeod has argued that programs that provide treatment and other social services as alternatives to incarceration can facilitate systemic decarceral change.²²⁷ Among other things, these programs attract fiscal and social support for treatment and change the way we understand criminalized conduct.²²⁸ In other words, "this experience will lead court participants to work to address more comprehensively the structural problems at issue and to disseminate more widely the truth that criminal courts cannot serve as a cure-all for social insecurity, social risk, and other underlying social

222. Leily Arzy, *A Prosecutor Makes the Case for Transforming the System*, BRENNAN CTR. FOR JUST. (Oct. 9, 2020), <https://www.brennancenter.org/our-work/research-reports/prosecutor-makes-case-transforming-system> [<https://perma.cc/G7FG-N7YA>].

223. See James C. McKinley Jr., *Cyrus Vance Has \$808 Million to Give Away*, N.Y. TIMES (Nov. 6, 2015), <https://www.nytimes.com/2015/11/08/nyregion/cyrus-vance-has-dollar-808-million-to-give-away.html> [<https://perma.cc/X9ZE-XP35>].

224. Press Release, Manhattan Dist. Att'y's Off., DA Vance Announces Investments to Prevent Crime & Reform the Just. Sys. (Sept. 29, 2016), <https://www.manhattanda.org/da-vance-announces-investments-prevent-crime-and-reform-justice-system> [<https://perma.cc/4FD3-236T>].

225. See MANHATTAN DIST. ATT'Y'S OFF., MANHATTAN DISTRICT ATTORNEY'S CRIMINAL JUSTICE INVESTMENT INITIATIVE: PROGRESS REPORT 10–17 (Mar. 2019), <https://www.manhattanda.org/wp-content/uploads/2019/03/Criminal-Justice-Investment-Initiative-status-report-March-2019.pdf> [<https://perma.cc/YS4D-MP6N>].

226. McKinley, *supra* note 223.

227. Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1654 (2012).

228. *Id.*

problems the courts routinely confront.”²²⁹ Treatment belongs outside the criminal system, and district attorneys who want to transform how those who struggle with mental illness, addiction, and poverty are treated should give up some of their resources to bring about that change.

C. Preventing Wrongful Convictions and Increasing Leniency

A third cornerstone of the progressive prosecutor agenda is making the criminal system more fair by preventing the conviction of innocent individuals and being more lenient towards some of those who are guilty.²³⁰ Line assistants make hundreds of decisions every day—including about how to treat a person who claims they are innocent or one who may be worthy of lenience—that turn on their sole discretion.²³¹ Reform-minded district attorneys and their supporters hope that those decisions can be shaped by setting the tone from the top, making a concerted effort to change office culture by clearing out hardline prosecutors²³² and hiring allies,²³³ and placing some of them in new or expanded conviction integrity units.²³⁴ (Some progressive prosecutors

229. *Id.* at 1656–57; *see also* Noble, *supra* note 216, at 31 (“From a reformist perspective, diversion is perhaps a stopgap along a path towards transforming the system.”).

230. *See, e.g.*, *21 Principles for the 21st Century Prosecutor*, *supra* note 149, at 2 (listing “Charge with Restraint and Plea Bargain Fairly” and “Create Effective Conviction Review” among principles); *New Thinking: Prosecutor Power #6: Larry Krasner, the Antagonist*, CTR. FOR COURT INNOVATION (Dec. 2018), <https://www.courtinnovation.org/publications/larry-krasner-podcast> [<https://perma.cc/WX6X-EBL3>] [hereinafter *New Thinking*] (Krasner: “[O]ur job is not just to win cases, including cases against innocent people, but our job is to win cases when it’s appropriate . . .”).

231. *See* BAZELON, *supra* note 4, at 149 (discussing a “central dilemma” of prosecutors as “how to recalibrate the many decisions their assistant district attorneys made each day—about bail, charging, and plea bargaining—that still turned on discretion”).

232. This Article does not address the difficulty prosecutors may face in their attempts to “clean house.” For a helpful discussion of these challenges, *see* Ouziel, *supra* note 39, at 558–63, 582–85.

233. *See, e.g.*, BAZELON, *supra* at 149–50 (“Over time, examples of how you wanted it done would accrue, and you could hold them out as the desired result, but it would take time, effort, and a deft hand at office politics.”); *id.* at 167–68 (describing Krasner’s efforts to change his office’s culture through policies and personnel changes, and the difficulty of overcoming “multi-generational training in the other direction”); *21 Principles for the 21st Century Prosecutor*, *supra* note 149, at 14 (“Change Office Culture and Practice”); *New Thinking*, *supra* note 230 (Krasner urging that hiring practices are “the key to” reform); *Progressive Prosecutor’s Handbook*, *supra* note 8, at 39–42 (advising progressive prosecutors to be attentive to office culture and employ a diverse staff); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 996–1000 (2009) (arguing, based on analogy to corporations, that top-down cultural change is the most promising avenue for reforming prosecutors’ offices).

234. *See* *21 Principles for the 21st Century Prosecutor*, *supra* note 149, at 16–17 (recommending the creation and expansion of conviction integrity units and listing

have also adopted more generous discovery policies,²³⁵ which is an important and more easily administrable change.) These strategies assume that prosecutorial punitiveness is a culture that can be changed, with discretion being guided by an aura or mission of seeking “justice” and “fairness.”²³⁶ But this overstates the extent to which prosecutors can be programmed (or re-programmed) to prevent wrongful convictions and to view large numbers of defendants as legally guilty yet worthy of lenience.

Prosecutorial decision-making is heavily shaped by entrenched institutional factors. Academics at the intersection of law and psychology have written extensively about this problem and how it leads even well-intentioned prosecutors to convict the innocent. For example, prosecutors are prone to developing “tunnel vision” about defendants’ guilt because of confirmation bias, hindsight bias, and outcome bias.²³⁷ They are also affected by selective information processing, belief perseverance, and the avoidance of cognitive dissonance.²³⁸ In short, prosecutors’ decisions about charging, plea bargaining, the disclosure of exculpatory evidence, sentencing, and other steps in the process are slanted in favor of conviction simply because of their role in the adversarial system.

The fact that even “good” prosecutors fail to disclose *Brady* material illustrates only one way in which these biases make hiring and training practices an insufficient solution in this area. *Brady* requires prosecutors to disclose to the defense evidence that is “material” or has a reasonable probability of undermining confidence in the outcome of the trial.²³⁹ In the words of Keith A. Findley and Michael S. Scott, “*Brady* demands too much of prosecutors when it simultaneously asks them to act as advocates charged with prosecuting a defendant and as neutral observers responsible for assessing the value of evidence from the defendant’s perspective.”²⁴⁰ This dynamic also leads to the conviction of innocent defendants.²⁴¹

Kenneth Thompson and Dan Satterberg among those who have done so); *Progressive Prosecutor’s Handbook*, *supra* note 8, at 32–33 (encouraging prosecutors to “[b]uild in second looks”).

235. See, e.g., *21 Principles for the 21st Century Prosecutor*, *supra* note 149, at 17–18 (urging the adoption of broader discovery policies and citing Scott Colom and Dan Satterberg as having implemented these reforms); *The Progressive Prosecutor’s Handbook*, *supra* note 8, at 33–36 (discussing the need for “a clear, generous, and administrable disclosure policy”).

236. See BAZELON, *supra* note 4, at 155–56 (“Eric Gonzalez said he found that the message of fairness had stronger appeal than he thought it would.”).

237. See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 307–22.

238. See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1596–1602 (2006).

239. *United States v. Bagley*, 473 U.S. 667, 682 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

240. Findley & Scott, *supra* note 237, at 351.

241. See *id.*

Similarly, psychological factors also explain why prosecutors defend convictions obtained by their peers against credible innocence claims. To allege that a person was wrongfully convicted is to implicate not only the prosecutor's judgment, but often also their credibility and ethics.²⁴² Because a prosecutor working in the conviction integrity unit works for the same organization as the one accused of this mistake, social identity theory and ingroup bias make it difficult for her to believe that those allegations are true.²⁴³ It is perhaps unsurprising then that, according to the National Registry of Exonerations, several of the conviction integrity units run by progressive prosecutors have not produced a single exoneration.²⁴⁴

The psychology of prosecution undermines not only the idea that cultural changes and the establishment of conviction integrity units can prevent wrongful convictions, but also the notion that line prosecutors can and will easily dispense lenience. Just like the *Brady* standard, this movement incorrectly expects that prosecutors can neutrally assess a defendant's case while acting as his adversary.

How prosecutors interact with defendants and their lawyers is yet another obstacle to objectively evaluating the appropriateness of conviction and punishment in any given case. Defense lawyers learn about their clients' complexities by interacting with them.²⁴⁵ Even though mental health problems, developmental disabilities, and social stressors are prevalent among indigent defendants, they often do not have documentation of these difficulties.²⁴⁶ Nevertheless, defense lawyers can

242. For a discussion of the rhetoric around wrongful convictions, see Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119 (2010).

243. See Adam M. Gershowitz, *The Challenge of Convincing Ethical Prosecutors That Their Profession Has a Brady Problem*, 16 OHIO ST. J. CRIM. L. 307, 319–20 (2019).

244. See *Conviction Integrity Units*, NAT'L REGISTRY EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> [<https://perma.cc/A86H-HCUG>] (last visited Sep. 7, 2020) (listing units in Boulder, Contra Costa, San Francisco, and St. Louis City as having no recorded exonerations).

245. See Smith, *supra* note 29, at 381.

246. See, e.g., Shay-Ann Heiser Singh, *Atkins v. Virginia: Looking Back and Looking Forward*, 57 DEPAUL L. REV. 639, 642 (2008) (observing lack of access to mental health care for indigent defendants, as well as improper diagnoses "because of environmental and cultural issues"). In most cases, this information is very difficult to obtain because more than 80% of defendants are represented by public defenders, who have limited time and budgets to coordinate things like mental health evaluations and social work visits. See Richard A. Opiel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019) <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html> [<https://perma.cc/UBR4-RM53>] (documenting how overworked indigent defense lawyers, who represent approximately four of out of every five criminal defendants, are). Moreover, these appointments require defendants who are detained while awaiting trial to remain in jail even longer. See, e.g., Michael J. Finkle, Russel Kurth, Christopher Cadle & Jessica Mullan, *Competency Courts: A Creative Solution for Restoring Competency to the Competency Process*, 27 BEHAV. SCI. & L. 767, 768 (2009) ("[W]e have reached the point at which the increasing number of mentally ill defendants held in jail who need to be

witness these firsthand, allowing them to develop empathy for their clients.²⁴⁷

On the other hand, the only things prosecutors generally learn about defendants are their criminal histories and the crimes of which they are accused.²⁴⁸ Information about the latter, moreover, comes primarily from police officers and victims. Because both groups have strong negative attitudes about the accused, prosecutors in turn develop negative views about defendants as a class and as individuals.²⁴⁹ This is reinforced by the fact that almost all the signals prosecutors receive tell them that their assessments of guilt are accurate, as the vast majority of defendants plead guilty.²⁵⁰ When they contemplate appropriate sentences, they may be biased by the range of sentences the legislature permits them to request.²⁵¹

Prosecutors are ethically prohibited from talking to defendants without their counsel,²⁵² and defense lawyers are frequently hesitant about disclosing a client's vulnerabilities to the prosecution.²⁵³ A prosecutor who learns about a defendant's unstable home situation or mental health challenges may use that information to argue for the denial of pre-trial

evaluated for competency, or treated to restore competency, has outstripped the resources available to conduct these evaluations or to provide hospital beds to carry out the treatment. As a result, mentally ill defendants spend ever-increasing amounts of time in custody waiting for the competency process to run its course.”).

247. Smith, *supra* note 29, at 381–82.

248. See Gajwani & Lesser, *supra* note 27, at 80–81; see also Lawton P. Cummings, *Can an Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139, 2154 (2010) (“Defendants in the criminal justice system are systematically depersonalized from the prosecutor’s perspective, because the prosecutor has intimate contact with all parties involved except the defendant.”).

249. GARY LOWENTHAL, *DOWN AND DIRTY JUSTICE: A CHILLING JOURNEY INTO THE DARK WORLD OF CRIME AND THE CRIMINAL COURTS* 111 (2003) (“Prosecutors are at the center of a culture that abhors defendants and those around them. Every day, they interact with police officers who see themselves to be at war with criminals Crime victims, another important constituency, often have wrenching personal stories and cannot fathom why the courts allow their tormenters to get off lightly. Exposed to these views, prosecutors often develop a black and white view of the world.”).

250. Findley & Scott, *supra* note 237, at 329–30.

251. Cf. Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind Spot” Biases in Federal Sentencing: A Modest Solution for Reforming A Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 503–11 (2014) (reviewing studies showing the anchoring effect of prosecutors’ sentencing recommendations on judges’ sentencing decisions).

252. See MODEL RULES OF PRO. CONDUCT r. 4.2 (AM. BAR ASS’N 2019) (“In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”).

253. See ANTHONY G. AMSTERDAM & RANDY HERTZ, *TRIAL MANUAL 6 FOR THE DEFENSE OF CRIMINAL CASES* § 16.3 (6th ed. 2016) (warning defense lawyers of these risks as related to mental health problems).

release or probation.²⁵⁴ A defense lawyer may tell a prosecutor about inconsistencies in a witness's statement to try to convince the prosecutor of her client's innocence or lesser culpability, only for the witness's testimony to be shored up at trial.²⁵⁵ And prosecutors are often skeptical of mitigating information provided by defendants and their lawyers. Those who take such information seriously and give the defendant a "chance" at testing period discussed in Part III.B may release individuals who will recidivate and/or not return to court. So instead, many ignore it.²⁵⁶ Line prosecutors are not directly confronted with the negative consequences of harshness, only of lenience.²⁵⁷

No one likes to lose, but the culture of the adversarial system makes it such that winning is central to the prosecutorial identity.²⁵⁸ In contrast with the ambiguity of what it means to do justice, winning is a tangible and attainable goal.²⁵⁹ This motivation is amplified by the fact that prosecutors deal directly with defense lawyers—with whom they have repeat interactions and who they generally mistrust—rather than defendants.²⁶⁰

Yet another reason to doubt that prosecutors will regularly dispense lenience or otherwise abandon their leverage over defendants is that they are not only structurally incentivized to convict and punish, but also empowered to do so. Prosecutors are handed every advantage they need, from evidence collected by police to mandatory minimum sentences that give them leverage to extract guilty pleas.²⁶¹ These phenomena naturally reduce the prosecutorial appetite for lenience and the procedural fairness imagined by disclosure and non-coercive plea bargaining.²⁶²

254. *Id.*

255. *See New Thinking, supra* note 230 (“[W]hen I was a defense attorney, dealing with a draconian prosecutor’s office, most of the time I had to make a strategic decision not to give them the information because all they would do with it is take the extra time and try to destroy that evidence, or you would find magically that their witnesses modified their testimony.”).

256. *See Smith, supra* note 29, at 383–84.

257. District attorneys also face this problem to some extent. *See Gajwani & Lesser, supra* note 27, at 79–80 (discussing how progressive-minded prosecutors are heavily influenced by negative outcomes in cases for which they granted diversion); *New Thinking, supra* note 230 (“You don’t lose any points for keeping someone in jail forever who didn’t need to be there, you only get points for keeping people in jail forever, so they never do a bad thing.”). But the fact that they are elected exposes them more to pushback on overly punitive practices.

258. *See Smith, supra* note 29, at 388; *see also BUTLER, supra* note 41, at 105 (“My aspirations of changing the system got shot down because I liked winning too much, and I was good at it.”).

259. *See Smith, supra* note 29, at 388–89.

260. *See Gajwani & Lesser, supra* note 27, at 81–82.

261. *See PFAFF, supra* note 39, at 135–36.

262. *See id.* at 131–33; *Smith, supra* note 29, at 390–91.

Some reform-minded district attorneys flex the power that comes with being the prosecution in the same sentence that they pledge commitment to lenience. When Krasner pitches law students on joining his office, he calls prosecutors “public defenders with power.”²⁶³ Last year, Gonzalez’s office announced that his office would not contest parole requests by individuals prosecuted by his office—if they pled guilty.²⁶⁴

The coupling of almost unbridled power with the aura of progressivism is more than just ironic, it may in fact be counterproductive for this movement’s goals. Progressive prosecutors double-down on the traditional prosecutorial mantra of “doing justice.”²⁶⁵ Everyone believes they are fair; because prosecutors are told that their job is to do justice, they believe that what they do is just.²⁶⁶ A line prosecutor in an office run by a reformer, particularly one who believes in that mission, is even more likely to think that they know what justice is and that they are carrying it out.²⁶⁷ And because justice is in the eye of the beholder, it is difficult for a defense lawyer or supervisor to challenge that belief.²⁶⁸ These assistants, then, may in fact be *less* likely than their counterparts in traditional offices to take seriously claims that they are being unfairly and unnecessarily punitive.

Scholars and researchers have long recommended reforms to enable prosecutors to evaluate their cases more neutrally. Some are outside a district attorney’s control, such as giving prosecutors access to all

263. See Austen, *supra* note 151 (“‘A progressive D.A. is not the same thing as a traditional D.A.,’ [Krasner] told the law students. ‘You might call me a prosecutor with *com-passion*. Or a public defender with *pow-er*.’” (emphasis in original)); Gonnerman, *supra* note 124 (“‘Some people call them public defenders with power,’ [Krasner] joked.”).

264. Letter from Eric Gonzalez, Kings Cnty. Dist. Att’y, to Anthony J. Annucci, NYS Dep’t of Corr. & Cmty. Supervision Acting Comm’r (Apr. 3, 2019), <https://www.themarshallproject.org/documents/5926343-Eric-Gonzalez-letter-to-Anthony-Annucci> [<https://perma.cc/3SCH-NXNC>].

265. See *e.g.*, *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2019) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”).

266. See Smith, *supra* note 29, at 378–79.

267. See Cummings, *supra* note 248, at 2149 (“While a sense of having the moral high-ground may provide some needed exoneration from engaging in otherwise harmful behavior, a sense of moral superiority can be dangerous without specific guidance.”).

268. See Smith, *supra* note 29, at 379; see also Ouziel, *supra* note 39, at 588 (illustrating the difficulty of enforcing soft policies by describing “[t]he contrast between . . . Foxx’s success at reducing low-level shoplifting cases and her relatively greater struggle to generate change in bail outcomes”).

information gathered by police (so that their initial beliefs about culpability are more neutral).²⁶⁹ Others could be implemented through office policy, such as training programs that educate prosecutors about their biases; role-switching exercises in which prosecutors must play their own devil's advocate; the establishment of involving an unbiased decision maker in the case; and requiring prosecutors to do pro-defense work outside of their jobs.²⁷⁰ But research suggests that self-awareness does not necessarily prevent cognitive bias.²⁷¹ And the other recommendations are too elaborate to be practical given that many prosecutors handle hundreds of cases at a time.²⁷²

The prosecutorial psychology places profound limitations on the ability to accomplish reform through prosecutorial self-regulation. It lessens the likelihood that line prosecutors can prevent wrongful convictions and that they will deem individual defendants worthy of mercy warranting pre-trial release, diversion, or a dismissal. In other words, hiring line prosecutors who are interested in reform and telling them to be more careful in their dealings with defendants is unlikely to do much to end wrongful convictions and ensure appropriate leniency.

That prosecutors are incentivized to “win” and that they have much power by which to do so are separate problems that progressive prosecutors should address differently. First, they should support the reallocation of resources from their office not only to social services but also to indigent defense programs. The adversarial system incentivizes prosecutors to convict and punish, not to unilaterally mete out just results for criminal defendants. We need well-resourced criminal defense lawyers to make the system more balanced.²⁷³ Meanwhile, growth in spending on law enforcement has far outpaced that for indigent defense systems in the last few decades, leaving public defenders without the time or resources to zealously protect their clients from prosecutorial power.²⁷⁴ Nevertheless, even self-proclaimed progressive prosecutors have fought attempts to remedy huge budget discrepancies between their offices and

269. See Burke, *supra* note 238, at 1614–16.

270. See *id.* at 1616–26.

271. See *id.* at 1618.

272. See Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 267–76 (2011) (documenting prosecutorial caseloads in large counties).

273. Premal Dharia, *The Progressive Prosecutor Movement Is Great—But Without Funding Public Defenders It Won't Work*, SALON (Dec. 14, 2019, 12:00 PM), <https://www.salon.com/2019/12/14/the-progressive-prosecutor-movement-is-great-but-without-funding-public-defenders-it-wont-work> [<https://perma.cc/KC7Y-MN6B>] (“Public defenders are essential to implementing the policy changes proposed by so many prosecutors. They are the other half of the adversarial system; for every lever set up by prosecutors, they are necessary for pushing or pulling it.”).

274. See PFAFF, *supra* note 39, at 137–38.

the indigent defense system.²⁷⁵ A better funded indigent defense system could act as a more vigorous check on progressive and traditional prosecutors alike in order to ensure more fair results.

Second, district attorneys should support legislative and judicial limits on prosecutorial power. The progressive prosecutor movement is premised on a core claim about the power of district attorneys. As told by Bazelon: “American prosecutors have breathtaking power.”²⁷⁶ Since the 1980s, that power has been used to create mass incarceration.²⁷⁷ If we put the right people in charge of prosecutors’ offices, however, we can use that same power to undo those “disastrous results.”²⁷⁸

The only thing that district attorneys can hope to control is their own employees, which they do through the issuance of internal policies like those discussed throughout this Article. The progress that can be achieved through those policies is limited, however, because of who they cannot regulate (anyone outside the office, including police), the decisions they cannot direct (anything discretionary), how temporary they are (a new district attorney could repeal them all at once), and how narrowly enforceable they are (internally only, as they are not judicially enforceable).²⁷⁹ For these reasons, we must pursue legislative and judicial

275. For example, the New Orleans City Council voted in August 2020 to increase its funding to the public defender’s office from 35–85% of what it gives to the district attorney’s office. See Nicholas Chrastil, *City Council Passes Ordinance Bringing Public Defender Budget Closer to DA’s Office*, THE LENS (Aug. 20, 2020), <https://thelensnola.org/2020/08/20/city-council-passes-ordinance-bringing-public-defender-budget-closer-to-das-office> [<https://perma.cc/UTN7-CKXG>]. Leon Cannizzaro’s office spoke out to criticize claims that budget parity is needed as “attempts to mislead the public.” *Id.*

276. BAZELON, *supra* note 4, at xxv.

277. See *id.* (“Over the last forty years, prosecutors have amassed more power than our system was designed for. And they have mostly used it to put more people in prison, contributing to the scourge of mass incarceration . . .”).

278. *Id.*

279. See 1 KENNETH C. DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 17.7, at 145–46 (3d ed. 1994) (discussing judicial non-enforceability of agencies’ internal policies). As a result, there is widespread documentation of assistants explicitly and implicitly disregarding their reform-minded bosses’ office policies. See, e.g., Akela Lacy, *St. Louis Prosecutor Wesley Bell Launches Independent Unit to Hold Police Accountable*, INTERCEPT (July 4, 2019, 4:00 AM), <https://theintercept.com/2019/07/04/st-louis-prosecutor-wesley-bell-police-accountability-wrongful-conviction> [<https://perma.cc/G7QK-L65W>] (observing that, after Wesley Bell was elected on a campaign promise to combat police misconduct, his line prosecutors voted to join a police union before he took office—which would have placed them under the direct authority of the officers Bell wants them to prosecute); *Rhetoric, Not Reform: Prosecutors & Pretrial Practices in Suffolk, Middlesex, and Berkshire Counties*, COURTWATCH MA, 5–6 (Oct. 2019), https://www.courtwatchma.org/uploads/4/7/8/9/47895019/rhetoric_not_reform_-_oct._2019.pdf [<https://perma.cc/8TXP-X6T8>] (noting that assistants in Rollins’s office ignored her policies, continuing to prosecute offenses on her “do-not-charge” list and requesting frequently money bail); Beth Fertig & Jenny Ye, *Brooklyn DA’s Pledge to Reduce Marijuana Prosecutions Makes Little Difference*, WYNC (Sept. 7, 2017),

limitations on prosecutorial power if we hope to transform who prosecutors convict and how they punish.²⁸⁰ But prosecutors' offices have historically been some of the greatest obstacles to legislative and judicial reform of prosecutorial power and defendants' rights through lobbying and amicus activity.²⁸¹

Progressive prosecutors should stop opposing these reforms and instead actively support them. In doing so, they can lend great credibility to these efforts while pursuing their own goals. Some reform-minded district attorneys have already taken small steps in this direction. For example, several progressive prosecutors have withdrawn from their state district attorney associations, and some have even formed new ones.²⁸² In July 2020, eleven district attorneys in Virginia sent a letter to state legislators expressing their support for proposed reform legislation.²⁸³ The letter specifically mentioned support for the removal of mandatory minimum sentences, which are commonly viewed as a powerful tool for prosecutors.²⁸⁴ In 2014, when he was the district attorney in San Francisco, Gascón authored a California ballot initiative that recategorized some non-violent offenses from felonies to misdemeanors.²⁸⁵ These are very small starts, and prosecutors focused on transformation must go much further.

<https://www.wnyc.org/story/despite-das-change-marijuana-policy-brooklyn-defendants-still-come-court> [<https://perma.cc/ZMT8-V6XX>] (discussing how Brooklyn District Attorney's Office continued to prosecute more than 80% of those arrested for marijuana possession after Kenneth Thompson and then Eric Gonzalez directed them not to do so unless the defendant had a serious criminal record).

280. Progressive prosecutors' failed attempts to hold police accountable for killing unarmed civilians suggest the law likely must also be changed in order for those prosecutions to succeed. In addition to the acquittals in Baltimore, Wesley Bell announced in August 2020 that his office would not charge the officer who killed Michael Brown—although his campaign was premised largely on his predecessor's failure to do so—because the officer had a valid self-defense claim under Missouri law. See Alice Sperti, *Can "Progressive" Prosecutors Bring Justice to Victims of Police Violence?*, THE INTERCEPT (Aug. 27, 2020, 10:00 AM), <https://theintercept.com/2020/08/27/wesley-bell-michael-brown-darren-wilson-ferguson-police> [<https://perma.cc/677B-CNJM>].

281. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 727–29 (2005) (discussing law enforcement, and in particular prosecutorial, lobbying efforts); Bruce A. Green, *Gideon's Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336 (2013) (discussing use of amicus briefs to oppose expansion of defendants' rights).

282. Angela J. Davis, *The Carceral Force of Prosecutors Associations, Explained*, THE APPEAL (Feb. 26, 2021), <https://theappeal.org/the-lab/explainers/the-carceral-force-of-prosecutor-associations-explained> [<https://perma.cc/T73J-KZYE>].

283. See Letter from Virginia Progressive Prosecutors for Justice to Senator Surovell, Leader Herring, and Chair Bagby (July 13, 2020), <https://bluevirginia.us/2020/07/virginia-progressive-prosecutors-for-justice-write-letter-to-general-assembly-re-criminal-justice-reform-priorities> [<https://perma.cc/289G-VU9V>].

284. *Id.*

285. See George Gascón, *Prop 47 Is Necessary to Put War on Drugs Behind Us*, S.F. CHRON. (Nov. 24, 2018, 6:42 PM), <https://www.sfchronicle.com/opinion/article/Prop-47-is-necessary-to-put-the-war-on-drugs-13413035.php> [<https://perma.cc/D4LS-Z4N2>].

For other progressive prosecutors, support for reforms imposed on their office from the outside has been uneven. For example, Kim Ogg filed an amicus brief on the side of plaintiffs in a bail reform lawsuit against Harris County's misdemeanor judges, but she later objected to the resulting settlement between the state and plaintiffs.²⁸⁶ And Gonzalez supported discovery reform in New York, even convincing the District Attorneys Association of New York to follow suit.²⁸⁷ But he also advocated for the repeal of New York's bail reform law, which he said did not give judges enough discretion to detain individuals before trial.²⁸⁸

District attorneys who are serious about prosecutorial reform should support such initiatives even when they take the form of checks imposed by other branches of government. Rather than promising that they will use their power for good, district attorneys who are committed to transforming the criminal system should support efforts to make their offices less powerful.

*D. Eliminating Racial Discrimination*²⁸⁹

Finally, racial justice has been a central part of progressive prosecutor campaigns.²⁹⁰ There are racial disparities at every step of the criminal process,²⁹¹ and traditional prosecutors have played a major role in

286. See *Amicus Curiae* Brief of Harris County District Attorney, *ODonnell v. Harris Cnty.*, No. 4:16-cv-01414 (Aug. 22, 2019).

287. Rob Abbruzzese, *Brooklyn DA Pushes Major Reform in Evidence Disclosure*, BROOKLYN DAILY EAGLE (Mar. 4, 2019), <https://brooklyneagle.com/articles/2019/03/04/brooklyn-da-calls-for-discovery-reform-in-op-ed/> [<https://perma.cc/9QJ5-H7TH>].

288. *Bail Reform: Brooklyn DA Eric Gonzalez Demands Changes to Controversial Laws*, CBS N.Y. (Feb. 5, 2020, 5:46 PM), <https://newyork.cbslocal.com/2020/02/05/brooklyn-district-attorney-eric-gonzalez-bail-reform/> [<https://perma.cc/ZM7M-ZS2Z>]; see also Carimah Townes, *The Bail Bond Company Financing Brooklyn DA Candidate Eric Gonzalez*, THE APPEAL (Aug. 2, 2017), <https://theappeal.org/the-bail-bond-company-financing-brooklyn-da-candidate-eric-gonzalez-d7e265babdff/> [<https://perma.cc/5549-BEFW>] (noting that bail reform was not part of Gonzalez's platform and that he has accepted large campaign contributions from a bail bond company).

289. Particularly in light of recent events surrounding Floyd's death, tackling racial discrimination in policing and prosecution is one of the most important tasks facing the criminal system. I discuss it last in this Article, however, because of the movement's discouraging lack of actionable goals in this area is, despite an otherwise robust platform.

290. See, e.g., Steve Schmadeke, *Kim Foxx Promises "New Path" of Transparency as Cook County State's Attorney*, CHI. TRIB. (Dec. 1, 2016, 6:34 PM), <https://www.chicagotribune.com/news/breaking/ct-kim-foxx-states-attorney-met-20161201-story.html> [<https://perma.cc/W583-FCLC>] (noting that Foxx has promised her office will "address the racial disparities that people in the community have concerns about").

291. See Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. ONLINE 1, 1–2 (2018).

exacerbating discrimination through their discretion.²⁹² Because racial minorities are overrepresented in the criminal system, many of the reforms that are central to this movement—including declining certain charges, increasing the availability of diversion programs, and not seeking the death penalty²⁹³—will positively impact those individuals. But these efforts do not target racial *disparities*. Indeed, we have already seen evidence that some of the reforms this movement advocates may not affect them at all.²⁹⁴ Efforts to reduce incarceration rates that focus on non-violent crime, moreover, will likely exacerbate racial disparities as Black men are overrepresented among those serving time for violent offenses than they are for other offense categories.²⁹⁵

Progressive prosecutors and their proponents have proposed shockingly few policies to combat racial inequality specifically. Wesley Bell, John Creuzot, Kim Foxx, Larry Krasner, and Rachael Rollins all released lengthy policy memoranda soon after taking office and have updated them since.²⁹⁶ Only Rollins mentioned race, and none discussed policies targeted at reducing racial disparities.²⁹⁷ When progressive prosecutors do name such policies, they are typically data transparency initiatives.²⁹⁸

The movement’s supporters do not offer promising policy recommendations, either. Joseph Margulies advises prosecutors to “Be

292. *Id.* at 2.

293. *See* 21 *Principles for the 21st Century Prosecutor*, *supra* note 149, at 23 (“Oppose legislation to expand or expedite the death penalty and consider publicly supporting death-penalty repeal.”).

294. For example, New Jersey essentially eliminated money bail beginning in 2017. But Black defendants made up 54% of the jail population both before and one year after the reform went into effect. ADMIN. OFF. CTS., CRIMINAL JUSTICE REFORM: 2018 REPORT TO THE GOVERNOR AND THE LEGISLATURE 27 (Apr. 2019).

295. *See* William J. Sabol, Thaddeus L. Johnson & Alexander Caccavale, *Trends in Correctional Control by Race and Sex*, COUNCIL ON CRIM. JUST. 8 (Dec. 2019), https://cdn.ymaws.com/counciloncj.org/resource/collection/4683B90A-08CF-493F-89ED-A0D7C4BF7551/Trends_in_Correctional_Control_-_FINAL.pdf [<https://perma.cc/3BQ9-XU73>].

296. *See* *Policy Memo*, COOK CNTY. STATE’S ATT’Y, <https://www.cookcountystatesattorney.org/resources/policy-memo> [<https://perma.cc/UB7E-9J3P>] (last visited July 1, 2020); Letter from John Creuzot, *supra* note 134; *The Rachael Rollins Policy Memo*, SUFFOLK CNTY. DIST. ATT’Y (Mar. 2019), <https://www.suffolkdistrictattorney.com/rachael-rollins-policy-memo> [<https://perma.cc/QYH9-XR4R>]; Interim Off. Pol’y’s, *supra* note 134; Memorandum from Larry Krasner, *supra* note 133.

297. *The Rachael Rollins Policy Memo*, *supra* note 296.

298. *See, e.g.*, Amber Fisher, *Candidate Profile: Alexis King, 1st Judicial District Attorney*, PATCH (Oct. 8, 2020, 7:39 AM), <https://patch.com/colorado/golden/candidate-profile-alexis-king-1st-judicial-district-attorney> [<https://perma.cc/3ZRD-RHNP>] (“Since I began this campaign, before George Floyd’s murder, I was championing data collection and transparency to address systemic racism.”).

Purposeful” about their decisions.²⁹⁹ Sklansky suggests that they collect data on racial disparities, clean up discriminatory office culture, and diversify their staff.³⁰⁰ Bazelon, in a collaboration with Fair and Just Prosecution, recommends tracking and releasing race data, “[e]ngag[ing] the community and the office in reflective conversation about the role of prosecutors in racial inequity,” being weary of risk assessment tools, and working with police to reduce disparities in their practices.³⁰¹

Two notable exceptions to the lamentable lack of initiatives on this front—both from Boudin in San Francisco—illustrate that progressive prosecutors could do more within their own offices.³⁰² Scholars and criminal justice advocates have long complained that police use pretextual stops—minor traffic violations as a pretext for stopping individuals who they suspect, but have no evidence to suggest, are engaged in criminal activity³⁰³—in a racially discriminatory manner.³⁰⁴ Police may do so because they hope to discover such evidence during the stop or receive consent from the driver to search their vehicle.³⁰⁵ In an effort to disincentivize these discriminatory tactics—or at least prevent prosecutions built upon them—Boudin has directed his assistants not to charge people with possession of contraband discovered through consent vehicle searches following stops based on minor traffic infractions unless

299. See Joseph Margulies, *Seven Steps for Progressive Prosecutors*, VERDICT (Apr. 30, 2019), <https://verdict.justia.com/2019/04/30/seven-steps-for-progressive-prosecutors> [<https://perma.cc/6K8T-P7GY>].

300. *Progressive Prosecutor’s Handbook*, *supra* note 8, at 31–32, 39, 40; see also BUTLER, *supra* note 41, at 105 (“It is significant that mass incarceration, and its attendant gross racial disparities, are occurring at a time when prosecutors’ offices are more diverse than ever.”); Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1054 (2010) (“The prosecutors I’ve debated, many of whom are African-American, all claimed that their work is in the best interest of black people, even when that work includes locking up many blacks. These prosecutors have identified a different main race problem than mass incarceration.”).

301. *21 Principles for the 21st Century Prosecutor*, *supra* note 149, at 15–16.

302. See *infra* notes 302–09 and accompanying text.

303. *United States v. Guzman*, 864 F.2d 1512, 1515 (10th Cir. 1988) (“A pretextual stop occurs when the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop. The classic example . . . occurs when an officer stops a driver for a minor traffic violation in order to investigate a hunch that the driver is engaged in illegal drug activity.”), *overruled by United States v. Botero-Ospina*, 71 F.3d 783 (10th Cir. 1995).

304. See Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CAL. L. REV. 199, 209 n.56 (2007) (cataloguing a “voluminous literature on racial profiling and traffic stops”).

305. David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 249 (“Police use traffic violation stops as a way to gain consent, plain view, or other justification for a search or seizure.”).

“extraordinary circumstances present grave risks to public safety or crime victims.”³⁰⁶

Boudin has also prohibited his assistants from seeking sentence enhancements based on alleged gang affiliation on the grounds that they contribute to racial disparities.³⁰⁷ California, like many other states, permits prosecutors to ask for a longer sentence on the grounds that the defendant is a member of a “gang.”³⁰⁸ These enhancements are used overwhelmingly against people of color. For example, as of August 2019, more than 90% of adults with gang enhancements in California prisons were Black or Latinx.³⁰⁹ Almost a year after Boudin enacted this policy, newly elected Gascón (Boudin’s predecessor at the San Francisco District Attorney’s Office³¹⁰) followed suit.³¹¹ Ending prosecutions based on pretextual stops and the use of gang enhancements are laudable policies that push far beyond what the movement has asked of its candidates.

To some extent, the dearth of proposed reforms targeting racial discrimination in the standard progressive prosecutor playbook is not surprising: the structure and position of the prosecutor’s office simply do not make it a promising source of reform on this front. As Boudin’s policy regarding pretextual stops recognizes, police practices may introduce racial disparities into a case before it ever comes in the door.³¹² Some arise because of officers’ racial attitudes, and others from factors defined outside the criminal system, such as where racial minorities tend to live

306. Press Release, San Francisco Dist. Att’y’s Off., Dist. Att’y Boudin Pioneers First in the Nation Pol’y Directives (Feb. 28, 2020), <https://sfdistrictattorney.org/press-release/da-boudin-pioneers-first-in-nation-policy-directives/> [https://perma.cc/LFG9-PMJ4].

307. *Id.*

308. See CAL. PENAL CODE § 186.22(b) (West 2021).

309. Abené Clayton, *92% Black or Latino: The California Laws that Keep Minorities in Prison*, GUARDIAN (Nov. 26, 2019, 6:00 AM), <https://www.theguardian.com/us-news/2019/nov/26/california-gang-enhancements-laws-black-latinos> [https://perma.cc/6B5X-YYHW].

310. Julia Wick, *Newsletter: What Does it Mean to Be a Progressive Prosecutor?*, L.A. TIMES (Nov. 12, 2019, 3:30 AM), <https://www.latimes.com/california/story/2019-11-12/progressive-prosecutor-gascon-chesa-boudin> [https://perma.cc/VX2U-DDBP].

311. See Memorandum from George Gascón, Dist. Att’y, Los Angeles Cnty. Dist. Att’y’s Off., to All Deputy Dist. Att’ys, Los Angeles Cnty. Dist. Att’y’s Off. 1–2 (Dec. 7, 2020), <https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-08.pdf> [https://perma.cc/K8LJ-X8WX]. The policy also prohibits assistants from asking for several other types of enhancements, though Gascón ultimately walked back his promise not to seek any enhancements by making an exception for those “involving the most vulnerable victims and in specified extraordinary circumstances.” Memorandum from George Gascón, Dist. Att’y, Los Angeles Cnty. Dist. Att’y’s Off., to All Deputy Dist. Att’ys, Los Angeles Cnty. Dist. Att’y’s Off. 1 (Dec. 18, 2020), <https://da.lacounty.gov/sites/default/files/policies/SD-20-08-2.pdf> [https://perma.cc/2YEJ-RQT4].

312. See Dist. Att’y Boudin Pioneers First in the Nation Pol’y Directives, *supra* note 306.

and the differential criminal treatment of similar activities.³¹³ Once a case reaches that office, moreover, explicit and implicit biases extend and exacerbate racial disparities.³¹⁴ While district attorneys can collect and publish data on those disparities, doing so does not create an implementable goal for line prosecutors who make hundreds of decisions per day left entirely to their discretion.³¹⁵ In other words, we cannot trust prosecutors to unilaterally rectify racial discrimination in the criminal system through the exercise of their discretion.

Thus, district attorneys should support efforts to strengthen defendants' equal protection rights. The constitutional treatment of the pretextual stops Boudin's policy targets is just one example of why legal reform in this area is necessary. A one-two punch by the U.S. Supreme Court laid to rest any hope that the Constitution protected against these racist pretextual stops in 1996. In *Whren v. United States*,³¹⁶ the Court held that police may stop a vehicle any time they have probable cause to believe a traffic violation occurred, even if they were subjectively motivated by race in doing so.³¹⁷ Claims of racial discrimination, the Justices said, must be brought under the Equal Protection Clause rather than the Fourth Amendment.³¹⁸ Only a couple months earlier, however, the Court had held that an individual alleging racially selective enforcement of the law could not even get discovery from the state simply by showing that a disproportionate number of those prosecuted were Black.³¹⁹ Instead, he must prove that similarly situated individuals of other races had not been prosecuted.³²⁰ By requiring a plaintiff to provide this evidence even before the discovery phase of the case, the Court set the bar for proving racial discrimination in policing almost impossibly high.³²¹ Since then, it has

313. See PFAFF, *supra* note 39, at 149–50 (discussing how minorities who deal drugs are more likely to do so within a school zone than whites are simply because they more often live in denser urban areas); Smith, *supra* note 29, at 373 n.121 (discussing differential criminal treatment of crack cocaine and powder offenses).

314. See PFAFF, *supra* note 39, at 145–46 (discussing how implicit racial bias affects prosecutorial decision-making).

315. For example, district attorney candidate Alexis King said that data would reveal “whether people are treated differently because of their identity,” which would in turn serve as a basis for a “dialogue with [the] community, including police, about moving forward together with solutions to address systemic inequity and public safety.” Fisher, *supra* note 297.

316. 517 U.S. 806 (1996).

317. *Id.* at 810–13.

318. *Id.* at 813.

319. See *United States v. Armstrong*, 517 U.S. 456, 468–70 (1996).

320. *Id.* at 465.

321. See Jonathan Abel, *Batson's Appellate Appeal and Trial Tribulations*, 118 COLUM. L. REV. 713, 731 n.97 (2018) (noting that a search for successful selective prosecution cases between 2008 and November 2017 returned only “one trial court victory” and “one appellate court victory”).

only further chipped away at any hope that the U.S. Constitution protects against police or prosecutorial action motivated by unconstitutional purposes.³²² In other words, Boudin's policy of not prosecuting cases arising out of pretextual stops is meaningful because it not only recognizes the racial dynamics of policing generally but also addresses them systematically instead of placing the burden on defendants to plead and prove them in each case.

Progressive prosecutors should support reforms aimed at strengthening defendants' rights in this and other areas of racial discrimination that are not meaningfully actionable under the federal Constitution. Some state courts have interpreted their constitutions to be more protective against racial discrimination in the criminal process.³²³ If progressive prosecutors support the expansion of these rights, criminal defendants and their lawyers can serve as a more powerful check on racial discrimination by law enforcement—including by line prosecutors.

At least one progressive prosecutor has resisted reform efforts in this area. In 2013, the Washington Supreme Court handed down a decision in which it observed that “racial discrimination remains rampant in jury selection” and indicated that it was interested in changing the state's *Batson* procedures.³²⁴ Satterberg opposed the changes in substance, but he publicly stated that he was concerned that the court would implement them in a manner that would disrupt a criminal conviction his office had obtained.³²⁵ He observed that the court had a “minority and justice commission,” and said that if the justices wanted to have a “discussion” about discrimination in jury selection, “frankly that's where it should

322. See, e.g., *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019) (holding that existence of probable cause bars recovery for retaliatory arrest); *Hartman v. Moore*, 547 U.S. 250 (2006) (holding that existence of probable cause bars recovery for malicious prosecution).

323. See, e.g., *State v. Ladson*, 979 P.2d 833, 842–43 (Wash. 1999) (en banc) (concluding that pretextual stops violate Washington Constitution), *abrogated by State v. Arreola*, 290 P.3d 983, 991 (Wash. 2012); *State v. Heath*, 929 A.2d 390, 402 (Del. Super. Ct. 2006) (concluding that pretextual stops violate Delaware Constitution); *Nease v. State*, 105 P.3d 1145, 1148–49 (Alaska Ct. App. 2005) (holding that an officer's ulterior motive for stop is irrelevant unless defendant proves it prompted departure from “reasonable police practices”); *State v. Ochoa*, 206 P.3d 143, 151–55 (N.M. Ct. App. 2008) (declining to adopt *Whren* standard). A recent study of over eight million traffic stops conducted in Washington under *Ladson* and *Arreola* concluded that “the *Arreola* decision is associated with a statistically significant increase in traffic stops of drivers of color relative to white drivers” and, therefore, “that judicial decisions like *Whren* and *Arreola* may increase the probability of racial profiling by police officers.” Stephen Rushin & Griffin Edwards, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. (forthcoming 2021).

324. *State v. Saintcalle*, 309 P.3d 326, 329, 334 (Wash. 2013) (en banc).

325. Phyllis Fletcher, *State Supreme Court Blasts Racism in Jury Selection*, KUOW.ORG (Aug. 2, 2013, 2:41 PM), <https://www.kuow.org/stories/state-supreme-court-blasts-racism-jury-selection> [<https://perma.cc/4PTQ-28CP>].

happen.”³²⁶ The court ultimately announced a new *Batson* standard in a later case—though not one brought by Satterberg’s office—and implemented it through a rule change in 2017.³²⁷

In California, reform-minded district attorneys sat out the debate over one of the most progressive racial justice bills in the nation. The California Racial Justice Act was passed in September 2020 and allows defendants to challenge their convictions and sentences on the grounds that the state was motivated in part by the defendant’s race.³²⁸ Defendants can make this showing in a variety of ways that are distinctly more favorable than those provided by federal law. For example, a defendant may do so by demonstrating that he was charged or convicted of a more serious offense, or received a longer sentence, compared to other similarly situated individuals of other races.³²⁹ Importantly, defendants do not need to prove discriminatory intent or that the discrimination prejudiced their case.³³⁰ Although the California District Attorneys Association opposed the bill, none of the progressive prosecutors in the state appear to have taken a position on it either way.³³¹

Rather than prioritizing any one conviction in which their own assistants may have engaged in racial discrimination, reform-minded prosecutors should support state and local initiatives to bolster criminal defendants’ equal protection rights. As more states consider racial justice initiatives like those out of Washington and California, progressive prosecutors should embrace these opportunities.³³²

326. *Id.*

327. *See City of Seattle v. Erickson*, 398 P.3d 1124 (Wash. 2017); WASH. GEN. R. 37.

328. *See* Assem. Bill 2542, 2019-2021 Reg. Sess. (Cal. 2020).

329. *Id.* Although the bill does not provide a specific standard for discovery of the information relevant to proving this claim, it does state that it is legislators’ intent “to ensure that individuals have access to all relevant evidence, including statistical evidence, regarding potential discrimination in seeking or obtaining convictions or imposing sentences.” *Id.*

330. *See id.*

331. *See* Senate Floor Analyses, Assem. Bill 2542, SENATE RULES COMM. (Aug. 25, 2020) (listing California District Attorneys Association as one of two opponents).

332. *See, e.g., State v. Holmes*, 221 A.3d 407, 436–37 (Conn. 2019) (creating a Jury Selection Task Force to study the problem of race discrimination in jury selection); *State v. Curry*, 447 P.3d 7, 14 (Or. Ct. App. 2019) (“Washington’s experience, and whether a similarly concrete set of rules would improve our handling of peremptory challenges, are questions that may be appropriate for the Council on Court Procedures and the legislature to consider.”); Press Release, Merrill Balassone, Jud. Branch of Cal., Supreme Court Announces Jury Selection Work Group (Jan. 29, 2020), <https://newsroom.courts.ca.gov/news/supreme-court-announces-jury-selection-work-group> [<https://perma.cc/EQ9M-QHJX>] (announcing the creation of a working group to investigate racial discrimination in jury selection).

III. GOING BEYOND THE MOVEMENT

Part II examined the shortcomings of the progressive prosecutor movement's standard policies and suggested that it must ask more of its candidates in order to accomplish its goals. This Part scrutinizes a more fundamental element of the movement: its reliance on prosecutorial elections. More specifically, I argue that the electoral mechanism itself is likely one reason why we have not seen—and may continue not to see—the type of transformative policies needed to reduce mass incarceration and make the criminal system more fair. Bazelon and others believe that electing reform-minded prosecutors is a “shortcut” to addressing dysfunction in the criminal system while we wait for better solutions,³³³ but I worry that it is just cutting corners.

The primary reason why elections may be a flawed mechanism for selecting the types of prosecutors who will implement transformative policies is the incentives they create. Criminal justice reform advocates have long contended that prosecutors should not be elected.³³⁴ They argue that Americans have punitive attitudes towards crime and therefore any political process for determining criminal policies will ultimately trend towards catering to those views.³³⁵ Particularly because the nuts and bolts of the criminal system are not generally visible to the public,³³⁶ discussions about criminal policy—including during district attorney races—have tended to sensationalize individual cases.³³⁷ Aside from the fact that this political football generally results in more punitive policies, individual defendants or victims should never be the targets of political campaigns by those who seek to represent “the people.”³³⁸

333. BAZELON, *supra* note 4, at xxxi.

334. For an argument against the democratization of the criminal system more broadly, see John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711 (2020).

335. See, e.g., BARKOW, *supra* note 159, at 2–3; PFAFF, *supra* note 39, at 161–83.

336. See *Changing Political Landscape*, *supra* note 8, at 671 (“Prosecutors do much of their most important work not in open court but behind closed doors: that is where they consult with police officers, make charging decisions, determine what evidence needs to be disclosed, and hammer out plea deals. And prosecutors’ offices tend to be secretive and opaque, far more so than even most police departments. As a consequence, the public often lacks basic information about how a district attorney’s office is operating.”).

337. This problem is often referred to as the “Willie Horton Effect.” This refers to then-presidential candidate George H.W. Bush’s racialized campaign ad blaming his Democratic opponent, Massachusetts governor Michael Dukakis, for the brutal crimes Horton committed while on prison furlough. PFAFF, *supra* note 39, at 170; see also BUTLER, *supra* note 41, at 117 (listing prosecutorial decisions in high-profile cases that were motivated by political considerations).

338. See *Changing Political Landscape*, *supra* note 8, at 673 (“[R]elying on campaign rhetoric and isolated, sensational cases in deciding whether to reelect a district attorney . . . seems undesirable not just because it ignores too much and lets too many

A movement predicated on electing district attorneys necessarily perpetuates the politicization of that office, but this one also seems to exacerbate it. Donors and activists have tried to keep tremendous public pressure on prosecutors who campaigned on reform to follow through with their promises.³³⁹ Those prosecutors themselves criticized their predecessors based on their prosecution (or, more often, non-prosecution) of individual cases, particularly famous and wealthy defendants and police officers who killed unarmed citizens.³⁴⁰ Progressive prosecutors who want the continued support of those allies therefore may feel like they must throw the book in certain cases, even when it may not be legally justified. For example, some have attributed Mosby's unsuccessful prosecutions of three officers who shot Freddie Gray to overcharging under political pressure.³⁴¹ The policy memorandum Eli Savit issued the day he took office instructed line prosecutors to consult with a supervisor about "any case likely to attract significant public interest."³⁴² "[P]rosecution by plebiscite" perpetuates unfairness in the criminal system, even when it targets otherwise privileged individuals.³⁴³

These dynamics sometimes lead reform-minded district attorneys to pursue prosecutions that are otherwise inconsistent with their goals. The prosecution of Amy Cooper is illustrative. In June 2020, Ms. Cooper—a white woman—called 911 from Central Park and reported that an "African-American man" was threatening her and had tried to assault

elected prosecutors off the hook, but because it can inappropriately politicize the treatment of individual defendants.").

339. See, e.g., BAZELON, *supra* note 4, at 150 ("They won't let you get away from them," Foxx said, with wry affection, of the activists who'd gone from campaigning for her to tracking her work."); Jacob Rosenberg, *Can a Prosecutor Ever Truly Be Progressive? Ferguson May Be the Ultimate Test Case.*, MOTHER JONES (Apr. 17, 2019), <https://www.motherjones.com/crime-justice/2019/04/progressive-prosecutors-ferguson-wesley-bell-kamala-harris-kim-gardener> ("As a prosecutor in a birthplace of the Black Lives Matter movement, [Bell is] balancing significant pressure from the activists who helped elect him while he works within the system that inspired their anger in the first place.").

340. See *Changing Political Landscape*, *supra* note 8, at 673–74 (discussing roles of Bill Cosby in Kevin Steele's election and police shootings in Jackie Lacey's, Kim Foxx's, and Michael O'Malley's elections).

341. See Rector, *supra* note 117; David A. Graham, *Can the Baltimore Prosecutor Win Her Case?*, ATLANTIC (May 6, 2015), <https://www.theatlantic.com/politics/archive/2015/05/can-the-baltimore-prosecutor-win-her-case/392489/> [<https://perma.cc/UB6X-H3NA>].

342. *Policy Directive 2021-01*, *supra* note 147, at 11; Kristina Zheng & Shannon Stocking, *Washtenaw County Prosecutor Makes Sweeping Changes During First Two Weeks in Office*, MICH. DAILY (Jan. 15, 2021, 5:09 PM), <https://www.michigandaily.com/section/ann-arbor/washtenaw-county-prosecutor-makes-sweeping-changes-during-first-two-weeks-office> [<https://perma.cc/4PGW-7UVK>].

343. See *Changing Political Landscape*, *supra* note 8, at 674.

her.³⁴⁴ In reality, Christian Cooper had simply asked her to leash her dog.³⁴⁵ The call was the topic of national conversation for weeks, as many noted the troubling history of white people falsely accusing Black people of crimes.³⁴⁶ Then, Vance (the Manhattan District Attorney) charged Ms. Cooper with filing a false police report, a misdemeanor that carries up to one year in jail.³⁴⁷ His office even published a press release announcing her court date and promising to “provide the public with additional information as the case proceeds.”³⁴⁸

Vance appears to have treated Ms. Cooper differently than he would have if she were not a headline. Elsewhere, he boasts of having “slashed the number of people coming into the criminal justice system in Manhattan nearly in half” and “[e]nding the prosecution of most low-level, nonviolent violations.”³⁴⁹ Ms. Cooper’s behavior was troubling and could have had dire consequences for Mr. Cooper depending on how police responded.³⁵⁰ But it is difficult to square the decision to charge her with Vance’s prosecutorial priorities and the movement’s broader goals around reducing unnecessary criminal prosecutions.³⁵¹ And although Ms. Cooper

344. Sarah Maslin Nir, *How 2 Lives Collided in Central Park, Rattling the Nation*, N.Y. TIMES (Oct. 14, 2020), <https://www.nytimes.com/2020/06/14/nyregion/central-park-amy-cooper-christian-racism.html> [<https://perma.cc/8FDY-BRVD>].

345. Amanda Rosa, *A 2nd 911 Call: What to Know About the Amy Cooper Case*, N.Y. TIMES (Oct. 15, 2020), <https://www.nytimes.com/2020/10/15/nyregion/amy-cooper-false-report-charge.html> [<https://perma.cc/DH89-HGQE>].

346. See Jan Ransom, *Amy Cooper Faces Charges After Calling Police on Black Bird-Watcher*, N.Y. TIMES (Oct. 14, 2020), <https://www.nytimes.com/2020/07/06/nyregion/amy-cooper-false-report-charge.html> [<https://perma.cc/PZ3X-UAK3>].

347. Press Release, Manhattan Dist. Att’y’s Off., Statement from Manhattan D.A. Cy Vance, Jr. on Incident in Central Park Ramble on May 25, 2020 (July 6, 2020), <https://www.manhattanda.org/statement-from-manhattan-d-a-cy-vance-jr-on-incident-in-central-park-ramble-on-may-25-2020> [<https://perma.cc/DU8Y-XWAC>].

348. See *id.*

349. *Issues*, CY VANCE FOR DA, <http://www.cyvanceforda.com/page/issues> (last visited Feb. 3, 2021).

350. See Jan Ransom, *Case Against Amy Cooper Lacks Key Element: Victim’s Cooperation*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/07/07/nyregion/amy-cooper-central-park-false-report-charge.html> [<https://perma.cc/4ABE-875A>] (“‘If the police believed she was really being attacked, they could have come in with guns drawn and she would have been the only witness in this — outside of that video that may or may not have surfaced,’ said Gloria J. Browne-Marshall, a professor of constitutional law at the John Jay College of Criminal Justice.”).

351. See *supra* Part I (discussing demands that prosecutors prosecute fewer non-violent cases and consider collateral consequences in charging decisions); Christian Cooper, Opinion, *Christian Cooper: Why I Have Chosen Not to Aid the Investigation of Amy Cooper*, WASH. POST (July 14, 2020, 12:00 PM), https://www.washingtonpost.com/opinions/christian-cooper-why-i-am-declining-to-be-involved-in-amy-coopers-prosecution/2020/07/14/1ba3a920-c5d4-11ea-b037-f9711f89ee46_story.html [<https://perma.cc/3GA8-QSD6>] (“‘Considering that Amy Cooper has already lost her job

knowingly weaponized a racially discriminatory system, prosecuting her does nothing to address the system itself.³⁵² It appears instead to be a politically motivated symbolic gesture of the type that prosecutorial elections incentivize but which undermine the goal of creating a fair system. As Mr. Cooper— who refused to cooperate with prosecutors— has argued, this prosecution simply allows people to “pat themselves on the back for having done something about racism, when they’ve actually done nothing.”³⁵³ For these reasons, there is reason to doubt that elections can be a path to the achievement of progressive prosecutors’ goals.

A second obstacle that elections pose to truly transformative prosecutors is the cost of winning these races. A cornerstone of this movement’s electoral success is the small number of votes it takes to sweep a reform candidate (or any candidate, for that matter) into the district attorney’s office. District attorney races have historically been down-ballot races that garner little voter interest.³⁵⁴ As illustrated by Krasner’s race, elections made more salient by progressive candidates may, in some cases, boost voter turnout.³⁵⁵ But, as Bazelon has recognized, “The progressive victories in D.A. races [have] involved mobilizing relatively small numbers of voters.”³⁵⁶ Only 17% of Philadelphia voters turned out for Krasner’s election in 2017, giving him fewer than 30,000 votes more than his nearest competitor³⁵⁷ in a city of almost 1.6 million

and her reputation, it’s hard to see what is to be gained by a criminal charge, aside from the upholding of principle.”).

352. See Cooper, *supra* note 351 (“[I]f the fear is that the police would have done me harm as a result of Cooper’s call, then the solution is to fix policing.”); Jamil Smith (@JamilSmith), TWITTER (July 6, 2020, 2:28 PM), <https://twitter.com/JamilSmith/status/1280222095113285632> [<https://perma.cc/PLV7-HVPK>] (“[L]ocking her up would get us no closer to solving the issue that she exploited: cops killing black people disproportionately.”).

353. Cooper, *supra* note 351. This warning was prescient—Vance’s office dismissed the charges against Ms. Cooper after she completed five therapy sessions that focused on racial equity. See Jonah E. Bromwich, *Amy Cooper, Who Falsely Accused Black Bird-Watcher, Has Charge Dismissed*, N.Y. TIMES (Feb. 16, 2021), <https://www.nytimes.com/2021/02/16/nyregion/amy-cooper-charges-dismissed.html>.

354. See White, *supra* note 104 (“Once relegated to the realm of down-ballot afterthoughts for many voters, district attorney races have increasingly attracted national attention and money.”); see also Rosenberg, *supra* note 339 (characterizing St. Louis county district attorney primary as “normally a low-turnout local primary”).

355. See Larry Krasner, Opinion, *What Justice Looks Like: Philadelphia’s DA Praises Tiffany Cabán’s Addition to the Ranks of Reformers*, N.Y. DAILY NEWS (June 30, 2019, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-what-justice-looks-like-20190630-qs76ddsbrfk3evikmrbiqhxca-story.html> [<https://perma.cc/4FL5-HL7C>].

356. BAZELON, *supra* note 3, at 85.

357. Mark Dent, *Larry Krasner and George Soros Spent \$33 per Vote to Win the Philly DA Race*, BILLY PENN (June 26, 2017, 2:30 PM), <https://billypenn.com/2017/06/26/larry-krasner-and-george-soros-spent-33-per-vote-to-win-the-philly-da-race> [<https://perma.cc/PU9S-P8NL>].

people.³⁵⁸ In San Francisco, Boudin barely edged out Suzy Loftus in an election with voter turnout slightly below what it was in the last election with no federal candidates on the ballot.³⁵⁹ Mosby won the 2018 Baltimore democratic primary—the only seriously contested part of her re-election campaign—with just under 40,000 votes *total*.³⁶⁰ Voter turnout was 26%, barely higher than the last comparable election.³⁶¹ Bell won just over 20,000 more votes than incumbent Robert McCulloch to beat him in the 2018 St. Louis democratic primary.³⁶² Four years earlier, McCulloch defeated his primary challenger by more than 50,000 votes.³⁶³

Ad money is key to achieving the name recognition that a reformer—usually a newcomer on the political stage, and often challenging an incumbent³⁶⁴—needs to garner the small number of votes necessary to win. The amount of money spent to elect progressive prosecutors is staggering. Soros gave \$400,000 to a PAC that backed Foxx in her first election, a campaign for which she raised \$3.8 million in total.³⁶⁵ He gave \$2 million to that PAC for her re-election campaign.³⁶⁶ PACs spent almost

358. Alfred Lubrano, *Philadelphia's Population Increased in 2017, but It's Not All Good, According to Census Data*, PHILA. INQUIRER (Mar. 22, 2018), <https://www.inquirer.com/philly/news/philadelphia-population-census-data-20180322.html-2> [<https://perma.cc/YRS8-HZHN>].

359. *See November 5, 2019 Election Results*, CITY & CNTY OF S.F. DEP'T OF ELECTIONS (Nov. 26, 2019), <https://sfelections.sfgov.org/november-5-2019-election-results-summary> [<https://perma.cc/T4YK-T366>] (reporting voter turnout of nearly 42%); *Historical Voter Turnout*, CITY & CNTY OF S.F. DEP'T OF ELECTIONS, <https://sfelections.sfgov.org/historical-voter-turnout> [<https://perma.cc/7KMU-QS8J>] (reporting voter turnout of 45% in 2015) (last visited Feb. 19, 2021).

360. BALT. CITY BD. OF ELECTIONS, CITY OF BALT., ELECTION SUMMARY REPORT 007 (2018), <https://boe.baltimorecity.gov/sites/default/files/Election%20Summary%20Report%20-%202018.pdf> [<https://perma.cc/GC7C-S8RA>].

361. *See id.*; BALT. CITY BD. OF ELECTIONS, CITY OF BALT., STATEMENT OF VOTES CAST 6 (2014), <https://boe.baltimorecity.gov/sites/default/files/GUBERNATORIAL%2520PRIMARY%2520STATEMENT%2520OF%2520VOTES%2520CAST%2520%2520REPORT%2520FOR%25206-24-2014.pdf> [<https://perma.cc/8475-567H>] (reporting turnout of 23%).

362. ST. LOUIS CNTY., PRIMARY ELECTION SUMMARY REPORT (2018), <https://stlouiscountymo.gov/st-louis-county-government/board-of-elections/election-results-archive/2018-election-results/august-7-2018-primary-election/official-election-results/> [<https://perma.cc/K87D-9B7C>].

363. CITY OF ST. LOUIS, PRIMARY ELECTION SUMMARY REPORT (2014), <https://www.stlouis-mo.gov/government/departments/board-election-commissioners/documents/election-results/upload/Aug2014FinalOfficialSummary.pdf> [<https://perma.cc/ZH8M-CYXP>].

364. Rachel Hinton, *Another Billionaire Weighs in on State's Attorney's Race: George Soros Gives \$2M to Groups Backing Foxx*, CHI. SUN TIMES (Feb. 20, 2020, 5:19 PM), <https://chicago.suntimes.com/politics/2020/2/20/21146269/george-soros-kim-foxx-bill-conway-states-attorney> [<https://perma.cc/4EEG-VFJC>].

365. *See* BAZELON, *supra* note 4, at 83.

366. Hinton, *supra* note 364.

\$2.5 million on Ogg's first campaign in Houston³⁶⁷ and \$1.9 million on Krasner's race in Philadelphia.³⁶⁸ A Justice & Public Safety PAC spent \$2.2 million on Geneviève Jones-Wright's campaign in San Diego where she went on to lose by a wide margin.³⁶⁹

When progressive prosecutors run, the amount spent on district attorney races shoots up.³⁷⁰ Of course, this is in part because many of these elections would have otherwise been uncontested.³⁷¹ But progressive prosecutors both raise much more than traditional district attorney candidates and spur larger spending by their competitors. Candidates and their PACs spent almost three times as much on the 2017 Philadelphia district attorney race than they did in the last competitive race for that office in 2009.³⁷² A little more than three times as many votes were cast.³⁷³ Spending in the 2016 Denver district attorney race was also about triple that of the last competitive election, far more than for any other election in the state.³⁷⁴ Based on Safety & Justice PAC donations alone, Soros's cost per vote was over \$30 in Aramis Ayala, Larry Krasner, and Parisa Tafti-Dehgani's races.³⁷⁵

The amount of money in these races is an obstacle not only to winning them, but also to effectively holding district attorneys accountable once they are in office. Because of the incumbent advantage, donors and activists who are unsatisfied with the policies of prosecutors they seek to elect will have to work even harder to replace them in the next election.³⁷⁶ Efforts to unseat incumbent Ogg in 2020 after her PAC-financed 2016 win were unsuccessful.³⁷⁷ The money needed to win district attorney races will

367. See BAZELON, *supra* note 4, at 84.

368. Dent, *supra* note 357.

369. Moran, *supra* note 78.

370. See, e.g., *id.*

371. See, e.g., Hinton, *supra* note 364.

372. Moran, *supra* note 78.

373. *Id.*

374. Ben Markus, *Wide-Open Denver DA Race Attracts Historic Levels of Money*, CPR NEWS (June 9, 2016), <https://www.cpr.org/2016/06/09/wide-open-denver-da-race-attracts-historic-levels-of-money> [<https://perma.cc/5CAS-GC4E>].

375. Rory Fleming, *Legitimacy Matters: The Case for Public Financing in Prosecutor Elections*, 27 WASH. & LEE J. C.R. & SOC. JUST. 1, 24–26 fig.2.1 (2020).

376. See, e.g., Zach Despart, *Ogg Declares Victory, Leads Challengers in Harris County DA Race*, HOUS. CHRON. (Mar. 4, 2020, 7:07 AM), <https://www.houstonchronicle.com/politics/houston/article/Ogg-leads-challengers-in-Harris-County-D-A-race-15103083.php> [<https://perma.cc/7XUE-4PD6>].

377. For example, Texas Organizing Project endorsed Audia Jones over incumbent Ogg, who it had supported with more than \$300,000 in her 2016 election. See Zach Despart & Samantha Ketterer, *Dem Challenger Audia Jones*, HOUS. CHRON. (Jan. 20, 2020, 8:12 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Saying-Ogg-not-progressive-enough-TOP-endorses-14990286.php> [<https://perma.cc/5VE2-8CQE>]. Ogg won the primary anyway. See Despart, *supra* note 376.

likely be more difficult to garner for more transformative candidates because their views will be further from voters and will entail efforts to replace insufficiently progressive incumbents like Ogg.

Finally, progressive prosecutors are likely to face increasing challenges to the claims to democratic legitimacy that are fundamental to the outward justification of their non-traditional platforms. The first reason for concern is the financing structure of these races. Progressive prosecutors talk frequently about creating a criminal system that “works for everyone,”³⁷⁸ but PAC-financed campaigns exploit inequities in the electoral system. This became a problem in Foxx’s 2020 race. Bill Conway was her closest competitor in her re-election campaign.³⁷⁹ Conway’s father is the billionaire co-founder of a private equity firm who donated \$7.5 million to his son’s campaign—far more than Foxx raised.³⁸⁰ Foxx repeatedly assailed both the amount of money Conway was able to spend on the race and its source.³⁸¹ But it is difficult to take her complaints seriously given the sources of her own campaign funds.³⁸² Conway was unable to unseat Foxx,³⁸³ but this race illustrates that the financing structure of these elections may keep progressive prosecutors from claiming the moral high ground for much longer. By relying on a system where money buys elections one minute and then criticizing that system the next, progressive prosecutors look like opportunists and hypocrites.

A second reason why reform candidates are likely to face increased pushback on their claims of democratic legitimacy is that their electoral victories are far less representative of popular will than they claim. Candidates and their allies say that their campaigns encourage voter turnout, particularly in marginalized communities, and that their victories

378. See, e.g., KIM FOXX COOK COUNTY STATE’S ATT’Y, *supra* note 296, at 11, 13; SUFFOLK CNTY. DIST. ATT’Y, *supra* note 292, at 13; Krasner, *supra* note 357 (“Ours is a movement that starts with a focus on human dignity and individual justice for everyone directly or indirectly involved in our criminal justice system. That means everyone: victims and survivors, witnesses, defendants and everyone indirectly affected by the money fire that is mass incarceration and a criminal justice system based on retribution rather than rehabilitation.”).

379. Laura Washington, *Bill Conway Is Spending Big to Go After Kim Foxx in State’s Attorney’s Race*, CHI. SUN TIMES (Feb. 29, 2020, 4:20 PM), <https://chicago.suntimes.com/columnists/2020/2/29/21158240/bill-conway-is-spending-big-to-go-after-kim-foxx-in-states-attorneys-race-laura-washington-suntimes> [https://perma.cc/JT9P-489P].

380. *Id.*

381. See *id.* (“On Friday, the Foxx reelection campaign dispatched a fundraising plea. ‘We’re up against the son of a billionaire with practically unlimited resources,’ the email read, “and we’re running out of time as Election Day nears.”).

382. See Hinton, *supra* note 364.

383. Rachel Hinton, Tom Schuba & Neal Earley, *Foxx Wins Democratic Primary in State’s Attorney’s Race as Conway Concedes*, CHI. SUN TIMES (Mar. 17, 2020, 8:43 PM), <https://chicago.suntimes.com/elections/2020/3/17/21178096/results-cook-county-states-attorney-primary-election> [https://perma.cc/VH63-D92K].

evidence broad support for reform.³⁸⁴ But this overstates the breath and makeup of their supporters.

On top of the small number of votes needed to win these races, many progressive prosecutors receive most of their campaign contributions from national PACs.³⁸⁵ The three most prominent PACs in these races—Color of Change, the Justice & Public Safety PACs, and Real Justice—receive the majority of their donations from a small number of wealthy individuals.³⁸⁶ Other contributing PACs are not funded primarily by mega-rich philanthropists;³⁸⁷ but at base, the movement to elect reform-minded prosecutors is organized and funded by people who do not live in the candidates' districts and will not be affected by the policies of those they help elect.

384. See, e.g., BAZELON, *supra* note 4, at 95 (quoting Stephanie Morales as saying: “If I win, I’ll know people are really behind me.”); *Unlocking the Black Box of Prosecution*, VERA INST. JUST. (last visited July 1, 2020), <https://www.vera.org/unlocking-the-black-box-of-prosecution> [<https://perma.cc/VLR7-PTKX>] (“In what may have otherwise been quiet off-year elections, advocacy groups like Color of Change and the ACLU organized outreach campaigns that led to increased voter turnout and the election of new lead prosecutors committed to reforms that will reduce incarceration and address racial disparities in the justice system.”); Krasner, *supra* note 378 (“[O]ur movement garnered more votes and a higher voter turnout than any other district attorney in Philadelphia in at least 20 years. Cabán’s victory on Tuesday is rightly and similarly being described as a shocking upset of establishment politics.”); *id.* (“Ours is a people-led movement . . .”).

385. A recent study documents the extent to which contributions from George Soros have influenced these elections. See Rory Fleming, *supra* note 375. It finds that Soros PACs contributed 73.7% for Steve Descano’s 2019 campaign, 82.1% for Shani Curry Mitchell’s 2019 campaign, 75.9% for Parisa Tafti-Dehghani’s 2019 campaign, 87.9% for Geneviève Jones-Wright’s 2018 campaign, 63.3% for Noah Phillips’s 2018 campaign, 65.4% for Pamela Price’s 2018 campaign, 96.5% of funding for Aramis Ayala’s 2016 campaign, 95.1% for Jack Lilly’s 2016 campaign, 54.3% for Kim Ogg’s 2016 campaign, 98.1% for Diego Rodriguez’s 2016 campaign, and 73.3% for Scott Colom’s 2015 campaign. See *id.* at 10–11 fig.1.1; 13–14 fig.1.2; 14–15 fig.1.3.

386. See *Colorofchange.org: Donors, 2016 Cycle*, OPENSECRETS.ORG, <https://www.opensecrets.org/pacs/pacgave2.php?cmte=C00428557&cycle=2016> [<https://perma.cc/8GQD-TN4M>] (last visited Feb. 19, 2021) (listing Dustin Moskovitz and George Soros as donating \$2,053,000 of \$2,455,745 raised in 2016 cycle); *Safety & Justice PAC: Donors, 2016 Cycle*, OPENSECRETS.ORG, <https://www.opensecrets.org/pacs/pacgave2.php?cmte=C00616094&cycle=2016> [<https://perma.cc/V6L4-RSSR>] (last visited Feb. 19, 2021) (listing Soros as donating all of \$530,000 raised in 2016 cycle); *Real Justice PAC: Donors, 2020 Cycle*, OPENSECRETS.ORG, <https://www.opensecrets.org/pacs/pacgave2.php?cmte=C00632554&cycle=2020> [<https://perma.cc/W2N5-AZB2>] (last visited July 1, 2020) (listing Moskovitz and Cari Tuna as donating \$800,000 of \$1.9 million raised in 2020 cycle); *Real Justice PAC: Donors, 2018 Cycle*, OPENSECRETS.ORG, <https://www.opensecrets.org/pacs/pacgave2.php?cycle=2018&cmte=C00632554> [<https://perma.cc/UA76-5AW3>] (last visited July 1, 2020) (listing Cari Tuna as donating \$1,853,480 of \$2,673,913 raised in 2018 cycle).

387. For example, Real Justice PAC relies on small donor fundraising. See Miller, *supra* note 51.

It is also not clear that minority voters necessarily prefer more progressive candidates.³⁸⁸ In Gascón's 2020 race in Los Angeles, minority and lower-income neighborhoods did prefer the reformer.³⁸⁹ But in Queens, for example, gentrifying neighborhoods tended to support the more progressive candidate, Tiffany Cabán, while those that were more middle class and racially diverse supported the ultimate victor.³⁹⁰ Soros-backed civil rights lawyer Pamela Price was unable to unseat the Alameda County District Attorney in 2018.³⁹¹ Alameda County is one of the most racially diverse counties in the United States.³⁹² It is simply not true that progressive prosecutors are necessarily more representative—including of the preferences of minority voters—than other candidates.

The problems arising from electing prosecutors are not unique to this movement, but they are obstacles to its success. Public punitiveness will make attempts to end mass incarceration by treating violent crime differently more difficult. And the reality of American elections requires candidates to instrumentalize a system that violates its core principles. Nor can the movement even legitimately claim to be democratically representative.

One of the most commonly proposed alternatives to electing district attorneys is an appointment process.³⁹³ Today, only five states appoint their prosecutors, and the mechanics vary.³⁹⁴ It is difficult to discern how

388. See generally JAMES FORMAN JR., *LOCKING UP OUR OWN* (2017) (documenting the history of Black support for punitive criminal policies in Washington, D.C. in the 1980s and 1990s); MICHAEL JAVEN FORTNER, *BLACK SILENT MAJORITY: THE ROCKEFELLER DRUG LAWS AND THE POLITICS OF PUNISHMENT* 173–216 (2015) (documenting support among working- and middle-class Black citizens for Governor Nelson Rockefeller's harsh drug laws).

389. See Priya Krishnakumar & Iris Lee, *How George Gascón Unseated L.A. County Dist. Atty. Jackie Lacey*, L.A. TIMES (Nov. 6, 2020), <https://www.latimes.com/projects/2020-la-da-race-gascon-lacey-vote-analysis> [<https://perma.cc/9GQR-MA7J>].

390. See Wang, *supra* note 82.

391. See *Voters Choose Nancy O'Malley Over Pamela Price for Alameda County District Attorney*, *supra* note 78.

392. Svati Kirsten Narula, *The 5 U.S. Counties Where Racial Diversity Is Highest—and Lowest*, ATLANTIC (Apr. 29, 2014), <https://www.theatlantic.com/national/archive/2014/04/mapping-racial-diversity-by-county/361388> [<https://perma.cc/A5RH-BQV3>] (listing Alameda County as fourth most racially diverse county in the country).

393. See, e.g., Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, in 41 PROSECUTORS & POLITICS: A COMPARATIVE PERSPECTIVE 2, 14–18. (Michael Tonry ed., 2012).

394. In New Jersey, the governor appoints county prosecutors with the advice and consent of the state senate. Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1550–51 (2020). In Alaska and Delaware, the Attorney General appoints local prosecutors. *Id.* at 1551. Connecticut has a commission that appoints State's Attorneys in each district. *Id.* And in Rhode Island, the Attorney General handles prosecutions throughout the state. *Id.* Three states give counties the option of electing or

appointed prosecutors perform compared to their elected peers. But one rough unit of comparison—state incarceration rates—tells a mixed story.³⁹⁵ Several scholars have noted that it is unclear whether appointing prosecutors would be more conducive to reform than electing them.³⁹⁶ In sum, the evidence to date is inconclusive as to whether there is a method of prosecutorial selection that might be better suited to achieve this movement's goals.

Donors and allies who are committed to these goals should thus take calls to abolish prosecutors more seriously. Scholars and activists alike have long argued that prosecutor offices—like police departments and other criminal institutions—cannot be reformed and so must be defunded and ultimately abolished.³⁹⁷ Abolition will, of course, be a much more difficult project than the progressive prosecutor movement, both as currently framed and as how I propose it should change going forward. But, as I argued at the outset, the movement's supporters should push radical efforts at achieving its goals while they have an audience.³⁹⁸

CONCLUSION

If I were to summarize the recommendations I have laid out in this Article in only a few words, they would be: relinquish your power. This movement recognizes how much power prosecutors have and the ways in which it has been used for decades to drive up mass incarceration and ruin

appointing their prosecutors. *See id.* at 1551–52 (noting that Hawaii, Montana, and North Dakota grant such discretion and that two counties each in Montana and North Dakota, and three out of four counties in Hawaii, have chosen to appoint their prosecutors).

395. The average number of adults in prison or jail per 100,000 U.S. residents age 18 or older is 739 across jurisdictions that elect their prosecutors. *See* Laura M. Maruschak & Todd D. Minton, *Correctional Populations in the United States, 2017-2018*, BUREAU OF JUST. STAT. U.S. DEP'T OF JUST. 11–12 app. tbl.1 (Aug. 2020), <https://www.bjs.gov/content/pub/pdf/cpus1718.pdf> [<https://perma.cc/Z2TV-KZSH>]. The rate is lower in Connecticut (480), New Jersey (410), and Rhode Island (320), but higher in Alaska (790) and Delaware (790). *See id.*

396. *See, e.g.*, Rappaport, *supra* note 334, at 783 (“In short, reform-minded prosecutors may be preferable to the prosecutors who got us to where we are today, but a system of appointed prosecutors may well be better still.”); *Changing Political Landscape*, *supra* note 8, at 674 (“[W]e might be better off with prosecutors who were appointed.”).

397. *See, e.g.*, Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019) (discussing activist efforts at defund and abolish and their justifications); Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016) (arguing that the criminal system's race problem cannot be fixed).

398. *See supra* note 30 and accompanying text; *see also* Bill Keller, *What Do Abolitionists Really Want?*, MARSHALL PROJECT (June 13, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/06/13/what-do-abolitionists-really-want> [<https://perma.cc/LYS9-XCDK>] (acknowledging that “it’s a fair bet that ‘abolition’ is not a voter magnet” while urging that “a movement’s reach should exceed its grasp, or what’s a heaven for?”).

countless individual lives.³⁹⁹ It is startling then, that, if I were to summarize its policies in only a few words, they would be: use your power for good. Having reform-minded prosecutors matters, but we are wrong to trust that they can and should unilaterally conceptualize and dispense justice. We are selling this movement short if all we ask for from these candidates is that they self-regulate. Prosecutors who are committed to transforming our broken system must be willing to weaken the power their own office wields in order to protect criminal defendants from themselves and their assistants, as well as their successors.

In her book, Bazelon tells the stories of two individuals, one intended to illustrate how much damage a bad district attorney can do and the other how much progress a good one can make.⁴⁰⁰ The subject of the latter is twenty-one year old Kevin.⁴⁰¹ Kevin is arrested in Brooklyn and prosecuted by Gonzalez's office for possession of a weapon after police find him holding his friend's gun.⁴⁰² Police only showed up to the apartment where they found Kevin because they saw the friend post a picture on his social media account—which they were monitoring as members of a unit created by Vance to track people they deem “crime drivers”—with a gun.⁴⁰³ Gonzalez's assistant defended the legality of police questioning so blatantly in violation of *Miranda* that the judge suppressed it, which is an incredibly rare occurrence.⁴⁰⁴

After months of coaxing by Kevin's public defender and with a newly weakened case, the assistant agreed to admit Kevin to a youth diversion program Gonzalez's office runs for young people accused of “violent felonies.”⁴⁰⁵ Conditions include curfews, unannounced home visits by police, random drug testing, community service, enrollment in school or work, and weekly trips to see social workers at the district attorney's office.⁴⁰⁶ The program is post-plea, so Kevin first had to plead guilty to a felony that would trigger a mandatory two-year prison sentence followed by two years of supervision if he was unable to complete diversion.⁴⁰⁷

Only a few weeks later, Kevin almost set off that trip wire. He was in a park watching a dice game when police arrived and arrested him—because he was the only person who did not run away—for loitering and sent him to jail for the night.⁴⁰⁸ Any interaction with police is a violation

399. See *supra* notes 276–278 and accompanying text.

400. BAZELON, *supra* note 4, at xxix.

401. *Id.* at 309. This individual is real, but his name has been changed. *Id.*

402. *Id.* at 23.

403. BAZELON, *supra* note 4, at 123–24.

404. *Id.* at 122.

405. *Id.* at 30.

406. *Id.* at 123–24.

407. *Id.* at 146.

408. *Id.* at 196–97.

of the terms of his program and should have automatically resulted in him being sent to jail. Then, the district attorney's office could unilaterally impose sanctions or fail him out of diversion.⁴⁰⁹ Kevin had the foresight to tell his supervision officer what happened, and the luck to have been paired with someone who wanted to see him succeed and did not flag the arrest for the prosecutor.⁴¹⁰ After Kevin graduated from diversion, police raided his apartment during the night, handcuffing him in his own room as they looked through his things.⁴¹¹ They hinted that he was on the police watchlist that indirectly led to his arrest in the first place and that he had landed there because of his prior indictment—which had been dismissed and was supposed to be sealed by the district attorney's office.⁴¹²

To me, Kevin's experience illustrates why we should set our sights higher. In the context of the political economy of prosecution as it has been for decades, district attorneys like Gonzalez and programs like the one Kevin completed mark enormous improvement. But they will not end mass incarceration or make the criminal system fair. We can get more out of this movement, and this moment in history offers us the opportunity to do so. I hope we will demand transformation, rather than be satisfied with progress.

409. *Id.* at 197, 216–17.

410. *See id.* at 197.

411. *Id.* at 103.

412. *Id.* at 303–04.