



Imagining the Progressive Prosecutor

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IMAGINING THE PROGRESSIVE PROSECUTOR

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As criminal justice reform has attracted greater public support, a new brand of district attorney candidate has arrived: the “progressive prosecutors.” Commentators increasingly have keyed on “progressive prosecutors” as offering a promising avenue for structural change, deserving of significant political capital and academic attention. This Essay asks an unanswered threshold question: what exactly is a “progressive prosecutor”? Is that a meaningful category at all, and if so, who is entitled to claim the mantle? In this Essay, I argue that “progressive prosecutor” means many different things to many different people. These differences in turn reveal important fault lines in academic and public perceptions of the criminal system and its flaws.

This disagreement or definitional slippage matters, not just for semantic clarity. Some commentators hail the progressive prosecutor as a new champion of fixing the criminal legal system, while others express skepticism about the transformative potential of even the most progressive DAs. To the extent that there are fundamental disagreements, then it is critically important to surface them. If resources are being devoted to advancing a progressive prosecutor movement, how unified is that movement? And, do all the voices pushing for a new approach to prosecution actually agree on what that approach should entail?

In an effort to answer these questions and clarify the terms of debate on progressive prosecutors, this Essay offers a typology of progressive prosecutors. Rather than mapping all of the candidates and elected officials who have sought or received the mantle, I offer four ideal types: (1) the progressive who prosecutes; (2) the proceduralist prosecutor; (3) the prosecutorial progressive; and (4) the anti-carceral prosecutor. Each ideal type reflects a different vision of what’s wrong with the criminal system and whether (or to what extent) prosecutors might help in righting those wrongs.

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INTRODUCTION

In the lead up to the 2020 Democratic Presidential Primary, Senator Kamala Harris’s prosecutorial record became a major source of contention.¹ Harris—the former San Francisco District Attorney and California Attorney General—had received significant support and media attention that characterized her as a “progressive prosecutor.”² In a moment of increasing public enthusiasm for criminal justice reform, Harris’s rise was frequently framed in terms of her support for a more egalitarian and racially conscious approach to criminal law.³ But, as she gained ground in the primary, her progressive prosecutor *bona fides* came into question. Critics noted that Harris had (and continued to) endorse incarcerating parents of truant children; she defended line-level prosecutors accused of withholding exculpatory evidence; she continued to praise the use of long prison sentences in response to violent crime; and, throughout her career, she had failed to prosecute aggressively police officers alleged to have used excessive force against civilians.⁴ And,

¹ See, e.g., Lara Bazelon, Opinion, *Kamala Harris Was Not a “Progressive Prosecutor”*, N.Y. TIMES, Jan. 17, 2019, <https://www.nytimes.com/2019/01/17/opinion/kamala-harris-criminal-justice.html>; Sahil Kapur, *Kamala Harris Gambles on a Risky Embrace of Her Record as a Prosecutor*, BLOOMBERG, June 11, 2019, <https://www.bloomberg.com/news/articles/2019-06-11/kamala-harris-ga+mbles-on-embrace-of-her-record-as-a-prosecutor>; German Lopez, *Kamala Harris’s Controversial Record on Criminal Justice, Explained*, VOX, Jul. 31, 2019, <https://www.vox.com/future-perfect/2019/1/23/18184192/kamala-harris-president-campaign-criminal-justice-record>; Alex Shephard, *What Kamala Harris Didn’t Say*, NEW REPUBLIC, Jul. 1, 2019, <https://newrepublic.com/article/154400/kamala-harris-defend-record>.

² See, e.g., 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-progressive-prosecutor.html>; Nicole Allan, *The Unknowable Kamala Harris: The Complicated Career of a Self-Proclaimed Progressive Prosecutor*, THE CALIFORNIA SUNDAY MAGAZINE, May 22, 2019, <https://story.californiasunday.com/kamala-harris>.

³ See, e.g., Melissa Gira Grant, *Kamala Harris Gets Slightly Less Tough on Crime*, NEW REPUBLIC, Sept. 12, 2019, <https://newrepublic.com/article/155030/kamala-harris-criminal-justice-reform-plan>; Astead W. Herndon, *‘Trust Me’: Kamala Harris Makes Big Play on Criminal Justice Reform*, N.Y. TIMES, Sept. 9, 2019, <https://www.nytimes.com/2019/09/09/us/politics/kamala-harris-criminal-justice.html>.

⁴ See, e.g., Bazelon, *supra* note 1; Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform”*, 128 YALE L.J. FORUM 848, 916 (2019) (“When I first encountered Harris, she had spent her prosecutorial career using the cash-bail system in California to illegally jail thousands of impoverished people, to extract tens of millions of dollars every year from the poorest families in California for the for-profit bail industry, and to coerce guilty pleas through illegal pretrial detention.”); Walker Bragman & Mark Colangelo, *Kamala Harris’s Signature Achievement Was a Complete Failure*, JACOBIN, Sept. 29, 2019, <https://jacobinmag.com/2019/09/kamala-harris-back-on-track-program-prisons>.

commentators painted Harris's ultimate withdrawal from the presidential race as, at least in part, a referendum on her prosecutorial politics.⁵

This Essay doesn't offer a read of Harris's record. Instead, I use the debate regarding her record as a jumping off point to ask a bigger question: what exactly is a "progressive prosecutor"? In recent years, district attorney campaigns have attracted increased attention from the media, academics, and activists, as candidates have begun to embrace the role of "progressive prosecutor."⁶ Is that a meaningful category at all, and if so, who is entitled to claim the mantle? My reading of the debate over Harris's record reveals less a dispute about what she did in her time as a California prosecutor, or what she promised to do if elected president. Instead, the debate reveals fundamental disagreements (or, at the very least, troubling sloppiness) about what constitutes a "progressive prosecutor." In this Essay, I argue that "progressive prosecutor" means many different things to many different people. These differences in turn reveal important fault lines in academic and public perceptions of the criminal system and its flaws.

This disagreement or definitional slippage matters, not just for semantic clarity. The literature and activism surrounding criminal justice reform have increasingly keyed on "progressive prosecutors" as an extremely promising avenue for structural change, deserving of significant political capital and academic attention. Generally, speaking, the progressive prosecutor is presumed to be one powerful anecdote to mass incarceration or the problematic institutions of the carceral state.

Some hail the progressive prosecutor as a new champion of fixing the criminal legal system,⁷ while other express skepticism about the transformative potential of even the most progressive DAs.⁸ To the extent that there are

⁵ See, e.g., Lara Bazelon, *Kamala Harris's Criminal Justice Record Killed Her Presidential Run*, THE APPEAL, Dec. 4, 2019, <https://theappeal.org/kamala-harris-criminal-justice-record-killed-her-presidential-run/>; Rory Fleming, *Kamala Harris's Exit Shows That Prosecutors No Longer Get a Pass*, FILTER, Dec. 4, 2019, <https://filtermag.org/kamala-harris-prosecutor/>; Derecka Purnell, *Many Americans Are Ready for a Black Woman President. Just Not Kamala Harris*, THE GUARDIAN, Dec. 3, 2019, <https://www.theguardian.com/commentisfree/2019/dec/03/black-woman-president-kamala-harris>.

⁶ See, e.g., Karakatsanis, *supra* note 4, at 924-29; David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647 (2017) (describing the shift in electoral priorities in DA elections); David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25 (2017); Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748 (2018) (describing and critiquing the movement).

⁷ See, e.g., Jimmy Tobias, *This Son of the Left Could Become San Francisco's Next District Attorney*, NATION, Oct. 3, 2019, <https://www.thenation.com/article/chesa-boudin-da/>; Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, THE ATLANTIC, May 18, 2016, <https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/>.

⁸ See, e.g., Karakatsanis, *supra* note 4; *The Paradox of "Progressive Prosecution"*, *supra* note 6. Cf. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171 (2019) (expressing skepticism

fundamental disagreements, or at least significant uncertainties, as to what constitutes a “progressive prosecutor,” then, it is critically important to surface those disagreements.⁹ If resources are being devoted to advancing a progressive prosecutor movement, how unified is that movement? And, do all the voices pushing for a new approach to prosecution actually agree on what that approach should entail? Further, if the progressive prosecutor brand has allowed or is allowing some group of prosecutors to advance their careers and yet sidestep growing critiques of mass incarceration, we should be certain that the brand or classification is a meaningful one. Otherwise, are we simply witnessing a rebranding of tough-on-crime politics to appease an increasingly anti-carceral electorate?

In an effort to answer these questions and clarify the terms of the debate on progressive prosecutors, this Essay offers a typology of progressive prosecutors. Rather, than sorting all of the candidates and elected officials who have sought or received the mantle, I offer four ideal types: (1) the progressive who prosecutes; (2) the proceduralist prosecutor; (3) the prosecutorial progressive; and (4) the anti-carceral prosecutor. To be clear, these are ideal types. Many progressive prosecutors and many academic descriptions of the ideal or quintessential progressive prosecutor exhibit aspects of more than one type. And the realities of jurisdictions, municipalities, and offices mean that one progressive prosecutor might arrive on the job casting one type of figure, but bend into another as she swims in the political dynamics around her. Nevertheless, I think it’s useful to tease apart these different models as a means of appreciating the highly contested terms of criminal justice reform and the drastically differing visions of prosecutors as the vehicle for institutional change.¹⁰

In mapping the different visions or models of progressive prosecution, this Essay proceeds in six Parts. Part I briefly introduces the rise of the so-called progressive prosecutor movement. Then, Parts II through V describe the four ideal types in turn, tracing the different visions of the prosecutor’s function and role in criminal justice reform. In each Part, I identify the critique of the criminal system to which the model of prosecutor appears responsive. Finally, Part VI concludes by explaining how the distinctions among the ideal types demonstrate fundamental disagreements about the proper scope of criminal law and fundamental disagreements about what’s wrong with the current prosecutorial apparatus and carceral state.

about accounts of criminal justice reform that frame prosecutors as supremely powerful).

⁹ Cf. Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018) (making a similar claim with respect to characterizations of “mass incarceration” and “overcriminalization”).

¹⁰ Cf. Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1281-82 (1984) (describing the pros and cons of this sort of ideal type mapping project).

I. PROGRESSIVE PROSECUTORS

For decades, the literature on the administration of criminal law has told a fairly consistent story: Prosecutors are the most powerful actors in the criminal system.¹¹ Legislators have turned over the keys to the kingdom by drafting numerous broad and overlapping criminal statutes, allowing prosecutors wide discretion to decide whom to charge and with what.¹² Similarly, judges have consistently deferred to prosecutorial decisionmaking and, with vague nods to separation of power and democratic accountability, have declined to impose significant checks on prosecutorial conduct.¹³ The plea bargaining process coupled with a shift away from indeterminate sentencing regimes has taken power out of the hands of judges.¹⁴ Instead, prosecutors, facing mostly under-

¹¹ See, e.g., RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 143-54 (2019); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007); Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 172 (2019) (“Compelling assertions about prosecutorial dominance leap off the pages of the criminal justice literature. These statements position prosecutors as the most prominent stars in the criminal justice universe, bending all others to their will.”); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018) (“Prosecutors are the Darth Vader of academic writing: mysterious, powerful and, for the most part, bad.”); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009) (“No government official in America has as much unreviewable power and discretion as the prosecutor.”); Erik Luna & Marianne Wade, *Introduction*, 67 WASH. & LEE L. REV. 1285 (2010) (“For all intents and purposes, prosecutors are the criminal justice system through their awesome, deeply problematic powers.”); Sam B. Warner & Henry B. Cabot, *Changes in the Administration of Criminal Justice During the Past Fifty Years*, 50 HARV. L. REV. 583, 598 (1937) (“The prosecutor is today, as he was fifty years ago . . . the most powerful figure in the administration of criminal justice. . . .”).

¹² See, e.g., Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 995-96 (2019); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 765 (1999); Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 YALE L.J. 1909, 1965 (1992) (“[W]here the legislature drafts broad criminal statutes and then attaches mandatory sentences to those statutes, prosecutors have an unchecked opportunity to overcharge and generate easy pleas. . . .”); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1472 (2008).

¹³ See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Brady v. United States*, 397 U.S. 742 (1970); *United States v. Armstrong*, 517 U.S. 456 (1996); *McCleskey v. Kemp*, 481 U.S. 279, 311-12 (1987) (“[T]he capacity of prosecutorial discretion to provide individualized justice is firmly entrenched in American law.” (internal quotation marks omitted)); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973).

¹⁴ See, e.g., Marc L. Miller, *Domination & Dissatisfaction: Prosecutors As Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004) (“The overwhelming and dominant fact of the federal sentencing system, beyond the Commission and the guidelines and mandatory penalties, is the virtually absolute power the system has given prosecutors over federal prosecution and sentencing.”); Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1723 (2005); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1502 (1993) (“Plea bargaining as a negotiation over appropriate discounts from extant sentencing outcomes is a thing of the past. The prosecutor now controls the sentence

funded and over-worked defense attorneys are the drivers of a system of managerial justice, in which they effectively choose the charge and the penalty and generally are able to do so without the meaningful check of a public trial.¹⁵ Or, as Attorney General Robert Jackson put it decades before the phrase “mass incarceration” entered the popular lexicon, “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America.”¹⁶

With that narrative firmly entrenched, and with decades of post-Warren Court judicial decisions furthering a system of prosecutorial supremacy,¹⁷ it’s no surprise that prosecutorial discretion has taken a bad rap. In legal scholarship, “[t]he concentration of power in the hands of prosecutors has been called the ‘overriding evil’ of American criminal justice.”¹⁸ The power to exercise discretion is the power to discriminate.¹⁹ And, the realities of vastly disparate enforcement across axes of race and class, not to mention ballooning carceral populations led many (if not most) commentators to conclude that prosecutorial discretion was an evil, a driver of mass incarceration, and the facilitator of massive injustice.²⁰ In other words, “because prosecutors play

by controlling the charge, and the judge is largely powerless to object.”).

¹⁵ See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 873-74 (2008); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 625 (2014) (“[P]rosecutors, not independent finders of fact (be they judges or juries), determine both guilt and punishment.”); Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403-04 (2003) (“[T]he prosecutor, rather than a judge or jury, is the central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed).”).

¹⁶ Attorney General Robert Jackson, *The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940)*, 24 J. AM. JUDICATURE SOC’Y 18, 19 (1940).

¹⁷ See note 13, *supra*.

¹⁸ David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 481 (2016).

¹⁹ See, e.g., Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 130 (2004) (“[D]iscretion allows police and prosecutors to discriminate, consciously or unconsciously, based on race and other characteristics.”); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 884 (1991) (“When a statute sweeps more broadly than is warranted by the evil at which it aims, a concern arises that the legislature has sought to pursue forbidden ends, or that it has created an excessively capacious cloak of administrative or prosecutorial discretion, under which discriminatory enforcement may be hidden.”); Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737, 737 (1991); Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1145 (2016); *IV. Race and the Prosecutor’s Charging Decision*, 101 HARV. L. REV. 1520, 1521 (1988); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605 (1998).

²⁰ See, e.g., Ronald Wright & Marc Miller, *The Screening/ bargaining Tradeoff*, 55 STAN. L. REV. 29, 54 (2002) (“Most authors see only the bad effects of discretion: biased prosecutions that systematically harm defendants from particular demographic groups, or random prosecutions

such a dominant and commanding role in the criminal justice system through the exercise of broad, unchecked discretion, their role in the complexities of racial inequality in the criminal process is inextricable and profound.”²¹

Over the last few years, though, that standard story has shifted. Generally, commentators continue to view prosecutors as the dominant actors in the criminal system.²² But, where that prosecutorial primacy and discretionary authority were once treated as unmitigated evils, a new body of activism, advocacy, and scholarship argues that the power of the prosecutor might be leveraged for good.²³ Certainly, discretion might invite discrimination, but it also might allow for lenience or for prioritization of popular causes.²⁴ That is, rather than attacking prosecutorial discretion as a structural ill in need of a cure, many commentators and reformers have come to argue that replacing the discretionary actors (and their ideology) might be the best way to begin dismantling the carceral state.

Recent years have seen a surge in DA candidates branding themselves (or embracing the mantle of) “progressive prosecutors.”²⁵ Despite the widespread acknowledgement that prosecutors were immensely powerful, local prosecutorial elections generally attracted little political attention.²⁶ In the current reformist moment, though, advocates have poured their energy into campaigns in which candidates have adopted a critical posture, promising systemic change. For example, in 2017, the ACLU of Massachusetts launched the “What a Difference a DA Makes Campaign,” with an eye to encouraging

that apply the state's coercive power in unprincipled and arbitrary ways.”); Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1165 n. 9 (2019) (collecting sources).

²¹ Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 16–17 (1998).

²² *But see generally* Bellin, *supra* note 8 (arguing that prosecutors actually face more constraints than commentators recognize).

²³ Of course, as I note throughout this Essay, what exactly constitutes “good” is an important question.

²⁴ *See* Jeffrey Bellin, *Defending Progressive Prosecution*, Nov. 12, 2019, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479165 (identifying lenience as the prosecutorial power embraced by progressive prosecution proponents).

²⁵ *See, e.g.*, EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019); Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 871 (2019).

²⁶ This turn also reflects a much-needed realization that the “criminal justice system” really isn’t a system at all and consists of many disparate local political orderings. *See, e.g.*, LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 461 (1993); Bernard E. Harcourt, *The Influence of Systems Analysis on Criminal Law and Procedure: A Critique of a Style of Judicial Decision-Making* (Columbia Public Law Research Paper No. 14-562, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062900; Benjamin Levin, *Rethinking the Boundaries of “Criminal Justice”*, 15 OHIO ST. J. CRIM. L. 619 (2018); Sara Mayeux, *The Idea of “The Criminal Justice System”*, 45 AM. J. CRIM. L. 55, 55 (2018).

greater participation in the DA elections.²⁷ According to the campaign website:

District attorneys are the most powerful people in the criminal justice system. They decide who gets charged with a crime—and determine how most criminal cases are resolved. This means these elected officials have tremendous impact on people’s lives and our communities. It’s time to use our voices—and our vote—to make our criminal legal system fairer for everyone.²⁸

Similarly, at the national level, the ACLU Campaign for Smart Justice partnered with the Brooklyn Defender Services to produce a series of videos featuring actors, academics, activists, and attorneys describing the “Power of Prosecutors” and urging reformers to pay more attention to the role of elected DAs.²⁹ That is, rather than treating DAs’ offices as bastions of tough-on-crime politics and critical components of the carceral state, this new wave of activism treats the prosecutorial function as essentially indeterminate, capable of being redirected to serve a variety of different ends.

Generally, progressive prosecutor campaigns or descriptions of the “progressive prosecutor movement” sound in some sort of reformist discourse. The criminal system is way flawed, advocates suggest, and a shift in prosecutorial priorities is needed to address widespread racial disparities, massive carceral populations, etc. Some of these candidates are former defense attorneys or civil rights lawyers.³⁰ And, a growing number of candidates are women or people of color. For those with non-traditional prosecutorial backgrounds, these alternative qualifications are often framed as badges of honor and indicators that they are deserving of enthusiasm and have earned their progressive *bona fides*.³¹ (By way of example, treatments of the

²⁷ See “What a Difference a DA Makes’ Highlights Importance of Massachusetts District Attorneys,” ACLU of Massachusetts, Dec. 13, 2017, <https://www.aclum.org/en/press-releases/what-difference-da-makes-highlights-importance-massachusetts-district-attorneys>.

²⁸ *Id.*

²⁹ See The Power of Prosecutors, ACLU, <https://www.aclu.org/issues/smart-justice/prosecutorial-reform/power-prosecutors>.

³⁰ See, e.g., James Queally, *Former Public Defender Rachel Rossi Latest to Enter Crowded L.A. County D.A.’s Race*, L.A. TIMES, Nov. 12, 2019, <https://www.latimes.com/california/story/2019-11-12/former-public-defender-rachel-rossi-latest-to-enter-crowded-los-angeles-da-race>; Paula Reed Ward, *DA Race Pits 22-Year Incumbent against Longtime Public Defender*, PITTSBURGH POST-GAZETTE, Nov. 2, 2019, <https://www.post-gazette.com/news/crime-courts/2019/11/02/District-Attorney-race-allegheny-county-zappala-middleman/stories/201910280072>; Rick Rojas, *5 Key Things to Know About Tiffany Cabán*, N.Y. TIMES, June 26, 2019, <https://www.nytimes.com/2019/06/26/nyregion/who-is-tiffany-caban.html>.

³¹ See, e.g., Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1 (2019); Steven Zeidman, *Opinion, Public Defenders as Prosecutors: Unanswered Questions*, Gotham Gazette, June 20, 2019,

“progressive prosecutor movement” frequently include references to defense attorney-turned Corpus Christi DA, Mark Gonzalez who has “Not Guilty” tattooed on his chest.)³²

This turn to progressive prosecution has elicited many positive responses, but the terms (or stakes) remain unclear. Indeed, it is increasingly common, particularly in generally Democrat-leaning urban jurisdictions, for multiple candidates to vie for the title of the progressive choice for DA. For example, in the lead-up to the 2020 election for the Los Angeles County DA, multiple candidates claimed to represent a progressive approach to prosecution and a departure from criminal justice politics as usual.³³ In Boston, reformist prosecutor Rachael Rollins needed to edge out longtime public defender Shannon McAuliffe to win the Democratic Party nomination.³⁴ And, in San Francisco, Chesa Boudin, a public defender and the child of incarcerated Weather Underground activists eventually won the DA election, but only after defeating other candidates who pledged to end cash bail and “prioritize decarceration.”³⁵

The popular embrace of the “progressive prosecutor” moniker certainly might be viewed as an unqualified success: where once tough-on-crime was the only acceptable ethos for any politicians (let alone DA candidates),³⁶ the turn to progressive prosecutors heralds a broader acceptance of structural reform. The popularity of the phrase itself might suggest that the Overton window for

<https://www.gothamgazette.com/opinion/8607-public-defenders-as-prosecutors-unanswered-questions> (describing public defenders running for DA).

³² See, e.g., Michael Barajas, *The Tattooed Star of the ‘Progressive Prosecutor’ Movement Braces for His First Death Penalty Trial*, TEX. OBSERVER, Jan. 23, 2019, <https://www.texasobserver.org/the-tattooed-star-of-the-progressive-prosecutor-movement-braces-for-his-first-death-penalty-trial/>; Henry Gass, *Meet a New Breed of Prosecutor*, CHRISTIAN SCIENCE MONITOR, Jul. 17, 2017, <https://www.csmonitor.com/USA/Justice/2017/0717/Meet-a-new-breed-of-prosecutor>; Christopher Hooks, *Is the Best Offense a Good Defense Lawyer?*, TEX. MONTHLY (Nov. 2016), <http://www.texasmonthly.com/politics/best-offense-good-defense-lawyer/>; Sklansky, *The Progressive Prosecutor’s Handbook*, *supra* note 6, at 26; Sklansky, *The Changing Political Landscape for Elected Prosecutors*, *supra* note 6, at 648.

³³ See Editorial, *America’s Next Most Important Election? The L.A. District Attorney Race*, L.A. TIMES, Oct. 21, 2019, <https://www.latimes.com/opinion/story/2019-10-21/lacey-gascon-district-attorney-election>.

³⁴ See Brooks Sutherland, *Rachael Rollins Takes Democrats’ Nod for District Attorney*, BOSTON HERALD, Nov. 8, 2018, <https://www.bostonherald.com/2018/09/05/rachael-rollins-takes-democrats-nod-for-district-attorney/>.

³⁵ See Elizabeth Weill-Greenberg, *Deadlocked San Francisco District Attorney Race Shows Strength of Progressive Prosecutor Movement*, THE APPEAL, Nov. 6, 2019, <https://theappeal.org/san-francisco-district-attorney-race-boudin-loftus/>.

³⁶ See, e.g., MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S (2005); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016); JULILLY KOHLER-HAUSMANN, GETTING TOUGH: WELFARE AND IMPRISONMENT IN 1970S AMERICA (2017).

prosecutorial politics has shifted. Maybe, but there remains significant uncertainty. It's not just Harris who has attracted critics, and her record is not the only one that has left commentators unsure quite how to react. Scholars and advocates have sought to propose best practices, to determine evaluative metrics, and even to introduce scorecards that voters might use in assessing their DAs.³⁷

While these attempts to add content to the rhetoric of progressive prosecution provide important guidance, they often speak to a capacious (and at times conflicting) vision of reform. In some sense, this uncertainty is unsurprising given the historical lack of clarity or consensus regarding what prosecutors should do and what the prosecutorial role should entail.³⁸ Or, as Jeffrey Bellin puts it, the study of and policy debates regarding progressive prosecution suffers from a “curious absence of any normative theory of prosecution.”³⁹

Progressive prosecution, might entail or require many different steps, approaches, or priorities. And, most definitions of “progressive prosecution” consist less of a statement of over-arching goals, theories, or ideologies, and instead focus on specific policies. For example, “21 Principles for the 21st Century Prosecutor,” a 2018 publication of the Brennan Center for Justice and criminal justice reform organizations Fair and Just Prosecution and the Justice Collaboratory suggests two over-arching goals for prosecutors: “reduc[ing] incarceration” and “increas[ing] fairness.”⁴⁰ Yet, the recommendations that follow provide a host of different possibilities and priorities for DAs, from increasing diversion, to ensuring that sentences are calculated properly, to turning over exculpatory evidence, to speaking respectfully.⁴¹ Not to diminish the significance of each proposal, but these “principles” offer something for everyone, including DAs who might not be otherwise recognizable as “progressive.”⁴²

³⁷ See, e.g., Sklansky, *The Progressive Prosecutor's Handbook*, *supra* note 6; *21 Principles for the 21st Century Prosecutor*, BRENNAN CTR. FOR JUST. (2018), https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf; Katherine Moy, Dennis Martin, & David Sklansky, *Rate My District Attorney: Toward a Scorecard for Prosecutors' Offices*, STANFORD CRIMINAL JUST. CTR. (2018), <https://law.stanford.edu/publications/rate-my-district-attorney-toward-a-scorecard-for-prosecutors-offices-a-report-of-the-stanford-criminal-justice-center/>.

³⁸ See Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3347939 (“Yet when it comes to setting out principles to govern how prosecutors should act, the commentary offers only platitudes”).

³⁹ *Id.* at 4. Bellin, for his part, proposes a “servent of the law” model of prosecution. See *id.* at 10.

⁴⁰ *21 Principles for the 21st Century Prosecutor*, *supra* note 37.

⁴¹ See generally *id.*

⁴² Cf. Keri Bakinger, *Q&A: Author Bazelon on What Makes a 'Progressive Prosecutor'*, HOUSTON CHRONICLE, Sept. 2, 2019, <https://www.houstonchronicle.com/news/houston->

There might be good reason to embrace a capacious definition of progressive prosecution and to focus on individual policies (or, as Angela J. Davis puts it, to avoid a “litmus test”).⁴³ And, I’m not suggesting here which candidates should be supported or opposed. Rather, if the progressive prosecutor brand has become sufficiently popular that elections may see self-styled progressive prosecutor pitted against self-styled progressive prosecutor, I think it’s worth pausing to asking what we learn from (or don’t learn from) the categorization.

In other words, the success of the movement might actually highlight its shortcomings—if everyone can claim to be a progressive prosecutor, then what good does the categorization do? As John Pfaff (a proponent of progressive prosecution)⁴⁴ has observed:

It is increasingly easy for district attorney candidates to sound progressive or reform-leaning, but there is a growing risk that commonly-invoked words . . . could mean very different things to different people, and that ambiguity could allow candidates who lack a serious commitment to reform to avoid accountability if they win their elections but implement few real changes.⁴⁵

Frustratingly, the slipperiness of the progressive prosecutor categorization and its increasing popularity in the media and advocacy circle invites greater uncertainty about prosecutorial elections and—perhaps more provocatively—about whether progressive prosecution even is a worthwhile goal or target for academics and activists committed to dismantling the carceral state.

In the four Parts that follow, I ask what exactly it means to be a “progressive prosecutor” by identifying four ideal types. These types are not meant to be exhaustive and are, of course, potentially overlapping. But, by setting up these different visions or versions, I hope to tease out both the promises and limitations of the different visions of institutional change that each prosecutor represents.

texas/houston/article/Q-A-Author-Bazelon-on-what-makes-a-14407456.php (describing activists’ frustrations with some “non-progressive” decisions made by Harris County DA Kim Ogg).

⁴³ As Davis argues, “there should not be a litmus test or list of requirements for progressive prosecutors. . . . An ‘all or nothing’ approach will achieve nothing.” Davis, *supra* note 31. This question of strategy is a major one in conversations about the carceral state (and, indeed, any movement for radical social change). But, for purposes of this Essay, my goal is not to propose a litmus test; rather, it’s to ask the first principles question of what we’re expecting of or looking to prosecutors for.

⁴⁴ See generally JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION-AND HOW TO ACHIEVE REAL REFORM (2017).

⁴⁵ John F. Pfaff, *A Second Step Act for the States (and Counties, and Cities)*, 41 CARDOZO L. REV. 151, 165 (2019).

II. THE PROGRESSIVE WHO PROSECUTES

The first ideal type is in many ways the least interesting and the one least likely to receive the progressive prosecutor mantle. This “progressive prosecutor” is progressive in the sense of her general politics. That is, her voting patterns, endorsements, political beliefs, and so forth might be identified as “progressive” or falling somewhere left of center on the political spectrum. Of course, we might engage in a larger conversation about what makes one a progressive as opposed to a liberal, a Democrat, or a leftist.⁴⁶ But, the key point here is that the prosecutor is—outside of her work in the criminal sphere—identified with the left or center left of the political spectrum.

Critically important, the progressive who prosecutes doesn’t necessarily bring her politics to her job or to the administration of criminal law. Regardless of her views on a host of other divisive left/right issues (*e.g.*, reproductive rights, affirmative action, health care), she views her function as prosecutor to be a role in and of itself, divorced from other political battlegrounds. Maybe she “adopt[s] vaguely critical buzz words about mass incarceration that are trendy in liberal elite circles,”⁴⁷ but this familiarity with reformist rhetoric doesn’t translate to policy. This ideal type also might be classified as the “Democratic prosecutor” or some other categorization that indicates that the politics in question are of the general, electoral variety, rather than the criminal justice variety. To use William Stuntz’s formulation, the progressive prosecutor is progressive in terms of surface politics.⁴⁸

For a range of reasons, this ideal type is and should be the easiest one to dismiss from the conversation. Notably, academic discourse on progressive prosecutors doesn’t appear to refer to or embrace this model when referring to progressive prosecutors.⁴⁹ One way of understanding the debate over Harris,

⁴⁶ Indeed, as I have argued elsewhere, there might well be a strong theoretical relationship between a Progressive (in the early twentieth century sense) outlook and a prosecutorial impulse. *See, e.g.*, Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 532 (2019); Benjamin Levin, *Wage Theft Criminalization* (manuscript on file with author); *see also* Part IV, *infra*.

⁴⁷ Karakatsanis, *supra* note 4, at 910.

⁴⁸ *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001).

⁴⁹ That is, academic discussions tend to highlight specific policies adopted or campaign promises made by prosecutors, rather than those prosecutors general political commitments. *See, e.g.*, Sklansky, *The Progressive Prosecutor’s Handbook*, *supra* note 6. Notably, though, one recent paper by Sam Krumholz, an economics PhD candidate, does argue that there is a correlation between the political party of DA candidates and new prison admissions—*i.e.*, that prison admissions rise when Republican DAs are elected. *See generally* Sam Krumholz, *The Effect of District Attorneys on Local Criminal Justice Outcomes*, Oct. 31, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3243162&download=yes. Even assuming that this correlation did suggest a causal relationship, I don’t see that finding as

though, is that her claims to be (and the media's representation of her as) a progressive prosecutor reflected this vision or image—because Harris espoused progressive views on a range of other issues, commentators presumed that made her status and tenure as a prosecutor similarly “progressive.” Maybe she is/was a progressive prosecutor for some other reasons, but to the extent that her politics elsewhere justified the designation, it reflects a “progressive who prosecutes” vision of progressive prosecutors. It's as though a position on healthcare or education can take precedence over a position on policing when it comes to assessing criminal justice politics.

Whatever one's view on the accuracy or utility of the progressive prosecutor brand/mantle/moniker, using “progressive prosecutor” to describe any liberal Democrat who prosecutes strikes me as a big mistake. First of all, it would suggest that many of the longtime tough-on-crime warriors in DAs' offices across the country are in fact progressive prosecutors. Second, and relatedly, this frame or ideal type appears to be rooted in a common but misleading belief that punitive politics are the exclusive province of the political right.⁵⁰ In other words, being a progressive is treated as equivalent to having left, radical, or decarceral views on criminal justice. Or, at the very least, this account appears to rest on a claim that replacing Republican prosecutors with Democratic ones would reverse the dynamics of mass incarceration (whether racial disparities, or simply prison populations). Decades of policymaking and a growing body of scholarship shows just how faulty that equivalence is.⁵¹

Put simply, a discourse or political movement that equates a broad set of policy preferences with a specific agenda in the criminal arena is fundamentally bereft. This partisan frame understates the ways in which punitive impulses have played a significant role in many different political and social movements. It both lets progressives off the hook for their historical (and contemporary) role in constructing the carceral state, and also suggests a lack of serious

diminishing numerous other research showing that punitive policies and politics transcend partisan divides.

⁵⁰ This view of mass incarceration as an exclusively right-wing creation has come under increasing fire. See, e.g., LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* (2018); AYA GRUBER, *THE FEMINIST WAR ON CRIME* (forthcoming 2020) (describing radical feminist support for carceral policies); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006); JUSTIN MARCEAU, *BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT* (2019); NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014); JUDAH SCHEPT, *PROGRESSIVE PUNISHMENT: JOB LOSS, JAIL GROWTH, AND THE NEOLIBERAL LOGIC OF CARCERAL EXPANSION* (2015); Benjamin Levin, *Guns and Drugs*, 84 *FORDHAM L. REV.* 2173 (2016); Benjamin Levin, *Mens Rea Reform and Its Discontents*, *J. CRIM. L. & CRIMINOLOGY* (forthcoming 2019).

⁵¹ See generally sources cited in note 50, *supra*. But see Krumholz, *supra* note 49.

engagement with the any concept of criminal justice reform. In other words, it accepts an easy narrative in which the contemporary carceral state is exclusively the result of Goldwater-styled conservatives and/or outright white supremacists. Appealing though it might be for many commentators to lay blame at the feet of such easy scapegoats, such an account avoids necessary (and necessarily difficult) conversations about complicity and the complicated politics of mass incarceration.⁵²

III. THE PROCEDURALIST PROSECUTOR

The second ideal type is notably different from the first in that progressive politics have a critical role to play in the prosecutor's conception of her function. The proceduralist prosecutor brings these progressive commitments to bear in her handling of her office. The proceduralist prosecutor focuses on getting her house in order: she is concerned about corruption and misconduct. In other words, the proceduralist prosecutor brings a sort-of good government liberalism to the DA's office.

Viewed through this frame, the social function of the prosecutor is important, and the work of the DA's office is fundamentally good. But, the mission has been clouded or subverted by bad apples, or perhaps even by a culture of disinterest or lawlessness.⁵³ The proceduralist prosecutor brings a focus on procedural justice: defendants deserve fair process, and she seeks to reform her office by ensuring that line-level prosecutors see their job as "doing justice," not just obtaining convictions. Doing justice, in turn means: complying with *Brady* obligations, not encouraging or relying on problematic police behavior (*e.g.*, "testilying," unconstitutional stops and searches, etc.), and guarding against cognitive biases and practices that might lead to wrongful convictions.

By way of example, in his "Progressive Prosecutor's Handbook," David Sklansky sets forth a set of recommendations for "chief prosecutors who want

⁵² To be clear, this isn't to say that conservatism, a desire to control marginal populations, and the politics of racial fear and/or resentment didn't also play a major role in constructing the carceral state. *See, e.g.*, AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION (Mary Louise Frampton, *et al.*, eds. 2008); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007); LOÏC WACQUANT, PUNISHING THE POOR (2009); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2007). Rather, it's to say that no one ideology or political party should be seen as a sole driver of mass incarceration.

⁵³ *Cf.* Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 149 n. 285 (2004) ("Instead, people blame disposition for the bad conduct, partly (we suspect) in order to minimize the problem and isolate its cause—like looking for bad apples and ignoring the barrel or the tree. Doing so helps to maintain the legitimacy of the system.").

their offices to do a better job pursuing justice.”⁵⁴ Sklansky concedes that his recommendations “are far from comprehensive” in part because “[t]hey ignore, in particular, the critical roles that elected prosecutors can provide in advocating for systemic reform and in pushing other agencies, especially police departments, to change their own practices.”⁵⁵ Instead, he offers guidance for “how to improve the day-to-day functioning of a district attorney’s office.”⁵⁶ With several exceptions, Sklansky’s prescriptions sound in the register of the proceduralist prosecutor: “collect[ing] and shar[ing] data”;⁵⁷ “build[ing] in second looks”;⁵⁸ “hav[ing] a clear, generous, and administrable disclosure policy”;⁵⁹ not “turn[ing] a profit”;⁶⁰ “reduc[ing] case delays”;⁶¹ “investigat[ing] police shootings independently and transparently”;⁶² improving office culture,⁶³ and diversifying staff.⁶⁴

Similarly, the Brennan Center’s “21 Principles for the 21st Century Prosecutor” devotes substantial space to proceduralist principles. Like Sklansky, the report’s authors stress improving discovery policies,⁶⁵ “creat[ing] effective conviction review,”⁶⁶ employing “respectful language,”⁶⁷ and “changing office culture.”⁶⁸ Additionally, the report adopts a suggestion from the work of civil rights attorney-turned Philadelphia DA Larry Krasner: stressing the cost of incarceration.⁶⁹ Krasner, in a much-heralded 2018 memo to his line-level prosecutors, instructed ADAs to “place the financial cost of incarceration on the record as part of your explanation of the sentence recommended.”⁷⁰ The Krasner memo (and the Brennan Center report) both stress the financial cost to taxpayers, providing average figures for the amount spent to keep a person in a cage.⁷¹

Interestingly, while treated here as a principle of progressive prosecution,

⁵⁴ Sklansky, *The Progressive Prosecutor’s Handbook*, *supra* note 6, at 28.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 30-32.

⁵⁸ *Id.* at 32-33.

⁵⁹ *Id.* at 33-36.

⁶⁰ *Id.* at 36-37.

⁶¹ *Id.* at 37-38.

⁶² *Id.* at 38-39.

⁶³ *Id.* at 39-40.

⁶⁴ *Id.* at 40-41.

⁶⁵ *21 Principles for the 21st Century Prosecutor*, *supra* note 37, at 17-19.

⁶⁶ *Id.* at 16-17.

⁶⁷ *Id.* at 25.

⁶⁸ *Id.* at 14-15.

⁶⁹ *Id.* at 24.

⁷⁰ Memorandum from Larry Krasner, District Attorney of Phila., to Phila. District Attorneys on New Policies Announced Feb. 15, 2018, at 3 (Feb. 15, 2018), <https://www.documentcloud.org/documents/4415817-Philadelphia-DALarry-Krasner-s-Revolutionary-Memo.html>.

⁷¹ See *id.*; *21 Principles for the 21st Century Prosecutor*, *supra* note 37, at 24.

this economic-centered account is a staple of conservative and libertarian criminal justice reform.⁷² Transcending a left/right distinction, then, is an overarching concern for “good government,” whether framed in terms of shrinking wasteful government spending (from the right) or reallocating resources to worthy causes (from the left). Or, building on my dismissal of the “progressive who prosecutes” as a significant category,⁷³ perhaps it’s worth recognizing that at least some ideal types of progressive prosecutor don’t necessarily map onto a U.S.-style left/right axis. The proceduralist prosecutor’s progressivism might be understood correctly not as a manifestation of twenty-first century “progressivism” (*i.e.*, some broadly phrased left politics that might encompass liberalism, radicalism, etc.), but instead as a belief in ensuring that the structures of governance are operating “properly.” The proceduralist prosecutor’s primary commitment, then, is ideological and not necessarily partisan—a desire to uphold the tenets of liberal legalism or constitutionalism.⁷⁴

Sklansky’s and the Brennan Center’s suggestions and this proceduralist approach find purchase in a number of common practices in reform DAs’ offices. For example, a number of “progressive prosecutors” have instituted or increased emphasis on conviction integrity units that are designed to double-check line prosecutors’ work and ensure that the office isn’t securing wrongful convictions.⁷⁵ While many of these units predate the rise of the

⁷² See, e.g., Newt Gingrich & Pat Nolan, Op-Ed., *Prison Reform: A Smart Way for States To Save Money and Lives*, WASH. POST, Jan. 7, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html>; Marc Levin, Testimony for House Judiciary Committee Overcriminalization Task Force (2014), available at <http://rightoncrime.com/2014/05/marc-levin-testimony-at-house-judiciary-committee-overcriminalization-task-force/>; Vikrant P. Reddy & Marc A. Levin, *Right on Crime: A Return to First Principles for American Conservatives*, 18 TEX. REV. L. & POL. 231 (2014).

⁷³ See generally Part II, *supra*.

⁷⁴ Cf. Karl Klare, *Law Making As Praxis*, 40 TELOS 123, 132 n.28 (1979) (“I mean by ‘liberal legalism’ the particular historical incarnation of legalism ‘the ethical attitude that holds moral conduct to be a matter of rule following,’ which characteristically serves as the institutional and philosophical foundation of the legitimacy of the legal order in capitalist societies. . . . Liberal legalist jurisprudence and its institutions are closely related to the classical liberal political tradition, exemplified in the work of Hobbes, Locke and Hume. The metaphysical underpinnings of liberal legalism are supplied by the central themes of that tradition: . . . [including] the separation in political philosophy between public and private interest, between state and civil society; and a commitment to a formal or procedural rather than a substantive conception of justice.”).

⁷⁵ See, e.g., Mitchell Byars, *Boulder DA’s Conviction Integrity Unit Officially Online*, BOULDER DAILY CAMERA (CO), Oct. 8, 2018, <https://www.dailycamera.com/2018/10/09/boulderdas-conviction-integrity-unit-officially-online/>; Vaidya Gullapalli, *Defending the Conviction Integrity Unit in St. Louis*, THE APPEAL, Aug. 19, 2019, <https://theappeal.org/defending-the-conviction-integrity-unit-in-st-louis/>; Garrison Lovely, *Tiffany Cabán Will Put the System on Trial*, JACOBIN, Jun. 24, 2019, <https://www.jacobinmag.com/2019/06/tiffany-caban-queens-district-attorney-elections>.

contemporary progressive prosecutor movement, DA candidates have begun to emphasize the units as a part of a larger reformist project.⁷⁶ And, notably, DAs framing conviction integrity units as a part of a progressive agenda have often sought to hire attorneys with defense or Innocence Movement backgrounds to staff these units.⁷⁷

Similarly, take the move by some reformist DAs to implement no-call lists for police officer witnesses. Krasner, for example, has established such a list to bar police officers with a long history of misconduct from testifying at trial, as have Florida State Attorney Aramis Ayala and Orange County (California) District Attorney Todd Spitzer.⁷⁸ Applying a similar logic, St. Louis Circuit Attorney Kim Gardner adopted such a list and dropped over one hundred cases that relied on the statements of officers who had lied or engaged in corruption.⁷⁹ (This approach might go towards ensuring the accuracy of convictions, as it would bar potentially dishonest testimony; alternatively, or in addition, it might serve as a vehicle to punish or deter unlawful conduct from police officers, as they would be prevented from earning the overtime wages that testifying often entails.)⁸⁰

This model of prosecution might lead to fewer people incarcerated (or incarcerated for as long) because of fewer cases based on tenuous evidence and a less coercive approach to plea bargaining. But it need not, and the proceduralist prosecutor need not start from a posture that her job was to

⁷⁶ See, e.g., Gullapalli, *supra* note 75; Josie Duffy Rice, *Do Conviction Integrity Units Work*, THE APPEAL, Mar. 22, 2018, https://theappeal.org/do-conviction-integrity-units-work-a718bbc75bc7/?utm_source=The+Appeal&utm_campaign=098705f9c0-EMAIL_CAMPAIGN_2018_08_09_04_14_COPY_01&utm_medium=email&utm_term=0_72df992d84-098705f9c0-58408851.

⁷⁷ See, e.g., Maya Kaufman, *Queens District Attorney's Office Launches Conviction Review Unit*, PATCH.COM, Jan. 6, 2020, <https://patch.com/new-york/foresthills/queens-district-attorneys-office-launches-conviction-review-unit> (“Leading the new conviction integrity unit in the Queens district attorney's office will be former Innocence Project senior staff attorney Bryce Benjet. . .”).

⁷⁸ See Mensah M. Dean & Mark Fazlollah, *FOP Sues Kenney, Krasner, Ross Over Police 'Do-Not-Call' List*, PHILA INQUIRER, Nov. 13, 2018, <http://www2.philly.com/philly/news/breaking/fop-lawsuit-kenney-krasner-ross-police-do-not-call-list-philadelphia-20181113.html>; Elizabeth Weill-Greenberg, *When Cops Lie, Should Prosecutors Rely Upon their Testimony at Trial?*, THE APPEAL, Jul. 29, 2019, <https://theappeal.org/advocates-demand-da-do-not-call-lists-dishonest-biased-police/>.

⁷⁹ Justin George & Eli Hager, *One Way To Deal With Cops Who Lie? Blacklist Them, Some DAs Say*, MARSHALL PROJECT, Jan. 17, 2019, <https://www.themarshallproject.org/2019/01/17/one-way-to-deal-with-cops-who-lie-blacklist-them-some-das-say>.

⁸⁰ See Henry Gass, *When DA Doesn't Consider an Officer Reliable, Should Public Know?*, CHRISTIAN SCIENCE MONITOR, Sept. 3, 2019, <https://www.csmonitor.com/USA/Justice/2019/0903/When-DA-doesn-t-consider-an-officer-reliable-should-public-know>; Scott Shackford, *Philly Police Union Sues Over Attempts to Keep Bad Cops Off the Stand*, REASON (Nov. 21, 2018), <https://reason.com/blog/2018/11/21/philly-police-union-sues-over-attempts-t>.

scale down the size or footprint of the criminal system. Instead, her goal of “getting it right” might actually lead to more convictions (because of proper procedure).⁸¹ Similarly, a proceduralist prosecutor might reduce racial and socioeconomic disparities in enforcement by prioritizing anti-bias training or comprehensively tracking charging and sentencing patterns.⁸² But, again, these interventions need not have such a result—reducing bias at the prosecutorial stage need not guarantee a system where poor people, people of color, and other marginalized defendants are treated similarly to more privileged defendants.

That is, regardless of what changes are made at the prosecutorial level, there still might be significant biases at the policing stage (*i.e.*, which neighborhoods are policed heavily, and which crimes lead to arrest) and the legislative stage (*i.e.*, which types of conduct are criminalized and which are not).⁸³ Even if prosecutors are the most powerful discretionary actors in the system,⁸⁴ they are certainly not the only ones. And, on a deeper, structural level, assuming that persistent social inequalities can be addressed via prosecutorial, or, for that matter, any criminal decisionmakers disregards the ways in which criminal law and its enforcement are embedded in a broader network of social, political, and economic conditions. Without addressing distributional questions relating to labor markets, education, housing, resources, etc., the decision of how or whom to prosecute can only do so much.

IV. THE PROSECUTORIAL PROGRESSIVE

Unlike the proceduralist prosecutor, the prosecutorial progressive’s political commitments are explicitly left. And, her decisions are rooted in concern about structural inequality and substantive, not simply procedural justice. The prosecutorial progressive embraces her role as prosecutor and the power of state violence, but she does so with an eye towards advancing political ends favored by progressives and the political left (broadly conceived).

⁸¹ See Alice Ristroph, *The Constitution of Police Violence*, 64 UCLA L. REV. 1182, 1225 (2017) (“[Procedural justice] take[s] for granted the basic normative legitimacy of the criminal law and the punishments it imposes. If an individual is in fact guilty, we should want him to accept and even facilitate his own punishment, it might be argued.”).

⁸² It’s also possible that the proceduralist prosecutor would attract fewer applications for line-level positions from attorneys or law school graduates who harbored more explicitly racist views or who viewed their job as obtaining a conviction at all costs.

⁸³ Put differently, arrests and prosecutions are the result of a set of highly contingent and politically embedded decisions. They aren’t natural. See, e.g., Alice Ristroph, *Farewell to the Felony*, 53 HARV. C.R.-C.L. L. REV. 563, 617-18 (2018); Benjamin Levin, *De-Naturalizing Criminal Law: Of Public Perceptions and Procedural Protections*, 76 ALB. L. REV. 1777, 1784-94 (2013).

⁸⁴ See generally Part I, *supra*.

There are different flavors of prosecutorial progressives or different sets of prosecutorial progressive priorities: those focused on crimes committed by powerful defendants (e.g., white collar crime, political corruption, or police violence), those focused on crimes that further historical inequality or subordination (e.g., intimate partner violence, sexual assault, or hate crimes), or those focused on redistributing criminal justice resources (e.g., pursuing cases against more privileged defendants, while scaling back prosecutions of less privileged defendants). These approaches are evident in the continued calls for harsh punishment and carceral sanctions from commentators and activists on the left who otherwise decry mass incarceration and the abuses of the carceral state.⁸⁵ For example, advocates of the “progressive prosecutor” movement have called for prosecutors to amp up (and progressive DA candidates have promised to amp up) prosecutions of rape and gender-based violence,⁸⁶ wage theft,⁸⁷ corporate crime,⁸⁸ and other offenses less frequently identified with defendants from marginalized communities.

Perhaps one of the most important areas where prosecutorial

⁸⁵ See, e.g., GRUBER, *supra* note 8; Levin, *supra* note 8 (describing this phenomenon as “carceral exceptionalism”); Aya Gruber & Benjamin Levin, *Abolitionisms* (manuscript on file with author) (describing the prevalence of “carve outs” among commentators otherwise critical of the carceral state).

⁸⁶ See, e.g., Seamus Kirst, *These Progressive Prosecutors Want to Reshape Justice in Major American Cities*, TEEN VOGUE, July 29, 2019, <https://www.teenvogue.com/story/meet-progressive-prosecutors-krasner-rollins-boudin-owens-caban> (describing campaign promises to test all rape kits); Isabel Cristo, *Tiffany Cabán Wants to Transform What It Means to Be a DA*, NATION, June 13, 2019, <https://www.thenation.com/article/tiffany-caban-queens-da-interview/>. For a critical take on the use of prosecution to address gender subordination, see generally GOODMARK, *supra* note 50; GRUBER, *supra* note 50; Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418 (2012).

⁸⁷ See, e.g., Chris Opfer, *Prosecutors Treating ‘Wage Theft’ as a Crime in These States*, BLOOMBERG, June 26, 2018, <https://news.bloomberglaw.com/daily-labor-report/prosecutors-treating-wage-theft-as-a-crime-in-these-states>; Devin Magliozzi, *Wage Theft is Criminal and Should Be Prosecuted, Tompkins DA Says*, THE ITHACA VOICE (NY), Feb. 6, 2019, <https://ithacavoice.com/2019/02/wage-theft-is-criminal-and-should-be-prosecuted-tompkins-da-says/> (“One of the prosecutors Van Houten has been learning from is Diana Florence, attorney-in-charge of the construction task force for the Manhattan district attorney. Joining the panel via video call, Florence said her office has been successfully prosecuting wage theft cases for about three years, since becoming aware of systematic theft while investigating a workplace death.”); Terri Gerstein, *The Shutdown Shows Why Progressives Need to Make Labor-Law Enforcement a Top Priority*, SLATE, Jan. 23, 2019, <https://slate.com/news-and-politics/2019/01/shutdown-wage-theft-unpaid-federal-workers.html>.

⁸⁸ See, e.g., Eric Levitz, *Black Lives Matters’ Defense Attorney Is About to Become Philadelphia’s DA*, NEW YORK MAGAZINE, May 17, 2017, <http://nymag.com/intelligencer/2017/05/occupys-defense-attorney-is-about-to-become-phillys-da.html> (identifying real criminal justice reform as embodied by Krasner, as opposed to criminal justice reform designed to shield white-collar defendants); Larry Krasner, *Lecture by Larry Krasner*, 3 UCLA CRIMINAL JUSTICE L. REV. 99, 108 (2019) (critiquing underenforcement of white-collar crimes).

progressivism has reared its head is in the prosecution of police officers. Where many self-described progressive prosecutors are quick to stress their desire to reduce the criminal system's footprint or to point to their own defense-friendly credentials, police violence cases are a frequent exception.⁸⁹ That is, many progressive prosecutors have sought to make their name or to stake their political claim by adopting a tough line against police officers accused of using excessive force against civilians.⁹⁰ Being "tough on police" is often touted alongside supporting bail reform or addressing racial disparities as a campaign pledge for reformist prosecutors.⁹¹ Marilyn Mosby, for example, who was elected State's Attorney of Baltimore, made the prosecution of the officers involved in the death of Freddie Gray—an unarmed Black man—a major priority, as a means of sending a message that her office cared about state violence against people of color.⁹²

This approach jibes with a rich literature and long line of activism on underenforcement of criminal law. The accounts of underenforcement tend to emphasize the ways in which police and prosecutors have harmed marginalized communities not just by overcriminalizing them, but by failing to provide them with the true protection of the state.⁹³ If the "first civil right" is

⁸⁹ Indeed, Sklansky identifies the vigorous prosecution of police homicides as a defining characteristic of progressive prosecution. See Sklansky, *The Progressive Prosecutor's Handbook*, *supra* note 6, at 38-39.

⁹⁰ See, e.g., Davis, *supra* note 31, at 7 ("Some [DA candidates] challenged incumbents who declined to prosecute police officers involved in the killings of unarmed black men and boys, campaigning in part on this issue."); Akela Lacey, *St. Louis Prosecutor Wesley Bell Launches Independent Unit to Hold Police Accountable*, THE INTERCEPT, Jul. 4, 2019, <https://theintercept.com/2019/07/04/st-louis-prosecutor-wesley-bell-police-accountability-wrongful-conviction/>; Laurel Rosenhall, *Kamala Harris Prosecuted a Mentally Ill Woman Shot by SF Police. The jury Didn't Buy It*, THE MERCURY NEWS (CA), Sept. 11, 2019, <https://www.mercurynews.com/2019/09/11/as-d-a-kamala-harris-prosecuted-a-mentally-ill-woman-shot-by-police-the-jury-didnt-buy-it/> (describing Harris as having adopted a hard line on prosecution and investigation of police shootings).

⁹¹ See, e.g., Jake Bittle, *Brooklyn Is America's Next Shot at Electing a Progressive Prosecutor*, NATION, Sept. 11, 2017, <https://www.thenation.com/article/brooklyn-is-americas-next-shot-at-electing-a-progressive-prosecutor/>.

⁹² See generally Tim Prudente, *Marilyn Mosby Wins Re-Election in Three-Way Race for Baltimore State's Attorney*, BALTIMORE SUN (MD), June 26, 2018, <https://www.baltimoresun.com/politics/bs-md-ci-states-attorney-20180625-story.html> (describing Mosby's aggressive prosecution of the police officers involved in Freddie Gray's death).

⁹³ RANDALL KENNEDY, RACE, CRIME AND THE LAW (1997) (tracing the underenforcement of crimes against Black defendants); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1717 (2006) ("Underenforcement can also be a form of deprivation, tracking familiar categories of race, gender, class, and political powerlessness. Conceived of as a form of public policy, underenforcement is a crucial distribution mechanism whereby the social good of lawfulness can be withheld." (footnotes omitted)); Deborah Tuerkheimer, *Underenforcement As Unequal Protection*, 57 B.C. L. REV. 1287, 1288-89 (2016) ("As is true of underenforcement generally, under-policing tends to result from a devaluing of

the freedom from violence, then the state's fundamental task is to provide safety for its inhabitants, particularly those who might be particularly vulnerable or who might lack the political power to address widespread violence.⁹⁴ Viewed in this way, the decision to use prosecutorial resources to target defendants who have harmed marginalized victims or communities sends a powerful message that those communities or victims matter.⁹⁵

A similar justification has made wage theft and financial crime major priorities of contemporary prosecutorial progressives. Former Southern District of New York U.S. Attorney Preet Bharara was celebrated in liberal and progressive circles for aggressively prosecuting white-collar crime,⁹⁶ Krasner instituted a special unit for wage theft prosecution,⁹⁷ and Tiffany Cabán, the queer Latina public defender and Democratic Socialist who came within a few votes of being elected DA in Queens, made prosecuting abusive employers and landlords a key component of her platform.⁹⁸ Indeed, some commentators have argued that the progressive prosecutor movement and the attention it has drawn to DA elections affords an opportunity to make the crimes of the rich primary targets of law enforcement.⁹⁹

the harms caused by a specific crime, the harms suffered by members of a certain demographic group, or both.” (footnotes omitted)). *But see* Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270 (1998) (critiquing the focus on underenforcement).

⁹⁴ See generally MURAKAWA, *supra* note 50 (arguing that this theory of state protection for the powerless helped drive liberal support for the carceral state).

⁹⁵ See, e.g., Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 860 (2014); Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIAMI L. REV. 961 (2014); Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in A Prison Nation*, 37 WASH. U. J.L. & POL'Y 13, 34 (2011) (“Like expressive violence itself, criminal punishment is widely understood to “send a message”—the message that women and sexual minorities matter.”).

⁹⁶ See, e.g., Tina Nguyen, *Bharara Lands a New Job While He Considers His Next Move*, VANITY FAIR, Mar. 21, 2017, <https://www.vanityfair.com/news/2017/03/preet-bharara-nyu-law-school> (“Democrats itching for new leadership have long hoped that Bharara, an anti-corruption, anti-Wall Street crusader, might use his free time to take on Donald Trump.”); William D. Cohan, *Will Preet Bharara, New York's Anti-Corruption Crusader, Run for Higher Office?*, NATION, Apr. 29, 2015, <https://www.thenation.com/article/will-preet-bharara-new-yorks-anti-corruption-crusader-run-higher-office/>.

⁹⁷ See Juliana Feliciano Reyes, *Philly DA's Office Launches a Unit to Prosecute Employers for Crimes Against Workers*, PHILADELPHIA INQUIRER, Oct. 8, 2019, https://www.inquirer.com/news/district-attorney-larry-krasner-employer-crimes-prosecution-wage-theft-20191008.html?__vz=medium%3Dsharebar.

⁹⁸ See Oren Schweitzer, *Tiffany Cabán, a Socialist in the District Attorney's Office*, JACOBIN, June 26, 2019, <https://jacobinmag.com/2019/06/tiffany-caban-socialist-district-attorney-queens-election>.

⁹⁹ See, e.g., Terri Gerstein, *Stealing From Workers Is a Crime. Why Don't More Prosecutors See It That Way?*, NATION, May 24, 2018, <https://www.thenation.com/article/stealing-from-workers-is-a-crime-why-dont-prosecutors-see-it-that-way/> (“Yet these contests also present an opportunity to elect leaders who understand the importance of judiciously using criminal law

Regardless of which marginalized class of victims or relatively powerful defendants the prosecutorial progressive chooses to prioritize, her mission or approach accepts the fundamental legitimacy and desirability of the criminal system and carceral state violence. To the prosecutorial progressive, many aspects of mass incarceration and the contemporary construction of criminal policy might be objectionable. But, those objections rest on a belief that resources and energies have been misdirected and that the objectionable corners of the criminal system are aberrations.¹⁰⁰ Rather than rejecting a prosecutorial politics, or embracing a skeptical view of the prosecutorial credential in the political sphere, this approach remains firmly rooted in a vision of the heroic or crusading prosecutor. Elsewhere, I have argued that this approach—carceral progressivism—is rooted in a statist worldview that understands criminal law as the proper vehicle for channeling the state (and, by extension, society’s) moral outrage about social problems.¹⁰¹ From this Progressive viewpoint, the state is ultimately trustworthy as solver of social problems. And, to the extent that criminal law represents the state at its purist form—embodying the collective moral will and ensuring security for its citizens¹⁰²—criminal law might be the ultimate solution to social problems.¹⁰³

Of course, such a belief assumes that the progressive functions of the prosecutor could be neatly cordoned off from the regressive functions (*e.g.*,

to address serious employer abuses, like wage theft, sexual assault, and utterly avoidable workplace injuries and fatalities.”).

¹⁰⁰ By way of analogy, Don Dripps argues that making rape a federal crime would have positive hydraulic effects because shifting enforcement priorities “could not help but draw resources away from [problematic] drug and firearms cases.” Donald A. Dripps, *Why Rape Should Be A Federal Crime*, 60 WM. & MARY L. REV. 1685, 1692 (2019).

¹⁰¹ See Benjamin Levin, *Wage Theft Criminalization* (manuscript on file with author).

¹⁰² As a descriptive matter, this account of criminal law resonates with non-liberal critiques of criminal law and its place in the liberal (and/or neoliberal) state. See, *e.g.*, BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 40–44 (2011). (“Neoliberal penalty facilitates passing new criminal statutes and wielding the penal sanction more liberally because that is where government is necessary, that is where the state can legitimately act, that is the proper and competent sphere of politics.”); ÉMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 102 (W.D. Halls trans., 2014) (1893); MICHEL FOUCAULT, *SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE 1977-78* (Graham Burchell trans., 2007).

¹⁰³ To be clear, this view is at odds with many formulations embraced by left liberals and civil libertarians who have been critical of “overcriminalization.” See, *e.g.*, DOUGLAS N. HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008); HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 909 (1962); Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L. Q. 17, 33 (1968-69); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1354 (2012).

incarcerating powerless defendants, executing coercive plea deals, etc.).¹⁰⁴ That is, the claim seems to rest on a belief that crusader or “progressive” aspects of the prosecutorial progressive are easily divorceable from the aspects of the prosecutorial apparatus that subjugate marginalized populations and serve to further other institutions of the carceral state.¹⁰⁵ Such a belief, though perhaps widely shared is not uncontroversial. In a particularly cutting op-ed written at the end of Bharara’s tenure, David Patton, the chief Federal Defender for the Southern District of New York, argued that the liberal adoration for “the sheriff of Wall Street” was fundamentally misguided.¹⁰⁶ As Patton described it,

none of the tags do much to describe the actual work of his office and the overwhelming number of prosecutions it brings that have nothing to do with Wall Street or Albany [where Bharara focused on government corruption]. . . . Federal criminal cases rarely involve the rich or powerful. Consistent with the rest of the country, 80% of federal defendants in the Southern District of New York are too poor to hire a lawyer. Seventy percent are African-American or Hispanic. The most commonly prosecuted offense type, by far, is drugs. . . His office greatly increased the prosecution of poor people of color using sprawling conspiracy and racketeering statutes to charge many low level drug dealers and addicts¹⁰⁷

Embracing progressive prosecutorialism requires a concession that critiques like Patton’s might persist, but that the fundamental need for criminal law to discipline the powerful or protect marginalized victims makes it worthwhile. Or, at least, that the benefits in any such tradeoff are too substantial for anti-carceral commentators to dismiss out of hand.

V. THE ANTI-CARCERAL PROSECUTOR

Which brings us to the final ideal type and the most assertive vision of the prosecutor as anti-carceral (or decarceral) actor. Like the second and third ideal types, and unlike the first, the anti-carceral prosecutor brings her politics

¹⁰⁴ See Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 *FORDHAM L. REV.* 3211, 3213 (2015) (critiquing this position); Levin, *Mens Rea Reform and Its Discontents*, *supra* note 46 (same).

¹⁰⁵ *Cf. generally* ALEC KARAKATSANIS, *USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM* (2019) (critiquing prosecutors as cogs in the machine of criminal injustice).

¹⁰⁶ David Patton, Opinion, *An Honest Assessment of Preet Bharara’s Record: Harsh Prosecutions Put More African-Americans and Hispanics Behind Bars*, N.Y. *DAILY NEWS*, Mar. 15, 2017, <https://www.nydailynews.com/opinion/honest-assessment-preet-bharara-record-article-1.2999367>.

¹⁰⁷ *Id.*

with her to the workplace. The anti-carceral prosecutor isn't simply a progressive in the voting booth. But, unlike the prosecutorial progressive and the proceduralist prosecutor, the anti-carceral prosecutor's "progressiveness" has a specific valence, applied to the scope and function of the criminal system. Where the proceduralist prosecutor wholeheartedly supports criminal law as long as it is enforced constitutionally, and the prosecutorial progressive embraces criminal law as a desirable tool for righting social wrongs and balancing an unequal political and economic system, the anti-carceral prosecutor harbors no illusions about criminal law as a vehicle for positive change. Instead, to the anti-carceral prosecutor, criminal law and the carceral state are fundamentally flawed. The anti-carceral prosecutor's job is not to repurpose the existing institutional structures for good (as the prosecutorial progressive would wish), but rather to shrink those institutions, or perhaps do away with them altogether.

The anti-carceral prosecutor's stance comes closest to resembling those embraced by prison abolitionists and other more radical critics of the carceral state.¹⁰⁸ Rather than arguing for more investment in DAs offices so that they can do their jobs better,¹⁰⁹ the anti-carceral prosecutor advocates for a divestment from prosecution and the criminal system.¹¹⁰ Similarly, where the prosecutorial progressive might prioritize enforcing certain types of crimes, the anti-carceral prosecutor seeks to enact policies of declination—*i.e.*, formally refusing to bring charges. This approach has gained ground, particularly in the context of certain classes of drug crimes. Suffolk County DA Rachael Rollins, for example made a campaign promise not to prosecute a range of "quality of life offenses" including minor in possession of alcohol, breaking and entering to seek shelter, and other crimes not readily linked to violence or victims.¹¹¹ Similarly, once in office, Cook County State's Attorney Kim Foxx announced

¹⁰⁸ On this account of the criminal system as fundamentally flawed or rooted in an inherently objectionable politics, see, e.g., Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L. J. 1419 (2016); Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684 (2019); Dorothy E. Roberts, *Democratizing Criminal Law As an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1604–05 (2017); Dylan Rodríguez, *Abolition As Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575 (2019).

¹⁰⁹ See Bakinger, *supra* note 42 (discussing tension over progressive prosecutors' requests for more funds to hire new ADAs).

¹¹⁰ See, e.g., Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1622 (2019); Platform, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/platform/>.

¹¹¹ See Maria Cramer, *DA Candidate Rachael Rollins Hailed Nationally, But Locally Her Plan Not to Prosecute Petty Crimes Alarms Some*, BOSTON GLOBE, Sept. 12, 2108, <https://www.bostonglobe.com/metro/2018/09/12/candidate-hailed-nationally-but-locally-her-plan-not-prosecute-petty-crimes-alarms-some/pyQX8MT4iWpyJ8XMi6SsFO/story.html>; Carissa Byrne Hessick & F. Andrew Hessick, *The National Police Association Is Throwing a Fit Over Prosecutorial Discretion*, SLATE, Jan. 4, 2019, <https://slate.com/news-and-politics/2019/01/national-police-association-throwing-fit.html>.

that she would stop prosecuting individuals for driving with licenses suspended for inability to pay fines or fees.¹¹² Certainly, such policies could be coupled with prosecutorial progressive or proceduralist goals of redistributing resources to other areas—perhaps other crimes or internal institutional checks. But a declination or decarceration policy need not be.

Indeed, the anti-carceral prosecutor might pursue “accountability” for police or others, but would not view accountability as synonymous with incarceration or state control.¹¹³ And, the pure anti-carceral prosecutor would see her function purely as scaling back the system. “Doing justice” to this prosecutor entails not prosecuting at all. A growing number of former defense attorneys and civil rights lawyers have run for DA with a stated mission of changing the system from a position of power. The anti-carceral prosecutor stands at the extreme pole of this posture—a sort of double-agent committed to destroying the system from within.¹¹⁴ To the anti-carceral prosecutor, the problem isn’t that the wrong people are incarcerated, it’s that people are incarcerated. To the anti-carceral prosecutor, resolving the injustice and inequality in the administration of criminal law wouldn’t mean finding avenues to punish more privileged defendants more harshly; it would mean treating all defendants with the lenience, mercy, and humanity often reserved for the most powerful.¹¹⁵

VI. CONCLUSION: DIFFERENT PROGRESSIVISMS & DIFFERENT PROSECUTORIALISMS

As should be clear, the ideal types traced above might overlap, and many progressive prosecutors might embrace policies that I associate with several different ideal types. Indeed, some of the biggest-name reform prosecutors certainly have adopted multiple policies that I would identify with competing theories. Further, a DA who ran as one type of progressive prosecutor might shift to embrace another mode based either on her experiences or after encountering resistance.¹¹⁶ But, what I hope to highlight in this Essay is the

¹¹² See Davis, *supra* note 31, at 9.

¹¹³ See Elisabeth Epps, *Amber Guyger Should Not Go to Prison*, THE APPEAL, Oct. 7, 2019, <https://theappeal.org/amber-guyger-botham-jean/>.

¹¹⁴ Cf. Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1943 (2019) (describing “resistance lawyering” in criminal defense as “using the tools of a hostile system both to achieve results for their clients and to challenge the system itself”).

¹¹⁵ See, e.g., Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337 (2018); Levin, *Mens Rea Reform and Its Discontents*, *supra* note 46, at 540-48; Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 776 (2016) (“This realization has led many to call for less process for police. This Article has argued that the far more desirable conclusion is to give more process to the rest of us. Anyone serious about criminal justice reform needs to consider how prosecutors treat police suspects. The process they give their law enforcement partners has much to tell us about how to create a better system for everyone.”).

¹¹⁶ Cf. Davis, *supra* note 31, at 15-20 (describing challenges faced by progressive

way in which these different ideal types reveal very different understandings of what's wrong with the criminal system.¹¹⁷ Or, put differently, each version of the progressive prosecutor mantle should be promising only to the extent that we understand it as responsive to major problem with the administration of criminal law.

The progressive who prosecutes is only a desirable alternative to the status quo or an attractive candidate for the office if the problem with the criminal system is the prevalence of conservatives and/or Republicans in positions of power. As described above, I think that partisan characterization is dangerously reductive and largely inaccurate. Punitivism and carceral politic transcend party lines.

The proceduralist prosecutor is an attractive candidate if the problem with the criminal system is corrupt or unconstitutional behavior in DAs' offices. Like almost every academic commentator on criminal law and procedure, I believe that widespread procedural abuses are a defining feature of the system. From failures to disclose exculpatory information, to reliance on questionable policing, or deployment of coercive plea terms, prosecution in the United States is replete with affronts to procedural justice. But should procedurally just case management truly be the lodestar for criminal procedure? Maybe procedural justice would reduce wrongful convictions. And, maybe procedural justice would make defendants and court-involved individuals feel less like the system was a repository for racism, classism, abuses, and a range of structural inequalities.¹¹⁸ Maybe, but I think it's important to appreciate the critiques of procedural justice that stress how better process can't undo the underlying structural inequalities and injustices.¹¹⁹ Given the choice, of course, I would prefer a world in which innocent defendants weren't convicted.¹²⁰ Or in which

prosecutors).

¹¹⁷ Cf. Bellin, *supra* note 38, at 1 ("Despite all the attention paid to prosecutors in recent years, the primary guidance on the prosecutorial function remains a timeworn Rorschach test.").

¹¹⁸ See, e.g., Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing—and Why It Matters*, 54 WM. & MARY L. REV. 1865, 1875 (2013); Tracey Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651, 653 (2009).

¹¹⁹ See, e.g., Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2082–83 (2017) ("Thin conceptions of procedural justice could produce what Jeremy Bentham called 'sham security,' leaving some individuals with a vague sense that they have been treated justly while neglecting more fundamental questions of justice."); Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295, 359 (2016); Ristroph, *supra* note 81, at 1227 n. 188 (collecting sources).

¹²⁰ Cf. Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587 (2005) (arguing that the focus on innocent defendants, while important, can obscure and preclude discussions about structural change); cf. also Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549 (2008) (collecting and responding to similar critiques of a focus on innocent defendants).

the constitutional rights and liberties of individuals, guilty or not, were not easily disregarded.¹²¹ But, an account of what's wrong with the system that focuses exclusively on innocent defendants or prioritizes affronts to liberal legalism barely scratches the surface of mass incarceration and its attendant ills.¹²² As Jeffrey Bellin put it, “[d]eclining to prosecute the innocent is not a progressive position. It is a consensus position.”¹²³ Weeding out the truly indefensible conduct of unscrupulous prosecutors would be a good, but it also would be setting a relatively low bar in imagining what the system should look like.¹²⁴

What of the prosecutorial progressive? Again, the account of the criminal system's flaws to which this approach responds is a specific and idiosyncratic one: the state (or, the prosecutorial apparatus) has failed to hold the powerful accountable and has failed to live up to its moral authority by under-enforcing laws that should protect marginalized victims. As I've argued elsewhere, this view is widely shared, particularly on the political left (broadly conceived).¹²⁵ But, it is also fundamentally at odds with a broader decarceral or decarcerationist project, not just because it treats the criminal system as fundamentally legitimate, but also because it is inherently rooted in a belief that prosecutors need to prosecute *more*. If progress means changing who is in prison, this approach has little to say to the growing body of scholars, advocates, and activists talking about how to get people out of prison.¹²⁶ And, it might not even be responsive to less-radical critics concerned about overcriminalization (*i.e.*, maybe passing more criminal statutes would be a social good as long as those statutes targeted the right types of conduct). If a

¹²¹ Cf. Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013) (critiquing constitutional rights discourse as obscuring deeper distributional inequality); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995) (arguing that Eighth Amendment discourse obscures the deeper injustice of the death penalty).

¹²² See generally Butler, *supra* note 121.

¹²³ Bellin, *supra* note 24, at 25. Of course, like any other consensus, this one has its dissenters. See, e.g., Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005).

¹²⁴ Cf. Amna A. Akbar, *Toward A Radical Imagination of Law*, 93 N.Y.U. L. REV. 405 (2018) (arguing that legal scholarship and traditional legal thought leaves little room for more radical understandings of what law could be or how society could be structured); *Introduction*, 132 HARV. L. REV. 1568 (2019) (quoting activist and advocate Derecka Purnell as observing that “People on the streets, people who are organizing, are gonna put certain things on the table that will rarely leave a lawyer’s mouth. Like police abolition. Abolishing the carceral state. Ending prisons.”).

¹²⁵ See note 46, *supra*.

¹²⁶ See Epps, *supra* note 113 (“If you champion abolition for certain people and situations but not others, then yours is not a call for abolition but for sentencing reform. 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.”).

carceral sentence is the only way (or the best way) to ensure “accountability” for police, wealthy executives, or politicians, then why isn’t it the fitting response for people who commit violent crimes or cause other sorts of grave harm?

Which brings us to the anti-carceral prosecutor. This last vision in many ways holds both the most promise for me, but also the most unanswered questions.¹²⁷ To more radical critics of the carceral state, this approach is probably the only one that holds significant appeal¹²⁸—it is fundamentally oppositional to existing power structures and sees the problems with the system as ones of essential (or existential?) purpose, rather than scale or design. At the same time, there’s a live question as to whether it’s possible to be an anti-carceral prosecutor.¹²⁹ Perhaps, this posture reflects the prosecutor’s status as embedded in the “punishment bureaucracy”¹³⁰ or just the “paradox of progressive prosecution.”¹³¹ That is, from a radical stance, if one views the structures of the criminal system as fundamentally illegitimate, rooted in white supremacy, social control of the poor, or fundamentally opposed to true democracy, then how could working within those structures do anything but legitimate these same problematic institutions? If the goal should be a world without prisons or if the institutions of the criminal system are inherently objectionable, is there any way to escape a dangerous complicity? Or, even if the goals of critics are slightly less radical, but are still rooted in wide-scale decarceration, isn’t relying on or celebrating prosecutors still fundamentally illogical?

Ultimately, these are big questions. Answering them requires an honest and careful engagement with the terms of the progressive prosecutorial movement. Like so many other corners of the discourse on criminal justice reform, discussions about progressive prosecution tend to take for granted that we (some imagined group of right-thinking people) all agree on what’s wrong with mass incarceration and what needs to happen to get to a world without the much-maligned carceral state.¹³² But, like so many corners of the

¹²⁷ In articulating a vision of progressive prosecution that hews most closely to the anti-carceral prosecutor, Abbe Smith observes that “I remain unsure about whether prosecution can truly be progressive over the long haul—and whether prosecutors can bring real, fundamental, progressive change to the criminal justice system.” Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. L. 411, 422 (2019)

¹²⁸ To be clear, abolitionists and other radical critics certainly might prefer the prosecutorial progressive or proceduralist prosecutor to many other DA candidates. But, such a preference needn’t reflect a belief that such prosecutors were a long-term solution. Cf. Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017) (arguing for community bail funds, not as a solution to the problem of cash bail, but as a necessary institution for combatting cash bail as long as it exists).

¹²⁹ See generally Smith, *supra* note 21.

¹³⁰ See Karakatsanis, *supra* note 4.

¹³¹ See *The Paradox of “Progressive Prosecution”*, *supra* note 6.

¹³² See generally Levin, *The Consensus Myth in Criminal Justice Reform*, *supra* note 9 (critiquing

discourse on criminal justice reform, debates about progressive prosecution ultimately reveal deep fault lines and deep disagreements about what's wrong and what needs to be done.¹³³ Certainly, minor theoretical disagreements can easily derail important policy changes with real impacts on the lives of real people.¹³⁴ We do ourselves no favors, though, by pretending that we all share the same goals or the same vision of how to get there. Appreciating these disagreements should be a key component of determining if and when compromise actually serves our best interests, whatever those may be. And, understanding what degree of prosecutorialism is either acceptable or desirable should be essential to determining whether (and to what extent) progressive prosecutors have a role to play in moving beyond mass incarceration.

this approach).

¹³³ See generally *id.*

¹³⁴ See Davis, *supra* note 31, at 27 (“No single approach can achieve success in all jurisdictions, nor can every reform be implemented in every jurisdiction. . . . Any attempt to reduce the incarceration rate and unwarranted racial disparities in the criminal justice system should be supported.”); FORMAN, *supra* note 50, at 229 (arguing that mass incarceration resulted from “a series of small decisions, made over time, by a disparate group of actors” and so “mass incarceration will have to be undone the same way”).