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## CAN PROSECUTORS END MASS INCARCERATION?

*Rachel E. Barkow\**

CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION. By *Emily Bazelon*. New York: Random House. 2019. Pp. xxxi, 409. Cloth, \$24.99; paper, \$17.99.

### INTRODUCTION

In her excellent book, *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*, Emily Bazelon<sup>1</sup> uses the stories of two individuals to showcase the enormous power prosecutors have in a criminal case. The use of these narratives makes the book both a gripping read and a valuable primer for understanding how important local prosecutors are to the way punishment operates in America. Showing the authority prosecutors have over most aspects of punishment in America is the book's central descriptive contribution. But the book has a normative agenda as well. Bazelon argues that those seeking to dismantle mass incarceration should recognize that the power of prosecutors can be an effective lever of reform. She argues that by electing prosecutors concerned about mass incarceration, we can start to shift course away from tough-on-crime rhetoric that in reality does a poor job keeping people safe and move toward policies that actually work. I agree wholeheartedly with Bazelon's descriptive claim that prosecutors are critical actors—probably the most important actor, if we had to choose just one—in administering criminal justice policy in America. I also agree that we would do well as voters to select prosecutors who understand what really works to fight crime and therefore know that mass incarceration is not the answer. Electing prosecutors committed to decarceration is an improvement over the status quo, and it should be a vital part of any reform agenda.

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\* Vice Dean and Charles Seligson Professor of Law; Faculty Director, Center on the Administration of Criminal Law, NYU School of Law. Thanks to Ben Hoynes, Jenna Pearlson, Dan Schiano, and Naomi Schmidt for helpful research assistance. Thanks to Emily Bazelon, Ryan Bubb, John Ferejohn, David Garland, Courtney Oliva, Judith Reznik, Steve Schulhofer, Jacob Schuman, Vincent Sutherland, and Kenji Yoshino and the participants in faculty workshops at Penn State and NYU for helpful comments on an earlier draft of this review. I am particularly thankful that Emily Bazelon pushed me to be less of a glass-is-half-empty person in characterizing what progressive prosecutors have achieved so far.

1. Staff Writer, *New York Times Magazine*.

To the extent Bazelon and I diverge, it is only about how optimistic we should be about this movement transforming the landscape.<sup>2</sup> Bazelon believes that “[t]he movement to elect a new kind of prosecutor is the most promising means of reform . . . on the political landscape” (p. 296). Bazelon could well be right, but for that to happen, these progressive prosecutors will have to successfully achieve key institutional reforms. Critically, that includes imposing real checks on prosecutors themselves (reform-minded or otherwise). Indeed, a key metric for identifying whether a prosecutor is, in fact, a real reformer, as opposed to someone who is just seeking a convenient label as a progressive, is whether or not they are actively pursuing reforms that limit the leverage they have in criminal cases, such as seeking the elimination of mandatory minimum sentences, promoting open-file discovery laws, pursuing the end of cash bail and the dramatic curtailment of pretrial detention, accepting limits on their use of state-prison resources, pushing for judicial discretion in sentencing, advocating for robust second looks of sentences by actors other than prosecutors, and downsizing their offices. For these prosecutors to achieve real reform, they will need not only to advocate for these positions but also to help achieve their realization—and that is no small task given the entrenched opposition to all of these ideas, including from prosecutors within their own offices.

This Review will proceed in three parts. In Part I, I will explain why Bazelon is right to focus on prosecutors as key actors under the current regime. While scholars have documented the enormous role prosecutors play in virtually every aspect of criminal law’s administration and how that leads to the mass incarceration we currently have in America,<sup>3</sup> Bazelon’s book stands out for its ability to make this connection vivid and comprehensible to an average reader with no legal training or deep policy expertise. The two central stories are gripping, and you cannot help but want to learn more about the law and policies that shape these tales.

In Part II, I will explain why I have less optimism than Bazelon does about using prosecutor elections as “a shortcut to addressing a lot of dysfunction” (p. xxx). I think electing reform-minded prosecutors is a valuable step, and I do not mean to shortchange what some of the people in these positions have already accomplished. Many newly elected progressive prosecutors have already achieved laudable results and have done so in environments where change was not feasible through other means. But even with their gains, it is important to note that we are a long way from curbing

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2. Bazelon notes my more pessimistic view in *Charged* but says she “think[s] and hope[s] otherwise,” citing the examples from her book as her grounds for optimism. P. 296.

3. RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 143–64 (2019); ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 127–60 (2017); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011); see also Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 177, 188 (2019) (citing scholars focusing on prosecutorial power).

mass incarceration and that their advances are not necessarily shortcuts but rather incremental steps toward the more radical changes that are needed. Put another way, the unfortunate truth is that simply changing who serves as district attorney is not an easy shortcut to reducing prison and jail populations by significant amounts.<sup>4</sup>

That said, Bazelon and the voters and activists who have helped elect progressive prosecutors are right that this movement has the potential to be transformative. But bigger changes will happen only if these prosecutors do more than seek to exercise the vast discretion of their offices more wisely than their predecessors. They need to advocate for institutional changes, including changes that limit the leverage prosecutors have over defendants. Part III thus identifies key institutional reforms that are necessary to achieve more fundamental change. At their core, these ideas require placing significant checks on the powers prosecutors exercise instead of trying to change the type of people who occupy those roles and how they exercise their broad discretion. Part III will provide a summary of what some of those checks should look like. In addition to providing a list of needed reforms, this summary can serve as a checklist to evaluate prosecutors who claim to be progressive. If they are not putting their full support behind these institutional changes, one should question just how progressive they are.

Even if prosecutors pursue all these reforms, we should recognize that they cannot dismantle mass incarceration on their own. Real change is going to require changes in police departments, the judiciary, the legislature, and governors' offices. Most fundamentally, transforming punishment in America will require the public to change its understanding of the most effective policies for crime control.<sup>5</sup> Prosecutors have long lobbied for the get-tough approach as the way to address crime,<sup>6</sup> so this new breed of prosecutor needs to take the lead in explaining why punishment is not the answer to deeper social problems that lead to crime and violence.

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4. Bellin, *supra* note 3, at 175 (“[P]rosecutors remain just one piece of a complex puzzle.”).

5. David Garland, *The Road to Ending Mass Incarceration Goes Through the DA’s Office*, AM. PROSPECT (Apr. 8, 2019), <https://prospect.org/justice/road-ending-mass-incarceration-goes-da-s-office/> [<https://perma.cc/QT4P-YBFY>] (“Mass incarceration came into existence when the nation abandoned the War on Poverty and chose to treat social problems and wayward lives as problems for police, prosecutors, and prisons. It is hard to see how it can be ended without a transformation of America’s urban policy, its welfare state, and the political economy that underlies them.”).

6. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728 (2005); Radley Balko, Opinion, *Behind the Scenes, Prosecutor Lobbies Wield Immense Power*, WASH. POST: WATCH (Apr. 23, 2018, 1:25 PM), <https://www.washingtonpost.com/news/the-watch/wp/2018/04/23/behind-the-scenes-prosecutor-lobbies-wield-immense-power/> [<https://perma.cc/T7AP-6G2S>]; see also Josie Duffy Rice, *Prosecutors Aren’t Just Enforcing the Law—They’re Making It*, APPEAL (Apr. 20, 2018), <https://theappeal.org/prosecutors-arent-just-enforcing-the-law-theyre-making-it-d83e6e59f97a/> [<https://perma.cc/BJ66-BCMC>].

## I. THE POWER OF PROSECUTORS

Bazon's book tells the stories of two individuals facing criminal charges and shows how the fate of these individuals lies with their prosecutors. In one case, an overzealous Memphis prosecutor, Amy Weirich, fails to disclose exculpatory evidence in violation of *Brady v. Maryland* to obtain a murder conviction in a high-profile case against a teenage girl named Noura Jackson (p. 186). Weirich is representative of the win-at-all-costs, tough-on-crime prosecutor that we have seen in counties across America.

Bazon contrasts Weirich with Eric Gonzalez, the district attorney in Brooklyn, whom she portrays as a prototypical example of a new breed of progressive prosecutor. Gonzalez's office allows the other central character in the book, Kevin,<sup>7</sup> to participate in a diversion program that would allow dismissal of charges upon successful completion, instead of pursuing more serious charges against Kevin for possessing an unlicensed, loaded gun, which would have landed him in prison for at least three and a half years (pp. xxiv, 30). Gonzalez, in Bazon's telling, represents a different kind of prosecutor who recognizes that incarceration does little to benefit society, and instead increases the risk that someone will commit more crimes when they are released.

Through the stories of Noura's and Kevin's cases, Bazon vividly shows how prosecutors hold the keys to someone's liberty. They make the critical decisions about what to charge, whether to seek pretrial detention, and what sentence to pursue. Bazon demonstrates that courts largely remain on the sidelines for these determinations because of the deference they give prosecutors. Although judges could release pretrial defendants on bail even when prosecutors ask that they be detained, "[i]n practice, judges almost never defy the prosecution by setting low bail when a crime involves sex or violence" (p. 37). That is because most state judges are elected, and they do not want to be deemed responsible if someone released pretrial commits a crime that attracts media attention. And as Bazon notes, "[a] judge who lets out a defendant over the objections of a prosecutor is especially vulnerable" (p. 37). So judges normally agree to whatever bail amount a prosecutor requests (p. 39). Courts typically let prosecutors use evidence obtained by the police even when there are serious doubts that evidence was legally obtained because judges tend to believe the police's version of events (p. 29). They fail to enforce prosecutors' constitutional obligation to turn over exculpatory evidence by finding most violations harmless (p. 105).

Juries do not act as a robust check on prosecutors either. Grand juries operate as "rubber stamps," because they receive only the prosecutor's presentation of the evidence.<sup>8</sup> Coercive plea bargaining has stifled the checking role of trial juries. Prosecutors armed with the ability to threaten pretrial

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7. This is the pseudonym Bazon uses for this person.

8. P. 79; Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 8-9 (2004).

detention, mandatory minimums, and long sentences are easily able to extract guilty pleas in exchange for lesser punishments (pp. 132–35).

With this kind of power, it is easy to see why Bazelon believes “prosecutors also hold the key to change” (p. xxvii). In her view, prosecutors “can protect against convicting the innocent. They can guard against racial bias. They can curtail mass incarceration” (p. xxvii). Because if prosecutors reform their pretrial-detention requests, charging policies, and sentencing recommendations, criminal justice could look very different. This has been the spark behind the remarkably successful movement to transform district attorney elections and place reformers in posts traditionally held by tough-on-crime prosecutors.<sup>9</sup> These traditional prosecutors were often unresponsive to concerns that they were putting too many young men, and particularly young men of color, in prison, while at the same time failing to prosecute cases of police abuse and violence against citizens (pp. 77–78).

Many of the prosecutors elected on a progressive platform have reduced incarceration in their jurisdictions. For example, Larry Krasner reduced the jail population in Philadelphia by 30 percent in his first year in office.<sup>10</sup> Kim Foxx has sought to lower the population in the Cook County jail by having her prosecutors recommend I-Bonds,

which allow a person to be released on their own recognizance pending trial, in cases where there is no prior violent criminal history, the current offense is a misdemeanor or low-level felony, and there are no other risk factors suggesting a danger to the community or a failure to appear for court.<sup>11</sup>

Eric Gonzalez, the Brooklyn district attorney (DA), created two programs (CLEAR and Project Reset) that “allow non-violent or low-level drug possession charges to be resolved by offering services or completing a program instead of appearing in court.”<sup>12</sup> His office dismissed 254 cases in 2019 under CLEAR and declined to prosecute 420 cases because of Project Reset.<sup>13</sup> Gonzalez also required bail in only 7 percent of misdemeanor cases in 2019.<sup>14</sup>

Progressive prosecutors have also taken steps to correct past injustices that occurred under their predecessors. Brooklyn District Attorney Ken

9. Pp. 78–88; BARKOW, *supra* note 3, at 155–160; David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 25–29 (2017).

10. Bobby Allyn, *After Year One, Philly DA Larry Krasner Earns Praise from Reformers, Scorn from Victim Advocates*, WHYY (Feb. 5, 2019), <https://whyy.org/articles/after-his-first-year-philly-d-a-larry-krasner-earns-praise-from-reformers-scorn-from-victim-advocates/> [<https://perma.cc/ZF2X-XL2T>].

11. *State's Attorney Foxx Announces Major Bond Reform*, COOK CNTY. STATE'S ATT'Y (June 12, 2017), <https://www.cookcountystatesattorney.org/news/state-s-attorney-foxx-announces-major-bond-reform> [<https://perma.cc/BD6Y-WPD5>].

12. Anna Quinn, *BK Sees Lowest Number of Murders in Borough's History in 2019: DA, PATCH* (Jan. 3, 2020, 12:12 PM), <https://patch.com/new-york/brooklyn/brooklyn-sees-lowest-murder-rate-boroughs-history-2019-da> [<https://perma.cc/65KM-PDG3>].

13. *Id.*

14. *Id.*

Thompson established a Conviction Review Unit that has freed twenty-eight people who were wrongfully convicted.<sup>15</sup> Gonzalez, Thompson's successor, recently issued a report analyzing twenty-five of those wrongful convictions in an effort to understand the causes of wrongful convictions and prevent those same mistakes in the future.<sup>16</sup> The Philadelphia Conviction Integrity Unit (CIU) exonerated twelve people in the period between January 2018, when Krasner took over, and January 2020.<sup>17</sup> Kim Foxx has rejuvenated the Cook County CIU, making it an independent unit with publicized policies and standards.<sup>18</sup> Under Foxx's leadership, the CIU has reversed seventy convictions.<sup>19</sup>

Many of these prosecutors have also publicly supported broader reform efforts by participating in litigation involving practices outside their own jurisdictions. For example, groups of progressive prosecutors have supported constitutional challenges to cash bail in California and Texas<sup>20</sup> and the right to counsel at bail hearings in Texas.<sup>21</sup> They joined an amicus brief arguing in favor of safe injection and overdose prevention sites in Philadelphia<sup>22</sup> and

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15. Rob Abruzzese, *So Far, It Has Freed 28 People. New Report Highlights Brooklyn's Conviction Review Unit*, BROOKLYN DAILY EAGLE (July 10, 2020), <https://brooklyneagle.com/articles/2020/07/10/so-far-it-has-freed-28-people-new-report-highlights-brooklyns-conviction-review-unit/> [<https://perma.cc/4DD2-TXW4>].

16. DIST. ATT'Y, KINGS CNTY., 426 YEARS: AN EXAMINATION OF 25 WRONGFUL CONVICTIONS IN BROOKLYN, NEW YORK (2020), [http://www.brooklynda.org/wp-content/uploads/2020/07/KCDA\\_CRUReport\\_v4r3-FINAL.pdf](http://www.brooklynda.org/wp-content/uploads/2020/07/KCDA_CRUReport_v4r3-FINAL.pdf) [<https://perma.cc/B3FH-K93U>].

17. Phila. Dist. Att'y's Off., *District Attorney Krasner Statement on Exoneration of Theophalis Wilson After 28 Years of Wrongful Incarceration*, JUST. WIRE (Jan. 21, 2020), <https://medium.com/philadelphia-justice/district-attorney-krasner-statement-on-exoneration-of-theophalis-wilson-after-28-years-of-wrongful-8d416f6c0f6f> [<https://perma.cc/9VKX-6DR3>].

18. John O'Connor, *Innocence Project Founder Seeks 'Conviction Integrity Unit'*, AP NEWS (Apr. 9, 2019), <https://apnews.com/98a31816d9e74e75951b8f652e3606e9> [[https://perma.cc/\[34\]-852W](https://perma.cc/[34]-852W)].

19. *Id.*

20. *Amici Curiae* Brief of Current and Former Prosecutors and Law Enforcement Officials in Support of Respondent Kenneth Humphrey, *In re Kenneth Humphrey*, 228 Cal. Rptr. 3d 513 (Cal. Ct. App. 2018), 2018 WL 6019625, *appeal docketed*, No. S247278 (Cal. Oct. 18, 2018); Brief of *Amici Curiae* Current and Former District and State's Attorneys et al. in Support of Plaintiffs-Appellees, *O'Donnell v. Harris County*, 892 F.3d 147 (5th Cir. 2018) (No. 17-20333).

21. Brief of *Amici Curiae* Current and Former District, State, and Prosecuting Attorneys, and State Attorneys General, in Support of Plaintiff-Appellee, *Booth v. Galveston County*, 352 F. Supp. 3d 718 (S.D. Tex. 2019), *appeal docketed*, No. 19-40785 (5th Cir. Feb. 14, 2020).

22. *More than 60 Criminal Justice Leaders Advocate for Overdose Prevention Sites as Critical to Saving Lives*, FAIR & JUST PROSECUTION (July 10, 2019), <https://fairandjustprosecution.org/wp-content/uploads/2019/07/FJP-Safehouse-Amicus-Brief-Release-FINAL.pdf> [<https://perma.cc/4X4G-NL5Z>].

have supported the due process rights of people in Missouri sentenced to life without parole as children.<sup>23</sup>

Some prosecutors have also started speaking out and pushing back against the prosecution lobby that consistently seeks longer sentences and resists other reforms. For example, San Joaquin County District Attorney Tori Salazar left the California District Attorneys Association (CDAA) because of its opposition to needed reforms, including its resistance to reform of the state's notoriously harsh three-strikes law.<sup>24</sup> Krasner announced in November 2018 that he was leaving the Pennsylvania District Attorneys Association (PDAA) because of his belief that the policies advocated for by PDAA were regressive and contributed to the explosion in the state's prison population over several decades.<sup>25</sup>

Many recently elected prosecutors have publicly supported large-scale legislative changes. For example, a group of eleven progressive prosecutors in Virginia, who collectively represent more than 40 percent of the state's population, recently urged their state legislators to enact a series of reforms, including many that would curtail their own powers. In particular, they asked to eliminate all mandatory minimum sentences, which would give judges more discretion over sentencing and take it away from prosecutors with their charging decisions.<sup>26</sup>

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23. *Elected Prosecutors Call for Relief for Individuals Sentenced to Life Without Parole as Children*, FAIR & JUST PROSECUTION (Feb. 20, 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/02/MO-JLWOP-Brief-Release.pdf> [<https://perma.cc/86HJ-QWAS>].

24. Daniel Nichanian, *D.A. Associations Should Own Up to the Splintering Politics of Prosecution*, APPEAL (Feb. 14, 2020), <https://theappeal.org/politicalreport/district-attorney-associations-political-conflicts-cdaa> [<https://perma.cc/F25F-TLU6>]; Daniel Nichanian, *California Prosecutor Quits State's D.A. Association: "Let's Accept Responsibility for the Mistakes We've Made,"* APPEAL (Jan. 23, 2020), <https://theappeal.org/politicalreport/prosecutor-quits-california-district-attorney-association-tori-salazar/> [<https://perma.cc/9MB5-CXNC>].

25. Chris Palmer, *Philly DA Larry Krasner Withdraws Office from Statewide Prosecutors Group*, PHILA. INQUIRER (Nov. 16, 2018), <https://www.inquirer.com/philly/news/crime/philadelphia-da-district-attorney-larry-krasner-withdraws-pdaa-20181116.html> [<https://perma.cc/8GH2-4GP4>]; Daniel Nichanian, *Larry Krasner Quit Pennsylvania's DA Association. What Does Group Stand For?*, APPEAL (Dec. 20, 2018), <https://theappeal.org/politicalreport/spotlight-pdaa/> [<https://perma.cc/SZZ3-M99V>]. Advocacy groups understand the significance of these prosecutor associations to blocking reforms and have urged progressive district attorneys committed to decarceration to disassociate from them. For example, "advocacy groups including Citizen Action, VOCAL-NY, New York Communities for Change, and JustLeadershipUSA formally . . . call[ed] on several sitting district attorneys [in New York] who call themselves progressives to step down from DAASNY, publicly disavow the association and support reform legislation in Albany." Samar Khurshid, *State District Attorneys Association Targeted as Roadblock to Reform*, GOTHAM GAZETTE (Mar. 14, 2019), <https://www.gothamgazette.com/state/8356-state-district-attorneys-association-targeted-as-roadblock-to-reform> [<https://perma.cc/YKV7-384W>].

26. "Virginia Progressive Prosecutors for Justice" Write Letter to General Assembly re: *Criminal Justice Reform Priorities*, BLUE VA. (July 13, 2020), <https://bluevirginia.us/2020/07/virginia-progressive-prosecutors-for-justice-write-letter-to-general-assembly-re-criminal-justice-reform-priorities> [<https://perma.cc/KMJ8-C23A>].



These prosecutors are engaged in important reform, and they amply deserve the careful attention Bazelon's book gives them. But they are not a panacea for what ails criminal justice in America, as the next Part explains.

## II. THE LIMITS OF PROSECUTORS AS REFORMERS

Without taking away from the real achievements of many prosecutors, it is important to pay attention to the real limits of the progressive-prosecutor model as a linchpin of reform. Let's start with the fact that not everyone claiming to be progressive actually is. The movement to elect progressive prosecutors has grown powerful enough that some prosecutors try to claim the label to boost their credibility with certain constituencies. But if one looks behind their rhetoric, some of these prosecutors are a far cry from seeking anything close to transformational change and are instead more interested in expanding the powers of their office.

Take one of the prosecutors mentioned by Bazelon, Kim Ogg, who represents perhaps the starkest case of a prosecutor who tried to claim the mantle of reformer, but who in practice has sought to preserve the power of her office at the expense of needed systemic changes. Bazelon notes that Ogg won on a platform of bail reform.<sup>27</sup> But after her election, Ogg bristled at a proposed settlement after a federal lawsuit was brought against bail practices in her jurisdiction.<sup>28</sup> She attempted to rally police officers in Harris County who opposed the consent decree because it allowed too many accommodations for defendants who missed court dates or showed up late for them.<sup>29</sup> Ogg also requested an additional \$20 million for her department's budget so that she could hire 102 new prosecutors, thereby increasing the size of her office by approximately 40 percent.<sup>30</sup> Ogg's attempt to dramatically expand the size of her office would put the office in a position to bring many more prosecutions—which runs contrary to the progressive idea that shrinking the size of the carceral state requires shrinking the size of law enforcement's footprint. Even if Ogg wanted to use the additional resources to help her divert more cases, there is no guarantee that a successor would use an expanded office to do anything other than send more people to prisons and jails. Her efforts failed,<sup>31</sup> but the request itself shows that the label progressive can

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27. P. 84; *see also* p. 264 (referring to Ogg as “reform-minded”).

28. Gabrielle Banks, *District Attorney Kim Ogg Summons Police Chiefs to Oppose Historic Bail Settlement*, HOUS. CHRON. (Oct. 12, 2019, 8:35 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/District-Attorney-Kim-Ogg-summons-police-chiefs-14517578.php> [<https://perma.cc/AYSS-N8BJ>].

29. *Id.*

30. Andrew Schneider, *Ogg's Push to Hire More Prosecutors Stirs Backlash from Criminal Justice Reform Groups*, HOUS. PUB. MEDIA (Feb. 5, 2019, 4:32 PM), <https://www.houstonpublicmedia.org/articles/news/2019/02/05/320698/oggs-push-to-hire-more-prosecutors-stirs-backlash-from-criminal-justice-reform-groups/> [<https://perma.cc/6EYY-YB6D>].

31. Matt Harab & Paul DeBenedetto, *Organizers Protest Harris County DA Plan to Use Private Lawyers as Prosecutors*, HOUS. PUB. MEDIA (Feb. 26, 2020, 3:19 PM), <https://www.houstonpublicmedia.org/articles/news/harriscounty/2020/02/26/361933/organize>

be misleading and that even prosecutors who support certain reforms can nevertheless fuel more incarceration than they curtail. And Ogg is not the only example of someone who does not deserve the label progressive even though they try to claim it.<sup>32</sup>

But we are seeing mixed results even from prosecutors who genuinely seem to want fundamental changes. In these cases, the label progressive is deserved, but there are important questions to ask about why they are not able to do more. Consider, for example, Rachael Rollins, the district attorney in Boston, who pledged not to prosecute certain low-level crimes. CourtWatch MA reports that those cases continue to be prosecuted.<sup>33</sup> Similarly, prosecutors working for Chicago State's Attorney Kim Foxx continued to oppose defendants' motions to reduce bond or obtain release during the coronavirus outbreak.<sup>34</sup>

Even Eric Gonzalez, the reform star of *Charged*, does not have an unblemished track record. Bazelon rightfully applauds many of his accomplishments, including his embrace of alternatives to incarceration, opposition to mandatory minimums for gun possession, advocacy for closing Rikers, and support for the end of bail requests in misdemeanor cases (pp. 90–92, 98). He also made a special effort not to bring charges that would make the deportation of undocumented immigrants more likely and to urge his prosecutors to take into account immigration consequences when bring-

rs-protest-harris-county-da-plan-touse-private-lawyers-as-prosecutors/ [https://perma.cc/SPW4-8T8G].

32. Another example might be District Attorney Mark Gonzalez of Nueces County, Texas, who promised to crack down on prosecutors who withhold exculpatory evidence, but who critics say failed to discipline or remove lawyers engaged in misconduct. Carimah Townes, *Is Mark Gonzalez the Reformer He Promised to Be?*, APPEAL (Nov. 21, 2017), <https://theappeal.org/is-mark-gonzalez-the-reformer-he-promised-to-be-462f199a60c/> [https://perma.cc/GD4T-64UH]. Andrew Warren of Hillsborough County, Florida, is likewise sometimes viewed as a progressive prosecutor, Jordan Smith, *Overzealous Prosecutors Ousted Across the Country, Showing There Is Still Hope for Reform*, INTERCEPT (Nov. 10, 2016, 11:24 AM), <https://theintercept.com/2016/11/10/overzealous-prosecutors-ousted-across-the-country-showing-there-is-still-hope-for-reform/> [https://perma.cc/GY65-4HEN], but he nevertheless brought first-degree murder charges against a heroin dealer in a case involving an accidental overdose, Dan Sullivan, *Amid Reform Agenda, Hillsborough State Attorney Takes Hard Line in Heroin Overdose Case*, TAMPA BAY TIMES (Mar. 13, 2020), <https://www.tampabay.com/news/tampa/2020/03/13/amid-reform-agenda-hillsborough-state-attorney-takes-hard-line-in-heroin-overdose-case/> [https://perma.cc/2WRX-6JVV]. These DAs thus seem to be exercising their oversight authority in a way that sends mixed signals about how committed they really are to change. Because these are clearly their decisions about how to proceed in matters that have come to their attention, they should be accountable for them, and any shortcoming cannot be blamed on a failure to properly change office culture or manage subordinates.

33. Eoin Higgins, *Progressive DA Rachael Rollins Hasn't Stopped Prosecuting Petty Crimes, Despite Pledge. Police Are Still Furious.*, INTERCEPT (Mar. 24, 2019, 6:00 AM), <https://theintercept.com/2019/03/24/rachael-rollins-da-petty-crime/> [https://perma.cc/N952-LVSL].

34. John Seasly, *State's Attorney Has Contested Vast Majority of Bond Motions Since COVID-19*, INJUSTICE WATCH (May 18, 2020), <https://www.injusticewatch.org/news/2020/states-attorney-covid-bond-contested/> [https://perma.cc/D3MZ-QY8X].

ing charges (pp. 92–93). All these efforts and others<sup>35</sup> more than justify Bazelton’s decision to profile Gonzalez as a model of this new movement and for Gonzalez to be treated as a real reformer.

But for all Gonzalez’s achievements, he is not consistently on the side of decarceration. As the coronavirus spread through Rikers, he signed on to a letter with other New York City prosecutors opposing the city’s decision to release people from the jail, calling the process a “haphazard” one that would potentially release “violent offenders” whom “we know will put communities at risk.”<sup>36</sup> The letter asked the mayor to “immediately reassure the public and the courts that the city’s jail system is capable of appropriately managing the health needs of the remaining inmates” even while the person in charge of medical care at Rikers made it clear that the jail could not, in fact, make any such assurances.<sup>37</sup> Bazelton notes in *Charged* that Gonzalez’s opposition to a commission to investigate prosecutorial misconduct was also hard to “squar[e] . . . with [his] bid to be a national leader for reform” (p. 289). Observers from Court Watch NYC have further noted that, despite his stated commitment not to seek bail in most misdemeanor cases, volunteers from their organization were witnessing many such cases where bail was requested.<sup>38</sup> They further noticed that the requests had a disparate impact, with bail requested in 67 percent of the drug cases involving Black people but in only 32 percent of the drug cases involving white people.<sup>39</sup>

What accounts for the shortcomings of prosecutors like Gonzalez, Foxx, and Rollins—all of whom have taken many positive steps that show they are walking the walk and not just talking about change? For starters, we cannot expect prosecutors to achieve immediate transformation in their offices across every measure. As David Sklansky has noted, prosecutors “need priorities, and everything can’t be a priority.”<sup>40</sup> Moreover, these prosecutors need to be reelected to continue to achieve the changes they want, so they may

35. See *supra* text accompanying notes 12–13; *infra* text accompanying note 111.

36. Letter from Bridget G. Brennan, Special Narcotics Prosecutor, Darcel D. Clark, Bronx Dist. Att’y, Eric Gonzalez, Brooklyn Dist. Att’y, Melinda R. Katz, Queens Dist. Att’y, Michael E. McMahon, Richmond Cnty. Dist. Att’y & Cyrus R. Vance, Jr., Manhattan Dist. Att’y, to Bill de Blasio, Mayor of New York, and Cynthia Brann, Comm’r, New York City Dep’t of Corr., <https://www.ny1.com/content/dam/News/static/nyc/pdfs/6%20DA%20Letter.pdf> [https://perma.cc/QF7E-FJ3E].

37. *Id.*; Ross MacDonald (@RossMacDonaldMD), TWITTER (Mar. 30, 2020, 11:03 PM), <https://twitter.com/RossMacDonaldMD/status/1244822686280437765> (on file with the *Michigan Law Review*).

38. Theodore Hamm, *Observers: Brooklyn DA Still Pushes for Bail Too Often*, CITY LIMITS (Sept. 5, 2017), <https://citylimits.org/2017/09/05/observers-brooklyn-da-still-pushes-for-bail-too-often/> [https://perma.cc/5VKM-V35F].

39. COURT WATCH NYC, BROKEN PROMISES: A CWNYC RESPONSE TO DRUG POLICING AND PROSECUTION IN NEW YORK CITY 3 (2018), <https://static1.squarespace.com/static/5a21b2c1b1ffb67b3f4b2d16/t/5bda55bb21c67c69e6b50409/1541035453806/CWNYC+Drug+Zine+FOR+WEB.pdf> [https://perma.cc/R2FX-BPJE].

40. Sklansky, *supra* note 9, at 28.

have to reject reforms that voters do not support.<sup>41</sup> In addition, they cannot directly supervise and control all the decisions of the prosecutors in their office, which might explain the disconnect between the stated policies of DAs like Rollins or Foxx and what court watchers are actually seeing from the line attorneys in those offices.

This Part considers the forces that push against the agenda of a progressive prosecutor. Section A describes the resistance prosecutors face from forces outside their offices and why those pressures will limit what they can accomplish. Section B, in turn, explains the resistance that comes from inside the office. Part C notes most prosecutors' limited power to release those who are currently incarcerated, a critical limitation if the goal is dismantling mass incarceration.

### A. Resistance Outside the Office

The first hurdle for any progressive prosecutor is getting elected. For the most part, the movement to elect reformers is confined to large urban areas with a sufficiently liberal voting constituency.<sup>42</sup> Even in those communities, people running on decarceral, progressive agendas have lost. *Charged* notes such candidates' losses in the 2018 primaries in Las Vegas, Sacramento, and San Diego (p. 290). More progressive candidates have also lost races in Alameda County, California (which includes Oakland); Queens, New York; Harris County, Texas (which includes Houston); Allegheny County, Pennsylvania (which includes Pittsburgh); and Hennepin County, Minnesota (which includes Minneapolis).<sup>43</sup>

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41. Note, *The Paradox of "Progressive Prosecution,"* 132 HARV. L. REV. 748, 766–67 (2018).

42. Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors' Perspective*, 88 FORDHAM L. REV. 2287, 2308 (2020).

43. Pamela Price lost her race in Oakland, Tiffany Cabán lost in Queens, Mark Haase lost in Hennepin, Turahn Jenkins lost in Allegheny County, and Audia Jones lost in Harris County. *Voters Choose Nancy O'Malley over Pamela Price for Alameda County District Attorney*, KTVU FOX 2 (June 6, 2018), <https://www.ktvu.com/news/voters-choose-nancy-omalley-over-pamela-price-for-alameda-county-district-attorney> [<https://perma.cc/SH9Z-B6Q5>]; Jan Ransom & Jeffery C. Mays, *Tiffany Cabán Was the Next Progressive Hope. Now What?*, N.Y. TIMES (Aug. 13, 2019), <https://www.nytimes.com/2019/08/13/nyregion/tiffany-caban-future-queens-da.html> [<https://perma.cc/6BSA-NTAN>]; *Election Results: Freeman Re-elected as Hennepin County Attorney, Hutchinson Selected for County Sheriff*, KSTP (Nov. 07, 2018, 9:27 PM), <https://kstp.com/politics/election-results-voters-go-to-the-polls-in-hennepin-county/5135783/> [<https://perma.cc/4EM9-HHWN>]; *Allegheny County District Attorney Stephen Zappala Defeats Challenger Turahn Jenkins in Primary*, PITTSBURGH'S ACTION NEWS 4 (May 22, 2019, 7:35 AM), <https://www.wtae.com/article/allegheny-county-district-attorney-stephen-zappala-defeats-turah-n-jenkins-democratic-primary/27547120> [<https://perma.cc/TN2F-E95Z>]; Andrew Schneider, *DA Kim Ogg Fends Off Three Challengers in Democratic Primary*, HOUS. PUB. MEDIA (Mar. 4, 2020, 8:18 AM), <https://www.houstonpublicmedia.org/articles/news/politics/2020/03/04/361664/super-tuesday-harris-county-district-attorneys-race/> [<https://perma.cc/6UXF-4ELF>].

Running on a progressive agenda is a nonstarter in most suburban and rural counties.<sup>44</sup> In fact, as prison admissions from jurisdictions with progressive prosecutors have dropped, surrounding areas have seen prison admissions from their jurisdictions go up. That has been the case, for example, in Pennsylvania, where Philadelphia District Attorney Larry Krasner spearheaded a host of decarceral initiatives that have lowered the state's prison population.<sup>45</sup> But suburban and rural counties have increased their incarceration rates, so "you're now statistically more likely [to] be sentenced to state prison from a small town than a big city in Pennsylvania."<sup>46</sup> We see a similar dynamic with jail populations. Jail populations nationwide increased 4.3 percent in the period between 2015 and June of 2019, mainly because of larger jail populations in rural counties and small and midsized metropolitan areas.<sup>47</sup> While many decry mass incarceration, a sizeable portion of the country still seems to believe that sentences are too lenient.<sup>48</sup> This means the progressive prosecutor is not going to be a viable solution in many, if not most, places.

Even in jurisdictions where progressive candidates can win, they have to be careful not to go too far in the direction of reform for fear of losing too many voters. These prosecutors face many groups all too eager to portray them as a threat to public safety. Bazelon notes the opposition Larry Krasner faced from the Philadelphia police from the moment he ran for the position.<sup>49</sup> Krasner is hardly alone, as police opposition to progressive prosecutors has been widespread. When prosecutors have announced they will not bring charges in certain categories of cases, police departments in their jurisdictions have insisted on continuing with arrests for those charges. For example, Baltimore prosecutor Marilyn Mosby announced she would no longer charge marijuana possession cases,<sup>50</sup> but the Baltimore police department continued arresting people found with pot.<sup>51</sup> After Suffolk County

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

45. Allyn, *supra* note 10.

46. Samantha Melamed, *Why Is Mass Incarceration Moving to the Suburbs?*, PHILA. INQUIRER (June 26, 2018), <https://www.inquirer.com/philly/news/crime/pennsylvania-mass-incarceration-montgomery-bucks-lancaster-delaware-county-larry-krasner-prison-department-of-corrections-20180626.html> [<https://perma.cc/DF3F-R9FB>].

47. JACOB KANG-BROWN, OLIVER HINDS, EITAL SCHATTNER-ELMALEH & JAMES WALLACE-LEE, VERA INST. OF JUST., PEOPLE IN JAIL IN 2019 (2019), <https://www.vera.org/downloads/publications/people-in-jail-in-2019.pdf> [<https://perma.cc/97W2-SQBN>].

48. John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 765 (2020).

49. See p. 161.

50. Tim Prudente, *Judges Deny Request by Baltimore State's Attorney Mosby to Dismiss Thousands of Marijuana Convictions*, BALT. SUN (Apr. 29, 2019, 6:25 PM), <https://www.baltimoresun.com/news/crime/bs-md-ci-marijuana-convictions-denial-20190429-story.html> (on file with the *Michigan Law Review*).

51. Ethan McLeod, *Baltimore Plays Catch-and-Release for Weed Arrests*, BLOOMBERG CITYLAB (Mar. 22, 2019, 10:46 AM), <https://www.citylab.com/equity/2019/03/marijuana-laws-baltimore-police-weed-arrests-decriminalize/585406/> [<https://perma.cc/B88Z-27U5>].

District Attorney Rachael Rollins adopted a policy not to charge certain nonviolent offenses, she noticed police increasingly bringing those charges alongside claims of assault of a police officer, raising the question of whether the police were trying to make it more difficult for her to dismiss those charges.<sup>52</sup>

Police unions have actively opposed many candidates for prosecutor, as they did, for example, with Larry Krasner<sup>53</sup> and Chesa Boudin.<sup>54</sup> Unions have also criticized progressive prosecutors after their election. For example, the Chicago police union issued a vote of no confidence against District Attorney Kim Foxx.<sup>55</sup> When Dallas County District Attorney John Creuzot adopted a policy not to prosecute cases involving theft of items worth less than \$750 when stolen as a matter of necessity (such as out of hunger), the Combined Law Enforcement Associations of Texas, the largest police union in the state, called for him to resign.<sup>56</sup> The police union in St. Louis has called for Kim Gardner to step down or to be removed “through any means available.”<sup>57</sup> Police resistance to Gardner has been so extreme that Gardner filed a federal civil rights lawsuit against the union and the city arguing that they are part of a “racially motivated conspiracy to deny the civil rights of racial minorities” by interfering with her efforts to crack down on police misconduct and to institute changes in the city’s criminal justice system.<sup>58</sup> Several other Black female district attorneys from across the country traveled

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52. Marie Szaniszlo & Sean Philip Cotter, *Rachael Rollins’ Office: Boston Cops Turning to Higher Charges*, BOS. HERALD (Apr. 3, 2019, 8:50 PM), <https://www.bostonherald.com/2019/04/03/rachael-rollins-office-boston-cops-turning-to-higher-charges/> (on file with the *Michigan Law Review*).

53. Julia Terruso & Stephanie Farr, *Krasner, Police Union Spar on Day After Primary Election*, PHILA. INQUIRER (May 17, 2017), <https://www.inquirer.com/philly/news/politics/city/Krasner-police-union-spar-day-after-election.html> [<https://perma.cc/H7HK-W98L>].

54. Evan Sernoffsky, *Police, DA Chesa Boudin Battle over Withdrawal of Charges Against Attack Suspect*, S.F. CHRON. (Jan. 28, 2020, 1:59 PM), <https://www.sfchronicle.com/crime/article/SF-police-union-calls-on-feds-to-prosecute-man-15008195.php> [<https://perma.cc/YN7C-RDBR>].

55. Elyssa Cherney, *Chicago Police Union President Renews Criticism of Kim Foxx, Says She ‘Needs to Step Down’ if She Can’t Do Her Job*, CHI. TRIB. (Apr. 30, 2019, 6:40 PM), <https://www.chicagotribune.com/news/breaking/ct-met-chicago-union-president-fop-comments-kim-foxx-20190430-story.html> (on file with the *Michigan Law Review*).

56. Catherine Marfin, *Texas Prosecutors Want to Keep Low-Level Criminals Out of Overcrowded Jails. Top Republicans and Police Aren’t Happy.*, TEX. TRIB. (May 21, 2019, 12:00 AM), <https://www.texastribune.org/2019/05/21/dallas-district-attorney-john-cruezot-not-prosecuting-minor-crimes/> [<https://perma.cc/4VTN-AG93>].

57. Bill Hutchinson, Aaron Katersky & Steve Osunsami, *‘Enough Is Enough’: St. Louis Circuit Attorney Defends Lawsuit Accusing ‘Racist Conspiracy’*, ABC NEWS (Jan. 14, 2020, 6:40 PM), <https://abcnews.go.com/US/black-prosecutors-back-st-louis-state-attorneys-lawsuit/story?id=68268836> [<https://perma.cc/QDW6-JH6V>].

58. Richard A. Oppel Jr., *Prosecutor Sues Her Own City Under a Law Passed to Fight the K.K.K.*, N.Y. TIMES (Jan. 13, 2020), <https://www.nytimes.com/2020/01/13/us/st-louis-circuit-attorney-kim-gardner.html> [<https://perma.cc/H6VE-TZKQ>].

to St. Louis to support Gardner when she filed the lawsuit.<sup>59</sup> Mosby was one of them, and she observed that “[t]he keepers of the status quo that brought us mass incarceration, the over-criminalization of poor black and brown people, tough sentences, no redemption and no second chances won’t give up their power quietly.”<sup>60</sup> Mosby is correct to note the vocal opposition of the police. In all these cases, the police strategies are designed to garner media attention to their point of view and to sway voters and other elected officials to reject the policies of the prosecutors’ office.<sup>61</sup>

Other elected officials have engaged in similar tactics against progressive prosecutors, and in some cases have had the authority to directly block their progressive agendas. Bazelon recounts the pushback Aramis Ayala received when she announced she would never seek the death penalty, including in a case where a defendant was charged with killing his ex-girlfriend and the police officer who tried to arrest him.<sup>62</sup> Then-Governor Rick Scott responded by issuing an order transferring that case along with roughly two dozen others to a prosecutor in another district, and the state legislature slashed Ayala’s budget (p. 151). When Ayala sued to get the case back, she lost in the Florida Supreme Court because, in the court’s view, her “blanket” objection to the death penalty meant that she had not properly exercised prosecutorial discretion.<sup>63</sup>

Other state-level actors have taken similar actions to limit the authority of progressive prosecutors. The Pennsylvania legislature passed a bill giving the state attorney general the authority to prosecute certain firearms offenses if Krasner’s office declines to prosecute them.<sup>64</sup> This legislation directly targets Krasner, as it only applies to Philadelphia and expires shortly after his first term in office.<sup>65</sup> A similar dynamic is playing out in Missouri, where a Republican state legislature is pushing legislation to give the Missouri attorney general the authority to prosecute gang-related crimes if prosecutors in St. Louis and Kansas City decide not to pursue charges.<sup>66</sup> St. Louis prosecu-

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59. *Id.*

60. *Id.*

61. *See infra* note 91.

62. Pp. 150–51. Steve Bousquet, *Orlando Prosecutor Defends Stance Against Death Penalty*, MIA. HERALD (June 28, 2017, 12:24 PM), <https://www.miamiherald.com/news/politics-government/state-politics/article158614209.html> (on file with the *Michigan Law Review*).

63. *Ayala v. Scott*, 224 So. 3d 755, 759 (Fla. 2017).

64. Andrew Cohen, *State Lawmakers Target a Reformist District Attorney*, BRENNAN CTR. FOR JUST. (July 11, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/state-lawmakers-target-reformist-district-attorney> [https://perma.cc/8DLG-BAAJ].

65. Akela Lacy & Ryan Grim, *Pennsylvania Lawmakers Move to Strip Reformist Prosecutor Larry Krasner of Authority*, INTERCEPT (July 8, 2019, 5:55 PM), <https://theintercept.com/2019/07/08/da-larry-krasner-pennsylvania-attorney-general/> [https://perma.cc/D342-PT5B].

66. Tynan Stewart, *Missouri Proposal Would Give Attorney General Power to Prosecute Some Criminal Gang Cases*, ST. LOUIS POST-DISPATCH (Jan. 14, 2020), <https://www.stltoday.com/news/local/govt-and-politics/missouri-proposal-would-give-attorney-general->

tor Kim Gardner has called this out as “an unbridled attempt to usurp the authority of the elected prosecutors in Kansas City, St. Louis County, and St. Louis City in a legislative overreach.”<sup>67</sup> The chief of staff to Wesley Bell, the prosecuting attorney for St. Louis County, called this out as an “example of racism.”<sup>68</sup> Both Bell and Gardner are Black, and the legislation is predicted to disproportionately affect Black people.<sup>69</sup> These efforts are an extraordinary rebuke to local prosecution authority, as states have traditionally left these decisions to local communities. But just as federal intervention in state authority has largely been driven by a desire for harsher punishments, these state decisions to override local prosecutors seem motivated by concerns that local prosecutors are being too lenient.<sup>70</sup>

State-level actors aren’t the only ones seeking to override decisions by local prosecutors; federal prosecutors have also aggressively stepped in when they think these local prosecutors are being too lenient. The U.S. attorney in the Eastern District of Pennsylvania, William McSwain, brought federal charges in a robbery case based on his view that Krasner’s office was too lenient in its treatment of the case.<sup>71</sup> In taking on the case, McSwain accused Krasner of giving “sweetheart deals to violent defendants” and criticized his policies as emboldening criminals.<sup>72</sup> McSwain has claimed his office has “prosecuted 70% more violent crime cases this year than we did last year, in response to the District Attorney’s lawlessness.”<sup>73</sup> Former Attorney General William Barr has criticized progressive prosecutors, claiming they are “demoralizing to law enforcement and dangerous to public safety” because they “spend their time undercutting the police, letting criminals off the hook, and refusing to enforce the law.”<sup>74</sup> Barr appointed individuals to a presidential

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power-to-prosecute-some-criminal-gang-cases/article\_d40a88d4-e099-589a-aebf-41a1233fad25.html [https://perma.cc/7CXH-VLG6].

67. *Id.*

68. *Id.*

69. See Crystal Thomas, ‘A Step in the Wrong Direction.’ *Parson Urged to Veto Crime Bill that Harshens Sentences*, KAN. CITY STAR (June 10, 2020, 11:12 AM), <https://www.kansascity.com/news/politics-government/article243414601.html> (on file with the *Michigan Law Review*).

70. Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 574–75 (2011).

71. Julie Shaw, *Federal Prosecutors Charge AK-47 Shooter Who Got Plea Deal from DA Krasner’s Office*, PHILA. INQUIRER (Feb. 28, 2019), <https://www.inquirer.com/news/philadelphia-district-attorney-larry-krasner-us-attorney-william-mcswain-feds-charge-ak-gunman-20190228.html> [https://perma.cc/U6XA-ZPPW].

72. *Id.*

73. *Statement by United States Attorney William M. McSwain on the Shooting of Six Philadelphia Police Officers*, U.S. ATT’Y’S OFF. E. DIST. PA. (Aug. 15, 2019), <https://www.justice.gov/usao-edpa/pr/statement-united-states-attorney-william-m-mcswain-shooting-six-philadelphia-police> [https://perma.cc/X7DP-ZMKF].

74. *Attorney General William P. Barr Delivers Remarks at the Grand Lodge Fraternal Order of Police’s 64th National Biennial Conference*, U.S. DEP’T JUST. (Aug. 12, 2019),



commission on law enforcement who are likely to criticize progressive prosecutors and “stoke community fear in an attempt to resurrect failed ‘tough on crime’ approaches of past decades that fueled mass incarceration and disproportionately impacted communities of color.”<sup>75</sup> Donald Trump joined this chorus, calling out Krasner in particular and urging voters to get him out of office.<sup>76</sup>

It’s not just other elected officials who have pushed back. While courts have traditionally been deferential to prosecutors’ decisions not to charge or to dismiss cases, that deference appears to be weakening with the rise of the progressive prosecutor. In Boston, a trial court judge rejected a notice of *nolle prosequi* filed by DA Rachael Rollins’ office, which sought to drop charges against a protestor.<sup>77</sup> While the trial court was ultimately overruled by the Supreme Judicial Court of Massachusetts, which reiterated the traditional view that a decision to enter *nolle prosequi* was well within the state’s constitutional grant of prosecutorial discretion, the trial court’s willingness to second-guess the decision is not an isolated occurrence.<sup>78</sup> The Norfolk County head prosecutor, Greg Underwood, adopted a policy of not charging simple possession of marijuana cases and faced similar judicial pushback when his office moved to dismiss cases in which charges had already been brought.<sup>79</sup> Trial court judges objected on the grounds that Underwood’s categorical policy not to charge improperly undermined the legislative judgment to criminalize simple possession.<sup>80</sup> When Underwood sought a writ of mandamus, the Virginia Supreme Court sided with the trial judges and concluded they had discretion to deny the request to dismiss the cases.<sup>81</sup> After the Vir-

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<https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-grand-lodge-fraternal-order-polices-64th> [<https://perma.cc/M3G8-AHGX>].

75. Allan Smith, *These Prosecutors Want Radical Criminal Justice Change. Barr Is Fighting to Stop Them.*, NBC NEWS (Feb. 17, 2020, 5:00 AM), <https://www.nbcnews.com/politics/justice-department/these-prosecutors-want-radical-criminal-justice-change-barr-fighting-stop-n1126986> [<https://perma.cc/M98F-KUWJ>] (quoting Miriam Krinsky, Executive Director of Fair and Just Prosecution).

76. Virginia Streva, *Trump Calls Philly’s Krasner ‘the Worst District Attorney’ During Rally in Hershey*, PHILLYVOICE (Dec. 11, 2019), <https://www.phillyvoice.com/donald-trump-philadelphia-district-larry-krasner-worst-rally-hershey/> [<https://perma.cc/9H84-2C29>].

77. Quincy Walters & Lisa Creamer, *The Arraignments of the Protesters of the ‘Straight Pride’ Parade, by the Numbers*, WBUR NEWS (Sept. 6, 2019), <https://www.wbur.org/news/2019/09/05/the-arraignments-of-the-protesters-of-the-straight-pride-parade-by-the-numbers> [<https://perma.cc/7QF5-3MQE>].

78. Roberto Scalese, *Mass. High Court Sides with Suffolk DA Rollins in Battle with Judge over Protester Charge*, WBUR NEWS (Sept. 9, 2019), <https://www.wbur.org/news/2019/09/09/states-highest-court-sides-with-suffolk-da-rollins-in-straight-pride-battle-with-judge> [<https://perma.cc/9P8J-6YNP>].

79. L. Steven Emmert, *SCV Announces Important Mandamus Ruling*, VA. APP. NEWS & ANALYSIS (May 2, 2019), <https://virginia-appeals.com/scv-announces-important-mandamus-ruling/> [<https://perma.cc/2SYC-JDUJ>].

80. *Id.*

81. *In re Underwood*, No. 190497, 2019 WL 9078712 (Va. May 2, 2019).

ginia Supreme Court's decision, city judges in Portsmouth, Virginia, backed out of an agreement they had with the local prosecutor there to dismiss misdemeanor marijuana charges and instead said they were going to review each dismissal request on a case-by-case basis.<sup>82</sup> The resistance of these judges to dismissals stands in sharp contrast to what was previously settled precedent to defer to prosecutorial decisions not to pursue charges.

To be sure, there may be a distinction between a prosecutor not bringing charges in an individual case versus announcing a rule not to enforce an entire category of cases,<sup>83</sup> but the underlying principle of deference is similar in both contexts, particularly in a world of limited resources where prosecutors need to choose which cases to prioritize. The fact that some of these progressive prosecutors are choosing to make clear announcements about their priorities may simply be a different communications strategy, because offices have long had informal cutoffs for dismissing cases. Moreover, some of these prosecutors ran on platforms not to bring certain kinds of cases, and voters agreed. So, in some sense, the democratic accountability is even stronger with this current crop of prosecutors. The judicial resistance thus appears to be a rebuke of just that kind of platform.

Judges have pushed back in other ways as well. Although traditionally deferential to prosecutors' requests to seek detention or high bail, some have been less willing to go along with prosecutors who want to release more people pretrial. In Chicago, for instance, some judges have imposed higher bail amounts than those requested by prosecutors in Kim Foxx's office.<sup>84</sup> In cases where prosecutors have requested that individuals be resentenced to lesser terms or receive new trials, judges have also pushed back. When Kim Gardner sought a new trial for a man she believed was wrongfully convicted of

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82. Scott Daugherty, *Portsmouth Judges Have Been Dismissing Most Marijuana Cases. Now They Say That Could Change.*, VIRGINIAN-PILOT (May 21, 2019, 1:46 PM), [https://www.pilotonline.com/news/crime/article\\_0b9c6bcc-7bd2-11e9-b335-9f1e79fc2b86.html](https://www.pilotonline.com/news/crime/article_0b9c6bcc-7bd2-11e9-b335-9f1e79fc2b86.html) (on file with the *Michigan Law Review*).

83. Ned Oliver, *Virginia Explained: Can a Local Prosecutor Decide to Just Stop Prosecuting Marijuana Cases? The Va. Supreme Court Will Decide*, VA. MERCURY (Apr. 22, 2019), <https://www.virginiamercury.com/2019/04/22/can-a-local-prosecutor-decide-to-just-stop-prosecuting-marijuana-cases-the-va-supreme-court-will-decide/> [<https://perma.cc/57J5-GPQJ>] (quoting Corinna Lain's assertion that, unlike prosecutorial nonenforcement of individual cases, nonenforcement of entire categories of crimes raises questions about whether prosecutors are "cross[ing] the line into the legislative arena"); see Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1244–45 (2011) (distinguishing prosecutorial nonenforcement in individual cases on the basis of insufficient resources, a victim's wishes, or strategy from prosecutorial nonenforcement of categories of crimes on the basis of political opposition to the law). See generally Corinna Barrett Lain, *Passive-Aggressive Executive Power*, 73 MD. L. REV. 227 (2013) (evaluating the legitimacy of executives' explanations for categorical nonenforcement).

84. See RECLAIM CHI., PEOPLE'S LOBBY, CHI. COUNCIL OF LAWS. & CHI. APPLESEED FUND FOR JUST., *CREATING A CULTURE OF FAIRNESS AND ACCOUNTABILITY: DEFENSE ATTORNEYS REPORT ON KIM FOXX'S PROGRESS TOWARDS TRANSFORMING THE PRIORITIES OF HER OFFICE 7* (2019), [https://www.thepeopleslobbyusa.org/wp-content/uploads/2019/10/2019-10-Report-Kim-Foxx\\_ForPrint\\_FINAL.pdf](https://www.thepeopleslobbyusa.org/wp-content/uploads/2019/10/2019-10-Report-Kim-Foxx_ForPrint_FINAL.pdf) [<https://perma.cc/E2RH-BQ7N>].

murder, the judge concluded Gardner lacked the authority to file such a motion.<sup>85</sup> When Krasner sought lower sentences for juveniles originally sentenced to life without parole, the judges rejected his argument that they should be released for time served and instead imposed longer sentences than Krasner sought. (p. 164). As Bazelon notes, it was “a reminder that there were limits to his power” (p. 164). The Pennsylvania Supreme Court also pushed back when Krasner appealed a lower court judge’s decision not to throw out a death sentence at Krasner’s request.<sup>86</sup> While the court said prosecutors have wide discretion in deciding which charges to bring at the outset of a case, it held things were different after a verdict and sentence. Prosecutors cannot, according to the court, “seek to implement a different result based upon the differing views of the current office holder” because that would mean that “[e]very conviction and sentence would remain constantly in flux.”<sup>87</sup> Another judge similarly rejected Krasner’s decision in another capital case not to fight the defendant’s arguments on appeal, stating that the office had challenged the defendant’s appeals for thirty years and had not done enough to explain its recent shift.<sup>88</sup>

Many of the officials who oppose progressive prosecutors have also taken their criticisms to the press, who are often all too willing to criticize prosecutors as soft on crime. Several prominent newspapers have come out strongly against reform candidates. The *Philadelphia Inquirer*, for example, backed Krasner’s Republican opponent even though it had historically supported the Democratic candidate (p. 96). Once Krasner was elected, the paper continued to bash him, reportedly at the urging of employees of the Pennsylvania attorney general.<sup>89</sup> The coverage was so slanted that it prompted twenty-four Philadelphia-area academics to write a letter to the *Inquirer* editor and staff criticizing the paper’s coverage, saying its recent reporting on shootings in the city stoked “unfounded fear over criminal justice re-

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85. Rachel Lippmann, *Judge Thwarts Gardner’s Attempt to Get a New Trial for Man Convicted of Murder*, ST. LOUIS PUB. RADIO (Aug. 23, 2019, 5:39 PM), <https://news.stpublicradio.org/government-politics-issues/2019-08-23/judge-thwarts-gardners-attempt-to-get-a-new-trial-for-man-convicted-of-murder> [https://perma.cc/3RDK-UHAS].

86. See *Commonwealth v. Brown*, 196 A.3d 130 (Pa. 2018).

87. *Id.*; Chris Palmer, *Larry Krasner’s First Year as Philly DA: Staff Turnover, Fewer Cases, Plenty of Controversy*, PHILA. INQUIRER (Jan. 6, 2019), <https://www.inquirer.com/news/larry-krasner-philadelphia-district-attorney-staff-reform-cases-first-year-20190106.html> [https://perma.cc/Y2M4-SGJ9].

88. Julie Shaw, *Judge Denies Krasner Office’s Request to Vacate Death Penalty in 1984 Double Murder*, PHILA. INQUIRER (Mar. 4, 2019), <https://www.inquirer.com/news/district-attorney-larry-krasner-death-penalty-judge-mitchell-goldberg-robert-wharton-bradley-hart-sam-hart-20190304.html> [https://perma.cc/JGY9-LV6W].

89. Akela Lacy, *Pennsylvania Attorney General’s Staff Pushed Philadelphia Inquirer to Be More Critical of Larry Krasner: Emails*, INTERCEPT (Oct. 8, 2019, 10:58 AM), <https://theintercept.com/2019/10/08/josh-shapiro-philadelphia-inquirer-larry-krasner-josh-shapiro/> [https://perma.cc/8TEJ-JDD7].

form.”<sup>90</sup> Progressive prosecutors across the country have received similar treatment from local media.<sup>91</sup>

Prosecutors have traditionally operated without much pushback because they were part of a broader law-and-order consensus to be punitive.<sup>92</sup> As a result, they may have appeared more powerful than they are.<sup>93</sup> Now that some prosecutors are seeking a different path, other actors are using their own levers of control and demonstrating how prosecutors are part of a much larger framework that frequently does not share the same decarceral priorities.

90. *Id.*

91. The Chicago Tribune has focused relentlessly on Kim Foxx’s handling of the Jussie Smollett prosecution. *See, e.g.,* John Kass, *Kim Foxx Plays the Race Card to Save Herself from Her Jussie Smollett Fiasco*, CHI. TRIB. (Apr. 10, 2019, 5:00 AM), <https://www.chicagotribune.com/columns/john-kass/ct-met-kim-foxx-jussie-smollett-race-card-kass-20190409-story.html> (on file with the *Michigan Law Review*) (asserting that Foxx played “the race card” to maintain her “fake integrity”); John Kass, *Column: Why Is Kim Foxx Sticking Taxpayers with a Bill for Her Jussie Smollett Mess?*, CHI. TRIB. (Jan. 17, 2020), <https://www.chicagotribune.com/columns/john-kass/ct-jussie-smollett-kim-foxx-kass-20200118-23bsbc3ipvhfbmvzxcfnbnzom-story.html> (on file with the *Michigan Law Review*) (claiming that Foxx planned to stick “taxpayers with her office’s legal bills” in order to “dig herself out of a hole of her own making in the Jussie Smollett fiasco”); Kristen McQueary, *Ignore Bobby Rush. Kim Foxx’s Wounds Are Self-Inflicted*, CHI. TRIB. (Apr. 8, 2019, 7:10 PM), <https://www.chicagotribune.com/columns/kristen-mcqueary/ct-perspec-mcqueary-bobby-rush-kim-foxx-smollett-20190408-story.html> (on file with the *Michigan Law Review*) (stating that the Jussie Smollett prosecution displays Kim Foxx’s incompetence). The Boston Globe has reported that Rachael Rollins’s progressive reforms could pose a risk to public safety. *See* James Doyle, Letter, *Weighing the Scales of Rollins’s Justice Policy*, BOS. GLOBE (July 10, 2019, 12:00 AM), <https://www.bostonglobe.com/opinion/letters/2019/07/09/weighing-scales-rollins-justice-policy/iQ11dpwIw65IkeW1ehMcuK/story.html> (on file with the *Michigan Law Review*) (arguing that the Boston Globe’s persistent criticism of Rollins is an “example of the role of media coverage as a driver of the mass incarceration that the Globe’s editorial pages so frequently mourn”); *e.g.,* Andrea Estes & Shelley Murphy, *Stopping Injustice or Putting the Public at Risk? Suffolk DA Rachael Rollins’s Tactics Spur Pushback*, BOS. GLOBE (July 6, 2019, 5:57 PM), <https://www.bostonglobe.com/metro/2019/07/06/stopping-injustice-putting-public-risk-suffolk-rachael-rollins-tactics-spur-pushback/IFC6Rp4tVHiVhOf2t97bFI/story.html> (on file with the *Michigan Law Review*) (“Some police, court clerks, and fellow prosecutors say they fear her policy is putting the public at risk and emboldening criminals to believe they can commit crimes with impunity.”). The Orlando Sentinel has covered similar fears about Aramis Ayala’s policies on the death penalty and bail reform. *See, e.g.,* Steve Zellers, Letter to the Editor, *Ayala Should Go*, ORLANDO SENTINEL, Mar. 17, 2017, at A16 (criticizing Ayala for refusing to seek the death penalty in a case where the defendant murdered his pregnant girlfriend and a police officer); Don Mescia, Opinion, *Ayala’s Cash-Bail Policy Burdens Taxpayers, Hurts Justice*, ORLANDO SENTINEL (May 22, 2018), <https://www.orlandosentinel.com/opinion/os-ed-bail-association-responds-to-ayala-editorial-20180522-story.html> (on file with the *Michigan Law Review*) (claiming that bail reform is dangerous to communities, citing the “devastating results” observed by New Mexico’s governor).

92. Bellin, *supra* note 3, at 200 (noting that “[l]egislators, judges, police, governors, voters, etc., are not ‘shocked, shocked’ at the outputs of the American criminal justice system” but rather want severity).

93. *Id.* at 203–04.

### B. Resistance Within the Office

Opposition to elected prosecutors often hits even closer to home. They must convince their line prosecutors to buy into their policy changes and faithfully implement them. But these assistant prosecutors are often resistant, either because they disagree with the new policies or because changing long-standing practices would require more effort than they are willing to expend.<sup>94</sup> Attorneys in Kim Foxx's office have made only half-hearted efforts to support her new bail policy.<sup>95</sup> Some prosecutors align themselves more with local police than their new boss. This was made explicit when District Attorney Wesley Bell took office in St. Louis and the prosecutors who worked there voted to unionize under the St. Louis Police Officers Association.<sup>96</sup> Court observers have noted numerous instances of line attorneys flouting the office policies proclaimed by their progressive bosses.<sup>97</sup> Bazelon personally observed this, attending a proceeding in Brooklyn where a prosecutor sought a fine for a homeless person who could not pay it (p. 273). Surveys of prosecutors working in offices with progressive DAs report widespread resistance to their proposed changes.<sup>98</sup>

Some district attorneys are able to combat this by removing attorneys opposed to their agenda. Larry Krasner, for example, fired many attorneys when he took over as Philadelphia DA, and Bazelon notes that a memo he sent to supervising attorneys in his office "could have been called 'Your Job Just Changed: If You Don't Like it, There's the Door.'"<sup>99</sup> Krasner also provided presumptions for the lawyers in his office to follow: no charges for marijuana possession, no charges for sex workers with fewer than three

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94. Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 557–63 (2020) (describing reasons for bureaucratic resistance).

95. *Id.* at 587; Steve Bogira, *The Hustle of Kim Foxx*, MARSHALL PROJECT (Oct. 29, 2018 6:00 AM), <https://www.themarshallproject.org/2018/10/29/the-hustle-of-kim-foxx> [<https://perma.cc/3UJL-75YZ>].

96. Akela Lacy, *Before Criminal Justice Reformer Is Even Sworn In, St. Louis Prosecutors Have Joined a Police Union*, INTERCEPT (Dec. 20, 2018, 3:42 PM), <https://theintercept.com/2018/12/20/wesley-bell-st-louis-prosecutor-police-union/> [<https://perma.cc/75WH-Q97E>].

97. See *supra* notes 33–34 and accompanying text; see also Ouziel, *supra* note 94, at 532–33 & n.30 (noting shortcomings in efforts by progressive prosecutors to implement changes in pretrial detention and bail-request practices).

98. Ouziel, *supra* note 94, at 563 n.149 (citing studies); BESIKI LUKA KUTATELADZE, RYAN MELDRUM, REBECCA RICHARDSON, DON STEMEN & ELIZABETH WEBSTER, PROSECUTORIAL ATTITUDES, PERSPECTIVES, AND PRIORITIES: INSIGHTS FROM THE INSIDE (2018), <https://caj.fiu.edu/news/2018/prosecutorial-attitudes-perspectives-and-priorities-insights-from-the-inside/report-1.pdf> [<https://perma.cc/YKK8-Q3U9>].

99. P. 165. Many of the lawyers Krasner fired have landed in the office of the Pennsylvania attorney general, so they are now poised to bring the gun charges that Krasner rejects from their new positions. See *infra* text accompanying notes 71–72; Richard A. Oppel Jr., *These Prosecutors Promised Change. Their Power Is Being Stripped Away.*, N.Y. TIMES (Nov. 25, 2019), <https://www.nytimes.com/2019/11/25/us/prosecutors-criminal-justice.html> [<https://perma.cc/MP6M-UB4L>].

convictions, offer more options for diversion in a range of cases (pp. 164–65). If the lawyers wanted to do otherwise, they had to seek supervisor approval (pp. 165–66). Krasner’s ability to install supervisors faithful to his agenda has enabled him to shift the culture in his office more quickly.

But many district attorneys cannot replace hostile line prosecutors because of civil-service protections (p. 157). Moreover, unless a district attorney is willing to start completely from scratch—which makes it all but impossible to keep the office running—many career prosecutors will remain. Offices have established cultures and procedures, and “[c]hanging that mindset often meant confronting opposition from within the ranks and dismantling the basic building blocks of an office, including training, supervision, and rewards” (p. 149). Without a district attorney’s clear guidance on permissible behavior, it is easy for line attorneys to act as if the leadership never changed. And in many of these offices, that appears to be happening.

It is hard enough to get prosecutors to adapt to changes going forward as new cases come in; it is even harder to get them to reconsider positions they have already taken. In her discussion of Weirich’s overly aggressive approach to Noura’s case, Bazelon notes that part of the dynamic can be explained in terms of tunnel vision (p. 16). Prosecutors, like all human beings, have cognitive biases that affect their judgment. As Bazelon notes, one of those is confirmation bias, “the tendency to seek out and interpret evidence that supports a preexisting belief or expectation” (p. 16). Hindsight bias is also an issue, as prosecutors tend to view their prior judgments as correct and resist changing their beliefs (p. 16). Bazelon notes that these biases help explain prosecutors’ resistance to rethinking convictions they pursued even when new evidence demonstrates that someone is innocent. She quotes Professor Keith Findley, who observed this phenomenon: “Prosecutors say to themselves, ‘I’m a good person. I wouldn’t prosecute someone innocent. Therefore, this person must be guilty.’ You sweep away the reasons for doubt” (pp. 17–18).

Even though many DA’s offices, including offices headed by progressive prosecutors, have established conviction integrity units, most CIUs have overturned few convictions.<sup>100</sup> One reason for this is that it is difficult to overcome prosecutors’ cognitive biases about convictions they have already obtained.<sup>101</sup> Offices like Brooklyn and Philadelphia have a better record on this front because they have created structures with more independent review.<sup>102</sup> But offices that continue to rely on prosecutors to make these decisions overturn few convictions because the cognitive bias in favor of maintaining them is so strong.

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100. JOHN HOLLWAY, *CONVICTION REVIEW UNITS: A NATIONAL PERSPECTIVE* (2016).

101. *Id.*; Josie Duffy Rice, *Do Conviction Integrity Units Work?*, *APPEAL* (Mar. 22, 2018), <https://theappeal.org/do-conviction-integrity-units-work-a718bbc75bc7/> [<https://perma.cc/TVN7-HWRY>].

102. Hollway, *supra* note 100, at 26, 28.

### C. *Limits on the Back End*

Even if prosecutors could convince line prosecutors in their offices to rethink their prior convictions and sentences, they may lack authority to overturn those past decisions. Krasner and Gardner, as noted, have experienced pushback from the judiciary when they sought to have cases resentenced, being told that such requests exceeded their authority.<sup>103</sup> Prosecutors in other jurisdictions similarly lack the authority to directly obtain the release of those who are already serving their sentences. In many cases, prosecutors cannot even control the fate of cases on appeal or those being challenged on habeas because those are within the purview of the attorney general. This is a crucial point. If the aim of electing district attorneys is to dismantle mass incarceration, that means these prosecutors must be able not only to stem the tide of new admissions to jails and prisons but also to release or reduce the sentences of those already there.

Some DAs are seeking broader resentencing authority, and their efforts were successful in California.<sup>104</sup> A law that took effect on January 1, 2019, allows district attorneys more discretion to review old sentences and recommend less time if they feel the punishment is unduly harsh.<sup>105</sup> Though this expands prosecutors' power, a judge ultimately has the authority over whether to change a sentence. Moreover, California is the rare jurisdiction that allows prosecutors this authority.

To be sure, prosecutors could try to influence other proceedings, such as clemency or parole, by supporting requests for release. Unfortunately, though, because of the cognitive biases discussed in Part B, offices tend to stand by their prior charges and the sentences they sought. The result is that most prosecutors' offices reflexively recommend against releasing individuals earlier than their maximum possible time served. Consider Eric Holder, the former U.S. attorney general. He focused on criminal justice reform in his time as attorney general and changed federal charging practices to minimize the imposition of mandatory minimums.<sup>106</sup> But he nevertheless opposed efforts to broaden who could be eligible for retroactive sentence adjustments and was also resistant to broad clemency grants.<sup>107</sup> Critically, this has been true of other prosecutors who identify as progressive.<sup>108</sup>

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103. See *supra* text accompanying notes 77–82.

104. See Kyle C. Barry, *A New Power for Prosecutors Is on the Horizon—Reducing Harsh Sentences*, APPEAL (Sept. 7, 2018), <https://theappeal.org/a-new-power-for-prosecutors-is-on-the-horizon-reducing-harsh-sentences/> [<https://perma.cc/JN72-FLFB>].

105. Dustin Gardiner, *First Inmate Released Under New California Resentencing Law*, S.F. CHRON. (Aug. 2, 2019, 5:09 PM), <https://www.sfchronicle.com/politics/article/First-inmate-released-under-new-California-14276997.php> [<https://perma.cc/69LE-K3WN>].

106. See Josh Gerstein, *Sessions Moves to Lengthen Drug Sentences*, POLITICO (May 12, 2017, 6:24 AM), <https://www.politico.com/story/2017/05/12/mandatory-minimum-drug-sentences-jeff-sessions-238295> [<https://perma.cc/28LP-XUVG>].

107. Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 411–

There are some exceptions. Seattle DA Dan Satterberg reviews cases where defendants have been sentenced to life imprisonment and has recommended clemency for those serving those sentences for relatively minor crimes.<sup>109</sup> Eric Gonzalez has also sought to be more supportive of early-release requests. In April 2019, he announced that his office will “cease our previous practice of ordinarily opposing parole.”<sup>110</sup> Under the new policy, his office will “consent to parole at the initial hearing for all those who entered into plea agreements . . . once they have completed their minimum sentence, ‘absent extraordinary circumstances and subject to their conduct during incarceration.’”<sup>111</sup> His office is less generous to those who exercised their jury trial right, agreeing to support parole at an initial hearing only for individuals who were twenty-three or younger at the time of the offense and sentenced to lengthy prison terms.<sup>112</sup> Drawing such a sharp line between cases that go to trial and those that plead may reflect office biases, because prosecutors have to work harder to obtain convictions at trial and may be more reluctant to agree to an earlier release date as a result. But from a public safety perspective, drawing a line between pleas and trials makes no sense because the method by which the conviction was obtained has no bearing on

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16, 425–35 (2017); see Liz Halloran, *New Climate for Drug Sentencing, Guidelines Expected to Change*, NPR (Mar. 13, 2014, 3:32 PM), <https://www.npr.org/sections/itsallpolitics/2014/03/13/289817341/new-climate-for-drug-sentencing-guidelines-expected-to-change> [<https://perma.cc/T446-HGZY>].

108. In New Orleans, District Attorney Leon Cannizarro has framed himself as a reformer but has opposed the resentencing of a man serving ninety-nine years for armed robbery he committed at just seventeen years old. Josie Duffy Rice, Opinion, *Cyrus Vance and the Myth of the Progressive Prosecutor*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/opinion/cy-vance-progressive-prosecutor.html> [<https://perma.cc/7APP-PATH>]. In Los Angeles, Jackie Lacey has also claimed to be attentive to the criminal justice system’s flaws, but she has opposed a ballot measure that would allow people convicted of nonviolent felonies to be eligible for early release. John Ismay, *LA County Sherriff McDonnell, DA Lacey Speak Out Against Prop 57*, KPCC (Oct. 20, 2016), <https://www.scpr.org/news/2016/10/20/65702/mcdonnell-lacey-speak-out-against-prop-57/> [<https://perma.cc/XAD6-Z24R>]; Jessica Pishko, *How District Attorney Jackie Lacey Failed Los Angeles*, APPEAL (Nov. 12, 2019), <https://theappeal.org/how-district-attorney-jackie-lacey-failed-los-angeles/> [<https://perma.cc/HVD4-3M4K>] (“When Lacey was elected, voters expected support for reforms and a healing of the historical racial divisions in Los Angeles.”).

109. Eli Hager, *The DAs Who Want to Set the Guilty Free*, MARSHALL PROJECT (Mar. 20, 2018, 6:00 AM), <https://www.themarshallproject.org/2018/03/20/the-das-who-want-to-set-the-guilty-free> [<https://perma.cc/Z95A-GWPV>].

110. Letter from Eric Gonzalez, Brooklyn Dist. Att’y, to Anthony J. Annucci, Acting Comm’r, New York State Dep’t of Corr. & Cmty. Supervision (Apr. 3, 2019) (on file with the *Michigan Law Review*).

111. Tom Robbins, *Took a Plea? Brooklyn’s District Attorney Will Support Your Parole*, MARSHALL PROJECT (Apr. 17, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/04/17/took-a-plea-brooklyn-s-district-attorney-will-support-your-parole> [<https://perma.cc/PC5J-ETZD>].

112. *Id.*



someone's future risk or their rehabilitation. And Gonzalez is an outlier in providing even this kind of effort to support second looks.<sup>113</sup>

Most fundamentally, these second-look decisions belong to someone else: a parole board, a governor, or a judge. Thus electing a progressive district attorney may help persuade those other actors, but the DA alone cannot change most sentences already being served. If the goal is releasing those currently incarcerated, that is a notable shortcoming.

### III. THE PROSECUTOR AS THE DRIVER OF INSTITUTIONAL CHANGE

Bazon notes at the end of *Charged* that a “challenge for the movement is figuring out how demanding to be” of self-identified progressive prosecutors, and she cautions against “a purity test” (p. 297). But she does insist on some benchmarks, “like reducing incarceration, racial disparity, the rate of reoffending, and findings of misconduct” (p. 297). I agree with Bazon that we cannot expect these prosecutors to uniformly pursue positions we would like, and her checklist of benchmarks is a good one. I would like to add some specific additional metrics to her list because I do not think this movement offers much in the way of positive and lasting change unless these prosecutors use their positions of leadership to pursue institutional changes. If progressive prosecutors want to transform criminal justice in America, and if they only have so much political capital to spend before they risk losing their positions or facing too much pushback by other officials or lawyers in their own office, they need to choose the issues that will matter most.

One such critical move is advocating for limits on the prosecutorial powers that legislators and courts have given them. That is obviously a lot to ask of someone: it is hard for anyone to relinquish power they already have, particularly if they think they will exercise it wisely. But that is what is required for fundamental change and for the election of more progressive prosecutors to be transformative instead of incremental. Just as it is insufficient to hire better police officers or train them more effectively in order to address systemic problems with violence and racial bias in policing,<sup>114</sup> it is similarly not enough to elect better prosecutors to address systemic problems with prosecution. We need structural changes to do more than chip away at the edges of mass incarceration.

For starters, just as it is important to move police away from jobs better suited to other professionals, it is likewise critical to limit the reach of prosecutors. At a basic level, that means preventing prosecutors' offices from further expanding. Even some of the most progressive prosecutors seem to have lost sight of the fact that, while they might use extra personnel in the service of their progressive aims, their successors will simply have more bodies to

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113. *Id.*

114. See ALEX S. VITALE, THE END OF POLICING 1, 11 (2017); Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1459–61 (2016).

bring more cases.<sup>115</sup> John Pfaff has explained that one of the drivers of mass incarceration has been the simple fact that we have more prosecutors to bring cases.<sup>116</sup> Thus keeping offices in check or downsizing them should be a key goal.

We also need to remove prosecutors from areas where they do not belong and where they have a conflict of interest that makes them ill-suited to a task. Prosecutors should make decisions about charging and enforcement; they should not be involved in decisions about forensics, corrections, clemency, or parole. While some progressive prosecutors might be more inclined to support decisions that favor defendants, most “[p]rosecutors will inevitably view these issues through a prism of what would be good for them and their cases and will not be able to assess objectively other interests that conflict with their own.”<sup>117</sup> For far too long we have seen prosecutors resist requests for reductions in sentences because their offices brought those cases in the first place<sup>118</sup> or support junk science because it helps them win cases.<sup>119</sup> But they should not be involved in any of these decisions except to support the reformers working in those spaces. We should thus see any prosecutor who claims to be progressive make clear that they support second looks of sentences and presumptive release policies—and recognize that prosecutors themselves should not be vetoes for any of those decisions. At a minimum, they should not oppose parole and clemency requests because those decisions are based on what someone has done since their sentencing—facts prosecutors know nothing about. Prosecutors should also recognize that they are not qualified to set forensics policy and leave that to scientists. And to the extent prosecutors are involved in corrections, it should be to call out poor conditions and the absence of programming in prisons and jails because improving the way people are treated while they are incarcerated is critical for public safety and reentry outcomes.

In terms of the decisions that do fall within prosecutors’ responsibilities, prosecutors will need to do more than just exercise their discretion with

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115. For example, Larry Krasner, who is otherwise outstanding on just about every metric one would use to assess whether a prosecutor is pursuing a reform agenda, asked for an 11 percent increase in his budget to pay for twenty-seven new hires. Michael D’Onofrio, *Krasner Fights Impending \$8.7M Budget Cut to DA’s Office*, PHILA. TRIB. (June 8, 2020), [https://www.phillytrib.com/news/local\\_news/krasner-fights-impending-8-7m-budget-cut-to-das-office/article\\_1f2d4a56-39ea-5415-8c95-be9419e94223.html](https://www.phillytrib.com/news/local_news/krasner-fights-impending-8-7m-budget-cut-to-das-office/article_1f2d4a56-39ea-5415-8c95-be9419e94223.html) [<https://perma.cc/Y24R-ZMCL>]. Similarly, St. Louis County Prosecutor Wesley Bell, another reliably progressive prosecutor, requested an increase in his budget to hire twenty-one new people. Julie O’Donoghue, *St. Louis County Prosecutor Seeks Boost in Funding*, ST. LOUIS PUB. RADIO (Nov. 14, 2019, 8:34 PM), <https://news.stpublicradio.org/post/st-louis-county-prosecutor-seeks-boost-funding#stream/0> [<https://perma.cc/9UR6-NPGM>]. While Bell wanted to use seven of those new hires to support alternatives to incarceration, there is nothing to stop a prosecutor’s office, once expanded, to shift to bringing more cases. See *id.*

116. PFAFF, *supra* note 3, at 129–30.

117. BARKOW, *supra* note 3, at 145.

118. See Barkow & Osler, *supra* note 107, at 406–24.

119. *Id.* at 449–54.

more wisdom than their predecessors. That kind of reform only lasts as long as the prosecutor is in office (and to the extent the prosecutor can get the line attorneys in the office on board). Instead, these prosecutors should use the authority of their office to push for needed institutional changes that limit the excessive powers of prosecutors. That means seeking changes in the law itself—both in case law and legislation.<sup>120</sup>

Consider, for example, the policy of open discovery where defense lawyers have access to the prosecutor's files before deciding whether to plead guilty. In recounting Noura's case, Bazelon discusses the factors that lead to convictions of innocent people, one of which is the failure of prosecutors to turn over exculpatory evidence.<sup>121</sup> "Chillingly, prosecutors may be more likely to withhold evidence when proof of guilt is uncertain," Bazelon observes (p. 225). "If you think the suspect did it but you don't quite have the goods to convict, you may be tempted to put a thumb on the scale" (p. 225). A key guard against this is to have prosecutors open their files to defense lawyers. Bazelon notes that Texas passed a law mandating prosecutors to share their case files in the wake of a high-profile case of a prosecutor convicting an innocent man after failing to turn over exculpatory evidence (p. 263). There are exceptions to protect confidential information and sensitive information, but otherwise, prosecutors have to turn over their files (p. 264). The result has been extraordinary. Texas has had more exonerations than any other state (p. 264), and with no evidence of witness intimidation or obstruction—problems prosecutors in other states fighting such laws have claimed would result from sharing their files. North Carolina has a similar open-file law, and their prosecutors now report it works well (p. 265). Most prosecutors in other states have resisted similar reforms, however, because they think it makes it harder for them to win their cases.<sup>122</sup> Some of the newly elected progressive prosecutors have adopted open files as an office policy,<sup>123</sup> but not

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120. David E. Patton, *A Defender's Take on "Good" Prosecutors*, 87 *FORDHAM L. REV. ONLINE* 20, 24 (2018) ("I will look to see if they affirmatively press legal arguments that would expand Fourth, Fifth, Sixth, and Eight[h] Amendment rights. I will look to see if they establish lasting structures to address police misconduct in everyday cases. And I will look to see how hard they press legislatures to enact laws that accomplish all of those things by binding them and their successors.").

121. P. 225 (citing 2002 study by James Liebman and Jeffrey Fagan finding that in about 20 percent of death penalty cases where convictions were reversed the reason was the state's failure to disclose evidence).

122. See Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-plea Discovery in Criminal Cases: An Empirical Comparison*, 73 *WASH. & LEE L. REV.* 285, 366–67 (2016).

123. See Joe Luppino-Esposito, *Virginia Is for Lovers of Discovery Reform*, *DUE PROCESS INST.: JUST. BLOG* (Jan. 21, 2020), <https://idueprocess.org/blog/f/virginia-is-for-lovers-of-discovery-reform> (on file with the *Michigan Law Review*) (stating that Portsmouth, Virginia's Commonwealth Attorney Stephanie Morales adopted an open-file discovery policy); *FAIR & JUST PROSECUTION*, 21 *PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR* 18 (2018), [https://www.brennancenter.org/sites/default/files/publications/FJP\\_21Principles\\_FINAL.pdf](https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf) [<https://perma.cc/BL58-DWNS>] (noting that District Attorney Scott Colom in Lowndes Coun-

all of them have. Even more critically, however, prosecutors must vigorously support this as a legislative mandate. That would bind prosecutors throughout the state and be harder to overturn. Gonzalez, to his credit, supported state legislation that would mandate the kind of open file access his office was already providing.<sup>124</sup> But many other progressive prosecutors have been silent on this issue. And even Gonzalez (along with other district attorneys) ended up opposing the enacted reforms because they went further than he would have liked.<sup>125</sup> But for prosecutors to be real change agents, they need to lead the charge for legislation like this.

One can see the same issue play out with cash bail. Cash bail gives prosecutors leverage because people detained pretrial are more likely to plead guilty. In Bazelon's words, "[j]ails serve as plea mills" (p. 43). "Over the last two decades, all of the growth in the jail population has consisted of people detained pretrial" (p. 40). While this might make a prosecutor's job easier, cash bail is completely unnecessary for public safety. In fact, it harms public safety because pretrial detention is more likely to cause crime than prevent it.<sup>126</sup> It also isn't necessary to get people to appear in court because other measures, like electronic reminders, work well (p. 42). And the brunt of pretrial detention's harms falls disproportionately on people of color (p. 44). Bazelon notes that ending cash bail should therefore "be the kind of commonsense measure just about everyone can agree on" (p. 42). Certainly, it should be something that anyone claiming to be a progressive prosecutor should agree on, because it harms public safety, costs a fortune, and causes so much human suffering. As with open-file discovery, we are seeing some of

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ty, Mississippi and District Attorney Mark Dupree in Kansas City, Kansas have implemented open discovery policies).

124. In 2019, Gonzalez advocated for open-file discovery legislation, emphasizing the importance of balancing transparency with witness safety and advertising his office as a model for discovery reform. Eric Gonzalez, *Commentary: Reform Discovery Rules, Writes District Attorney*, TIMES UNION (Mar. 1, 2019), <https://www.timesunion.com/opinion/article/Commentary-Reform-discovery-rules-writes-13656795.php> [<https://perma.cc/28Z9-8FE8>]. A few months before discovery reform took effect, Gonzalez submitted written testimony to the New York state legislature, asking for increased funding to facilitate the implementation of the onerous fifteen-day discovery deadline, as well as changes to the law's broad requirement to disclose personal information about witnesses, citing concerns about safety and reduced witness cooperation. *Implementation of Pretrial Discovery Reform: Hearing Before the S. Standing Comm. on Codes*, 203d Leg. (N.Y. 2019) (written testimony of Eric Gonzalez, Brooklyn District Atty), [https://www.nysenate.gov/sites/default/files/public\\_hearing\\_09\\_09\\_2019\\_testimony\\_1\\_of\\_2\\_1.pdf](https://www.nysenate.gov/sites/default/files/public_hearing_09_09_2019_testimony_1_of_2_1.pdf) [<https://perma.cc/4LR6-UHCW>].

125. These district attorneys asked to have the fifteen-day discovery deadline be relaxed, to impose more safeguards to protect witness safety, and to limit the breadth of applicable discovery. See Darcel D. Clark, Eric Gonzalez, Melinda Katz, Michael E. McMahon, Anthony A. Scarpino Jr., Madeline Singas & Cyrus R. Vance Jr., Opinion, *Why We Need to Reform New York's Criminal Justice Reforms*, N.Y. TIMES (Feb. 25, 2020), <https://www.nytimes.com/2020/02/25/opinion/new-york-bail-reform.html> [<https://perma.cc/2958-Q4XB>].

126. BARKOW, *supra* note 3, at 58; p. 41 ("[O]ver time, jail before trial is associated with more future risk of crime, not less."); p. 42 (citing studies showing an increased risk of recidivism after detention).

the prosecutors elected on decarceral platforms changing their office policies to limit the use of cash bail.<sup>127</sup> Yet many of the so-called progressive prosecutors have yet to actively lobby for legislation to end cash bail in their jurisdictions. It is not enough to change office policies if you are not also seeking to make changes permanent and broadly applicable. Otherwise, those shifts are only as strong as the next election. Moreover, making changes through legislation also helps prosecutors get greater compliance from their line attorneys because other actors like judges and defense lawyers can act as enforcement mechanisms.

The same holds true for sentencing policy. It is not enough to pledge not to seek long sentences or file charges that bring mandatory minimums. Prosecutors must advocate to change the laws on the books as well, as a group of Virginia prosecutors recently did when they urged their legislature to abolish mandatory minimums.<sup>128</sup> Doing so is consistent with a prosecutor's mandate to further public safety and pursue justice. Mandatory minimum sentences are ineffective as deterrents and racially disparate in their application (pp. 62–64). Excessive sentences likewise fail to deter and at a certain point become criminogenic because of how difficult they make reentry.<sup>129</sup> Bazelon quotes a report from the National Academy of Science in 2014 concluding that “[t]he incremental deterrent effect of increases in lengthy prison sentences is modest at best.”<sup>130</sup> And as sentences get longer, it gets that much harder for people to reenter society. As Bazelon concludes, “we’re long past the point of diminishing returns” (p. 67). Despite these facts, prosecutors all too often support mandatory minimums and long statutory sentence lengths because of the leverage it gives them to obtain guilty pleas and cooperation (pp. 138–39). If prosecutors care about better policies instead of what makes their jobs easier, sentencing reform should be at the top of their list of legislative reforms. They should be vocal advocates for shortening statutory sentences.

127. Chesa Boudin has been at the forefront, refusing to have his prosecutors request cash bail in any case. Colin Doyle, *Chesa Boudin's New Bail Policy Is Nation's Most Progressive. It Also Reveals Persistence of Tough-on-Crime Norms.*, APPEAL (Jan. 30, 2020), <https://theappeal.org/politicalreport/chesa-boudin-cash-bail-predictions/> [https://perma.cc/SM2H-5NX5]. Larry Krasner's office no longer seeks cash bail in certain categories of cases, which has led to an eight percentage-point reduction in the use of cash bail in Philadelphia. Aurélie Ouss & Megan Stevenson, *Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors*, SSRN 14 (June 22, 2020), <https://ssrn.com/abstract=3335138> [https://perma.cc/9CR3-79EF]; Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform"*, 128 YALE L.J.F. 848, 925 n.346 (2019). Rachael Rollins, who ran on eliminating cash bail, instituted an office policy requiring line prosecutors to obtain a supervisor's approval before requesting cash bail. Walter Wuthmann, *Rachael Rollins, 100 Days In: What Has Changed, and What Hasn't, Under the Reformer DA*, WBUR (Apr. 12, 2019), <https://www.wbur.org/news/2019/04/12/rachael-rollins-first-100-days> [https://perma.cc/L64P-KDVV].

128. See *supra* note 26 and accompanying text.

129. BARKOW, *supra* note 3, at 46.

130. P. 67 (quoting NAT'L RSCH. COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES* 5 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014)).

lative reforms. They should be vocal advocates for shortening statutory sentences.

Advocating for legislative change is particularly critical when it comes to sentencing because, as noted in Section II.C, most prosecutors have a limited toolkit when it comes to altering sentences already imposed. Mass incarceration is driven by two factors: the number of cases coming into the system (admissions) and the length of sentences. Prosecutors have discretion to change the rate of admissions, and for cases going forward, they can also influence sentences based on the charges they bring and the sentences they request (or accept in pleas). But for the people already serving their sentences, there is often little these prosecutors can do. Additionally, for many people seeking relief from an existing sentence—either on habeas or because of unconstitutional conditions in the prison—the relevant prosecutor dealing with the claim is the state attorney general. Even if a local progressive prosecutor would agree with the release, the state attorney general may not. Thus, the progressive-prosecutor movement needs to go beyond local elections and consider these statewide officeholders as critically important as well, because they are often crucial voices when sentences are being considered.<sup>131</sup> Progressive prosecutors need to call attention to these other actors—judges, legislators, and attorneys general—and urge them to reform existing sentences.<sup>132</sup>

Progressive prosecutors should also support caps on their own use of prisons. Because prisons are paid for by the state, they are a free resource for local prosecutors to use. Sound correctional policy would require prosecutors to internalize those costs so they do not overuse prisons, either by giving them financial bonuses for using them less or charging them for using them too much. Prosecutors should support these limits on the use of prison resources and support legislative efforts to downsize populations in prisons and jails.<sup>133</sup>

A true progressive prosecutor will also support the constitutional rights of defendants. That means more than not violating them. It also means taking positions in litigation that support those rights, even if it may mean losing a particular case. It is important to pay attention to how prosecutors are handling appeals and whether they are requiring people to waive their right to an appeal as part of their plea agreements. Bazelon notes that while more

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131. For example, New York Attorney General Letitia James has opposed every coronavirus-related plea for release made by elderly and ill incarcerated individuals. Steven Zeidman, Opinion, *Coronavirus Makes Reducing NY Prison Population a Matter of Life and Death*, SYRACUSE.COM (May 28, 2020), <https://www.syracuse.com/opinion/2020/05/coronavirus-makes-reducing-ny-prison-population-a-matter-of-life-and-death-commentary.html> [https://perma.cc/HJ54-QYLJ].

132. If these prosecutors are asked their views on any particular case that comes up for reconsideration—as prosecutors often are in cases of parole or clemency—they need to support release unless there are serious red flags in a person's postconviction behavior.

133. See BARKOW, *supra* note 3, at 161–63; Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 856 (2018) (book review).

than a million people are convicted of felonies each year, there are only 70,000 appeals (p. 137). That is because a condition of many pleas is for defendants to waive their right to file an appeal. Indeed, some prosecutors go even further and require additional waivers. Federal prosecutors in California, for example, have required individuals to waive claims of compassionate release, even though the conditions that prompt such requests are by definition not known at the time of sentencing.<sup>134</sup> As Judge Breyer noted in criticizing this practice, the government does this because “rather than risk a court decision it disagrees with, the Government can rely on its disproportionate power in negotiating the terms of the plea agreement to foreclose in advance any compassionate release motion it think[s] is unmeritorious.”<sup>135</sup> This makes prosecutors’ jobs easier and gives them power to decide the merits of a case. But it is an end-run around the judiciary’s role, because it is up to judges to decide these motions, just as judges are to decide the legal issues on appeal that prosecutors get people to waive in these agreements. If progressive prosecutors care about dismantling mass incarceration and protecting constitutional rights, these waivers must no longer be sought.

When appeals are brought, prosecutors claiming the mantle of “progressive” need to be willing to concede error and make sure constitutional rights are being protected. That has yet to be a central part of this movement, but until it is, real progress on mass incarceration will stall because these rights are critical checks on overreach. Without Eighth Amendment checks on excessive punishment, robust enforcement against excessive fines and fees, and real limits on police overreach, we will not see big shifts in punishment in America.<sup>136</sup> While it is up to judges to police these critical constitutional rights,<sup>137</sup> prosecutors can play a key supporting role by taking litigating positions that protect those rights. Prosecutors should also be calling for an end to absolute immunity for their decisions and an end to qualified immunity for policing decisions because both of these doctrines impede the protection of constitutional rights.<sup>138</sup>

Prosecutors also need to support other institutions that are using data and evidence to set criminal justice policies based on best practices instead of responding to political tides. This kind of insulation is important because if criminal justice policy depends on the current whims of the electorate, mass

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134. United States v. Sembrano, No. 19-cr-00651-CRB-1, 2020 WL 3161003, at \*2 (N.D. Cal. May 28, 2020) (“[C]ompassionate release exists to address the unforeseeable.”).

135. *Id.*

136. See BARKOW, *supra* note 3, at 187–96.

137. For an argument that it is critical to select judges with a commitment to these values and to criminal justice reform, see *id.* at 198–201.

138. See ERWIN CHERMERINSKY, *Suing Government Officers*, in CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE 55 (2017); William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018); Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2006 (2018).

incarceration is here to stay.<sup>139</sup> None of the reforms we have seen through the political process thus far have produced more than modest changes, and they have been largely limited to drug and property crime.<sup>140</sup> If reformers want to make a significant inroad into mass incarceration, they must address crimes involving violence, because individuals convicted of those crimes make up roughly half of the state-prison population.<sup>141</sup> Having a body more removed from the tabloid story of the day allows policies to be grounded in evidence of what works best to address crime, including violent crime.<sup>142</sup> But those bodies need support from political actors, and especially from prosecutors. Prosecutors should support well-designed commissions charged with evaluating sentencing policies, prison conditions, limits on police use of force, prosecutorial misconduct, collateral consequences, and a variety of other criminal justice issues to support policies that actually work to reduce crime.<sup>143</sup>

It is critical to achieve institutional changes such as these because simply announcing that an office will exercise its discretion differently is change without staying power should prosecutors lose their reelection bids.<sup>144</sup> One can see an example of this at the federal level. Although hardly a revolutionary criminal justice reformer, Attorney General Eric Holder was committed to making changes at the Department of Justice to make the administration of criminal justice more equitable and less severe. The president for whom he worked, Barack Obama, wrote a law review article documenting his commitment to criminal justice reform.<sup>145</sup> But the Obama-era effort was almost entirely rooted in policy changes in how discretion was exercised, so

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139. See, e.g., Rappaport, *supra* note 48, at 766, 776–78 (noting that we might be in “a possibly fleeting ‘moment’ of public restraint” and noting the research connecting punitive responses with political responsiveness).

140. BARKOW, *supra* note 3, at 12–13 (noting that the state of criminal justice reform right now consists of “modest efforts that improve the status quo, mostly focused on drug sentencing and minor property crimes”).

141. In 2016, more than half (55 percent) of state prisoners were serving sentences for violent offenses. JENNIFER BRONSON & E. ANN CARSON, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NCJ 252156, PRISONERS IN 2017 (2019), <https://www.bjs.gov/content/pub/pdf/p17.pdf> [<https://perma.cc/V3RT-9J8V>].

142. See generally BARKOW, *supra* note 3.

143. Critically, putting in place a body like this is consistent with democracy because the public itself wants this kind of structure in place. In a recent article, John Rappaport notes that the public doesn’t want to be more involved in decisionmaking and would prefer to have elite experts making decisions as long as they are doing it for the greater good and not for self-interest. Rappaport, *supra* note 48, at 751–53 (citing research). For a description of what these commissions could address, see BARKOW, *supra* note 3, at 169–77.

144. See Ross Barkan, *Exterminating Angels*, BAFFLER (July 2019), <https://thebaffler.com/outbursts/exterminating-angels-barkan> [<https://perma.cc/7SQ2-NM8K>] (“Just as important, the elected district attorney is not about to shrink the office permanently or limit its scope. He or she merely sets some power aside for what is, naturally, a limited amount of time, since they can all only serve in office or live so long.”).

145. Barack Obama, Commentary, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811 (2017).



when Donald Trump took over and Jeff Sessions became the Attorney General, all the policies immediately shifted.

For example, Attorney General Holder changed DOJ charging policy so prosecutors would not bring as many cases that would be subject to mandatory minimum sentences.<sup>146</sup> But the Department did not support legislative changes that would have allowed judges to depart from mandatory minimums in all cases. The Department, in other words, opted to change its own discretionary policies but refused to tie its hands—and consequently, the hands of subsequent administrations—by supporting legislative changes. The result, predictably, was that DOJ prosecutors inconsistently followed the Holder charging memo,<sup>147</sup> and when the Trump Administration took over, the discretionary charging policy was eliminated. Prosecutors were instructed to charge the most serious readily provable offense, including those with mandatory minimums.<sup>148</sup> If the Obama Department had successfully lobbied for mandatory minimums to be repealed instead of fighting proposed legislation along those lines, the world would look much different even after the election. The Department did not make that push, however, because it did not want to relinquish its own powers, and without mandatory minimums to threaten, prosecutors lose much of their leverage in cases. Instead, the Administration wanted to keep discretion to decide when and whether to charge those mandatory minimums and the result is that none of its discretionary changes lasted.

#### CONCLUSION

Real change requires a shift in law—case law and legislation. And prosecutors can help make that happen. They are key litigators in court, and they are leading lobbyists on criminal law issues.<sup>149</sup> People listen to them because they trust their commitment to public safety. Progressive prosecutors should thus use their capital to bring about as many institutional shifts as they can. Institutional changes are more lasting and extend beyond a single district. They help elected prosecutors get greater compliance from line attorneys within their offices and create a solid foundation that future progressive prosecutors can expand.<sup>150</sup> So if the prosecutors Bazelon praises want to

146. Gerstein, *supra* note 106.

147. Page Pate, *Some Federal Prosecutors Apparently Didn't Get the Memo About Going Easy on Low-Level Drug Offenders*, LAW & CRIME (Apr. 5, 2016, 2:22 PM), <https://lawandcrime.com/columnists/some-federal-prosecutors-apparently-didnt-get-the-memo-about-laying-off-low-level-drug-offenders/> [<https://perma.cc/8KTA-T4TC>].

148. Gerstein, *supra* note 106.

149. BARKOW, *supra* note 3, at 113; Shon Hopwood, *The Misplaced Trust in the DOJ's Expertise on Criminal Justice Policy*, 118 MICH. L. REV. 1181, 1185–96 (2020) (book review).

150. TAYLOR PENDERGRASS, LEGISLATIVE STRATEGIES FOR PROSECUTORIAL REFORM: PHASE 1, EXPLORING POSSIBILITIES 4 (2016), [https://www.openphilanthropy.org/files/Focus\\_Areas/Criminal\\_Justice\\_Reform/Exploring\\_Legislative\\_Possibilities\\_for\\_Prosecutorial\\_Reform\\_with\\_Appendices\\_5.8.16.pdf](https://www.openphilanthropy.org/files/Focus_Areas/Criminal_Justice_Reform/Exploring_Legislative_Possibilities_for_Prosecutorial_Reform_with_Appendices_5.8.16.pdf) [<https://perma.cc/M83Q-PRY7>] (“[E]lectoral success and voluntarily-implemented best practices can be reversed unless they are secured by legislation.”).

leave a lasting legacy, they will realize the key is to tie their own hands—because doing so will tie the hands of future prosecutors who will not exercise that discretion in the same way. Then this movement will truly live up to its promise.

