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### When Prosecutors Politick: Progressive Law Enforcers Then and Now

Bruce A. Green

*Fordham University School of Law*, [bgreen@law.fordham.edu](mailto:bgreen@law.fordham.edu)

Rebecca Roiphe

*New York Law School*, [rebecca.roiphe@nyls.edu](mailto:rebecca.roiphe@nyls.edu)

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## WHEN PROSECUTORS POLITICK: PROGRESSIVE LAW ENFORCERS THEN AND NOW

BRUCE A. GREEN & REBECCA ROIPHE\*

*A new and recognizable group of reform-minded prosecutors has assumed the mantle of progressive prosecution. The term is hard to define in part because its adherents embrace a diverse set of policies and priorities. In comparing the contemporary movement with Progressive Era prosecutors, this Article has two related goals. First, it seeks to better define progressive prosecution. Second, it uses a historical comparison to draw some lessons for the current movement. Both groups of prosecutors were elected on a wave of popular support. Unlike today's mainstream prosecutors who tend to campaign and labor in relative obscurity, these two sets of prosecutors received a good deal of popular attention and support. The Progressive Era reformers introduced the notion promoted by current progressive prosecutors that crime is a social phenomenon, which community services are better equipped to address than prisons. The Progressive Era movement also sought to implement professional norms and practices to promote the values of fairness and proportionality. Contemporary progressive prosecutors inherit this legacy but tend not to emphasize these professional values. The Article concludes that the professional values championed during the Progressive Era are critical, in conjunction with new programs and policies, to ensure that as innovation*

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\* *Bruce A. Green.* Louis Stein Chair of Law and Director of the Stein Center for Law and Ethics, Fordham University School of Law.

*Rebecca Roiphe.* Professor of Law and Dean for Faculty Development, New York Law School.

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*helps achieve social justice, prosecution remains in the hands of those committed to fair and even-handed justice.*

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## INTRODUCTION

Since 2016, “progressive prosecutors” have won elections on promises to reduce mass incarceration and redress the unfair treatment of the poor and minorities in the criminal justice system.<sup>1</sup> The progressive politics of the day have filtered into prosecutorial elections, and prosecutors are drawing on a populist movement to fuel their campaigns and platforms.<sup>2</sup> Their election as

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<sup>1</sup> Mark Berman, *These Prosecutors Won Office Vowing to Fight the System. Now, the System Is Fighting Back*, WASH. POST (Nov. 9, 2019, 4:52 PM), [https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3da\\_story.html](https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3da_story.html) [https://perma.cc/K6XK-F5CM]; see *infra* Part II(A).

<sup>2</sup> Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 87–93, 100–07 (2016) (describing how public and regulatory efforts to hold prosecutors accountable for misconduct and abuse have been fueled by, among other things, “public disenchantment with the criminal process,” reform coalitions and movements, and information technology).

district and county attorneys marks a significant break from the law-and-order approach to prosecution that dominated for decades.<sup>3</sup>

This is not the first time that reformers pursued a new approach to prosecution. The Progressive Era reform movement in the late nineteenth and early twentieth centuries included a promise to overhaul an outdated, corrupt criminal justice system, including replacing corrupt prosecutors who belonged to the party machines. While the Progressive Era and the present are not the only times when criminal law reform has been pressing,<sup>4</sup> these particular historical periods are worth comparing because, in both cases, prosecutor elections were and are politically salient, drawing significant attention and popular support.

The Progressive Era criminal justice reform movement had several defining features. Its aim was to combat corruption by professionalizing criminal justice: reformers sought to replace political cronies with disinterested experts who applied the law to facts rather than basing their decisions on impermissible personal, partisan, or political considerations.<sup>5</sup> Progressive Era reformers also rejected nineteenth-century notions of free will and personal responsibility, believing instead that biology and environment shaped individuals' conduct.<sup>6</sup> Finally, criminal justice reformers sought to bring rational business management to chaotic courts. During this era, lawyers seeking election as prosecutors under the reform banner, most famously William Travers Jerome of Manhattan, challenged office holders who were beholden to a political party and dedicated to

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<sup>3</sup> See, e.g., Rachel E. Barkow, *Three Lessons for Criminal Law Reformers from Locking Up Our Own*, 107 CALIF. L. REV. 1967, 1969–70 (2019) (contrasting progressive prosecutors with “traditional ‘tough-on-crime’” prosecutors).

<sup>4</sup> Obviously, criminal justice reform has been important at many, if not all, points in American history. We are simply suggesting that the two reform movements are worth comparing because they involve a unique common feature. For a discussion of the use of history in legal scholarship, see Mark Tushnet, *Interdisciplinary Legal Scholarship: The Case of History-in-Law*, 71 CHI.-KENT L. REV. 909 (1996). Tushnet argues that history is a form of storytelling. *Id.* at 914–17. The story we tell in this article is not one of decline or progressive victory. It is rather a story of oscillation, consistency about some things and extreme swings in sentiment about others. A lesson we draw from this story is that as we embrace change, it might be useful to moderate the nature of change with some useful lessons of the past.

<sup>5</sup> See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 149–71 (1993).

<sup>6</sup> See generally THOMAS L. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE: THE AMERICAN SOCIAL SCIENCE ASSOCIATION AND THE NINETEENTH-CENTURY CRISIS OF AUTHORITY* (1977) (discussing the shift from personal responsibility to environmental explanations for social phenomena); MORTON WHITE, *SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM* (Beacon paperback ed. 1957) (describing a shift from formalism to a more pragmatic, historical, and socially grounded philosophy).

powerful and moneyed interests.<sup>7</sup> The legacy of disinterested and independent prosecutorial professionalism, which Jerome exemplified, is now widely accepted, if not taken for granted.

This Article compares the new progressive prosecutors to the Progressive Era criminal justice reformers to identify the benefits and concerns that accompany a prosecutorial reform movement linked to popular politics. The successes and failures of Progressive Era criminal justice reform offer a cautionary tale to progressive prosecutors who draw on active popular support to feed their campaigns and platforms. While populist energy lends momentum and political will for positive change, it can also be in tension with professional values. The Article concludes that contemporary progressive prosecutors ought to take care not to sacrifice professionalism to broader social justice policy goals. The Article also cautions that, although a focus on the social context in which crime occurs is progress from the cruder nineteenth-century conception of free will and personal responsibility, it too has its dangers.

Part I of the Article describes the criminal justice reform movement during the Progressive Era and its legacy. Part II then turns to contemporary progressive prosecutors. Focusing especially on the exercise of prosecutorial discretion, it highlights how progressive prosecutors have distinguished themselves from their mainstream contemporaries and, in doing so, how they compare with Progressive Era reformers. Finally, Part III offers some lessons from history.

## I. CRIMINAL JUSTICE REFORM IN THE PROGRESSIVE ERA

### A. PROGRESSIVE ERA PROSECUTORS

Beginning around 1870, the progressive movement emerged to address the increasingly complex problems of industrial capitalism in America. The rapidly changing economy brought an influx of new immigrants from southern and eastern Europe, as well as a migration of a large number of African Americans from the South to northern cities. The social problems were complex: overcrowding, increases in crime, clashing of cultures, and more. These new conditions were accompanied by harsh working conditions,

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<sup>7</sup> RICHARD O'CONNOR, *COURTROOM WARRIOR: THE COMBATIVE CAREER OF WILLIAM TRAVERS JEROME* 74–82 (1963); ARTHUR TRAIN, *FROM THE DISTRICT ATTORNEY'S OFFICE: A POPULAR ACCOUNT OF CRIMINAL JUSTICE* 116 (1939).

poverty, child labor, and more women in the workforce.<sup>8</sup> While the progressive movement was in no way monolithic, its proponents shared a concern about these social conditions and came to a consensus on some common causes and means to address them.<sup>9</sup>

One target of the Progressive Era reform movement was criminal justice. The conditions of urban America, along with the increased concentration of people from diverse communities, contributed to an increase in crime and corruption.<sup>10</sup> The Progressive Era reformers sought to address this in various ways. This Part highlights three aspects of the Progressive Era criminal justice reform movement that had particular significance for criminal prosecutors: Section B examines Progressive Era reformers' focus on administrative efficiency; Section C looks at their faith in expertise and professionalization; and Section D underscores their belief that crime was a symptom of a larger social problem. Finally, Section E focuses on what we regard as Progressive Era prosecutors' most significant legacy for contemporary prosecutors: their conception of prosecutors' professional role and responsibilities.

#### B. RATIONALIZATION AND BUREAUCRATIZATION OF CRIMINAL JUSTICE

The Progressive Era was the heyday of muckrakers, the journalists and social reformers who sought to shed light on the corruption, inefficiency, and evils of industrial capitalism. The most famous of their works was Upton Sinclair's *The Jungle*, which described the harsh conditions of immigrant workers in Chicago and exposed the unsanitary conditions of America's meat packing plants.<sup>11</sup> Along these lines—albeit in a far less dramatic way—

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<sup>8</sup> Progressive Era reform was in no way monolithic, nor were its causes simple. For a historiographical account of the various strains within the progressive movement, see Daniel T. Rodgers, *In Search of Progressivism*, 10 REVS. AM. HIST. 113 (1982).

<sup>9</sup> See generally *id.*

<sup>10</sup> DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 51–52 (rev. ed. 2002).

<sup>11</sup> While Sinclair sought to advance socialism, his book mostly sparked upset and outrage at the unsanitary conditions of the meat packing industry, leading ultimately to the passage of the Federal Meat Inspection Act in 1906. See BROOKE KROEGER, UNDERCOVER REPORTING: THE TRUTH ABOUT DECEPTION 84, 89–90 (2012) (“I aimed at the public’s heart and by accident I hit it in the stomach.”) (quoting Sinclair); see generally UPTON SINCLAIR, THE JUNGLE (1906) (following the lives of fictional immigrants who work in Chicago’s meat industry).

reformers described, in minute detail, the sluggish inefficiency and venality of municipal courts.<sup>12</sup>

The municipal courts in Cleveland, for instance, were populated by prosecutors who knew nothing about the cases, carried no papers, and kept few files.<sup>13</sup> Cases were disposed of without public scrutiny. Prosecutors whispered in the ears of the judges, who issued decisions to continue the case or impose a light penalty, while defense attorneys drifted around the room doing little to nothing.<sup>14</sup> Courts were dirty, dark, and noisy, belying any misconceived sense of the administration of impartial justice.<sup>15</sup> As urban planner and reformer Alfred Bettman and his co-author Howard F. Burns put it, anyone would be left with the impression that “results are dependent upon favor or strange influences [rather] than upon a judgment of the court based exclusively on the dictates of law and justice.”<sup>16</sup> Drawing on the efficiency movement pioneered by Frederick Taylor and others, criminal justice reformers hoped to make courts look more like businesses than government agencies.<sup>17</sup>

The inefficiency of prosecutors’ offices, like that of the courts, made them susceptible to corruption. The lack of documentation and the individual prosecutors’ power to dismiss cases bred a sense that criminal justice was for sale to those with political, social, or financial influence.<sup>18</sup> When asked why he did not discipline his subordinates when they neglected their cases or acted

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<sup>12</sup> See generally RAYMOND FOSDICK, REGINALD HEBER SMITH, HERBERT B. EHRMANN, ALFRED BETTMAN, HOWARD F. BURNS, BURDETTE G. LEWIS, HERMAN M. ADLER, ALBERT M. KALES, M.K. WISEHART, FELIX FRANKFURTER & ROSCOE POUND, *CRIMINAL JUSTICE IN CLEVELAND: REPORTS OF THE CLEVELAND FOUNDATION SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN CLEVELAND, OHIO* (Roscoe Pound & Felix Frankfurter eds., 1922) [hereinafter *CRIMINAL JUSTICE IN CLEVELAND*] (reporting on corruption in the criminal courts in Cleveland).

<sup>13</sup> Alfred Bettman & Howard F. Burns, *Prosecution*, in *CRIMINAL JUSTICE IN CLEVELAND*, *supra* note 12, at 83, 98–99.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 109–10.

<sup>17</sup> The efficiency movement argued that the economy, society, and government were riddled with inefficiency. Proponents like Frederick Winslow Taylor proposed to bring expert management to bear on these problems to reduce waste. The movement favored administrative and executive expertise over popular participation or control and assumed that proper management would not only reduce waste but also eliminate most conflict. See generally FREDERICK WINSLOW TAYLOR, *THE PRINCIPLES OF SCIENTIFIC MANAGEMENT* (1911). For a discussion of the movement, see generally ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977); SAMUEL HABER, *EFFICIENCY AND UPLIFT: SCIENTIFIC MANAGEMENT IN THE PROGRESSIVE ERA, 1890–1920* (1964).

<sup>18</sup> See Bettman & Burns, *supra* note 13, at 136–38.

improperly, one reform prosecutor in Cleveland responded that he had no control over the assistant prosecutors, who “were appointed just as he was.”<sup>19</sup> A county prosecutor developed a policy of keeping assistant prosecutors in the dark about their cases until shortly before trial so they would not have the time to corruptly drop or block a prosecution.<sup>20</sup>

Reformers insisted that the municipal prosecutor ought to be like an executive of a large business or the managing clerk of a law office.<sup>21</sup> Specialization, a key goal of the efficiency movement, was seen as critical to the proper functioning of prosecutors’ offices. The reformers were convinced that the existing system, in which prosecutors handled all different sorts and stages of cases, had led to both corruption and amateurism. Specialization would breed expertise while helping to ensure oversight such that no one prosecutor could corrupt the system. Thus, as in a factory, some prosecutors should serve as trial assistants and others should manage police-initiated charges, while another set should deal with complaints from the community.<sup>22</sup> Prosecutors would become experts in their work, a key to the impartial administration of justice, the legitimacy of the criminal justice system, and the efficient functioning of the system. As Bettman and Burns concluded in the volume edited by Felix Frankfurter and Roscoe Pound, the efficient and organized administration of justice was critical, but would fail without the skilled and professional exercise of discretion and judgment.<sup>23</sup>

Reformers understood that increased efficiency would come at a cost to participatory democracy. While susceptible to corruption, the old model was also fluid and informal. In the old system, complainants could speak directly to judges, witnesses, victims, and the accused, and spoke with one another and interacted casually to bargain for a desired result. While not all parties were equal in this spoils system, anyone could join the fray. Reformers wanted a structure with rules and processes, something more arcane that would no doubt make the process less accessible. As rules and procedures grew more intricate and were more consistently enforced, individuals accused of crimes as well as other participants had to rely on lawyers to navigate the system. However, the imposition of rational systems, rules, and processes would also help weed out corruption and ensure fair results, an end that seemed pressing given that individual liberty was at stake.<sup>24</sup>

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<sup>19</sup> *Id.* at 119.

<sup>20</sup> *Id.* at 162–63.

<sup>21</sup> *Id.* at 194–95; MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 7 (2003).

<sup>22</sup> Bettman & Burns, *supra* note 13, at 195–96.

<sup>23</sup> *Id.* at 196.

<sup>24</sup> WILLRICH, *supra* note 21, at 30–32.



## C. PROFESSIONALIZATION

Progressive Era courtroom reformers largely targeted corruption. The urban criminal courts had become a tool of party machine politics or, as one contemporary argued, captive to the joint interest of municipal politics and big business.<sup>25</sup> Rich, well-connected parties got their way. Others were given little attention and often had no way to pursue their complaints or defend against allegations of wrongdoing. Progressive Era reformers envisioned professionalism as part of the solution.<sup>26</sup>

The perceived need for professionalism extended to prosecutors' offices. As Roscoe Pound described in his book about criminal justice in Cleveland, prosecutors lacked competence, knowledge, and training.<sup>27</sup> They were chosen for their political connections, not for their mastery of the law.<sup>28</sup> The public suspected that they were carrying on private practices while prosecuting cases, exposing them to persistent conflicts of interest.<sup>29</sup> Bettman and Burns concluded that the office of the prosecutor had to be reformed so as "to attract and hold men of ability and character."<sup>30</sup> Arthur Train insisted that, at least for the top prosecutor, character was the more important trait: "Courtesy, courage, broadmindedness, and scrupulous integrity are needed rather than legal ratiocination."<sup>31</sup>

The elite bar at the turn of the century looked down on lawyers who practiced criminal law. Reformers sought to improve the image of prosecutors to match the import of their work. As observers of the Cleveland system explained:

The criminal branch of the administration of justice, dealing as it does with the protection of the community against crime, the promotion of the peace, safety, and

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<sup>25</sup> TRAIN, *supra* note 7, at 120–22; *see also* O'CONNOR, *supra* note 7, at 33–34.

<sup>26</sup> *See generally* BURTON J. BLEDSTEIN, *THE CULTURE OF PROFESSIONALISM: THE MIDDLE CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA* (1976) (arguing in that professionalism emerged as a way of consolidating middle class status and giving it meaning); HASKELL, *supra* note 6 (arguing that professionalization became a way of addressing social problems and organizing social activity); DOROTHY ROSS, *THE ORIGINS OF AMERICAN SOCIAL SCIENCE* (1991) (arguing that the social sciences emerged as a way of recasting ideological views of American exceptionalism); Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise: 1870–1920*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* 70 (Gerald L. Geison ed., 1983) (discussing how lawyers used new economic theories to support their vision of reform).

<sup>27</sup> *See* Roscoe Pound, *Criminal Justice and the American City*, in *CRIMINAL JUSTICE IN CLEVELAND*, *supra* note 12, at 559, 622–23.

<sup>28</sup> Bettman & Burns, *supra* note 13, at 133.

<sup>29</sup> *Id.* at 156.

<sup>30</sup> *Id.* at 194.

<sup>31</sup> TRAIN, *supra* note 7, at 128–29.

morals of the inhabitants, the lives and the liberties of men, and, therefore, from any intelligent point of view, the more important branch of the administration of the law, has become a sort of outlaw field which many a lawyer avoids as he avoids the slums of the city.<sup>32</sup>

Reformers understood that the chief prosecutor in particular ought to be a professional, possessing skill and training, but also the capacity and inclination to resist public influence. As Bettman and Burns put it, it should not be that

the prosecutor permits himself to be carried hither or thither by alternating currents of public cruelty or public sentimentality or blown about by gusts of popular or press excitement. He should be the captain who steadies the boat and at the same time discovers new or improved routes to the havens of public order, security, and morals.<sup>33</sup>

The solution was to improve the prestige and professional status of the prosecutor's office<sup>34</sup> by hiring professional prosecutors who adhered to proper processes instead of using any means to achieve conviction.<sup>35</sup>

One of the most famous Progressive Era reform prosecutors, William Travers Jerome, posed a threat to the traditional party system and its loyal district attorneys because he was honest and incorruptible.<sup>36</sup> He derived his power directly from the people and won favor with the poor and the rich alike, posing a distinct threat to the entrenched politicians.<sup>37</sup> As one editorial writer explained during his campaign: "If the people want blackmailers and other criminals vigorously prosecuted without fear or favor they will elect Judge Jerome."<sup>38</sup> When he was elected, Jerome sought to professionalize the New York County District Attorney's office by hiring young lawyers who were just a few years out of law school.<sup>39</sup> He used recommendations by civic groups, well-respected lawyers, or both to fill the office with professional assistants.<sup>40</sup> One observer complained, "[i]n the ould days a feller could use his pull; now, the divil take it, to get anythin' done you got to hold up your hand and yell 'Hay-var'd, Hay-var'd, Hay-var'd.'"<sup>41</sup>

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<sup>32</sup> Bettman & Burns, *supra* note 13, at 219.

<sup>33</sup> *Id.* at 198.

<sup>34</sup> *See id.* at 194.

<sup>35</sup> *See* TRAIN, *supra* note 7, at 130–31.

<sup>36</sup> *See* O'CONNOR, *supra* note 7, at 35–36, 44, 53.

<sup>37</sup> *See id.* at 79.

<sup>38</sup> *Id.* at 81.

<sup>39</sup> *Id.* at 86.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 87.

Arthur Train, who served as a prosecutor in Manhattan both before and after Jerome's election,<sup>42</sup> described prosecutors' previous approach to their work: "Prior to the muckraking era the traditional concept of a prosecutor was that of a bull-necked gladiator with an undershot jaw, whose only object was to convict every unfortunate charged with crime, whether innocent or guilty."<sup>43</sup> This thought captured prosecutors' indifference to the evidence and to the possible innocence of the accused. It also conveyed prosecutors' excessive harshness, at least toward the working class and the poor.

In contrast, Jerome was particularly forgiving of those charged with petty offenses, focusing instead on what he regarded as more serious crimes, particularly corruption.<sup>44</sup> He believed a harsher approach toward the poor would erode his popular support and undermine the reform effort.<sup>45</sup> But Jerome's bid for popular support in this respect coincided with a conception of prosecutorial professionalism, which called for making decisions based on a sense of proportionality rather than on popular preference in individual cases. While a more lenient attitude toward criminals was not central to the Progressive Era prosecutors' mission, it was a policy advanced by individual prosecutors, such as Jerome, who were committed to preventing crime instead of simply punishing it.<sup>46</sup> For instance, Jerome often expressed compassion for defendants. Assistant prosecutors reported that Jerome sometimes intervened personally in cases that his office had worked hard to win, asking for leniency for a convicted felon.<sup>47</sup>

To Jerome, equal treatment of the rich and poor was just as important as proportionality. When Jerome was elected, Train explained, the criminal process was marked not just by inefficiency, but also by a particular breed of corruption in which poor and rich were treated unequally.<sup>48</sup> Criminal justice was for sale. It was "prize ring" justice in which the rich controlled all the fighting men.<sup>49</sup> Another reformer argued that "our penal machinery seems to recruit its victims from among those that are fighting an unequal fight in the struggle for existence."<sup>50</sup> The populist, class-based rhetoric, however, was

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<sup>42</sup> *Id.* at 78.

<sup>43</sup> TRAIN, *supra* note 7, at 116.

<sup>44</sup> See O'CONNOR, *supra* note 7, at 63, 70.

<sup>45</sup> *Id.* at 63–64.

<sup>46</sup> In New York, the concern about corruption accompanied a fear that prosecutors were too soft on crime. Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1338 (2002).

<sup>47</sup> O'CONNOR, *supra* note 7, at 120.

<sup>48</sup> TRAIN, *supra* note 7, at 120–22.

<sup>49</sup> *Id.* at 117–18.

<sup>50</sup> JOHN P. ALTGELD, LIVE QUESTIONS: INCLUDING OUR PENAL MACHINERY AND ITS VICTIMS 168 (1890) (emphasis omitted).

confined to a description of the problem. The solution was not to hand the system to the public but to conduct it with greater efficiency and professionalism. Reformers identified the key defect in the existing criminal justice system as the cozy attitude between prosecutors and politicians—that is, prosecutors’ lack of independence from political bosses and the criminal element.<sup>51</sup>

Jerome’s tenure as head prosecutor highlighted the tension between professionalism and populism. Notwithstanding his commitment to professionalizing criminal justice, Jerome employed populist rhetoric. In one speech to a group of wealthy individuals at Carnegie Hall, he raged: “You are too respectable to care about the teeming tenements and the hovels where crouch in darkness a million people of this city.”<sup>52</sup> But Jerome resolved the tension in favor of professionalism in the exercise of authority. Unlike many populists who argued that the working class should have more direct control of the government,<sup>53</sup> Jerome insisted that it was the wealthy who had a special obligation to run the city well: “Every dollar you have laid by, every step you have climbed in the social scale has laid upon you an obligation of civic leadership, and you have failed. You are not bad people. You are heartless people and, above all, stupid people.”<sup>54</sup>

While professionalism was the antidote offered for the ills that seemed to plague the criminal courts, popular prosecutors could fall victim to their own rhetoric. For instance, as District Attorney, Jerome tangled with Howe and Hummel, the most famous defense firm in the city and reportedly one of the most corrupt.<sup>55</sup> He set out to destroy Abe Hummel, or “Little Abe,” who was the underworld’s most effective advocate.<sup>56</sup> Like a superhero battling his nemesis, Jerome sought to destroy Hummel once and for all. Having caught one of Hummel’s famously dissolute and corrupt clients, Jerome fed a story to the press that Hummel himself might escape prison if he agreed to cooperate against his clients.<sup>57</sup> Removing an effective defense lawyer in this way, even if he was entangled in the corrupt activities of those he represented, hardly seems to exemplify a fair and professional criminal justice system. Thus, while he promoted a professional office dedicated to following the

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<sup>51</sup> See Ramsey, *supra* note 46, at 1343–45.

<sup>52</sup> O’CONNOR, *supra* note 7, at 77.

<sup>53</sup> David Fontana, *Unbundling Populism*, 65 UCLA L. REV. 1482, 1486–87 (2018).

<sup>54</sup> O’CONNOR, *supra* note 7, at 77.

<sup>55</sup> *Id.* at 121–45.

<sup>56</sup> *Id.* at 122.

<sup>57</sup> *Id.* at 139–43.

evidence, Jerome took a personal interest in pursuing his opponent, defying the maxim that prosecutors ought to pursue evidence, not individuals.<sup>58</sup>

Ultimately, though, it was Jerome's commitment to professionalism, and his unwillingness to play to a populist demand, that ended his career as a prosecutor. By 1907, the public began to grow impatient with the prosecution of corrupt local officials.<sup>59</sup> Instead, they wanted Jerome to go after Wall Street and the moneyed trusts.<sup>60</sup> Many of his own reform allies balked as he grew more interested in rooting out local corruption than in leading a fight against powerful wealthy families like the Morgans, Whitneys, and Harrimans.<sup>61</sup> Ironically, while his success was built on fair treatment for all and leniency for less fortunate criminals, he was accused in the end of creating "two kinds of law—one for the rich and one for the poor."<sup>62</sup> The professional approach did not, in the end, satisfy the populist demand.

#### D. CRIMINAL JUSTICE AS SOCIAL WELFARE

Part of the professionalization project involved a scientific approach to crime. Progressivism in general was devoted to the proper diagnosis of social problems.<sup>63</sup> The social sciences emerged as a popular field in part because of the promise to describe social problems in a scientific way.<sup>64</sup> A careful, unbiased study of the causes of crime was considered essential to any solution. While this seems obvious now, it marked a departure from the nineteenth-century focus on individual responsibility and retribution.<sup>65</sup>

Progressive Era reformers observed and responded to the interconnectedness of the social fabric. The individual was no longer

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<sup>58</sup> Before being elected District Attorney, Jerome also cut corners as a judge. As an anti-corruption crusader, trailed by reporters, he would enter brothels and gambling clubs, holding trials and cross-examining witnesses on the spot without regard to rules of evidence and procedures. *Id.* at 69–71. The pursuit of professionalism did not always live up to its own aspirations, in part because its proponents, like Jerome, depended on popular support.

<sup>59</sup> O'CONNOR, *supra* note 7, at 252–53.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 253. While the Progressive Era was diverse and there was no one political or social agenda, the movement shared certain themes, one of which was anti-monopolism, which could take the form of a populist rage against concentration of wealth and power. See Rodgers, *supra* note 8, at 123.

<sup>62</sup> O'CONNOR, *supra* note 7, at 254.

<sup>63</sup> See generally HASKELL, *supra* note 6 (emphasizing the increased focus on interdependence and the need to study social conditions as a result); see also Rodgers, *supra* note 8, at 124 (describing the Progressive Era emphasis on social bonds).

<sup>64</sup> See *supra* note 26 and accompanying text.

<sup>65</sup> See WILLRICH, *supra* note 21, at xxi–xxviii.

assumed to be in control of his actions, and the exercise of free will seemed more a fiction than a reality to reformers.<sup>66</sup> Crime did not have one cause, nor did punishment have a single effect on the individual. Progressive Era reformers believed that the stress of the urban industrial world, harsh working conditions, and concentrated areas of poverty produced social ills.<sup>67</sup> They also understood that punishing individuals could have negative consequences for the community, thereby causing an increase in the very problems they sought to alleviate.<sup>68</sup> For example, with a typical Progressive Era emphasis on the effect of environment on crime, Jerome intervened in an assistant's case to ask for a lenient sentence.<sup>69</sup> A longshoreman was convicted for killing a man during a dockside brawl.<sup>70</sup> Jerome argued that the judge should not impose a severe sentence because the crime was a result of the defendant's poor upbringing, his lack of education, and the culture of street fighting.<sup>71</sup>

Not all Progressive Era reformers viewed crime as the product of poverty, culture, and lack of education. For instance, Harry Olson—a chief prosecutor and judge in the late-nineteenth century—linked mental and emotional defects to crime.<sup>72</sup> Many, like Olson, preferred sterilization and institutionalization to social programs.<sup>73</sup> Olson oversaw the implementation of the “morals court,” designed to address public morality, including prostitution.<sup>74</sup> Once again, he and others like him used voluntary associations, criminal sanctions, and expert treatment to address what was increasingly seen as a crisis in morality and a social pathology.<sup>75</sup>

For the majority of Progressive Era criminal justice reformers, however, crime itself became a way to study the social pathologies of an industrial democratic state.<sup>76</sup> The social explanation for crime, in turn, justified greater state involvement in the lives of working class Americans.<sup>77</sup> Besides casting members of the working class as victims of poverty, prosecutors and reformers also blamed working class culture as a cause of criminality.<sup>78</sup>

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<sup>66</sup> *Id.* at xxi–xxii.

<sup>67</sup> *See id.* at 83.

<sup>68</sup> *Id.* at 66.

<sup>69</sup> O'CONNOR, *supra* note 7, at 120.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> WILLRICH, *supra* note 21, at 48.

<sup>73</sup> Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900–1930*, 16 L. & HIST. REV. 63, 63–67 (1998).

<sup>74</sup> WILLRICH, *supra* note 21, at 57.

<sup>75</sup> *Id.* at 176–77.

<sup>76</sup> *Id.* at xxiii.

<sup>77</sup> *Id.* at xxvi.

<sup>78</sup> *Id.* at 138.

Criminal justice reform in the Progressive Era served as one of the origins and early examples of the American welfare state. Reform prosecutors were not only interested in fighting corruption, they also sought to use the criminal law as a means of social control to reform individuals and enforce what they saw as American values in cities increasingly populated by immigrants.<sup>79</sup> A specialized courtroom staff of social workers and psychiatrists was recruited to assist prosecutors in treating individuals and communities instead of simply punishing criminals.

For instance, legislatures increasingly enacted deserter laws with criminal consequences for husbands who abandoned their families.<sup>80</sup> Taxpayers had not yet committed to sharing the burden for these individuals, and legislatures hoped to force wayward husbands to at least take a share of the responsibility. Charities and local government welfare agencies often required that a woman file a criminal complaint against her husband before collecting support. New family courts were established. These specialized courts employed social workers to assess the details of the relationship and determine whether a woman was worthy of help.<sup>81</sup> Voluntary associations, charities, and government agencies worked alongside prosecutors in an attempt to solve the social problem of deserting husbands rather than merely punishing them.<sup>82</sup>

It was not only the laws and mechanisms of government that drew prosecutors to help solve the social problems of the modern industrial state. Individuals also asked prosecutors to help discipline unruly children or punish delinquent husbands.<sup>83</sup> Reformers argued that prisons were ineffective at deterring and rehabilitating individuals.<sup>84</sup> Juvenile courts and

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<sup>79</sup> *Id.* at xxi–xxx.

<sup>80</sup> For instance, Illinois made it a misdemeanor for a husband to abandon or neglect his wife and child: “[E]very person who shall, without good cause, abandon his wife and neglect and refuse to maintain and provide for her, or who shall abandon his or her minor child or children, under the age of twelve years, in destitute or necessitous circumstances, and willfully neglect or refuse to maintain and provide for such child or children, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than one hundred dollars or more than five hundred dollars, or by imprisonment in the County Jail, House of Correction or Workhouse not less than one month or more than twelve months, or by both such fine and imprisonment . . . .” Act of May 13, 1903, 1903 Ill. Laws 155–56.

<sup>81</sup> Michael Willrich, *Home Slackers: Men, the State, and Welfare in Modern America*, 87 J. AM. HIST. 460, 481–82 (2000).

<sup>82</sup> *Id.* at 460–61. Overcriminalization was, at least in this one example, the result of trying to force a more powerful group to support a less powerful one and to use the criminal law to incentivize men to treat women properly.

<sup>83</sup> WILLRICH, *supra* note 21, at 5.

<sup>84</sup> *Id.* at 79.

the broad use of probation were tools prosecutors and judges used to avoid punishment but still address social ills.<sup>85</sup>

The state expanded through its criminal laws to address the social problems of the urban industrial state. Progressive social thought emphasized both the interdependent nature of society as well as the critical role that experts and professionals play in understanding and addressing social problems. Thus, reformers sought to bring professionalism to the criminal justice system not only to rationalize it but also to calibrate it to address these problems rather than punish individuals, who were increasingly seen as the product of social conditions rather than lone instigators of bad acts.

#### E. THE LEGACY OF PROSECUTORIAL PROFESSIONALISM

The Progressive Era influenced criminal justice in various ways. One prominent legacy of the reformers is the cooperative, voluntary association between prosecutors, private organizations, and the state. Today, many cities have drug courts, family courts, and other specialized tribunals where prosecutors work with communities through social workers, mental health professionals, and others. But our focus here is on the reformers' influence on the idea of the role and responsibilities of criminal prosecutors.

The idea of public prosecution, exemplified by William Travers Jerome and others in the Progressive Era, was not wholly innovative. The professional ideal of prosecutors as quasi-judicial officials meting out even-handed justice, without fear or favor, based on the evidence and a sense of proportionality, finds expression in nineteenth-century court opinions and other writings on the prosecutorial duty to seek justice.<sup>86</sup> However, as illustrated by the New York County District Attorney's office, into which Jerome stepped, early twentieth-century prosecutors often ignored—or at best paid lip service to—this ideal.<sup>87</sup> Moreover, the professional ideal was itself underdeveloped. For example, Carolyn Ramsey's history of nineteenth-century prosecution suggests that even those who accepted the notion that prosecutors ought to be politically neutral did not necessarily agree that prosecutors, as representatives of the government, should serve the broader public interest as opposed to serving victims directly.<sup>88</sup> Progressive Era prosecutors significantly advanced earlier professional norms, in part because of the sharpness and visibility of their break with their predecessors.

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<sup>85</sup> *Id.* at 66–68, 81–82.

<sup>86</sup> Bruce A. Green, *Why Should Prosecutors "Seek Justice?"*, 26 *FORDHAM URB. L.J.* 607, 612–14 (1999).

<sup>87</sup> *See supra* Part (I)(B).

<sup>88</sup> Ramsey, *supra* note 46, at 1342–51.



The Progressive Era ideals of criminal prosecution included various related concepts—for example, that prosecutors do not take direction from, or serve the interests of, private parties; that prosecutors serve the public, not the parochial interests of their political parties or patrons; and that prosecutors pursue justice in a disinterested manner, exercising power based on the law and evidence, not personal whim. Later writings reiterated and expanded on these concepts. For example, in a much-quoted 1935 opinion, the Supreme Court reaffirmed that prosecutors represent “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”<sup>89</sup> Then-Attorney General Robert Jackson further explained this concept in a 1940 published speech to federal prosecutors that is also cited often.<sup>90</sup> In 1953, the U.S. Department of Justice began codifying its internal policies and practices in a manual for federal prosecutors to promote consistent enforcement of federal criminal law in accordance with accepted principles.<sup>91</sup> In 1958, in an influential report on lawyers’ role in the adversarial process, Lon Fuller and John D. Randall emphasized that public prosecutors differ from lawyers with private clients in that they are “possessed . . . of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice.”<sup>92</sup>

A decade later, the American Bar Association published the first edition of the Prosecution Function Standards (now in its fourth edition), reflecting a professional consensus about how prosecutors should run their offices and exercise their authority.<sup>93</sup> Since then, contemporary codifications of

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<sup>89</sup> *Berger v. United States*, 295 U.S. 78, 88 (1935).

<sup>90</sup> Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3–6 (1940) (explaining that federal prosecutors should be animated by “the spirit of fair play and decency,” “should have, as nearly as possible, a detached and impartial view of all groups in his community,” and is required “to select the cases for prosecution and to select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain,” and that “[a]lthough the government technically loses its case, it has really won if justice has been done”). On the enduring significance of Jackson’s speech, see generally Charles R. Wilson, “*That Justice Shall Be Done*”—*Constitutional Requirements, Ethical Rules, and the Professional Ideal of Federal Prosecution*, 36 N. ILL. U. L. REV. 111 (2015).

<sup>91</sup> U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL, tit. 2 (1953), <https://www.justice.gov/archive/usao/usam/1953/title2criminaldivision.pdf> [<https://perma.cc/G4HR-69F2>].

<sup>92</sup> Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958).

<sup>93</sup> See Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 10 (2009); see generally CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION (AM. BAR ASS’N 2017).

professional conduct rules for the legal profession have referred to prosecutors' responsibility to use their discretionary power fairly.<sup>94</sup> These writings are a significant part of the framework for contemporary understandings of prosecutorial independence, neutrality, and detachment.<sup>95</sup> While it is hard to trace specific features of modern-day prosecution directly to the Progressive Era reform movement, most prosecutors, courts, and the public now accept certain Progressive Era ideals with little question.

As the twentieth century progressed, professionalism and expertise supplanted political favoritism and cronyism in prosecutors' offices. Although prosecutors still occasionally abuse their authority, and there is evidence that entire offices have abandoned professional norms and processes,<sup>96</sup> the outright corruption of public prosecutors' offices—with lawyers who are either completely ineffective or in the pocket of politicians or wealthy business interests—is far more alien to us now than it was before the Progressive Era.

For elected prosecutors, however, as the Progressive Era reform movement illustrated, there is a tension between populism and professionalism. William Travers Jerome rose to office on a wave of popular support for reform. He restored faith in criminal justice by implementing policies to treat defendants equally regardless of their wealth and status and personally advocating leniency for less fortunate criminals whose bad acts may have been influenced by their circumstances. Ultimately, however, his commitment to professionalism and refusal to interpret his campaign promise as a vow to unseat the powerful and pursue Wall Street and the moneyed trusts regardless of criminal conduct cost him his popular support. To a large extent, the mid- to late-twentieth-century prosecutors addressed the need to garner popular support by campaigning on their experience and expertise, not their policies. Once professionalism became an established qualification for office, prosecutors could turn their fidelity to professional expectations into a selling point, thus depoliticizing prosecutors' offices. Of course,

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<sup>94</sup> MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 1983); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-14 (AM. BAR ASS'N 1980).

<sup>95</sup> See Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. U. L. REV. 805, 844–46 (2020) (identifying prosecutors' skill and expertise as a justification for their independence) [hereinafter Green & Roiphe, *A Fiduciary Theory of Prosecution*]; Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 60–74 (2018) (discussing the history of federal prosecutors' independence and nonpartisanship and the underlying policy reasons) [hereinafter Green & Roiphe, *Can the President Control the Department of Justice?*].

<sup>96</sup> For example, in many cases, prosecutors have been indifferent to discovery obligations. See, e.g., *Connick v. Thompson*, 563 U.S. 51, 70–72 (2011) (declining to hold a prosecutors' office liable for one *Brady* violation even when the office failed to provide adequate training).

contemporary prosecutors' commitment to strict enforcement of the criminal law, which could be characterized as a professional value, also aligned with popular sentiment until recent years.

## II. TWENTY-FIRST CENTURY "PROGRESSIVE PROSECUTORS"

Against the background of popular unease with the criminal process, today's progressive prosecutors have offered an alternative to mainstream prosecutors, just as Progressive Era prosecutors offered an alternative to those exercising prosecutorial power in their day. Of course, the twenty-first-century progressive prosecutors probably have not been looking for inspiration in the endeavors of their Progressive Era predecessors. However, as the following discussion shows, parallels may be drawn.

Although the Progressive Era prosecutors may have had prior prosecutorial experience, they ran for election as outsiders with significant popular support, opposed to the conventional way of running prosecutors' offices as marked by favoritism, cronyism, and incompetence. Today's progressive prosecutors have different—and less stark—complaints about the status quo given improvements during the past century in law and society, but they also run on a promise of change. Like the earlier Progressive Era prosecutors, today's progressive prosecutors advance ideas for reform that take account of the broader socio-economic context in which criminal conduct occurs and cases are prosecuted. They do not simply process cases but seek to change criminal laws, institutions, and procedure. In opposing the status quo and the political establishment responsible for it, today's progressive prosecutors—like the Progressive Era reformers—have sought office by appealing directly to the people by promising to protect the poor and to bring the rich and powerful to justice. Consequently, today's progressive prosecutors, like their Progressive Era predecessors, have faced considerable backlash from the political establishment.

This Part begins in Section A by offering a short review of relevant developments in criminal justice during the past fifty years. Section B then describes the contemporary progressive prosecution movement. Section C focuses particularly on progressive prosecutors' approach to the exercise of discretion and how their approach differs from that of today's mainstream prosecutors, whose ideas of professionalism are a legacy of the Progressive Era. Notwithstanding differences in approach that may look significant from a contemporary perspective, today's mainstream and progressive prosecutors share fundamental understandings that, from a historical perspective, probably make them more alike than different. Sections B and C each draw parallels to the earlier Progressive Era movement.

## A. FRAMING THE NEW PROGRESSIVE PROSECUTION MOVEMENT

Historians of twentieth-century criminal justice in America have documented an increasingly punitive system. Beginning in the 1970s, politicians responded to the increases in the national crime rate to promote a more aggressive approach to crime.<sup>97</sup> Since then, the country has witnessed an increase in the rate of incarceration, disproportionately affecting African-American men and other minorities.<sup>98</sup> In many, if not all, of these accounts, prosecutorial discretion played a dominant role in these trends.<sup>99</sup>

As the country witnessed these changes, there was a historical turn against experts and professionals from both the left and the right.<sup>100</sup> Scholars, the popular press, and others questioned the Progressive Era assumption that experts and professionals would seek truth and transcend political or personal interest. Skeptics argued that professionals are all political actors, subject to bias,<sup>101</sup> and all have their own professional self-interest driving their decisions.<sup>102</sup>

In the political arena, the innocence movement, #MeToo, and Black Lives Matter have popularized some critical aspects of criminal justice.<sup>103</sup> The innocence movement has exposed the fact that some defendants serving long sentences are not guilty. This movement simultaneously demonstrated that prosecutors abuse their discretion at times, contributing to this injustice.<sup>104</sup> The #MeToo movement focused public attention on inequality

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<sup>97</sup> See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 216 (2011).

<sup>98</sup> ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 5 (2016); RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 21–22 (1997).

<sup>99</sup> JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* 206 (2017); Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 *HOFSTRA L. REV.* 1063, 1070–78 (2016).

<sup>100</sup> Rebecca Roiphe, *The Decline of Professionalism*, 29 *GEO. J. LEGAL ETHICS* 649, 665–68 (2016).

<sup>101</sup> *Id.* at 666.

<sup>102</sup> *Id.*; see also Dana A. Remus, *Reconstructing Professionalism*, 51 *GA. L. REV.* 807, 811–14 (2017) (arguing that the neo-liberal notion of lawyers as market actors neglects the ways in which the professional form contributes significant value to society).

<sup>103</sup> Green & Yaroshefsky, *supra* note 2, at 87–93; Lara Bazelon & Aya Gruber, *#MeToo Doesn't Always Have to Mean Prison*, *N.Y. TIMES* (Mar. 2, 2020), <https://www.nytimes.com/2020/03/02/opinion/metoo-doesnt-always-have-to-mean-prison.html> [<https://perma.cc/DK86-H5XU>].

<sup>104</sup> Bennett L. Gershman, *The Prosecutor's Contribution to Wrongful Convictions*, in *EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD* 109, 114–118 (Allison D. Redlich, James R. Acker, Robert J. Norris & Catherine L. Bonventre, eds., 2014); *New Report: Prosecutorial Misconduct and Wrongful Convictions*, INNOCENCE PROJECT (Aug. 25, 2010), <https://www.innocenceproject.org/new-report-prosecutorial-misconduct-and-wrongful-convictions/> [<https://perma.cc/22QC-QCLX>].

in the criminal justice system by protesting the under-enforcement of rape and sexual assault, particularly by wealthy white men. Finally, Black Lives Matter drew attention to the unequal and often dehumanizing treatment of black men by law enforcement.

Thus, the contemporary progressive prosecution movement comes on the heels of concerns about mass incarceration, an increasing distrust of professionals and experts of all sorts, and a political focus on inequality in the criminal justice system. The movement is also accompanied by a growing chorus of scholars who believe the solution to criminal justice problems is handing over control to local communities.<sup>105</sup>

#### B. THE RISE OF THE NEW PROGRESSIVE PROSECUTION MOVEMENT

By late 2019, a number of elected prosecutors across the United States came to be known as “progressive prosecutors.”<sup>106</sup> These included prosecutors elected in Boston, Brooklyn, Kansas City, Philadelphia, and San Francisco.<sup>107</sup> But not all were from the North or from big cities. So-called progressive prosecutors have been elected in Dallas, Houston, Orlando, San Antonio and localities in Louisiana, Mississippi, and Virginia, among other places.<sup>108</sup> In general, beginning in 2015, their campaigns have been funded

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<sup>105</sup> See STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 129–65 (2012); Josh Bowers, *Upside-Down Juries*, 111 NW. U. L. REV. 1655, 1666–67 (2017); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1397–1401 (2017); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1622–23 (2017). For a critique of this solution, see John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 739–809 (2020).

<sup>106</sup> Berman, *supra* note 1.

<sup>107</sup> See, e.g., Jeffrey Bellin, *Defending Progressive Prosecution*, 39 YALE L. & POL’Y REV. (forthcoming 2020) (manuscript at 4) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3479165](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479165)) [<https://perma.cc/J4EY-4VZC>] (identifying Larry Krasner (Philadelphia), Kim Foxx (Chicago), Marilyn Mosby (Baltimore), Rachael Rollins (Boston), Chesa Boudin (San Francisco), and John Creuzot (Dallas)); Emily Bazelon & Miriam Krinsky, *There’s a Wave of New Prosecutors. And They Mean Justice.*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html> [<https://perma.cc/Y56Z-DNU6>] (identifying Mark Dupree (Kansas City) and others as “new, progressive prosecutors”); Sam Resiman, *The Rise of the Progressive Prosecutor*, LAW360 (Apr. 7, 2019, 8:02 PM), <https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor> [<https://perma.cc/68SN-TSS7>] (identifying Wesley Bell (St. Louis), Rachael Rollins (Boston), and Larry Krasner (Philadelphia) as “part of a new wave of progressive prosecutors”).

<sup>108</sup> Bellin, *supra* note 107; Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 18, 23 (2019) (identifying Aramis Ayala (Orlando), Scott Colom (Mississippi), and others as progressive prosecutors); Bazelon

by a consortium led by George Soros, as part of a broader criminal justice reform effort.<sup>109</sup>

It is not entirely clear when these twenty-first-century prosecutors were first labeled as progressives, or when the label became popular. It is certainly not meant as a reference to Progressive Era prosecutors. Prior to 2015, the term “progressive” was used conceptually to characterize liberal, reform-oriented prosecutors.<sup>110</sup> Since then, it has come to be used to describe an identifiable group of elected prosecutors. A 2015 interview with Kim Foxx before her election in Chicago referred to two of the first Soros-backed prosecutors—Scott Colom of Mississippi and James Stewart of Caddo Parish, Louisiana—as “progressive prosecutors.”<sup>111</sup> In a 2017 article, David Sklansky offered ten “‘best practices’ for . . . progressive district

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& Krinsky, *supra* note 107 (stating the progressive prosecutors were elected in five Texas cities, including Dallas, Houston, and San Antonio); *Virginia’s Newly Elected Progressive Prosecutors*, CTR. FOR AM. PROGRESS, <https://www.americanprogress.org/events/2019/12/10/478594/virginias-newly-elected-progressive-prosecutors/> [<https://perma.cc/7Z93-7NUM>] (identifying newly-elected prosecutors of Arlington, Fairfax, and Loudoun Counties); Alex Yablon, *The Suburbs Aren’t Scared of Criminal Justice Reform*, SLATE (Feb. 7, 2010, 5:18 PM), <https://slate.com/news-and-politics/2020/02/virginia-suburbs-progressive-prosecutors.html> [<https://perma.cc/P5CZ-856H>] (“In 2019, progressive prosecutors swept Democratic primary and general elections in the prosperous suburbs of northern Virginia: Fairfax, Loudoun, and Prince William counties as well as the city of Arlington.”); *see also infra* note 130 and accompanying text.

<sup>109</sup> *See* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 79, 83 (2019); Scott Bland, *George Soros’ Quiet Overhaul of the U.S. Justice System*, POLITICO (Aug. 30, 2016, 5:25 AM), <https://www.politico.com/story/2016/08/george-soros-criminal-justice-reform-227519> [<https://perma.cc/JW3U-CSPL>] (discussing Soros’s support for “district attorney campaigns in Florida, Illinois, Louisiana, Mississippi, New Mexico and Texas”); Paige St. John & Abbie VanSickle, *Here’s Why George Soros, Liberal Groups Are Spending Big to Help Decide Who’s Your Next D.A.*, L.A. TIMES (May 23, 2018, 7:00 AM), <https://www.latimes.com/local/california/la-me-prosecutor-campaign-20180523-story.html> [<https://perma.cc/ED2V-6WYP>] (discussing Soros’s support for district attorney campaigns in California).

<sup>110</sup> Before then the term was not used to describe an identifiable group of elected prosecutors, but to describe subordinate or chief prosecutors who were out-of-step with mainstream, tough-on-crime prosecutors in that they supported liberal criminal justice policies or practices. PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 114–19 (2009) (asking “what happens to progressive prosecutors?” and explaining that “[p]eople who go into prosecution with a progressive agenda get derailed”); Bruce A. Green, *Gideon’s Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336, 2356 (2013) (“Progressive prosecutors could establish their own association to advance their perspectives.”).

<sup>111</sup> Leon Neyfakh, *Why Did It Take More Than a Year to Charge the Officer Who Shot Laquan McDonald?*, SLATE (Nov. 25, 2015, 4:41 PM), <https://slate.com/news-and-politics/2015/11/laquan-mcdonald-kim-foxx-on-why-anita-alvarez-mishandled-the-jason-van-dyke-case.html> [<https://perma.cc/2PJ4-WSUM>].

attorneys.”<sup>112</sup> In her 2019 book on the prosecution reform movement, Emily Bazelon described the victors as “[r]eform-minded prosecutors,”<sup>113</sup> but others described these nontraditional elected prosecutors and their like-minded colleagues as “progressive prosecutors.”<sup>114</sup> The label stuck, although some prosecutors in the group might not claim to be “progressive” and others’ claims might be contested.<sup>115</sup>

There is not complete agreement on what distinguishes progressive prosecutors from their mainstream contemporaries.<sup>116</sup> Jeffrey Bellin distinguishes progressive prosecutors from “traditional by-the-book prosecutor[s],” in how progressive prosecutors employ the power of “prosecutorial lenience” to “serve as a check on the [criminal justice] system’s severity by counteracting overly-punitive police, legislatures, judges, and juries . . . .”<sup>117</sup> This, however, is not necessarily as sharp of a break with the status quo as progressive prosecutors suggest on the campaign trail. Bellin notes that mainstream prosecutors customarily decline to prosecute some minor offenders in order to conserve resources. He argues that when progressive prosecutors adopt controversial policies to decline to prosecute “[m]inor crimes that are extremely common, like drug possession, trespassing, and loitering . . . apart from the rhetoric surrounding those decisions, the distinction is one of degree rather than kind.”<sup>118</sup> Bellin also observes that, rhetorically, progressive prosecutors adopt a “‘populist justice’ approach that attempts to mold discretionary decisions to accord with

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<sup>112</sup> David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 UC DAVIS L. REV. ONLINE 25, 28–42 (2017), <https://lawreview.law.ucdavis.edu/online/vol50/Sklansky.pdf> [<https://perma.cc/58DL-T92F>].

<sup>113</sup> BAZELON, *supra* note 109, at xxix.

<sup>114</sup> Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 750–51 (2018) (referring to Krasner, Foxx, Ogg, and Rollins).

<sup>115</sup> See David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 653 (2017) (noting “how difficult it can be to say what makes a prosecutor ‘progressive’”); see also Zach Despart & Samantha Ketterer, *Saying Ogg Not Progressive Enough, TOP Endorses Dem Challenger Audia Jones*, HOUS. CHRONICLE (Jan. 20, 2020, 8:12 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Saying-Ogg-not-progressive-enough-TOP-endorses-14990286.php> [<https://perma.cc/UX2N-6S7Q>].

<sup>116</sup> See Benjamin Levin, *Imagining the Progressive Prosecutor*, MINN. L. REV. (forthcoming 2021) (manuscript at 2) ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3542792](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542792)) [<https://perma.cc/X4SY-F6GP>]; Sklansky, *supra* note 115, at 667 (observing that “[t]he prosecutors who have won election on ‘progressive’ platforms are an eclectic group”).

<sup>117</sup> Bellin, *supra* note 107, at 26; see also Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1541 (2020) (“[Using] the term to refer to prosecutors who have specifically championed or adopted prosecutorial practices that are intended to make the criminal justice system less punitive.”).

<sup>118</sup> Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1249–50 (2020).

constituent preferences.”<sup>119</sup> While the same might previously have been said about “tough on crime” prosecutors, we, too, identify a closer link between progressive prosecutors and their political base.

Other journalists and scholars emphasize progressive prosecutors’ campaign platforms and published policies, particularly insofar as they are meant to redress over-incarceration and racial bias in the criminal process. These include internal policies on when and how to use prosecutorial power. Progressive prosecutors might be distinguished from traditional “tough-on-crime” prosecutors in that their campaign platforms have “included abandoning cash bail, declining low-level charges, not pursuing marijuana cases and closely scrutinizing police conduct, in efforts to reform a system that they say over-incarcerates and disproportionately punishes poor people and racial minorities.”<sup>120</sup>

Like Progressive Era prosecutors, today’s progressive prosecutors are situated in a broader reform movement. Bellin underscores progressive prosecutors’ efforts “to leverage prosecutorial power to achieve criminal justice reform.”<sup>121</sup> But progressive prosecutors also support legislative reform of aspects of the criminal justice system over which they have no immediate control.<sup>122</sup> Many of the prosecutorial practices and legislative policies associated with progressive prosecutors can be found in a 2018 report, “21 Principles for the 21st Century Prosecutor,”<sup>123</sup> designed to advance the movement and give it coherence.

Today’s progressive prosecutors may be regarded as successors to liberal and reform-minded predecessors of a few years earlier such as Craig Watkins, the Dallas prosecutor who established one of the most prominent conviction integrity units out of concern for the fairness and reliability of

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<sup>119</sup> *Id.* at 1218.

<sup>120</sup> Berman, *supra* note 1.

<sup>121</sup> Bellin, *supra* note 118, at 1206; *see also* Daniel Nichanian, *The Politics of Prosecutors*, APPEAL, <https://theappeal.org/political-report/the-politics-of-prosecutors/> [<https://perma.cc/VK4Q-F7RV>] (tracking developments in the prosecutorial reform movement).

<sup>122</sup> *See Note, supra* note 114, at 750 (identifying platforms on decriminalizing marijuana and the repeal of mandatory minimum sentences for drug offenses).

<sup>123</sup> FAIR AND JUST PROSECUTION, BRENNAN CTR. FOR JUST. & THE JUST. COLLABORATIVE, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR (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/SSL6-TYNN>]. For additional issue statements from Fair and Just Prosecution, *see* FAIR AND JUST PROSECUTION, <https://fairandjustprosecution.org/> [<https://perma.cc/HQ2T-Z2U9>].



death-row defendants' convictions,<sup>124</sup> Milwaukee prosecutor John Chisholm, who was lauded in 2015 for his efforts to reduce the rate of incarceration,<sup>125</sup> and others.<sup>126</sup> But the progressive prosecutors are distinguished from their predecessors in part by their numbers, their visibility, and their transparency about their exercise of discretion. Some earlier prosecutors proceeded experimentally by, for example, promoting diversion programs and other rehabilitative measures, especially for low-level offenders.<sup>127</sup> But these were typically prosecutors who ran unopposed or faced no serious opposition and who did not campaign on their innovative efforts.

Both Progressive Era prosecutors and today's progressive prosecutors come from outside the political establishment. Today's progressive prosecutors are also distinguished from mainstream prosecutors by their identity, which adds to their outsider status. A large proportion of progressive prosecutors are African-American,<sup>128</sup> women,<sup>129</sup> or both. Many have little or no prosecutorial experience, instead previously serving as criminal defense or civil rights lawyers.<sup>130</sup> Notably, progressive prosecutors have banded

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<sup>124</sup> See Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2250 (2010) (identifying Watkins' Conviction Integrity Unit as "[t]he most prominent and successful model").

<sup>125</sup> See Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER (May 14, 2015), <https://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment> [<https://perma.cc/H5WR-SJCK>].

<sup>126</sup> See, e.g., BAZELON, *supra* note 109, at 80 ("The partial exceptions to harsh law-and-order prosecution, over the last generation, were a few cities like Seattle and Milwaukee with long-serving D.A.s who emphasized drug treatment and rehabilitation rather than locking people up and throwing away the key.").

<sup>127</sup> *Id.*; ABA COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES 13 (2007), [http://www.rashkind.com/alternatives/dir\\_01/saltzburg\\_ABA%20report.pdf](http://www.rashkind.com/alternatives/dir_01/saltzburg_ABA%20report.pdf) [<https://perma.cc/D4KZ-AX8G>] (discussing programs supported by elected prosecutors in Brooklyn (New York), Multnomah County (Oregon), and elsewhere).

<sup>128</sup> See, e.g., Eli Hager & Nicole Lewis, *Facing Intimidation, Black Women Prosecutors Say: "Enough,"* MARSHALL PROJECT (Jan. 16, 2020, 2:00 PM), <https://www.the-marshallproject.org/2020/01/16/facing-intimidation-black-women-prosecutors-say-enough> [<https://perma.cc/Q3JR-FCTU>] (discussing challenges to progressive prosecutors who are black women, including Kimberly Gardner (St. Louis), Aramis Ayala (Orlando), Kim Foxx (Chicago), Rachael Rollins (Boston), and Marilyn Mosby (Baltimore)).

<sup>129</sup> See *id.*

<sup>130</sup> Several of the progressive prosecutors have replaced subordinates at a notably high rate. See, e.g., Chris Palmer, Julie Shaw & Mensah M. Dean, *Krasner Dismisses 31 From Philly DA's Office in Dramatic First-Week Shakeup*, PHIL. INQUIRER (Jan. 5, 2018, 12:29 PM), <https://www.inquirer.com/philly/news/crime/larry-krasner-philly-da-firing-prosecutors-20180105.html-2> [<https://perma.cc/AYR5-KLD4>]; Brian Rogers, *Shake-Up at the Courthouse:*

together—or been brought together—both to share their experiences and to provide mutual support.<sup>131</sup> Although other elected prosecutors belong to the National District Attorney’s Association or to state prosecutors’ associations, these other prosecutors have less in common with each other and benefit less from mutual exchange.

Having called attention to themselves and to how they differ from their campaign opponents or from other traditional prosecutors, progressive prosecutors have been closely scrutinized.<sup>132</sup> Some left-wing critics of the criminal process have been heartened by their election<sup>133</sup>—but not all.<sup>134</sup> At the same time, progressive prosecutors have also become a lightning rod for criticism from the right.<sup>135</sup> In late 2019, U.S. Attorney General William Barr sharply attacked progressive prosecutors collectively in a speech to the Fraternal Order of Police.<sup>136</sup> Progressive prosecutors have also been attacked

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*Incoming DA Ogg Hands Pink Slips to 37 Top Prosecutors*, HOUS. CHRON. (Dec. 16, 2016, 9:12 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Shake-up-at-the-courthouse-Incoming-DA-Ogg-hands-10802264.php> [<https://perma.cc/D6CG-Q6RY>].

<sup>131</sup> See, e.g., Hager & Lewis, *supra* note 128 (noting that progressive black women prosecutors came to a rally in St. Louis to support Kimberly Gardner). Progressive prosecutors were chief among the signatories to a letter responding to Attorney General Barr’s attack. See, e.g., Statement, Fair & Just Prosecution, Statement in Response to Attorney General Barr’s Remarks to the Fraternal Order of Police (Aug. 16, 2019), <https://assets.law360news.com/1189000/1189627/barr-remarks-sign-on-statement.pdf> [<https://perma.cc/CAA6-KYXS>]. Progressive prosecutors also joined an amicus brief defending St. Louis prosecutor Kimberly Gardner’s efforts to secure the release of an allegedly wrongly convicted incarcerated, Lamar Johnson. Brief of Amici Curiae 43 Prosecutors in Support of the State’s Motion for New Trial, *State v. Johnson*, No. 22941-03706A-01 (Mo. Ct. App. Oct. 23, 2019).

<sup>132</sup> For example, there has been considerable debate over progressive prosecutors’ policies to decline prosecuting certain low-level offenses. See, e.g., John E. Foster, Note, *Charges to be Declined: Legal Challenges and Policy Debates Surrounding Non-Prosecution Initiatives in Massachusetts*, 60 B.C.L. REV. 2511, 2530 (2019); James M. Doyle, *Why Rachael Rollins Makes Boston’s ‘Courthouse Regulars’ Nervous*, CRIME REP. (July 15, 2019), <https://theirimereport.org/2019/07/15/why-rachel-rollins-unnerves-bostons-justice-establishment/> [<https://perma.cc/4DPD-BKCL>].

<sup>133</sup> See, e.g., Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. ONLINE 1, 3–5 (2018), <https://fordhamlawreview.org/wp-content/uploads/2018/09/Davis-BP.pdf> [<https://perma.cc/7M22-XLEU>].

<sup>134</sup> See, e.g., Note, *supra* note 114, at 760–68 (discussing “the inadequacies of progressive prosecution against the rubric of transformative reforms”).

<sup>135</sup> See Davis, *supra* note 108, at 15 (discussing challenges to progressive prosecutors from subordinates and from others outside their offices).

<sup>136</sup> William P. Barr, Att’y Gen., Remarks at the Grand Lodge Fraternal Order of Police’s 64th National Biennial Conference (Aug. 12, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-grand-lodge-fraternal-order-polices-64th> [<https://perma.cc/Z8VQ-GH46>] (maintaining that prosecutors who “style

individually. For example, President Trump accused Philadelphia's Larry Krasner of "let[ting] killers out almost immediately,"<sup>137</sup> and the local U.S. Attorney blamed the shooting of six police officers on "a new culture of disrespect for law enforcement" created by Krasner.<sup>138</sup> Some progressive prosecutors have become embroiled in formal disputes with other public officials. For example, after Orlando's Aramis Ayala announced a policy to decline to seek the death penalty, the state's governor removed her authority over capital cases.<sup>139</sup> The Pennsylvania legislature authorized the state Attorney General to initiate firearms charges in Philadelphia, so that the local police can ask the Attorney General to bring charges that Krasner declines.<sup>140</sup> St. Louis's Kimberly Gardner has clashed with the state's Attorney General over her authority to remedy her predecessor's conviction of an innocent defendant,<sup>141</sup> and she has filed a federal lawsuit against the city, its police officers' association, and others, accusing them of engaging in a racist

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themselves as 'social justice' reformers" are "demoralizing to law enforcement and dangerous to public safety" because they have "refus[ed] to enforce broad swathes of the criminal law . . . [a]nd when they do deign to charge a criminal suspect, they are frequently seeking sentences that are pathetically lenient"). Barr later announced his intention to scrutinize local prosecutors whom he accused of "charging foreign nationals with lesser offenses for the express purpose of avoiding the federal immigration consequences." Sarah N. Lynch & Makini Brice, *U.S. Justice Department Files New Lawsuits in Renewed Push to Pressure 'Sanctuary Cities'*, REUTERS (Feb. 10, 2020, 4:50 PM), <https://www.reuters.com/article/us-usa-justice-immigration/us-justice-department-files-new-lawsuits-in-renewed-push-to-pressure-sanctuary-cities-idUSKBN2042JW> [<https://perma.cc/7XYW-6ER9>].

<sup>137</sup> Virginia Strevia, *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/D26V-XXMV>].

<sup>138</sup> Bobby Allyn, *U.S. Attorney Slams Philadelphia DA over 'Culture of Disrespect for Law Enforcement'*, NPR (Aug. 17, 2019, 4:26 PM), <https://www.npr.org/2019/08/17/752051788/u-s-attorney-slams-philadelphia-da-over-culture-of-disrespect-for-law-enforcemen> [<https://perma.cc/Q38P-NJ57>]; Statement by United States Attorney William M. McSwain on the Shooting of Six Philadelphia Police Officers (Aug. 15, 2019), <https://www.justice.gov/usa-o-edpa/pr/statement-united-states-attorney-william-m-mcswain-shooting-six-philadelphia-police> [<https://perma.cc/KN6P-J5MN>].

<sup>139</sup> *Ayala v. Scott*, 224 So. 3d 755, 759–60 (Fla. 2017).

<sup>140</sup> Akela Lacy & Ryan Grim, *Pennsylvania Lawmakers Move to Strip Reformist Prosecutor Larry Krasner of Authority*, INTERCEPT (July 8, 2019, 4:55 PM), <https://theintercept.com/2019/07/08/da-larry-krasner-pennsylvania-attorney-general/> [<https://perma.cc/UNX3-BHB5>].

<sup>141</sup> Richard A. Oppel Jr., *30 Prosecutors Say Lamar Johnson Deserves a New Trial. Why Won't He Get One?*, N.Y. TIMES (Dec. 25, 2019), <https://www.nytimes.com/2019/12/25/us/criminal-justice-missouri-conviction.html> [<https://perma.cc/RDV9-K4VY>] (discussing *State v. Johnson*, No. ED108193, 2019 WL 7157665 (Mo. Ct. App. Dec. 24, 2019)).

conspiracy which has included securing a special prosecutor to investigate her office.<sup>142</sup>

One of the most high-profile controversies arose out of the Chicago indictment of Jussie Smollett, a well-known black actor, for staging his own attack and pretending that it was a race-based hate crime.<sup>143</sup> The State's Attorney's Office, run by Kimberly Foxx, subsequently dropped all sixteen charges against him, accepting the \$10,000 bond in exchange.<sup>144</sup> Ordinarily, a state prosecutor would either dismiss charges entirely, enter into a plea bargain, or in some circumstances defer prosecution with an understanding that charges will be dismissed if no further wrongs are committed. Although it has become common in corporate criminal cases for the federal government to receive a monetary payment as part of a non-prosecution agreement,<sup>145</sup> it is unusual for state or local prosecutors to accept money (other than restitution) from an individual in exchange for declining to bring criminal charges. Meanwhile, Foxx stated that she was personally recusing herself from the case because she had discussed it with some interested parties.<sup>146</sup> But, rejecting the advice of an adviser in her office, she did not follow the normal recusal procedure in which the court would be asked to appoint a special prosecutor from outside the office, and instead she delegated prosecution decisions to a subordinate.<sup>147</sup> Later, Foxx's office asserted that the resolution of the Smollett case was in keeping with its policy regarding non-violent offenses.<sup>148</sup> There may well have been no impropriety, but Foxx's failure to follow the norms and practices of the office invited critics, including her political opponents, to speculate that this result was improperly motivated.<sup>149</sup>

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<sup>142</sup> Complaint at 2–3, 28, *Gardner v. City of St. Louis*, No. 4:20-cv-00060 (E.D. Mo. Jan. 13, 2020).

<sup>143</sup> See Order at 2–4, *In re Appointment of Special Prosecutor*, No. 19 MR 00014 (Ill. Cir. Ct. June 21, 2019).

<sup>144</sup> *Id.* at 4–5.

<sup>145</sup> See, e.g., Press Release, U.S. Dep't of Just., Defense Contractor Agrees to Pay \$45 Million to Resolve Criminal Obstruction Charges and Civil False Claims Act Allegations (Dec. 4, 2019), <https://www.justice.gov/opa/pr/defense-contractor-agrees-pay-45-million-resolve-criminal-obstruction-charges-and-civil-false> [<https://perma.cc/3626-3YH5>]; Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1810 (2011) (presenting data regarding fines paid by corporations resolving criminal cases with the Department of Justice).

<sup>146</sup> *In re Appointment of Special Prosecutor*, Order at 6–7.

<sup>147</sup> *Id.* at 6–7, 14–16.

<sup>148</sup> German Lopez, *Trump: FBI and Justice Department Will Review the Jussie Smollett Case*, VOX (Mar. 28, 2019, 10:35 AM), <https://www.vox.com/policy-and-politics/2019/3/28/18285310/jussie-smollett-trump-fbi-justice-department> [<https://perma.cc/6DRV-27X3>].

<sup>149</sup> See *id.*

Progressive prosecutors do not espouse identical sets of policies and practices. Nor for that matter do mainstream prosecutors—not all mainstream prosecutors are “tough on crime.”<sup>150</sup> In liberal jurisdictions, many candidates have opposed incumbents or career prosecutors who themselves endorsed policies and practices associated with the progressive prosecution movement.<sup>151</sup> Nevertheless, progressive prosecutors plainly differ in general from most of their contemporaries in ways that seem evident, if not easily encapsulated. And in notable respects, their differences have parallels to the experience of Progressive Era reformers, who were also outsiders who challenged the political establishment based on a different conception of how prosecutors’ offices—and the criminal process in general—should function. In Section C, we turn to the question Bellin posed of whether the difference is one of degree or kind.

### C. COMPARING PROGRESSIVE PROSECUTORS TO THEIR PROGRESSIVE ERA PREDECESSORS

This Section examines whether contemporary progressive prosecutors are distinctive from the Progressive Era tradition and from contemporary notions of prosecutorial professionalism that arose out of it. Our focus is on progressive prosecutors’ exercise of discretion. In particular, we examine progressive prosecutors’ controversial policies to refrain from prosecuting

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<sup>150</sup> For example, Manhattan prosecutor Cyrus Vance, Jr., undertook initiatives later associated with progressive prosecution, such as creating a conviction integrity unit; ending the prosecution of violations, infractions, and certain misdemeanors where the individual poses no risk to public safety; and pursuing alternatives to incarceration. See MANHATTAN DIST. ATT’Y’S OFFICE, *MODELS FOR INNOVATION: THE MANHATTAN DISTRICT ATTORNEY’S OFFICE 2010–2018* 9, 13, 16 (2018), <https://www.manhattanda.org/wp-content/uploads/2018/03/Models-For-Innovation-Report-1.pdf> [<https://perma.cc/S5SA-D5C5>].

<sup>151</sup> For instance, Cyrus Vance, Jr., the District Attorney of New York County, was described in 2017 as “considered one of America’s most progressive prosecutors.” Josie Duffy Rice, *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/5DG9-4QN8>]. Vance himself has claimed credit for “enact[ing] numerous progressive initiatives and reforms that reduce unnecessary incarceration and end the criminal prosecution of thousands of low-level, nonviolent offenses annually.” *Cy Vance for DA*, CYRUS VANCE FOR MANHATTAN DIST. ATT’Y, <http://www.cyvanceforda.com/page/criminal-justice-reform> [<https://perma.cc/ZSE7-6QBC>]. Nevertheless, as of June 2020, a year before the next election and before Vance had announced whether he would step down, he faced five progressive challengers for the Democratic party nomination. See Jeff Colton, *Challengers Blast Vance’s Push to Jail Looters*, CITY & ST. N. Y. (June 9, 2020), <https://www.cityandstateny.com/articles/politics/new-york-city/challengers-blast-vances-push-jail-looters.html> [<https://perma.cc/3W95-4MU4>] (“Tahanie Aboushi, Alvin Bragg, Janos Marton, Eliza Orlins and Assemblyman Dan Quart . . . are all are running as progressive candidates in the 2021 Democratic primary for Manhattan district attorney.”).

certain low-level offenses and to divert certain offenders, particularly non-violent offenders, out of the conventional criminal process and into rehabilitative services.

### *1. The Politics of Criminal Justice Reform*

Both Progressive Era prosecutors and contemporary progressive prosecutors shared broad popular support and the avid attention of local and national voters. While Progressive Era reform was complex, it included a faith in expertise, professionalism, and efficiency, and a focus on curing the social ills that accompanied urban industrial capitalism. Contemporary progressive prosecutors share some of the same concerns about society and, like Progressive Era reformers, believe that the internal processes and organization of prosecutors' offices need reform. At times, it seems as if progressive prosecutors are skeptical about the value of prosecutorial professionalism that we have identified as a legacy of the Progressive Era.<sup>152</sup> But at other times, it seems that progressive prosecutors simply take a different view of how to implement conventional professional values.

Progressive Era prosecutors and criminal justice reformers invoked populist political rhetoric in their campaign speeches,<sup>153</sup> promising to address corruption within prosecutors' offices and the courts themselves.<sup>154</sup> While professionalism was always the main focus of the movement, there was also a promise to root out corruption and hold powerful political bosses accountable for their misdeeds. Contemporary progressive prosecutors similarly appeal to and draw on a popular political movement. But unlike candidates who ran as reformers in the Progressive Era, today's progressive prosecutors aim to root out bias rather than political influence and corruption. Consequently, their method focuses less on reforming internal decision-making processes than on altering substantive priorities that bear on the exercise of discretion.<sup>155</sup> Perhaps the new progressive prosecutors simply take professionalism for granted, but it is at least worth noting a possible tension between their populist rhetoric and the idea of professionalism with its focus on processes rather than outcomes.

Today's would-be progressive prosecutors' campaign platforms address not only considerations of criminal justice policy, but also broader

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<sup>152</sup> See *supra* Part I(D) (highlighting Progressive Era prosecutors' legacy of professionalism).

<sup>153</sup> See, e.g., O'CONNOR, *supra* note 7, at 77–81 (describing William Travers Jerome's populist campaign oratory).

<sup>154</sup> See generally TRAIN, *supra* note 7 (cataloguing the anti-corruption effort). See also WILLRICH, *supra* note 21, at 23.

<sup>155</sup> See *infra* Parts II(C)(2) & II(C)(3).

considerations of social policy, such as racial justice and over-incarceration.<sup>156</sup> Likewise, Progressive Era prosecutors, while focusing on fairness and the evenhanded application of law to fact, also addressed the treatment of offenders and the social nature of crime. Their objective was not only to reduce criminal activity in urban communities, but also to deal with broader social problems.<sup>157</sup> By campaigning on their discretionary charging policies, however, today's progressive prosecutors seem more directly responsive to popular race-based and class-based sentiment. They discuss their discretionary decision-making on the campaign trail, expressly tying their proposed policies regarding prosecutorial discretion to the social and political concerns of the day. In contrast, although seeking popular support by opposing establishment candidates, the Progressive Era prosecutors were wary of popular control over prosecution decisions, recognizing that the pursuit of popular support could distract them from their core mission of ensuring that those who can be proved guilty are adequately punished and others are not.

In campaigning on issues of prosecutorial discretion, progressive prosecutors seem especially different from the many mainstream prosecutors who have had the luxury of running for office unopposed or without serious opposition.<sup>158</sup> But even mainstream prosecutors facing serious opposition have typically campaigned on their experience and expertise, not on their policies.<sup>159</sup> In doing so, mainstream prosecutors convey that they are at least nonpartisan, if not apolitical.<sup>160</sup> Much like judges who picture themselves as

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<sup>156</sup> See, e.g., *Tiffany's Commitments*, CABÁN FOR QUEENS DIST. ATT'Y, <https://www.cabanforqueens.com/issues/> [<https://perma.cc/AR9U-MYYP>] (website of Tiffany Cabán promising to “End Racist Law Enforcement” and “End Mass Incarceration in Queens”). Cabán failed to secure the Democratic Party's nomination for District Attorney of Queens County, New York. Associated Press, *Tiffany Cabán Concedes Defeat in Contested Queens DA Race*, NBC NEWS (Aug. 6, 2019, 10:22 PM), <https://www.nbcnews.com/politics/elections/tiffany-cab-n-concedes-defeat-contested-queens-da-race-n1039841> [<https://perma.cc/RB2M-EQX6>].

<sup>157</sup> See *supra* Part I(C).

<sup>158</sup> See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 592–97 (2009) (finding that incumbent prosecutors seeking reelection rarely have challengers); see also Hessick & Morse, *supra* note 117, at 1545 (finding that, particularly in rural counties, prosecutorial elections are often uncontested, not only when an incumbent seeks reelection but also when the office is open).

<sup>159</sup> Wright, *supra* note 158, at 600–02 (finding that prosecutors campaigning for reelection “talked about character and individual experiences far more often than they discussed the performance of the office as a whole”).

<sup>160</sup> In some jurisdictions, elections for prosecutors are designated as nonpartisan. *Id.* at 606.

nonpartisan—for example, as umpires calling balls and strikes<sup>161</sup>—prosecutors, who have been described as “ministers of justice,”<sup>162</sup> often depict themselves in similarly neutral terms: like bloodhounds, they just “follow the evidence.”<sup>163</sup> The implication is that when presented with similar evidence, other experienced prosecutors, as professionals, would make comparable charging and plea bargaining decisions. What sets prosecutors apart, in their view, is principally their skill in investigating and trying cases, not their individual approach to exercising discretion; they avoid the appearance that they import their own political and social policy preferences into their work.

Of course, the idea that judges merely apply the law to the facts without regard to their own philosophies or preferences is now greeted skeptically, if not derisively, and the public has even greater reason to doubt that elected prosecutors exercise discretion uniformly based on received wisdom. The opacity of prosecutors’ decision-making processes and criteria,<sup>164</sup> which makes pretense hard to expose, leads commentators to decry the difficulty of holding elected prosecutors accountable.<sup>165</sup> One might assume that voters will make better-informed judgments if, like magicians revealing how they perform their tricks, prosecutors explain how they decide whom to charge,

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<sup>161</sup> See Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. AM. L. 497, 551 (2009) (quoting Chief Justice Roberts at his confirmation hearings).

<sup>162</sup> MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 1983). See generally Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419 (2018) (arguing that prosecutors should serve exclusively in the role as ministers of justice and not as adversarial advocates).

<sup>163</sup> See, e.g., Ethan Bronner, *Lawyers, Saying DNA Cleared Inmate, Pursue Access to Data*, N.Y. TIMES (Jan. 3, 2013), <https://www.nytimes.com/2013/01/04/us/lawyers-saying-dna-cleared-inmate-pursue-access-to-data.html> [<https://perma.cc/QH3Q-LYMU>] (quoting executive director of prosecutors’ association: “We, as law enforcement and prosecutors, are obligated to seek the truth and follow the evidence.”).

<sup>164</sup> See TRAIN, *supra* note 7, at 135 (“How, then, are the taxpayers to know a ‘good’ district attorney when they see one? The only answer is that they can’t.”); Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589, 595 (2019).

<sup>165</sup> See Russell M. Gold, *Promoting Democracy in Prosecution*, 86 WASH. L. REV. 69, 94 (2011) (“When voters lack meaningful information with which to check the exercise of prosecutorial discretion, efficiency and sovereignty problems arise.”); Sklansky, *supra* note 115, at 671 (“If elections are to serve more than sporadically as constructive tools for overseeing prosecutors, voters will need better ways to evaluate prosecutors’ performance . . .”).



what charges to bring, and what plea bargains to offer.<sup>166</sup> Progressive prosecutors promise to be more transparent than traditional prosecutors.<sup>167</sup> What some might see as their populist tendencies—in seeming contrast to the Progressive Era promise to avoid popular influence—might be justified as an endeavor to be as open as possible about how they intend to do their work.

Insofar as progressive prosecutors campaign on promises to exercise discretion differently, they distinguish themselves from many of their contemporaries but not necessarily from the Progressive Era prosecutors, who made comparable campaign pledges promising to resist the corroding power of partisan politics. Today's progressive prosecutors make different promises. For example, they promise to resist the corroding power of racial bias. But both responded to their social context and to the perceived challenge of fair and impartial decision-making. And to the extent today's progressive prosecutors avoid campaigning on how they will make charging decisions in any individual case to instead focus on their approaches to exercising discretion—as they generally but not invariably do<sup>168</sup>—concerns about improper popular influence diminish. The danger is that campaign promises to be tough on particular kinds of cases, like police shootings, can sound almost like promises about how prosecutors will exercise their authority in particular cases, since these sorts of cases tend to be rare and high-profile.<sup>169</sup>

## 2. *Lenity in Aid of Proportionality and Equality*

Not surprisingly, a defining feature of contemporary progressive prosecutors' work, and probably the most contentious feature, is the way in which they exercise discretion in investigating, charging, seeking pre-trial

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<sup>166</sup> For a cautionary note, see Green & Roiphe, *A Fiduciary Theory of Prosecution*, *supra* note 95, at 854–55 (arguing that the public is not well-equipped to evaluate prosecutors, that there are reasons to preserve the confidentiality of aspects of prosecutors' decision-making in individual cases, and that the interest in accountability may be better served in ways other than transparency).

<sup>167</sup> See, e.g., *On the Issues*, PARISA FOR JUST., <https://parisaforjustice.com/on-the-issues/> [<https://perma.cc/B7YQ-WHVX>] (website of Parisa Dehghani-Tafti promising to “Increase Transparency and Accountability”).

<sup>168</sup> See Sklansky, *supra* note 115, at 650, 673–74 (citing examples of campaigns where constituents wanted specific individuals indicted, and emphasizing “the risk that prosecutorial decision-making will become inappropriately politicized, particularly when elections focus on the handling of the outcome of isolated cases”).

<sup>169</sup> In Atlanta, for example, District Attorney Paul L. Howard, Jr., rapidly charged an officer in a police shooting right before his reelection. While many were relieved at the decisions, others questioned whether the DA was politically motivated. Richard Fausset, *Swift Charges Against Atlanta Officers Met with Relief and Skepticism*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/30/us/rayshard-brooks-paul-howard.html> [<https://perma.cc/R2SY-X7JR>].

detention, plea bargaining, sentencing, and employing alternatives to prosecution and incarceration. This is by no means their only distinctive emphasis, of course. For example, progressive prosecutors also promise to promote or protect certain group rights,<sup>170</sup> to take measures to prevent or rectify wrongful convictions,<sup>171</sup> and, as noted, to pursue legislative reforms.<sup>172</sup> But what runs most forcefully through progressive prosecutors' campaign platforms, positions, and the literature on which they draw is their commitment regarding the use of discretionary authority. This is unsurprising, since the exercise of discretion is one of the most distinctive, significant, and varying features of American prosecutors' work<sup>173</sup> and perhaps the most puzzling.<sup>174</sup>

Many progressive prosecutors promise more vigorous pursuit of wrongdoing that—in their view—has been under-prosecuted, such as violent sexual offenses, government corruption, corporate crime, and police violence.<sup>175</sup> But more consequential is their promise to mitigate what they perceive as the excessive harshness of the criminal process. The rule of lenity is a longstanding judicial approach to interpreting criminal statutes;<sup>176</sup> many

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<sup>170</sup> See, e.g., *A Roadmap for Reform*, CHESA BOUDIN FOR DIST. ATT'Y 2019, <https://web.archive.org/web/20191212081103/https://www.chesaboudin.com> (promising to work to “[p]rotect immigrant rights,” to “[t]reat sexual assault survivors with dignity,” and to “[g]ive crime victims a voice in every case”).

<sup>171</sup> See, e.g., *Wrongful Convictions Unit*, CHESA BOUDIN FOR DIST. ATT'Y 2019, [https://web.archive.org/web/20200101141322/https://www.chesaboudin.com/wrongful\\_convictions](https://web.archive.org/web/20200101141322/https://www.chesaboudin.com/wrongful_convictions) [<https://perma.cc/92N3-J7AD>] (promising to “[e]stablish a Wrongful Conviction Unit (WCU)” as well as “an Innocence Commission of Experts to Pre-Screen Cases for the WCU”).

<sup>172</sup> See, e.g., *On the Issues*, *supra* note 167 (promising to “support decriminalization and legalization [of marijuana use], with appropriate government regulation”).

<sup>173</sup> Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408–15 (2001). This contrasts with prosecution in civil law countries, where the charging decision is largely a ministerial function. William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L. J. 1325, 1327–28, 1331–34 (1993).

<sup>174</sup> See, e.g., Green & Roiphe, *A Fiduciary Theory of Prosecution*, *supra* note 95, at 824–36.

<sup>175</sup> See, e.g., *A Roadmap for Reform*, *supra* note 170 (promising to work to “[t]est every rape kit” and “hold rapists accountable,” to “[e]ffectively prosecute police misconduct,” and to “[i]nvestigate and prosecute political corruption, corporate crime and landlords who break laws to exploit tenants”).

<sup>176</sup> Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 886, 940–41 (2004) (advocating for strict construction of criminal statutes in response to the overbreadth of the criminal law).

progressive prosecutors have adopted a different sort of lenity principle for prosecutorial enforcement of the criminal law.<sup>177</sup>

Progressive prosecutors' lenity principle can be explained, in part, as an attempt to minimize racial and economic injustice, exemplified by high rates of incarceration, particularly of poor people and minorities.<sup>178</sup> The intent to use prosecutorial discretion to avoid disproportionately or unfairly burdening poor people and minorities is the common goal behind promises to eliminate or reduce applications for cash bail,<sup>179</sup> to divert many non-violent offenders out of the criminal process,<sup>180</sup> including by declining to prosecute certain

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<sup>177</sup> A dramatic example is Maine prosecutor Natasha Irving's promise to "seek restorative justice solutions in all but the most violent cases." Beth Brogan, *How a New District Attorney is Shaking Up the Justice System in Midcoast Maine*, BANGOR DAILY NEWS (May 28, 2019, 3:09 PM), <https://bangordailynews.com/2019/05/28/news/midcoast/how-a-new-district-attorney-is-shaking-up-the-justice-system-in-midcoast-maine/> [https://perma.cc/5PLM-H2NU].

<sup>178</sup> See, e.g., *A Roadmap for Reform*, *supra* note 170 (promising to work to "[e]nd racist disparities" which "plague every step of our criminal justice system" and to "[e]nd mass incarceration"); see also FAIR & JUST PROSECUTION, BRENNAN CTR. FOR JUST. & THE JUST. COLLABORATIVE, *supra* note 123, at 3–14 (stating that "punitive policies [including over-policing of poor and minority communities] have contributed to the incarceration build-up" and identifying ten principles to reduce incarceration, including making diversion the rule, charging with restraint, encouraging "the treatment (not criminalization) of mental illness" and drug addiction, minimizing misdemeanors, and promoting restorative justice); *id.* at 16 (giving example of Milwaukee prosecutor who, after data showed that black people were prosecuted disproportionately for possessing drug paraphernalia, "stopped prosecuting most paraphernalia cases" and instead referred people to drug treatment, thereby reducing disparities). Underlying empirical assumptions about the extent to which racial disparities are attributable to prejudice and implicit bias in law enforcement may sometimes be difficult to prove. See Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, 21 CRIME & JUST. 311, 312 (1997) (discussing how the politically and ideologically charged debate has made it difficult to discuss, let alone pursue, a scholarly approach to empirical data about race and crime).

<sup>179</sup> See, e.g., *A Roadmap for Reform*, *supra* note 170 (promising to "[e]liminate cash bail," which "allows dangerous people with money to buy their way out while poor people languish in jail regardless of how weak the evidence is against them"); *On the Issues*, *supra* note 169 (promising to "[w]ork to [e]liminate [c]ash [b]ail," and stating that "[p]eople should not be kept in jail simply because they are poor").

<sup>180</sup> See, e.g., *Focusing Resources on Serious & Violent Felonies and Holding 100% of DUI's Accountable*, CHESA BOUDIN FOR DIST. ATT'Y 2019, [https://web.archive.org/web/20191220223447/https://www.chesaboudin.com/violent\\_crime](https://web.archive.org/web/20191220223447/https://www.chesaboudin.com/violent_crime) [https://perma.cc/QJ7H-77H2] (promising to "Expand Neighborhood Courts[,] . . . access to PreTrial Diversion[, and] . . . use of Deferred Entry of [Judgment]").

categories of crimes;<sup>181</sup> and to focus on prosecuting violent felons.<sup>182</sup> But progressive prosecutors' lenity also reflects a belief, like that of the Progressive Era prosecutors, that for many offenders there are no sharp distinctions between social problems, mental health problems, and criminal conduct, and that the public interest, including public safety, is often best served by rehabilitative and social services. This helps explain progressive prosecutors' support for alternatives to prosecution and incarceration, such as drug and mental health treatment and restorative justice.<sup>183</sup> Also like Progressive Era reformers, progressive prosecutors are committed to a data-based approach. They have promised to collect and release data both to show how their policies are being implemented and to enable themselves and others to attempt to measure the impact.<sup>184</sup>

Progressive prosecutors' commitment to lenity has echoes in the Progressive Era approach. The Progressive Era movement also invoked the rhetoric of leniency, although not so centrally, and its concept drew in part on a commitment to fair treatment of the poor.<sup>185</sup> But on the surface, the progressive prosecutors' principle of lenity as the norm or presumption for certain offenses, rather than as the occasional exception intended to conserve resources or to avoid grossly unfair or excessive punishment, departs from the approach of the Progressive Era prosecutors. Prosecutors have traditionally been expected to serve a gate-keeping function to avoid

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<sup>181</sup> See, e.g., *On the Issues*, *supra* note 167 (promising "not [to] prosecute simple possession of marijuana").

<sup>182</sup> See, e.g., *Focusing Resources on Serious & Violent Felonies and Holding 100% of DUI's Accountable*, *supra* note 180 (promising to "[f]ocus [r]esources on [s]erious [and] [v]iolent [f]elonies").

<sup>183</sup> See, e.g., *Replace Jail with Mental Health Care*, CHESA BOUDIN FOR DIST. ATT'Y 2019, [https://web.archive.org/web/20191229164958/https://www.chesaboudin.com/mental\\_health](https://web.archive.org/web/20191229164958/https://www.chesaboudin.com/mental_health) [<https://perma.cc/P6LU-X4CY>] (promising to work to "implement a comprehensive transformation of the criminal justice system to decriminalize and treat mental illness, housing instability and substance use as public health issues rather than criminal justice issues").

<sup>184</sup> See, e.g., Matt Daniels, *The Kim Foxx Effect: How Prosecutions Have Changed in Cook County*, MARSHALL PROJECT (Oct. 24, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/10/24/the-kim-foxx-effect-how-prosecutions-have-changed-in-cook-county> [<https://perma.cc/K574-ZK9W>] (Chicago's Kim Foxx "released six years of data" regarding felony prosecutions which showed that "she turned away more than 5,000 cases that would have been pursued by" her predecessor, "mostly by declining to prosecute low-level shoplifting and drug offenses and by diverting more cases to alternative treatment programs"); Catherine Elton, *The Law According to Rachael Rollins*, BOSTON (Aug. 6, 2019, 9:47 AM), <https://www.bostonmagazine.com/news/2019/08/06/rachael-rollins/> [<https://perma.cc/85J9-XFT8>] (reporting that Suffolk County DA Rachael Rollins "hired a data scientist to analyze past performance and measure the impact of new policies, something she says no other DA in the state is doing").

<sup>185</sup> See *supra* notes 48–51 and accompanying text.

prosecuting innocent individuals,<sup>186</sup> and norms of prosecutorial professionalism have long reflected the importance of avoiding public pressure to bring charges without adequate proof.<sup>187</sup> But for Progressive Era reformers, rigorous enforcement of criminal law (when supported by the proof) was the antidote to lawlessness, arbitrariness, and partisanship.<sup>188</sup> Progressive Era reformers expected equality to flow from a professional approach to law enforcement. They were committed to equal treatment of the rich and the poor, which they believed would naturally follow from the anti-corruption effort as well as the focus on the treatment, as opposed to punishment, of offenders.

The lenity rule also departs, although less sharply, from the exercise of discretion by contemporary, mainstream prosecutors who built on the Progressive Era legacy of professionalism. For mainstream prosecutors, decisions to refrain from prosecuting offenders where there is adequate proof have been the exception, not the norm. These decisions were conventionally made on an individual, case-by-case basis, not categorically.<sup>189</sup>

Progressive Era prosecutors believed that equal treatment would follow from the successful effort to prevent arbitrary and partisan charging

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<sup>186</sup> See, e.g., *Rush v. Cavanaugh*, 2 Pa. 187, 189–90 (1845).

<sup>187</sup> See, e.g., Green & Roiphe, *A Fiduciary Theory of Prosecution*, *supra* note 95, at 838 (“[P]rosecutors have a duty to avoid convicting innocent people, which may require declining to bring charges in light of their own professional doubts about an individual’s guilt, even if the public is clamoring for a prosecution.”).

<sup>188</sup> See TRAIN, *supra* note 7, at 119–20 (asserting that district attorneys “go bad” when they “abandon[] the real and only test, which should be applied—namely, that of deciding whether the complainant, come to him for relief, has suffered a violation of his rights. Once a prosecutor gets inoculated with the virus of arbitrary power he becomes the tool of rascals, of politicians, and of his own ambitions alike.”). *But see id.* at 132–33 (recognizing that a prosecutor cannot “bother[] himself with every trifling offense” because prosecutors have limited resources and because there are “so many statutes and ordinances that there is hardly anybody who does not violate some one of them every day of his life”).

<sup>189</sup> See, e.g., Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 *FORDHAM URB. L.J.* 553, 558–62 (1999) (explaining that federal prosecutors’ charging decisions depend on many factors); *Pre-Trial Diversion*, ST. JOSEPH CTY., <https://www.stjoepros.org/697/Pre-Trial-Diversion> [<https://perma.cc/QQ8E-E4SA>] (“Eligibility for the [pre-trial diversion] program is determined by the deputy prosecutor assigned to the case and on a case-by-case basis.”). For example, in death penalty jurisdictions, prosecutors generally make case-by-case determinations of whether to pursue the death penalty in homicide cases that, on the facts, are eligible for capital punishment. See, e.g., *State v. Campbell*, 691 P.2d 929, 942–44 (Wash. 1984) (rejecting constitutional challenge that authorizes prosecutors to seek the death penalty in eligible cases on an ad hoc basis); see also Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 *OKLA. L. REV.* 603, 633–34 (2020) (concluding that it is preferable for prosecutors to be transparent about their categorical policies and practices—e.g., a policy never to seek the death penalty—rather than purporting to make discretionary decisions on a case-by-case basis).

decisions. Professionalism would ensure that the rich did not get an unfair advantage over the poor. By the mid-twentieth century, the legacy of Progressive Era reform was largely taken for granted. Prosecutors came to assume that, as professionals, they could avoid the influence of partisan politics and other impermissible or irrelevant considerations when making charging decisions, while still making distinctions based on legitimate criteria. As a New Jersey judge explained in 1952, the ad hoc exercise of discretion is “the everyday function of a prosecutor,” who may decline or dismiss prosecutions for any of countless different reasons but whose decisions “are unexceptionable if made in good faith.”<sup>190</sup> Eventually, particularly in urban prosecutors’ offices, internal policies governing charging and plea bargaining decisions in recurring types of cases were developed with the aim of providing further protection against arbitrariness and favoritism.<sup>191</sup>

Although lenity therefore is not unique to the contemporary progressive prosecutors, their rationale for lenity seems to set them apart. Mainstream prosecutors have long declined to prosecute based on forensic and administrative considerations—for example, because an offender was more useful as a witness, because a government witness became unavailable, or because a prosecution was simply not worth the cost.<sup>192</sup> Many also implemented a principle of proportionality—e.g., declining to prosecute, or to prosecute as vigorously as the law and facts permit, to mitigate the excessive harshness of the criminal process.<sup>193</sup> And many also sought to implement a principle of equality—i.e., to treat similarly situated individuals

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<sup>190</sup> *State v. Winne*, 91 A.2d 65, 78 (N.J. Super. Ct. Law Div. 1952), *rev’d*, 96 A.2d 63 (N.J. 1953).

<sup>191</sup> See generally Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1971).

<sup>192</sup> FRANK W. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 253–59 (1970) (discussing the decision not to charge because of the suspect’s willingness to cooperate); *id.* at 159 (“[T]here is general recognition everywhere that resources are simply not adequate to fully enforce every penal law. Recognition of the necessity for charging discretion, therefore, is most widespread in terms of limited resources.”).

<sup>193</sup> *Id.* at 186 (“Obviously guilty persons may not be charged when, in the judgment of the police or prosecutor, the consequences of prosecution and conviction seem unduly harmful in relation to the criminal conduct involved or the social and economic circumstances of the suspect.”). In cases involving low-level offenders, state and federal prosecutors have employed formal and informal diversion programs, in which charges are deferred and ultimately declined or dismissed upon satisfaction of conditions such as payment of restitution or refraining from further criminal conduct. See *United States v. Flowers*, 983 F. Supp. 159, 161–65 (E.D.N.Y. 1997) (describing the history and use of deferred prosecution).

equally.<sup>194</sup> In doing so, mainstream prosecutors have cultivated the appearance that prosecuting is apolitical and that discretionary decisions are made by reference to time-honored professional values and understandings.

Insofar as today's progressive prosecutors are implementing different charging criteria from their mainstream counterparts, it is not entirely clear whether their approach to prosecutorial discretion is different in principle. Progressive prosecutors might be understood to be applying ordinary, accepted principles of charging discretion. What is different may not be how they conceptualize their role or, in particular, the principles governing their exercise of discretionary power, but how they see the criminal process and the wider world in which they perform their work. Progressive prosecutors make different judgments from their mainstream contemporaries regarding when punishment is necessary to serve the public interest because they think the public interest is often better served by an alternative to prosecution and punishment. Further, they have a different social understanding about when similarly situated individuals are being treated differently: they perceive that implicit racial bias and structural racism pervade the criminal process, often making it unjust to apply criminal laws as strictly as law and facts would allow.<sup>195</sup>

Progressive prosecutors view the colorblind approach of their predecessors as inadequate given their understanding of how racial bias defines the system. In other words, the professional approach might promise to treat like individuals alike, regardless of particular characteristics like race. But a progressive prosecutor will be wary of how even this seemingly fair approach might have a different impact on African-American communities. For instance, a mainstream prosecutor might offer a more lenient plea to a white defendant with no prior convictions than an African American who had been arrested previously for a nonviolent crime. A progressive prosecutor, understanding how policing policies target young black men, might offer the same deal to both.

In focusing on the social impact of crime and criminal justice, progressive prosecutors build on the legacy of Progressive Era reformers, who introduced the notion that crime is a social rather than an individual problem. Of course, at least some Progressive Era reformers also looked at heredity and race as the source of criminality—a stark contrast from today's progressive prosecutors who would all certainly condemn any such theory.

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<sup>194</sup> Green, *supra* note 164, at 611–13 (“[P]rosecutors generally agree that they should not make arbitrary distinctions among cases—that is, similar cases should be treated similarly.”).

<sup>195</sup> See Gold, *supra* note 165, at 118 (“Allocating prosecutorial resources away from small-time drug offenders could . . . reduce racial disparity in the criminal justice system.”).

### 3. *Categorical Presumptions of Lenity*

Progressive Era reformers and contemporary progressive prosecutors were equally concerned about two different systems of justice: one for the poor and one for the rich. Progressive Era prosecutors believed that the main source of the problem was corruption. Contemporary progressive prosecutors, however, see the problem as more insidious—the result of implicit bias and other forms of discrimination. To address the problem of unequal justice, Progressive Era reformers primarily sought to root out corruption and implement fair and professional procedures. Contemporary progressive prosecutors, among other things, advance lenity, refusing in some cases to prosecute entire categories of crimes.

Progressive prosecutors' efforts to implement their vision of the public good through presumptions against prosecuting certain crimes, such as marijuana possession, are particularly controversial.<sup>196</sup> This policy seems distinctive not just because of its lenity, but also because of the categorical approach to discretionary decision making in which lenity is the norm for certain categories of criminal conduct. Mainstream prosecutors, even those who approve of lenity, tend to take a case-by-case approach.<sup>197</sup> In other words, in mainstream contemporary prosecution, it tends to be the individual that invites the forgiving treatment, not a social situation as a whole. Their implicit understanding is that the legislative judgment to criminalize conduct, thereby subjecting it to criminal prosecution, is generally entitled to respect.

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<sup>196</sup> Following Rachael Rollins's election as Boston prosecutor, the National Police Association filed a complaint with the Massachusetts disciplinary authority, alleging that Rollins's campaign promise not to charge certain crimes reflected a "reckless disregard of the laws." Letter from the National Police Association to Constance V. Vecchione, Office of the Bar Counsel (Dec. 23, 2018), [https://nationalpolice.org/dev/wp-content/uploads/2018/12/DA\\_Rachael\\_Rollins\\_Complaint.pdf](https://nationalpolice.org/dev/wp-content/uploads/2018/12/DA_Rachael_Rollins_Complaint.pdf) [<https://perma.cc/8CHK-ZARQ>]. Nonetheless, Rollins implemented her controversial pledge. See RACHAEL ROLLINS, SUFFOLK CTY. DIST. ATT'Y., THE RACHAEL ROLLINS POLICY MEMO app. C (2019), <http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> [<https://perma.cc/D2QR-YLLT>] (listing fifteen offenses that will presumptively not be charged, including marijuana possession, shoplifting, and trespass, subject to identified exceptions and factors for consideration).

<sup>197</sup> See Stuart Diamond, *The Law; Prosecutorial Discretion: Worthy of Defense?*, N.Y. TIMES (July 22, 1988), <https://www.nytimes.com/1988/07/22/us/the-law-prosecutorial-discretion-worthy-of-defense.html> [<https://perma.cc/SZ3C-QNXX>] ("The discretion afforded American prosecutors is defended on the ground that it provides for case-by-case flexibility and ultimately more leniency for deserving defendants."); Memorandum from N.J. Att'y Gen. Gurbir S. Grewal on Guidance Regarding Municipal Prosecutors' Discretion in Prosecuting Marijuana and Other Criminal Offenses (Aug. 29, 2018), [https://nj.gov/oag/newsreleases18/2018-0829\\_AG-Memorandum.pdf](https://nj.gov/oag/newsreleases18/2018-0829_AG-Memorandum.pdf) [<https://perma.cc/RZD6-8T8R>] (directing that municipal prosecutors may not categorically decline to prosecute marijuana offenses but may decide on a case-by-case basis to recommend that the court accept a plea to a lesser or other offense or to recommend that eligible defendants be accepted into diversion programs).



Legislatures contemplate that prosecutors will exercise discretion when enforcing the criminal law. Therefore, it does not undermine the legislature to decline to prosecute some individuals who are provably guilty of offenses to conserve limited resources. The prosecutor is still deferring to the legislature because the objectives of the criminal law can be achieved without punishment, the benefits of prosecution might outweigh the harms, or the legislative purpose may not be served for other reasons particular to the individual and the circumstances of the case. But adopting a categorical policy not to prosecute conduct that the legislature has said is a crime might seem to countermand the legislative judgment and thus comprise a failure to faithfully execute the law.<sup>198</sup>

At least with respect to marijuana cases, one might argue that progressive prosecutors are simply a step ahead of the state legislatures, which is legitimate when legislatures are slow to repeal laws that become unworthy of enforcement in light of changing social understandings.<sup>199</sup> Progressive prosecutors were not the first to stop prosecuting individuals for possessing small amounts of marijuana in states that had not yet decriminalized its personal use and possession.<sup>200</sup> In generally forgoing prosecutions of marijuana possession, progressive prosecutors might be said to follow in the footsteps of earlier prosecutors who declined to prosecute outmoded victimless crimes such as lewd cohabitation, adultery, and similar sex offenses involving consenting adults. But this does not explain why, for example, Boston's Rachael Rollins adopted a presumption against prosecuting trespassing and shoplifting.<sup>201</sup> No one would suggest that the underlying conduct should be allowed, much less that it has become socially acceptable. Rather, Rollins's rationale is that public safety can be protected more effectively by alternative approaches.<sup>202</sup>

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<sup>198</sup> Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 705 (2014) (“[C]ategorical nonenforcement for policy reasons usurps Congress’s function of embodying national policy in law; it effectively curtails the statute that Congress enacted, replacing it with a narrower prohibition.”).

<sup>199</sup> See Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 225 (2007) (“[W]hen legislatures leave out-dated crimes on the books, other components of democratic governance compensate: politically accountable prosecutors rarely prosecute (and thus effectively nullify) many crimes the public cares little about—and that scholars complain about.”); Melissa J. Mitchell, Comment, *Cleaning Out the Closet: Using Sunset Provisions to Clean Up Cluttered Criminal Codes*, 54 EMORY L. REV. 1671, 1680–83 (2005) (discussing the exercise of prosecutorial discretion to account for shifting social norms).

<sup>200</sup> See Gold, *supra* note 165, at 115–17.

<sup>201</sup> See ROLLINS, *supra* note 196, at app. D-1.

<sup>202</sup> *Id.* at 4–6 (“Sweeping advances in data science and public health have revealed that decades of punitive incarceration are not effectively preventing recidivism and promoting

To critics, underenforcement jeopardizes public safety.<sup>203</sup> Progressive prosecutors disagree. For example, Rollins has asserted, with distinct echoes of Progressive Era prosecutors, that “protect[ing] the community’s safety . . . is best accomplished when the office first considers solutions that direct those in need of treatment—mental health, substance use disorder, or otherwise—to available resources, minimize court involvement, and keep people free of criminal records and able to work and function without government oversight.”<sup>204</sup> There is insufficient data to resolve the empirical disagreement.<sup>205</sup> Progressive prosecutors may be rejecting mainstream prosecutors’ empirical assumptions or predictions and leaving it to future study to decide whose guess is correct. But they are not necessarily rejecting the conventional conception of prosecutors’ role in exercising discretionary power. Once convinced that an individual is provably guilty of a crime, prosecutors are supposed to decide whether to pursue a prosecution based principally on the need to protect the public and on other public interests, such as economy and fairness, that may point in different directions. Progressive prosecutors might argue that they are simply weighing interests differently or striking a different balance.

Critics also challenge this approach as anti-democratic.<sup>206</sup> While state legislators understand and anticipate that prosecutors will decline to

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public safety. A large number of criminal convictions secured by prosecutors nationally are for drug, property, and public order offenses, which are often driven by economic, mental health, and social needs . . . . Data show that a carceral approach to low-level, non-violent offenses can do more harm than good . . . . As a result, jurisdictions across the country are taking a smarter approach to punishment and accountability. Law enforcement agencies and prosecutors’ offices are collecting and analyzing new and varied sources of data, and they are safely beginning to move all but the most serious offenses away from carceral punishment and its downstream collateral harms.”)

<sup>203</sup> See, e.g., Berman, *supra* note 1 (detailing criticisms of progressive prosecutors’ policies in Boston, Dallas, Philadelphia, and San Antonio, including accusations that lenient enforcement policies will create “lawlessness” and a “public safety crisis” and will lead to more crime and more victims).

<sup>204</sup> ROLLINS, *supra* note 196, at app. C-1. As historians of Progressive Era criminal justice reform would argue, however, the substitution of private voluntary organizations for government punishment involves a shift in policing rather than an elimination of social control entirely. See WILLRICH, *supra* note 21, at xxi–xxxix.

<sup>205</sup> See Berman, *supra* note 1 (quoting Professor Richard Berk’s observation that it is too soon to measure the impact of progressive prosecutors’ policies on crime rates).

<sup>206</sup> See, e.g., Steve Volk, *Larry Krasner vs. Everybody: Inside the Philly DA’s Crusade to Revolutionize Criminal Justice*, PHILA. (Nov. 23, 2019, 9:00 PM), <https://www.phillymag.com/news/2019/11/23/larry-krasner-criminal-justice-reform/> [<https://perma.cc/YK26-DUKJ>] (recounting U.S. Attorney Bill McSwain’s criticisms of Philadelphia prosecutor Larry Krasner, including “that Krasner has ‘abdicated’ his responsibility as a prosecutor and disrespected democracy by failing to enforce the law as it’s been passed down to him”); see also Foster, *supra* note 132, at 2534–45.

prosecute some individual offenders, one might assume that they do not expect prosecutors to decline to prosecute whole categories of offenses; Otherwise, the legislature would not have adopted the law in the first place. At least at one time, it might have been considered nonfeasance for a prosecutor to categorically refuse to investigate or prosecute certain crimes, rather than making good faith decisions among individual cases.<sup>207</sup> Today, prosecutors' decisions not to prosecute whole categories of crimes, absent exceptional circumstances, might be viewed as a repudiation of the legislature's intent—and therefore the democratic will—underlying the relevant criminal laws. Even more difficult to square with legislative intent would be situations where prosecutors absolutely decline to bring certain charges.<sup>208</sup> An example is the Orlando prosecutor's decision never to seek the death sentence—that is, never to bring charges of capital murder.<sup>209</sup>

Bellin's answer is that exercising discretion leniently is a legitimate and lawful check on state power to punish, and there is nothing amiss in starting with an understanding that leniency will be the norm with respect to certain criminal conduct.<sup>210</sup> Even if a state legislature does not endorse this approach, the authority to adopt it is implicit in prosecutors' state constitutional status as executive branch officials. While one can debate whether any given prosecutor is exercising this power wisely or abusively—and the electorate can ultimately resolve this question for itself through the democratic process<sup>211</sup>—there is nothing generally anomalous or anti-democratic about a presumption that charges will not be pursued in a category of cases.

There are analogues in mainstream prosecutors' work. For example, the federal and state prosecution of tax crimes—willful failure to file federal or state tax, willful failure to declare income, false statements in tax filings, and the like—is surely the exception, not the rule. Mostly, the problem is left to civil tax authorities to address. But prosecutors diverge from this practice at times, for example, if the tax evader is a repeat offender or—as in Al Capone's case—is guilty of more serious but unprovable crimes,<sup>212</sup> the

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<sup>207</sup> See, e.g., *State v. Winne*, 96 A.2d 63 78–79 (1953) (upholding indictment of local prosecutor for nonfeasance for failing to prosecute individuals for operating gambling establishments).

<sup>208</sup> See Bellin, *supra* note 118, at 1249.

<sup>209</sup> See *supra* note 139 and accompanying text.

<sup>210</sup> Bellin, *supra* note 107, at 29; Bellin, *supra* note 118, at 1248.

<sup>211</sup> While it is impossible to know why some would-be progressive prosecutors were defeated at the polls, the answer may be, in part, that voters regarded their proposed policies as unwise.

<sup>212</sup> Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 583 (2005).

offender has a special obligation to the tax law,<sup>213</sup> or the nature or extent of wrongdoing is particularly egregious. Arguably, progressive prosecutors and mainstream prosecutors simply make different judgments about when a rule of lenity should apply.

#### 4. Holistic Prosecuting

Finally, today's progressive prosecutors seem different from many of their contemporaries in their broad—if not holistic—conception of their role, which follows from their conception of the role of criminal law in society.<sup>214</sup> Conventional prosecutors are primarily case processors: their assigned role is to decide whom to prosecute and how.<sup>215</sup> They leave it to civil government agencies to decide how to deal with the mental health or social problems that might influence offenders' wrongdoing. But progressive prosecutors tend to see criminal problems as interconnected with other social problems—an insight pioneered by the Progressive Era reformers and reinforced more recently with the advent of drug courts and other diversion programs for nonviolent offenders. This explains, at least in part, progressive prosecutors' conviction that providing mental health and social services to offenders rather than prosecuting and imprisoning them can sometimes promote public safety at lower individual and public cost. They champion diversion programs in which offenders are offered entry into treatment as an alternative to prosecution and the risk of incarceration.<sup>216</sup> This is not an innovation, but rather a recent incarnation of the Progressive Era approach to crime as a social problem. In turning away from a more draconian nineteenth-century conception of individual responsibility and crime, the Progressive Era reformers involved the state in a more intricate way in policing individual

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<sup>213</sup> See, e.g., *United States v. Swanson*, 509 F.2d 1205, 1208–09 (8th Cir. 1975) (finding it was a proper exercise of discretion to selectively enforce criminal tax laws against lawyers and accountants).

<sup>214</sup> Much has been written about holistic, or comprehensive, criminal defense representation. See, e.g., James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 HARV. L. REV. 819, 819 (2019). There is no comparable literature about holistic approaches to prosecution, although references are occasionally made to the concept.

<sup>215</sup> Bruce Green, *Urban Policing and Public Policy—The Prosecutor's Role*, 51 GA. L. REV. 1179, 1188–89 (2017) (“The principal objective of a prosecutor’s office ‘is to ensure the efficient and effective prosecution or disposition of cases presented for the prosecution,’ and some offices may view this as the limit of their responsibilities.”) (citation omitted).

<sup>216</sup> Bellin raises issues with this approach, arguing that prosecutors should prosecute or dismiss cases, but not create diversion programs. See Bellin, *supra* note 118, at 1239–40.

lives. The welfare state itself, as the historian Michael Willrich has argued, was born in part of this concept of criminal justice.<sup>217</sup>

While progressive prosecutors are more committed to alternatives to prosecution and incarceration, many conventional prosecutors also employ diversion programs. Contemporary prosecutors are involved in social engineering in other respects as well. For example, federal prosecutors in corporate criminal cases use non-prosecution and deferred prosecution agreements to induce corporations to rehabilitate themselves by adopting internal structural reforms. And “community prosecutors” have used criminal power to address social problems, such as vagrancy, that might ordinarily have been addressed by civil authorities.<sup>218</sup> One might argue that strict case processing is becoming the exception. The difference for progressive prosecutors may simply be in how they tackle social problems and which ones they prioritize.

### III. LESSONS FROM HISTORY

Even though the two criminal justice reform movements, separated by about a century, significantly diverge in goals and substance, progressive prosecutors can both take inspiration from their predecessors and learn from them. We close by drawing from Progressive Era criminal justice reform to offer a few such lessons.

Progressive Era prosecutors such as William Travers Jerome faced the challenge of reconciling professionalism with a movement closely tied to popular support, and contemporary progressive prosecutors face a similar challenge. To the extent that the dictates of professionalism lead to results that win popular support there may be little problem, but progressive prosecutors will not always be so fortunate, particularly because prosecutorial professionalism often calls for making individual decisions based on evidence that is inaccessible to the public.

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<sup>217</sup> See generally WILLRICH, *supra* note 21 (arguing that the advent of the welfare state was rooted in the Progressive Era concept of criminality, which justified a greater intrusion of the government in the lives of immigrants and the poor).

<sup>218</sup> Bruce A. Green & Alafair S. Burke, *The Community Prosecutor: Questions of Professional Discretion*, 47 WAKE FOREST L. REV. 285, 291–92 (2012) (“Community prosecutors typically work with members of the community to identify recurring, ongoing criminal justice problems (drug dealing, graffiti, vagrancy) and then work in tandem with community representatives and agencies to address these problems through a project, policy, or strategy, often involving nontraditional methods.”); see also Green, *supra* note 215, at 1196 (“[W]here vagrancy is the result of poverty or homelessness, a prosecutor must determine whether the state should respond through criminal prosecutions or whether social welfare programs that address the underlying causes will better serve societal ends.”).

While progressive prosecutors embrace policy priorities that win popular support, and the public may have an interest in ensuring that prosecutors implement these policies as promised, the public is in a bad position to assess how policy priorities play out in individual cases, even with greater transparency. Consequently, professionalism often calls for ignoring or even disappointing popular calls for results in individual cases: prosecutorial decisions in particular cases ought to be made by professionally independent prosecutors based on the evidence and applicable, articulable principles and policies. As we learned from the Progressive Era reformers, independence from the public and the political establishment goes to the core objective of the prosecutor's role: exercising discretion on behalf of the public based on a professional commitment to assess the evidence objectively and make decisions in a fair and even-handed way.<sup>219</sup> But it is harder to achieve that independence when prosecutors garner popular support with a particular agenda.

Particularly given that strong social movements have helped propel progressive prosecutors to victory, the public may expect charging and plea-bargaining decisions in individual cases to conform to its preferences. For example, the public may perceive that progressive prosecutors, who were elected against the background of the #MeToo movement, abandon their campaign promises if they fail to charge or convict powerful defendants in high-profile sexual-abuse cases. Likewise, given the popular progressive conviction that mainstream prosecutors mishandled cases of police violence against civilians, a progressive prosecutor's constituency may feel betrayed by a progressive prosecutor who fails to successfully prosecute violence by police, even when from the prosecutor's perspective, the result is dictated by law and fact. Part of the legacy of Progressive Era criminal justice reform is that public preferences should not govern criminal justice outcomes in individual cases, and contemporary prosecutors undoubtedly share this understanding. But in making evidence-based decisions, especially the decision not to charge, progressive prosecutors may disappoint their constituencies. Conversely, progressive prosecutors may be influenced by public pressure in subtle and unacknowledged ways. As recent controversies in federal criminal prosecution remind us, prosecutors' independence from those who put them in office cannot be accepted as a given.<sup>220</sup>

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<sup>219</sup> See Green & Roiphe, *A Fiduciary Theory of Prosecution*, *supra* note 95, at 846–47 (arguing that the primary fiduciary obligations of prosecutors are criminal justice ones, such as the obligation to charge only when there is sufficient evidence to prove guilt).

<sup>220</sup> See, e.g., Katie Benner, Charlie Savage, Sharon LaFraniere & Ben Protess, *After Stone Case, Prosecutors Say They Fear Pressure from Trump*, N.Y. TIMES (Feb. 12, 2020),

One lesson may be that prosecutors should discourage unreasonable expectations. While nuance is not normally a feature of the stump speech, progressive prosecutors today should be careful in their campaign rhetoric not to promise too much in terms of results in particular types of cases and to remind and educate the public about the nature of the criminal process. This may not be easy, given that races for prosecutorial office are competitive and social media encourages the publication of brief, popular sentiments, but progressive prosecutors committed to the values of professionalism and progressive policies ought to emphasize both.

Another challenge is suggested by a point of contrast between the current era and the Progressive Era—the challenge of preserving professional values while implementing new, progressive policies. In some offices, upon a progressive prosecutor’s election, there has been a purge of career prosecutors.<sup>221</sup> This is not entirely surprising. To change the office culture, newly elected prosecutors might understandably replace prosecutors who are hostile to new policies and practices or encourage them to leave. But this is where today’s progressive prosecutors might be expected to take a different approach from Progressive Era prosecutors who had a powerful incentive to replace incompetent staff members who got their jobs through the political machine. Prosecutors’ offices have come a long way since then, and even where progressive prosecutors disagree with their predecessors’ approach to questions of policy, they are likely to benefit from career prosecutors’ institutional memory, relationships with the court, and commitment to internal policies and practices that promote enduring professional values (e.g., avoiding wrongful convictions, candor to the court, fair process) that progressive prosecutors wish to preserve. While retaining career prosecutors might be problematic in that it can slow the pace of progressive change, continuity can also serve to ensure that professional values are maintained.<sup>222</sup> Progressive prosecutors’ fresh perspectives as outsiders may be useful in changing a recalcitrant institutional culture, but, given the importance of preserving professionalism, progressive prosecutors may be better served by converting at least some career prosecutors rather than replacing them.

In addition to avoiding all-out purges of personnel, progressive prosecutors should be careful not to cut procedural or ethical corners in order to obtain particular results. Even if the result is fair, the prosecutorial norms,

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<https://www.nytimes.com/2020/02/12/us/politics/justice-department-roger-stone-sentencing.html> [<https://perma.cc/3DDQ-BN2U>].

<sup>221</sup> See, e.g., Palmer, Shaw & Dean, *supra* note 130.

<sup>222</sup> Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C.L. REV. 523, 582–86 (2020). For a critique of the growing chorus of academic support for democratizing criminal justice, see Rappaport, *supra* note 105, at 739–809.

traditions, and ethical rules not only ensure fair results, they also reassure the public about the legitimacy of the process. This reassurance is particularly important because the progressive platform is controversial, and political opponents might look for reasons to question the legitimacy of particular outcomes. Chicago prosecutor Kimberly Foxx's departure from convention in Jussie Smollett's case is a stark example, which may have done more harm to the progressive cause than good.<sup>223</sup> Following established norms, policies, and practices helps reassure the public that the resolution of a case is fair. And this sort of legitimacy is critical, particularly in a high-profile, politically charged case such as Smollett's.

A similar tension between professionalism and populism may arise, not only in individual cases, but with respect to progressive prosecutors' charging policies, such as a policy to divert individuals arrested for marijuana possession to social programs. In advancing alternatives to incarceration, contemporary progressive prosecutors are taking a page from the Progressive Era playbook. But prosecutorial policies are not legitimate merely because they enjoy popular support. While some may see popular support as conferring democratic legitimacy on lenity policies, such as a policy against prosecuting possession of marijuana for personal use, popular support is neither a necessary nor sufficient justification. A lesson of the Progressive Era, with its emphasis on professionalism over populism, was that prosecutors should set policy priorities—for example, prioritizing corruption prosecutions—based on the same sorts of professional values (e.g., proportionality and even-handed justice) that govern decision making in individual cases.<sup>224</sup>

While diversion programs have persisted for so long in part because of evidence pointing to their effectiveness, they are also imperfect and often of unproven use. They may have unintended negative consequences.<sup>225</sup> The Progressive Era has taught us that blind faith in the association between

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<sup>223</sup> See *supra* notes 143–149 and accompanying text.

<sup>224</sup> On this point, we disagree with a forthcoming article arguing that local popular support itself confers democratic legitimacy on progressive prosecutors' policies of lenity. See W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3542575](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542575) [<https://perma.cc/FGS7-JRFU>]; cf. MILLER, *supra* note 173, at 160 n.21 (noting differing views on whether, and to what extent, prosecutors should weigh prevailing community sentiment in deciding not to enforce criminal laws).

<sup>225</sup> See, e.g., Michelle Chen, *Why Do Sex-Work Diversion Programs Fail?*, NATION (Sept. 25, 2015), <https://www.thenation.com/article/archive/why-do-sex-work-diversion-programs-fail/> [<https://perma.cc/V6W7-QXG2>] (discussing criticisms of New York City's diversion program for sex workers).



criminal justice and private organizations is misplaced.<sup>226</sup> Social programs, such as diversion programs, advanced by prosecutors can be an improvement over harsh carceral punishment but may still be a problematic form of social control. They invariably involve a greater degree of government supervision and involvement in the daily lives of individuals, especially the poor and minorities.<sup>227</sup> Putting too much faith in these sorts of programs, as the Progressive Era reformers did, may lead to disappointment or to the creation of unanticipated problems. While experimentation is laudatory, today's progressive prosecutors have a responsibility to follow up by collecting data (as many have promised to do) and then by fixing or replacing what does not work. Ultimately, evidence-based judgments about whether, as a matter of policy, to pursue alternatives to prosecution in particular classes of cases should be made by elected prosecutors—not by public referendum—against the background of professional criminal-justice values and expectations, not based exclusively on social policy preferences.

#### CONCLUSION

Although Progressive Era reformers and today's reform-oriented progressive prosecutors are separated by about a century and much has changed over that time, a comparison between them provides some interesting and important insights. This is so for two reasons. First, progressive prosecutors inherit important traditions and legacies from the Progressive Era movement, and, second, both groups of prosecutors were elected on a wave of popular support. Progressive Era prosecutors and today's progressive prosecutors, unlike most of today's mainstream prosecutors, were elected by a politically active, mobilized, and vigilant segment of the public. It is a sign of a healthy democracy when those affected by criminal justice policy are active and involved in the nature of its implementation. But, at the same time, this direct involvement can pose a threat to prosecutorial independence. Because prosecutors' decisions in individual cases are—and ought to be—driven by complex considerations of fact and law, they are not well-suited to popular oversight. Some degree of insulation is necessary to ensure fairness in individual cases. Prosecutorial

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<sup>226</sup> See, e.g., Lee Romney, *Private Diversion Programs Are Failing Those Who Need Help the Most*, REVEAL (May 31, 2017), <https://www.revealnews.org/article/private--are-failing-those-who-need-help-the-most/> [<https://perma.cc/4VLG-AQMK>] (discussing criticisms of diversion programs administered by a for-profit company).

<sup>227</sup> See Jonathan Simon, *Is Mass Incarceration History?*, 95 TX. L. REV. 1077, 1097–98 (2017) (reviewing ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (2016)).

independence is under greater strain when the prosecutor has been elected by a populist movement.

The task of the Progressive Era prosecutors was to replace the corrupt and incompetent uses of criminal authority by prosecutors controlled by political machines. In contrast, today's progressive prosecutors, although also reformers, are not promoting wholesale change. While the progressive prosecutors of this century share their predecessors' concern for the broader social context in which the criminal law is enforced, they do not make a priority of improving the efficiency or professionalism of their staff, as did the Progressive Era reformers. They seem instead to accept the expectations of prosecutorial professionalism, including prosecutorial independence, that are a legacy of the Progressive Era. Their emphasis is on the enunciation and implementation of internal policies and practices—particularly those promoting lenity through the exercise of prosecutorial discretion with respect to diversion, charging, plea bargaining, and sentencing—that, in their view, better express the aspirations of the criminal justice process.

Thus, current progressive prosecutors do not see themselves as rejecting or reinterpreting the principles of prosecutorial professionalism that they inherited from their mainstream contemporaries. They can argue that their reform agenda simply expresses their conviction that mainstream prosecutors do not adequately meet professional expectations in practice, or that mainstream prosecutors have not adequately applied general professional norms to the particular social and criminal-justice problems of the day. Progressive prosecutors' innovations—even such sharp departures as the wholesale diversion of certain classes of criminal cases out of the criminal justice system—can largely be justified in terms of now-conventional professional norms of prosecutorial discretion. They point to data to support their argument that the concerns that all prosecutors share for the public safety and the well-being of the community are better served, in certain classes of cases, by alternatives to incarceration.<sup>228</sup>

But at the same time, there is a risk that—however newly-elected prosecutors might rationalize their reform agendas—they will be tempted to conform to the expectations of those who elected them to office. Many of their constituents may focus more on the particular decisions made by progressive prosecutors in individual cases than on whether the decision-making process is principled, fact based and data driven. Progressive prosecutors' challenge as elected officials will be, when professional principles demand, to make unpopular as well as popular decisions, while

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<sup>228</sup> See, e.g., *supra* note 202 (quoting Rachael Rollins's policy memo).

striving to preserve popular support. As the Progressive Era prosecutors learned, that is no easy task.