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The Place of the Prosecutor in Abolitionist Praxis

Cynthia Godsoe

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Cynthia Godsoe

ABSTRACT

Progressive prosecutors have been widely hailed as the solution to mass incarceration. This Article argues, to the contrary, that the legal arm of law enforcement can never be the full answer to its problems. While scholars critique police and call to defund and dismantle them, they overlook prosecutors. Building on the work of abolitionist organizers to theorize and critique progressive prosecutors, the Article asks two key questions that scholars have left unanswered: 1) Should the system be changed from within? and 2) Can the system be changed from within? In other words, can reformers prosecute, and can prosecutors transform? I answer the first question with cautious optimism, concluding that prosecutors' institutional power and ethical mandate to "do justice" can be repurposed to start reversing decades of building the carceral state. As to whether prosecutors can transform the system, I conclude they cannot. Transformation entails ceding power to communities, divesting criminal system resources, and investing in societal supports that actually keep people safe. Prosecutors' essential function to convict and punish people cannot meaningfully achieve the dismantling of the carceral state or the buildup of alternatives. Three pitfalls in particular impede them: exceptionalism, net-widening, and the hero complex.

This inquiry is particularly timely as the progressive prosecutor movement grows and some of the first wave of them face reelection. Despite their rhetoric and reforms, progressive prosecutors are not shrinking their own footprint. None are decreasing their budgets; indeed, most are asking for more resources to "help" people. This Article demonstrates that these prosecutors are not the magic bullet. They are at best a half-measure to achieve real change, and at worst, a "reformist reform" which risks reentrenching and relegitimizing the criminal system under new cover. I conclude by gesturing to the limits of all lawyers in fixing the carceral monster they largely created and calling for greater attention to grassroots, bottom-up change.



AUTHOR

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INTRODUCTION

“Prosecution is a systemic and structural component of the criminal punishment system. Discussions of ‘good,’ ‘bad,’ ‘progressive,’ or ‘regressive’ prosecutors keep the focus on individuals and are a distraction that impedes the need for structural and systemic change.”¹

—#Defund and Defang the Manhattan DA²

It is now widely accepted that mass incarceration must be rolled back and that the criminal legal system operates to subjugate communities already marginalized by race and class.³ Also widely agreed upon is the fact that prosecutors have played a significant role in the building of the modern carceral state.⁴ The recent elections of self-described “progressive prosecutors” have been greeted with great enthusiasm, even hailed as a possible solution.⁵ It has also generated a good deal of legal scholarship, most of it focused on the exciting possibilities of prosecutorial reform.⁶ This optimism is understandable in our

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1. CMTY. JUSTICE EXCH., COURTWATCH MA, FAMILIES FOR JUST. AS HEALING, PROJECT NIA & SURVIVED AND PUNISHED NY, ABOLITIONIST PRINCIPLES & CAMPAIGN STRATEGIES FOR PROSECUTOR ORGANIZING 2 (2019), https://static1.squarespace.com/static/5e1f966c45f53f254011b45a/t/5e46c2744feb170e01fc09f7/1581695604941/CJE_AbolitionistPrinciples_FINAL.pdf [<https://perma.cc/WSD2-YN6T>].
 2. *Issue Platform and Demands for the Manhattan District Attorney*, PEOPLE’S COAL. FOR MANHATTAN DA ACCOUNTABILITY, <https://peopleforprosecutoraccountability.org/demands> [<https://perma.cc/B7UE-SEVV>].
 3. For a few insightful examples of the vast overcriminalization literature, see, e.g., LOIC WACQUANT, *PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY* (2004); JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* (2007); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME* (2016); Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2054 (2017).
 4. JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons From Administrative Law*, 61 STAN. L. REV. 869, 869-70 (2009). *But see* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 171 (2019) (arguing that prosecutors do not have as much power as others assert they do).
 5. *See, e.g.*, EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019).
 6. *See, e.g.*, Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1415 (2021); Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law*

world of legislative “pathological politics” and largely powerless courts, and it is borne out in these prosecutors’ platforms for change on three axes: procedural, substantive, and in relationship to their constituencies. District Attorneys (DAs) such as Larry Krasner in Philadelphia, Rachael Rollins in Boston, Parisa Taft in suburban Virginia, and others, have, among other things, implemented bail reform; categorically declined to prosecute lower-level offenses, such as shoplifting, drug possession, and trespassing; and issued unprecedented data on racial disproportionality in the criminal system.⁷ Not just their policies but also their demographics look very different from the vast majority of DAs who are white male career prosecutors.⁸ In November 2020, a reformer, George Gascon, was elected DA in the country’s largest prosecutor office, Los Angeles, while one of the most fast-moving progressive prosecutors, Kim Foxx of Chicago, was reelected.⁹ These prosecutors, however, also face rabid opposition, including intervention from other politicians, lawsuits from their own employees, and even

Enforcers Then and Now, 110 J. CRIM. L. & CRIMINOLOGY 719, 719 (2020) [hereinafter Green & Roiphe, *When Prosecutors Politick*]; Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. 1, 1 (2018) (“If we ever hope to fix our broken criminal justice system, we must work to replicate [the progressive prosecutor] model throughout the country”) [hereinafter Davis, *The Progressive Prosecutor*]; Vida B. Johnson, *Prosecutors Who Police the Police Are Good People*, 87 FORDHAM L. REV. 13, 13 (2018); David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 25 (2017) [hereinafter Sklansky, *The Progressive Prosecutor’s Handbook*]; see also Note, *The Paradox of “Progressive Prosecution”*, 132 HARV. L. REV. 748 (2018).

7. See Diana Becton, Satana Deberry, Kim Gardner, Kim Foxx & Rachael Rollins, *Opinion, Prosecutors Are Not Exempt From Criticism*, POLITICO (Aug. 25, 2020, 12:00 PM), politico.com/news/magazine/2020/08/25/black-prosecutors-11-ideas-393577 [https://perma.cc/VJZ8-VTYG]. This group of prosecutors is transparent to an unprecedented degree about many things, including their goals and methods. See, e.g., RACHAEL ROLLINS, SUFFOLK CNTY. DIST. ATT’Y, THE RACHAEL ROLLINS POLICY MEMO, SUFFOLK CNTY. DIST. ATT’Y (Mar. 2019), https://static1.squarespace.com/static/5c671e8e2727be4ad82ff1e9/t/5d44a5f79807850001acc3d9/1564780028241/The+Rachael+Rollins+Policy+Memo.pdf [https://perma.cc/8CPG-T3YQ].
8. Ninety-five percent of elected chief prosecutors are white and 79 percent are white men, per a recent study; in contrast, those identifying as progressives are much more likely to be female or people of color. See Joe Watson, *Study: 95 Percent of Elected Prosecutors Are White*, PRISON LEGAL NEWS (Feb. 8, 2017), https://www.prisonlegalnews.org/news/2017/feb/8/study-95-percent-elected-prosecutors-are-white [https://perma.cc/AER6-CLB7]; REFLECTIVE DEMOCRACY CAMPAIGN, JUSTICE FOR ALL: WHO PROSECUTES IN AMERICA? (2015), https://wholeads.us/wp-content/uploads/2019/03/Justice-For-All-Report_31319.pdf [https://perma.cc/UJA9-ZY56].
9. Gascon’s victory was in no small part due to extensive organizing by the Black Lives Matter movement. See Sam Levin, *How Black Lives Matter Reshaped the Race for Los Angeles’ Top Prosecutor*, GUARDIAN (Oct. 15, 2020, 6:00 AM) https://www.theguardian.com/us-news/2020/oct/15/los-angeles-district-attorney-black-lives-matter [https://perma.cc/268S-5BH4].

recall votes.¹⁰ As the movement is growing and some of this first wave of progressive prosecutors has been reelected, it is a particularly important time to assess their impact, potential, and limits.

At the same time, the murder of George Floyd and long-overdue recognition of state violence against people of color are bringing—for the first time—widespread traction to imagining alternatives to the criminal system. Abolitionist visionary Angela Y. Davis explained that she has never seen an opportunity like this, “an extraordinary moment . . . that rapidly shifts popular consciousness and suddenly allows us to move in the direction of radical change.”¹¹ Scholars are interrogating the role of police.¹² Some are even concluding that the structural racism and violence endemic to law enforcement make reforms impossible; instead, dismantling and transformation are needed.¹³ These calls to defund and reimagine, however, seem to skip over progressive prosecutors who pledge to reform and “fix” the system.¹⁴ What makes prosecutors different?

I argue here that they are *not* different. In making this argument, I build on the ideas of community movements who recognize that even this new type of prosecutor remains an arm of law enforcement, contributing to the carceral state.¹⁵ Structural racism, the criminalization of poverty, the system’s ineffectiveness at

10. See *infra* note 84.

11. Amy Goodman, *Uprising & Abolition: Angela Davis on Movement Building, “Defund the Police” & Where We Go From Here*, DEMOCRACYNOW! (June 12, 2020), https://www.democracynow.org/2020/6/12/angela_davis_historic_moment [https://perma.cc/5FZF-6TNA] (interviewing Angela Davis). See also Tonya Mosley & Allison Hagan, ‘An Extraordinary Moment’: Angela Davis Says Protests Recognize Long Overdue Anti-Racist Work, WBUR (June 19, 2020), <https://www.wbur.org/hereandnow/2020/06/19/angela-davis-protests-anti-racism> [https://perma.cc/KR7V-679C] (interviewing Angela Davis).

12. See, e.g., Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 930 (2021) (“If we truly want to achieve public safety, we need to look beyond minimizing the harms of policing and focus on what it is exactly the police do daily, asking whether the police are the institution best suited to the panoply of societal needs they confront regularly.”). Movement actors, however, have been making these arguments long before the summer of 2020. See, e.g., Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [https://perma.cc/RNE5-6HG2] (discussing some of this past activism).

13. See, e.g., Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U.L. REV. 997 (2021); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778 (2021).

14. #102 Prosecution at the Crossroads, CRIM. INJUSTICE PODCAST (Apr. 16, 2019), <http://www.criminalinjusticepodcast.com/blog/2019/04/16/102-prosecution-at-the-crossroads> [https://perma.cc/J2HL-V6YY].

15. See CMTY. JUSTICE EXCH. ET AL., *supra* note 1; *New Campaign: Defund Prisons. Defend Survivors!*, SURVIVED & PUNISHED (Oct. 20, 2020), <https://survivedandpunished.org/2020/10/20/defund-prisons-defend-survivors> [https://perma.cc/6P99-5UCG].

preventing injuries, and the immense harms it brings to the accused and their families and communities are systemic features, not bugs.¹⁶ Prosecutors are antithetical to abolition because they maintain systems of harm, enact state violence, and retain the power to break up families and communities; accordingly, true transformation of the system includes the abolition of prosecutors along with policing and other forms of state surveillance and punishment.¹⁷ In short, progressive prosecutors are only the solution if they work themselves out of a job.

In this Article, I analyze prosecutors through an abolitionist lens, which allows for a comprehension of the criminal system's history as rooted in slavery and other forms of racialized social control. In her seminal article *Abolition Constitutionalism*, Dorothy Roberts describes abolitionism as both “destructive and . . . creative,” dismantling harmful, racist systems and rebuilding safer and more equal ones.¹⁸ An abolitionist lens also allows for the assessment of all reforms against the horizon of dismantling the carceral state, revealing that true change is impossible without a reimagining of how we prevent and redress interpersonal and societal harms.¹⁹ As Mariame Kaba explains in the context of policing, “the only way that we will address oppressive policing is to abolish the police. Therefore all of the ‘reforms’ that focus on strengthening the police or ‘morphing’ policing into something more invisible but still as deadly should be opposed.”²⁰ Similarly

16. See *infra* Subpart IV.A.

17. See *Survived & Punished NY* (@survivepunishNY), TWITTER (June 30, 2020, 9:51 AM), <https://twitter.com/survivepunishny/status/1278008172339478528?s=21>.

18. Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 43 (2019) (discussing Du Boisian abolition democracy). I similarly use abolitionism here to mean dismantling the carceral state, empowering communities, and building new institutions to address harm. My definition of the carceral state includes quasi-criminal systems like the family regulation system. I have previously applied an abolitionist lens to examine sex offenses among juveniles, as well as the child welfare/family regulation system. See Cynthia Godsoe, *#MeToo and the Myth of the Juvenile Sex Offender*, 17 OHIO ST. J. CRIM. L. 335 (2020) [hereinafter Godsoe, *The Myth of the Juvenile Sex Offender*]; Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173 (2017) [hereinafter Godsoe, *Recasting Vagueness*] (analyzing juvenile sex offenses); Cynthia Godsoe, *An Abolitionist Horizon for Child Welfare*, L. & POL. ECON. PROJECT BLOG (Aug. 6, 2020), <https://lpeproject.org/blog/an-abolitionist-horizon-for-child-welfare> [https://perma.cc/AJV7-2SMF] [hereinafter Godsoe, *An Abolitionist Horizon for Child Welfare*]; see also Caitlyn Garcia & Cynthia Godsoe, *Divest, Invest, and Mutual Aid*, 12 COLUM. J. RACE & L. (forthcoming 2022).

19. See Derecka Purnell, *How I Became a Police Abolitionist*, ATLANTIC (July 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/how-i-became-police-abolitionist/613540> [https://perma.cc/6M6B-P3LC] (“[W]e should expand restorative and transformative processes for accountability.”). For further discussion of abolitionist theory, see *infra* Subpart I.C.

20. Mariame Kaba, Opinion, *Police “Reforms” You Should Always Oppose*, TRUTHOUT (Dec. 7, 2014), <https://truthout.org/articles/police-reforms-you-should-always-oppose>

to Kaba's concerns about police reforms, progressive prosecutors may "smooth out the wheels of injustice" and render less visible the institution's inherent brute force, thus prolonging its existence.²¹ Nonetheless, abolitionist organizers also recognize that this is a "long-term project" that will sometimes entail working with and through state actors, albeit always keeping an eye on the end goal.²² Accordingly, while a number of Black Lives Matter activists have acknowledged that "[n]o people have ever voted their way to freedom or to liberation," they have also very effectively mobilized in recent elections, for instance, to vote out the punitive Los Angeles DA.²³ As organizer Joseph Williams explained, "we also know that during this time, we have the opportunity to do the most concrete thing in our power to make sure that Jackie Lacey is not still our district attorney . . ."²⁴

Through this abolitionist lens, I consider two key questions that scholars, while theorizing numerous aspects of progressive prosecution, have largely left unanswered: (1) *Should* the system be changed from within? and (2) *Can* the system be changed from within? In short, can reformers prosecute, and can prosecutors transform? These questions raise issues about prosecutor and defense attorney ethics and roles, and surface the complicity of lawyers in the broader political economy of the criminal system.²⁵ I answer the first question, whether reformers should prosecute, with a cautiously optimistic yes. Historically, prosecutors have almost exclusively interpreted justice as maximizing convictions

[<https://perma.cc/B3LB-GUMR>] (suggesting legislation to decrease and redirect policing funds to other social goods as one example of a proposal to support instead of police-strengthening "reforms").

21. Raj Jayadev & Pilar Weiss, *Organizing Towards a New Vision of Community Justice*, L. & POL. ECON. PROJECT BLOG (May 9, 2019), <https://lpeproject.org/blog/organizing-towards-a-new-vision-of-community-justice> [<https://perma.cc/8QKZ-NM34>].
22. Roberts, *supra* note 18, at 108.
23. Adrian Florido, *Black Lives Matter Activists Push to Vote Out Los Angeles Prosecutor*, NAT'L PUB. RADIO (Oct. 21, 2020, 4:09 PM), <https://www.npr.org/2020/10/21/926329248/black-lives-matter-activists-push-to-vote-out-los-angeles-prosecutor> [<https://perma.cc/3KW2-FKSN>] (interviewing Joseph Williams, BLM organizer).
24. *Id.*
25. See GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* (1992) (critiquing the traditional regnant lawyering model as elitist and paternalistic); see also Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 *MERCER L. REV.* 715, 716 (2018) (examining the participatory defense movement, which seeks to "transform the landscape of power in the court system . . ." and arguing that public defenders are also part of the elite framework that, albeit inadvertently, perpetuates the current system) (quoting Raj Jayadev, *What is "Participatory Defense,"* ALBERT COBARRUBIAS JUST. PROJECT, <https://acjusticeproject.org/about/purpose-and-practice> [<https://perma.cc/2JRD-STAE>] [hereinafter Godsoe, *Participatory Defense*]). See also *infra* Subpart IV.A.

and punishment.²⁶ Recently, some scholars, and these prosecutors themselves, have countered that justice can be repurposed to mean ending racial disparities and reducing mass incarceration.²⁷ I agree. The exercise of discretion is not new—just its direction. Boston DA Rachael Rollins thus had good reason to point out the hypocrisy of those who challenge a more lenient use of prosecutorial discretion: “None of you cared about prosecutorial discretion as this train was flying 100 miles an hour towards mass incarceration.”²⁸

As to whether prosecutors can fix the system from within, I conclude that they cannot—not as they are currently operating. The problem is both literal—the numbers are such that meaningful decarceration cannot occur without including serious crimes—and conceptual. The racial hierarchy and dominant narrative of punishment are so central to the American national identity that system actors cannot imagine a different way to address harm.²⁹ Despite their many positive changes and some rhetoric around “transforming” the system, none of these progressive prosecutors are actually ceding power and funding; indeed, many seek ever more resources and influence over their communities. They do not discuss reducing the footprint of prosecutors or, usually, the criminal system more broadly.³⁰ Much of their platforms’ content, such as wrongful conviction review and discovery reforms, simply raise the practice up to a floor it should already be at or fix egregious errors of their predecessors. Other changes, like expanding diversion programs, are “reformist reforms” that can further entrench or expand the system rather than “unravel[ing] the net of social control through criminalization.”³¹ Even those changes that are transformative, like eliminating cash bail or categorical declinations, are vulnerable because they are based on discretion alone and could be summarily reversed by a new prosecutor.³²

26. See *infra* text accompanying notes 59–64, 136–137.

27. Angela J. Davis, *The Prosecutor’s Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1079 (2016) [hereinafter Davis, *The Prosecutor’s Ethical Duty*] (both by “exercis[ing] their discretion and not pursu[ing] criminal charges in appropriate cases . . . [and by] consider[ing] the broader goals of the criminal justice system [and] seek[ing] reform . . .”).

28. *Episode 10 - Season 1 Finale: Obstacles to Our Movement*, CHASING JUST., at 52:07 (Aug. 11, 2020), <https://www.chasingjusticepodcast.com/episodes/episode-10-overcoming-obstacles> [<https://perma.cc/6S3C-BTX2>].

29. See *infra* Subpart III.A.

30. Instead, they aim to reduce incarceration and shift the targets of prosecution. See *infra* Subpart III.C.1.

31. RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 242 (2007) (revitalizing and defining the term ‘reformist reforms’). See further discussion *infra* Subpart III.B.

32. See *infra* notes 192–193 (elaborating on this problem and flagging more long-lasting reforms).

Three challenges in particular impede prosecutors from being truly transformational, despite their best intentions: (1) exceptionalism,³³ (2) net-widening,³⁴ and (3) the “hero” syndrome that often characterizes prosecutors (and maybe lawyers more broadly).³⁵ This last is perhaps the most “sticky.” The very persistent—literally think of any episode of the *Law & Order* franchise—cultural narrative of the prosecutor as “good guy” or “hero” impedes reflection about their role in the system and obscures what most prosecutors actually do—the vast majority of their cases are not homicides or even assaults, but rather low-level drug and property offenses.³⁶ Most problematically, this narrative distracts from systemic change efforts, analogous to how the focus on a few “bad apple” police officers obscures structural problems.³⁷ I do not mean to suggest that traditional prosecutors are better or to demean the importance of these changes for the people living in these communities; the impact of progressive prosecutors’ reforms is real and significant. Rather, I want to point out that well-intentioned reforms often bring unintended long-term consequences, as could the focus on building up

33. See *infra* Subpart III.C.1.

34. See *infra* Subpart III.C.2.

35. Black Lives Matter founder Patrisse Cullors recently argued persuasively that this self-image is driving a significant amount of the near-rabid backlash against California progressive prosecutors, noting that “yesterday’s heroes may fear they are today’s villains. Accepting or adopting criminal justice reform could undermine their very sense of self.” Patrisse Cullors, Opinion, *What Two California Recall Efforts Say About Criminal Justice Reform*, L.A. TIMES (Feb. 4, 2021, 3:05 AM), <https://www.latimes.com/opinion/story/2021-02-04/gascon-boudin-recall-criminal-justice-reform> [<https://perma.cc/C53B-7M8D>]. For further discussion, see *infra* Subpart III.C.2.

36. Considering the case of a public defender who was charged for blog posts critical of DA’s offices, a group of public defenders noted that the hero complex prevents prosecutors from evaluating their carceral role. “People generally respect and admire prosecutors. Historically [they] have been considered righteous protectors of vulnerable victims of crime who could do no wrong. That time is over.” Guest Columnist, Opinion, *Letter: 650 Public Defenders Stand Behind Sajid Khan*, SAN JOSE INSIDE (June 23, 2020), <https://www.sanjoseinside.com/opinion/letter-650-public-defenders-stand-behind-sajid-khan> [<https://perma.cc/TDB9-H9GJ>]; see also *infra* Subpart I.A.

37. The response to the murder of George Floyd starkly reveals this dynamic; many are satisfied with the prosecution of the officers who killed him, rather than looking at the bigger picture. See Tami Abdollah, *Analysis: “White America Can Keep Kicking Derek Chauvin,” But What Does It Mean for Systemic Change?*, USA TODAY (June 25, 2021), <https://www.usatoday.com/analysis-white-america-can-keep-kicking-derek-chauvin-but-what-does-it-mean-for-systemic-change> [<https://perma.cc/GH4V-XY7S>] (pointing out that the criminal system and the Derek Chauvin trial in particular focus on individual police officers acting badly rather than holding the system itself accountable). Racialized police violence is not a problem we can prosecute our way out of. See generally ALEX S. VITALE, *THE END OF POLICING* (2017) (discussing the dismantling of the police state and implementation of noncarceral alternatives).

prosecutorial power as the only solution to the excessive punishment and structural racism of the criminal system.³⁸ Progressive prosecutors are useful as a half measure, but truly changing the system requires a great deal more.

What would further movement toward an abolitionist horizon look like? I develop that argument throughout the four parts of this Article. I begin in Part I by mapping the political economy of progressive prosecution, including prosecutors' outsized role in building the carceral state, the progressive movement's stated goals, and the backlash against them, and I finish with a brief consideration of statist and non-statist paths to reform. In Part II, I turn to the question of whether reformers can prosecute. Considering separation of powers issues, legal ethics, and the day-to-day work of prosecutors, I cautiously answer yes. As to the second, more difficult, question, whether prosecutors can truly create change, I answer no—or at least not unless they dramatically downsize and cede their epistemic and material power.

In Parts III and IV, I argue that truly transformative change requires prosecutors to cede expertise and power to communities, as well as divest from prosecutorial and other law enforcement funding while supporting investment in truly independent community supports.³⁹ This entails not just listening to a variety of voices but also giving up decisionmaking power and control.⁴⁰ Addressing harms outside of or far removed from the criminal system in restorative and transformative justice programs is another way to empower communities, particularly communities of color harshly impacted by the criminal system; to better serve many victims; and to diminish prosecutorial power.⁴¹ Progressive prosecutors are not doing this; indeed, none have decreased their budgets, and many have asked for more resources⁴² rather than redirecting investments in their offices to other social supports, such as housing and mental

38. For an analogous argument, see, e.g., Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136 (2015) (arguing that the framing of the marriage equality movement, while a hugely important win for many people, also reinscribed gender roles and further entrenched marriage as the only relationship meriting state support).

39. See Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1162–63 (2015) (describing abolitionism as entailing “fundamentally reconstructing social, economic and political arrangements.”). See also Simonson, *supra* note 13 (arguing that crime policy reform ought to be driven by shifting decisionmaking power over policing institutions to subordinated groups); but see Trevor George Gardner, *By Any Means: A Philosophical Frame for Rulemaking Reform in Criminal Law*, 130 YALE L.J.F. 798 (2021) (responding to Simonson and countering that crime-policy reform proponents should prioritize “equitable crime policy” over “inclusive crime policymaking.”).

40. See *infra* Subpart IV.A.1.

41. See *infra* Subpart IV.A.2.

42. See *infra* Subpart IV.B.1.

health treatment.⁴³ Reallocating resources to support communities not only effectively addresses the root causes of most crime but also “challeng[es] the belief that caging and controlling people makes us safe [B]asic necessities such as food, shelter, and freedom are what really make our communities secure.”⁴⁴

I conclude by suggesting the limits of lawyers. As much as lawyers are loath to admit it, we are not the solution to the excesses of the carceral state. The profession is, almost by definition, focused on tradition and history, resistant to change, and cautiously incremental when change does occur. And while legal scholars and reformers view police and prisons as carceral institutions, we avoid recognizing lawyers and courts as such.⁴⁵ Part of this is reluctance by lawyers to give up status and power, a reluctance that legal scholars share. Scholars also should expand limited definitions of expertise and learn from movement actors who are shaping law on the ground.⁴⁶ Most importantly, true change necessitates recognizing that transformation must come from the ground up, and honoring communities’ exhortations for elites to “get out of the way.” The Movement for Black Lives tells us this is essential so that “those most impacted [can] . . . control the laws, the institutions, and policies that are meant to serve [the people].”⁴⁷ From this people’s perspective, progressive prosecutors are at best a harm reduction stop on the way to the final goal—“not co-strugglers, but targets we can push on the path to eliminating prosecution altogether.”⁴⁸

43. To be clear, this means services that are not tied to prosecutors, as diversion programs and victims’ services often are. CMTY. JUSTICE EXCH. ET AL., *supra* note 1, at 2 (“Prosecutors are not social workers, therapists, housing advocates They cannot and should not provide services to people who are in need.”).

44. *About*, CRITICAL RESISTANCE, <http://criticalresistance.org/about>. [<https://perma.cc/HJC7-R2JS>]; *see also* #8toAbolition, 8 TO ABOLITION, <https://www.8toabolition.com> [<https://perma.cc/3KWC-SLK7>] (calling for “[a] world without prisons or police where we can all be safe” and laying out eight steps to get there including “invest[ing] in community self-governance, provid[ing] safe housing for everyone,” and “invest[ing] in care, not cops.”).

45. I have been critiqued for questioning their good work. I understand the political pitfalls involved in such an inquiry but also believe that the profession is particularly resistant to self-reflection and overestimates its role in change. *See, e.g.*, Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005) (detailing how law scholars overestimate law’s importance to social movements).

46. *See* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 846 (2021). *See infra* notes 337-340.

47. *Community Control*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/community-control> [<https://perma.cc/7KNN-7K6Z>].

48. CMTY. JUSTICE EXCH. ET AL., *supra* note 1, at 1.

I. THE POLITICAL ECONOMY OF PROGRESSIVE PROSECUTION

It is widely agreed that prosecutors wield tremendous, if not the most, power in the criminal legal system.⁴⁹ Using a political economy lens helps expose that power and show how the institution of prosecution contributed significantly to the growth and (false) legitimacy of the American racist carceral state.⁵⁰ After detailing this landscape, this Part describes the growing progressive prosecutor movement. It concludes with a brief discussion of the role of the state in abolition theory.

A. Prosecutors' Outsized Role in Building the Racist Carceral State

Historically, prosecutorial power has been a virtual one-way ratchet to increased criminalization and punishment.⁵¹ The number of prosecutors has grown exponentially in recent decades, as have overcriminalization and mass incarceration.⁵² In the post-trial world, where the vast majority of cases settle via plea bargains, prosecutors' unilateral control of charging offenses means they are frequently judge as well as jury.⁵³ Given the lack of consistent checks on prosecutors by courts or legislatures, it is not hyperbole to describe them as "leviathans" or the "real lawmakers."⁵⁴

There are also few internal checks on prosecutors. Law as a self-regulating profession has particularly failed in this regard; despite widespread discovery and

49. See PFAFF, *supra* note 4. It should be noted here that there is not one criminal "system;" instead there are many overlapping institutions and actors who do not operate in a rational, neutral fashion. See Bernard Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419 (2018).

50. See Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1820 (2020) (encouraging "[inquiry] into how law creates, reproduces, and protects political-economic power, for whom, and with what results.") (emphasis omitted); see also ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 85 (2003) (arguing that transforming the system means "tak[ing] into account economic and political structures and ideologies.").

51. PFAFF, *supra* note 4.

52. I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1571 (2020) (recounting the growth in state prosecutors nationwide from 17,000 in 1974 to 27,000 by 2001 and ongoing growth).

53. See Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. (Nov. 20, 2014), <https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty> [<https://perma.cc/T3VP-CQG4>]; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

54. Barkow, *supra* note 4, at 874, 885–86; Stuntz, *supra* note 53, at 506. To be clear, I am not arguing that the legislature and courts have no power, but I agree with most commentators that prosecutors have the greatest ability to quickly exercise their power and, relatedly, that progressive prosecutors are being hailed as the solution in large part because of this power.

other malfeasance, including many instances leading to wrongful convictions, very few prosecutors nationwide have been sanctioned in any way.⁵⁵ In addition to a failure to monitor, there is also limited guidance about what prosecutors are supposed to do. Their role has been little theorized beyond general statements about “doing good” and what “the people” want—which never applied to all of the people and often did not even apply to victims. This is in stark contrast to the other branch of law enforcement, the police.⁵⁶ Aiming to gain greater clarity and to cabin the role, scholars have recently theorized prosecutors as fiduciaries to the public, or as servants of the law.⁵⁷ These frames are helpful but still do not change the fundamental nature of the prosecutor’s role, which is to convict and punish people.

This ambiguity and “hero” image obscure what most prosecutors actually do, which is not what the public assumes.⁵⁸ Most prosecutors participate in the assembly line system of justice as social control, sometimes stacking charges to coerce guilty pleas or (rarely) gaining convictions; they mostly prosecute minor drug and property offenses, not homicides or even low-level assaults.⁵⁹

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55. See Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 51-53 (2016). Indeed, the widespread failure to hold prosecutors accountable led to my involvement in a project to file disciplinary grievances against prosecutors found by an appellate court to have committed misconduct. See George Joseph, *Prosecutors Wrongfully Convicted Three Men Who Spent 24 Years Behind Bars. Will They Be Disbarred?*, GOTHAMIST (May 6, 2021), <https://gothamist.com/news/prosecutors-wrongfully-convicted-three-men-who-spent-24-years-behind-bars-will-they-be-disbarred> [https://perma.cc/X28P-GGZZ]; see also Jonah E. Bromwich, *They Publicized Prosecutors’ Misconduct. The Blowback Was Swift*, N.Y. TIMES (Nov. 10, 2021), <https://www.nytimes.com/2021/11/10/nyregion/queens-prosecutors-misconduct.html> [https://perma.cc/U9SR-HXV9]; see also Editorial Board, *How Can You Destroy a Person’s Life and Only Get a Slap on the Wrist?*, N.Y. TIMES (Dec. 4, 2021), <https://www.nytimes.com/2021/12/04/opinion/prosecutor-misconduct-new-york-doj.html> [https://perma.cc/UC3D-AR33] (describing the status quo system as a “prosecutor-protection racket”). For more information on the project, see *It’s Time to Hold Prosecutors Accountable* #AccountabilityNY, ACCOUNTABILITYNY, <https://accountabilityny.org> [https://perma.cc/4Z57-WQVH].
56. See *supra* notes 12–13 and accompanying text.
57. See Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory of Prosecution*, 69 AM. UNIV. L. REV. 805 (2020) [hereinafter Green & Roiphe, *A Fiduciary Theory*]; Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203 (2020) (arguing that the “servant-of-the-law” paradigm eliminates prosecutors’ focus on winning and frees them to reallocate resources to more serious crimes). See also David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473 (2016) (describing prosecutors’ complex role as bridges between various institutional actors and contexts in the criminal system).
58. See Kaba, *supra* note 12 (making the same argument detailed above about the false narrative regarding the police function).
59. See ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018) (describing the societal discipline function of the prosecution of lower level crimes). For one illustration of how prosecutors focus too many resources on minor crimes, see Jessica Smith, Ross Hatton, & Christopher Tyner, *Detailed*

Prosecutors also contribute to the criminalization of poverty and public health problems, such as substance abuse and mental illness, through the prosecution of low-level “disorder” crimes to segregate and stigmatize swaths of the population.⁶⁰ They file thirteen million misdemeanor cases annually,⁶¹ despite recent research that prosecuting misdemeanors increases recidivism.⁶² More broadly, this massive churn of cases means that prosecutors inevitably perpetuate the structural racism of the criminal legal system, as it dehumanizes millions of people, especially people of color who make up a disproportionate amount of those involved as both victims and defendants.⁶³ Caring, or even learning about, each individual case would grind the system to a halt.⁶⁴ There is no way to avoid the racism baked into the system, which is a particularly stark reality for prosecutors who are people of color. Paul Butler eloquently describes this dilemma. He became a prosecutor to address the under- and over-enforcement in Black communities like the one where he grew up; initially “an idealist,” he soon realized what he really was doing, like his peers, was “selectively appl[ying] criminal laws, defending the police, and locking up a lot of black people.”⁶⁵

Few other prosecutors acknowledge their role in perpetuating a hierarchy of race and class.⁶⁶ Yet the criminal system they have helped create is tremendously costly in fiscal and human terms—dehumanizing both those harmed and those committing harm, perpetuating racism, and entrenching whole communities in multigenerational cycles of poverty and stigma.⁶⁷ Although crime victims are

North Carolina Statewide & County-Level Criminal Charging Data, UNIV. N.C. SCH. GOV'T CRIM. L. BLOG (June 8, 2020, 10:00 AM), <https://www.sog.unc.edu/blogs/nc-criminal-law/detailed-north-carolina-statewide-county-level-criminal-charging-data> [<https://perma.cc/2WQA-GF4C>].

60. For several examples from overcriminalization literature, see *supra* note 3; see also BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001).
61. ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 2* (2018).
62. Amanda Y. Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution*, NAT'L. BUR. ECON. RSCH. (Mar. 2021), <https://www.nber.org/papers/w28600> [<https://perma.cc/SDD4-5TK5>] (demonstrating the historic lack of transparency from and data about prosecution, this ground-breaking project resulted from progressive prosecutor Rachel Rollins' consent to opening her office's records to researchers).
63. See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007) (critiquing prosecutors for perpetuating racial disparities).
64. See Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089 (2013).
65. Paul Butler, *How Can You Prosecute Those People?*, in *HOW CAN YOU REPRESENT THOSE PEOPLE?* 15, 16–17 (Abbe Smith & Monroe H. Freedman eds., 2013).
66. See Britton-Purdy, Singh Grewal, Kapczynski & Rahman, *supra* note 50 (arguing that a legal framework does so by positing the law as neutral and ignoring distributional concerns).
67. See *supra* note 3 for sources documenting the historic and ongoing function of the criminal system to control populations, particularly those marginalized by race and class; see also NAT'L

frequently invoked as beneficiaries of the system, it is increasingly clear that many, if not most of them, are dissatisfied with the system and would prefer alternatives.⁶⁸ Yet the punitive machine continues to grow, with funding and resources increasing over time despite the system's abysmal record of ineffectiveness at preventing and redressing harm.⁶⁹ To take just one example, federal spending on approaches to Intimate Partner Violence (IPV) started at an already skewed distribution of 62 percent of funding allocated to the criminal legal system and 38 percent to social services in 1994; by 2013, the allocation to social services was only 15 percent of the grants.⁷⁰ In 2017, \$266 million went to the criminal system, with only \$30 million to housing, despite significant evidence that housing is the greatest need for survivors of IPV and that the criminal system is ineffective at preventing IPV and other violent crime.⁷¹

B. The Progressive Prosecutor Movement

The current progressive prosecutor group differs from traditional prosecutors in numerous ways. First, they look different. Elected chief prosecutors are a particularly nondiverse group—95 percent are white, and 79

RSCH. COUNCIL NAT'L ACADS, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 125 (2014) (documenting the extent and racial disproportionality of U.S. incarceration).

68. See Cynthia Godsoe, *The Victim/Offender Overlap & Criminal System Reform*, 87 BROOK. L. REV. 1319 (2022) (noting that only 41 percent of crime victims report to the police and only eight percent of victims of violent crime receive services, often because their diverse needs and experiences are not recognized in the system); see also Capers, *supra* note 52, at 1565–82 (documenting victims' dissatisfaction with the criminal system). Victims already marginalized by race, class, gender identity, or similar characteristics are treated particularly badly by the system. See, e.g., Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313 (2015) (describing how marginalized girls are more likely to be prosecuted for prostitution than seen as victims of trafficking and statutory rape, although they are below the age of consent and thus are victims); Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75 (2008) (describing how only some women "look enough like victims" to be accorded victimhood status). Indeed, abolitionism was founded in large part by women of color survivors of violence who found no healing or accountability through the criminal system, and who sometimes were even punished. See Godsoe, *The Myth of the Juvenile Sex Offender*, *supra* note 18, at 338–39 (documenting this history).
69. STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012). This growth includes pro bono or volunteer law students and lawyers working at prosecutors' offices for free, despite their existing significant government funding. See Russell M. Gold, *Volunteer Prosecutors*, 59 AM. CRIM. L. REV. (forthcoming 2022) (describing and critiquing this practice).
70. LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE 3 (2018) (discussing Violence Against Women Act funding).
71. *Id.*

percent are white men.⁷² Three fifths of the states that elect prosecutors have never elected a Black prosecutor, as of 2014.⁷³ Yet little notice is paid to how unreflective elected prosecutors are of the communities they serve. As Bryan Stevenson observes, “[in contrast to police diversity], we haven’t paid much attention to prosecutors. And that role . . . has largely been occupied by white men and [] has changed almost not at all in the last 30 years.”⁷⁴ In contrast, many progressive prosecutors are people of color, with a notable number of these leaders being Black women; some have familial experience with the criminal system or prior professional experience as defense and civil rights attorneys.⁷⁵ This picture alone alters the nature of prosecution.⁷⁶

Second, progressive prosecutors’ goals and methods are different. They seek to improve the criminal system through, for instance, fairer plea-bargaining practices;⁷⁷ better allocation of resources to address the most serious crime; data-driven interventions and increased use of diversion; and greater transparency.⁷⁸

72. Watson, *supra* note 8.

73. REFLECTIVE DEMOCRACY CAMPAIGN, *supra* note 8.

74. All Things Considered, *Report Highlights Lack of Racial Diversity Among U.S. Prosecutors*, NAT’L PUB. RADIO, at 00:59 (July 7, 2015), <https://www.npr.org/2015/07/07/420913863/report-highlights-lack-of-racial-diversity-among-u-s-prosecutors> [<https://perma.cc/J8K4-HSB8>].

75. The number of women of color prosecutors increased nearly 50 percent between 2015 and 2019. Ryan J. Reilly, *Elected Prosecutors Are Still Overwhelmingly White and Male*, HUFFPOST (Oct. 24, 2019, 12:00 PM), https://www.huffpost.com/entry/elected-prosecutors-diversity_n_5db1b486e4b0131fa99ad093 [<https://perma.cc/B8YR-2XZS>].

76. The cohort is also growing; one recent high-profile example is the election of Alvin Bragg in Manhattan. See Alvin Bragg & Cynthia Godsoe, *Prosecutorial Discretion: The Prosecutor’s Role in Curbing Infections in Prisons*, ROUTE FIFTY (June 5, 2020), <https://www.route-fifty.com/health-human-services/2020/06/prosecutors-role-curbing-infections-prisons/165937> [<https://perma.cc/YF62-W5FS>] (urging prosecutors to reenvision public safety and incarcerate fewer defendants).

77. See NEW POLICIES ANNOUNCED FEBRUARY 15, 2018, PHILA. DIST. ATT’Y OFF. (Feb. 15, 2018), https://cdn.muckrock.com/outbound_composer_attachments/Lucasgs/62919/Philadelphia-DA-Larry-Krasner-s-Memo.pdf [<https://perma.cc/QH5L-UMVX>].

78. Kim Foxx has released unprecedented amounts of data and even sponsored “hack-a-thons” to get feedback from the community about how to organize and share data. See HACKING 4 JUSTICE, <https://hacking4justice.org> [<https://perma.cc/S2F2-4BZW>]; ROLLINS, *supra* note 7, at 4–6; BAZELON, *supra* note 5; James Queally, *On First Day as L.A. County D.A., George Gascón Eliminates Bail, Remakes Sentencing Rules*, L.A. TIMES (Dec. 7, 2020, 6:51 PM), <https://www.latimes.com/california/story/2020-12-07/in-first-day-on-job-gascon-remakes-bail-sentencing-rules> [<https://perma.cc/AN9T-CLEY>]. One particularly significant illustration of this transparency is the two prosecutors from North Carolina and Massachusetts who partnered with academics to allow tracking and analysis of plea bargains, which account for almost all cases—the “black box” of the contemporary criminal system. See Brandon L. Garrett, William Crozier, Elizabeth J. Gifford, Catherine Grodenky,

They explicitly address the systemic racism and immense costs of the current system and aim to redefine the conversation about community and public safety. As Kim Foxx wrote recently about increased homicides: “To tackle violence, it is vital that we reckon with race.”⁷⁹ This cohort has already accomplished a great deal. To take just three examples: Boudin cut the San Francisco jail population by 40 percent in his first six months in office; Rollins (mostly) ceased charging fifteen minor offenses in Boston;⁸⁰ and Foxx, in three years, turned away more than 5000 cases that would have been prosecuted by her predecessor with no correlated negative impact on public safety.⁸¹ Some members of this group have even adopted abolitionist rhetoric—Chesa Boudin recently described his philosophy of finding other solutions than incarceration for harms to abolitionist visionary Angela Y. Davis, and she responded that it sounded a lot like her world view.⁸² Unsurprisingly, progressive prosecutors have received tremendous pushback from institutional actors, including police unions, federal prosecutors, judges, and even line attorneys in their own offices.⁸³ Recall efforts against the Los Angeles

Adele Quigley-McBride & Jennifer Teitcher, *Open Prosecution*, Stanford L. Rev. (forthcoming) (detailing this project and its results).

79. Kim Foxx, *To Tackle Violence, It Is Vital That We Reckon With Race*, CHI. SUN-TIMES (Dec. 7, 2020, 4:47 PM), <https://chicago.suntimes.com/2020/12/7/22160123/kim-foxx-institutional-racism-system-racism-chicago-violence-states-attorneys-office> [https://perma.cc/74AJ-ZQ2Z] (noting the hugely disproportionate number of people of color among both victims of homicide and those in the criminal system and referencing the “systemic and institutional racism in housing, education, economic investment”).
80. See ROLLINS, *supra* note 7.
81. Kristin Toussaint, *How San Francisco’s DA Cut the City’s Jail Population Without Jeopardizing Public Safety*, FAST CO. (Oct. 6, 2020), <https://www.fastcompany.com/90558083/how-san-franciscos-da-cut-the-citys-jail-population-without-jeopardizing-public-safety> [https://perma.cc/2626-MX3R]; ROLLINS, *supra* note 7, at 26; 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/G4E3-8DWJ] (analyzing data released by Foxx and concluding that the only category of major crimes to increase under Foxx is gun charges).
82. *Episode 2: The Modern Civil Rights Movement*, CHASING JUST. (June 19, 2020), <https://www.chasingjusticepodcast.com/episodes/episode-2-the-modern-civil-rights-movement> [https://perma.cc/NP6D-X4LR] (interviewing Angela Davis).
83. See, e.g., Rory Fleming, *After GOP Sweep, Virginia’s AG-Elect Takes Aim at Reform Prosecutors*, FILTER (Nov. 8, 2021), <https://filtermag.org/virginia-ag-republican-prosecutors> [https://perma.cc/5YRC-24JA]; Radley Balko, *Opinion, Boston’s First Black Woman Prosecutor Has Yet to Take Office, but She’s Already Facing an Ethics Complaint*, WASH. POST (Dec. 28, 2018), <https://www.washingtonpost.com/opinions/2018/12/28/bostons-first-black-prosecutor-has-yet-take-office-shes-already-facing-an-ethics-complaint> [https://perma.cc/774Z-S3YT]; Caitlin Oprysko, *I Am Fed Up With It: Philadelphia U.S. Attorney Torches Local D.A. After Police Standoff*, POLITICO (Aug. 15, 2019, 7:32 PM), <https://www.politico.com/story/2019/08/15/philadelphia-attorney-larry-krasner-police>

and San Francisco DAs are a particularly potent threat; initiated within days of each progressive prosecutors' election, California's recall mechanism allows for the undoing of regular elections without the usual rules governing election finance and the like.⁸⁴

The doomsday prophesying of those who back the status quo is matched only by the liberal establishment's enthusiasm. Progressive prosecutors have been hailed as the saviors of our system who can correct decades or more of racist and overly harsh punishment. This mindset has become so pervasive that Emily Bazelon and other prominent commentators have urged law students concerned about mass incarceration and racial justice to become prosecutors rather than

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- standoff-1465394 [https://perma.cc/7DYD-6UAE]; Verified Petition for Writ of Mandate and/or Prohibition and Complaint for Declaratory and Injunctive Relief, Ass'n of Deputy Dist. Att'ys for L.A. Cty. v. George Gascón, No. 20STCP04250 (Cal. Super. Ct. Apr. 8, 2021). India Thusi presciently points out that the backlash against the Black female progressive prosecutors has been particularly severe and awful: "when Black women occupy the office of the prosecutor, there is a pervasive dislocation to the social hierarchy." See India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 101, 134 (2022).
84. The frequently false media coverage and huge donations by tech billionaires left San Francisco's Boudin particularly vulnerable to recall on June 7, 2021. Megan Cassidy, *These Are the Ultra-Wealthy Donors Pouring Money Into the Chesa Boudin Recall*, SF CHRONICLE (April 3, 2022), https://www.sfchronicle.com/sf/article/chesa-boudin-recall-17052312.php [https://perma.cc/6YY7-FNZL]. Silicon Valley tech giants and venture capitalists have been especially critical of Boudin, even though some do not even live in San Francisco and thus are not directly affected by Boudin's policies. See Cyrus Farivar, *Why Silicon Valley Investors Are Injecting Millions Into San Francisco's DA Recall Election*, FORBES (Jan. 28, 2022), https://www.forbes.com/sites/cyrusfarivar/2022/01/28/chesa-boudin-recall-silicon-valley/?sh=7ba1eb1f6922 [https://perma.cc/SE46-YGCZ] (quoting experts noting the "weaponization of the recall as a device" and the fact that "Chesa [Boudin] is the unfortunate victim, the unfortunate recipient of all of the anger from the investor class and the billionaire class."). Signatures are still needed for Gascón to face a recall vote, but there is significant, and somewhat bipartisan, opposition to the Los Angeles DA, see, e.g., *Prosecutors' Association Overwhelmingly Backs Recall of LA County District Attorney Gascón*, NBC L.A. (Feb. 22, 2022), https://www.nbclosangeles.com/news/local/prosecutors-association-recall-vote-la-county-district-attorney-george-gascon/2832727 [https://perma.cc/7AJ2-FKYT] (reporting that 83 percent of the Association of Deputy District Attorneys, a group of over 800 deputy DAs in LA County, voted on whether to recall their boss, Gascón; 97.9 percent voted in support of the recall). See also Saul Gonzalez, *Recall of LA District Attorney George Gascón Builds Steam*, KCRW (Feb. 24, 2022), https://www.kcrw.com/news/shows/greater-la/la-da-prisoners-ca-restaurants/second-recall-support-george-gascon [https://perma.cc/YM2Z-9RCN]; Jason McGahan, *Gascón Recall Is Being Funded By Hollywood Power Players*, L.A. MAG. (Feb. 4, 2022), https://www.lamag.com/citythinkblog/gascon-recall-is-being-funded-by-hollywood-power-players [https://perma.cc/S2QN-NYTH] (noting that while the recall drive is co-chaired by Steve Cooley, a former very conservative Los Angeles DA, numerous wealthy Democrats have supported it).

public defenders.⁸⁵ And while scholars have praised, critiqued, and theorized this movement, none have really asked the questions I address about their viability and normative desirability through an abolitionist lens.⁸⁶ This enthusiasm for progressive prosecutors is understandable, given the serious flaws of traditional prosecutors, but the low bar should not stop us from asking whether prosecution should be seen as the solution to racialized criminalization and mass incarceration. Asking now is particularly apt timing, as the movement continues to grow and some members from the first wave of progressive prosecutors were recently reelected.

Despite their significant accomplishments, progressive prosecutors, I argue below, leave much of the criminal system's political economy unchanged or even further entrenched. The structure still prioritizes top-down expertise and consumes more and more societal resources to address harms; the narrative continues to be one of a 'hero' saving the community. This last point was made very clear when Boston DA Rachael Rollins blasted defenders for claiming to be "heroes" while failing to adequately represent "her people," that is, communities of color, implying prosecutors were the real protectors and "saviors" of these communities.⁸⁷

C. Abolition & the State

Abolitionism is first about asking the big questions—like, "Why prisons?"—as Angela Davis famously did.⁸⁸ Rather than taking the criminal system as a given, denaturalizing assumptions of these institutions helps to assess their effectiveness and imagine better institutions.⁸⁹ Uncovering the history of how the criminal system

85. See *The Revolution in Prosecutors' Offices*, BRENNAN CTR. FOR JUST. (Apr. 15, 2020), <https://www.brennancenter.org/our-work/analysis-opinion/podcasts/revolution-prosecutors-offices> [<https://perma.cc/MT8X-PKD8>].

86. See *supra* sources discussed in note 6 for examples of this scholarship.

87. See Catherine Elton, *The Law According to Rachael Rollins*, BOS. MAG. (Aug. 6, 2019), <https://www.bostonmagazine.com/news/2019/08/06/rachael-rollins> ("One of [Rollins'] siblings has served time in federal prison on drug and weapons charges. And Rollins is candid when talking about how another has had his own run-ins with the law, and a third has battled an opioid addiction.").

88. DAVIS, *supra* note 50, at 9, 15 ("[T]he prison is considered an inevitable and permanent feature of our social lives . . . [but] [w]hy do we take prison for granted?").

89. Abolitionism is simultaneously a theory and a blueprint to guide activism, and as such it is particularly relevant to assessing on-the-ground structural change. See, e.g., *What is the PIC? What is Abolition?*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/not-so-common-language> [<https://perma.cc/CV6E-PHHK>] ("Abolition is both a practical organizing tool and a long-term goal.").

was built reveals it to primarily prioritize social control rather than true community safety.⁹⁰ As with the conduct we criminalize, the instruments of the penal state should not be taken as a given. Yet while police and prisons have recently come under intense critical scrutiny by, legal scholars have largely overlooked the role of lawyers and judges.⁹¹

Although sometimes derided as utopian, abolitionism is actually intensely pragmatic, seeking to address root causes for more effective prevention of and healing from harm.⁹² It calls for responses to harm that do not rely on incarceration, that prioritize accountability, and that provide services for both those who harm and those who are harmed. Those who challenge it as ignoring violence or victims thus misunderstand abolitionism's genesis and its aims. Indeed, abolitionism was born, in many ways, out of the criminal legal system's failure to address the needs of survivors, bringing "nothing restorative in place for anyone . . . punish[ing] and le[aving] more disaster in its wake."⁹³ While the model of abolition centers the needs of those harmed much more than the current criminal system does, it also recognizes that to stop the cycle of interpersonal harm, the needs of those who have caused harm must also be addressed.⁹⁴ Indeed, as I

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90. Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1633 (2019) (“[M]uch of the conduct that is the focus of criminal law enforcement should not be understood as criminal at all.”).
91. One promising counterexample is a new piece chronicling the role of criminal courts “as systems of coercion, violence, and exploitation” in the carceral state. Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. at 4 (forthcoming 2022).
92. See Kelly Hayes & Mariame Kaba, *The Sentencing of Larry Nasser Was Not ‘Transformative Justice.’ Here’s Why.*, APPEAL (Feb. 5, 2018), <https://theappeal.org/the-sentencing-of-larry-nassar-was-not-transformative-justice-here-s-why-a2ea323a6645> [https://perma.cc/MGV8-46L4] (explaining that transformative justice “do[es] what criminal punishment systems fail to do: build support and more safety for the person harmed, figure out how the broader context was set up for this harm to happen, and how that context can be changed so that this harm is less likely to happen again.”).
93. Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684, 1688 (2019).
94. See Casper Hughes, *Why Prison Should Be Abolished*, INDEPENDENT (Mar. 28, 2018, 2:07 PM), <https://www.independent.co.uk/voices/big-idea-prison-abolition-social-problems-domestic-violence-a8275636.html> [https://perma.cc/TE2U-M63G]. Related to recognizing the needs and humanity of those committing harm is the language we use to refer to them. I try here to avoid use of the terms “offender” and “perpetrator,” which both make assumptions of guilt—often without proper grounds—and reduce humans to one bad act. See MATTHEW DESMOND & GREISA MARTINEZ ROSAS, *BEYOND THE EASIEST CASES: CREATING NEW NARRATIVES FOR CRIMINAL JUSTICE AND IMMIGRATION REFORM* 10 (2021), <https://squareonejustice.org/wp-content/uploads/2021/12/CJLJ9282-Beyond-the-Easiest-Cases-report-211206-WEB.pdf> [https://perma.cc/4XDN-PSE7] (describing this nomenclature as “condens[ing] people] from full personhood to one label: criminal”).

argue in a recent article, there is tremendous overlap among these groups, in that most people who cause harm have been harmed themselves.⁹⁵ Focusing on harm reduction and transformative justice interventions rather than punitive ones, this framework calls into question the false binary between public safety and downsizing the criminal legal system.⁹⁶

This praxis also seeks to address structural inequality.⁹⁷ The racialized history of the criminal legal system, particularly in relation to the enslavement of Black people, is so apparent in the current system that dismantling structural racism plays a key role in abolitionists' mission.⁹⁸ Overcoming inequality means that the process as well as the outcome are important, and power-shifting is a key component of both. Abolitionism began as a grassroots movement and remains deeply committed to on-the-ground activism and community empowerment, even as more scholars engage with it.⁹⁹

Although abolitionism is far from monolithic, many adherents do not seek to eradicate all state involvement in harm prevention and redress; rather, they

95. Criminologists refer to this as the “victim/offender overlap.” Despite its salience to theories of punishment and to effectively preventing and redressing harm, it is virtually ignored by policymakers and legal scholars alike. See Godsoe, *The Victim/Offender Overlap & Criminal System Reform*, *supra* note 68 (summarizing research and arguing for further scrutiny, and even dismantling, of the problematic and inaccurate victim/offender binary).
96. See *infra* Part IV. It is important to note that we still have so far to go in dismantling the carceral state and reenvisioning safety that—at this point—it is not productive to address how to deal with the “dangerous few” or very small percent of those who might require incapacitation. See Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 57 (2020) (making this point in his larger comparative discussion of abolitionist theory). Accordingly, abolitionism and criminal law minimalism have significant overlap in my analysis.
97. Hayes & Kaba, *supra* note 92.
98. See e.g., Beth E. Richie, *Keynote—Reimagining the Movement to End Gender Violence: Anti-racism, Prison Abolition, Women of Color Feminisms, and Other Radical Visions of Justice*, 5 U. MIA. RACE & SOC. JUST. L. REV. 257, 262 (2015) (“To me, prison abolition represents a chance to think about the work to end gender violence and how it needs to be reframed as work against the patriarchal carceral state, and the architecture of racism and related forms of oppression upon which that patriarchal carceral state is built. That is the reimagining that will be truly radical and transformative.”).
99. See Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (Aug. 24, 2017), <https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration> [https://perma.cc/X8DD-WMDG]; see also Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1282 (2014) (“The first step of the participatory defense movement is for people who face criminal charges, their families, and their communities to transform themselves from service recipients to change agents.”); *End the War on Black People*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/end-the-war-on-black-people> [https://perma.cc/K5VP-H33F].

advocate for nonpunitive state involvement that would best address the root causes of crime.¹⁰⁰ In this way, abolitionism is a positive project of envisioning a more supportive state. As W.E.B. Du Bois first conceived of it, abolition democracy is not only a project of dismantling unjust institutions but also a positive one of imagining and building a more equal and just society—what Reconstruction should have been.¹⁰¹ Du Bois noted that slavery was only ended in a narrow, hyperlegal sense and that the criminal system was one of the primary tools the state used as “a method of keeping [Black people] at work and intimidating them.”¹⁰² Change would not come just from dismantling the criminal system or ending sharecropping and other unjust labor and property practices; these reforms must also be accompanied by equal access to education, employment, and voting.¹⁰³ Indeed, abolition entails entirely new ways of societal adhesion and interaction; as Allegra McLeod describes Du Bois’s vision, “to be meaningful, abolition of slavery required fundamentally reconstructing social, economic and political arrangements.”¹⁰⁴

Abolition democracy is both a visionary and material project recognizing that the buildup of the carceral state has been accompanied with, indeed driven by, grossly insufficient spending on social welfare.¹⁰⁵ Contemporary movements like Critical Resistance emphasize the importance of meeting basic human needs because “communities where people have housing, food, education and jobs have the lowest crime rates. The best way to reduce harm is by building safe, healthy

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100. Those advocating for nonstate intervention sometimes propose a mutual aid model, drawing on the rich history of marginalized groups who have engaged in this work, such as the Black Panthers. See DEAN SPADE, *MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT)* (2020) (“mutual aid is the radical act of caring for each other while working to change the world”); see also Garcia & Godsoe, *supra* note 18 (proposing a grassroots mutual aid model, accompanied by a robust state-funded social safety net with no strings attached, to replace the current quasi-criminal family regulation system).
101. W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA* 165 (Routledge ed., 2017) (1935) (arguing persuasively that formerly enslaved people built a thriving civil society and nearly achieved a true, racially inclusive democracy, until a violent and politically powerful white supremacist backlash resulted in the unjust Jim Crow era).
102. *Id.* at 451, 289 (“Abolition democracy demands for [Black people] physical freedom, civil rights, economic opportunity and education and the right to vote, as a matter of sheer human justice and right.”).
103. ANGELA DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE* 118–19 (2005) (“[S]lavery could not be truly abolished until people were provided with the economic means for their subsistence. They also needed access to educational institutions and needed to claim voting and other political rights . . .”).
104. McLeod, *supra* note 39, at 1162.
105. See DAVID SCOTT, *AGAINST IMPRISONMENT: AN ANTHOLOGY OF ABOLITIONIST ESSAYS* 195 (2018) (“Building a new prison is not just about putting money into the pain infliction industry—it is also about shifting focus away from welfare support.”).

communities where people have their basic needs met.”¹⁰⁶ The United States is particularly stingy at providing societal supports; national spending on the carceral state far outstrips spending on societal needs like education and housing, and government support has been racialized and stigmatized as “handouts.”¹⁰⁷ Indeed, a significant driver of popular support for increased policing and prosecution in the past was the lack of social services; the government’s failure to provide such services made the criminal system the only option of state engagement for those with family or community members experiencing violence, mental illness, addiction, or other crises.¹⁰⁸ The growing popularity of abolitionism, accelerated by the pandemic’s revelation of structural inequality and the recent reckoning with racist state violence, reveals that people are no longer willing to accept that Hobson’s choice.¹⁰⁹

This moment of crisis also presents an opportunity. Adopting Dorothy Roberts’s “hopeful” view, I argue here to shift the frame of what state intervention means. Envisioning a state that is more caring, perhaps decentralized, certainly deferential to communities, and that operates from a harm reduction or mutual aid model frame takes us a long way from prosecution as the only way to prevent and redress harm.¹¹⁰

II. CAN REFORMERS PROSECUTE?

In this Part, I ask whether those committed to changing the criminal legal system should become prosecutors. Answering this question requires looking at the unique and highly contested prosecutorial role. I consider here three aspects of that role: prosecutors’ purported responsibility as executive branch members to

106. *What is the PIC? What is Abolition?*, *supra* note 89.

107. See, e.g., LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935* (1994); Garcia & Godsoe, *supra* note 18 at notes 36–46 (documenting the very strong connection between poverty and involvement in the family regulation systems).

108. James Forman Jr. documents this dynamic in the Black community. See JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 12–13 (2017); see also Monica C. Bell, *Situational Trust: How Disadvantaged Mothers Reconceive Legal Cynicism*, 50 *LAW & SOC’Y REV.* 314, 342 (2016) (reporting on her sociological research demonstrating that “[b]ecause of the retraction of noncriminal social systems, the criminal justice system has become one of few socially sanctioned avenues through which [low-income] mothers can procure resources and security for their families,” and also noting the possible costs and harms accompanying this use of the police).

109. Related is the growth in popularity of mutual aid programs, which provide material support and organizing for change. See Garcia & Godsoe, *supra* note 18.

110. See Godsoe, *An Abolitionist Horizon for Child Welfare*, *supra* note 18 (calling for nonpunitive state support for families).

“enforce the law,” not make it; their unique ethical mandate as ministers of justice; and the argument that their day-to-day function is inherently problematic, so that “good people” cannot be prosecutors.¹¹¹

I conclude that the idea that prosecutors merely enforce legislatively enacted law is both inaccurate, especially in the current landscape of overcriminalization and plea bargaining, and normatively wrong as a separation-of-powers matter. Second, the ethical mandate to do “justice” actually strengthens the case for progressive prosecutors. As to the third and most difficult question, I am cautiously optimistic that reformers—“good people”—can be prosecutors. Indeed, they should, as a necessary correction to the long trajectory of overly punitive prosecutors. As I explain further below, however, the inherent nature of prosecution means that they cannot transform the criminal system without shrinking their own footprint and eventually “getting out of the way” of more effective and just community interventions.

A. Just Enforcing the Law

One of the most frequent critiques of progressive prosecutors is that they are overstepping their role, which is merely to enforce the law, not to make it. Critics argue that through their reform policies, particularly categorical declinations to prosecute certain crimes, these prosecutors are violating the separation of powers. And they do not just argue this point; they have filed lawsuits, lobbied against, and otherwise tried to block progressive prosecutors from implementing their reforms.¹¹² Most famously, former United States Attorney General William Barr berated these same prosecutors for “refusing to enforce” and “disrespecting” the law.¹¹³

This critique, however loud, deliberately overlooks the long history of prosecutors making the law, mostly to grow and strengthen the carceral state, and misunderstands the prosecutor’s institutional role and democratic mandate. Individual prosecutors shaping criminal law through their enforcement

111. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

112. *See supra* note 83.

113. William P. Barr, Att’y Gen., *Remarks at the Grand Lodge Fraternal Order of Police’s 64th National Biennial Conference*, U.S. DEP’T OF JUST. (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/Q3B]-ZZRJ]; *see also Bonus: The Attack on Elected District Attorneys*, CRIM. INJUSTICE (Sept. 7, 2019), <http://www.criminalinjusticepodcast.com/blog/2019/09/07/bonus-attack-elected-das> [https://perma.cc/2ZUK-FHTK].

priorities is certainly not a new phenomenon. The immense sweep of criminal law's power in any jurisdiction means prosecutors are always lawmaking by directing resources to enforce or not enforce certain offenses.¹¹⁴ Their power to make the laws through enforcement has only increased over time, as the vast majority of cases today are resolved via plea bargaining; prosecutors' charging decisions, rather than juries, often determine legal guilt and innocence. This is particularly true of not only widely violated and more minor offenses, such as marijuana possession, but also of homicides.¹¹⁵

Further confirming the fact that prosecutors are not merely apolitical enforcers of the law is the very active lobbying in which individual prosecutors and state and national DA associations engage. For instance, the largest such association, the California District Attorneys Association, insists that all of the state's prosecutors have the same professional aims, criticizes the handful of prosecutors who decline to be members, and has consistently lobbied against reforms and for more punitive measures.¹¹⁶ Prosecutors are often very influential in preventing any reforms.¹¹⁷ A few recent examples include blocking bail reform and preventing the decriminalization of gravity knives in New York State and the legislature's abrogation of the felony murder rule in California.¹¹⁸

Categorical declinations to enforce are also supported by prosecutors' unique role vis-à-vis legislatures and courts in the system of checks and balances. Experts have persuasively argued that the prosecutorial role actually requires that

114. Categorical declinations to enforce criminal laws as a whole may be less successful at changing the system than some progressive prosecutors and reformers believe, due to immense resistance and refusal by line ADAs and police to follow the mandates of the elected top prosecutor. See Justin Murray, *Prosecutorial Enforcement and Residual Criminalization*, OHIO STATE J. CRIM. L. (forthcoming 2022) (making this argument).

115. I have previously described prosecutors' discretion in statutory rape cases. See Godsoe, *Recasting Vagueness*, *supra* note 18; see also Daniel C. Richman, *Accounting for Prosecutors*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 40, 45–46 (Maximo Langer & David Alan Sklansky eds., 2017) (“[T]hrough the cases they take and the way they frame the facts, American prosecutors regularly push the law beyond its initially assumed limits.”).

116. Daniel Nichanian, *D.A. Associations Should Own Up to the Splintering Politics of Prosecution*, APPEAL (Feb. 14, 2020), <https://theappeal.org/politicalreport/district-attorney-associations-political-conflicts-cdaa> [<https://perma.cc/4XET-AYW9>].

117. A recent empirical study of prosecutor lobbying found that it is widespread and most commonly used to prevent funding decreases to prosecutorial offices and to block other criminal system reforms. See Carissa Byrne Hessick, Ronald F. Wright, & Jessica Pishko, *The Prosecutor Lobby*, 79 WASH. & LEE L. REV. (forthcoming 2023) (cautioning also that the picture is more complex, especially with progressive prosecutors breaking away from traditional prosecutor groups).

118. Sam Mellins, *Will Manhattan's Next D.A. Break Ranks With Tough-On-Crime Colleagues?*, APPEAL (Feb. 2, 2021), <https://theappeal.org/politicalreport/manhattan-candidates-district-attorney-association> [<https://perma.cc/FD7U-Q7V3>].

prosecutors have some independence from the legislature and judiciary in order to serve as checks on those branches.¹¹⁹ Daniel Richman describes this connection between prosecutorial discretion and checks and balances in both the political economy and delegation doctrine contexts.¹²⁰ Proponents of this theory point out that prosecutorial independence or power is primarily kept in check by the democratic process; their mandate comes from direct local election.¹²¹ Scholars have supported this as a valid use of prosecutorial discretion—one arguably based in the “localized, populist criminal law enforcement” roots of the American system that was largely lost due to the disappearance of juries in a plea-bargaining world.¹²² In stark contrast, this democratic check does not often exist for other actors in the criminal system, such as the police, whose leadership is usually not elected and who are treated exceptionally, thus placing them in a “democratic vacuum” with little oversight or accountability.¹²³

The new wave of progressive prosecutors demonstrates a particularly strong case for a democratic mandate because they have been elected in a much more transparent and contested context.¹²⁴ Many progressive prosecutors have been particularly transparent during their campaigns. Rachael Rollins and Alvin Bragg, among others, for instance, revealed detailed policy platforms during their campaigns, including explicit detailing of the crimes they would categorically

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119. See, e.g. Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369 (2010).
 120. See Daniel C. Richman, *Defining Crime, Delegating Authority—How Different Are Administrative Crimes?*, 39 YALE J. REGUL. 24 (2021) (“Prosecutorial gatekeeping ensures some separation of power and keeps a degree of political accountability.”).
 121. Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603 (2020) (arguing both that prosecutors have some independence from the legislature, contained by separation of powers principles, and that the check on prosecutors is the democratic process, particularly with transparency about their platforms).
 122. See, e.g., W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 180 (2021) (arguing that categorical declination is a valid use of prosecutorial discretion, based in the “localized, populist control of criminal law” at the roots of the American system and analogizing it to jury nullification on a “wholesale” level).
 123. Anthony O’Rourke, Rick Su, & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1389 (2021). Some members of law enforcement, namely sheriffs, are elected. Matt Keyser, *An Intersection of Jails, Arrests, & Mass Incarceration: Q&A With Jessica Pishko on the Role of Sheriffs*, NAT’L P’SHIP PRETRIAL JUST., <http://www.pretrialpartnership.org/project/an-intersection-of-jails-arrests-mass-incarceration-qa-with-jessica-pishko-on-the-role-of-sheriffs> [<https://perma.cc/47K3-C24P>].
 124. Carissa Hessick, Michael Morse & Nathan Pinnell, *Donating to the District Attorney*, UC DAVIS L. REV. (forthcoming 2023) (detailing nationwide empirical research on recent prosecutorial elections).

decline to prosecute.¹²⁵ This is a significant departure from most prosecutorial elections, which have centered on one or two high-profile, atypical cases and on conviction statistics that, although easily measurable, do not reveal much about crime prevention, accountability, or victim satisfaction.¹²⁶ Moreover, most of the newly elected progressive prosecutors also ran as outsiders to the DA's office and also as outsiders to the political power structure in their cities, presenting a particularly strong case for democratic support.¹²⁷ In an empirical study of prosecutor elections, Carissa Hessick and Michael Morse found that most prosecutorial races are not challenged, with the incumbent running unopposed, particularly in less populous, rural districts.¹²⁸ In contrast, almost every member of this new group of prosecutors ran against long-entrenched incumbents and was explicit and detailed in the planned changes for how their prosecutor's office are managed, enhancing their democratic legitimacy.¹²⁹

B. Ministers of Justice

Prosecutors not only have a unique institutional function; they also serve a singular professional role. They are the only category of attorneys with their own ethical mandate: to be “ministers of justice.”¹³⁰ Although this mandate is vague and has historically been interpreted as carceral, I argue that it can be repurposed to support change in the other direction. The mandate comes from prosecutors' lack of a concrete client and concomitant claim to represent the community or “the people.” It also references their immense power, the punishment power of the state.¹³¹ The Model Rules of Professional Conduct and other professional

125. See ROLLINS, *supra* note 7; Alvin Bragg, *Plans for DA*, <https://www.alvinbragg.com/plans> [<https://perma.cc/RWU3-WRZ7>] (describing Bragg's election platform including specifying numerous categorical declinations).

126. John Pfaff, *Op-Ed: The Never-Ending 'Willie Horton Effect' Is Keeping Prisons Too Full for America's Good*, L.A. TIMES (May 14, 2017, 4:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-pfaff-why-prison-reform-isnt-working-20170514-story.html> [<https://perma.cc/6GKS-MEKX>] (discussing the “Willie Horton” effect).

127. Ronald F. Wright, Jeffrey L. Yates, & Carissa Byrne Hessick, *Election Contestation and Progressive Prosecutors*, OHIO STATE J. CRIM. L. (forthcoming 2022) (analyzing data from 200 large prosecutorial districts and finding that elections became more competitive over the last decade, including particularly the elections of progressive prosecutors).

128. Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537 (2020).

129. See Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593 (2014) (concluding after an empirical study that prosecutorial elections are not effective at holding prosecutors accountable due to the high number of uncontested elections and partisan control).

130. AM. BAR ASS'N, MODEL RULES OF PROFESSIONAL CONDUCT r. 3.8 (2020); see also *id.*, at r. 3.8 cmt.

131. *Berger v. United States*, 295 U.S. 78, 88 (1935) (describing the prosecutor as “representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern

standards enumerate the many obligations this position carries, such as “ensuring that the guilty are held accountable, that the innocent are protected from unwarranted harm, and that the rights of all participants, particularly victims of crime, are respected.”¹³² Professional guidelines promulgated by the American Bar Association and the National District Attorneys Association make clear that the job extends well beyond maximizing convictions.¹³³

This mandate is amorphous and rarely interrogated or enforced.¹³⁴ Numerous professional incentives, the institutional design of the criminal legal system, and prosecutorial immunity render the mandate quite toothless in practice.¹³⁵ It also leaves unanswered the question of whose justice? Although prosecutors frequently invoke victims’ names (and challengers to progressive prosecutors continue to do so), their actions often do not comport with victims’ interests.¹³⁶ Indeed, numerous prosecutors go so far as to jail victims who refuse to cooperate, particularly in family violence cases.¹³⁷ Despite this variability and the wide potential of interpretations under the Rorschach-like “justice” mandate, prosecutors, judges, and the mainstream public have—until recently—interpreted the mandate as virtually synonymous with a narrow, tough-on-crime perspective.¹³⁸ The failure to incorporate the views of victims and marginalized community members who have long advocated for a more nuanced and expansive view of justice reveals many prosecutors’ view that “they *and they alone* know what justice is.”¹³⁹

Although historically used to ramp up incarceration, the minister of justice mandate can still be useful to support the reforms that progressive prosecutors are implementing. Angela J. Davis has persuasively argued that the mandate encompasses a prosecutor’s duty to work toward ending mass incarceration, both

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.”)

132. NAT’L DIST. ATT’YS ASS’N, NATIONAL PROSECUTION STANDARDS 1–1.1 (2009).

133. AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION, Standard 3–1.2(b) (2017).

134. See Green & Roiphe, *supra* note 57, at 820 (describing the mandate as “vague and subject to multiple conflicting interpretations”).

135. See Green & Yaroshefsky, *supra* note 55.

136. Based in large part on this reality, Bennett Capers has proposed privatizing prosecution, giving victims more choice and agency. See Capers, *supra* note 52, at 1590–96.

137. See Leigh Goodmark, *The Impact of Prosecutorial Misconduct, Overreach, and Misuse of Discretion on Gender Violence Victims*, 123 DICK. L. REV. 627 (2019).

138. See Jeffrey Bellin, *The Changing Role of the American Prosecutor*, 18 OHIO STATE J. CRIM. LAW 329, 331–32 (2020) (describing how prosecutors contribute to “increasing severity . . . and big picture skyrocketing incarceration.”).

139. Smith, *supra* note 111, at 378.

by “exercis[ing] their discretion and not pursu[ing] criminal charges in appropriate cases . . . [and by] consider[ing] the broader goals of the criminal justice system [and] seek[ing] reform.”¹⁴⁰ This group of progressive prosecutors is doing this. They are providing unprecedented data to communities and expanding input to include those most harmed by overcriminalization.¹⁴¹ Many of them are also declining to prosecute lesser crimes to focus their time and resources on more serious harms.¹⁴² More broadly, they are explicitly redefining justice. As New Orleans DA Jason Roger Williams put it: “[Prosecutors] are ethically required to consider broader notions of the right results, the rights of defendants and the public good. . . [including] understand[ing] the complicated ways that race, and the overlapping issue of poverty, impacts the lives of defendants.”¹⁴³

C. Can True Reformers Be Prosecutors?

The third question about their role is whether a prosecutor’s task is so inherently problematic that “good” people should not undertake it. Abbe Smith first asked this question in 2001¹⁴⁴ and returned to in 2018, after the election of several progressive prosecutors. She twice concluded that it is not possible, although more recently, she expressed more hesitance and slightly less pessimism, concluding: “I would like to believe that good, well-intentioned people who become prosecutors could bring justice back to the criminal justice system in 2018. But I doubt it.”¹⁴⁵ Other scholars and advocates also deem it impossible to cross the aisle from defense or, relatedly, to be a true change agent as a prosecutor.¹⁴⁶

140. Davis, *supra* note 27, at 1079.

141. See *infra* notes 269–271.

142. See *supra* sources and text accompanying notes 66–69.

143. TANIA TETLOW & FLOZZEL DANIELS, FOR THE SAKE OF JUSTICE 38 (2021), <https://www.dropbox.com/s/jg7L27q1c89L2sn/DA%20Williams%20Transition%20Report.pdf?dl=0&fbclid=IwAR0xt7YjAEOYSop5KFPv6J2oQimqCttCvjO-U2xu-QHNiCH2Oae-Z8luWak> [<https://perma.cc/6ZYQ-NH5L>] (also calling for prosecutors to “understand a host of issues around sexuality, gender identity, national origin and immigration status”).

144. See Smith, *Can You Be a Good Person and a Good Prosecutor?*, *supra* note 111.

145. See Abbe Smith, *Good Person, Good Prosecutor in 2018*, 87 FORDHAM L. REV. ONLINE 3 (2018).

146. See, e.g., Steven Zeidman, *Public Defenders as Prosecutors: Unanswered Questions*, GOTHAM GAZETTE (June 20, 2019), <https://www.gothamgazette.com/columnists/other/130-opinion/8607-public-defenders-as-prosecutors-unanswered-questions> [<https://perma.cc/M5RC-FAPM>] (critiquing former public defenders who seek to become prosecutors—like Queens DA candidate Tiffany Caban—by arguing that “real” defenders “could not imagine prosecuting their clients in any way, shape, or form.”). See also Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803 (2020) (noting that the extremely low bar for those deemed “progressive”

Perhaps in an effort to address the historic underprotection of communities of color, other experts take a less categorical approach to Smith's question and propose that a subset of prosecutors, based largely on prosecuting historically exempt or under-punished groups, such as the police, corporate defendants, or exploitative landlords, can be "good people." For instance, Vida Johnson argues this category includes prosecutors who "police the police" and people like Parisa Taft, elected in Virginia, who campaigned to increase the prosecution of employers engaged in wage theft of largely low-income workers.¹⁴⁷ Prosecutors seeking to end the harshness and inequities in the criminal system should work to equalize the racial, class, and other distributional aspects of the criminal legal system. Yet, as I more fully elaborate below, simply shifting the targets of punishment without downsizing the criminal legal system and redistributing power to people in the system cannot truly change the system.

While recognizing the valid concerns about reforming from within, I conclude that the prosecutorial role is not so rigid that people must fulfill it in the same way. Indeed, many progressive prosecutors are former civil rights attorneys or have personal familial experience with the criminal legal system. They argue that these qualities make them particularly qualified to be prosecutors, and at least in some respects, such as connecting with communities historically harmed and underserved by the criminal system, they seem to be correct.¹⁴⁸ Accordingly, I am cautiously optimistic that prosecutors can do good. Like Angela J. Davis, I believe not only that it is possible, but also that the great power prosecutors wield makes this an important step on the path to addressing overcriminalization and mass incarceration.¹⁴⁹

In sum, prosecutors' institutional role and ethical mandate support the progressive turn. Reconciling the day-to-day prosecutorial function with a larger sense of doing good is trickier, yet still possible. In the next Part, I turn to whether prosecutors can accomplish meaningful change and argue that, in order to be avoid inadvertently perpetuating the current system, prosecutors must reimagine public safety and justice. Truly transforming the system entails going beyond reforms; indeed, mere reforms can backfire and even further entrench the status

means the term is applied to many people who are not envisioning truly transformational change).

147. See Johnson, *supra* note 6. Analogously, Stephen Lee and Sameer Ashar have demonstrated how government lawyers in the Department of Homeland Security employed prosecutorial discretion to soften the harshness of immigration policy. See Stephen Lee & Sameer M. Ashar, *DACA, Government Lawyers, and the Public Interest*, 87 *FORDHAM L. REV.* 1879 (2019).

148. See Reilly, *supra* note 75.

149. Davis, *supra* note 6.

quo under new cover. A key part of this transformation is shrinking the criminal system's footprint. This is where my argument diverges from that of Angela J. Davis. Since their function is inherently punitive, prosecutors, I argue, cannot transform the system unless they work themselves out of a job.

III. CAN PROSECUTORS TRANSFORM?

In this Part, I argue that the transformation of the criminal system needed to reduce harm, encourage accountability, and achieve true justice, cannot be accomplished via reform alone. Overcoming the criminal system's racialized societal hierarchy and dominant narrative requires deep structural change. I first illustrate why, both numerically and conceptually, the criminal system cannot be reformed but rather must be transformed, going well beyond the status quo to "imagine . . . and make resources that actually create well-being."¹⁵⁰ Abolitionist theory helps illustrate why reforms without a visionary end-goal do not achieve meaningful change in the long run. Reforms also risk legitimating an unfair system, which can produce worse outcomes than no action. I posit three particular hurdles that impede prosecutors from truly transformative action: exceptionalism, net-widening, and a hero complex.

A. Criminal System Flaws Are a Feature, Not a Bug

It is by now a well-known fact that the criminal legal system is overly punitive and perpetuates inequality.¹⁵¹ Structural racism, the criminalization of poverty, the system's ineffectiveness, and its immense harms to those accused and convicted of crimes and their families, are a feature, not a bug. Compounding this is the system's failure to address the root causes of crime and its inexorable creep: When one part of the system is shut down, another pops up to replace it.¹⁵² Minor

150. *Reformist Reforms vs. Abolitionist Steps in Policing*, CRITICAL RESISTANCE, http://criticalresistance.org/wp-content/uploads/2020/08/CR_NoCops_reform_vs_abolition_REV2020.pdf [https://perma.cc/4BAU-NN3N].

151. See *supra* Subpart I.A.

152. Ginia Bellafante, *Criminal Justice Reform Empties Cells, Parole Fills Them Up Again*, N.Y. TIMES (Feb. 2, 2018), <https://www.nytimes.com/2018/02/02/nyregion/criminal-justice-reform-empties-cells-parole-fills-them-up-again.html> [https://perma.cc/SW2U-YGCW] ("Too often, former prisoners find themselves incarcerated a second or third time, not because they have done anything particularly wrong or pose a threat to their communities, but because they are found to have violated stringent rules that have little to do with maintaining public well-being."). Bill Stuntz presciently theorized an analogous interrelationship between criminal procedure and the substantive criminal law; in the wake of expanded defendant due process rights, jurisdictions expanded criminal laws to enable police

reforms or even major shifts in the objects of prosecution are not sufficient. Both the numbers and the ideology of the criminal system substantiate this conclusion. Perhaps most gravely, the narrative of punishment and racial hierarchy is so strong, so central to the American national identity, that we cannot imagine a different way of addressing harms.

Achieving a system that is more effective at preventing and redressing harm, less costly, and more racially just, cannot happen without a massive downsizing. As John Pfaff concludes after an extensive analysis of incarceration data: “Any significant reduction in the US prison population is going to require states and counties to rethink how they punish people convicted of violent crimes where ‘rethink’ means ‘think about how to punish less.’”¹⁵³

This need to rethink how we address harms is illustrated not only by the numbers but also by the public discussion and policies around particularly stigmatized crimes.¹⁵⁴ I have previously described how the categorical exclusion of those convicted of sex offenses—a very broadly defined term—from any criminal system reforms hinders our ability to effectively address both sex offenses and the excesses of the carceral state more broadly.¹⁵⁵ Political scientist Marie Gottschalk also makes this point about the famous exclusion of the majority of people in the system (the “non, non, nons”) from California’s SCOTUS-mandated decarceration: “[I]f the ultimate aim is to slash the prison and jail population, render the criminal justice system more just, and dismantle the carceral state without jeopardizing public safety [the political strategy of excluding violent offenders, sex offenders, and criminal immigrants] may ultimately be self-defeating.”¹⁵⁶ This focus on individual wrongdoing and pathology obscures the powerful social drivers of crime (including, for instance, poverty and childhood

and prosecutors to arrest and charge far more people. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1 (1997).

153. PFAFF, *supra* note 4, at 136.

154. See Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 *ALA. L. REV.* 574, 593, 602 (2011) (mapping contested constructions of murder, assault, rape and domestic abuse as “one more illustration of the contingent and contested parameters of violence”); see also DAVID ALAN SKLANSKY, *A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE* 236 (2021) (describing how American law treats violence as exceptional and punishes or rewards it in an inconsistent and highly racialized fashion so that the “category of ‘violent’ crimes winds up being a legal construction, a kind of conceptual gerrymander.”).

155. Godsoe, *The Myth of the Juvenile Sex Offender*, *supra* note 18.

156. See MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 165 (2015) (arguing that those crimes deemed “violent” must also be included to achieve meaningful decarceration).

trauma) and impedes their effective prevention.¹⁵⁷ Despite these recognitions and growing dissatisfaction among victims, the irrational but tenacious suggestion—including from prosecutors themselves—continues to be that to “fix” the system, we just need more—more police, more years in prison, more prosecutors.¹⁵⁸

Transformation first requires significantly shrinking the system—something even progressive prosecutors seem unwilling to do. Prosecutors are also, by definition, unable to partake in the second step of building different institutions to address harm in largely nonpunitive ways; their role in the criminal system and their top-down message of change are at odds with creating lasting community institutions.

B. Reformist Reforms v. Transformative Reforms

An abolitionist horizon demands only reforms that are consistent with the larger vision of dismantling the carceral state, rather than those that inadvertently empower it. This is consistent with abolitionists’ view that these punitive state systems cannot be tinkered with or fixed but rather are, in fact, rather rotten to the core. In the police context, “reformist reforms,” as Ruth Wilson Gilmore famously termed them, include measures to increase police budgets to monitor police malfeasance, such as purchasing bodycams, as well as community policing necessitating increased personnel.¹⁵⁹ In contrast, abolitionist steps reduce the funding and scope of policing and challenge the dominant narrative that police increase safety. Steps that accomplish one or both of these goals include capping overtime pay, not re-hiring police involved in excessive force, and, most of all, decreasing police funding and prioritizing spending on other social goods such as

157. See, e.g., PATRICK SHARKEY, *UNEASY PEACE: THE GREAT CRIME DECLINE, THE RENEWAL OF CITY LIFE, AND THE NEXT WAR ON VIOLENCE* (2018); David Alan Sklansky, *Addressing Violent Crime More Effectively*, BRENNAN CTR. FOR JUST., (Sept. 27, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/addressing-violent-crime-more-effectively> [<https://perma.cc/9DDA-ZALZ>].

158. See, e.g., Frank Main, ‘We’re in Really, Really Uncharted Territory,’ *Kim Foxx Says of Gun Violence in Chicago*, CHI. SUN-TIMES (Aug. 7, 2020), <https://chicago.suntimes.com/politics/2020/8/7/21356372/kim-foxx-chicago-violence-gun-crime> [<https://perma.cc/BAN6-RKS4>] (quoting Kim Foxx requesting more law enforcement resources to address violence); see also *infra* Subpart IV.B.1 (discussing budgets).

159. GILMORE, *supra* note 31, at 242; see also Kaba, *supra* note 12 (providing examples of legislative proposals to decrease and redirect police funding to other social goods).

housing and education.¹⁶⁰ Below, I argue that prosecution, like policing, is often the site of reformist reforms that impede abolitionist goals.

Indeed, reformist reforms are dangerous in that they may reentrench and legitimate fundamentally unjust systems. By obscuring the true nature of unjust and flawed institutions—be it the police, prosecutors, or the capitalist, neoliberal state—reformist reforms help to reinvent and perpetuate these institutions and concomitant hierarchies of race and class.¹⁶¹ In contrast, nonreformist reforms, as Amna Akbar describes them, “advance radical critique and radical imagination” and are “pathways for building ever-growing organized popular power.”¹⁶² As such, they are bottom-up, not formulated by elites, and directly involve struggle; indeed, the process of mobilization and struggle itself contributes to transformation. One important caveat is due here: Eschewing reformist reforms does not mean refusing to make things better for those in the system while working towards the long-term abolitionist goal. Former prisoner and now-lawyer Angel Sanchez analogizes the carceral state to cancer: “We should fight to eradicate it but never stop treating those affected by it.”¹⁶³ Doing so can sometimes seem in tension with avoiding reformist reforms, but focusing on the long-term goal of reducing and transforming the carceral state helps differentiate between those “treatments” that will impede the horizon and those that will not.¹⁶⁴

Lawyers may be particularly prone to the false promises of reformist reforms, given their elitist position and reliance on the strict confines of legal procedure.¹⁶⁵ Lawyers working within government, such as prosecutors, are even more likely to stymie radical movement goals, over-prioritize moderation, and

160. *Reformist Reforms vs. Abolitionist Steps in Policing*, *supra* note 150.

161. See Rachel Herzing, *Let's Reduce, Not Reform, Policing in America*, OPEN SOCIETY FOUNDATIONS (Oct. 6, 2016), <https://www.opensocietyfoundations.org/voices/let-s-reduce-not-reform-policing-america> [<https://perma.cc/3SPC-NALN>] (arguing that to abolish policing we must first understand it “for what it is: the armed enforcement of the interests of the most powerful over those who would challenge that power.”).

162. Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 104–113 (2020).

163. Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1652 (2019).

164. See Beth A. Colgan, *Beyond Graduation: Economic Sanctions and Structural Reform*, 69 DUKE L.J. 1529, 1534–35 (2020) (describing the utility of abolitionist theory in “measuring reforms not against the status quo but against a fundamentally different set of goals: the dismantling of the carceral state and its replacement with systems of ‘transformative justice.’”).

165. See Brendan D. Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. F 213, 216 (2021) (“Law is a space where even the most hardened materialism, grounded in radical movements and mutual aid, tends to give way to defensive . . . reformism . . . whenever truly cornered, Law demands its own replication.”).

“conservatiz[e]” social movements.¹⁶⁶ Tellingly, there have been two prior iterations of reformer prosecutors, neither of which resulted in a downsizing of the criminal system and both of which may even have increased prosecutorial power. Consider the examples of turn-of-the-century Progressive reformers and the 1990s community prosecution model that accompanied the trend for community policing.

Progressive Era reformists aimed to professionalize prosecution and eliminate endemic corruption in the criminal system.¹⁶⁷ They also shared with today’s progressives the situation of criminal conduct within a larger societal context and a commitment to a data-driven approach.¹⁶⁸ Although the original Progressive movement improved the criminal system in numerous ways, it also brought many more people under punitive state control.¹⁶⁹ “Community prosecution,” a somewhat related, although definitely less far-reaching trend in prosecution twenty years ago, was greeted with enthusiasm by some scholars and advocates as a way to render prosecution more racially just and fair.¹⁷⁰ Perhaps well intentioned, its most prominent version quickly morphed into a project of the conservative National District Attorneys’ Association (which is actively opposing progressive prosecutors today), and during the trend’s heyday (1990s to early 2000s), prosecutors increased their power and criminal systems across the county ballooned.¹⁷¹ This expansion is not surprising in retrospect, since a key

166. Douglas NeJaime, *Cause Lawyers Inside the State*, 81 *FORDHAM L. REV.* 649, 687–91, 699 (2012).

167. Green & Roiphe, *supra* note 6, at 719, 727 (describing implementation of the prosecutor model as independent and neutral but also noting that one of the most prominent reformist prosecutors, the Manhattan DA William Travers Jerome, drew “his power directly from the people and won favor with the poor and the rich alike, posing a distinct threat to the entrenched politicians.”).

168. *Id.* at 753.

169. *Id.* at 731. As did the Progressive reformers in general. This was true of many groups, such as immigrants and the working-class, and particularly true of minors and young adults from those communities. I have previously described how “juvenile court was created in large part to regulate and ‘Americanize’ low-income immigrant youth,” often via placement in punitive “reform schools.” See Godsoe, *Recasting Vagueness*, *supra* note 18, at 191–95; see also Alexis Hoag, *Black on Black Representation*, 96 *N.Y.U. L. REV.* 1493 (describing the overlap between the Progressive and eugenics movements and the resulting increase in interventions into criminal or “deviant” behavior, usually among communities of color and/or immigrants).

170. See Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 *NOTRE DAME L. REV.* 321, 323 (2002) (describing prosecutors taking “nascent steps to reinvent themselves” in this manner, although noting that it might not “flow from a [genuine] desire to be self-critical about [their] conventional role... [so much as] an instinct to ride the contemporary tide” of community policing).

171. For an alternative take on community prosecution and its potential to engage historically marginalized groups, see Ronald F. Wright, *Community Prosecution and Building Trust Across*

component of the community prosecution model is to address social problems via the criminal system.¹⁷²

Today's progressive prosecutors present the same risks of addressing social problems via punishment, net-widening, and ultimately legitimating and strengthening the criminal system. In short, as I elaborate further below, lawyers are, by training and professional culture, conservative—they are not change agents. Accordingly, by seeking change primarily through the rights-oriented legal system, lawyers have likely narrowed the vision of possible options and stymied real change.

C. Three Hurdles to Real Change

I outline here three significant challenges to prosecutors trying to change the criminal legal system: exceptionalism, net-widening, and the hero complex.

1. Exceptionalism

Numerous scholars and advocates have defined as “progressive” those who prosecute societally powerful groups that have historically escaped accountability, such as those committing white-collar crime or IPV, landlords, or the police.¹⁷³ Labeling such prosecutors as progressive illustrates the trend of exceptionalism, or arguing that prosecutors should prosecute less, except for certain categories of crimes. This would likely positively impact some progressive goals, such as equalizing criminal law's distributional effects and increasing public safety for historically under-recognized victims, such as women and people of color. Nonetheless, I argue here that no matter who is prosecuted, prosecution cannot lead to a truly just and equal society.

The focus on prosecuting “the right people” perpetuates many of the same pathologies found in the current approach to prosecution, such as racial disproportionality and erasure of structural causes of harm. It also ignores the criminal system's ineffectiveness at preventing and redressing harms, particularly the more complex ones related to state power and economic inequality, such as police force and intimate partner violence. In the case of police, prosecuting individual officers perpetuates the few “bad apples” myth that overlooks the

a Racial Divide, in THE OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION (Ronald F. Wright et al. eds. 2021).

172. See Green & Roiphe, *supra* note 6, at 762.

173. See, e.g., BAZELON, *supra* note 5; Johnson, *supra* note 6.

systemic and built-in violence of policing. Individual interventions, via prosecutions or civil suits, will continue to be more costly and less effective than other ways to address state violence (such as reducing police). Compounding this, are distributional costs, such as police of color being charged more frequently.¹⁷⁴ Similarly, there is increased recognition that the criminal system does not effectively address IPV and does not make most victims safe. As Leigh Goodmark documents: “We have the data that shows involvement in the criminal legal system does not deter [IPV] . . . [P]olice [and prosecutors] are an [ineffective] after-the-fact remedy.”¹⁷⁵ Despite the billions of dollars the federal government has spent on police and prosecutor intervention, there is no proof this has decreased IPV, and indeed, IPV homicides have risen in recent years.¹⁷⁶ The vast majority of these victims do not report their abuse to law enforcement, and some—particularly people of color and those who are otherwise not “perfect” victims—are even prosecuted for trying to protect themselves.¹⁷⁷ Nonetheless, law enforcement and prosecutorial funding has increased with each repassage of the Violence Against Women Act (VAWA); the mantra of more—more police, more prosecution—is even being given new impetus by the progressive prosecutor movement.

Every one of the progressive prosecutors discussed here practices exceptionalism in some form, with the two most common examples being exceptions for police violence and for IPV/sexual assault.¹⁷⁸ They also mostly leave the overinclusive group of people deemed “violent” out of many reforms, making any significant decarceration impossible, as a significant percentage of today’s prison population are classified as “violent offenders.” This exceptionalism can lead prosecutors to ignore empirical evidence and give in to the biased, emotional reactions that have driven criminal policy for too long. It also frequently leads them to ignore the lived experiences of those most impacted by crime—victims—and sustains the narrative that certain people are deserving and others

174. See Levine, *supra* note 13.

175. GOODMARK, *supra* note 70, at 115.

176. *Id.* at 116–18.

177. See SURVIVED AND PUNISHED, NO GOOD PROSECUTORS NOW OR EVER (2021), <https://www.survivedandpunishedny.org/anti-prosecution/no-good-das-zine> [https://perma.cc/H85J-RHXY] (detailing this criminalization of survival, illustrating it with case examples, and noting that prosecutors do this while continuing to ask for increased resources in the name of victims).

178. See, e.g., ROLLINS, *supra* note 7; ERIC GONZALEZ, JUSTICE 2020: AN ACTION PLAN FOR BROOKLYN (2020), <http://www.brooklynnda.org/wp-content/uploads/2019/03/Justice2020-Report.pdf> [https://perma.cc/FT4F-AJXE].

undeserving of punishment, perpetuating the cycle of reformist reforms.¹⁷⁹ This is not to say that there should be no individual accountability for, for instance, police who kill people. Such individual accountability should, however, be accompanied by an acknowledgment that the police are part of a state violence system, as well as by efforts at systemic reform. Most importantly, the limited tools of prosecution to do anything other than punish mean that prosecuting individual police officers is at best an interim solution that does not further the end goal of eliminating state-sanctioned violence.

2. Net-widening

A perhaps unintended, but pervasive, problem with efforts to decarcerate is net-widening, or expanding surveillance, control, and punishment of marginalized communities. Net-widening does not just center on the criminal system but also includes other punitive systems of state control, such as immigration and the family regulation system.¹⁸⁰ Decriminalization may cause net-widening when the state continues to regulate a decriminalized activity and ends up sweeping into state surveillance programs those people who would never have been criminally charged.¹⁸¹ Diversion programs in particular have been cited as increasing surveillance over those who would never have been charged otherwise, and violations of the terms of diversion sometimes result in more jail time than would have been served under a conviction for the underlying crime.¹⁸² In this manner, net-widening increases the footprint of the criminal system. It also compounds racial inequality even more by drawing in more people and thus

179. See Deborah Weissman, *Imperfect Progressive Reforms: Situating the Problem of Gender Violence*, L. & POL. ECON. PROJECT BLOG (Sept. 30, 2020), <https://lpeproject.org/blog/imperfect-progressive-reforms-situating-the-problem-of-gender-violence> [https://perma.cc/HV6T-M29D] (describing these results from categorically excluding gender violence offenses from reforms).

180. See, e.g., Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012); Godsoe, *An Abolitionist Horizon for Child Welfare*, *supra* note 18.

181. See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015) (describing this in the context of marijuana decriminalization).

182. See, e.g., Stephen Handelman, *How Juvenile Probation Lands More Youths in Jail*, CRIME REP. (Oct. 26, 2020), <https://thecrimereport.org/2020/10/26/how-juvenile-probation-lands-more-young-people-in-jail> [https://perma.cc/6RL5-GSPN] (documenting that, in addition to net-widening, increased use of probation likely increases the number of youths serving short jail terms); Michael M. O'Hear, *Rethinking Drug Courts: Restorative Justice as a Response to Racial Injustice*, 20 STAN. L. & POL'Y REV. 463, 481 (2009) (reporting that "sentences for failing participants in New York City drug courts were typically two-to-five times longer than the sentences for conventionally adjudicated defendants.").

creating more crime in an ever-expanding cycle.¹⁸³ Racial inequality is increased for numerous reasons, including preferential treatment of white defendants via referrals to diversion programs (usually by prosecutors),¹⁸⁴ higher risks of noncompliance by certain defendants due to the lack of resources such as mental health and substance abuse treatment in communities of color; and harsher sanctions received by people of color for not completing programs or for violating probation or parole conditions.¹⁸⁵

Part of the effort to decarcerate has been the increased use of diversion programs. Diversion programs must be well-crafted to work at all. To effectively address overincarceration and overcriminalization, such programs must include those accused of serious crimes, which few do, and must always incorporate ongoing assessment of whether a diversion program is enlarging the state surveillance and control footprint.¹⁸⁶ Indeed, research shows that many diversion programs are net-widening.¹⁸⁷ This is in large part because prosecutors usually

183. Substantial research supports both these propositions: net-widening and increased racial disproportionality. For one recent study finding both as to juveniles on probation, see ANNIE E. CASEY FOUND., *TRANSFORMING JUVENILE PROBATION* (2018), <https://www.aecf.org/resources/transforming-juvenile-probation> [<https://perma.cc/EE8Z-6N9W>] (demonstrating that “probation can also become a gateway to unnecessary confinement for youth, [particularly youth of color], who frustrate authorities with noncompliant behavior but pose minimal risk to public safety.”).
184. Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged With Felonies and Processed in State Courts*, 3 *RACE AND JUST.* 210, 228 (2013) (reporting findings from a 16-year study of pretrial diversion among men charged with felonies and concluding that “[o]verall, prosecutors are more likely to grant pretrial diversions to White defendants than they are to grant these diversions to Black, Latino, or Asian and Native American defendants with similar legal characteristics”); O’Hear, *supra* note 182, at 477–478 (providing evidence which suggests that white drug offenders are more likely to benefit from this “pathway out” than Black offenders, so that diversion courts “are apt to exacerbate, not ameliorate, overall racial disparities.”); see also BESIKI LUKA KUTATELADZE, REBECCA RICHARDSON DUNLEA, MELBA PEARSON, LIN LIU, RYAN MELDRUM & DON STEMEN, *RACE AND PROSECUTORIAL DIVERSION* (2021), <https://prosecutorialperformanceindicators.org/wp-content/uploads/2021/07/FIU-Race-and-Prosecutorial-Diversion-D.pdf> [<https://perma.cc/LM86-4LLA>] (demonstrating significant racial disparities in diversion opportunities in four different counties studied).
185. SENT’G PROJECT, *REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS* 15–16, <https://www.sentencingproject.org/wp-content/uploads/2016/01/Reducing-Racial-Disparity-in-the-Criminal-Justice-System-A-Manual-for-Practitioners-and-Policymakers.pdf> [<https://perma.cc/EX2J-J8NG>] (“A study of Wisconsin probationers indicates that African Americans were nearly three times as likely as whites to be revoked from probation, especially for drug offenses.”).
186. See Kay L. Levine & Ronald F. Wright, *Models of Prosecutor-Led Diversion Programs*, *ANN. REV. OF CRIMINOLOGY* 331, 334–35 [hereinafter Levine & Wright, *Diversion Programs*].
187. See, e.g., YALE GLOB. HEALTH JUST. P’SHP, *DIVERSION FROM JUSTICE: A RIGHTS-BASED ANALYSIS OF LOCAL ‘PROSTITUTION DIVERSION PROGRAMS’ AND THEIR IMPACTS ON PEOPLE IN THE SEX*

divert “low-hanging fruit”—minor crimes that might otherwise have been quickly dismissed.¹⁸⁸ In other words, rather than having their charges entirely dismissed, people convicted of more minor offenses find themselves under state surveillance through diversion programs. Compounding this phenomenon, most prosecutor-run diversion programs have little transparency and accountability.¹⁸⁹ In a recent survey of these programs, Ronald Wright and Kay Levine found that prosecutors generally operated them without any legislative or court oversight and very few peer-reviewed evaluations or rigorous assessments, which has resulted in particularly “weak accountability.”¹⁹⁰ Many prosecutors continue to resist restorative justice programs under any guise, especially those that diminish any of their control.¹⁹¹ This siloed corner of the criminal system creates a significant risk of abuse because of its insularity, its lack of transparency, and the fact that those defendants involved are even more likely to agree to all kinds of strict conditions, and potential criminal liability if they fail, just for the opportunity to avoid incarceration.¹⁹²

The rhetoric and actions of numerous progressive prosecutors indicate that they are particularly at risk for net-widening; indeed, it seems to be happening in many of their localities. Progressive prosecutors frequently speak about diversion from court and mental health and substance abuse treatment, but these programs remain firmly under prosecutorial control—meaning the stick of incarceration hangs over those most vulnerable. First, the progressive prosecution movement is primarily framed in terms of reducing mass incarceration rather than re-envisioning the larger criminal system. Tellingly,

SECTOR IN THE UNITED STATES 11–18 (2018), https://www.nswp.org/sites/nswp.org/files/diversion_from_justice_ghjp_-_2018.pdf [<https://perma.cc/HQ9A-JSM7>] (finding lower recidivism rates for prostitution diversion programs but also finding “coercive practices” to induce participation, and “further entrench[ment]” of participants in state control); Kalani C. Johnson, Robert C. Davis, Melissa Labriola, Michael Rempel & Warren A. Reich, *An Overview of Prosecutor-Led Diversion Programs: A New Incarnation of an Old Idea*, 41 JUST. SYS. J. 63 (2020) (summarizing studies of diversion for several decades and noting the ever-present possibility of net-widening).

188. Johnson et al., *supra* note 187, at 66 (prosecutors frequently let in “only the weakest cases which could not have been successfully prosecuted.”).
189. YALE GLOB. HEALTH JUST. P’SHIP, *supra* note 187, at 18 (noting that most diversion programs are “very local” and “hard to monitor”).
190. Levine & Wright, *supra* note 186 (finding also that prosecutors showed selection bias and were unclear in eligibility criteria and that the programs presented a significant risk of net-widening and even, in some cases, a criminogenic one).
191. See Lara Bazelon & Bruce A. Green, *Restorative Justice From Prosecutors’ Perspective*, 88 FORDHAM L. REV. 2287 (2020).
192. In some instances, defendants may be diverted pre-arraignment, so may not even have been assigned an attorney.

the leading organization of the movement, Fair and Just Prosecution, and many of the most openly reformist candidates, such as Chesa Boudin, describe themselves as “decarceral” rather than more broadly anti-system or abolitionist.¹⁹³ Second, and connected to the hero mentality discussed below, progressive prosecutors repeatedly express a desire to solve social problems such as mental illness, addiction, intimate partner violence, and more. For instance, Eric Gonzalez has discussed his office’s focus on rehabilitation, including employing therapeutic professionals:

So we have pivoted in Brooklyn, but it does actually make the role of prosecutors a little bit more complex, because we’re in an area that we’re not best suited for, right? We’re in an area where we’re trying to help provide rehabilitative services. That is a switch for DA’s offices, so the type of people that my office is looking to bring in now are actually people with that kind of expertise, right? Starting to hire more social workers and people who are licensed to do this type of work.¹⁹⁴

The prosecutor’s office remains an arm of the criminal system and thus is not the appropriate actor to address these problems.

While it is admirable that Gonzalez has the humility to recognize that lawyers, particularly prosecutors, do not have the expertise to really address mental illness, he overlooks the fact that social workers employed by his office are still law enforcement. Providing services to those in need “is inherently in conflict with [prosecutors’] pledge to serve and maintain the criminal punishment system.”¹⁹⁵ Indeed, this mission creep to include services for victims expands the reach of prosecutorial control, as well as renders services less effective or completely unavailable to many survivors.¹⁹⁶ In contrast, some social workers not employed by prosecutors’ offices, but working adjacent to or in coordination with law enforcement and punitive state programs, are beginning to reject this use of their social work expertise.¹⁹⁷

193. See FAIR AND JUST PROSECUTION, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR (2018), https://fairandjustprosecution.org/wp-content/uploads/2018/12/FJP_21Principles_Interactive-w-destinations.pdf [<https://perma.cc/5F3L-VB7M>].

194. BRENNAN CTR. JUST., *supra* note 85.

195. See CMTY. JUSTICE EXCH. ET AL., *supra* note 1, at 2.

196. See SURVIVED AND PUNISHED, *supra* note 177, at 9 (detailing this phenomenon in New York City and noting that these nominally independent social service agencies “receive money from carceral systems and prosecutors in their campaign for legitimacy”).

197. See Leah A. Jacobs, Mimi E. Kim, Darren L. Whitfield, Rachel E. Gartner, Meg Panichelli, Shanna K. Kattari, Margaret Mary Downet, Shanté Stuart McQueen & Sarah E. Mountz, *Defund the Police: Moving Towards an Anti-Carceral Social Work*, 32 J. PROGRESSIVE HUM. SERVS. 37 (2021).

3. Hero Complex

Perhaps the stickiest hurdle to success for progressive prosecutors is the hero role accorded to prosecutors and lawyers more generally. This trope of the prosecutor as saving victims and protecting society continues to be very pronounced in both public lore and legal authority. From *Law and Order*'s depiction of them as saviors to real-world examples like Linda Fairstein (the now infamous Manhattan prosecutor who continues to justify her crusade against five innocent youths in the Central Park rape case and portrays herself as a justice-seeking “pioneer”), prosecutors posit themselves as the only barrier between the people and violence and chaos.¹⁹⁸ Although some prosecutors have acknowledged the need for “humility,” most do not seem to embrace its use in practice.¹⁹⁹ Indeed, in a profession often characterized by hubris, prosecutors are arguably at the top.²⁰⁰

This savior mentality obscures what the job of most prosecutors actually is.²⁰¹ It also justifies ethical shortcuts, a problem that can lead to terrible outcomes, such as wrongful convictions. Kay Levine and Ron Wright, in interviews with prosecutors, reveal that those who describe themselves as “the savior[s] and

198. See, e.g., COLOR OF CHANGE HOLLYWOOD, NORMALIZING INJUSTICE: THE DANGEROUS MISREPRESENTATIONS THAT DEFINE TELEVISION'S SCRIPTED CRIME GENRE (2020) https://hollywood.colorofchange.org/wp-content/uploads/2020/02/Normalizing-Injustice_Complete-Report-2.pdf [<https://perma.cc/8R8H-9Q5T>]; Elizabeth A. Harris & Julia Jacobs, *Linda Fairstein, Once Cheered, Faces Storm After 'When They See Us'*, N.Y. TIMES (June 6, 2019), <https://www.nytimes.com/2019/06/06/arts/television/linda-fairstein-when-they-see-us.html> [<https://perma.cc/SW4H-FS9Z>].

199. Jackson famously stated:

A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Robert H. Jackson, *The Federal Prosecutor: An Address Delivered to the Second Annual Conference of United States Attorneys*, in 24 J. AM. JUD. SOC'Y 18 (1940).

200. Steve Zeidman notes that the image of prosecutors as “noble and righteous protectors of virtue and morality” is inextricably connected to the historic rise in the prestige and size of prosecutors' offices and the career path to judgeships and political office by so many former prosecutors which remains very true today. See Steven Zeidman, *Virtuous Prosecutors?*, 25 CUNY L. REV. F. 1, 2 (2022). Progressive prosecutors continue to struggle with this image; Seattle DA Dan Satterberg recently noted his “humility” in thinking the criminal legal system could solve societal problems—a positive development—but simultaneously lamented his office's difficulty in hiring local law graduates since prosecutors are no longer seen by many as the “good guys.” Dan Satterberg, Seattle Dist. Att., Virtual Presentation at UNLV Law School Prosecution Symposium (April 8, 2022).

201. See *supra* notes 59–64.

protector[s] of the community” are more likely to engage in discovery malfeasance, vilify the defense, “hav[e] blinders on,” and lack an objective view of the strength of evidence and proportionate punishment.²⁰² One prosecutor they interviewed explained that these “true believers” are “the prosecutors who tend to get themselves in trouble . . . who maybe take shortcuts, or might be tempted to put on perjured testimony, or might be tempted to prosecute a case that they know doesn’t have merit.”²⁰³

Prosecutors’ collective self-image leads many of them to justify their actions on a daily basis and act against victims’ wishes (albeit ironically in their names), and it perpetuates their status as being apart from and above the community. Accordingly, their representation of “the people” has gone mostly unquestioned, and those most impacted by the system are ignored, their expertise overlooked, and the costs to their community accepted as deserved.²⁰⁴ Epistemic injustice theory demonstrates the particular harms of silencing and discounting the viewpoints and lived experiences of marginalized groups.²⁰⁵ Epistemic injustice occurs when a marginalized group “is unable to contribute knowledge to public discussions” due to its disfavored status, and the barriers to this group’s participation are deemed unproblematic.²⁰⁶

This silencing perpetuates the societal hierarchy, with lower-income people and people of color particularly likely to be silenced. It stifles activism and inhibits the agency and dignity of entire groups of people. And it leads to myopic and harmful policies, such as diversion programs that actually increase incarceration and racial disproportionality. The vision of prosecutors as heroes representing “the community” means that people accused of crimes and their families and communities are categorically ignored and deemed unreliable or unworthy of participation. Accordingly, the prevailing, highly racialized narrative is maintained, even if the line moves slightly to, for example, be more lenient towards

202. Kay L. Levine & Ronald F. Wright, *Images and Allusions in Prosecutors’ Morality Tales*, 5 VA. J. CRIM. L. 38, 44–50, 56–58 (2017) [hereinafter Levine & Wright, *Prosecutors’ Morality Tales*].

203. *Id.* at 58.

204. *But see* Jocelyn Simonson, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019).

205. Eve Hanan, *Incarcerated Activism During COVID-19*, 18 OHIO STATE J. CRIM. L. 475, 479 (2021) (describing the epistemic injustice of people who are incarcerated).

206. *Id.* at 478; *see also* S. Lisa Washington, *Survived and Coerced: Epistemic Injustice in the Family Regulation System*, COLUM. L. REV. (forthcoming 2022) (examining and critiquing the family regulation system’s treatment of mothers who are survivors of domestic violence).

people convicted of drug offenses; real systemic change, redistribution of societal resources, and the envisionment of new institutions are off the table.²⁰⁷

Although the progressive prosecution movement questions the traditional prosecutorial image, it simultaneously reentrenches the view of prosecutors as saviors and invigorates the cult of personality. First, progressive prosecutors explicitly view and present themselves as “fixing” the broken system.²⁰⁸ Second, they want to hold onto the “good guy” mantle but recast it in a progressive light based on their policies or backgrounds. Exemplifying this, Boston DA Rachael Rollins created a public flap last year when she critiqued public defenders for claiming to be “heroes” despite failing to adequately represent “her people,” that is, communities of color, thus implying prosecutors were the real protectors and saviors.²⁰⁹

207. Olúfemi O. Táíwò, *Being-In-The-Room Privilege: Elite Capture and Epistemic Deference*, PHILOSOPHER (Fall 2020), <https://www.thephilosopher1923.org/essay-taiwo> [https://perma.cc/ZT8K-8B9F]. The false racialized narrative that crime is about individual “bad actors” obscures the root causes of criminal offending and perpetuates othering, and a stark moral binary between those who harm and those who are harmed. Godsoe, *The Victim/Offender Overlap & Criminal System Reform*, *supra* note 68 at notes 15, 121–22. A transformational narrative—including overcoming the view of prosecutors as heroes—is essential to meaningful change. As advocate and formerly incarcerated person, Robert Saleem Holbrook, puts it: “narrative change always comes before social change.” Interview by Robert Saleem Holbrook with Professor Jocelyn Simonson, Brooklyn Law School (Aug. 2021) <https://brooklynlawschool.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=6a841abc-3228-433a-8508-ac22016040b1>.

208. But at least one urges humility. See BRENNAN CTR. JUST., *supra* note 85 (quoting Dan Satterberg, DA of Seattle).

209. See Andrea Estes, *District Attorney Rollins Calls Public Defenders Too White and Privileged, Setting off a Storm of Protest*, BOS. GLOBE (May 5, 2020), <https://www.bostonglobe.com/2020/05/05/metro/district-attorney-rollins-calls-public-defenders-too-white-privileged-setting-off-firestorm-among-defense-lawyers/> [https://perma.cc/HT3V-L9BF].

The cult of personality is also evident in how many of these prosecutors campaign—sharing personal stories of being stopped by police,²¹⁰ being abused,²¹¹ or having family members incarcerated.²¹² They use social media and, in Boudin’s case, a podcast to describe their policies and their personal and professional histories.²¹³ This level of transparency and attempt to connect with a broader community can be positive, as I argued earlier. Nonetheless, it simultaneously entrenches the idea of the prosecutor as a change agent—perhaps the only, or at least the primary one—thus obscuring community voices and deterring questioning of the ongoing role of even the most progressive prosecutor in the carceral state. (Indeed, I have had people question me on this Article’s project of critiquing progressive prosecutors, arguing that we should all be united behind these prosecutors—an understandable concern given the alternative of traditional prosecutors, but one that stymies debate). Finally, the savior narrative obscures the structural reality that progressive policies can be undone by the next prosecutor—discretion goes both ways. To truly address the deep-rooted pathologies in the criminal system, as abolitionist organizers write: “It needs to be seen not as an individual issue but a systemic one.”²¹⁴

Perhaps because of these impediments, progressive prosecutors are mostly not implementing truly transformative changes and, as discussed further below, are certainly not cutting funding or staff. Much of their

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210. See e.g. Jonah E. Bromwich, *Why Police Accountability Is Personal for This Manhattan D.A. Candidate*, N.Y. TIMES (May 12, 2021), <https://www.nytimes.com/2021/05/12/nyregion/alvin-bragg-manhattan-district-attorney.html> [<https://perma.cc/5D5Z-XQUR>] (“In seeking to position himself as the candidate most capable of changing the system from the inside, Mr. Bragg has leaned on his personal history—including both his street-corner and courtroom encounters with the police.”); Matthew Kassel, *Alvin Bragg Has a Personal Reason for Pushing Police Reform*, JEWISH INSIDER (Feb. 3, 2021), <https://jewishinsider.com/2021/02/alvin-bragg-manhattan-da> [<https://perma.cc/6KYM-4F64>] (“Alvin Bragg, a former federal prosecutor... was reminiscing about all the occasions—and there are many—in which he was wrongly held at gunpoint by the police. . . . Now that he is running to be Manhattan’s next district attorney, Bragg believes that such intimate interactions with the legal system . . . make him uniquely suited to revamp the office amid a national reckoning over police safety and racial inequality. ‘I’m drawing from a place of personal and professional experience.’”).
211. John Chase, *Foxx Parlays Personal Story, Message of Change to Big Win*, CHI. TRIBUNE (Mar. 16, 2016), <https://www.chicagotribune.com/politics/ct-kim-foxx-cook-county-states-attorney-met-20160315-story.html> (“In TV commercials and on the campaign trail, she said that surviving a Cabrini-Green childhood, being the victim of sexual abuse in her youth and even being homeless for a time during high school allowed her to see the county’s justice system differently.”).
212. See Elton, *supra* note 87.
213. CHASING JUST., <https://www.chasingjusticepodcast.com> [<https://perma.cc/6YCB-QJYP>].
214. See CMTY. JUSTICE EXCH. ET AL., *supra* note 1.

platform, such as wrongful conviction review,²¹⁵ discovery reforms (which often entail simply complying with existing constitutional and ethical guidelines),²¹⁶ and not opposing funding parity for defenders simply raises the practice of law to a low bar of decency.²¹⁷ Others expand and entrench the system; particularly treacherous are the programs some are implementing under a more therapeutic veneer that still operate under prosecutorial control.²¹⁸

The much-touted focus on data and transparency is a valuable step forward but it is not sufficient to truly change the system. Tracking data and providing it to the public is undoubtedly a major contribution of many in this group; Kim Foxx in particular has provided information on charging and declination decisions to community groups who used it to assess her performance. This neutral assessment likely enabled voters in November 2020 to vote on her reelection with more relevant information than in any prior prosecutorial election.²¹⁹ Nonetheless, research in other areas of criminal system reform suggest that transparency is largely ineffective at achieving significant change, since it does not shift decisionmaking power, and it may even deepen racial inequities and stymie change efforts by increasing systemic legitimacy.²²⁰ Indeed, transparency has been

215. See, e.g., Larry Krasner, <https://krasnerforda.com/plans-for-the-future> [https://perma.cc/V3ZD-4E2C].

216. See, e.g., Eric Gonzalez, *Eric's First Term Achievements*, <https://www.ericgonzalez.com/policy> [https://perma.cc/5253-ZGD8]; Bragg, *supra* note 125.

217. Indeed, no DA actually appears to vocally support pay parity—most are not likely to actively oppose it. One who did support it before being elected then reversed course when in office, and asked for more funding to do his 'progressive' work. See Nick Chrastil, *Now DA, Williams Backs off on the Need for Funding Parity Between Prosecutors, Defenders*, THE LENS (Nov. 10, 2021) <https://thelensnola.org/2021/11/10/now-da-williams-backs-off-on-the-need-for-funding-parity-between-prosecutors-defenders> [https://perma.cc/YA66-L4US].

218. See *supra* note 178 (discussing Gonzalez's use of social workers to "help" those being prosecuted); David Greenwald, *Three Prosecutors Join With Shaun King to Announce Grassroots Law Project to Create Truth, Justice and Reconciliation Programs*, DAVIS VANGUARD (July 2, 2020), <https://www.davisvanguard.org/2020/07/three-prosecutors-join-with-shaun-king-to-announce-grassroots-law-project-to-create-truth-justice-and-reconciliation-programs> [https://perma.cc/7J3Z-4ASF].

219. See Daniels, *supra* note 81.

220. Two examples of this dynamic are sentencing reform and police body camera mandates, both of which have been shown to either not produce the desired changes or even to increase mass incarceration and inequities. See HINTON, *supra* note 3 (sentencing reform); Cynthia Lum, Megan Stoltz, Christopher S. Koper, & J. Amber Scherer, *Research on Body-Worn Cameras: What We Know, What We Need to Know*, 18 CRIMINOLOGY & PUB. POL'Y 93 (2019) (reviewing and summarizing empirical research on police body cameras).

so effective at staving off meaningful change that it has become the darling of many defenders of the status quo.²²¹

Some of these prosecutors are implementing, or trying to implement, truly transformative reforms that may shrink the carceral power of the state, such as abolishing money bail,²²² banning peremptory challenges in jury selection, ceasing use of sentencing enhancements,²²³ or categorically declining to prosecute certain crimes.²²⁴ Even those changes, however, could be reversed by a new prosecutor. Simply put, prosecutorial discretion is inherently reformist, rather than a long-term solution. That is why numerous scholars and community groups—from a wide range of perspectives on reform versus abolition—call for legislative change, with progressive prosecutors’ lobbying assistance, and emphasize the need to reduce prosecutorial power.²²⁵ As with police, it is not that there are “good” prosecutors and “bad” prosecutors but rather that the institution of prosecution itself is deeply flawed. To be clear (again), I support these efforts by progressive prosecutors but am concerned that their efforts are not accompanied by attempts to shrink the larger criminal law footprint and are being hailed as the end goal when they are, at best, half measures.²²⁶

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221. See David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 100, 158 (2018) (mapping transparency’s move from a progressive measure to a neoliberal or libertarian measure and concluding that transparency provides “diminishing marginal returns” and should not be elevated over other reform demands).
222. Chesa Boudin has likely gone the furthest in this regard. See Jasmin Wyatt, *Boudin Takes Aim at the Criminal Justice System as SF’s New District Attorney*, BERKELEY POL. REV. (Apr. 10, 2022), <https://bpr.berkeley.edu/2020/08/01/boudin-takes-aim-at-the-criminal-justice-system-as-sfs-new-district-attorney/> [<https://perma.cc/G2JE-FMHS>].
223. George Gascón stopped using gang sentencing enhancements because they are racially disproportionate and ineffective; despite this “embrace [of] data and reject[ion of] alarmist rhetoric,” this measure inspired the suit against Gascón by his employees’ union. See Gil Garcetti, Ira Reiner, and Miriam Aroni Krinsky, Opinion, *George Gascon’s Policies Are Based in Science and Backed by Voters*, ORANGE CNTY. REG. (Nov. 22, 2021), <https://www.ocregister.com/2021/11/22/george-gascons-policies-are-based-in-science-and-backed-by-voters/> [<https://perma.cc/AP2H-YRTV>].
224. See ROLLINS, *supra* note 7; Bragg, *supra* note 125 (outlining categorical declination platforms).
225. For instance, Rachel Barkow, a criminal law scholar who supports decarceration and downsizing but not abolition, and the Community Justice Exchange, an abolitionist grassroots movement, both call for prosecutors to support legislative change to the criminal system and to cede their own executive powers, including limiting the scope of their discretion. Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1390–92 (2021) (reviewing EMILY BAZELON, *CHARGED* (2019)); CMTY. JUSTICE EXCH. ET AL., *supra* note 1.
226. These unintended consequences arise whenever there is not a long-term horizon of equality and autonomy for all people. To take just one example, I have previously described how the framing of the marriage equality movement, while a hugely important win for so many people, also reinscribed gender roles and further entrenched marriage as the only relationship meriting state support. Godsoe, *supra* note 38. Aya Gruber makes an analogous argument to

IV. BEYOND PROSECUTORS

Because of the inherent nature of the prosecutorial role, I conclude that the only prosecutor who can transform the system is an abolitionist one. Prosecutors cannot execute justice within the current framework because justice cannot be done via the criminal legal system—the racism, narrative of individual blame rather than attention to structural root causes, and reactive rather than preventive stance—are all built into it.²²⁷ In this Part, I make the normative and prudential case that the only way for prosecutors to contribute to a transformed system is to cede both their influence as political elites and professional experts and their material resources.

The first part of my argument is consonant with scholars, such as Rachel Barkow and Barry Friedman, who recommend disaggregating the police or more broadly downsizing the criminal system. Their remedy, however, is significantly different from my proposal; they largely call for professional experts and state actors—legislatures and social services—as the replacement.²²⁸ In contrast, I build on the work of movement actors and argue that the best action prosecutors can take for people who need services “is get out of the way.”²²⁹ Let the community self-

feminist efforts to have sexual assault and intimate partner violence recognized as harms, which contributed to the growth of the carceral state and mass incarceration. See AYA GRUBER, *THE FEMINIST WAR ON CRIME* (2020).

227. A system that addresses the root causes of crime looks very different than the current reactive system; a key function of the former is building up the social infrastructure so that people are safer and healthier. See MOVEMENT FOR BLACK LIVES, *Invest-Divest*, <https://m4bl.org/policy-platforms/invest-divest/> [<https://perma.cc/5BLU-77GC>] (“We demand investments in the education, health and safety of Black people, instead of investments in the criminalizing, caging and harming of Black people.”).
228. See RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 168–85 (2019) (describing the importance of engaging experts in reform efforts, explaining how the public is guided by “emotions,” and calling for “expert bodies that use empirical data and studies to guide their decisions about criminal justice policy”); Friedman, *supra* note 12, at 978 (arguing that there are “real questions” about whether police are the right actors to do much of what they are tasked with, then suggesting that other professionals, such as social workers, and state agencies, such as child welfare and housing, might be better suited to these tasks); see also Bellin, *supra* note 57, at 1253 (concluding that the limitations of the prosecutorial role make other elite entities “like legislators, judges, and police” most capable of enacting significant changes). To be clear, Barkow advocates more evidence-based and thus “pragmatic” measures in criminal system reforms and does not suggest progressive prosecutors are the solution to overincarceration, due to the easily reversible nature of their discretionary power. She also points out that legislative and judge-made reforms can help progressive prosecutors corral or compel their line prosecutors to implement their policies. Barkow, *supra* note 225, at 1392.
229. See CMTY. JUSTICE EXCH. ET AL., *supra* note 1. Research shows that most of the people who harm and are harmed, usually designated ‘offenders’ and ‘victims,’ lack meaningful access to

defend and build their own new institutions and a new vision of safety, from the ground up.²³⁰

Sociologist Patrick Sharkey’s research demonstrates that building up community resources and social infrastructure, such as local non-profits, can address even violent crime “at least as effective[ly] as the police” and with far fewer costs; accordingly, he calls for “investments in a alternative set of institutions [than law enforcement and the criminal system] driven by residents and local organizations that can play a central role in creating safe streets and strong communities.”²³¹ Positing the community as a primary source of expertise and change implicates the ongoing debate in criminal system reform between increased expertise and increased democratic engagement.²³² While recognizing that “the community” has traditionally skewed in favor of increasing punishment, as Rachel Barkow aptly documents, I do not agree that the remedy, at least in the case of prosecutors, is to eschew the community’s expertise and

services such as health care, substance abuse treatment, education, and employment assistance. See Godsoe, *The Victim/Offender Overlap & Criminal System Reform*, *supra* note 68 (summarizing research).

230. I use community self-defense here to mean the concept that “we keep us safe;” true public safety comes from support systems for families and communities, who work together against violence and other harms through restorative justice approaches and investments in resources such as healthcare and housing, education and living-wage jobs, rather than through top-down carceral interventions. As one community-based organization puts it, “[T]oo often, public safety is seen as an individual issue when it is actually a community issue. We all have something to gain by investing in community-based solutions that genuinely create safe and secure communities.” ELLA BAKER CTR. FOR HUM. RTS., PUBLIC SAFETY BEGINS WITH PUBLIC HEALTH: MAKING OAKLAND SAFER TOGETHER 4 (2017), https://slidelegend.com/public-safety-begins-with-public-health-ella-baker-center_5ad9c09f7f8b9ad5018b4585.html [<https://perma.cc/64WV-K9VT>]; see also RISE & TAKEROOT JUST., AN UNAVOIDABLE SYSTEM: THE HARMS OF FAMILY POLICING AND PARENTS’ VISION FOR INVESTING IN COMMUNITY CARE (2021), <https://www.risemagazine.org/wp-content/uploads/2021/09/AnUnavoidableSystem.pdf> [<https://perma.cc/LUZA-PHQ2>] (detailing, in the family regulation context, how families and communities know far better than the state how to best care for their children).
231. Roge Karma, *How Cities Can Tackle Violent Crime Without Relying on Police*, Vox (Aug. 7, 2020, 8:10 AM), <https://www.vox.com/21351442/patrick-sharkey-uneasy-peace-abolish-defund-the-police-violence-cities> [<https://perma.cc/E52X-V85T>]. See further discussion *infra* notes 326-331.
232. I cite here just a few of the many scholars discussing this important issue. Compare BARKOW, *supra* note 228; John Rappaport, *Some Doubts About “Democratizing” Criminal Justice*, 87 U. CHI. L. REV. 711, 810 (collecting studies showing that laypeople can be punitive and arguing for reform that “emphasizes an evidence-based approach to criminal justice problem-solving focused on achieving outcomes consistent with democratic values”); with Akbar, *supra* note 162 (calling for “non-reformist reforms,” or changes that empowers communities rather than those made by elites); Simonson, *supra* note 13 (calling for powershifting to grassroots movements from elites).

democratic voice in favor of experts “knowing better,” thereby increasing the (already large) influence of professionals.

State prosecutors are expressly political and almost always directly elected. Accordingly, they cannot profess to neutrality as experts, and they also have a greater democratic mandate than most other system actors.²³³ This latter point softens the either/or choice of egalitarian process versus outcomes that Trevor Gardner points out—DAs are chosen by an egalitarian process (as much as one considers our elections egalitarian), so reformers can focus on those candidates advocating the most egalitarian outcomes.²³⁴ Indeed, the recent elections of progressive prosecutors may indicate that penal populism has in part been based on a lack of information about the criminal system and prosecutorial actions, as well as a dearth of other options in struggling communities.²³⁵ Perhaps the greater transparency of criminal system actors exemplified by this group of prosecutors, coupled with increased community attention to the system’s pathologies, will result in more informed and less punitive choices.²³⁶ Moreover, the growing body of evidence from restorative justice programs suggests that “on the individual level, mercy may have purchase.”²³⁷ As to the question of expertise, prosecutors have historically used neither empirically-proven interventions nor community experiences to shape their policies. Accordingly, the choice between bottom-up or top-down inputs is also not necessarily an either/or. Expanding both those inputs, as progressive prosecutors are doing, will only benefit their decisionmaking.

Despite these positive signs, however, progressive prosecutors can only take us so far. Long-term change cannot come unless they shrink their own

233. I agree with Ben Levin that neutrality is likely impossible and that experts professing to be neutral may be more problematic than those making their political priorities clear. See Benjamin Levin, *De-Democratizing Criminal Law*, 39 CRIM. JUST. ETHICS 74, 84–85 (2020); see also, *supra* notes 120–126 (discussing prosecutors’ democratic mandate). I, with two coauthors, make the same argument as to legal scholars in a forthcoming piece. Cynthia Godsoe, Abbe Smith & Ellen Yaroshfsky, *Can You Be A Legal Ethics Scholar and Have Guts?*, GEO. J. LEGAL ETHICS (forthcoming 2022), at nn.119-36 (also noting the false neutrality narrative in the fields of journalism and history).

234. Gardner, *supra* note 39.

235. See FORMAN, *supra* note 108 (arguing in part that communities supported punitive measures due to a lack of other options). Rachel Barkow seems to agree, suggesting that their election may indicate that, at a local level, voters are better able to assess “actual crime rates and practices and how they affect their lives and communities.” Barkow, *supra* note 225, at 155.

236. It is true that progressive prosecutors remain a very small minority of elected prosecutors. Given their high profile, however, it is certainly possible that their reforms can influence, even in a small way, jurisdictions that do not go so far as to elect one.

237. Capers, *supra* note 52, at 1598.

footprint.²³⁸ Unfortunately, this is not happening. While some prosecutors in this new movement are further involving the community in advising their platforms, none are ceding funding, and most are seeking expanded resources to implement their platforms and grow their influence.

A. Shifting Power From Professionals to Communities

Although defense and prosecution are presented as a binary, the progressive prosecution movement, with its decarceral mission and crossover defender personnel, reveals similarities between the two—something long known to the people involved in the system. There is no doubt all lawyers are insiders in a system that others and dehumanizes people accused of crimes (and often victims as well). Attorneys on either the prosecution or defense side are more highly educated, have higher incomes, are more likely to be white, and are less likely to have a disability or mental illness than people involved in the system.²³⁹ They also usually have little-to-no personal experience with the criminal legal system, and their cultural and political hegemony remain largely unchallenged.²⁴⁰ Recall the Rachel Rollins flap, where it became clear that *both* prosecutors and defenders are far less demographically diverse than, and often also out of touch with, the communities they serve.

By training and professional culture, lawyers are more elite and usually more conservative than other movement actors.²⁴¹ Gerald López recognized

238. Lawyers and law itself are not accustomed to taking a backseat and deferring to others, though they should do so much more. Roediger, *supra* note 165, at 216 (“Law hears ‘abolitionist alternative’ and imagines a new apparatus, similar in form, ready for co-optation”).

239. See Hoag, *supra* note 169, at nn.18–20 (detailing statistics). Prosecutors, as particularly powerful and valorized lawyers skew even whiter and maler than other attorneys, see *supra* notes 74–75, and their power may be so racialized and gendered as to render Black women elected head prosecutors particularly harassed and criticized by many. See Thusi, *supra* note 83, at 133–37 (arguing persuasively that the “racialized attacks and disadvantages” on Kim Foxx, Kim Gardner and others, stem from this bias that they are deemed “inadequate . . . to reap all the privileges available to white prosecutors”).

240. Some legal scholars and lawyers are starting to question this hegemony. See, e.g., JONATHAN RAPPING, GIDEON’S PROMISE: A PUBLIC DEFENDER MOVEMENT TO TRANSFORM CRIMINAL JUSTICE (2020); see also Letter: 650 Public Defenders Stand Behind Sajid Khan, *supra* note 36 (calling for “[a]ll of us who work in the criminal legal system, including public defenders, [to] at the very least be willing to examine the roles we play in perpetuating systemic injustices.”); Hoag, *supra* note 169; Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161 (2019).

241. Nejaime, *supra* note 166, at 700 (describing lawyers in the feminist movement as a “particularly privileged demographic in the broader movement” who were less racially diverse, of higher-income, and more educated than other movement activists).

decades ago that they are constrained by the elitist norms of the profession that cast them as “heroes” to their “helpless” and “incapable” clients; today, lawyers continue to erase or override client voices and, likely inadvertently, perpetuate racialized stereotypes and structural inequality.²⁴² I have previously described how defenders are part of the “insider baseball” of the criminal legal process and are still “part of the power structures that exclude nonlawyers and nonprofessionals from the court systems and silence the people most affected.”²⁴³

This blurring of roles, coupled with attorney paternalism, can also result in collaboration with the other side, which can play out to the detriment of those whose lives are actually impacted.²⁴⁴ Indeed, San Francisco DA Boudin acknowledged that the defenders and prosecutors all know each other and have professional relationships, such that the bigger change for him was not crossing the aisle but rather going from being a line attorney to managing an office.²⁴⁵ When the public defender’s office is “cozy” with the prosecutor in our (at least nominally) adversarial system, does that change the client’s perception of defenders’ loyalty and zealous advocacy? Sociologist Matthew Clair exposed this problematic dynamic in his in-depth study of the Boston criminal court system: “Defense attorneys—caught between the expectations and power of prosecutors and judges, on the one hand, and the hopes of their clients on the other—often ignore, silence, and even coerce” their clients who attempt to exercise autonomy and dignity.²⁴⁶

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242. LÓPEZ, *supra* note 25; see also Angela Onwuachi-Willig & Anthony V. Alfieri, (*Re*)*Framing Race in Civil Rights Lawyering*, 130 YALE L.J. 2052, 2076 (2021) (describing how civil rights, criminal defense, and other public interest lawyers often perpetuate racialized narratives “of racial inferiority and chronic dependence” that both stigmatize and silence their clients).
243. Godsoe, *supra* note 25, at 717–25; see also RAPPING, *supra* note 240 (calling on defenders to recognize their part in upholding the status quo and highlighting the need for a culture shift).
244. Jenny Roberts, *Defense Lawyering in the Progressive Prosecution Era* (manuscript on file with author) (observing that for some defenders, “things changed overnight—from a highly-charged adversarial relationship with a harsh law-and-order prosecutor to, well, something quite different” and remarking that this may make systemic advocacy by defenders, even getting a seat at the table, harder since prosecutors now purport to speak for the accused).
245. Rachel Marshall & Chesa Boudin, *Episode 4—The Personal Is Political: One on One With DA Boudin and Rachel*, CHASING JUST. (June 30, 2020), <https://www.chasingjusticepodcast.com/episodes/episode-4-the-personal-is-political> [<https://perma.cc/X9ZZ-9B4A>].
246. MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT 3 (2020). See also Matthew Caldwell, *The End of Public Defenders*, INQUEST (Feb. 25 2022), <https://inquest.org/the-end-of-public-defenders> [<https://perma.cc/39FY-BF8G>] (noting the history of public defenders’ institutional role as a “formative step in the expansion of our system of mass arrest, guilty pleas, and incarceration,” questioning whether public defenders serve as a “check or a collaborator” to the carceral system, and concluding that most of the “job came down to assisting the court, however unwillingly, in extracting guilty pleas from [his]

This is a particular risk with progressive prosecutors. To cite just one example, the Philadelphia head public defender described his close relationship with Krasner's office: "We agree on so much *at that top level* . . . I don't see why two people that have a major impact on the system would not get together to figure out what we are doing, and where we want to be. That's how it should work, right?"²⁴⁷ Yet at the "bottom," from most clients' perspectives, Krasner's office is still prosecuting them or diverting them with the threat of punishment looming in the background. In a system where the odds are so stacked in favor of one side—the state—too much collaboration can miss an pivotal part of the defender role—to help articulate and publicize the systemic oppression of entire categories of people.²⁴⁸ As a public defender myself, I quickly learned that my role in a system stacked against my clients was sometimes to just be the only person in the courtroom unequivocally on their side. For the same reason, that is, client trust in their lawyer's loyalty, Bay Area public defender Avi Singh has cautioned against appearing too friendly with his former colleague Boudin.²⁴⁹ More broadly, the blurring of roles when the prosecutor claims the accused as their "people" may perpetuate or even expand the system by using the criminal system to "help" people who are trafficking victims or who have mental illness or substance abuse issues.²⁵⁰

In addition to not allowing clients' voices to be heard, lawyers may curtail movement goals by focusing on individual rights rather than considering larger power issues. While scholars have suggested using a power lens to examine police and other punitive state entities, lawyers rarely if ever apply this lens to themselves

clients and thereby burying misconduct on the part of the police, the prosecution, and the court.")

247. Maura Ewing, *Philadelphia's New Top Prosecutor Is Rolling Out Wild, Unprecedented Criminal Justice Reforms*, SLATE (Mar. 14, 2018, 5:47 PM), <https://slate.com/news-and-politics/2018/03/phillys-new-top-prosecutor-is-rolling-out-wild-unprecedented-criminal-justice-reforms.html> [<https://perma.cc/DSU4-CF4F>] (emphasis added).
248. See RAPPING, *supra* note 240 (calling on defenders to recognize their part in upholding the status quo and highlighting the need for a culture shift); Daniel Farbman, *Resistance Lawyering*, 107 CAL. L. REV. 1877 (2019) (providing examples of abolitionist lawyers in the slavery era).
249. Rachel Marshall, Chesa Boudin, Avi Singh, & Sajid Khan, *Episode 7—“For the People”: Finding the Humanity in Our Criminal Legal System*, CHASING JUST. (July 21, 2020), <https://www.chasingjusticepodcast.com/episodes/episode-7-for-the-people> [<https://perma.cc/LAU9-EEJZ>].
250. Scholars have made the same arguments about the role conflation built into problem-solving courts. See, e.g., Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481 (2017); Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333 (2016).

and their role in perpetuating the system because they focus on the individual and use a narrow rights framework.²⁵¹ This can obscure systemic issues of racial inequality and the criminalization of poverty and perpetuate narratives of inferiority and pathology.²⁵² To overcome these professional tendencies, Sameer Ashar has encouraged lawyers to “think[] beneath and beyond liberal legalist approaches to social problems...through collaborative work with people, communities, and thinkers at the margins of our social structure.”²⁵³ Most scholars and lawyers, however, largely fail to grapple with these big questions and posit their role as neutral or even heroic.²⁵⁴

Prosecutors must involve communities in actual decisionmaking as well as let diversion programs be primarily led by those most system-impacted in order to begin really representing the community. Below, I sketch out three models to cede decisionmaking power and to learn from the true experts with lived experience of the system: the participatory defense, mutual aid, and transformative justice frameworks. Two clarifications are warranted. First, in advocating for listening to community voices, I am referring to a categorical or wholesale level, not an individual one. It is important for prosecutors to respond where communities agree that prosecutions of, for instance, marijuana possession, are racist and a waste of resources. They should not, however, heed calls to prosecute individual ‘X’ for a certain crime. Second, community in terms of voting districts is inextricably connected with race and class segregation. Accordingly, it

251. Former public defender Alec Karakatsanis has described the “real failure of lawyers” on both sides of the aisle as the failure to understand and engage with the people most impacted, with bottom-up change, and with lawyers’ concomitant reluctance to cede financial, often racial, and cultural power. See Alice Speri, *The Criminal Justice System Is Not Broken. It’s Doing What It Was Designed to Do.*, INTERCEPT (Nov. 9, 2019), <https://theintercept.com/2019/11/09/criminal-justice-mass-incarceration-book> [<https://perma.cc/Q2ZH-9SVX>] (quoting Alec’s description of lawyers failing “in our understanding of politics, in our understanding of organizing, in our understanding of power”).

252. See Onwuachi-Willig & Alfieri, *supra* note 242.

253. Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CALIF. L. REV. 201, 210 (2016).

254. Many are also not conscious of the racialized roots of public defense and of ongoing racial disparities in representation and advocacy. Yet, several scholars are surfacing this overlooked history. See, e.g., Alexis Hoag, *The Color of Justice*, 120 MICH. L. REV. 1, 5 (forthcoming 2021) (noting that “many of the first public defender offices ignored the structural racism inherent in the criminal adjudication process,” and that for the next century white-dominated defender offices did not advocate against mass criminalization, as Black-led defender organizations did); Ossei-Owusu, *supra* note 240, at 1163 (arguing that “the politics of race fundamentally shaped indigent defense jurisprudence and policy” in a manner that continues to leave defendants of color disproportionately impacted by under-resourced defense providers).

is essential that the community outreach and input be explicitly anti-hierarchical and seek to empower marginalized voices.

1. Centering Community Expertise

In centering community expertise and power, prosecutors can learn both from movements that attempt to educate and transform defense attorneys and from grassroots community movements. The first—learning from defense movements—might seem odd, but given that “the people” prosecutors purport to represent include defendants and their families, learning from these communities is equally as important for prosecutors as for defenders. Indeed, even more so since prosecutors’ lack of a concrete client insulates them from direct external input.²⁵⁵ As to the second, prosecutors have largely ignored the voices of the communities from which most defendants—and most victims—originate. This impedes prosecutors’ ability to truly achieve justice and inhibits any large-scale change. Securing community input and expanding notions of expertise beyond the professional elite are essential to these goals.

Participatory defense and mutual aid models can help prosecutors move towards this goal. The participatory defense movement takes as its centerpiece dismantling the hierarchy between the system players and the people whose lives are at stake. It seeks to increase the agency of those involved in the system, both for better outcomes and for their dignity.²⁵⁶ As community organizer and cofounder Raj Jayadev describes it, participatory defense is “not about the person receiving a better service, it is about becoming the agent of change themselves.”²⁵⁷ To secure better outcomes in individual cases, and even to further change the larger narrative about who commits crimes and why, participatory defense also humanizes defendants via videos about their lives and families.²⁵⁸ A central tenet of the movement is to have non-lawyer spaces—meetings and organizing spaces where lawyers are not permitted. Otherwise, old habits would continue, with attorneys taking the lead as the “experts” and clients and their families relying on the attorneys rather than recognizing their collective “community intelligence” and

255. See Irene Oritseweyinmi Joe, *The Prosecutor’s Client Problem*, 98 B.U. L. REV. 885 (2018).

256. Parent-led movements in the family policing space are adopting similar models to “humanize the defendant . . . and increase visible family presence” in individual cases, as well as to downsize and ultimately abolish the system as a whole. See, e.g., *Family Reunification, Equity & Empowerment (Free) Project*, STARTING OVER, INC., <https://www.startingoverinc.org/free> [https://perma.cc/953D-RZAA].

257. Godsoe, *Participatory Defense*, *supra* note 25, at 723 (quoting interview with Jayadev).

258. See Moore, Sandys, & Jayadev, *supra* note 99, at 1285.

taking matters into their own hands.²⁵⁹ Despite the success of the participatory defense approach both in individual cases and in changing the public conversation, there remains pushback from defenders based on, I argue, a reluctance to cede expertise and power.²⁶⁰

Mutual aid also provides a model for community empowerment and less paternalistic lawyering.²⁶¹ Combining “no strings attached” material aid with community organizing for societal change, mutual aid “practices non-hierarchy, positioning recipients as members of the project—with a goal of self-determination.”²⁶² Mutual aid is both a practical intervention and a political movement; it is different from “charity” in the key sense that it is not a delivery from the rich to the poor—based on the giver’s funding priorities with many strings attached and creating a shame in dependency. In contrast, mutual aid is designed to be communally led through a relationship among equals. The aid is not based on means-testing and carries no stigma or threats.²⁶³ Mutual aid also builds solidarity. As Dean Spade describes, it is a “radical act of caring for each other while working to change the world.”²⁶⁴ Marginalized communities have long practiced mutual aid for these reasons, including, for instance, the Black Panthers, Young Lords Puerto Rican movement, and the transgender community.²⁶⁵

Both models expand the notion of expertise more broadly. For instance, the participatory defense movement has proffered community members as gang experts to successfully counter police or other professional experts’ testimony for the prosecution.²⁶⁶ Similarly, mutual aid posits communities themselves as most knowledgeable about what they need on both a daily basis and broader level. If involved at all, lawyers are mere recipients and members, like anyone else. Both of these movements stand in stark contrast to the usual self-privileging role of lawyers; the entire legal system, including legal education and particularly the bar exam and attorney licensing structure, is based on the notion of lawyers as the

259. Godsoe, *Participatory Defense*, *supra* note 25, at 722 (quoting interview with Jayadev).

260. *Id.*

261. Garcia & Godsoe, *supra* note 18, at nn. 53–68, 162–66. *Id.* at nn.71–84.

262. *Id.* at n.162 (quoting Tammy Gan, *Mutual Aid: Non-Hierarchy in Practice*, BAD ACTIVIST, <https://www.badactivistcollective.com/the-bad-book/mutual-aid-non-hierarchy> [<https://perma.cc/M6X2-TLNF>]).

263. *Id.* at nn.53–54.

264. *Mutual Aid: Building Solidarity During This Crisis (And the Next)*, DEAN SPADE, <http://www.deanspade.net/mutual-aid-building-solidarity-during-this-crisis-and-the-next> [<https://perma.cc/EP4D-TSA5>] (book abstract); DEAN SPADE, *MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT)* 12, 82 (2020).

265. Garcia & Godsoe, *supra* note 18, at nn.71–84.

266. *Id.* at 722.

ultimate experts. It acts as a gatekeeping mechanism separating “us” from “them.” This professional culture is both elitist and carceral.²⁶⁷ Knowledge and the recognition of expertise represent power structures that are highly racialized, gendered, and classist.²⁶⁸ Consonant with these movements, Angela Onwuachi-Willig and Anthony Alfieri argue for “civil self-defense,” wherein lawyers witness and embrace community of color-led advocacy campaigns that counter racist tropes and humanize clients, rather than being the leaders and experts themselves.²⁶⁹

Prosecutors should incorporate the lessons of participatory defense and mutual aid, give voice to previously silenced communities, and learn from their expertise.²⁷⁰ Some are taking steps to do this with unprecedented levels of community engagement. For instance, the “People’s DA Platform” during the 2017 Philadelphia election of Larry Krasner brought together “communities on the front lines of criminal justice reform.”²⁷¹ Krasner continues to meet with a wide range of community members and coalitions which are much broader than most prosecutors.²⁷² Though expanded input is positive, prosecutors are still largely

267. See Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631 (2020); see also Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982) (arguing that American legal education, although ostensibly non-ideological, perpetuates hierarchy by justifying it as the result of a supposedly logical and neutral process called “legal reasoning”).

268. Like participatory defense, participatory research centers the community members, “too often viewed as [mere] research subjects,” and prioritizes their needs and expertise to build change “through co-learning community-academic partnerships.” Lauren Johnson, Cinnamon Pelly, Ebony Ruhland, Simone Bess, Jacinda K. Dariotis, & Janet Moore, *Reclaiming Safety: Participatory Research, Community Perspectives, and Possibilities for Transformation*, 18 STAN. J. C.R. & C.L. (forthcoming) (manuscript on file with author) (offering the “first known interdisciplinary, community-based participatory research study” focusing on what safety is and how to make safety accessible to everyone).

269. Onwuachi-Willig & Alfieri, *supra* note 242, at 2075. Of course, community self-defense requires that communities receive investments other than ones for the criminal system and that programs be funded to the levels that institutions like law enforcement have been funded historically. See *supra* note 245 (citing Patrick Sharkey’s work). The backlash against and tepid movement on shifting funding from policing to social services demonstrates how significant this barrier is.

270. See Wright, *supra* note 171, at 416 (noting that “democracy deficits” have led to “intense problems” for prosecutors with low-income and racially marginalized communities).

271. PHIL. COAL. FOR A JUST DIST. ATT’Y, OUR VISION OF TRANSFORMATIVE POLICIES FOR THE FIRST 100 DAYS (2018), https://vorxbxy61q-flywheel.netdna-ssl.com/wp-content/uploads/2018/04/PRINT_DIGITAL-coc-da-platform_02-1.jpg [<https://perma.cc/EVG8-M9QD>]; PHILLY DA FOR THE PEOPLE, <https://www.phillydaforthepeople.org> [<https://perma.cc/34E5-JWSH>].

272. For instance, Krasner’s office recently put together an LGBTQ advisory group. Brian X. McCrone, *Philly DA Launches LGBTQ Advisory Board as Transgender*

gathering input rather than truly changing governance or ceding decisionmaking influence. So, while Eric Gonzalez included community groups representing formerly incarcerated people and public defenders in advising his reform agenda, the focus was on “listening to the people of Brooklyn,” not ceding governance.²⁷³ Moreover, it is arguably impossible for prosecutors to “co-govern” with community organizations, given the structural power imbalance. Instead, community groups can use their status as constituents to “demand change” and hold prosecutors accountable.²⁷⁴

Prosecutors also resist community involvement if it does not coordinate precisely with their agendas. For instance, some prosecutors engaging in bail reform have opposed community bail funds. They do so, presumably, because this takes the control out of the prosecutor’s hands. For instance, Rachael Rollins was angry when someone the Boston community bail fund bailed out committed another violent crime (a very rare occurrence, but obviously always a slight risk).²⁷⁵ Calling them “coward[s],” Rollins used loaded and moralistic language to claim her status as the true protector of, and voice for, the community. Giving community leaders a place at the table is a start, but it is not enough. Communities

Residents Face Violence, NBC: PHILA. (Mar. 29, 2021), <https://www.nbcphiladelphia.com/news/local/philly-da-launches-lgbtq-advisory-board-as-transgender-residents-suffer-epidemic-of-violence/2759741> [<https://perma.cc/B8JM-2DSZ>]. Similarly, Boudin put together a transition team that included a broader array of expertise than past DAs, but the team is “helping guide” him on policies only. *San Francisco DA-Elect Chesa Boudin Announces Transition Leadership Team*, DAVIS VANGUARD (Nov. 23, 2019), <https://www.davisvanguard.org/2019/11/san-francisco-da-elect-chesa-boudin-announces-transition-leadership-team> [<https://perma.cc/B6AC-9FD7>]; *Chesa Boudin, San Francisco DA-Elect, Announces Transition Leadership Team*, S.F. RISING (Jan. 7, 2020), <https://www.sfrising.org/chesa-boudin-announces-transition-team> [<https://perma.cc/44ER-GKBB>].

273. GONZALEZ, *supra* note 178, at 9–11 (recommending that “the community be included in” the prosecutor’s work).
274. *See* CMTY. JUSTICE EXCH. ET AL., *supra* note 1, at 3. *See also* Wright, *supra* note 171, at 421–22 (describing how in order to overcome the historically disproportionate punishment and alienation of certain communities, prosecutors should reach out to partner with groups—beyond organized lobby groups—and nonprofits to include “inchoate groups [identified] through social media” and even “informal coalitions that do not agree to ‘partner’ with the prosecutor,” but rather “push back” against them).
275. Liam Knox, *Rollins Criticizes Group That Bailed Out Repeat Sex Offender Charged in New Rape*, WBUR NEWS (Aug. 11, 2020), <https://www.wbur.org/news/2020/08/11/da-rollins-mass-bail-fund-criticism> [<https://perma.cc/LED9-S7SS>]. Krasner has also had disputes with the Philadelphia community bail fund for not living up to his promises to change bail practice. PHILA. BAIL FUND, RHETORIC VS. REALITY: THE UNACCEPTABLE USE OF CASH BAIL BY THE PHILADELPHIA DISTRICT ATTORNEY’S OFFICE DURING THE COVID-19 PANDEMIC (July 2020), <https://www.phillybailfund.org/dao-policy-rhetoric-vs-reality> [<https://perma.cc/PL73-GHR4>].

need to have decisionmaking power beyond the ballot box, incorporated in a structural way, and not undermined by prosecutors when community efforts do not precisely conform to the DA's direction.²⁷⁶

2. Restorative & Transformative Justice

Transformative and restorative justice present another way to address harm through transferring power from prosecutors to the community itself. This Part outlines how progressive prosecutors are increasing their use of restorative justice programs, though still not in the most serious cases or in widespread ways. As for truly transformative justice processes, organizers argue, and I agree, that prosecutors' role as an arm of state punishment means they cannot run these programs.²⁷⁷

Both restorative and transformative processes aim to address harm outside of the traditional adversarial system, with a focus on addressing root causes and resolving cases without a "winner" and "loser." In individual cases, restorative justice "brings together those directly impacted by an act of harm to address the impact of the crime, hold the person who did it accountable, and make things as right as possible for those harmed."²⁷⁸ This can take a number of different forms—including victim/offender mediation, healing circles, and family group conferencing—but the key is a move away from punishment to healing and prevention. Transformative justice builds on the restorative approach to address both individual and systemic change. Incorporating "analyses of privilege and power," this framework posits that each incidence of personal harm can be understood only in the "larger context of [gender, race, and class hierarchies and] structural violence."²⁷⁹ Remedies in an individual case, for instance, might include community reparations as well as healing. Transformative justice can thus best be

276. I agree with commentators who argue that community voice and power should be as localized as possible in order for people to have direct input on their governing institutions. See O'Rourke, Su & Binder, *supra* note 123, at 1401 (recommending smaller localities for police and sheriff departments as this allows for greater input and control for those communities, particularly marginalized ones, most impacted by police).

277. See *infra* note 302.

278. Danielle Sered, *Restorative Justice: Why Do We Need It?*, COMMON JUST., https://www.commonjustice.org/restorative_justice_why_do_we_need_it [<https://perma.cc/7YLG-PTNL>].

279. Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13, 18–19, 52, 58 (2011).

understood as a political framework, in addition to a case-by-case approach to harm.²⁸⁰

A central principle of these alternative approaches to harm is that they are victim-centered.²⁸¹ The victim must consent to the program and have a meaningful opportunity to choose the conditions. Prosecutors often invoke victims' names, but research has shown that prosecutors usually do not listen or accord agency to victims who seek alternatives to the criminal system.²⁸² In contrast, restorative programs listen to victims and give them agency.²⁸³ Tellingly, victim satisfaction from these programs is high, usually significantly exceeding reported rates in the regular criminal system.²⁸⁴

By definition, and certainly to succeed, these programs must be at least partially independent from the prosecutor's office.²⁸⁵ The threat of criminal sanctions impairs true choice by both those who harm and those who are harmed; this is especially true of the majority of programs that require a guilty plea for participation. Given the long trajectory of state violence against those communities most likely to be involved in the criminal system (as both "offenders" and "victims"), transformative justice in particular eschews reliance on state

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280. Mia Mingus, *Transformative Justice: A Brief Description*, TRANSFORMHARM.ORG, <https://transformharm.org/transformative-justice-a-brief-description> [https://perma.cc/6DJN-SVNC].
281. The particular failures of the criminal system toward victims in rape and family violence cases give restorative models particular traction as to these complex crimes. See, e.g., GENERATIONFIVE, ENDING CHILD SEXUAL ABUSE: A TRANSFORMATIVE JUSTICE HANDBOOK (2017), <http://www.generationfive.org/wp-content/uploads/2017/06/Transformative-Justice-Handbook.pdf> [https://perma.cc/65TS-UJSY]; Wilson Wong, 'Defund the Police' Movement Could Offer Sexual Assault Survivors a Different Path for Justice, Experts Say, NBC NEWS (Aug. 2, 2020), <https://www.nbcnews.com/news/us-news/defund-police-movement-could-offer-sexual-assault-survivors-different-path-n1235478> [https://perma.cc/MZ2E-NBKH].
282. Susan A. Bandes, *Victims, 'Closure,' and the Sociology of Emotion*, 72 L. & CONTEMP. PROBS. 1, 14–15 (2009).
283. Donna Coker, *Restorative Responses to Campus Sexual Harm: Promising Practices and Challenges*, 1 INT'L J. RESTORATIVE JUST. 385, 386 (2018) ("Restorative processes provide victims with voice, validation and vindication.").
284. See e.g. DANIELLE SERED, UNTIL WE RECKON (2019) (over 90 percent versus under 50 percent for the criminal system); see also James Ptacek & Loretta Frederick, *Restorative Justice and Intimate Partner Violence*, NAT'L ONLINE RES. CTR. ON VIOLENCE AGAINST WOMEN 1, 6 (2008), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_RestorativeJusticeIPV.pdf [https://perma.cc/29ZC-GZ7D] (summarizing research on multiple programs and reporting findings of higher victim satisfaction and feelings of dignity and decreased sense of fear).
285. Indeed, as I argue below, truly effective programs should be divested from the criminal system entirely and placed under independent community control.

institutions, particularly policing and incarceration.²⁸⁶ More broadly, restorative and transformative processes are intended to be truly grassroots, run by community members themselves—not attorneys or other “experts.” Part of the long-term aim is to build community capacity to deal with conflict via minimal state involvement.²⁸⁷

Programs that are truly arms-length from prosecution provide significant cost savings and have a considerable success rate for prevention of further crimes, particularly violent and sexual crimes.²⁸⁸ For instance, Common Justice, a restorative justice program in Brooklyn which (unusually) addresses violent crime, reports recidivism rates of its participants that are much lower than those of people who have been incarcerated or assigned probation.²⁸⁹ Similarly, a program for youth in Alameda County had only a five percent recidivism rate for those charged with serious crimes and significantly lower rearrest and charging rates for any crimes in comparison with those funneled through the regular criminal system. The program also cost only \$4500 per youth, versus \$23,000 per year for probation and \$493,000—one hundred times more—for incarceration.²⁹⁰ To take another data point, a Bay Area program working with incarcerated men who have been charged with violent crimes has had 82 percent lower rearrest rates of participants during the first year after release than the general incarcerated population.²⁹¹

A small but growing number of successful restorative justice programs exist, reflecting in particular the ineffectiveness of traditional criminal systems at addressing harm in communities of color. For instance, Black Youth Project 100 (BYP100) and the Crises Act aim to address the way that sexual assault of Black girls and women is handled, both on an individual and systemic level.²⁹² They call

286. See Mingus, *supra* note 280 (“State responses to violence reproduce violence and often traumatize those who are exposed to such responses, especially oppressed communities who are already targeted by the state.”).

287. *Id.*

288. Godsoe, *The Myth of the Juvenile Sex Offender*, *supra* note 18, at 349, 357–58.

289. SERED, *supra* note 284.

290. Taylor Walker, *A Blueprint for Reimagining Alameda County’s Youth Justice System to Prioritize Healing Over Incarceration*, WITNESS L.A. (Oct. 26, 2020), <https://witnessla.com/a-blueprint-for-reimagining-alameda-countys-youth-justice-system-to-prioritize-healing-over-incarceration> [<https://perma.cc/9VEZ-VKQL>].

291. James Gilligan & Bandy Lee, *The Resolve to Stop the Violence Project: Reducing Violence in the Community Through a Jail-Based Initiative*, 27 J. PUB. HEALTH 143, 147 (2005) (reporting findings of lower rearrest rates for violent crimes by participants in the program as well as less time spent in custody).

292. See BYP100, *Take the #SheSafeWeSafe Pledge!*, ACTION NETWORK, <https://actionnetwork.org/petitions/shesafewesafe> [<https://perma.cc/UY8E-J4ZH>] (“pledging to

for changing the first responders from police to community-based organizations (CBOs), so people never even enter the front door of the criminal system.²⁹³ Another example is the Violence Interrupters, a particularly effective preventive restorative justice model to address gun crime.²⁹⁴ This organization's approach to violence uses community members, often with criminal system experience themselves, to serve as on-the-ground mediators of disputes that otherwise might flare into violence.

Despite their success, these programs remain underutilized and underfunded, largely due to prosecutors' reluctance to cede control coupled with their frequent disregard for victims who are anticarceral. When prosecutors do engage, they do so in very minimal ways.²⁹⁵ Most prosecutors, for instance, refuse to allow this intervention for anything but minor or nonviolent offenses—Common Justice is an outlier. Yet this on minor crimes can increase the net-widening impact of diversion programs. The end result is that most restorative justice programs run by prosecutors' offices differ little from standard prosecution and only divert a small number of very minor cases.²⁹⁶

In contrast to mainstream prosecutors, many self-identified progressives have expanded their use of restorative justice. For instance, Eric Gonzalez is expanding Common Justice and using Violence Interrupters.²⁹⁷ Kim Gardner has pledged to incorporate restorative justice, including into plea offers “on more serious cases.”²⁹⁸ Former Manhattan DA candidate Janos Marton proposed

listen to survivors” and seek “community-based alternatives to addressing harm instead of calling the police . . . [because] police interaction puts Black people at risk of increased poverty, surveillance, incarceration, beatings, rape, and even death.”)

293. These programs have had success in multiple sites, including, most recently, Denver. See Joe Jurado, *Early Report Finds Denver Program That Sends Healthcare Workers to Handle Mental Health Calls Instead of Police Has Been a Success*, ROOT (Feb. 9, 2021), <https://www.theroot.com/early-report-finds-denver-program-that-sends-healthcare-1846233628> [<https://perma.cc/H7VU-8S5L>].
294. See *Who Are the Violence Interrupters?*, NAT'L INST. JUST. (Oct. 28, 2009), <https://nij.ojp.gov/topics/articles/who-are-violence-interrupters> [<https://perma.cc/2JUA-KSE3>].
295. Bazelon & Green, *supra* note 191, at 2296–98.
296. *Id.* at 2304–06.
297. See Eric Gonzalez, *Using the Power of Prosecutors to Drive Reform*, 34 A.B.A. CRIM. JUST. MAG. 9, 12, 14 (2019).
298. *Kim Will Continue to Attack and Prevent Violent Crime*, RE-ELECT KIMBERLY GARDNER (May 21, 2020), <https://votekimgardner.com/2020/05/21/kim-will-continue-to-attack-and-prevent-violent-crime> [<https://perma.cc/9JSA-BRNT>].

working with CBOs in IPV cases to offer restorative justice and other alternative interventions, prosecuting only with victim approval and as a last resort.²⁹⁹

Many of these programs, however, continue to be limited by exceptionalism and the concomitant net-widening. For instance, most programs exclude those charged with more serious crimes, or even most crimes, and are often limited to juveniles involved in the system or others deemed less culpable. For instance, Boudin's partnership with a CBO to conduct restorative justice in San Francisco is limited to young adults (ages eighteen to twenty-five).³⁰⁰ And, despite it being portrayed as a community approach, its funding from the state Board of Corrections and partnership with DA's offices makes it unclear how separate from the carceral state restorative justice can really be. Ceding control to communities and divesting funding are inextricably connected; arms-length or truly independent restorative justice programs would be allocated funding directly from noncriminal government agencies. Relatedly, can the Violence Interrupters really work effectively at prevention when coupled with very harsh prosecutorial approach with no opportunity for bail?³⁰¹ It is a very delicate, or perhaps impossible, matter to achieve the community trust and buy-in necessary for preventive programs while also being really 'tough on crime.'

Raising even more questions about their appropriate role, a handful of progressive prosecutors are attempting the even more unusual task of engaging in systemic transformative justice programs.³⁰² Three of these prosecutors—

299. See Janos Marton, *Reimagining Our Response to Intimate Partner Violence*, MEDIUM (July 7, 2020), <https://janosforda.medium.com/reimagining-our-response-to-intimate-partner-violence-5d1059fc6b7b> [https://perma.cc/DR8G-EHSU].

300. COMMUNITY WORKS, <http://communityworkswest.org> [https://perma.cc/R3HM-XPEQ].

301. See, e.g., Main, *supra* note 158 (interviewing Foxx, who posits a multi-pronged, "all-hands-on-deck" approach to address gun violence in Chicago, including police, no-bail prosecutions, and preventive restorative justice efforts, such as the Violence Interrupters).

302. Similar initiatives to combat police violence led to reparations in Chicago—the first issued by a city in the nation—and are now being attempted in the Bronx. Logan Jaffe, *The Nation's First Reparations Package to Survivors of Police Torture Included a Public Memorial. Survivors Are Still Waiting.*, PROPUBLICA (July 3, 2020), <https://www.propublica.org/article/the-nations-first-reparations-package-to-survivors-of-police-torture-included-a-public-memorial-survivors-are-still-waiting/amp>.

Importantly, these initiatives are led by CBOs, not prosecutors' offices. See Mary Childs & Noel King, *Reparations for Police Brutality*, NPR (July 3, 2020), <https://www.npr.org/2020/07/02/886945461/reparations-for-police-brutality> [https://perma.cc/3LDP-V367] (discussing unprecedented reparations for police brutality in Chicago); Natalie Y. Moore, *Payback*, Marshall Project (Oct. 30, 2018), <https://www.themarshallproject.org/2018/10/30/payback> [https://perma.cc/4XDZ-YREK] (describing how a "group of activists and artists," along with social justice lawyers, formed Chicago Torture Justice Memorials to ask for unprecedented individual and community reparations); Demand Letter from Bronx Defs. on Behalf of the Mott Haven Collective to

Boudin, Krasner, and Rollins—have teamed up with community organizations to try to implement a systemic reparations approach via a local “Truth, Justice and Reconciliation Commission.”³⁰³ Modeled after the South African post-apartheid panels, these commissions will provide a forum for people harmed by racialized police violence and the carceral state to be heard and have harms redressed. This is certainly a positive step in naming the harm and overcoming the historically overly cozy relationships between police and prosecutors. While the project exists to nominally hold both police and prosecutors accountable, specifics of how expression and redress will happen remain unclear.

These widespread systemic efforts have brought forth considerable criticism about the appropriate role of prosecutors and the limits of the criminal legal system. Community organizers have stated that they are “appalled and angered” that prosecutors, or “top cops,” are attempting to lead community reparations about police violence when they themselves engage in state surveillance and punishment of communities of color.³⁰⁴ They also note that a truth and

Bill de Blasio, Mayor of New York City, and Scott M. Singer, Comptroller of New York City (Jan. 26, 2021), <https://www.bronxdefenders.org/wp-content/uploads/2021/01/2021.26.01-Mott-Haven-Collective-Demand.pdf> (asking the New York City Mayor and Comptroller to approve a reparations fund to compensate people for injuries and other harms from New York Police Department (NYPD) abuse, as well as to fund public services as determined by the Mott Haven community, rather than suing the NYPD).

303. Greenwald, *supra* note 218. Later reports state that the San Francisco program will not be run out of Boudin’s office, but rather from a local nonprofit at armslength from the DA, while the Boston and Philadelphia Commissions appear to be canceled. John Ferrannini, *SF DA’s Truth Commission Pushed Back, Yet Again*, BAY AREA REP. (Nov. 5, 2021), https://www.ebar.com/news/latest_news/310351 [<https://perma.cc/WJL2-LBMS>] (detailing a lack of response from the Philadelphia DA’s office and a statement from the Boston DA that the office “continue[s] to explore how the Truth, Justice and Reconciliation Commission may be able to help the community . . . [but t]he global pandemic has required us to adapt and reallocate our attention to deal with the disparities in health care, education, housing, and public health and public safety.”).
304. Elias Rodriques, Melonie Griffiths, & Ralowe Ampu, Opinion, *Prosecutors Have No Place in Truth, Justice and Reconciliation Commissions*, TRUTHOUT (Aug. 22, 2020), <https://truthout.org/articles/prosecutors-have-no-place-in-truth-justice-and-reconciliation-commissions> [<https://perma.cc/EEF4-DV37>]; see also Sia Henry, *Opinion: Restorative Justice Is Used to Legitimize Oppressive Systems*, JUV. JUST. INFO. EXCH. (Feb. 22 2022), <https://jjie.org/2021/02/22/restorative-justice-is-used-to-legitimize-oppressive-systems> [<https://perma.cc/FT72-66DM>] (noting the “danger in restorative justice being used as a way to stabilize, if not legitimize, traditionally racist and toxic systems”). Interestingly, Boston City Council members are backing a new proposal for the formation of a commission on reparations for African Americans in the city, unconnected to the DA’s office. See *Three Boston City Councilors Propose Commission on Reparations for African Americans*, WCVB (Feb. 2, 2022), <https://www.wcvb.com/article/three-boston-city-councilors-propose-commission-on-reparations-for-african->

reconciliation model is “fundamentally opposed to prosecution.”³⁰⁵ Is it possible to achieve widescale justice via an office that also prosecutes and punishes individuals? Probably not.

Boudin, Foxx, and others also seek to give defendants and victims in the system more dignity. The question remains—can anyone really be treated as a dignified human in our criminal system? Put another way, is prosecution itself, which results in caging and otherwise harming people, not an act of state violence that is by definition dehumanizing? Given this, I agree with community organizers that prosecutors are not the right people to run transformative justice programs, nor can they fully empower and dignify people.

americans/38963072#:~:text=Three%20members%20of%20the%20Boston,day%20of%20Black%20History%20Month.

305. This is a critique many made of the South African model, which eventually did prosecute more than pay reparations or achieve meaningful reconciliation. Nahla Valji persuasively argues that through its narrow investigation and prosecution of “gross violations of human rights,” the Commission focused primarily on individualized responsibility, thus failing to address the “everyday administrative horrors” that created a system of racial imbalance in South Africa; as a result, the process left many South Africans feeling unrepresented by “those the Commission define[d] as perpetrators.” NAHLA VALJI, RACE AND RECONCILIATION IN A POST-TRC SOUTH AFRICA 1–2 (2004); see also Jay A. Vora & Erika Vora, *The Effectiveness of South Africa’s Truth and Reconciliation Commission: Perceptions of Xhosa, Afrikaner, and English South Africans*, 34 J. BLACK STUD. 301, 317–18 (2004) (reporting the results of their empirical study to evaluate the effectiveness of the Truth and Reconciliation Commission through the lens of several ethnic groups (Xhosa, Afrikaners, and English) and concluding that, because the Truth and Reconciliation Commission focused more on social and judicial goals to reconciliation, there was less emphasis on psychological and personal factors, which may have facilitated true reconciliation). As a result, most experts believe it did not successfully address the root causes of racist state violence or move the country much closer to racial equality. See, e.g., Mary Kay Magistad, *South Africa’s Imperfect Progress, 20 Years After the Truth & Reconciliation Commission*, WORLD (Apr. 6, 2017, 1:45 AM), <https://www.pri.org/stories/2017-04-06/south-africas-imperfect-progress-20-years-after-truth-reconciliation-commission> [https://perma.cc/5R9L-E23J] (“When apartheid ended and the Truth and Reconciliation process started, [‘colored’ South African Brendon] Adams says he thought it would genuinely lead to a united South Africa. He’s disappointed that the colored population [in South Africa] has been left behind, effectively ghettoized . . .”); Kim Harrisberg, *South Africans Protest Police Brutality Against Poor, Black Communities Under Lockdown*, GLOB. CITIZEN (June 11, 2020), <https://www.globalcitizen.org/en/content/south-africa-police-brutality-poor-black-protest> [https://perma.cc/65V2-M782] (noting that, according to the World Bank, “South Africa remains one of the most unequal countries in the world . . . with urban areas starkly divided along racial lines.”); Ereshnee Naidu-Silverman, *What South Africa Can Teach the U.S. About Reparations*, WASH. POST (June 25, 2019), <https://www.washingtonpost.com/outlook/2019/06/25/what-south-africa-can-teach-us-about-reparations> [https://perma.cc/N7WQ-NTMY] (“There was a general feeling among the black South African public that despite being victims, they were once again required to accept the mantle of reconciliation, while white South Africans remained comfortable in their positions of historic privilege.”).

B. Divest and Invest to Reimagine Public Safety

To truly transform the criminal legal system, prosecutors need to cede material resources in addition to relinquishing epistemic and cultural power. Public funding currently spent on prosecution should instead be invested in societal supports, such as housing, childcare, and mental health and substance abuse treatment care, that address the root causes of crime, including violent crime. Only this fiscal investment can rectify decades of failure to support people and communities, with state funding in predominantly Black and Brown communities being almost exclusively limited to policing and the criminal system.³⁰⁶ It is a zero-sum equation. As Monica Bell has demonstrated, “[m]any of the states with the least generous social safety nets use criminal justice to stand in for poverty alleviation and thus have had the nation’s highest incarceration rates.”³⁰⁷ Reallocating funds is a longer-term but essential aim in transforming the criminal system; to get to a future with no prosecutors, “movements need to build significant power [through organizing] . . . while remaining pointedly focused on shrinking the power, size, and scope of the prosecuting office.”³⁰⁸

Even progressive prosecutors support reforms only up to a certain point; this has been particularly true of the consistently demanded open-file discovery and bail reform. Many of this cohort supported some measures in this regard, even legislative change, but curtailed or reversed their support once it seemed that they would lose too much control or when unusual events, such as the pandemic, led to more strident media calls for doubling down on the traditional law-and-order model.³⁰⁹ A particular pitfall impeding divestment from the racialized criminal

306. See, e.g., ELLA BAKER CTR. FOR HUM. RTS., *supra* note 230, at 1–3 (detailing the historic “disinvestment” in communities of color and noting that “too often, law enforcement officers are the primary—or only—responders to public health problems,” including mental health, substance abuse, housing, student discipline, etc.); see also SHARKEY, *supra* note 157, at 115–45 (documenting that the primary investment in lower-income communities since the Jim Crow era has been policing and the criminal system, and calling for new investments as the country moves “away from the idea that punishment can be a sustainable solution to the problem of urban poverty.”).

307. Monica C. Bell, Response, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1, 12–13 (2018).

308. CMTY. JUSTICE EXCH. ET AL., *supra* note 1, at 4.

309. See Barkow, *supra* note 225, at 1390–92 (detailing how Brooklyn DA Eric Gonzalez supported discovery reform until he perceived the reforms as going too far but also noting that, Chesa Boudin has consistently refused to have his line prosecutors demand cash bail).

system and mass incarceration are the requests for more funding to implement reforms by these progressive prosecutors.³¹⁰

Divesting and investing do not just entail better allocation of societal resources. Divesting and investing also prompt questioning of existing perceptions of public safety, change the sticky narrative that “caging and controlling people makes us safe,” and offer the alternative that “basic necessities such as food, shelter, and freedom are what really make our communities secure.”³¹¹ On a broader scale, greater societal equality and more funding for families and children are proven to reduce harm and to help victims heal.³¹² Recognizing this can help society shift from a fear-based to a care-based framework for true community safety.³¹³

1. Decrease Prosecutorial Budgets

An obvious step to shrinking the criminal system footprint is reducing the budget of system actors. Despite their otherwise far-reaching platforms for change, none of the progressive prosecutors specifically cite downsizing their offices or cutting their budgets. A few mention shrinking the footprint of the criminal legal system but, even then, make no specific proposals for how to do that. Tellingly, the widespread and (deservedly) praised transparency of this new group of prosecutors does not extend to budget information. This is true even from those

310. See discussion *infra* at IV.B.1.

311. CRITICAL RESISTANCE, <http://www.criticalresistance.org> [https://perma.cc/9G9V-YE7G].

312. Godsoe, *The Victim/Offender Overlap & Criminal System Reform*, *supra* note 68 at notes 103–06 (noting that “economic stress and underresourced communities are overwhelmingly correlated with violence.”).

313. See ZACH NORRIS, *DEFUND FEAR: SAFETY WITHOUT POLICING, PRISONS, AND PUNISHMENT* (2020) (proposing a continuum of societal supports in place of criminalization and punishment and citing successful community programs). I recognize that this rearrangement of the economy and civil society is not imminent, but it is still a goal worth striving for. And, as with the acknowledgement of racist state violence, the pandemic has brought unprecedented (if perhaps temporary) recognition of inequality and concomitant public support for state support for families. See Cynthia Godsoe & Steven Dean, *It’s Time for an Antiracist Welfare Policy*, IMPRINT (Mar. 15, 2021, 7:47 AM), <https://imprintnews.org/child-welfare-2/time-for-an-antiracist-welfare-policy-america/52691> [https://perma.cc/42MY-HCYW] (reporting the unprecedented nature of a direct child allowance, as implemented in the summer of 2021, while also calling for further supports for families, particularly families of color who historically have been marginalized and even punished for their poverty).

such as Kim Foxx and Larry Krasner who have made public unprecedented data and information about their offices.³¹⁴

Although information on budgets and staff sizes is hard to come by, one thing is clear—none of these progressive prosecutors have meaningfully decreased, or even chosen to decrease at all, their budgets and staff sizes of their own accord. Indeed, almost all have asked for and sometimes received increased resources to hire new attorneys and other staff. Sometimes the request is for line attorneys and investigators, and other times for diversion programs and other innovations. For instance, soon after taking office, Foxx requested more than twenty new attorneys to implement her agenda; even more recently, Krasner has asked for several significant budget increases to add staff members, mostly to fight gun violence and prosecute police abuse, and to increase equality among his staff—the latter request “hijack[ing] a hearing on economic development.”³¹⁵ These requests are motivated by all three of the pitfalls identified above: exceptionalism in increasing resources to prosecute certain crimes, such as sexual assault or police violence, net-widening via more funding for diversion programs, and the hero complex that only prosecutors and more prosecutors can solve societal problems.

The only budgetary decreases have not come voluntarily but rather were forced on prosecutors by the pandemic’s fiscal impact on all government agencies. Notably, one of the prosecutors with the most far-reaching change platform, Boudin, did not submit a reduced budget request this spring despite the San Francisco mayor’s request that all agencies do so. Boudin cited his

314. These prosecutors have failed to release budget information despite promising to do so. See Becton, Deberty, Gardner, Foxx & Rollins, *supra* note 7. Moreover, prosecutorial access to other funding, such as civil forfeiture funds, both expands their financial resources and obscures the true extent of them. See e.g., SURVIVED AND PUNISHED, *supra* note 177, at 5–6 (making this point as to the Manhattan DA’s office, which as of June 2017 had accrued \$730 million in asset forfeiture funds).

315. See Lolly Bowean, *Cook County Board Approves \$6.2 Billion Budget for 2020, Without Increases in Taxes or Fees*, CHI. TRIB. (Nov. 21, 2019, 6:50 PM), <https://www.chicagotribune.com/politics/ct-cook-county-board-approves-2020-20191121-7ndxlv4utzahpomkpdfsouyue-story.html> [<https://perma.cc/G3FV-SJQJ>]; Michael D’Onofrio, *Philly City Council Approves \$4.8B Budget Full of Cuts, Layoffs*, PA. CAP.-STAR (June 25, 2020, 2:54 PM), <https://www.penncapital-star.com/government-politics/philly-city-council-approves-4-8b-budget-full-of-cuts-layoffs> [<https://perma.cc/B82R-8TWW>]. The latter request was made by a Krasner representative at a hearing on economic development in Philadelphia, and was deemed by numerous attendees to be “disrespectful and unempathetic” to the small business owners and other intended participants. See Todd Shepherd, *Krasner’s Office Asks for Raises at Hearing on Impact of Crime on Philly’s Neighborhood Economies*, BROAD AND LIBERTY (Oct. 6, 2021), <https://broadandliberty.com/2021/10/06/krasnerns-office-asks-for-raises> [<https://perma.cc/BYW6-2S6R>] (quoting Jabari Jones, an organizer of the event and president of a local community group).

opposition to laying off any staff as the reason; this loyalty to his employees, however commendable, is preserving the status quo of the criminal arm of the prosecutor's office. As such, it stands in stark contrast to movement actors' demands of "reduced budgets, staff, and scope of power."³¹⁶

Beyond their own budgets, prosecutors could use their considerable lobbying power to advocate for allocating greater state resources to noncriminal agencies, such as away from the police and toward education and health care.³¹⁷ To take just one example, they could support directing more federal VAWA funding toward what IPV survivors most need—housing, childcare, and trauma-informed mental health and medical services—instead of the ongoing increase to policing and other law enforcement services.³¹⁸ There is no indication that they are doing this consistently, if at all.

A few positive trends are emerging, however. Several of this cohort, including Krasner and Rollins, are pledging to give a portion of their city's civil asset forfeiture fund—usually a boon to prosecutors to fund their operations—to recreation centers and community programs in low-income communities.³¹⁹ Even more significantly, advocacy groups called on the candidates in the recent high-profile Manhattan DA race (most of whom identified as progressive) to commit to cutting their offices by 50 percent.³²⁰ Only two candidates pledged to do so, but this pressure also impacted many of the other candidates, including the winner, Alvin Bragg.³²¹ Campaign promises are obviously different than

316. Survived & Punished NY (@survivepunishNY), TWITTER (June 30, 2020, 9:53 AM), <https://twitter.com/survivepunishNY/status/1278007963031146497> [https://perma.cc/K3EV-M6FV].

317. A growing number of community movements are calling for funds to be reallocated from policing and incarceration to "long-term safety strategies such as education, local restorative justice services, and employment programs." See, e.g., MOVEMENT FOR BLACK LIVES, *supra* note 227.

318. See Jessica Pishko, *The Defund Movement Aims to Change the Policing and Prosecution of Domestic Violence*, APPEAL (July 28, 2020), <https://theappeal.org/the-defund-movement-aims-to-change-the-policing-and-prosecution-of-domestic-violence> [https://perma.cc/SCE7-QZYG].

319. See, e.g., D'Onofrio, *supra* note 315; RACHAEL ROLLINS, ASSET FORFEITURE COMMUNITY REINVESTMENT GRANT: REQUEST FOR PROPOSAL (RFP) 2–3 (2019), <https://static1.squarespace.com/static/5c671e8e2727be4ad82ff1e9/t/5cf00af22759a10001fbc7a3/1559235314586/FY19+SCDAO+Community+Reinvestment+Grant+RFP+FINAL.pdf> [https://perma.cc/7LAZ-9FCF].

320. See *Meet the Candidates: Candidate Questionnaire*, PEOPLE'S COAL. FOR MANHATTAN DA ACCOUNTABILITY, <https://peopleforprosecutoraccountability.org/candidate-comparison> [https://perma.cc/LJZ6-AUMV].

321. Bragg has explicitly pledged to "shrink the system," including via categorical declinations of certain crimes and has also decried the false dichotomy between system reform and public safety. See Samar Khurshid, *Debate Over Reform and Safety in Manhattan District Attorney*

implementing policies when in office, but this still signals a changing dialogue. Despite these changes, however, most progressive prosecutors are not giving up their resources and, indeed, are calling for increased societal investment in prosecution as a solution to societal problems.

2. Increase Social Infrastructure

Transformation also requires investment in effective and truly independent services, ones that address the root causes of crime, engage in prevention, and are run not by prosecutors but by community actors. Research indicates that societal supports such as childcare and home repairs,³²² as well as community-based interventions that focus on economic and social supports rather than just law enforcement, are more effective at preventing even violent crimes than the current

General Election, GOTHAM GAZETTE (Sept. 21, 2021), <https://www.gothamgazette.com/state/10776-debate-over-reform-and-safety-in-manhattan-district-attorney-general-election> [<https://perma.cc/YA4L-HEYT>]. How this interacts with budget requests, of course, remains to be seen.

322. See, e.g., NAT'L RSCH. COUNCIL NAT'L ACADS., *supra* note 67, at 127 (citing urban economic distress as a significant driver of crime necessitating social infrastructure remedies); see also SHARKEY, *supra* note 157 (gathering and explaining research); MICHAEL A. RAMOS, 25 YEARS IN, WE'RE MORE SURE THAN EVER THAT CRIME PREVENTION STARTS IN EARLY CHILDHOOD (2021), <https://strongnation.s3.amazonaws.com/documents/1409/e14635c9-e5a0-4369-a803-aacc17961db9.pdf?1634320897&inline;%20filename=%2225%20Years%20In,%20We%E2%80%99re%20More%20Sure%20Than%20Ever%20that%20Crime%20Prevention%20Starts%20in%20Early%20Childhood.pdf%22> [<https://perma.cc/9SK9-52D9>] (summarizing research demonstrating that early childhood education, after-school programs, and other supports for children and families are proven to decrease crime); Eugenia South, John MacDonald & Vincent Reina, *Association Between Structural Housing Repairs for Low-Income Homeowners and Neighborhood Crime*, JAMA NETWORK OPEN (July 21, 2021), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2782142> [<https://perma.cc/GJP9-HCCL>] (finding a "dose-dependent" relationship between housing repairs in low-income, largely Black communities and reduction (21.9 percent) in crime, including reductions in violent crime such as assault, robbery, and homicide).

system is.³²³ Some progressive prosecutors openly acknowledge this.³²⁴ This investment is particularly crucial in the United States, given the country's criminalization of poverty and lack of social supports. Ideally, such programs are universal, to avoid the stigma long coupled with income-based societal supports, in contrast to the COVID relief checks, for instance, which applied to more middle-class families and were less stigmatized.³²⁵ This requires real change to funding streams and the institutional structure addressing societal problems such as homelessness and substance abuse: a public health and harm reduction model rather than a criminal framework.³²⁶ We are a long way from achieving this kind of change in mindset and funding a more robust social safety net in place of the criminal system. Nonetheless, the last year alone has seen change in this regard, even if only temporarily, change that can safely be termed radical by historical standards in the United States—both the child allowance and greater investment in child care and preschool.³²⁷

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323. Despite their underfunding, research consistently shows that community-based and more localized and holistic interventions such as violence interrupters or Ceasefire Projects in Boston and Oakland perform better than, or at least as well as, our current law enforcement and prosecution framework with far fewer accompanying costs and harms. *See, e.g.*, David Alan Sklansky, *Addressing Violent Crime More Effectively*, BRENNAN CTR. FOR JUST. (citing the Boston program's reduction of youth gun violence by 50 percent); NORRIS, *supra* note 313, at 83–88 (describing a community-based intervention in Richmond, Virginia, using formerly incarcerated “neighborhood change agents,” cash stipends, and social services, which is credited in large part with a 77 percent murder rate decline in its first 7 years); Karma, *supra* note 231 (quoting Patrick Sharkey on “extraordinarily effective” programs in Chicago, including mentoring and cognitive behavioral therapy, and, in another program, summer jobs placement which resulted in 40 to 50 percent decreases in violence and concluding that even including those programs that do have mixed results, often based upon local implementation, “the evidence base for a community response to violence is at least as strong as the evidence base for policing.”).
324. *See, e.g.*, Main, *supra* note 158 (quoting Kim Foxx on economic development in low-income neighborhoods as a long-term solution to violence).
325. GORDON, *supra* note 107.
326. Sharkey, one of the foremost experts on addressing entrenched inequality and intergenerational urban poverty, argues that it is not sufficient to downsize the criminal system and expect the same impoverished neighborhoods decimated by mass incarceration to absorb re-entry of those formerly incarcerated in prisons. Rather, new investments in employment, housing, and physical and mental health care must be made so that “[a]fter years of relying on the police and the prison to deal with the problem of urban poverty through brute force, . . . we ensure that a new set of guardians is prepared to look out over every neighborhood.” SHARKEY, *supra* note 157, at 144–45.
327. *See* Godsoe & Dean, *supra* note 314 (reporting the unprecedented nature of a direct child allowance, as implemented in the summer of 2021). At the same time, it was not renewed for a second year, in the one-step forward, two-steps back, or two-steps forward, one-step back path to change that is so central to the American approach to societal problems. Deepa Shivaram, *Families Are in Distress After the First Month Without the Expanded Child Tax*

I should clarify that investing in societal supports via the prosecutor’s office or another criminal agency is not sufficient—surveillance and threat of punishment loom in the background. For instance, advocates note that only 4.5 percent of the Alameda County probation budget for youth is distributed to programs run by CBOs.³²⁸ Increasing that percentage would be beneficial, but optimally the county would decrease probation’s, and the prosecutors’, budgets and reallocate funds to noncriminal government agencies, such as education. Community activists presciently point out that “prosecutors are not social workers [and] . . . [r]esource shifting. . . to carceral social services is not de-resourcing.”³²⁹ Shifting funding to quasi-criminal social and medical services will not work either, as demonstrated all too well by the child “welfare”/family regulation system.³³⁰ True investment in public safety requires supports provided in a humane manner, without surveillance and punishment.

Though few, there are a growing number of community campaigns redirecting funding from police and jails to other kinds of public resources. Local campaigns, such as Atlanta’s Communities Over Cages, have had success with this argument for defunding incarceration—now the argument needs to be extended to the criminal system more broadly.³³¹ To take another example, Alameda community groups call for divesting from probation and police funding and

Credit, NPR (Jan. 21, 2022), <https://www.npr.org/2022/01/21/1074413273/end-expanded-child-tax-credit-families-effects> [<https://perma.cc/8UMZ-FFNF>].

328. AMISHA KAMBATH, ELLA BAKER CTR. FOR HUM. RTS., REIMAGINING YOUTH JUSTICE: A BLUEPRINT FOR ALAMEDA COUNTY (Oct. 2020), <https://ellabakercenter.org/wp-content/uploads/2020/10/Reimagining-Youth-Justice.pdf> [<https://perma.cc/4LTD-E6RV>]; A Blueprint for Reimagining Alameda County’s Youth Justice System To Prioritize Healing Over Incarceration, ROSENBERG FOUND. (Oct. 26, 2020), <https://rosenbergfound.org/a-blueprint-for-reimagining-alameda-countys-youthjustice-system-to-prioritize-healing-over-incarceration> [<https://perma.cc/EV7X-SSXB>].
329. CMTY. JUST. EXCH. ET AL., *supra* note 1, at 2.
330. See Godsoe, *An Abolitionist Horizon for Child Welfare*, *supra* note 18 (explaining how the system runs parallel to the criminal system and harms rather than helps families because it is essentially “a coercive state apparatus that controls and punishes poor and Black and Brown families.”); see also RISE & TAKEROOT JUSTICE, AN UNAVOIDABLE SYSTEM: THE HARMS OF FAMILY POLICING AND PARENTS’ VISION FOR INVESTING IN COMMUNITY CARE (2021), <https://www.risemagazine.org/wp-content/uploads/2021/09/AnUnavoidableSystem.pdf> [<https://perma.cc/G7G4-P5H2>] (reporting interviews of system-involved parents in New York City).
331. Atlanta’s campaign emphasizes that true equity means “redistributing resources where they are most needed and shifting power to the hands of communities.” CLOSE THE JAIL ATL & DESIGNING JUSTICE + DESIGNING SPACES, RAZE & REPLACE: THE PEOPLE’S PLAN TO REIMAGINE ATLANTA, https://www.closejailatl.org/_files/ugd/c1b234_9356fd044f5d423ba25a61025ac48118.pdf [<https://perma.cc/77V2-DD9U>].

investing in community supports for youth and family; they also organized a “truth and reinvestment” campaign to divest from the criminal system and invest in low-income communities and communities of color.³³² Again, the volume of material on police and silence as to prosecutors in such campaigns is striking, but the same principles of reducing the police role in addressing social problems, investing in communities for safety and equality, and developing independent oversight systems can apply very well to prosecutors.³³³ For instance, the “safely home campaign” focuses on diverting funds from juvenile detention and building community capacity with recreation centers and parks, functional and resourced schools, and after-school programs and summer jobs.³³⁴ Voters in Los Angeles County have gone even further to enact budget reform by referendum. In the same election when Gascon was elected as DA, they passed Measure J, mandating that 10 percent of the county’s unrestricted budget fund youth and community development, health care, and diversion programs.³³⁵ All of these campaigns could also expand to include downsizing prosecution, as well as police and prisons. Of course, prosecutors alone cannot accomplish this funding reallocation, but they can advocate for decreasing their own funding and footprint, and for increasing funding for noncriminal system programs.

I recognize that many prosecutors’ offices are underfunded for what they are currently being tasked with and that scant resources can lead to shortcuts and bad processes.³³⁶ The solution is not, however, to fund them more. As with the police, providing more funding to “fix” prosecutors’ offices continues to expand the system without addressing the main problem—that the office is already too big and cannot effectively do most of what it is tasked with. Accordingly, the only meaningful solution is for prosecutors to shrink their offices while using their considerable political power to advocate for increased funding for societal

332. Zachary Norris, *Truth and Reinvestment: Why We Need Reparations for Right Now*, ELLA BAKER CTR. FOR HUM. RTS. (Mar. 9, 2016), <https://ellabakercenter.medium.com/truth-and-reinvestment-why-we-need-reparations-for-right-now-2dba1f26cb49> [https://perma.cc/LQV2-LNN8]; see also John Sapida, *Ella Baker Center Continues the Fight for ‘Books Not Bars’*, WITNESS, <https://blog.witness.org/2015/04/ella-baker-center-continues-the-fight-for-books-not-bars> [https://perma.cc/YQY5-Z6TJ].

333. *A Roadmap for Re-Imagining Public Safety in the United States*, HUM. RTS. WATCH (Aug. 12, 2020, 8:00 AM), <https://www.hrw.org/news/2020/08/12/roadmap-re-imagining-public-safety-united-states> [https://perma.cc/2M2G-SN86].

334. Shaena Fazal, *A Much-Needed Alternative to Youth Prisons*, HUFFINGTON POST (July 15, 2015, 5:07 PM), https://www.huffpost.com/entry/youth-prisons_b_7772722 [https://perma.cc/AK72-5PU2].

335. RE-IMAGINE L.A. COUNTY, <https://yesonj.reimagine.la> [https://perma.cc/PQD7-S7PJ] (“Start dismantling systemic racism by investing in health, housing, and economic justice. Let’s #reimaginela.”).

336. Thanks to Carissa Hessick for this point.

supports. While some progressive prosecutors explicitly recognize that investment in social infrastructure is the best long-term crime prevention measure, they are not ceding control over their budgets or expressly advocating to have public resources reallocated to institutions outside the criminal system.

Ceding power to the community, transformative justice, divesting from prosecution, and investing in societal supports are all inextricably connected actions and essential to downsizing and transforming the carceral state. Even those prosecutors who are increasing community consultation and ramping up societal support programs are not willing to cut budgets. Indeed, they are asking for more money to conduct their “progressive” work. This refusal to cede material resources calls into question their commitment to engaging in restorative programs—are prosecutors truly recognizing community voice and expertise if they insist on controlling the purse strings?

CONCLUSION: BEYOND LAWYERS

In returning to the question I asked at the opening of this Article, whether progressive prosecutors, as opposed to courts and legislatures, are the best hope for change, I need to add one more locus of change—the people themselves. Progressive action is not enough to meaningfully change the criminal system. Instead, only radical action can work, and lawyers are not by professional culture, or perhaps nature, radical. Indeed, their ethical rules and training may make them incapable of being so.³³⁷ As a result, social change mostly comes from beyond the narrow confines of the legal system—including individual cases, appeals, and impact litigation—and from community self-defense, organizing, and protest.³³⁸ This is a reckoning for lawyers: It goes against our professional culture to cede expertise, to listen rather than talk, to follow rather than direct. This is true of legal scholars, too. As Mari Matsuda has pointed out, scholars “should listen” to the voices of marginalized people, and “build coalitions with others,” since we “will never be [at] the center of any successful [change] movement.”³³⁹ All lawyers and scholars, not just prosecutors, should allow the true change agents, those in the system and those touched by it, to exercise their autonomy from the bottom up.

337. See, e.g., Farbman, *supra* note 248, at 1927 (noting that the most ardently abolitionist lawyers could not freely admit to, for instance, helping to facilitate escapes of enslaved persons, which was at the time illegal).

338. I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 55 (2019) (“[S]ometimes it makes sense to ‘keep the law at bay.’”).

339. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324, 349 (1987).

This does not mean there is no role for lawyers in transforming the carceral state. We are part of the solution—but only a supporting role, not the lead. Defenders and prosecutors both “are part of the pathway to the future we seek to create. They are the start of how we reposition community, but they are not of themselves the ultimate goal.”³⁴⁰ So, while communities will organize to help elect prosecutors like Gascon in Los Angeles, they will never forget that all prosecutors “remain part of an unjust system” and that it is not lawyers who will dismantle that system and rebuild a better world. Rather, they themselves must keep striving toward the horizon of a truly free and equal state.³⁴¹

340. Jayadev & Weiss, *supra* note 21.

341. *See also* Levin, *supra* note 9 (quoting Black Lives Matter cofounder Melina Abdullah).
