

# REDUNDANT LENIENCY AND REDUNDANT PUNISHMENT IN PROSECUTORIAL REFORMS

STEPHANIE HOLMES DIDWANIA \*

## *Abstract*

The United States imprisons an enormous number of people. Imprisonment in the United States is not only mass, but also unequal by race, sex, and class. Over the last several years, criminal reform advocates, scholars, and the public have paid greater attention to the potential of elected prosecutors to fix the massive and unequal harms our criminal legal system imposes on people. To do so, some jurisdictions have elected those who are popularly called *progressive prosecutors* to enforce criminal law. I estimate that roughly 15% of U.S. residents now live in a jurisdiction with a progressive prosecutor, although that term is difficult to define.<sup>1</sup>

This Essay presents early evidence suggesting that progressive prosecutorial reforms have not always been as effective as hoped at reducing incarceration. Why not? As this Essay describes, reform-minded prosecutors might fall prey to two phenomena. First, prosecutorial reforms sometimes replicate lenient treatment that was already happening. I call this the *redundant leniency* problem. Second, reforms implemented by progressive prosecutors sometimes underestimate the *redundant punishment* that persists in many criminal legal regimes. That is, progressive policies sometimes fail to account for the ways in which different parts of our criminal legal systems reinforce each other, leaving less room than expected for the prosecutorial reform to bring about meaningful change. And, as many scholars have pointed out, carceral systems outside the criminal legal system also work in tandem with the criminal system to perpetuate mass, unequal incarceration. Taken together, these critiques suggest that progressive prosecutors must pursue reforms that are both systemic and far-reaching if they hope to dramatically reduce incarceration in their jurisdictions.

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\* Assistant Professor of Law, University of Wisconsin Law School. I am grateful to Cara Drinan, Thea Johnson, Kathryn Miller, Jamelia Morgan, Anna Offit, and participants of the *Oklahoma Law Review* Symposium, “Ending Mass Incarceration: Philosophy, Practice, and Policy,” for helpful comments and suggestions. I am also thankful for Guha Krishnamurthi’s invitation to contribute this piece. Finally, I am indebted to the student editors of the *Oklahoma Law Review* for their careful and insightful editorial assistance.

1. See generally Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415 (2021).

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*Introduction*

The United States has long had one of the world’s largest prison populations, both in raw numbers and as a percentage of its population.<sup>2</sup> Incarceration in the United States is not only mass, but also unequal. In 2019, Black residents were imprisoned at more than five times the rate of White residents; Hispanic residents were imprisoned at roughly two and a half times

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2. John Gramlich, *America’s Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/> (reporting that as of 2019, “the United States incarcerates a larger share of its population than any other country for which data is available). *But see Highest to Lowest – Prison Population Total*, WORLD PRISON BRIEF, [https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All) (last visited Oct. 20, 2022) (reporting that the United States now has the second largest prison population of roughly 1.68 million, while China has the largest with a prison population of 1.69 million); *Highest to Lowest – Prison Population Rate*, WORLD PRISON BRIEF, [https://www.prisonstudies.org/highest-to-lowest/prison\\_population\\_rate?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All) (last visited Oct. 20, 2022) (showing the United States has the fifth highest incarceration rate after El Salvador, Rwanda, Turkmenistan, and Cuba).

the rate of White residents.<sup>3</sup> Imprisonment rates are also disparate by sex, class, and geography. For example, in 2019, Louisiana imprisoned people at a higher rate than any other state (1,330 per 100,000 adults) and at more than four times the rate of the states that imprison the lowest shares of their adult populations.<sup>4</sup>

After rapid growth beginning in the 1980s,<sup>5</sup> the U.S. prison population has declined every year since 2014.<sup>6</sup> Yet we still imprison more than three times as many people as we did fifty years ago.<sup>7</sup> At the current pace, it will take seventy-five years to cut our prison population in half.<sup>8</sup>

Many observers believe prosecutors shoulder the blame for mass and unequal incarceration, but some also believe that prosecutors are uniquely suited to fix this critical social problem. This Essay examines the work reform-minded prosecutors have done thus far to reduce mass and unequal incarceration. It does so by bringing together and building upon the work of legal theorists, doctrinal scholars, and empirical researchers. It proceeds in three parts. First, it describes the role of prosecutors in creating mass and unequal incarceration. Second, it documents the rise of “progressive prosecutors” in the 2010s and 2020s and describes three broad ways that prosecutors might help reduce the prison population: by bringing fewer criminal cases, by advocating for shorter sentences, and by supporting decarceration efforts. Third, this Essay presents two hurdles that progressive prosecutors might face in addressing mass and unequal incarceration—*redundant leniency* and *redundant punishment*. It then offers three case

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3. See John Gramlich, *Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006*, PEW RSCH. CTR. (May 6, 2020), <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/>.

4. TODD D. MINTON ET AL., BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2019 – STATISTICAL TABLES 11–12 (2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/epus19st.pdf> (reporting for Massachusetts, Rhode Island, and Vermont, imprisonment rates of 310, 320, and 320 per 100,000 adult residents, respectively).

5. Joshua Aiken, *Era of Mass Expansion: Why State Officials Should Fight Jail Growth*, PRISON POL’Y INITIATIVE (May 31, 2017), <https://www.prisonpolicy.org/reports/jailovertime.html>.

6. See E. ANN CARSON, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., PRISONERS IN 2020 – STATISTICAL TABLES 7 (2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf>.

7. In 2020, the imprisonment rate was 358 per 100,000 residents. CARSON, *supra* note 6, at 13. In 1970, it was ninety-six per 100,000 residents. BUREAU OF JUST. STAT., PRISONERS 1925–81, at 2 (1982), <https://bjs.ojp.gov/content/pub/pdf/p2581.pdf>.

8. Nazgol Ghandnoosh, *Can We Wait 75 Years to Cut the Prison Population in Half?*, SENT’G PROJECT (Mar. 8, 2018), <https://www.sentencingproject.org/publications/can-wait-75-years-cut-prison-population-half/>.

studies that illustrate these hurdles and ends by arguing that if prosecutors hope to meaningfully address mass, unequal incarceration, they must pursue reforms that are both systemic and far-reaching.

### *I. Prosecutors as a Cause of Mass and Unequal Incarceration*

Many observers believe prosecutors are to blame for mass and unequal imprisonment in the United States but also acknowledge that prosecutors might be well suited to help fix this problem given their tremendous discretionary power. Angela Davis explained, “Historically prosecutors are largely responsible for a lot of the problems we have in the criminal justice system,” but “[t]hey also have the power to correct them.”<sup>9</sup> This Part situates the role of prosecutors among other actors in creating and maintaining mass and unequal incarceration in the United States.

That prosecutors are to blame for mass and unequal incarceration in the United States might seem like an unremarkable proposition. Because prosecutors have discretion to decide which cases to bring, every person who is imprisoned in the United States ended up in prison because of a prosecutorial decision to pursue a conviction. By this logic, the United States could have zero incarcerated people if prosecutors wanted it to be so. For this reason, prosecutors have been described as “the most powerful actors”<sup>10</sup> and the “real lawmakers”<sup>11</sup> in the criminal legal system.<sup>12</sup>

Not only do prosecutors have discretion over *who* is imprisoned, they also influence *how long* a person is imprisoned.<sup>13</sup> This is because prosecutors engage in plea bargaining, which is the way most criminal cases in the United States are resolved.<sup>14</sup> In many pleas, the prosecution and defense will agree

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9. Del Quentin Wilber, *Once Tough-on-Crime Prosecutors Now Push Progressive Reforms*, L.A. TIMES (Aug. 5, 2019, 4:00 AM PT), <https://www.latimes.com/politics/story/2019-08-02/once-tough-on-crime-prosecutors-now-push-progressive-reforms> (quoting Angela J. Davis).

10. Brandon Hasbrouck, *The Just Prosecutor*, 99 WASH. U. L. REV. 627, 627 (2021).

11. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001).

12. *But see* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 181 (2019) (“[I]t takes a village to send someone to prison. The track is laid by legislators and passes through critical gateways controlled by police, judges, and other actors.” (footnote omitted) (internal quotation marks omitted)).

13. William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004).

14. John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RSCH. CTR. (June 11, 2019), <https://www.pewresearch.org/fact->

that the prosecutor will recommend a certain sentence.<sup>15</sup> Even in cases in which the prosecutor and defense bargain over guilt alone, the prosecutor's choice of charges and formal recommendation at the sentencing stage will heavily influence the defendant's ultimate sentence.

Of course, prosecutors are not the only people who contribute to mass, unequal incarceration in the United States. Judges approve guilty pleas and impose sentences on defendants. Legislators create the substantive criminal laws that prosecutors enforce, and criminal statutes define not only crimes, but also punishments. Legislators can constrain prosecutors and judges from imposing the sentences they would prefer by legislating statutory minimum and maximum terms of imprisonment.<sup>16</sup>

But this Essay focuses on prosecutors. What influences *their* behavior? In many cases, the electorate. This is because in the United States, nearly all district attorneys are elected.<sup>17</sup>

Because most district attorneys in the United States are elected, prosecutorial decision-making likely responds to public attitudes about

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tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ (reporting that ninety percent of federal defendants pleaded guilty in fiscal year 2018, while two percent went to trial and eight percent had their charges dismissed by the government); BRIAN A. REAVES, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 24 (2013), <https://bjs.ojp.gov/content/pub/pdf/fdluc09.pdf> (reporting that 53% of felony defendants in the seventy-five largest counties pleaded guilty in 2009, while 2% went to trial, 25% had their charges dismissed by the government, and 9% had some other outcome).

15. See *How Courts Work: Steps in a Trial*, AM. BAR ASS'N (Nov. 28, 2021), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/pleabargaining/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleabargaining/).

16. Prosecutors sometimes appear to use statutory minima strategically, such as by charging a statutory minimum upon learning that the case has been assigned to a more lenient judge, or by using the threat of a long statutory minimum to induce a defendant to plead guilty. See Crystal S. Yang, *Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from Booker*, 89 N.Y.U. L. REV. 1268, 1325–26 (2014). Prosecutors also charge mandatory minima in racially disparate ways. M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320 (2014); Cody Tuttle, *Racial Disparities in Federal Sentencing: Evidence from Drug Mandatory Minimums* (Aug. 18, 2021) (unpublished manuscript), [https://codytuttle.github.io/tuttle\\_mandatory\\_minimums.pdf](https://codytuttle.github.io/tuttle_mandatory_minimums.pdf); Crystal S. Yang, *Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing*, 44 J. LEGAL STUD. 75 (2015).

17. *When Does Each County Elect Its Prosecutor and Sheriff?*, APPEAL, <https://theappeal.org/political-report/when-are-elections-for-prosecutor-and-sheriff/> (last visited Aug. 3, 2022) (indicating that five states—Alaska, Connecticut, Delaware, New Jersey, and Rhode Island—do not elect prosecutors); see also Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1549–51 (2020).

crime.<sup>18</sup> Quantitative empirical scholarship lends support to this theory. For example, Chika Okafor finds—among other things—that criminal sentences increase in prosecutorial election years and that these election-year increases are largest in the South, in Republican counties, and in places where the prosecutorial election is contested.<sup>19</sup> Okafor concludes that “these findings suggest DA behavior and sentencing outcomes may respond to voter preferences—including to racial sentiment and preferences regarding the harshness of the court system.”<sup>20</sup> This finding is consistent with earlier work finding that defendants face a higher probability of conviction during prosecutor election years and that Republican district attorneys are associated with harsher sentences than Democrats.<sup>21</sup> Researchers have also documented similar electoral and political effects on judicial decision-making in criminal cases.<sup>22</sup>

What does the electorate want from its prosecutors? It’s complicated and varies across the United States. As described in Section II.A, the electorates of some jurisdictions have supported prosecutorial visions of reduced incarceration and increased racial equality.

Overall, though, Americans as a whole hold notoriously punitive attitudes about crime, although punitive attitudes have declined over the last several decades. For example, in the past thirty years, the fraction of Americans viewing the criminal legal system as “not tough enough” has fallen by nearly half, while the fraction viewing it as “too tough” has increased roughly ten-

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18. *But see* Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 605 (2014) (arguing that prosecutorial elections are “highly imperfect mechanisms to promote accountability” for prosecutors).

19. Chika O. Okafor, *Prosecutor Politics: The Impact of Election Cycles on Criminal Sentencing in the Era of Rising Incarceration* 28–33 (July 4, 2022) (unpublished manuscript), <https://scholar.harvard.edu/files/okafor/files/prosecutorpolitics.pdf>. This study does not, however, account for the possibility that judicial (rather than prosecutorial) elections could be driving the results.

20. *Id.* at i (abstract).

21. Andrew Dyke, *Electoral Cycles in the Administration of Criminal Justice*, 133 PUB. CHOICE 417, 431 (2007); Sam Krumholz, *The Effect of District Attorneys on Local Criminal Justice Outcomes* 3–4 (May 9, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3243162](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3243162).

22. David Abrams et al., *Electoral Sentencing Cycles*, J.L., ECON., & ORG., Jan. 12, 2022, at 1, 3 (advance article), <https://doi.org/10.1093/jleo/ewab037> [<https://perma.cc/P76E-32DW>]; Alma Cohen & Crystal S. Yang, *Judicial Politics and Sentencing Decisions*, AM. ECON. J.: ECON. POL’Y, Feb. 2019, at 160, 161; Christian Dippel & Michael Poyker, *How Common Are Electoral Cycles in Criminal Sentencing?* (Nat’l Bureau of Econ. Rsch., Working Paper No. 25716, 2020), <https://www.nber.org/papers/w25716>.

fold according to Gallup's regular polling.<sup>23</sup> But even as recently as 2020, twice as many U.S. residents (41%) viewed our criminal legal system as “not tough enough” compared to those who viewed it as “too tough” (21%)<sup>24</sup> (in 1992, the numbers were 83% and 2%, respectively<sup>25</sup>). Along the same lines, public support for the death penalty is now the lowest it's been since the early 1970s, but it is still the case that more Americans support (54%) than oppose (43%) capital punishment.<sup>26</sup> Most Americans believe there are too many people in prison, and a large majority favor expanding alternatives to prison and reducing imprisonment for people convicted of “nonviolent” crimes.<sup>27</sup> But most oppose doing so for people who have been convicted of violent crimes.<sup>28</sup>

How do prosecutors implement the electorate's preferences? The most important way is through plea bargaining, which is the way most criminal cases in the United States are resolved. Mandatory-minimum sentences bolster prosecutorial power in this process, but even without mandatory minimums, prosecutors have tremendous power in deciding to pursue charges and negotiate pleas. Part of the reason prosecutors enjoy so much bargaining power against criminal defendants is that any involvement in the carceral system (not just imprisonment) is extremely costly to defendants. For example, there is widespread empirical evidence that people will plead guilty to avoid or shorten pretrial detention.<sup>29</sup> Research by Megan Stevenson

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23. Megan Brenan, *Fewer Americans Call for Tougher Criminal Justice System*, GALLUP (Nov. 16, 2020), <https://news.gallup.com/poll/324164/fewer-americans-call-tougher-criminal-justice-system.aspx>.

24. *Id.*

25. *Id.*

26. *Death Penalty*, GALLUP, <https://news.gallup.com/poll/1606/death-penalty.aspx> (last visited Aug. 3, 2022).

27. See Morning Consult, National Tracking Poll 3 (Sept. 1–2, 2016), [https://cdn3.vox-cdn.com/uploads/chorus\\_asset/file/7052001/160812\\_topline\\_Vox\\_v1\\_AP.0.pdf](https://cdn3.vox-cdn.com/uploads/chorus_asset/file/7052001/160812_topline_Vox_v1_AP.0.pdf) (finding strong support for reducing prison time of non-violent offenders who are at a low risk of committing a subsequent crime).

28. *Id.* at 3–4.

29. Will Dobbie et al., *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 225 (2018) (finding that pretrial detention increases probability of conviction, primarily through increase in guilty pleas); Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L., ECON., & ORG. 511, 532 (2018) (same); Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 498 (2016) (finding that assignment of money bail increases likelihood of conviction); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case*

and Sandra Mayson presents evidence that people are very averse to spending even short stints in jail.<sup>30</sup> Due to these high costs, defendants who are factually innocent or who might have valid claims against their prosecution could still find it in their interest to plead guilty. Moreover, many defendants who have committed the crime charged fear they will suffer additional punishment for going to trial.<sup>31</sup> Prosecutors thus have tremendous power to shape convictions and sentences via plea bargaining.

## *II. Prosecutors as a Potential Solution to Mass and Unequal Incarceration*

Because prosecutors have enormous discretion, they are a natural starting point for reversing mass and unequal incarceration. This Part describes the rise of elected prosecutors that vow to do exactly that. It then discusses three ways that prosecutors might, in theory, make a dent in mass and unequal incarceration. It also acknowledges hurdles of each approach.

### *A. The Rise of Progressive Prosecutors in the 2010s–2020s*

The past decade has seen an upsurge of so-called “progressive prosecutors” elected in jurisdictions around the United States. For purposes of this Essay, I define a *progressive prosecutor* as a chief prosecutor of a jurisdiction who claims to want to use the power of their office to reduce incarceration and inequality. This definition is fairly broad; for example, it does not require the prosecutor to actually achieve these objectives, and it allows prosecutors to self-identify as progressive prosecutors.<sup>32</sup> The definition is also probably underinclusive because there are likely to be prosecutors who eschew the “progressive prosecutor” label but maintain the

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*Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529, 530 (2017) (finding that pretrial detention increases probability of conviction).

30. Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 709, 714 (2022).

31. In the federal criminal system, for example, defendants are entitled to a sentencing reduction if they accept responsibility for their crimes by quickly pleading guilty. *See* U.S. SENT’G GUIDELINES MANUAL § 3E1.1 (U.S. SENT’G COMM’N 2021). *But see* David S. Abrams, *Putting the Trial Penalty on Trial*, 51 DUQ. L. REV. 777 (2013) (arguing that popular conceptions of the trial penalty are based on “a fundamental misunderstanding,” namely “the failure to distinguish between conditional and unconditional expected values,” and finding that the empirical evidence supports the presence of a “trial discount” rather than a trial penalty).

32. *See, e.g.*, Rachel E. Barkow, 119 MICH. L. REV. 1362, 1372 (2021) (“The movement to elect progressive prosecutors has grown powerful enough that some prosecutors try to claim the label to boost their credibility with certain constituencies.”)



goal of reducing incarceration and inequality in their jurisdictions.<sup>33</sup> Many of the United States' largest cities, such as Los Angeles, Chicago, and Philadelphia, now have a progressive prosecutor as I use that term.<sup>34</sup> Yet, as described in more detail below, the vast majority of U.S. residents do not live in a jurisdiction with a progressive prosecutor.<sup>35</sup>

Most scholars who study the progressive prosecutor movement view it as having started in the 2010s. As David Alan Sklansky describes this period, “with remarkable speed . . . [i]ncumbent prosecutors began to be defeated by candidates who pledged restraint and moderation in charging practices and sentencing recommendations, along with more scrutiny of the police, greater vigilance against prosecutorial misconduct, and a new focus on racial equity.”<sup>36</sup>

Sklansky lists three reforms that are typical of progressive prosecutors: bail reform, not seeking the death penalty, and not prosecuting low-level drug offenses.<sup>37</sup> Progressive prosecutors appear less uniformly interested in reducing sentences for violent crime. For example, the reelection campaign website for Kim Foxx—the state’s attorney for Cook County, Illinois—includes “Taking on Violent Crime” as the second of four “priorities” (the other three are “Criminal Justice Reform,” “Righting the Wrongs of the War on Drugs,” and “Standing up to President Donald Trump and the FOP [Fraternal Order of Police].”)<sup>38</sup> Her website boasts that her office has “worked to enact bail reform and stop the overcrowding of our jails by *prioritizing the detainment of those that pose a threat to our communities*” and describes other accomplishments from her first term, such as exonerating eighty wrongfully convicted people, reforming how unpaid traffic tickets are prosecuted, and expunging the records of over one thousand people convicted of low-level cannabis offenses.<sup>39</sup>

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33. See, e.g., Hessick & Morse, *supra* note 17, at 1541 (noting this concern that “the label ‘progressive’ may alienate [those] who support criminal justice reform, but who do not identify as politically progressive or liberal”).

34. *Id.* at 1542.

35. See *infra* notes 51–52 and accompanying text.

36. David Alan Sklansky, *Foreword: The Future of the Progressive Prosecutor Movement*, 16 STAN. J.C.R. & C.L. i, i (2021), <https://www-cdn.law.stanford.edu/wp-content/uploads/2021/08/Sklansky-The-Future-of-the-Progressive-Prosecutor-Movement-16-Stan.-J.-C.R.-C.L.-i-2021.pdf>.

37. *Id.*

38. *Priorities*, KIM FOXX FOR COOK CNTY. STATE’S ATT’Y, <https://www.kimfoxx.com/priorities> (last visited Aug. 4, 2022).

39. *Id.* (emphasis added).

In contrast, George Gascón, the District Attorney of Los Angeles County (and previously the District Attorney of San Francisco County) implemented “sweeping changes” upon taking office in 2020.<sup>40</sup> These announcements included familiar parts of the progressive prosecutor playbook:<sup>41</sup> calling for abolition of the death penalty; an end to most uses of cash bail for misdemeanor, nonserious, or nonviolent felony offenses; and consideration of resentencing for inmates serving excessive sentences.<sup>42</sup> But Gascón also included a more expansive and less common reform: instructing prosecutors to stop charging sentencing enhancements.<sup>43</sup> Gascón’s office projects that the first three months of this policy reduced future prison sentences by a little over 8,000 years and will ultimately save state prisons around \$664 million.<sup>44</sup>

Some progressive prosecutors have already suffered setbacks. Perhaps most notably, Chesa Boudin, a progressive candidate who was elected to be San Francisco’s district attorney in 2019, was recalled by voters in June of 2022.<sup>45</sup> The campaign to recall Boudin was heavily funded by Republican and conservative-leaning donors and emphasized San Francisco’s rising homelessness and property crime rate to motivate the electorate.<sup>46</sup> For

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40. Brakkton Booker, *George Gascón Implements Sweeping Changes to Los Angeles District Attorney’s Office*, NPR (Dec. 8, 2020), <https://www.npr.org/2020/12/08/944396495/george-gascon-implements-sweeping-changes-to-los-angeles-district-attorneys-offi>; *San Francisco District Attorney Gascon Resigns; Signals Move to LA*, CBS NEWS (Oct. 3, 2019, 6:44 PM), <https://www.cbsnews.com/sanfrancisco/news/san-francisco-district-attorney-gascon-resigns-job/>.

41. See generally David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25 (2017).

42. See, e.g., Booker, *supra* note 40.

43. See, e.g., *id.*; Special Directive from George Gascón, Dist. Att’y, to All Deputy Dist. Att’ys (Dec. 7, 2020), <https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-08.pdf> [hereinafter Special Directive from Gascón] (addressing sentencing enhancements and allegations).

44. Frank Stoltze, *DA Gascón: In 3 Months, I’ve Cut Prison Sentences By More Than 8,000 Years*, LAIST (Mar. 17, 2021, 2:46 PM), <https://laist.com/news/los-angeles-da-george-gascon-in-3-months-cut-prison-sentences-8-000-years>. An analysis by researchers at the Stanford Computational Policy Lab similarly showed that sentencing enhancements are responsible for more than 25% of prison time served for felony sentences in San Francisco. See Elan Dagenais et al., *Sentencing Enhancements and Incarceration: San Francisco, 2005-2017*, STAN. COMPUTATIONAL POL’Y LAB, Oct. 2019, at 3, [https://policylab.stanford.edu/media/enhancements\\_2019-10-17.pdf](https://policylab.stanford.edu/media/enhancements_2019-10-17.pdf).

45. Megan Cassidy et al., *Chesa Boudin Ousted As San Francisco District Attorney in Historic Recall*, S.F. CHRON. (June 13, 2022, 12:03 PM), <https://www.sfchronicle.com/election/article/Chesa-Boudin-ousted-as-San-Francisco-District-17226641.php>.

46. See, e.g., *Poll: San Francisco Residents Consider Relocating as Crime Worsens*,

example, the first sentence of the *Wall Street Journal* Editorial Board's endorsement of the recall asserted (without citation): "Crime has surged in many big American cities, and one reason is the rise of progressive prosecutors who refuse to enforce criminal laws."<sup>47</sup> Other progressive prosecutors have faced similar attacks, but many have warded them off.<sup>48</sup>

Even when popular within their own jurisdictions, some reformist prosecutors have faced opposition from state officials. For example, then-Governor Rick Scott removed Aramis Ayala, the elected State Attorney for two Florida counties, from several murder cases because she announced an official policy not to seek the death penalty.<sup>49</sup> Current Florida Governor Ron DeSantis suspended the elected State Attorney for a different county after that prosecutor pledged not to prosecute people who seek abortions or doctors who perform them, nor to prosecute families seeking gender-affirming care for their children.<sup>50</sup>

Another intrinsic limitation to progressive prosecutors' potential to reduce mass, unequal incarceration is the fact that progressive prosecutors do not blanket the United States. The Appendix presents a list created by the author of progressive prosecutors in the United States. According to the numbers

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*Quality of Life in a Decline*, CBS NEWS (June 30, 2021, 5:36 AM), <https://www.cbsnews.com/sanfrancisco/news/poll-san-francisco-residents-consider-relocating-as-crime-worsen-quality-of-life-in-a-decline/> (describing a poll released by the San Francisco Chamber of Commerce that found 80% of residents thought crime had worsened in recent years, 70% felt their quality of life had declined, and 88% believed homelessness had worsened).

47. *The Criminal Streets of San Francisco*, WALL ST. J. (May 31, 2022, 6:42 PM ET), <https://www.wsj.com/articles/the-criminal-streets-of-san-francisco-progressive-prosecutor-chesa-boudin-crime-cities-11653855019>.

48. For example, Philadelphia District Attorney Larry Krasner defeated a Democratic primary challenger, Carlos Vega, in 2021 despite his opponent's attempts to "paint [Krasner] as soft on crime." Jon Hurdle & Jonah E. Bromwich, *Victory in Philadelphia Buys Supporters of Progressive District Attorney*, N.Y. TIMES (May 20, 2021), <https://www.nytimes.com/2021/05/19/us/krasner-vega-philadelphia.html>. Diana Becton, the District Attorney of Contra Costa County, California, similarly defeated a well-funded challenger in 2022. *Contra Costa County District Attorney Diana Becton Holds Off Challenger Mary Knox*, NBC (June 8, 2022, 11:09 AM), <https://www.nbcbayarea.com/decision-2022/contra-costa-county-district-attorney-diana-becton-holds-off-challenger-mary-knox/2913945/>.

49. *Florida Supreme Court Upholds Removal of Prosecutor from Death-Eligible Cases*, DEATH PENALTY INFO. CTR. (Aug. 31, 2017), <https://deathpenaltyinfo.org/news/florida-supreme-court-upholds-removal-of-prosecutor-from-death-eligible-cases>.

50. Brendan Farrington & Anthony Izaguirre, *DeSantis Sued by Florida Prosecutor He Removed Over Abortion* (Aug. 17, 2022), <https://apnews.com/article/2022-midterm-elections-abortion-lawsuits-florida-8c311d5742140575bdd456307ac7d488>. For a general treatment of the "preemption" of progressive prosecutors by other state actors, see Nicholas Goldrosen, *The New Preemption of Progressive Prosecutors*, 2021 U. ILL. L. REV. ONLINE 150.

reported in the Appendix, jurisdictions with a progressive prosecutor comprise roughly 15% of the American public.<sup>51</sup> Put another way, around six out of seven U.S. residents do *not* live in a jurisdiction with a progressive prosecutor. Even if progressive prosecutors are extraordinarily effective at reducing incarceration in their jurisdictions, this will not help the vast majority of American prisoners.<sup>52</sup> Therefore, the focus of this Essay is constrained. It asks, at best, can progressive prosecutors meaningfully affect mass and racially disparate incarceration of defendants prosecuted *in their jurisdictions*? The rest of this Essay considers this question.

### *B. Prosecutorial Tactics to Reduce Mass and Unequal Incarceration*

Broadly speaking, there are three ways to reduce the size of an incarcerated population. The first is to reduce the number of people entering prison. The second is to reduce the sentences for those entering prison. The third is to release people from prison. Any of these three mechanisms alone will reduce the prison population; but the prison population will decline faster if all three tactics are used simultaneously.<sup>53</sup> It is also important to note that even if a prosecutor adopts strategies that are effective at reducing the prison

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51. See *infra* app. A. This estimate is similar to others. See, e.g., EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 290 (2019) (asserting that 12% of the U.S. population lives in a jurisdiction with a “reformer” district attorney); LARRY KRASNER, FOR THE PEOPLE: A STORY OF JUSTICE AND POWER 311 (2022) (“[B]y 2021, about 20.1 percent of the U.S. population lived in jurisdictions that had elected or reelected a progressive prosecutor.”).

52. See, e.g., Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 803 (2020) (warning that “[prosecutorial] reforms that occur in large jurisdictions sometimes do not extend to those suffering injustices in small communities”); KIM TAYLOR-THOMPSON & ANTHONY C. THOMPSON, PROGRESSIVE PROSECUTION: RACE AND REFORM IN CRIMINAL JUSTICE 9 (2022) (“The few dozen [progressive] prosecutors who have been elected cannot possibly reform and transform the system by themselves. Their numbers are far too small to create sustainable change in the justice system.”).

53. See generally Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL’Y REV. 307, 308 (2009) (defining “the iron law of prison populations” as the fact “that the total number of prisoners behind bars is purely and simply a result of two factors: the number of people put there and how long they stay”); Ben Grunwald, *Toward an Optimal Decarceration Strategy*, 33 STAN. L. & POL’Y REV. 1 (2022) (describing different strategies to reduce the prison population and metrics by which to judge them).

population, it does not automatically follow that imprisonment rates will become less disparate.<sup>54</sup>

As this Section describes, prosecutors play a role in each of these mechanisms. Most obviously, prosecutors can reduce the number of people entering prison by charging fewer people with crimes. Prosecutors can also lessen sentences for those entering prison through plea bargaining and charging decisions. Finally, prosecutors can increase the number of people released from prison in many ways, such as by supporting motions for compassionate release or revisiting long sentences.

### *1. Declinations: Reducing the Number of People Entering Prison*

Prosecutors can reduce the prison population by reducing the number of people they prosecute for crimes. One way that prosecutors sometimes do this is by announcing that they will decline to prosecute certain crimes, such as possession of small amounts of cannabis.<sup>55</sup> As another example, in the wake of the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, many district attorneys announced that their offices would not prosecute abortion providers or people who obtained abortions.<sup>56</sup> In Georgia, one prosecutor announced that his office would not prosecute anyone under a newly enacted law that criminalizes providing food and water

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54. Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 772 (2020) (arguing that progressive prosecutors "often articulate neutral principles that are susceptible to being used in a racially discriminatory manner").

55. See, e.g., Stephanie Clifford & Joseph Goldstein, *Brooklyn Prosecutor Limits When He'll Target Marijuana*, N.Y. TIMES (July 8, 2014), <https://www.nytimes.com/2014/07/09/nyregion/brooklyn-district-attorney-to-stop-prosecuting-low-level-marijuana-cases.html>; Lulu Garcia-Navarro, *Baltimore State's Attorney Will No Longer Prosecute Marijuana Possession Cases*, NPR (Feb. 3, 2019, 7:39 AM ET), <https://www.npr.org/2019/02/03/690975390/baltimore-states-attorney-will-no-longer-prosecute-marijuana-possession-cases>; Travis Loller & Jonathan Mattise, *Nashville Will No Longer Prosecute Minor Marijuana Charges*, AP NEWS (July 1, 2020), <https://apnews.com/article/9ce3b3975625e0b16ddfc076e88d9eal>.

56. Michael Atwell et al., *Fair & Just Prosecution*, Joint Statement from Elected Prosecutors (July 25, 2022), <https://fairandjustprosecution.org/wp-content/uploads/2022/06/FJP-Post-Dobbs-Abortion-Joint-Statement.pdf> (collecting signatures from ninety-two elected prosecutors at the time of writing).

to voters waiting in line to cast their ballots.<sup>57</sup> Some scholars refer to these efforts as “prosecutorial nullification” or “prosecutorial decriminalization.”<sup>58</sup>

Aside from blanket, crime-specific declinations, prosecutors can elect to simply not bring criminal charges in cases that are viewed as less serious. For example, the federal government often states that it prioritizes prosecuting more egregious crimes, especially for crimes over which states will also have jurisdiction (such as drug crimes and financial crimes).<sup>59</sup>

## 2. *Leniency Directives: Reducing Sentences for Those Convicted*

Prosecutors can also reduce the prison population by working to obtain lesser sentences for those whom they prosecute for crimes.<sup>60</sup> I define a *leniency directive* as an order from a chief prosecutor (such as a district attorney) that instructs prosecutors to not prosecute certain defendants or crimes to the fullest extent possible under the law.<sup>61</sup> Leniency directives are

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57. Arielle Kass, *Gwinnett Solicitor Says He Won't Prosecute People for Giving Voters Water*, ATLANTA J.-CONST. (Apr. 5, 2021), <https://www.ajc.com/news/atlanta-news/gwinnett-solicitor-says-he-wont-prosecute-people-for-giving-voters-water/KLPNOM3RPZEIZHKBU2IE4LU3IU/>.

58. See, e.g., Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1252 (2011); Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785 (2012); W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173, 179 (2021); see also Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization*, 19 OHIO ST. J. CRIM. L. (forthcoming 2022) (arguing that “residual criminalization” can persist even after a reform-minded prosecutor promulgates a non-enforcement policy).

59. See generally Lauren M. Ouziel, *Ambition and Fruition in Federal Criminal Law: A Case Study*, 103 VA. L. REV. 1077 (2017); *White-Collar Crime*, FBI, <https://www.fbi.gov/investigate/white-collar-crime> (“The FBI’s white-collar crime program focuses on analyzing intelligence and solving complex investigations—often with a connection to organized crime activities. Our white-collar crime investigations can be regional, national, and/or international.”).

60. One analysis found that criminal cases decided in jurisdictions led by a progressive prosecutor were “more likely to end without a felony conviction and less likely to result in a prison sentence.” Ojmarh Mitchell et al., *Are Progressive Chief Prosecutors Effective in Reducing Prison Use and Cumulative Racial/Ethnic Disadvantage? Evidence from Florida*, 21 CRIMINOLOGY & PUB. POL’Y 535, 535 (2022). The authors also found that racial disparities are smaller in jurisdictions led by progressive chief prosecutors. *Id.* at 560. These results should be interpreted with caution because whether a jurisdiction has a progressive chief prosecutor is a selected outcome that is likely to be correlated—perhaps not causally—with the outcomes studied.

61. I use the term “lenient” to refer to the situation in which the prosecutor does not prosecute someone to the fullest extent allowed by the law. For a critique of using this term, see Anna Roberts, *Criminal Terms*, MINN. L. REV. (forthcoming), <https://papers.ssrn.com/>

a popular tool among progressive prosecutors. For example, George Gascón, the District Attorney for Los Angeles, instructed prosecutors in his office to stop pursuing enhanced sentences under California's Three Strikes Law.<sup>62</sup> As another example, described in detail in Section III.C.2, then-Attorney General Eric Holder instructed federal prosecutors in 2013 to stop charging mandatory minimums in certain drug trafficking cases.<sup>63</sup> The Holder policy is another example of a leniency directive.

Leniency directives have a political economy. Typically, the most politically feasible leniency directive is one aimed at those defendants who are seen as the most deserving in the eyes of the public. Such defendants tend to be those charged with offenses involving low-level conduct, those with little or no criminal record, and those with no prior convictions for physically violent crimes. Even for elected progressive prosecutors, merciful treatment might not be politically feasible for defendants convicted of serious crimes or with a prior criminal record.<sup>64</sup>

Thus, while politically palatable, we might not expect low-level leniency to be an effective tool at making a dent in mass and unequal incarceration. First, and perhaps most obviously, at any given moment, most people imprisoned in the United States are serving sentences for convictions of violent crimes.<sup>65</sup>

Second, and perhaps overlooked, is that prosecutors might already be exercising leniency in these cases. For progressive prosecutors, the chance of redundancy could be inflated by selection bias: progressive prosecutors are most likely to be elected in locations where the populace already holds progressive views about the criminal legal system.

Third, prosecutors are resource constrained. As a leading criminal law casebook explains,

Criminal statutes now commonly permit (or purport to require) draconian punishments that no one expects to be imposed in the

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sol3/papers.cfm?abstract\_id=4135537 (manuscript at 28) (“‘Lenient’ is another common term in academia that bolsters the criminal apparatus by suggesting the state’s benevolence.”).

62. See Special Directive from Gascón, *supra* note 43.

63. See *infra* Section III.C.2.

64. Some have criticized mercy for its capricious implementation. See, e.g., Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1436 (2004) (“Mercy [is] the remission of deserved punishment, in part or in whole, to criminal offenders on the basis of characteristics that evoke compassion or sympathy but that are morally unrelated to the offender’s competence and ability to choose to engage in criminal conduct.”).

65. JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM viii (2017).

typical case. . . . “Leniency” has therefore become not merely common but a systemic imperative. Under these circumstances, the decision to “withhold leniency” is effectively a decision to *impose* severe punishment.<sup>66</sup>

In other words, progressive prosecutors might implement measures that are duplicative of prior informal leniency policies. This Essay calls this the *redundant leniency* problem in Part III.

It is also important to note that traditionally, prosecutorial leniency has been disproportionately directed towards certain people—those with social power—and has therefore often benefited race-, sex-, and class-privileged people. As Kenneth Culp said, “[T]he power to be lenient is the power to discriminate.”<sup>67</sup> Thus, a leniency directive that reduces the prison population as a whole might do little to address inequality.

### 3. *Prosecutorial Approaches to Decarceration*

Finally, prosecutors can reduce the prison population by encouraging decarceration—the process by which people leave prison in a way other than by serving their full sentence. Decarceration takes many forms, which this subsection describes. Although several decarceral avenues exist in the law, prosecutors typically do not revisit sentences in closed cases.<sup>68</sup>

Decarceration often takes the form of compassionate release, a process that allows imprisoned people to be released early from a prison term if they have a serious or terminal medical condition.<sup>69</sup> Prosecutors play an important role in the compassionate-release process. *Ex post*, a prisoner’s motion for compassionate release will involve the prosecutor’s office, which can choose to oppose or support compassionate release.

Prosecutors also affect compassionate release *ex ante*. In some jurisdictions, prosecutors require defendants to waive their ability to later seek compassionate release as part of the plea-bargaining process<sup>70</sup>—a

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66. SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 77–78 (10th ed. 2016).

67. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 170 (1969) (emphasis omitted).

68. Rory Fleming, *Prosecutor-Driven “Second Look” Policies Are Encouraging, but Not a Panacea*, 32 FED. SENT’G REP. 205, 205 (2020).

69. *See generally* Renagh O’Leary, *Compassionate Release and Decarceration in the States*, 107 IOWA L. REV 621 (2022).

70. Carrie Johnson, *Justice Department Ends Limiting Compassionate Release in Plea Deals After NPR Story*, NPR (Mar. 11, 2022, 5:23 PM ET), <https://www.npr.org/2022/>



practice that “aggravates the most coercive aspects of plea bargaining by requiring an accused to waive the opportunity to seek relief for future, unknown, and unpredictable personal or familial tragedies including terminal diagnoses.”<sup>71</sup> In March 2022, the Department of Justice banned federal prosecutors from engaging in this practice outside of “select instances,” such as “exceptionally rare” terrorism and homicide cases.<sup>72</sup>

Progressive prosecutors have touted other decarceration strategies. Some have set up *conviction integrity units* (sometimes called *conviction review units*) to “prevent, identify, and remedy false convictions.”<sup>73</sup> According to the National Registry of Exonerations, there are around ninety-five conviction integrity units in the United States, but a little less than half have ever recorded an exoneration.<sup>74</sup> Some reform prosecutors have also set up *sentence review units* that revisit the sentences of people who are currently serving exceptionally long sentences—not because the prosecutor necessarily believes the prisoner is innocent, but because they believe the sentence might be unjustly long.<sup>75</sup> Although these strategies provide important relief to those they help, they are unlikely to make a significant dent in mass and unequal incarceration because the number of people helped is very small relative to the size of the prison population. As Renagh O’Leary describes, “progress toward decarceration has been exceedingly modest.”<sup>76</sup>

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03/11/1086140965/justice-department-ends-limiting-compassionate-release-in-plea-deals-after-npr-s (reporting that compassionate release waivers have been used in Arizona, Illinois, Indiana, Maryland, Massachusetts, Ohio, Oklahoma, South Carolina, and Tennessee).

71. Letter from Kevin A. Ring, President, Nat’l Ass’n of Crim. Def. Laws., and Martín Sabelli, President, FAMM, to Lisa Monaco, Deputy Att’y Gen. (Feb. 15, 2022), [https://fammm.org/wp-content/uploads/Letter-DAG-Plea-Agmt\\_2.15\\_FAMM.NACDL\\_FINAL17.pdf](https://fammm.org/wp-content/uploads/Letter-DAG-Plea-Agmt_2.15_FAMM.NACDL_FINAL17.pdf) (citing *United States v. Osorto*, 445 F. Supp. 3d 103, 105, 107, 110 (N.D. Cal. 2020)).

72. Memorandum from Lisa Monaco, Deputy Att’y Gen., to All Federal Prosecutors (Mar. 11, 2022), <https://www.justice.gov/file/1482956/download>.

73. *Conviction Integrity Units*, NAT’L REGISTRY EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> (listing known conviction integrity units in the United States) [hereinafter *Conviction Integrity Units*]; Carla D. Pratt, *Hip Hop Prosecutors Heed the Call for Criminal Justice Reform*, in *HIP HOP AND THE LAW* 87 (Pamela Bridgewater et al. eds., 2019) (describing Dallas District Attorney Craig Watkins’ creation of the first conviction integrity unit in the United States).

74. *Conviction Integrity Units*, *supra* note 73.

75. See, e.g., *State’s Attorney Kim Fox Announces New Resentencing Initiative*, CHI. DEFENDER (Mar. 18, 2022), <https://chicagodefender.com/states-attorney-kim-fox-announces-new-resentencing-initiative/> (describing efforts by Cook County State’s Attorney Kim Foxx to identify incarcerated prisoners for resentencing).

76. O’Leary, *supra* note 69, at 631.

### III. *Redundant Leniency and Redundant Punishment*

Many advocates and scholars have raised what are now familiar but important concerns about the obstacles prosecutors are likely to face in efforts to reduce mass and unequal incarceration. For example, many worry that reform-minded prosecutors will face political pressures, pressures from other branches of government, or internal resistance to a progressive agenda for reasons described in Part II. This Part presents two additional hurdles that prosecutors are likely to face in efforts to reduce mass and unequal incarceration: redundant leniency and redundant punishment. This Part ends with three case studies that illustrate these two phenomena.

#### A. *Redundant Leniency*

People impacted by the criminal system, advocates, and scholars have long recognized that one obstacle to transformational change in the criminal space is that reforms often help those the public views as the most deserving of lenient treatment. These constituencies often include people without criminal records and those whose crimes are nonsexual and nonviolent.

For example, most of the U.S. public believes there are too many people in prison, and a large majority of the public favors expanding alternatives to prison and reducing imprisonment for people convicted of “nonviolent” crimes and who have a low risk of committing another crime.<sup>77</sup> But most also oppose doing so for people who have been convicted of a “violent” crime and have a low risk of committing another crime.<sup>78</sup> Most Americans might not realize that these twin goals—significantly reducing the prison population while holding constant the way the system punishes people convicted of violent crimes—are difficult to reconcile in reality.<sup>79</sup>

The *redundant leniency* problem goes a step further than offering lesser punitiveness to those viewed as most deserving. The *redundant leniency*

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77. Morning Consult, *supra* note 27, at 3.

78. *Id.* at 3.

79. I do not mean to suggest we should ignore the criminal system’s punitiveness towards those arrested and/or prosecuted for low-level, nonviolent crimes. But those reforms do little to reduce mass incarceration. This does not mean that such reforms are unimportant, but it does mean they are insufficient to meaningfully reduce the number of people imprisoned in the United States. See generally Dana Goldstein, *How to Cut the Prison Population by 50 Percent*, MARSHALL PROJECT (Mar. 4, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/03/04/how-to-cut-the-prison-population-by-50-percent> (noting that to cut the prison population in half “would entail touching what has long been a third-rail in criminal justice reform. To halve the prison population, sentencing would have to change not only for the so-called ‘non, non, nons’—non-violent, non-serious, and non-sex offender criminals—but also for some offenders convicted of violent crimes.”).

problem exists when a progressive prosecutor implements a reform of leniency that was *already happening* in their jurisdiction.

Even before the rise of progressive prosecutors, it was never the case that prosecutors have prosecuted every single person they could to the fullest extent possible. Instead, it has always been the case that prosecutors decline to prosecute some cases.<sup>80</sup> Redundant leniency exists when progressive prosecutors implement reforms that either duplicate (or, at least, overlap) these prior practices, or when they duplicate preexisting leniency created by other actors like legislators or judges.<sup>81</sup>

The rhetoric many progressive prosecutors employ suggests that redundant leniency could be a problem. For example, many progressive prosecutors express firm unwillingness to reduce punishment of people convicted of violent crimes.<sup>82</sup> This is perhaps an unsurprising position for a progressive prosecutor to take—progressive prosecutors are almost always elected by the general public and, as described above, the U.S. public reports favoring long sentences for people convicted of “violent” crimes.<sup>83</sup> But it impedes a progressive prosecutor’s ability to meaningfully reduce incarceration and suggests some progressive reforms could duplicate pre-existing but unspoken lenient treatment.

### B. Redundant Punishment

Progressive prosecutors also must grapple with *redundant punishment* in the carceral systems within which they operate. In myriad ways, carceral

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80. *Federal Prosecutors: Wide Variation Found in Handling of Criminal Referrals for Prosecution*, TRAC REPORTS (Jan. 24, 2003), [https://trac.syr.edu/tracreports/pros/ausa\\_pctdecG.html](https://trac.syr.edu/tracreports/pros/ausa_pctdecG.html) (finding that federal prosecutors declined to prosecute around 45,000 cases per year in the early 2000s).

81. For example, newly elected progressive prosecutor Alvin Bragg promulgated a memo that listed many crimes that his office would not prosecute. Jonah E. Bromwich, *Manhattan D.A. Acts on Vow to Seek Incarceration Only for Worst Crimes*, N.Y. TIMES (Jan. 6, 2022), <https://www.nytimes.com/2022/01/06/nyregion/alvin-bragg-manhattan-da.html>; *Alvin Bragg: Day 1 Memo*, ALVIN BRAGG, <https://www.alvinbragg.com/day-one> (last visited Aug. 4, 2022). The list included some crimes—like adultery—that have virtually never been prosecuted. *Id.* (categorizing adultery under “outdated offenses”); see also Eamon McNiff, *Woman Charged with Adultery to Challenge New York Law*, ABC NEWS (June 8, 2010, 12:17 PM), <https://abcnews.go.com/TheLaw/woman-charged-adultery-challenge-york-law/story?id=10857437> (noting that a woman prosecuted in 2010 was only the thirteenth person in New York history to be charged with the crime of adultery, five of whom had been convicted).

82. See *supra* Section II.A.

83. See Morning Consult, *supra* note 27, at 3.

systems in the United States interact and reinforce each other.<sup>84</sup> The *redundant punishment* obstacle hinders progressive prosecutors if their policy interventions do not dismantle redundant sources of punishment. For example, a progressive prosecutor might change their office’s approach to charging, plea bargaining, sentencing, or decarceration, but other actors who influence incarceration—such as judges, probation or pretrial service officers, police officers, and legislators—might continue to perpetuate the carceral system. I refer to this as the *redundant punishment* obstacle.

### C. Three Case Studies

This Section presents three case studies of prosecutorial decision-making that illustrate the *redundant leniency* and *redundant punishment* problems, in chronological order. The first describes the prosecutorial response to California’s Three Strikes Law during the 1990s. The second describes a charging policy that U.S. Attorney General Eric Holder implemented in 2013. The third describes Philadelphia District Attorney Larry Krasner’s bail reform policy in 2018.

#### 1. Case Study: The Prosecutorial Response to California’s Three Strikes Law (1994)

In 1994, during the height of the War on Crime, California voters overwhelmingly passed Proposition 184, which required the California legislature to enact a three-strikes law.<sup>85</sup> Under the law, a person who had been convicted of three “violent” or “serious” felonies was subject to a minimum sentence of twenty-five years to life imprisonment.<sup>86</sup> In *Ewing v. California*, the defendant Gary Ewing challenged his three-strikes sentence of life imprisonment after being convicted of stealing roughly \$1,200 worth of golf clubs.<sup>87</sup> The U.S. Supreme Court held that the law did not violate the Eighth Amendment.<sup>88</sup>

Three-strikes laws remove discretion from judges by constraining their freedom to sentence as they see fit. As a result, these laws necessarily place

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84. See, e.g., S. Lisa Washington, *Pathology Logics*, NW. U. L. REV. (forthcoming 2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4068859](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4068859) (manuscript at 1) (explaining how the “pathologizing of impoverished and racialized groups” is a “logic deeply embedded in the [family regulation] system,” as in other carceral systems).

85. See Brian Brown & Greg Jolivet, *A Primer: Three Strikes – The Impact After More Than a Decade*, LEGIS. ANALYST’S OFF. (Oct. 2005), [https://lao.ca.gov/2005/3\\_strikes/3\\_strikes\\_102005.htm](https://lao.ca.gov/2005/3_strikes/3_strikes_102005.htm).

86. *Id.*

87. *Ewing v. California*, 538 U.S. 11, 18–20 (2003).

88. *Id.* at 30–31.

tremendous power in prosecutors (who select charges). They also disproportionately affect people of color.<sup>89</sup> In *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, David Bjerk examined how California prosecutors responded to the three-strikes law.<sup>90</sup> Bjerk found “that prosecutors become significantly more likely to lower a defendant’s prosecution charge to a misdemeanor when conviction for the initial felony arrest charge would lead to sentencing under a three-strikes law.”<sup>91</sup> This finding shows that even at the height of the 1990s War on Crime, some prosecutors opted to charge defendants with lesser offenses in order to avoid harsh mandatory punishment.

Although Bjerk documented that some prosecutors chose leniency in some cases, this approach was not evenly spread across California’s population. As Joshua Bowers described, prosecutors across California varied in how they applied the three-strikes law, with “each county’s prosecutors enforc[ing] the law according to their own principles of proportionality.”<sup>92</sup> Bowers connects this patchwork of enforcement to earlier work by Michael Tonry, showing how prosecutors have historically “adapted” to excessively harsh sentencing regimes by adjusting their charging behavior.<sup>93</sup>

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89. Brian Brown & Greg Jolivet, *A Primer: Three Strikes – The Impact After More Than a Decade*, LEGIS. ANALYST’S OFF. (Oct. 2005), [https://lao.ca.gov/2005/3\\_strikes/3\\_strikes\\_102005.htm](https://lao.ca.gov/2005/3_strikes/3_strikes_102005.htm) (noting that as of 2005, the racial composition of second- and third-strikers is similar to that in the total prison population but that African Americans make up forty-five percent of the third-striker population, which is fifteen percent higher than their share of the prison population).

90. David Bjerk, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 591 (2005).

91. *Id.*

92. Joshua E. Bowers, Note, “*The Integrity of the Game is Everything*”: *The Problem of Geographic Disparity in Three Strikes*, 76 N.Y.U. L. REV. 1164, 1164 (2001).

93. *See id.* at 1172 n.52 (citing MICHAEL TONRY, *SENTENCING MATTERS* (1996)); *id.* at 1173 n.53 (citing MICHAEL TONRY, *MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA* (1995)); *see also* Michael Tonry, *Sentencing in America, 1975–2025*, 42 CRIME & JUST. 141, 168 (2013).

## 2. Case Study: Reforming Federal Drug Prosecutions (2013)

In 2013, Attorney General Eric Holder implemented a charging policy designed to reduce imprisonment of defendants who had minor or no prior criminal record and were convicted of low-level, nonviolent drug trafficking offenses.<sup>94</sup> The policy was designed to reduce sentences for defendants in this group because their charges frequently triggered mandatory minimums due to how the Controlled Substances Act defined culpability in drug cases based on drug quantity.<sup>95</sup> In the memo announcing the policy change, Holder explained that

[w]e must ensure that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers. In some cases, mandatory minimum and recidivist enhancement statutes have resulted in unduly harsh sentences and perceived or actual disparities . . . . Long sentences for low-level, non-violent drug offenses do not promote public safety, deterrence, and rehabilitation.<sup>96</sup>

Some might object that Eric Holder is not a “progressive prosecutor,” and perhaps the federal criminal setting is too different from the state criminal systems where most criminal prosecutions take place. Although Holder did not identify as a progressive prosecutor as I define that term above, the reform he promulgated is the type of reform that many progressive prosecutors at the state level likely would find appealing. The reform was likely to be politically unobjectionable (if not popular) because mandatory minimums are so unpopular. It used the prosecutorial power for leniency but

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94. Memorandum from Eric Holder, Att’y Gen., to the U.S. Att’ys & Assistant Att’y Gen. for the Crim. Div. (Aug. 12, 2013) [hereinafter Memorandum to U.S. Att’ys & Assistant Att’y Gen. for the Crim. Div.], <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/ag-memo-department-policyon-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf>.

95. *See id.* at 2. In federal criminal cases, a defendant who is part of a conspiracy to distribute drugs is deemed responsible for the entire quantity trafficked by the conspiracy, even if the defendant is a relatively minor participant. *See, e.g.*, Matt Alston, *Mandatory Minimum Sentencing Might Have a “Girlfriend Problem,”* ROLLING STONE (Nov. 18, 2018), <https://www.rollingstone.com/culture/culture-features/mandatory-minimum-sentencing-girlfriend-problem-757690> (noting the problem of “long prison sentences given to women tangentially connected to violent or severe offenders”).

96. Memorandum to U.S. Att’ys & Assistant Att’y Gen. for the Crim. Div., *supra* note 94, at 1.

continued to reserve harsh penalties for the “serious, high-level, or violent” cases.<sup>97</sup>

To accomplish this goal of reducing sentences for people convicted of low-level, nonviolent crimes, Holder instructed federal prosecutors to stop alleging drug quantity in the indictments of such cases.<sup>98</sup> Although the Holder Memo instructed federal prosecutors to stop charging mandatory minimums for eligible defendants, it made clear that “[p]rosecutors should continue to ascertain whether a defendant is eligible for any statutory mandatory minimum statute or enhancement” and “must be candid with the court, probation, and the public as to the full extent of the defendant’s culpability, including the quantity of drugs involved in the offense and the quantity attributable to the defendant’s role in the offense, even if the charging document lacks such specificity.”<sup>99</sup> In May 2017, however, Attorney General Jeff Sessions rescinded the charging policy.<sup>100</sup>

For those working to end mass and unequal incarceration in the United States, Holder’s policy change was widely—although not universally—viewed as a promising reform.<sup>101</sup> But from the outset, there were many reasons to think the plan might create only modest results. First, the policy used prosecutorial power to affect an outcome (sentence length) that is ultimately decided by another actor—in this case, a district judge. Second, the policy only applied to certain defendants convicted of low-level crimes. These are defendants that the criminal system typically treats the most leniently, raising the threat of redundant leniency. In federal law, for example, the “safety-valve” provision already allowed many defendants with little criminal history convicted of low-level drug trafficking crimes to avoid

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97. *See id.*

98. Holder implemented this policy change six weeks after the U.S. Supreme Court decided *Alleyne v. United States*, which held that any fact that increased the statutory minimum for a crime must be proven beyond a reasonable doubt. *See id.*; *Alleyne v. United States*, 570 U.S. 99, 115–16 (2013). After *Alleyne*, a prosecutor can easily charge a drug trafficking case in a way that does not trigger a mandatory minimum by omitting from the indictment any mention of the quantity of drugs involved in the offense. This is what Holder’s policy instructed prosecutors to do. Memorandum to U.S. Att’y’s & Assistant Att’y Gen. for the Crim. Div., *supra* note 94, at 2.

99. Memorandum to U.S. Att’y’s & Assistant Att’y Gen. for the Crim. Div., *supra* note 94, at 2, 3.

100. Memorandum from Jeff Sessions, Att’y Gen., to All Fed. Prosecutors 2, 2 n.1 (May 10, 2017), <https://www.justice.gov/archives/opa/press-release/file/965896/download>.

101. Charlie Savage, *Justice Dept. Seeks to Curtail Stiff Drug Sentences*, N.Y. TIMES (Aug. 12, 2013), <https://www.nytimes.com/2013/08/12/us/justice-dept-seeks-to-curtail-stiff-drug-sentences.html>.

mandatory minimums.<sup>102</sup> Third, Holder's memo left individual prosecutors with some discretion as to whether to follow the policy.<sup>103</sup> Fourth, the policy change did not instruct prosecutors to make other changes to how they prosecute cases—as described above, the policy change instructed prosecutors to continue proving all relevant information at sentencing, which in turn meant the policy change did not affect defendants' Sentencing Guidelines ranges. This aspect of the federal criminal legal system suggests the policy change did not account for redundant punishment.

In other work, I assess the effects of Holder's policy change.<sup>104</sup> I first find that federal prosecutors around the United States appear to have complied with the charging policy—mandatory minimum charges fell for defendants that were likely eligible for charging leniency while remaining stable for other federal defendants after the policy change was announced.<sup>105</sup> However, sentences for eligible defendants did not change much.<sup>106</sup> By most estimates, they did not change at all.<sup>107</sup> I argue that the failure of the Holder policy to effectively translate charging reductions into sentencing reductions stems from redundant leniency and redundant punishment.

### 3. Case Study: Philadelphia Bail Reform (2018)

In 2018, Philadelphia District Attorney Larry Krasner—unquestionably a *progressive prosecutor* as I define that term in Part II—announced a new bail reform initiative.<sup>108</sup> Bail reform was a central element of Krasner's campaign platform.<sup>109</sup> In an effort to reduce the use of cash bond in Philadelphia's criminal courts, Krasner's policy directed the prosecutors in his office to stop

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102. See *Safety Valves*, FAMM, <https://famm.org/our-work/u-s-congress/safety-valves/> (last visited Aug. 4, 2022).

103. Memorandum to U.S. Att'ys & Assistant Att'y Gen. for the Crim. Div., *supra* note 94, at 1–2.

104. Stephanie Holmes Didwania, *Charging Leniency and Federal Sentences*, (Univ. Wis. L. Sch. Legal Stud. Rsch. Paper Series, Paper No. 1746, 2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3556138](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3556138).

105. *Id.* at 3.

106. *Id.*

107. *Id.*; see also Jacob Sullum, *How Many Drug Offenders Benefited from the Holder Memo That Sessions Rescinded?*, REASON (May 17, 2017, 9:15 AM), <https://reason.com/2017/05/17/how-many-drug-offenders-benefited-from-t/>.

108. Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, NEW YORKER (Oct. 22, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration>.

109. Max Marin, *Philly DA Report Card: The Promises Krasner Kept (or Didn't) in His First Term*, BILLY PENN (Apr. 25, 2021, 7:00 AM), <https://billypenn.com/2021/04/25/krasner-philadelphia-district-attorney-election-cash-bail-wrongful-convictions/>.



requesting money bail for defendants charged with certain nonviolent crimes.<sup>110</sup> Media coverage of the reform largely characterized it as an ambitious plan,<sup>111</sup> but on its face, several aspects of the plan suggested the effects would be modest. First, the plan was phrased in the negative rather than the affirmative—it did not tell prosecutors to request that defendants be released on recognizance or unsecured bond; rather, it simply told them not to *ask* for cash bond.<sup>112</sup> Second, like the Holder policy, the bail policy only applied to certain low-level arrestees rather than all arrestees.<sup>113</sup> Third, like the Holder policy, individual prosecutors retained discretion to request cash bond in some circumstances.<sup>114</sup> Fourth, like the Holder policy, prosecutors do not make bond decisions, judges do.

Aurélié Ouss and Megan Stevenson assessed the effects of Krasner’s policy change on pretrial detention in Philadelphia.<sup>115</sup> Put simply, their research design compares bail decisions for eligible versus ineligible defendants in Philadelphia in time periods before and after the policy change.

Ouss and Stevenson find that the policy did not affect pretrial detention rates.<sup>116</sup> Why not? One might wonder if individual prosecutors rebelled and did not follow Krasner’s policy, but that does not appear to be the case—Ouss and Stevenson find evidence of significant compliance by individual prosecutors. In 70% of eligible cases, compliance took the form of prosecutorial silence (that is, not making any recommendation to the court) during the bail hearing.<sup>117</sup> In 19% of eligible cases, prosecutors requested secured money bail despite the charging policy.<sup>118</sup> Given that the policy simply instructed prosecutors *not* to ask for secured money bail, this translates into a roughly 80% compliance rate.

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110. Malik Neal & Christina Matthias, *Broken Promises: Larry Krasner and the Continuation of Pretrial Punishment in Philadelphia*, 16 STAN. J.C.R. & C.L. 543, 547–48 (2021).

111. See, e.g., Justin Miller, *The New Reformer DAs*, AM. PROSPECT (Jan. 2, 2018), <https://prospect.org/health/new-reformer-das/> (noting “concerns that Krasner was too radical for even a staunchly Democratic city like Philadelphia”).

112. *Larry Krasner Announces End to Cash Bail in Philadelphia for Low-Level Offenses*, PHILA DIST. ATT’Y’S OFF. (Feb. 21, 2018), <https://phillyda.wordpress.com/2018/02/21/larry-krasner-announces-end-to-cash-bail-in-philadelphia-for-low-level-offenses/>.

113. *Id.*

114. *Id.*

115. Aurélié Ouss & Megan Stevenson, *Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors* (June 2020) (unpublished manuscript) (on file with authors).

116. *Id.* at 3.

117. *Id.* at 47, 58.

118. *Id.* at 47.

Ouss and Stevenson offer a different explanation for their findings. They notice that, prior to the policy change, the people targeted by Krasner's bail reform—those arrested for low-level crimes—were routinely released pending trial.<sup>119</sup> This fact left little room for bail reform to significantly affect release rates; that is, it was an example of redundant leniency.

Ouss and Stevenson do find one important success—the policy change appears to have increased the share of defendants released with no secured bond.<sup>120</sup> In other words, the reform seemed effective at substituting low bond amounts for release on recognizance, and this switch apparently did not lead to any increase in pretrial arrests or failure to appear. As Ouss and Stevenson explain, this finding calls into question the widespread use of low bond amounts for low-level defendants.<sup>121</sup>

Finally, as in Case Study 1, Ouss and Stevenson also analyze how the policy affected defendants with different racial identities and find that “white defendants were disproportionately selected” as beneficiaries of the reform.<sup>122</sup>

#### *IV. Conclusion*

This Essay considered the potential of reform-minded prosecutors to reduce mass and unequal incarceration in the United States. It identified several obstacles that reform-minded prosecutors will face. Some of these obstacles are familiar. Nearly all district attorneys face electoral pressures, and much of the American public holds punitive attitudes. This reality likely makes it difficult for many prosecutors to act where intervention could be most effective at reducing mass and unequal incarceration, such as by treating defendants who have committed crimes of physical violence less harshly. Even if a reform-minded district attorney has popular support within their jurisdiction, they could face opposition from a hostile state legislature or governor, which might retaliate against reformist policies by stripping the prosecutor of jurisdiction or firing them. A reform-minded district attorney might also face opposition from prosecutors within their office or from the local law enforcement agency with which they must work.

In addition to these familiar concerns, this Essay highlighted two potential obstacles to prosecutorial reform that have received less attention in the literature. The first is that “progressive prosecutors” sometimes implement

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119. *See id.* at 3.

120. *See id.* at 20–21.

121. *Id.* at 5.

122. *Id.* at 28.

policies that simply publicize examples of lenient treatment that had existed long before. I call this the *redundant leniency* problem. Second, prosecutors might implement reforms that fail to account for the way that many punitive aspects of the criminal system reinforce each other. I call this the *redundant punishment* problem. Together, both problems suggest that reform-minded prosecutors must pursue reforms that are both systemic and far-reaching if they hope to dramatically reduce incarceration in their jurisdictions.