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## Essay

# Imagining the Progressive Prosecutor

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### INTRODUCTION

In the lead-up to the 2020 Democratic presidential primary, Senator Kamala Harris's prosecutorial record became a major source of contention.<sup>1</sup> Harris—the former San Francisco District Attorney and California Attorney General—received significant support and media attention that characterized her as a “progressive prosecutor.”<sup>2</sup> In a moment of increasing public enthusiasm for criminal justice reform, Harris's rise was frequently framed in terms of her support for a more

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1. See, e.g., Lara Bazelon, Opinion, *Kamala Harris Was Not a “Progressive Prosecutor,”* N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/opinion/kamala-harris-criminal-justice.html> [<https://perma.cc/FDN2-JJA>]; Sahil Kapur, *Kamala Harris Gambles on a Risky Embrace of Her Record as a Prosecutor*, BLOOMBERG (June 11, 2019), <https://www.bloomberg.com/news/articles/2019-06-11/kamala-harris-gambles-on-embrace-of-her-record-as-a-prosecutor>; German Lopez, *Kamala Harris's Controversial Record on Criminal Justice, Explained*, VOX (Aug. 12, 2020), <https://www.vox.com/future-perfect/2019/1/23/18184192/kamala-harris-president-campaign-criminal-justice-record>; Alex Shephard, *What Kamala Harris Didn't Say*, NEW REPUBLIC (July 1, 2019), <https://newrepublic.com/article/154400/kamala-harris-defend-record> [<https://perma.cc/LR5E-PDZ7>].

2. See, e.g., Kate Zernike, *‘Progressive Prosecutor’: Can Kamala Harris Square the Circle?*, N.Y. TIMES (Feb. 11, 2019), <https://www.nytimes.com/2019/02/11/us/kamala-harris-progressive-prosecutor.html> [<https://perma.cc/JY4W-E5KA>]; Nicole Allan, *The Unknowable Kamala Harris: The Complicated Career of a Self-Proclaimed Progressive Prosecutor*, CAL. SUNDAY MAG. (May 22, 2019), <https://story.californiasunday.com/kamala-harris> [<https://perma.cc/2QDX-ALVV>].

egalitarian and racially conscious approach to criminal law.<sup>3</sup> But as she gained ground in the primary, her progressive prosecutor *bona fides* came into question. Critics noted that Harris endorsed incarcerating parents of truant children; she defended line-level prosecutors accused of withholding exculpatory evidence; she continued to praise the use of long prison sentences in response to violent crime; and throughout her career, she had failed to prosecute aggressively police officers alleged to have used excessive force against civilians.<sup>4</sup> Commentators painted Harris's ultimate withdrawal from the presidential race as, at least in part, a referendum on her prosecutorial politics.<sup>5</sup>

This Essay doesn't offer a reading of Harris's record. Instead, I use the debate regarding her record as a jumping off point to ask a bigger question: What exactly is a "progressive prosecutor"? In recent years,<sup>6</sup>

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3. See, e.g., Melissa Gira Grant, *Kamala Harris Gets Slightly Less Tough on Crime*, NEW REPUBLIC (Sept. 12, 2019), <https://newrepublic.com/article/155030/kamala-harris-criminal-justice-reform-plan> [<https://perma.cc/6GRQ-57GY>]; Astead W. Herndon, *'Trust Me': Kamala Harris Makes Big Play on Criminal Justice Reform*, N.Y. TIMES (Sept. 9, 2019), <https://www.nytimes.com/2019/09/09/us/politics/kamala-harris-criminal-justice.html> [<https://perma.cc/D3FY-GFPF>].

4. See, e.g., Bazelon, *supra* note 1; Alec Karakatsanis, *The Punishment Bureaucracy: How To Think About "Criminal Justice Reform"*, 128 YALE L.J.F. 848, 916 (2018–2019) ("When I first encountered Harris, she had spent her prosecutorial career using the cash-bail system in California to illegally jail thousands of impoverished people, to extract tens of millions of dollars every year from the poorest families in California for the for-profit bail industry, and to coerce guilty pleas through illegal pretrial detention."); Walker Bragman & Mark Colangelo, *Kamala Harris's Signature Achievement Was a Complete Failure*, JACOBIN (Sept. 29, 2019), <https://jacobinmag.com/2019/09/kamala-harris-back-on-track-program-prisons> [<https://perma.cc/NTT7-M4GW>].

5. See, e.g., Lara Bazelon, *Kamala Harris's Criminal Justice Record Killed Her Presidential Run*, APPEAL (Dec. 4, 2019), <https://theappeal.org/kamala-harris-criminal-justice-record-killed-her-presidential-run> [<https://perma.cc/SFN4-GWA2>]; Rory Fleming, *Kamala Harris's Exit Shows That Prosecutors No Longer Get a Pass*, FILTER (Dec. 4, 2019), <https://filtermag.org/kamala-harris-prosecutor> [<https://perma.cc/7AN3-6P7L>]; Derecka Purnell, *Many Americans Are Ready for a Black Woman President. Just Not Kamala Harris*, GUARDIAN (Dec. 3, 2019), <https://www.theguardian.com/commentisfree/2019/dec/03/black-woman-president-kamala-harris> [<https://perma.cc/WGM4-YJ24>]. Of course, Harris's vice-presidential nomination, and her eventual election alongside former tough-on-crime Senator Joe Biden, raises some questions about that characterization or how strong any such a referendum might have been. Cf. Derecka Purnell, *Why Black Progressive Women Feel Torn About Kamala Harris*, GUARDIAN (Aug. 12, 2020), <https://www.theguardian.com/commentisfree/2020/aug/12/kamala-harris-joe-biden-vp-black-progressive-women> [<https://perma.cc/V6C5-2WJ7>] (describing the fraught politics of the Harris nomination).

6. To be clear, the phrase "progressive prosecutor" had appeared in earlier writing and discussion, but generally quite sparingly and only in passing. See, e.g., Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 398 (2001) ("There is the question of working for unorthodox, independent-minded, or 'progressive' prosecutors."); Editorial, *A Disgraceful DA*, S.F. CHRON., Sept. 3, 1999, at

district attorney campaigns have attracted increased attention from the media, academics, and activists, as candidates have begun to embrace the role of “progressive prosecutor.”<sup>7</sup> Is that a meaningful category at all, and if so, who is entitled to claim the mantle? My reading of the debate over Harris’s record reveals less a dispute about what she did in her time as a California prosecutor, or what she promised to do if elected president, than it does fundamental disagreements (or, at the very least, troubling sloppiness) about what constitutes a “progressive prosecutor.” In this Essay, I argue that “progressive prosecutor” means many different things to many different people. These differences in turn reveal important fault lines in academic and public perceptions of the criminal system and its flaws.

This disagreement or definitional slippage matters not just for semantic clarity. The literature and activism surrounding criminal justice reform have increasingly keyed in on progressive prosecutors as an extremely promising avenue for structural change, deserving of significant political capital and academic attention.<sup>8</sup> Generally speaking, the progressive prosecutor is presumed to be one powerful antidote to mass incarceration or the problematic institutions of the penal state.<sup>9</sup> Some hail the progressive prosecutor as a new champion of fixing the criminal legal system,<sup>10</sup> while others express skepticism about

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A18, 1999 WLNR 4034771 (“Hallinan likes to characterize himself as a progressive prosecutor who does not waste city resources on minor-league criminals.”); Molly Justice, *Tanner Reinvents Image for New Term*, DAYTONA NEWS J., Oct. 29, 2000, at O1B, 2000 WLNR 9077091 (“‘Tanner has been a very progressive prosecutor and very open to innovation,’ said Circuit Judge Richard B. Orfinger . . . .”); Marlon Manuel, *Church Bombing Trial Aims for Healing Progressive Prosecutors, Nagging Consciences and New Power Structures Try To Make Up for Decades of Delays*, ATLANTA J. & CONST., Apr. 23, 2001, at A1, 2001 WLNR 3955911 (“Progressive prosecutors, guilty consciences and changing times slowly provoked a move toward atonement.”); Ilyssa Wellikoff, Note, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CARDOZO J. CONFLICT RESOL. § II(2) (2004) (“Only the most progressive prosecutor’s offices view crime victims as their clients and prioritize the needs of the victim.”).

7. See, e.g., Karakatsanis, *supra* note 4, at 924–29; David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647 (2017) (describing the shift in electoral priorities in DA elections); David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25 (2017), <https://lawreview.law.ucdavis.edu/online/vol50/Sklansky.pdf> [<https://perma.cc/A4ZJ-RMJP>]; Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748 (2018) (describing and critiquing the movement).

8. See *infra* notes 28–48 and accompanying text.

9. See *infra* notes 28–48 and accompanying text.

10. See, e.g., Jimmy Tobias, *This Son of the Left Could Become San Francisco’s Next District Attorney*, NATION (Oct. 3, 2019), <https://www.thenation.com/article/chesa-boudin-da>; Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*,

the transformative potential of even the most progressive DAs.<sup>11</sup> To the extent that there are fundamental disagreements, or at least significant uncertainties, as to what constitutes a “progressive prosecutor,” then it is critically important to surface those disagreements.<sup>12</sup> If resources are being devoted to advancing a progressive prosecutor movement, how unified is that movement? And, do all the voices pushing for a new approach to prosecution actually agree on what that approach should entail? Further, if the progressive prosecutor brand has allowed or is allowing some group of prosecutors to advance their careers and yet sidestep growing critiques of mass incarceration, we should be certain that the brand or classification is a meaningful one. Otherwise, are we simply witnessing a rebranding of tough-on-crime politics to appease an increasingly anti-carceral electorate?

In an effort to answer these questions and clarify the terms of the debate on progressive prosecutors, this Essay offers a typology of progressive prosecutors. Rather than sorting all of the candidates and elected officials who have sought or received the mantle, I offer four ideal types: (1) the progressive who prosecutes; (2) the proceduralist prosecutor; (3) the prosecutorial progressive; and (4) the anti-carceral prosecutor. To be clear, these are *ideal* types. Many progressive prosecutors and many academic descriptions of the ideal or quintessential progressive prosecutor exhibit aspects of more than one type.<sup>13</sup> And the realities of jurisdictions, municipalities, and offices mean that one progressive prosecutor might arrive on the job casting one type of figure, but bend into another as she swims in the politically charged currents around her.<sup>14</sup> Nevertheless, I think it’s useful to

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ATLANTIC (May 18, 2016), <https://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252> [<https://perma.cc/7LNK-8N4N>].

11. See, e.g., Karakatsanis, *supra* note 4; Note, *supra* note 7; cf. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171 (2019) (expressing skepticism about accounts of criminal justice reform that frame prosecutors as supremely powerful).

12. Cf. Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 262–63 (2018) (making a similar claim with respect to characterizations of “mass incarceration” and “overcriminalization”).

13. See *infra* notes 28–48 and accompanying text (cataloging academic and media characterizations of prosecutors as progressive).

14. See, e.g., Bill Mahoney, *The Left Turns Against Its One-Time Criminal Justice Reform Champion*, POLITICO (Feb. 11, 2020), <https://www.politico.com/states/new-york/albany/story/2020/02/11/the-left-turns-against-its-one-time-criminal-justice-reform-champion-1260516> [<https://perma.cc/F8QR-5PRS>]; Andrew Schneider, *In DA Race, Ogg Faces Multiple Challenges from the Left*, HOUS. PUB. MEDIA (Feb. 20, 2020), <https://www.houstonpublicmedia.org/articles/news/in-depth/2020/02/20/360881/da-ogg-faces-multiple-primary-challenges-from-left> [<https://perma.cc/8U2L-5PGA>] (describing dissatisfaction with Houston DA Kim Ogg’s performance after running on a progressive platform).

tease apart these different models as a means of appreciating the highly contested terms of criminal justice reform or transformation and the drastically differing visions of prosecutors as the vehicle for institutional change.<sup>15</sup>

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

### I. PROGRESSIVE PROSECUTORS

For decades, the literature on the administration of criminal law has told a fairly consistent story: prosecutors are the most powerful actors in the criminal system.<sup>16</sup> Legislators have turned over the keys

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

16. See, e.g., RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 143–54 (2019); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007); Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 172 (2019) (“Compelling assertions about prosecutorial dominance leap off the pages of the criminal justice literature. These statements position prosecutors as the most prominent stars in the criminal justice universe, bending all others to their will.”); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018) (“Prosecutors are the Darth Vader of academic writing: mysterious, powerful and, for the most part, bad.”); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009) (“No government official in America has as much unreviewable power and discretion as the prosecutor.”); *Prosecutorial Power: A Transnational Symposium*, 67 WASH. & LEE L. REV. 1285, 1285 (2010) (“For all intents and purposes, prosecutors are the criminal justice system through their awesome, deeply problematic powers.”); Alice Ristroph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1998 (2019) (describing prosecutors as “the most powerful actors in the criminal enforcement process”); Somil Trivedi & Nicole Gonzalez Van Cleve, *To Serve and Protect Each Other: How Police-Prosecutor Codependence Enables Police Misconduct*, 100 B.U. L. REV. 895, 925 (2020) (“Whether individually or, more commonly, as part of local District Attorney’s associations, prosecutors are often the most powerful voice on criminal-justice-related legislation in the states.”); Sam B. Warner & Henry B. Cabot, *Changes in the Administration of Criminal Justice During the Past Fifty Years*, 50 HARV. L. REV. 583,

to the kingdom by drafting numerous broad and overlapping criminal statutes, allowing prosecutors wide discretion to decide whom to charge and with what to charge them.<sup>17</sup> Similarly, judges have consistently deferred to prosecutorial decision-making and, with vague nods to separation of powers and democratic accountability, have declined to impose significant checks on prosecutorial conduct.<sup>18</sup> The plea bargaining process, coupled with a shift away from indeterminate sentencing regimes, has taken power out of the hands of judges.<sup>19</sup> Instead, prosecutors, facing mostly under-funded and over-worked defense attorneys, are the drivers of a system of managerial justice in which they effectively choose the charge and the penalty and generally are able to do so without the meaningful check of a public trial.<sup>20</sup> Or, as Attorney

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598 (1937) (“The prosecutor is today, as he was fifty years ago . . . the most powerful figure in the administration of criminal justice . . .”).

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

18. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Brady v. United States*, 397 U.S. 742 (1970); *United States v. Armstrong*, 517 U.S. 454 (1996); *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (“[T]he capacity of prosecutorial discretion to provide individualized justice is firmly entrenched in American law.” (internal quotation marks omitted)); *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973).

19. See, e.g., Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004) (“The overwhelming and dominant fact of the federal sentencing system, beyond the Commission and the guidelines and mandatory penalties, is the virtually absolute power the system has given prosecutors over federal prosecution and sentencing.”); Jennifer L. Mnookin, *Uncertain Bargains: The Rise of Plea Bargaining in America*, 57 STAN. L. REV. 1721, 1723 (2005); William Ortman, *Second-Best Criminal Justice*, 96 WASH. U. L. REV. 1061, 1072–73 (2019); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1502 (1993) (“Plea bargaining as a negotiation over appropriate discounts from extant sentencing outcomes is a thing of the past. The prosecutor now controls the sentence by controlling the charge, and the judge is largely powerless to object.”).

20. See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 873–74 (2009); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 625 (2014) (“[P]rosecutors, not independent finders of fact (be they judges or juries), determine both guilt and punishment.”); Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403–04 (2003) (“[T]he prosecutor, rather than a judge or jury, is the central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues and of the appropriate sentence to be imposed.”); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2194–95 (2014).

General Robert Jackson put it decades before the phrase “mass incarceration” entered the popular lexicon,<sup>21</sup> “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America.”<sup>22</sup>

With that narrative firmly entrenched, and with decades of post-Warren Court judicial decisions furthering a system of prosecutorial supremacy,<sup>23</sup> it’s no surprise that prosecutorial discretion has received a bad rap. In legal scholarship, “[t]he concentration of power in the hands of prosecutors has been called the ‘overriding evil’ of American criminal justice.”<sup>24</sup> The power to exercise discretion is the power to discriminate.<sup>25</sup> And, the realities of vastly disparate enforcement across axes of race and class, not to mention ballooning carceral populations, led many (if not most) commentators to conclude that prosecutorial discretion was an evil, a driver of mass incarceration, and the facilitator of massive injustice.<sup>26</sup> As Angela J. Davis puts it, “[B]ecause

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21. On the use and evolution of the phrase “mass incarceration,” see generally Levin, *supra* note 12, at 268–83.

22. Robert Jackson, U.S. Att’y Gen., *The Federal Prosecutor*, Address Delivered at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), in 24 J. AM. JUDICATURE SOC’Y 18, 18 (1940).

23. See *supra* note 18.

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

25. See, e.g., Nermeen Saba Arastu, *Aspiring Americans Thrown Out in the Cold: The Discriminatory Use of False Testimony Allegations To Deny Naturalization*, 66 UCLA L. REV. 1078, 1124 (2019) (“Laws leaving immense discretion and judgment in the hands of a single public officer created avenues for discrimination and unequal enforcement at many points in our history.”); Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 130 (2004) (“[D]iscretion allows police and prosecutors to discriminate, consciously or unconsciously, based on race and other characteristics.”); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 *passim* (2001); Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 884 (1991) (“When a statute sweeps more broadly than is warranted by the evil at which it aims, a concern arises that the legislature has sought to pursue forbidden ends, or that it has created an excessively capacious cloak of administrative or prosecutorial discretion, under which discriminatory enforcement may be hidden.”); Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737, 737–38 (1991); Carissa Byrne Hessick, *Vagueness Principles*, 48 ARIZ. ST. L.J. 1137, 1145 (2016); *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1521 (1988); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605 (1998).

26. See, e.g., Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 305, 327 (2018); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 54 (2002) (“Most authors see only the bad effects of discretion: biased prosecutions that systematically harm defendants from particular demographic groups, or random prosecutions that apply the state’s coercive

prosecutors play such a dominant and commanding role in the criminal justice system through the exercise of broad, unchecked discretion, their role in the complexities of racial inequality in the criminal process is inextricable and profound.”<sup>27</sup>

Over the last few years, though, that standard story has shifted. Generally, commentators continue to view prosecutors as the dominant actors in the criminal system.<sup>28</sup> But, where that prosecutorial primacy and discretionary authority were once treated as unmitigated evils, a new body of activism, advocacy, and scholarship argues that the power of the prosecutor might be leveraged for good.<sup>29</sup> Certainly, discretion might invite discrimination, but it also might allow for lenience or for prioritization of popular causes.<sup>30</sup> That is, rather than attacking prosecutorial discretion as a structural ill in need of a cure, many commentators and reformers have come to argue that replacing the discretionary actors (and their ideology) might be the best way to begin dismantling the carceral state.<sup>31</sup>

Recent years have seen a surge in DA candidates branding themselves (or embracing the mantle of) “progressive prosecutors.”<sup>32</sup> In the past, despite the widespread acknowledgement that prosecutors were immensely powerful, local prosecutorial elections generally attracted little political attention. In the current reformist moment,

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

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

28. *But see* Bellin, *supra* note 11 (arguing that prosecutors actually face more constraints than commentators recognize).

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

30. *See* Jeffrey Bellin, *Defending Progressive Prosecution*, 39 YALE L. & POL’Y REV. (forthcoming 2020) (identifying lenience as the prosecutorial power embraced by progressive prosecution proponents).

31. *See, e.g.*, Matt Ferner, *George Soros, Progressive Groups To Spend Millions To Elect Reformist Prosecutors*, HUFFINGTON POST (May 12, 2018), [https://www.huffpost.com/entry/george-soros-prosecutors-reform\\_n\\_5af2100ae4b0a0d601e76f06](https://www.huffpost.com/entry/george-soros-prosecutors-reform_n_5af2100ae4b0a0d601e76f06) [<https://perma.cc/UYC7-DWB8>]; Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1540 (2020) (“[A] motivated group of advocates and their supporters have started a movement to elect progressive prosecutors.”); Daniel Marans, *Black Activist Starts Group that Aims To Elect Progressive Prosecutors*, HUFFINGTON POST (Feb. 15, 2018), [https://www.huffpost.com/entry/black-activist-elect-progressive-prosecutors\\_n\\_5a85b64ee4b0058d55670e4f](https://www.huffpost.com/entry/black-activist-elect-progressive-prosecutors_n_5a85b64ee4b0058d55670e4f) [<https://perma.cc/A766-3RWT>].

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

though, advocates have poured their energy into campaigns in which candidates have adopted a critical posture, promising systemic change.<sup>33</sup> For example, in 2017, the ACLU of Massachusetts launched the “What a Difference a DA Makes Campaign” with an eye to encouraging greater participation in the DA elections.<sup>34</sup> According to the campaign website:

District attorneys are the most powerful people in the criminal justice system. They decide who gets charged with a crime—and determine how most criminal cases are resolved. This means these elected officials have tremendous impact on people’s lives and our communities. It’s time to use our voices—and our vote—to make our criminal legal system fairer for everyone.<sup>35</sup>

Similarly, at the national level, the ACLU Campaign for Smart Justice partnered with the Brooklyn Defender Services to produce a series of videos featuring actors, academics, activists, and attorneys describing the “Power of Prosecutors” and urging reformers to pay more attention to the role of elected DAs.<sup>36</sup> That is, rather than treating DAs’ offices as bastions of tough-on-crime politics and critical components of the punitive state, this new wave of activism treats the prosecutorial function as essentially indeterminate, capable of being redirected to serve a variety of different ends.<sup>37</sup>

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33. This turn also reflects a much-needed realization that the “criminal justice system” really isn’t a system at all and consists of many disparate local political orderings. See, e.g., Monica Bell, Stephanie Garlock & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1528 (2020); Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419, 421 (2018); Benjamin Levin, *Rethinking the Boundaries of “Criminal Justice,”* 15 OHIO ST. J. CRIM. L. 619 (2018); Sara Mayeux, *The Idea of “The Criminal Justice System,”* 45 AM. J. CRIM. L. 55, 55 (2018); John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1089 (2013).

34. See Press Release, ACLU of Mass., “What a Difference a DA Makes” Highlights Importance of Massachusetts District Attorneys (Dec. 13, 2017), <https://www.aclum.org/en/press-releases/what-difference-da-makes-highlights-importance-massachusetts-district-attorneys> [<https://perma.cc/YJK6-7N2E>].

35. *What a Difference a DA Makes*, ACLU MASS., <http://dadifference.org> [<https://perma.cc/C9UK-XZKP>].

36. See *The Power of Prosecutors*, ACLU, <https://www.aclu.org/issues/smart-justice/prosecutorial-reform/power-prosecutors> [<https://perma.cc/4WPT-73UB>].

37. See, e.g., Rachel E. Barkow, *Three Lessons for Criminal Law Reformers from Locking Up Our Own*, 107 CALIF. L. REV. 1967, 1969 (2019); Nora V. Demleitner, *State Prosecutors at the Center of Mass Imprisonment and Criminal Justice Reform*, 32 FED. SENT’G REP. 187, 187 (2020) (“A new cohort of ‘progressive prosecutors’ have campaigned on the promise of less imprisonment and greater racial equality. Some have captured the head prosecutor positions in large U.S. jurisdictions, including Chicago, Brooklyn, Boston, Philadelphia, and San Francisco. They have instituted a host of often dramatic changes.”); Jessica Pishko, *Can the California Elections Usher In a Slate of Progressive District Attorneys*, NATION (June 5, 2018), <https://www.thenation.com/>

Generally, progressive prosecutor campaigns or descriptions of the “progressive prosecutor movement” sound in some sort of reformist discourse. The criminal system is flawed, advocates suggest, and a shift in prosecutorial priorities is needed to address widespread racial disparities, massive carceral populations, etc.<sup>38</sup>

Some of these candidates are former defense attorneys or civil rights lawyers.<sup>39</sup> A growing number of candidates are women or people of color.<sup>40</sup> For those with non-traditional prosecutorial backgrounds, these alternative qualifications are often framed as badges of honor and indicators that they are deserving of enthusiasm and have earned their progressive *bona fides*.<sup>41</sup> By way of example, treatments of the progressive prosecutor movement frequently include

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article/can-slate-progressive-prosecutors-upend-status-quo-california (“An elected DA’s job is to seek justice, work to prevent crime, and serve as a leader of the diverse communities they represent. But, for too long, many DAs have operated inside a bubble free from public oversight.”).

38. See *supra* notes 26–37 and accompanying text.

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

40. See, e.g., Mark Berman, *These Prosecutors Won Office Vowing To Fight the System. Now, the System Is Fighting Back*, WASH. POST (Nov. 9, 2019, 4:52 PM), [https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3da\\_story.html](https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3da_story.html) [<https://perma.cc/L8TW-9HL9>] (describing challenges faced by Rachael Rollins and ascribing them at least in part to her gender); Aaron Morrison, *Black Women Prosecutors Rally Behind St. Louis Circuit Attorney over Racist Backlash*, APPEAL (Jan. 17, 2020), <https://theappeal.org/black-women-prosecutors-st-louis> [<https://perma.cc/TVX4-VZ38>]; Melba Pearson, *More Women of Color Are Getting Elected as District Attorneys, but Can They Stay There?*, ESSENCE (June 24, 2019), <https://www.essence.com/news/politics/women-of-color-district-attorneys> [<https://perma.cc/YR94-ZPFE>].

41. See, e.g., Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 10–12 (2019) (discussing Larry Krasner, a newly elected district attorney without a prosecutorial background); Steven Zeidman, *Public Defenders as Prosecutors: Unanswered Questions*, GOTHAM GAZETTE (June 20, 2019) <https://www.gothamgazette.com/opinion/8607-public-defenders-as-prosecutors-unanswered-questions> [<https://perma.cc/Y5KN-Z9ZD>] (describing public defenders running for DA).

references to Mark Gonzalez, the defense attorney-turned Corpus Christi DA who has “Not Guilty” tattooed on his chest.<sup>42</sup>

This turn to progressive prosecution has elicited many positive responses, but the terms (or stakes) remain unclear. Indeed, it is increasingly common, particularly in generally Democrat-leaning urban jurisdictions, for multiple candidates to vie for the title of the progressive choice for DA. For example, in the lead-up to the 2020 election for the Los Angeles County DA, multiple candidates claimed to represent a progressive approach to prosecution and a departure from criminal justice politics as usual.<sup>43</sup> In Boston, reformist prosecutor Rachael Rollins needed to edge out longtime public defender Shannon McAuliffe to win the Democratic Party nomination.<sup>44</sup> And in San Francisco, Chesa Boudin, a public defender and the child of incarcerated Weather Underground activists, eventually won the DA election but only after defeating other candidates who pledged to end cash bail and “prioritize decarceration.”<sup>45</sup>

The popular embrace of the “progressive prosecutor” moniker certainly might be viewed as an unqualified success: where once tough-on-crime was the only acceptable ethos for any politicians (let alone DA candidates),<sup>46</sup> the turn to progressive prosecutors heralds a

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42. See, e.g., Michael Barajas, *The Tattooed Star of the ‘Progressive Prosecutor’ Movement Braces for His First Death Penalty Trial*, TEX. OBSERVER (Jan. 23, 2019), <https://www.texasobserver.org/the-tattooed-star-of-the-progressive-prosecutor-movement-braces-for-his-first-death-penalty-trial> [https://perma.cc/B5C5-CAUM] (profiling Mark Gonzalez as a progressive prosecutor); Henry Gass, *Meet a New Breed of Prosecutor*, CHRISTIAN SCI. MONITOR (July 17, 2017), <https://www.csmonitor.com/USA/Justice/2017/0717/Meet-a-new-breed-of-prosecutor> [https://perma.cc/234L-F3Y2] (discussing Mark Gonzalez and progressive prosecutors in general); Christopher Hooks, *Is the Best Offense a Good Defense Lawyer?*, TEX. MONTHLY (Nov. 2016), <http://www.texasmonthly.com/politics/best-offense-good-defense-lawyer> [https://perma.cc/5Q8B-4UH4]; Sklansky, *The Progressive Prosecutor’s Handbook*, *supra* note 7, at 26; Sklansky, *The Changing Political Landscape for Elected Prosecutors*, *supra* note 7, at 648.

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

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

45. See Elizabeth Weill-Greenberg, *Deadlocked San Francisco District Attorney Race Shows Strength of Progressive Prosecutor Movement*, APPEAL (Nov. 6, 2019), <https://theappeal.org/san-francisco-district-attorney-race-boudin-loftus> [https://perma.cc/39AW-GXHL].

46. See, e.g., MICHAEL W. FLAMM, LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S 1–2 (2005); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 277–78

broader acceptance of structural reform. The popularity of the phrase itself might suggest that the Overton window for prosecutorial politics has shifted. Maybe, but there remains significant uncertainty. It's not just Harris who has attracted critics, and her record is not the only one that has left commentators unsure quite how to react.<sup>47</sup> Some scholars and advocates have sought to propose best practices, to determine evaluative metrics, and even to introduce scorecards that voters might use in assessing their DAs.<sup>48</sup>

While these attempts to add content to the rhetoric of progressive prosecution provide important guidance, they often speak to a capacious (and at times conflicting) vision of reform. In some sense, this uncertainty is unsurprising given the historical lack of clarity or consensus regarding what prosecutors should do and what the prosecutorial role should entail.<sup>49</sup> Or, as Jeffrey Bellin puts it, the study of and policy debates regarding progressive prosecution suffer from a "curious absence of a normative theory of prosecutorial behavior."<sup>50</sup>

Progressive prosecution might entail or require many different steps, approaches, or priorities. And, most definitions of "progressive prosecution" consist less of a statement of over-arching goals, theories, or ideologies and instead focus on specific policies.<sup>51</sup> For

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(2016) (describing the view of the Carter administration that only "greater punitive control" could result in reduced crime); JULILLY KOHLER-HAUSMANN, GETTING TOUGH: WELFARE AND IMPRISONMENT IN 1970S AMERICA 250 (2017) (describing how tough-on-crime policies were embraced by both Republicans and Democrats).

47. See, e.g., Michael Barajas, *Reform Candidates Are Trying To Change the Definition of a 'Progressive Prosecutor' in Texas*, TEX. OBSERVER (Feb. 7, 2020, 4:27 PM), <https://www.texasobserver.org/kim-ogg-progressive-prosecutor-harris-county> [<https://perma.cc/LR66-R4PC>] (describing progressive dissatisfaction with DA Kim Ogg who had been elected as a "progressive prosecutor"); Zach Despart & Samantha Ketterer, *Saying Ogg Not Progressive Enough, TOP Endorses Dem Challenger Audia Jones*, HOUS. CHRON. (Jan. 20, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Saying-Ogg-not-progressive-enough-TOP-endorses-14990286.php> [<https://perma.cc/YAD9-LFHN>].

48. See, e.g., Sklansky, *The Progressive Prosecutor's Handbook*, *supra* note 7, at 28–42 (proposing ten best practices for progressive prosecutors); FAIR & JUST PROSECUTION, BRENNAN CTR. FOR JUST. & THE JUST. COLLABORATIVE, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR (2018); KATHERINE MOY, DENNIS MARTIN & DAVID SKLANSKY, STANFORD CRIM. JUST. CTR., RATE MY DISTRICT ATTORNEY: TOWARD A SCORECARD FOR PROSECUTORS' OFFICES (2018) (suggesting how to build a scorecard to rate prosecutors).

49. See Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1204 (2018) ("Yet when it comes to setting out principles to govern how prosecutors *should* act, the commentary offers only platitudes.").

50. *Id.* at 1207. Bellin, for his part, proposes a "servant of the law" model of prosecution. See *id.* at 1253.

51. Cf. Mariana Valverde, *Police, Sovereignty, and Law: Foucaultian Reflections*, in POLICE AND THE LIBERAL STATE 15, 25 (Markus D. Dubber & Mariana Valverde eds., 2008)

example, “21 Principles for the 21st Century Prosecutor,” a 2018 publication of the Brennan Center for Justice and criminal justice reform organizations Fair and Just Prosecution and the Justice Collaboratory, suggests two over-arching goals for prosecutors: “reduc[ing] incarceration” and “increas[ing] fairness.”<sup>52</sup> Yet, the recommendations that follow provide a host of different possibilities and priorities for DAs, from increasing diversion, to ensuring that sentences are calculated properly, to turning over exculpatory evidence, and to speaking respectfully.<sup>53</sup> Not to diminish the significance of each proposal, but these “principles” offer something for everyone, including DAs who might not be otherwise recognizable as “progressive.”<sup>54</sup> For example, some of the principles simply might be recognizable as best practices for constitutional compliance or for ensuring that defendants were guilty—goals or practices that many observers might assume were (or were supposed to be) features of “traditional” prosecutors’ offices.<sup>55</sup>

There might be good reason to embrace a capacious definition of progressive prosecution and to focus on individual policies (or, as Angela J. Davis puts it, to avoid a “litmus test”).<sup>56</sup> And I’m not suggesting here which candidates should be supported or opposed. Rather, if the progressive prosecutor brand has become sufficiently popular that elections may see self-styled progressive prosecutor pitted against self-styled progressive prosecutor, I think it’s worth pausing to asking what we learn from (or don’t learn from) the categorization.

In other words, the success of the movement might actually highlight its shortcomings—if everyone can claim to be a progressive

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(“[A]s legal historians have documented, police regulations are in fact nothing but lists of details, with little by way of overriding rationale.”).

52. FAIR & JUST PROSECUTION ET AL., *supra* note 48.

53. *See generally id.*

54. *Cf.* Keri Blakinger, *Q&A: Author Bazelon on What Makes a ‘Progressive Prosecutor,’* HOUS. CHRON. (Sept. 2, 2019), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Q-A-Author-Bazelon-on-what-makes-a-14407456.php> [<https://perma.cc/5X9V-XJ6C>] (describing activists’ frustrations with some “non-progressive” decisions made by Harris County DA Kim Ogg).

55. *But see infra* Part III (identifying some of these goals and practices as indicative of the “proceduralist prosecutor”).

56. As Davis argues, “[T]here should not be a litmus test or list of requirements for progressive prosecutors . . . . An ‘all or nothing’ approach will achieve nothing.” *See* Davis, *supra* note 41, at 27. This question of strategy is a major one in conversations about the carceral state (and, indeed, any movement for radical social change). But, for purposes of this Essay, my goal is not to propose a litmus test; rather, it is to ask the first-principles question of what we’re expecting of or looking to prosecutors for.

prosecutor, then what good does the categorization do? As John Pfaff (a proponent of progressive prosecution)<sup>57</sup> has observed:

It is increasingly easy for district attorney candidates to *sound* progressive or reform-leaning, but there is a growing risk that commonly-invoked words . . . could mean very different things to different people, and that ambiguity could allow candidates who lack a serious commitment to reform to avoid accountability if they win their elections but implement few real changes.<sup>58</sup>

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

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

## II. THE PROGRESSIVE WHO PROSECUTES

The first ideal type is in many ways the least interesting and the one least likely to receive the progressive prosecutor mantle. This “progressive prosecutor” is progressive in the sense of her general politics. That is, her voting patterns, endorsements, political beliefs, and so forth might be identified as “progressive” or falling somewhere left of center on the political spectrum. Of course, we might engage in a larger conversation about what makes one a progressive as opposed to a liberal, a Democrat, or a leftist.<sup>59</sup> But, the key point here is that the prosecutor is—outside of her work in the criminal sphere—identified with the left or, perhaps more often, the center left of the political spectrum.

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

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

59. Indeed, as I have argued elsewhere, there might well be a strong theoretical relationship between a Progressive (in the early twentieth century sense) outlook and a prosecutorial impulse. See, e.g., Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 *J. CRIM. L. & CRIMINOLOGY* 491, 532 (2019); Benjamin Levin, *Wage Theft Criminalization*, *U.C. DAVIS L. REV.* (forthcoming 2021), <https://ssrn.com/abstract=3678430>; see also *infra* Part IV.

Critically important, the progressive who prosecutes doesn't necessarily bring her politics to her job or to the administration of criminal law.<sup>60</sup> Regardless of her views on a host of other divisive left/right issues (e.g., reproductive rights, affirmative action, health care), she views her function as prosecutor to be a role in and of itself, divorced from other political battlegrounds. Maybe she "adopt[s] vaguely

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60. To be clear, I do not mean to embrace a view of any legal practice as "apolitical." Even minor decisions have political stakes, and politics are baked into the foundation of any area of law or legal practice. Indeed, one certainly might critique much of legal discourse and the study of law as reinforcing an illusory vision of legal practice and decisionmaking as divorceable from political commitments and consequences. See, e.g., ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 3 (1987) (describing the "everything-is-politics idea"); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 8–14, 216–36 (1991) (critiquing concepts of "objectivity" and "neutrality" in law); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 999 n.3 (1985) ("Lawyers and would-be lawyers can and do learn to set off their 'professional' stories from their 'personal' stories . . ."); Darla L. Daniel, *Review, Of Deckchairs, Icebergs, and Gestalt Shifts: Unger, Kahn, and a Student on Contemporary Legal Thought*, 72 U. COLO. L. REV. 851, 902 (2001) ("[S]tudents come to law school to be emptied of all of their prior moral commitments, 'refilled' with the ideals of judge-like rationality and scrupulous neutrality, and then set loose to advise their clients about some of life's most intense moral and ethical dilemmas. But they are left without their own internal reservoir of moral commitments and insights on which to draw. This is a rather weird ideal."); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1261 (1985) ("In the liberal vision, law is legitimate only insofar as it is impersonal and impartial, existing outside the play of social differentiation."); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 32 (1984) ("It is understandable that the more controversial and politicized the decision, the more a court will want to appear above controversy. Such false appeals to neutrality are, nonetheless, illegitimate. When judges write opinions justifying their disposition of cases and their choices of rule, they should feel free honestly to express what they really were thinking about when they decided the case. These revelations will clarify the moral and political views at stake in legal controversies."). A rich literature on the practice of law as a political project rejects the possibility of a neutral practice where lawyerly reasoning and decision-making furthers no political ends. See, e.g., Nisha Agarwal & Jocelyn Simonson, *Thinking Like a Public Interest Lawyer: Theory, Practice, and Pedagogy*, 34 N.Y.U. REV. L. & SOC. CHANGE 455, 456–57 (2010) ("Normative concerns, however, are not only deeply embedded within the law; they are the explicit focus of public interest legal practice. As a result, learning how to think like any kind of lawyer, but especially learning how to think like a public interest lawyer, cannot be a value-neutral enterprise." (footnotes omitted)). See generally Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1495 (2017); Gary Bellow, *Steady Work: A Practitioner's Reflections on Political Lawyering*, 31 HARV. C.R.-C.L. L. REV. 297 (1996); Gary Bellow & Jeanne Kettleon, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice*, 58 B.U. L. REV. 337, 364 (1978); Stephen Lee & Sameer M. Ashar, *DACA, Government Lawyers, and the Public Interest*, 87 FORDHAM L. REV. 1879, 1881 (2019) (describing DACA and a "vision of prosecutorial justice"); Louise G. Trubek, *Embedded Practices: Lawyers, Clients, and Social Change*, 31 HARV. C.R.-C.L. L. REV. 415 (1996).

critical buzz words about mass incarceration that are trendy in liberal elite circles,”<sup>61</sup> but this familiarity with reformist rhetoric doesn’t necessarily translate to policy or specific goals. This ideal type also might be classified as the “Democratic prosecutor” or some other categorization that indicates that the politics in question are of the general, electoral variety, rather than the criminal justice variety.

For a range of reasons, this ideal type is and should be the easiest one to dismiss from the conversation. Notably, academic discourse on progressive prosecutors doesn’t appear to refer to or embrace this model when referring to progressive prosecutors.<sup>62</sup> One way of understanding the debate over Harris, though, is that her claims to be (and the media’s representation of her as) a progressive prosecutor reflected this vision or image—because Harris espoused progressive views on a range of other issues, commentators presumed that made her status and tenure as a prosecutor similarly “progressive.”<sup>63</sup> Maybe

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

62. Academic discussions tend to highlight specific policies adopted or campaign promises made by prosecutors rather than those prosecutors’ general political commitments. *See, e.g.*, Sklansky, *The Progressive Prosecutor’s Handbook*, *supra* note 7, at 25 (emphasizing campaign promises over particular political party). Notably, though, one recent paper by Sam Krumholz, an economics Ph.D. candidate, does argue that there is a correlation between the political party of district attorney candidates and new prison admissions—i.e., that prison admissions rise when Republican district attorneys are elected. *See generally* Sam Krumholz, *The Effect of District Attorneys on Local Criminal Justice Outcomes*, (Jan. 3, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3243162>. Even assuming that this correlation did suggest a causal relationship, I don’t see that finding as diminishing the substantial body of research showing that punitive policies and politics transcend partisan divides. *See* sources cited *infra* note 65. Further, given how many incumbent district attorneys run unopposed, it’s worth being wary of broadly ascribing specific ideologies or policy preferences to all district attorney candidates of a given political party and considering how idiosyncratic local politics are (i.e., plenty of jurisdictions functionally operate under single-party governance). *See, e.g.*, Deborah L. Rhode, *Character in Criminal Justice Proceedings: Rethinking Its Role in Rules Governing Evidence, Punishment, Prosecutors, and Parole*, 45 AM. J. CRIM. L. 353, 382 (2019) (“80 percent of district attorneys run unopposed in both primaries and general races, and 95 percent of incumbents win.”); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 604 (2014) (“[T]he number [of incumbent prosecutors re-elected] remains at 90% even for the largest and most competitive jurisdictions.”).

63. *See, e.g.*, Emily Bazelon, *Kamala Harris, a ‘Top Cop’ in the Era of Black Lives Matter*, N.Y. TIMES (May 25, 2016), <https://www.nytimes.com/2016/05/29/magazine/kamala-harris-a-top-cop-in-the-era-of-black-lives-matter.html> [<https://perma.cc/NT4J-URRT>] (describing the politics and background of Kamala Harris); Jake Bittle, *Brooklyn Is America’s Next Shot At Electing a Progressive Prosecutor*, NATION (Sept. 11, 2017), <https://www.thenation.com/article/archive/brooklyn-is-americas-next-shot-at-electing-a-progressive-prosecutor> (“Harris made a number of bold reforms to the criminal-justice system when elected as chief prosecutor in San

she is/was a progressive prosecutor for some other reasons, but to the extent that her politics elsewhere justified the designation, it reflects a “progressive who prosecutes” vision of progressive prosecutors. It’s as though a position on healthcare or education can take precedence over a position on policing when it comes to assessing criminal justice politics.

Whatever one’s view on the accuracy or utility of the progressive prosecutor moniker, using “progressive prosecutor” to describe any liberal Democrat who prosecutes strikes me as a big mistake. First of all, it would suggest that many of the longtime tough-on-crime warriors in DAs’ offices across the country are in fact progressive prosecutors because they voted for the right candidates or donated to the right causes. Second, and relatedly, this frame or ideal type appears to be rooted in a common but misleading belief that punitive politics are the exclusive province of the political right.<sup>64</sup> In other words, being a progressive is treated as equivalent to having left, radical, or decarceral views on criminal justice. Or, at the very least, this account

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Francisco—she established a community-college program for offenders and went after polluters and profiteers . . . .”); Steven Greenhut, *Kamala Harris Reimagines Herself as a ‘Progressive Prosecutor,’* ORANGE CNTY. REG. (July 5, 2019), <https://www.ocregister.com/2019/07/05/kamala-harris-reimagines-herself-as-a-progressive-prosecutor>; Louis Jacobson & Chris Nichols, *Kamala Harris: Criminal Justice Reformer, or Defender of the Status Quo? The Record Is Mixed*, POLITIFACT (Jan. 29, 2019), <https://www.politifact.com/article/2019/jan/29/kamala-harris-criminal-justice-reformer-or-defende> [<https://perma.cc/MVQ8-2EGH>].

64. This view of mass incarceration as an exclusively right-wing creation has come under increasing fire. *See, e.g.*, LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* 18 (2018) (noting that the “neoliberal turn in American public policy” has helped fuel the mass incarceration of America); JUDAH SCHEPT, *PROGRESSIVE PUNISHMENT: JOB LOSS, JAIL GROWTH, AND THE NEOLIBERAL LOGIC OF CARCERAL EXPANSION* 1–5 (2015) (describing the tension between progressives’ stated opposition to mass incarceration and their support for ostensibly kinder, gentler carceral institutions); Benjamin Levin, *Guns and Drugs*, 84 *FORDHAM L. REV.* 2173 (2016) (describing liberal and progressive support for criminalizing gun possession); Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 *J. CRIM. L. & CRIMINOLOGY* 491, 517–18 (2019) (describing progressive opposition to mens rea reform because of a desire to facilitate more white-collar prosecutions). *See generally* AYA GRUBER, *THE FEMINIST WAR ON CRIME* (2020) (describing radical feminist support for carceral policies); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* (2006) (demonstrating an overlap of traditional progressive social movements such as the feminist movement and harsh penal policies); JUSTIN MARCEAU, *BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT* (2019) (describing the paradox of animal justice proponents opposing caging and inhumane treatment of animals while supporting more criminal punishment for and caging of people who harm animals); NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* (2014).

appears to rest on a claim that replacing Republican prosecutors with Democratic ones would reverse the dynamics of mass incarceration (whether racial disparities or simply prison populations). Decades of policymaking and a growing body of scholarship shows just how faulty that equivalence is.<sup>65</sup>

Put simply, a discourse or political movement that equates a broad set of policy preferences with a specific agenda in the criminal arena is fundamentally bereft. This partisan frame understates the ways in which punitive impulses have played a significant role in many different political and social movements. It both lets progressives off the hook for their historical (and contemporary) role in constructing the carceral state and also suggests a lack of serious engagement with any concept of criminal justice reform or transformation. In other words, it accepts an easy narrative in which the contemporary carceral state is exclusively the result of Goldwater-styled conservatives and/or outright white supremacists. Appealing though it might be for many commentators to lay blame at the feet of such easy scapegoats, such an account avoids necessary (and necessarily difficult) conversations about complicity and the complicated politics of mass incarceration.<sup>66</sup> By equating Democratic or liberal with “progressive” in the realm of criminal policy, this conception glosses over the difficult realities of mass incarceration’s bipartisan history.

### III. THE PROCEDURALIST PROSECUTOR

The second ideal type is notably different from the first in that progressive politics have a critical role to play in the prosecutor’s conception of her function. The proceduralist prosecutor brings these progressive commitments to bear in her handling of her office. The proceduralist prosecutor focuses on getting her house in order: she is

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65. See *supra* note 64. But see Krumholz, *supra* note 62.

66. To be clear, this isn’t to say that conservatism, a desire to control marginal populations, and the politics of racial fear and/or resentment did not also play a major role in constructing the carceral state. See, e.g., AFTER THE WAR ON CRIME: RACE, DEMOCRACY, AND A NEW RECONSTRUCTION 6–8 (Mary Louise Frampton et al. eds., 2008) (detailing the link between the Republican Party, racial tensions, and the growth of mass incarceration); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 6 (2010) (describing the Reagan administration’s support for and acceleration of the War on Drugs); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 75–78 (2007) (describing the role of racism in cultivating a war on crime); LOIC WACQUANT, PUNISHING THE POOR (2009); BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2007); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 3 (2019). Rather, it is to say that no one ideology or political party should be seen as a sole driver of mass incarceration.

concerned about corruption and misconduct. In other words, the proceduralist prosecutor brings a sort-of good government liberalism to the DA's office.

Viewed through this frame, the social function of the prosecutor is important and the work of the DA's office is fundamentally good. But, the mission has been clouded or subverted by bad apples or perhaps even by a culture of disinterest or lawlessness.<sup>67</sup> The proceduralist prosecutor brings a focus on procedural justice: defendants deserve fair process, and she seeks to reform her office by ensuring that line-level prosecutors see their job as "doing justice," not just obtaining convictions. Doing justice, in turn, means: complying with *Brady* obligations, not encouraging or relying on problematic police behavior (e.g., "testilying," unconstitutional stops and searches), and guarding against cognitive biases and practices that might lead to wrongful convictions.

By way of example, in his "Progressive Prosecutor's Handbook," David Sklansky sets forth a number of recommendations for "chief prosecutors who want their offices to do a better job pursuing justice."<sup>68</sup> Sklansky concedes that his recommendations "are far from comprehensive" in part because "[t]hey ignore, in particular, the critical roles that elected prosecutors can provide in advocating for systemic reform and in pushing other agencies, especially police departments, to change their own practices."<sup>69</sup> Instead, he offers guidance for "how to improve the day-to-day functioning of a district attorney's office."<sup>70</sup> With several exceptions, Sklansky's prescriptions sound in

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67. *But cf.* DAVID GARLAND, PUNISHMENT AND WELFARE: A HISTORY OF PENAL STRATEGIES 175 (Quid Pro Books 2018) (1985) ("To raise the social question in a strong form would contradict the fundamental logic of both the criminal system and the penal system as presently constituted. In keeping with the basic ideologies of individualism, these institutions were structured around 'the individual,' making it impossible . . . to put society in the dock."); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 79 n.285 (2004) ("Instead, people blame disposition for the bad conduct, partly (we suspect) in order to minimize the problem and isolate its cause—like looking for bad apples and ignoring the barrel or the tree. Doing so helps to maintain the legitimacy of the system."); Ayesha Bell Hardaway, *The Supreme Court and the Illegitimacy of Lawless Fourth Amendment Policing*, 100 B.U. L. REV. 1193, 1214 (2020) ("The way that Supreme Court decisions have contributed to that suffering makes it clear that there are legal determinants beyond just a few bad apples that foster injustice and suffering."); Trevor George Gardner, *Police Violence and the African American Procedural Habitus*, 100 B.U. L. REV. 849, 864 (2020) (describing "a pivot from the police-violence literature's focus on the police department's bad apples").

68. Sklansky, *The Progressive Prosecutor's Handbook*, *supra* note 7, at 28.

69. *Id.*

70. *Id.*

the register of the proceduralist prosecutor: “collect[ing] and shar[ing] data”;<sup>71</sup> “build[ing] in second looks”;<sup>72</sup> “hav[ing] a clear, generous, and administrable disclosure policy”;<sup>73</sup> not “turn[ing] a profit”;<sup>74</sup> “reduc[ing] case delays”;<sup>75</sup> “investigat[ing] police shootings independently and transparently”;<sup>76</sup> improving office culture;<sup>77</sup> and diversifying staff.<sup>78</sup>

Similarly, the Brennan Center’s “21 Principles for the 21st Century Prosecutor” devotes substantial space to proceduralist principles. Like Sklansky, the report’s authors stress improving discovery policies,<sup>79</sup> “creat[ing] effective conviction review,”<sup>80</sup> employing “respectful language,”<sup>81</sup> and “changing office culture.”<sup>82</sup>

Additionally, the report adopts a suggestion from the work of civil rights attorney-turned Philadelphia DA Larry Krasner: stressing the cost of incarceration.<sup>83</sup> Krasner, in a much-heralded 2018 memo to his line-level prosecutors, instructed ADAs to “place the financial cost of incarceration on the record as part of [their] explanation of the sentence recommended.”<sup>84</sup> The Krasner memo (and the Brennan Center report) both stress the financial cost to taxpayers, providing average figures for the amount spent to keep a person in a cage.<sup>85</sup>

Interestingly, while treated here as a principle of progressive prosecution, this economic-centered account is a staple of conservative and libertarian criminal justice reform.<sup>86</sup> Transcending a

71. *Id.* at 30–32.

72. *Id.* at 32–33.

73. *Id.* at 33–36.

74. *Id.* at 36–37.

75. *Id.* at 37–38.

76. *Id.* at 38–39.

77. *Id.* at 39–40.

78. *Id.* at 40–41.

79. FAIR & JUST PROSECUTION ET AL., *supra* note 48, at 17–19.

80. *Id.* at 16–17.

81. *Id.* at 25.

82. *Id.* at 14–15.

83. *Id.* at 24.

84. Memorandum from Larry Krasner, Dist. Att’y of Phila., to Phila. Dist. Att’y’s 3 (Feb. 15, 2018), <https://www.documentcloud.org/documents/4415817-Philadelphia-DALarry-Krasner-s-Revolutionary-Memo.html> [<https://perma.cc/EZ8M-NG3W>].

85. *See id.*; FAIR & JUST PROSECUTION ET AL., *supra* note 48, at 24.

86. *See generally, e.g.*, Newt Gingrich & Pat Nolan, Opinion, *Prison Reform: A Smart Way for States To Save Money and Lives*, WASH. POST (Jan. 7, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604386.html> [<https://perma.cc/M7L6-5Z8G>]; Marc Levin, *Testimony for House Judiciary Committee Overcriminalization Task Force*, RIGHT ON CRIME (May 30, 2014), <http://>

left/right distinction, then, is an overarching concern for “good government,” whether framed in terms of shrinking wasteful government spending (from the right) or reallocating resources to worthy causes (from the left). Or, building on my dismissal of the “progressive who prosecutes” as a significant category,<sup>87</sup> perhaps it’s worth recognizing that at least some ideal types of progressive prosecutor don’t necessarily map onto a U.S.-style left/right axis, despite the politically loaded label. The proceduralist prosecutor’s progressivism might be understood correctly not as a manifestation of twenty-first century “progressivism” (i.e., some broadly phrased left politics that might encompass liberalism, radicalism, etc.), but instead as a belief in ensuring that the structures of governance are operating “properly.” The proceduralist prosecutor’s primary commitment, then, is ideological and not necessarily partisan—a desire to uphold the tenets of liberal legalism or constitutionalism.<sup>88</sup>

Sklansky’s and the Brennan Center’s suggestions and this proceduralist approach find purchase in a number of common practices in reform DAs’ offices. For example, a number of “progressive prosecutors” have instituted or increased emphasis on conviction integrity units that are designed to double-check line prosecutors’ work and ensure that the office isn’t securing wrongful convictions.<sup>89</sup> While many of these units predate the rise of the contemporary progressive

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rightoncrime.com/2014/05/marc-levin-testimony-at-house-judiciary-committee-overcriminalization-task-force [https://perma.cc/DEZ4-2N4V]; Vikrant P. Reddy & Marc A. Levin, *Right on Crime: A Return to First Principles for American Conservatives*, 18 TEX. REV. L. & POL. 231 (2014).

87. See generally *supra* Part II.

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

89. See, e.g., Mitchell Byars, *Boulder DA’s Conviction Integrity Unit Officially Online*, BOULDER DAILY CAMERA (Oct. 9, 2018, 12:07 PM), <https://www.dailycamera.com/2018/10/09/boulder-das-conviction-integrity-unit-officially-online>; Vaidya Gullapalli, *Defending the Conviction Integrity Unit in St. Louis*, APPEAL (Aug. 19, 2019), <https://theappeal.org/defending-the-conviction-integrity-unit-in-st-louis> [https://perma.cc/QTE9-NVV8]; Garrison Lovely, *Tiffany Cabán Will Put the System on Trial*, JACOBIN (June 24, 2019), <https://www.jacobinmag.com/2019/06/tiffany-caban-queens-district-attorney-elections> [https://perma.cc/WWA4-JBNZ].

prosecutor movement, DA candidates have begun to emphasize these units as a part of a larger reformist project.<sup>90</sup> And, notably, DAs framing conviction integrity units as a part of a progressive agenda have often sought to hire attorneys with defense or Innocence Movement backgrounds to staff these units.<sup>91</sup>

Similarly, take the move by some reformist DAs to implement no-call lists for police officer witnesses. Krasner, for example, has established such a list to bar police officers with a long history of misconduct from testifying at trial, as have Florida State Attorney Aramis Ayala and Orange County (California) District Attorney Todd Spitzer.<sup>92</sup> Applying a similar logic, St. Louis Circuit Attorney Kim Gardner adopted such a list and dropped over one hundred cases that relied on the statements of officers who had lied or engaged in corruption.<sup>93</sup> This approach might go towards ensuring the accuracy of convictions, as it would bar potentially dishonest testimony; alternatively, or in addition, it might serve as a vehicle to punish or deter unlawful conduct from police officers, as they would be prevented from earning the overtime wages that testifying often entails.<sup>94</sup>

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90. See, e.g., Gullapalli, *supra* note 89; Josie Duffy Rice, *Do Conviction Integrity Units Work?*, APPEAL (Mar. 22, 2018), <https://theappeal.org/do-conviction-integrity-units-work-a718bbc75bc7> [<https://perma.cc/AE7V-X9WE>] (“For many prosecutors, establishing a unit allows them to appear as if they are making strides towards justice.”).

91. See, e.g., Maya Kaufman, *Queens District Attorney’s Office Launches Conviction Review Unit*, PATCH (Jan. 6, 2020, 9:57 PM), <https://patch.com/new-york/foresthills/queens-district-attorneys-office-launches-conviction-review-unit> [<https://perma.cc/NML2-QEAJ>] (“Leading the new conviction integrity unit in the Queens district attorney’s office will be former Innocence Project senior staff attorney Bryce Benjet . . .”).

92. See Mensah M. Dean & Mark Fazlollah, *FOP Sues Kenney, Krasner, Ross over Police ‘Do-Not-Call’ List*, PHILA. INQUIRER (Nov. 13, 2018), <http://www2.philly.com/philly/news/breaking/fop-lawsuit-kenney-krasner-ross-police-do-not-call-list-philadelphia-20181113.html> [<https://perma.cc/J8CG-Z6B8>]; Elizabeth Weill-Greenberg, *When Cops Lie, Should Prosecutors Rely upon Their Testimony at Trial?*, APPEAL (July 29, 2019), <https://theappeal.org/advocates-demand-da-do-not-call-lists-dishonest-biased-police> [<https://perma.cc/8NXK-SSM2>].

93. Justin George & Eli Hager, *One Way to Deal With Cops Who Lie? Blacklist Them, Some DAs Say*, MARSHALL PROJECT (Jan. 17, 2019), <https://www.themarshallproject.org/2019/01/17/one-way-to-deal-with-cops-who-lie-blacklist-them-some-das-say> [<https://perma.cc/6MUR-9JGZ>].

94. See Scott Shackford, *Philly Police Union Sues Over Attempts To Keep Bad Cops off the Stand*, REASON (Nov. 21, 2018, 11:25 AM), <https://reason.com/blog/2018/11/21/philly-police-union-sues-over-attempts-t> [<https://perma.cc/QZK4-8TE4>] (noting that testimony constitutes significant overtime wages). *But see* Henry Gass, *When DA Doesn’t Consider an Officer Reliable, Should Public Know?*, CHRISTIAN SCI. MONITOR (Sept. 3, 2019), <https://www.csmonitor.com/USA/Justice/2019/0903/When-DA-doesn-t>

This model of prosecution might lead to fewer people incarcerated (or incarcerated for as long) because of fewer cases based on tenuous evidence and a less coercive approach to plea bargaining. But it need not, and the proceduralist prosecutor need not start from a posture that her job is to scale down the size or footprint of the criminal system. Instead, her goal of “getting it right” might actually lead to more convictions (i.e., proper procedure might prevent successful appeals or streamline case processing).<sup>95</sup>

Similarly, a proceduralist prosecutor might reduce racial and socioeconomic disparities in enforcement by prioritizing anti-bias training or comprehensively tracking charging and sentencing patterns.<sup>96</sup> But, again, these interventions need not have such a result—reducing bias at the prosecutorial stage does not guarantee a system where poor people, people of color, and other marginalized defendants are treated similarly to more privileged defendants.

That is, regardless of what changes are made at the prosecutorial level, there still might be significant biases at the policing stage (i.e., which neighborhoods are policed heavily and which crimes lead to arrest), the legislative stage (i.e., which types of conduct are criminalized and which are not), the trial stage (i.e., how judges and juries assess guilt, innocence, and credibility), and the sentencing stage (i.e., how judges perceive culpability and remorse).<sup>97</sup> Even if prosecutors are the most powerful discretionary actors in the system,<sup>98</sup> they certainly are not the only ones.

And, on a deeper, structural level, assuming that persistent social inequalities can be addressed via prosecutorial or, for that matter, any criminal decisionmakers disregards the ways in which criminal law and its enforcement are embedded in a broader network of social,

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-consider-an-officer-reliable-should-public-know [<https://perma.cc/6GAR-XUK9>]  
(noting that even if no-call lists become the norm, systematic issues will remain).

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

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

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

98. See generally *supra* Part I.

political, and economic conditions.<sup>99</sup> Without addressing distributional questions relating to labor markets, education, housing, resources, etc., the decision of how or whom to prosecute can only do so much. In other words, the proceduralist prosecutor could increase the perceived legitimacy of the system, but it's not clear that she actually would or could address the system's (and society's) substantive injustices.<sup>100</sup>

#### IV. THE PROSECUTORIAL PROGRESSIVE

Unlike the proceduralist prosecutor, the prosecutorial progressive's political commitments are explicitly left. And her decisions are rooted in concerns about structural inequality and substantive, not simply procedural, justice. The prosecutorial progressive embraces her role as prosecutor and the power of state violence, but she does so with an eye towards advancing political ends favored by progressives and the political left (broadly conceived).<sup>101</sup>

There are different flavors of prosecutorial progressivism and different sets of prosecutorial progressive priorities: those focused on crimes committed by powerful defendants (e.g., white-collar crime, political corruption, or police violence), those focused on crimes that further historical inequality or subordination (e.g., intimate partner violence, sexual assault, or hate crimes), or those focused on redistributing criminal justice resources (e.g., pursuing cases against more privileged defendants while scaling back prosecutions of less privileged defendants). These approaches are evident in the continued calls for harsh punishment and carceral sanctions from commentators and activists on the left who otherwise decry mass incarceration and the abuses of the carceral state.<sup>102</sup> For example, advocates of the

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99. See, e.g., Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2082–83 (2017).

100. In the language of abolitionist advocacy and scholarship, many of the steps taken by proceduralist prosecutors represent “reformist reforms,” rather than “non-reformist” or “transformative” reforms. See, e.g., THOMAS MATHIESEN, *THE POLITICS OF ABOLITION REVISITED* 231–32 (2015); DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 91–93 (2d ed. 2015); Mariame Kaba, Opinion, *Police “Reforms” You Should Always Oppose*, TRUTHOUT (Dec. 7, 2014), <https://truthout.org/articles/police-reforms-you-should-always-oppose> [<https://perma.cc/5Q88-KPLQ>]; Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1207 (2015); Roberts, *supra* note 66, at 114–17.

101. I have begun to trace this theory of “prosecutorial progressivism” or “carceral progressivism” elsewhere. See sources cited *supra* note 59.

102. See, e.g., Gruber, *supra* note 64, at 7–9 (describing feminist support for greater sexual misconduct incarceration); Levin, *Mens Rea Reform and Its Discontents*, *supra* note 59, at 548–57 (describing this phenomenon as “carceral exceptionalism”); Aya

progressive prosecutor movement have called for prosecutors to amp up (and progressive DA candidates have promised to amp up) prosecutions of rape and gender-based violence,<sup>103</sup> wage theft,<sup>104</sup> corporate crime,<sup>105</sup> and other offenses less frequently identified with defendants from marginalized communities.

Perhaps one of the most important areas where prosecutorial progressivism has reared its head is in the prosecution of police officers.<sup>106</sup> Where many self-described progressive prosecutors are quick to stress their desire to reduce the criminal system's footprint or to point to their own defense-friendly credentials, police violence cases

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Gruber & Benjamin Levin, *Abolitionisms* (unpublished manuscript) (manuscript on file with author) (describing the prevalence of "carve outs" among commentators otherwise critical of the carceral state); Kate Levine & Benjamin Levin, *Redistributing Justice* (unpublished manuscript) (manuscript on file with author).

103. See, e.g., Seamus Kirst, *These Progressive Prosecutors Want To Reshape Justice in Major American Cities*, TEEN VOGUE (July 29, 2019), <https://www.teenvogue.com/story/meet-progressive-prosecutors-krasner-rollins-boudin-owens-caban> [<https://perma.cc/2ZQ3-8S3Q>] (describing campaign promises to test all rape kits); Isabel Cristo, *Tiffany Cabán Wants To Transform What It Means To Be a DA*, NATION (June 13, 2019), <https://www.thenation.com/article/tiffany-caban-queens-da-interview>. For critical takes on the use of prosecution to address gender subordination, see generally Goodmark, *supra* note 65; Gruber, *supra* note 65; and Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418 (2012).

104. See, e.g., Chris Opfer, *Prosecutors Treating 'Wage Theft' as a Crime in These States*, BLOOMBERG L. (June 26, 2018, 5:31 AM), <https://news.bloomberglaw.com/daily-labor-report/prosecutors-treating-wage-theft-as-a-crime-in-these-states> [<https://perma.cc/CJ5F-BPKY>]; Devon Magliozzi, *Wage Theft Is Criminal and Should Be Prosecuted, Tompkins DA Says*, ITHACA VOICE (Feb. 6, 2019), <https://ithacavoices.com/2019/02/wage-theft-is-criminal-and-should-be-prosecuted-tompkins-da-says> [<https://perma.cc/3QHG-TCEC>] ("One of the prosecutors Van Houten has been learning from is Diana Florence, attorney-in-charge of the construction task force for the Manhattan district attorney. Joining the panel via video call, Florence said her office has been successfully prosecuting wage theft cases for about three years, since becoming aware of systematic theft while investigating a workplace death."); Terri Gerstein, *The Shutdown Shows Why Progressives Need To Make Labor-Law Enforcement a Top Priority*, SLATE (Jan. 23, 2019, 10:39 AM), <https://slate.com/news-and-politics/2019/01/shutdown-wage-theft-unpaid-federal-workers.html> [<https://perma.cc/975F-4MAV>].

105. See, e.g., Eric Levitz, *Black Lives Matters' Defense Attorney Is About To Become Philadelphia's DA*, N.Y. MAG. (May 17, 2017), <http://nymag.com/intelligencer/2017/05/occupys-defense-attorney-is-about-to-become-phillys-da.html> [<https://perma.cc/N8DA-JHJ9>] (identifying criminal justice reform as embodied by new Philadelphia DA Larry Krasner, as opposed to criminal justice reform designed to shield white-collar defendants); Larry Krasner, *Lecture by Larry Krasner*, 3 UCLA CRIM. JUST. L. REV. 99, 108 (2019) (critiquing underenforcement of white-collar crimes).

106. See Note, *supra* note 7, at 754.

are a frequent exception.<sup>107</sup> That is, many progressive prosecutors have sought to make their name or to stake their political claim by adopting a tough line against police officers accused of using excessive force against civilians.<sup>108</sup> Being “tough on police” is often touted alongside supporting bail reform or addressing racial disparities as a campaign pledge for reformist prosecutors.<sup>109</sup> For example, Marilyn Mosby who was elected State’s Attorney of Baltimore, made the prosecution of the officers involved in the death of Freddie Gray—an unarmed Black man—a major priority as a means of sending a message that her office cared about state violence against people of color.<sup>110</sup>

This approach jibes with a rich literature and long history of activism on underenforcement of criminal law. The accounts of underenforcement tend to emphasize the ways in which police and prosecutors have harmed marginalized communities not just by overcriminalizing them, but also by failing to provide them with the true protection of the state.<sup>111</sup> If the “first civil right” is the freedom

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107. See *id.*; Kate Levine, *Police Prosecutions and Punitive Instincts*, WASH. U. L. REV. (forthcoming 2021), <https://ssrn.com/abstract=3719408>. Indeed, David Sklansky identifies the vigorous prosecution of police homicides as a defining characteristic of progressive prosecution. See Sklansky, *The Progressive Prosecutor’s Handbook*, *supra* note 7, at 38–39.

108. See, e.g., Jeremy B. White, *Floyd Death Propels Police Reformers in Key Prosecutor Races*, POLITICO (June 10, 2020, 8:01 AM), <https://www.politico.com/states/california/story/2020/06/10/floyd-death-propels-police-reformers-in-key-prosecutor-races-1291855> [<https://perma.cc/X9WU-FX8N>]; Davis, *supra* note 41, at 7 (“Some [DA candidates] challenged incumbents who declined to prosecute police officers involved in the killings of unarmed black men and boys, campaigning in part on this issue.”); Akela Lacy, *St. Louis Prosecutor Wesley Bell Launches Independent Unit To Hold Police Accountable*, INTERCEPT (July 4, 2019, 6:00 AM), <https://theintercept.com/2019/07/04/st-louis-prosecutor-wesley-bell-police-accountability-wrongful-conviction> [<https://perma.cc/N5RG-93ES>].

109. See, e.g., Bittle, *supra* note 63.

110. See Tim Prudente, *Marilyn Mosby Wins Re-Election in Three-Way Race for Baltimore State’s Attorney*, BALT. SUN (June 26, 2018, 4:30 PM), <https://www.baltimoresun.com/politics/bs-md-ci-states-attorney-20180625-story.html> (describing Mosby’s aggressive prosecution of the police officers involved in Freddie Gray’s death).

111. See RANDALL KENNEDY, RACE, CRIME, AND THE LAW 29–75 (1997) (tracing the underenforcement of crimes against black defendants); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1717 (2006) (“Underenforcement can also be a form of deprivation, tracking familiar categories of race, gender, class, and political powerlessness. Conceived of as a form of public policy, underenforcement is a crucial distribution mechanism whereby the social good of lawfulness can be withheld.” (footnotes omitted)); Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1288–89 (2016) (“As is true of underenforcement generally, under-policing tends to result from a devaluing of the harms caused by a specific crime, the harms suffered by members of a certain demographic group, or both.” (footnote

from violence, then the state's fundamental task is to provide safety for its inhabitants, particularly those who might be particularly vulnerable or who might lack the political power to address widespread violence.<sup>112</sup> Viewed in this way, the decision to use prosecutorial resources to target defendants who have harmed marginalized victims or communities sends a powerful message that those communities or victims matter.<sup>113</sup>

A similar justification has made wage theft and financial crime major priorities of contemporary prosecutorial progressives. Former Southern District of New York U.S. Attorney Preet Bharara was celebrated in liberal and progressive circles for aggressively prosecuting white-collar crime,<sup>114</sup> Krasner instituted a special unit for wage theft prosecution,<sup>115</sup> and Tiffany Cabán, the public defender and Democratic Socialist who came within a few votes of being elected District Attorney in Queens, made prosecuting abusive employers and landlords a key component of her platform.<sup>116</sup> Indeed, some commentators have argued that the progressive prosecutor movement and the attention it has drawn to DA elections afford an opportunity to make

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omitted)). *But see* Paul Butler, *(Color) Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 270, 1309–12 (1998) (critiquing the focus on underenforcement).

112. *See generally* Murakawa, *supra* note 64 (arguing that this theory of state protection for the powerless helped drive liberal support for the carceral state).

113. *See, e.g.*, Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 860 (2014); Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid To Repeal Stand Your Ground*, 68 U. MIA. L. REV. 961, 1000–03 (2014); Angela P. Harris, *Heteropatriarchy Kills: Challenging Gender Violence in a Prison Nation*, 37 WASH. U. J.L. & POL'Y 13, 34 (2011) (“Like expressive violence itself, criminal punishment is widely understood to ‘send a message’—the message that women and sexual minorities matter.”).

114. *See, e.g.*, Tina Nguyen, *Bharara Lands a New Job While He Considers His Next Move*, VANITY FAIR (Mar. 21, 2017), <https://www.vanityfair.com/news/2017/03/preet-bharara-nyu-law-school> [<https://perma.cc/G3T9-NKMA>] (“Democrats itching for new leadership have long hoped that Bharara, an anti-corruption, anti-Wall Street crusader, might use his free time to take on Donald Trump.”); William D. Cohan, *Will Preet Bharara, New York’s Anti-Corruption Crusader, Run for Higher Office?*, NATION (Apr. 29, 2015), <https://www.thenation.com/article/will-preet-bharara-new-yorks-anti-corruption-crusader-run-higher-office>.

115. *See* Juliana Feliciano Reyes, *Philly DA’s Office Launches a Unit To Prosecute Employers for Crimes Against Workers*, PHILA. INQUIRER (Oct. 8, 2019), <https://www.inquirer.com/news/district-attorney-larry-krasner-employer-crimes-prosecution-wage-theft-20191008.html> [<https://perma.cc/LSR5-5L9J>].

116. *See* Oren Schweitzer, *Tiffany Cabán, a Socialist in the District Attorney’s Office*, JACOBIN (June 26, 2019), <https://jacobinmag.com/2019/06/tiffany-caban-socialist-district-attorney-queens-election> [<https://perma.cc/T4M3-GMS2>].

the crimes of the rich primary targets of law enforcement.<sup>117</sup> Such a call is hardly new; decades before the current wave of “progressive prosecutors” gained widespread attention, *The Nation* identified as “progressive prosecutors” a group of state attorneys general who had targeted industry for economic and environmental misdeeds.<sup>118</sup> As prosecutorial progressives, those AGs could “make an excellent second line of defense against corporate abuse” when the federal government showed disinterest and could “frighten[]” white-collar defendants with “the threat of jail.”<sup>119</sup>

Regardless of which class of marginalized victims or relatively powerful defendants the prosecutorial progressive chooses to prioritize, her mission or approach accepts the fundamental legitimacy and desirability of the criminal system and carceral state violence. To the prosecutorial progressive, many aspects of mass incarceration and the contemporary construction of criminal policy might be objectionable. But, those objections rest on a belief that resources and energies have been misdirected and that the objectionable corners of the criminal system are aberrations.<sup>120</sup> Rather than rejecting prosecutorial politics or embracing a skeptical view of the prosecutorial credential in the political sphere, this approach remains firmly rooted in a vision of the heroic or crusading prosecutor.<sup>121</sup>

Elsewhere, I have argued that this approach—carceral progressivism—is rooted in a statist worldview that understands criminal law as the proper vehicle for channeling the state’s (and, by extension, society’s) moral outrage about social problems.<sup>122</sup> From this

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117. See, e.g., Terri Gerstein, *Stealing from Workers Is a Crime. Why Don't More Prosecutors See It That Way?*, NATION (May 24, 2018), <https://www.thenation.com/article/stealing-from-workers-is-a-crime-why-dont-prosecutors-see-it-that-way> (“Yet these contests also present an opportunity to elect leaders who understand the importance of judiciously using criminal law to address serious employer abuses, like wage theft, sexual assault, and utterly avoidable workplace injuries and fatalities.”).

118. See Mark Green, *Filling the Deregulatory Vacuum*, NATION, Oct. 23, 1989, at 441, 458.

119. *Id.* at 460.

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

121. For other accounts of criminal law being repurposed to advance progressive ends, see, e.g., Ely Aharonson, “Pro-Minority” Criminalization and the Transformation of Visions of Citizenship in Contemporary Liberal Democracies: A Critique, 13 NEW CRIM. L. REV. 286, 287 (2010); Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control To Advance Social Justice Ends*, 68 BUFF. L. REV. 199, 202 (2020).

122. See Levin, *Wage Theft Criminalization*, *supra* note 59, at 56–65.

Progressive viewpoint, the state is ultimately trustworthy as solver of social problems. And to the extent that criminal law represents the state at its purist form—embodying the collective moral will and ensuring security for its citizens<sup>123</sup>—criminal law might be the ultimate solution to social problems.<sup>124</sup>

Of course, such a belief assumes that the progressive functions of the prosecutor could be neatly cordoned off from the regressive functions (e.g., incarcerating powerless defendants, executing coercive plea deals).<sup>125</sup> That is, the claim seems to rest on a belief that the crusader or “progressive” aspects of the prosecutorial progressive are easily divorceable from the aspects of the prosecutorial apparatus that subjugate marginalized populations and serve to further other institutions of punitive social control.<sup>126</sup>

Such a belief, though perhaps widely shared, is not uncontroversial. In a particularly cutting op-ed written at the end of Bharara’s tenure, David Patton, the chief Federal Defender for the Southern District of New York, argued that the liberal adoration for “the sheriff of Wall Street” was fundamentally misguided.<sup>127</sup> As Patton described it:

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

124. To be clear, this view is at odds with many formulations embraced by left liberals and civil libertarians who have been critical of “overcriminalization.” *See, e.g.*, DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 3–54 (2008); HARVEY A. SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT*, at xxxiii–xlvi (2009); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 909 (1962); Sanford H. Kadish, *The Crisis of Overcriminalization*, 7 AM. CRIM. L.Q. 17, 33–34 (1968); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1354 (2012).

125. *See* Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211, 3213 (2015) (critiquing such a view); Levin, *Mens Rea Reform and Its Discontents*, *supra* note 59, at 532–34.

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

127. David Patton, *An Honest Assessment of Preet Bharara’s Record: Harsh Prosecutions Put More African-Americans and Hispanics Behind Bars*, N.Y. DAILY NEWS (Mar. 15, 2017, 7:04 PM), <https://www.nydailynews.com/opinion/honest-assessment-preet-bharara-record-article-1.2999367>.

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[N]one of the tags do much to describe the actual work of his office and the overwhelming number of prosecutions it brings that have nothing to do with Wall Street or Albany [where Bharara focused on government corruption]. . . . Federal criminal cases rarely involve the rich or powerful. Consistent with the rest of the country, 80% of federal defendants in the Southern District of New York are too poor to hire a lawyer. Seventy percent are African-American or Hispanic. The most commonly prosecuted offense type, by far, is drugs. . . . His office greatly increased the prosecution of poor people of color using sprawling conspiracy and racketeering statutes to charge many low level drug dealers and addicts . . . .<sup>128</sup>

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

#### V. THE ANTI-CARCERAL PROSECUTOR

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

The anti-carceral prosecutor's stance comes closest to resembling those embraced by prison abolitionists and other more radical critics of the carceral state.<sup>129</sup> Rather than arguing for more

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128. *Id.*

129. For views of the criminal system as fundamentally flawed or rooted in an inherently objectionable politics, see, e.g., ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 1–12

investment in DAs offices so that they can do their jobs better,<sup>130</sup> the anti-carceral prosecutor advocates for a divestment from prosecution and the criminal system.<sup>131</sup> Similarly, where the prosecutorial progressive might prioritize enforcing certain types of crimes, the anti-carceral prosecutor seeks to enact policies of declination—i.e., formally refusing to bring charges.<sup>132</sup> This approach has gained ground, particularly in the context of certain classes of drug crimes. Suffolk County DA Rachael Rollins, for example, made a campaign promise not to prosecute a range of “quality of life” offenses, including minor in possession of alcohol, breaking and entering to seek shelter, and other crimes not readily linked to violence or victims.<sup>133</sup> Similarly, once in office, Cook County State’s Attorney Kim Foxx announced that she would stop prosecuting individuals for driving with licenses suspended for inability to pay fines or fees.<sup>134</sup> Certainly, such policies could be coupled with prosecutorial progressive or proceduralist goals of redistributing resources to other areas—perhaps other

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(2003); Mathiesen, *supra* note 101; Spade, *supra* note 101, at 118–38; and Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1604–05 (2017). See generally Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016) (discussing inherent racism of the criminal system); Patrisse Cullors, *Abolition and Reparations: Histories of Resistance, Transformative Justice, and Accountability*, 132 HARV. L. REV. 1684 (2019) (describing the historical and theoretical underpinnings of abolition movements); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575 (2019) (laying out a new conception of abolitionism).

130. See Blakinger, *supra* note 54 (discussing tension over progressive prosecutors’ requests for more funds to hire new public defenders).

131. See, e.g., Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1622 (2019); *Invest-Divest*, M4BL, <https://m4bl.org/policy-platforms/invest-divest> [<https://perma.cc/635S-2MN6>].

132. See generally Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477 (2020) (describing the practice).

133. See Maria Cramer, *DA Candidate Rachael Rollins Hailed Nationally, but Locally Her Plan Not To Prosecute Petty Crimes Alarms Some*, BOS. GLOBE (Sept. 12, 2018, 9:46 PM), <https://www.bostonglobe.com/metro/2018/09/12/candidate-hailed-nationally-but-locally-her-plan-not-prosecute-petty-crimes-alarms-some/pyQX8MT4iWpyj8XMi6SsFO/story.html> [<https://perma.cc/GZ49-LZP4>]; Carissa Byrne Hessick & F. Andrew Hessick, *The National Police Association Is Throwing a Fit Over Prosecutorial Discretion*, SLATE (Jan. 4, 2019, 12:55 PM), <https://slate.com/news-and-politics/2019/01/national-police-association-throwing-fit.html> [<https://perma.cc/FG2M-SN2B>].

134. See Davis, *supra* note 41, at 9.

crimes or internal institutional checks. But a declination or decarceration policy need not be.<sup>135</sup>

Indeed, the anti-carceral prosecutor might pursue accountability for police or others but would not view “accountability” as synonymous with “incarceration” or “state control.”<sup>136</sup> And, the pure anti-carceral prosecutor would see her function purely as scaling back the system. “Doing justice” to this prosecutor entails not prosecuting at all. A growing number of former defense attorneys and civil rights lawyers have run for DA with a stated mission of changing the system from a position of power.<sup>137</sup> The anti-carceral prosecutor stands at the extreme pole of this posture—a sort of double-agent committed to destroying the system from within.<sup>138</sup> To the anti-carceral prosecutor, the problem isn’t that the wrong people are incarcerated, it’s that people are incarcerated. To the anti-carceral prosecutor, resolving the injustice and inequality in the administration of criminal law wouldn’t mean finding avenues to punish more privileged defendants more harshly; it would mean treating all defendants with the lenience, mercy, and humanity often reserved for the most powerful.<sup>139</sup>

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135. Put differently, these policies might operate as reformist (rather than non-reformist) reforms if coupled with a re-dedication of resources *within* the criminal system or the prosecutor’s office. *See supra* note 100.

136. *See* Elisabeth Epps, *Amber Guyger Should Not Go to Prison*, APPEAL (Oct. 7, 2019), <https://theappeal.org/amber-guyger-botham-jean> [<https://perma.cc/C2LM-AKGY>].

137. *See, e.g.*, Nuala Sawyer Bishari, *Public Defender Chesa Boudin Joins District Attorney Race*, SF WEEKLY (Jan. 15, 2019, 10:37 AM), <https://www.sfweekly.com/news/public-defender-chesa-boudin-joins-district-attorney-race> [<https://perma.cc/233F-PM5L>]; Daniel Nichanian, *A Public Defender, Running for DA in Pittsburgh, Wants To Join Forces with Philly’s Larry Krasner*, APPEAL (Oct. 4, 2019), <https://theappeal.org/politicalreport/lisa-middleman-interview-running-pittsburgh-allegheeny-district-attorney> [<https://perma.cc/T2W3-QT7B>]; Jane Wester, *Public Defender Promises Major Change as She Joins Crowded Field for 2021 Manhattan District Attorney Race*, N.Y. L.J. (Mar. 5, 2020, 6:33 PM), <https://www.law.com/newyorklawjournal/2020/03/05/public-defender-promises-major-change-as-she-joins-crowded-field-for-2021-manhattan-district-attorney-race> [<https://perma.cc/6EZV-QP6S>].

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

139. *See, e.g.*, Aya Gruber, *Equal Protection Under the Carceral State*, 112 NW. U. L. REV. 1337, 1348–64 (2018); Levin, *Mens Rea Reform and Its Discontents*, *supra* note 59, at 540–48; Kate Levine, *How We Prosecute the Police*, 104 GEO. L.J. 745, 776 (2016) (“This realization has led many to call for less process for police. This Essay has argued that the far more desirable conclusion is to give more process to the rest of us. Anyone serious about criminal justice reform needs to consider how prosecutors treat police

## CONCLUSION: DIFFERENT PROGRESSIVISMS &amp; DIFFERENT PROSECUTORIALISMS

As should be clear, the ideal types traced above might overlap, and many progressive prosecutors might embrace policies or rhetoric that I associate with several different ideal types. Indeed, some of the biggest-name reform prosecutors certainly have adopted multiple policies that I would identify with competing theories.<sup>140</sup> Further, a DA who ran as one type of progressive prosecutor might shift to embrace another mode based either on her experiences or after encountering resistance.<sup>141</sup> (My own suspicion is that much campaign rhetoric, particularly in left-leaning jurisdictions, sounds in the register of the anti-carceral prosecutor, even if the policies that follow election don't reflect that approach.) But, what I hope to highlight in this Essay is the way in which these different ideal types reveal very different understandings of what's wrong with the criminal system.<sup>142</sup> Or, put differently, each version of the progressive prosecutor mantle should be promising only to the extent that we understand it as responsive to a major problem with the administration of criminal law.

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

The proceduralist prosecutor is an attractive candidate if the problem with the criminal system is corrupt or unconstitutional behavior in DAs' offices. Like almost every academic commentator on criminal law and procedure, I believe that widespread procedural abuses are a defining feature of the system. From failures to disclose exculpatory information, to reliance on questionable policing, to deployment of coercive plea terms, prosecution in the United States is

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suspects. The process they give their law enforcement partners has much to tell us about how to create a better system for everyone.”).

140. For instance, Larry Krasner embodies attributes of the proceduralist progressive, prosecutorial progressive, and anti-carceral prosecutor. See Krasner, *supra* note 105, at 99–119.

141. Cf. Davis, *supra* note 41, at 15–20 (describing challenges faced by progressive prosecutors).

142. Cf. Bellin, *supra* note 49, at 1204 (“Despite all the attention paid to prosecutors in recent years, the primary guidance on the prosecutorial function remains a timeworn Rorschach test.”).

replete with affronts to procedural justice.<sup>143</sup> But should procedurally just case management truly be the lodestar for criminal procedure? Maybe procedural justice would reduce wrongful convictions.<sup>144</sup> And maybe procedural justice would make defendants and court-involved individuals feel less like the system was a repository for racism, classism, abuses, and a range of structural inequalities.<sup>145</sup> Maybe, but I think it's important to appreciate the critiques of procedural justice that stress how better processes can't undo the underlying structural inequalities and injustices.<sup>146</sup>

Given the choice, of course, I would prefer a world in which innocent defendants weren't convicted or in which the constitutional rights and liberties of individuals, guilty or not, were not easily disregarded. But an account of what's wrong with the system that focuses exclusively on innocent defendants, speaks the language of individual rights, or prioritizes affronts to liberal legalism barely scratches the surface of mass incarceration and its attendant ills.<sup>147</sup> As Jeffrey Bellin

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143. See, e.g., Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 431 (2001) (describing "widespread, almost routine, violations of the *Brady* doctrine by prosecutors across the country"); Adam M. Gershowitz, *The Challenge of Convincing Ethical Prosecutors that Their Profession Has a Brady Problem*, 16 OHIO ST. J. CRIM. L. 307, 310–12 (2019); Jason Kreag, *The Jury's Brady Right*, 98 B.U. L. REV. 345, 349 (2018) ("One federal judge characterized widespread *Brady* violations as an 'epidemic.'"); Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1498 (2009); William Ortman, *Second-Best Criminal Justice*, 96 WASH. U. L. REV. 1061, 1077 (2019) (describing common plea bargaining tactics as effectively "coercing" defendants); Kimani Paul-Emile, *Reconsidering Criminal Background Checks: Race, Gender, and Redemption*, 25 S. CAL. INTERDISC. L.J. 395, 396 (2016) (arguing that "the increasingly common and often coercive use of plea bargains by prosecutors" has led numerous factually innocent people to plead guilty).

144. See, e.g., Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (describing empirically how procedural errors regularly allow for wrongful convictions).

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

146. See, e.g., Bell, *supra* note 99 ("Thin conceptions of procedural justice could produce what Jeremy Bentham called 'sham security,' leaving some individuals with a vague sense that they have been treated justly while neglecting more fundamental questions of justice."); Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295, 359; Ristroph, *supra* note 95, at 1227 n.188 (collecting sources).

147. See Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587 (2005) (arguing that a focus on innocent defendants, while important, can obscure and preclude discussions about structural

puts it in his treatment of progressive prosecution, “Declining to prosecute the innocent is not a progressive position. It is a consensus position.”<sup>148</sup> Weeding out the truly indefensible conduct of unscrupulous prosecutors would be good, but it also would be setting a relatively low bar in imagining what the system should look like.<sup>149</sup>

What of the prosecutorial progressive? Again, the account of the criminal system’s flaws to which this approach responds is a specific and idiosyncratic one: the state (or the prosecutorial apparatus) has failed to hold the powerful accountable and has failed to live up to its moral authority by under-enforcing laws that should protect marginalized victims. As I’ve argued elsewhere, this view is widely shared, particularly on the political left (broadly conceived).<sup>150</sup> But it is also fundamentally at odds with a broader decarceral or abolitionist project, not just because it treats the criminal system as fundamentally legitimate, but also because it is inherently rooted in a belief that prosecutors need to prosecute *more*.<sup>151</sup> If progress means changing who is in prison, this approach has little to say to the growing body of scholars, advocates, and activists talking about how to get people out of prison and move beyond using “criminalization and cages as catchall solutions to social problems.”<sup>152</sup> And, it might not even be responsive

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change); Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549 (collecting and responding to similar critiques of a focus on innocent defendants); Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176 (2013) (critiquing constitutional rights discourse as obscuring deeper distributional inequality); cf. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995) (arguing that Eighth Amendment discourse obscures the deeper injustice of the death penalty).

148. Bellin, *supra* note 30, at 25. Of course, like any other consensus, this one has its dissenters. Cf. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 728–29 (2005) (arguing for use of capital punishment even though some innocents will be executed).

149. Cf. Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 479 (2018) (arguing that legal scholarship and traditional legal thought leaves little room for more radical understandings of what law could be or how society could be structured); *Introduction*, 132 HARV. L. REV. 1568 (2019) (quoting activist and advocate Derecka Purnell as observing that “[p]eople on the streets, people who are organizing, are gonna put certain things on the table that will rarely leave a lawyer’s mouth. Like police abolition. Abolishing the carceral state. Ending prisons.”).

150. See *supra* note 59.

151. See Epps, *supra* note 136 (“If you champion abolition for certain people and situations but not others, then yours is not a call for abolition but for sentencing reform. If your strategy to end mass incarceration is putting more white collar criminals in prison and freeing folks caged only on petty drug offenses, then you don’t want fewer people in prison, you just want different people in prison.”).

152. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 2* (2007).

to less-radical critics concerned about overcriminalization (i.e., to the prosecutorial progressive, maybe passing more criminal statutes would be a social good as long as those statutes targeted the right types of conduct). If a carceral sentence or criminal prosecution is the only way (or the best way) to ensure “accountability” for police, wealthy executives, or politicians, then why isn’t it the fitting response for people who commit violent crimes or cause other sorts of grave harm?

The last vision of the anti-carceral prosecutor in many ways holds the most promise for me, but also the most unanswered questions.<sup>153</sup> To more radical critics of the carceral state, this approach is probably the only one that holds significant appeal<sup>154</sup>—it is fundamentally oppositional to existing power structures and sees the problems with the system as ones of essential (or existential?) purpose rather than scale or design.

At the same time, there’s a live question as to whether it’s possible to be an anti-carceral prosecutor.<sup>155</sup> Perhaps, this posture reflects the prosecutor’s status as embedded in the “punishment bureaucracy”<sup>156</sup> or just the “paradox of progressive prosecution.”<sup>157</sup> That is, from a radical stance, if one views the structures of the criminal system as fundamentally illegitimate, rooted in white supremacy, social control of the poor, or opposed to true democracy, then how could working within those structures do anything but legitimate these same problematic institutions? If the goal should be a world without prisons or if the institutions of the criminal system are inherently objectionable, is there any way to escape a dangerous complicity? Or, even if the goals of critics are slightly less radical or transformative

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

154. To be clear, abolitionists and other radical critics certainly might prefer the prosecutorial progressive or proceduralist prosecutor to many other DA candidates. But such a preference need not reflect a belief that such prosecutors were a long-term solution. Cf. Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 586–93 (2017) (arguing for community bail funds, not as a solution to the problem of cash bail, but as a necessary institution for combatting cash bail as long as it exists).

155. See generally Smith, *supra* note 6.

156. See Karakatsanis, *supra* note 4.

157. See Note, *supra* note 7.

but are still rooted in wide-scale decarceration, isn't relying on or celebrating prosecutors still fundamentally illogical?<sup>158</sup>

Ultimately, these are big questions. Answering them requires an honest and careful engagement with the terms of the progressive prosecutorial movement. Like so many other corners of the discourse on criminal justice reform, too many discussions about progressive prosecution tend to take for granted that we (some imagined group of right-thinking people) all agree on what's wrong with mass incarceration and what needs to happen to get to a world without the much-maligned carceral state.<sup>159</sup> But, like so many corners of the discourse on criminal justice reform, debates about progressive prosecution ultimately reveal deep fault lines and deep disagreements about what's wrong and what needs to be done.<sup>160</sup> Certainly, minor theoretical disagreements can easily derail important policy changes with real impacts on the lives of real people.<sup>161</sup> We do ourselves no favors, though, by pretending that we all share the same goals or the same vision of how to get there. Appreciating these disagreements should be a key component of determining if and when compromise actually advances the desired ends, whatever those may be. And understanding what degree of prosecutorialism is either acceptable or desirable should be essential to determining whether (and to what extent) progressive prosecutors have a role to play in moving beyond mass incarceration.

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158. Cf. Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 293–94 (2019) (“[W]e should be careful not to let the high-profile wins of progressive prosecutors further re-entrench the notion that the public belongs only on the prosecution side of the ‘v.’; even when a progressive prosecutor wins, she does not represent the full community. As long as there are prosecutions against individual defendants, there will be members of the public who support defendants, and there will be interests of the public that coincide with the interests of defendants. The people will be on both sides.”).

159. See generally Levin, *The Consensus Myth in Criminal Justice Reform*, *supra* note 12 (critiquing this approach).

160. See generally *id.*

161. See Davis, *supra* note 41, at 27 (“No single approach can achieve success in all jurisdictions, nor can every reform be implemented in every jurisdiction. . . . Any attempt to reduce the incarceration rate and unwarranted racial disparities in the criminal justice system should be supported.”); FORMAN, *supra* note 64, at 229 (arguing that mass incarceration resulted from “a series of small decisions, made over time, by a disparate group of actors” and so “mass incarceration will have to be undone the same way”).