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RACE, REFORM, & PROGRESSIVE PROSECUTION

DANIEL FRYER*

The progressive prosecution movement is one of the most recent efforts to reform the United States criminal justice system. In this Article, I analyze two assumptions that appear to be guiding this movement. The first is that prosecutors have unilateral power to change the system. The second is that those who bear the biggest burden of our current system—black Americans—would be the primary beneficiaries of the decarceration proposals advanced by progressive prosecutors. I argue that each of these assumptions is misguided. A successful criminal justice reform movement must recognize the contingent power of prosecutors and actively seek to advance racial justice on top of its decarceration efforts. To avoid exacerbating the problems they intend to correct, reformists must reexamine the principles underlying the movement and the aims they expect to achieve.

INTRODUCTION	770
I. RETHINKING PROSECUTORIAL POWER	773
A. Prosecutorial Accountability	775
B. Leveraging Prosecutorial Power For Reform	776
II. PROSECUTORIAL POWER: CONTINGENT, NOT UNILATERAL	778

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A. Exaggerating Prosecutorial Power	778
B. The Contingent Power Of Prosecutors	779
C. Another Look at Prosecutorial Power	781
D. Prosecutors and Other Criminal Justice Officials	785
III: PROGRESSIVE PROSECUTION AND RACIAL JUSTICE ...	790
A. Decarceration and Racial Justice	791
B. Prosecutorial Leniency as a Tool for Injustice	797
CONCLUSION.....	801

INTRODUCTION

Whatever else one might think about prosecutors, it is generally believed that they hold the power to right the wrongs of our criminal justice system. For example, while discussing a political action committee (PAC) created to help reform-minded prosecutors win elections, the activist Shaun King commented: “No position in America, no single individual has a bigger impact on the criminal justice system—including police brutality, but the whole crisis of mass incarceration in general—than your local district attorney . . . They are the gatekeepers of America’s justice system.”¹ Similarly, Danielle Sered, the executive director of the alternative-to-incarceration program Common Justice,² noted: “[m]ass incarceration is made or broken by a bunch of assistant D.A.s and their supervisors and the decisions they make between 10:00 a.m. and noon.”³ And, of course, one cannot forget President Obama’s recommendation to those dissatisfied with our criminal justice system: “If you are really concerned about how the criminal justice system treats African-Americans, the best way to protest is to vote . . . Do what they just did in Philadelphia and Boston, and elect state’s attorneys and district attorneys who are looking at issues in a new light.”⁴

These sorts of statements are common in discussions about criminal justice reform. The message they convey is obvious: if you want to end the

¹ Daniel Marans, *Black Activist Starts Group That Aims to Elect Progressive Prosecutors*, HUFFPOST (Feb. 15, 2018, 1:35 PM), https://www.huffpost.com/entry/black-activist-elect-progressive-prosecutors_n_5a85b64ee4b0058d55670e4f [https://perma.cc/ZCS5-BUPG].

² *Executive Director*, COMMON JUSTICE, https://www.commonjustice.org/danielle_sered_staff [https://perma.cc/J96Y-HPEW].

³ EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* 99 (2019) (quoting Danielle Sered).

⁴ *Read Obama’s Full Speech from the University of Illinois*, NBC CHICAGO (updated Sept. 8, 2018, 7:05 AM), <https://www.nbcchicago.com/blogs/ward-room/obama-university-of-illinois-full-speech-492719531.html> [https://perma.cc/H4MG-BF52] [hereinafter *Obama’s Full Speech*].

problems of our criminal justice system—such as mass incarceration and racial injustice—get prosecutors on your side. Since “[t]he American prosecutor rules the criminal justice system, exercising almost limitless discretion and virtually absolute power,”⁵ prosecutors should be able to unilaterally correct its wrongs. Or, as Professor Angela J. Davis puts it: “just as the power and discretion of prosecutors have contributed to mass incarceration and racial disparities in the criminal justice system, that same power and discretion may be used to institute reforms to correct these injustices.”⁶ Thus, if we are really concerned with how the criminal justice system treats black people, the message of what we should do is abundantly clear: vote for the right prosecutors.

If these responses to the oppressive aspects of our system of criminal justice strike you as too simple to be true, you are right—they are too simple to be true. Our penal society is shaped by longstanding stereotypes of black criminality,⁷ a complex relationship between racial capitalism and carceral punishment,⁸ and a general desire to promote white supremacy.⁹ Thus, although the recent movement of “progressive prosecution” is lauded as the solution to the flaws of our system, we may be skeptical about the potential reach of these prosecutors who are viewing issues in a new light. This is not to say that the movement isn’t promising. Yet endorsements encouraging those “concerned about how the criminal justice system treats African-Americans”¹⁰ to focus their energy on electing prosecutors should be met with caution. The first thing to note is that these proposals often rely on exaggerated claims about prosecutors’ power and naïve statements about the potential to limit such power. To the extent prosecutors have a lot of power, it is because other actors permit them to have it. Despite claims to the

⁵ David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 480–81 (2016) [hereinafter Sklansky, *Prosecutorial Power*] (internal quotation marks omitted).

⁶ Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 5 (2019) [hereinafter Davis, *Reimagining Prosecution*].

⁷ See KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA 3 (2010) (“Rather, the problem was racial criminalization: the stigmatization of crime as ‘black’ and the masking of crime among whites as individual failure.”).

⁸ See Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 12 (2019) (“[T]oday’s carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained.”).

⁹ See Dorothy E. Roberts, *The Social and Moral Costs of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1296 (2004) (“Mass incarceration seems to verify stereotypes about black criminality that originated in slavery and are part of a belief system premised on the superiority of whites and inferiority of blacks.”).

¹⁰ *Obama’s Full Speech*, *supra* note 4 and accompanying text.

contrary, our justice system is not set up as one ruled by a “prosecutor king”¹¹ who “answer[s] to no one else.”¹² The second thing to note is that reform-minded prosecutors rarely articulate methods to address the specific racial harms of the criminal justice system. Instead, they often articulate neutral principles that are susceptible to being used in a racially discriminatory manner. Thus, the ones we expect to be the obvious beneficiaries of a reform movement—black Americans—have the potential to bear the biggest burden.

These are bold claims. And in the pages that follow I will try to unpack them. My task here is not one of criticism (full disclosure: in 2018 I joined the first class of assistant district attorneys hired as part of Philadelphia District Attorney Larry Krasner’s “campaign to end mass incarceration”¹³), but rather to consider some underlying assumptions that appear to be guiding a promising reform movement. We are unlikely to make substantial progress in our reform efforts unless we examine the principles underlying the movement and the aims it expects to achieve. Too often, promising reform efforts improve community perceptions of criminal justice without actually improving criminal justice.¹⁴ Indeed, sometimes liberal reform efforts¹⁵ exacerbate problems they intend to correct.¹⁶ My purpose here, then, is to

¹¹ See generally Erik Luna, *Prosecutor King*, 1 STAN. J. CRIM. L. & POL’Y 48 (2014) (comparing the American prosecutor to Plato’s philosopher king).

¹² BAZELON, *supra* note 3, at xxvi.

¹³ See Jennifer Gonnerman, *Larry Krasner’s Campaign to End Mass Incarceration*, NEW YORKER (Oct. 22, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration> [<https://perma.cc/NRZ2-KBZB>].

¹⁴ See Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016) [hereinafter Butler, *Limits of Criminal Justice Reform*] (“[S]uccessful’ reform efforts substantially improve community perceptions about the police without substantially improving police practices.”).

¹⁵ Of course, the prosecutorial reform movement is not merely liberal. Its scope is wide: “It has roots in civil rights history, the Black Lives Matter campaign against violence and racism, libertarian skepticism of government overreach, and conservative concerns about waste and spending.” BAZELON, *supra* note 3, at xxvii. However, I focus on liberals here because of their history of advocating against prosecutorial power, mass incarceration, and racial injustice. Moreover, I interpret liberalism in the “philosophical sense that encompasses a group of related” social and political doctrines. SAMUEL FREEMAN, *LIBERALISM AND DISTRIBUTIVE JUSTICE* 2 (2018) (discussing the history of liberal theory). Since I am more interested in the moral underpinnings of the issues and less interested in the economic rationale, my focus is not so much on advocates for reform based on the financial burden of mass incarceration and racial injustice. Indeed, given that the movement to reform prosecutors is often viewed as heterogeneous, it is more vulnerable to overlooking professed liberal goals—such as racial justice—that are not politically viable.

¹⁶ Butler, *Limits of Criminal Justice Reform*, *supra* note 14, at 1425 (discussing examples of problems exacerbated by reform efforts). Among the situations that Butler describes are how “procedural protections for defendants led to harsher sentencing laws”; how “advocating

point out some of the assumptions of the progressive prosecution movement and indicate some of the areas where it is susceptible to a fate resembling past reform efforts.

In Part I, I briefly describe what I take to be the rationale behind reformists' support of progressive prosecutors. In Part II, I examine the assumption that prosecutors have unilateral power to change the system and show why this is based on a mistaken view of prosecutorial power. Rather than possessing the unilateral power to control the system, prosecutors possess a contingent power that depends on other officials deferring to their actions. In Part III, I address a second assumption—that black Americans will be the primary beneficiaries of the policies advanced by progressive prosecutors—and explain why it is problematic. The difficulty is not simply aiming to reduce mass incarceration by attending to the disparities that currently exist in the system. Instead, progressive prosecutors ought to develop a decarceration program that actively seeks to advance racial justice and avoids asymmetrically harming our most vulnerable populations. I explain how ignoring the complex problems of marginalized communities could exacerbate, not alleviate, the racial injustice in our society. I conclude with some thoughts about moving forward. To start, though, let's see how we ended up here in the first place.

I. RETHINKING PROSECUTORIAL POWER

Many say the American system of prosecution is in urgent need of reform.¹⁷ But what type of reform are we after? Conventional critiques sought to limit prosecutorial discretion and point out its anomalous position in our scheme of limited government.¹⁸ Sometimes the critique was made by comparison. When assessing prosecutorial power in relation to other powerful criminal justice officials, for example, scholars have been straightforward in their assessment: "No government official in America has as much unreviewable power and discretion as the prosecutor."¹⁹ This point

for race neutral policies" led to increasing race disparities; and how the Supreme Court's affirmation of the right to counsel for indigent persons accused of felonies legitimized mass incarceration. *Id.*

¹⁷ Sklansky, *Prosecutorial Power*, *supra* note 5, at 510 ("American prosecutorial agencies have long seemed, to most scholars, in urgent need of reform.").

¹⁸ See *id.* at 510–11 (discussing scholarly attacks on prosecutors since the mid-twentieth century).

¹⁹ Stephanos Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009); see also Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998) [hereinafter Davis, *Prosecution and Race*] (footnotes omitted) ("[Prosecutorial] discretion, which is almost

was typically buttressed by appealing to the public's ignorance of what goes on in prosecutors' offices. "Unlike judges," David Sklansky points out, "prosecutors generally do not announce the grounds for their decisions."²⁰ "And unlike the police," he continues, "prosecutors carry out most of their work behind closed doors."²¹ Our system has observable metrics to keep judges and police accountable for their decisions, but "[w]e have nothing like that for prosecutors."²²

This lack of accountability might not be worrisome if prosecutors were thought to have minimal power. But the prosecutor has long been thought to have "more control over life, liberty, and reputation than any other person in America."²³ As former United States Attorney General Robert H. Jackson put it eighty years ago:

[A prosecutor] can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.²⁴

Scholars still share Jackson's view of prosecutors.²⁵ But until a few years ago, reformists were less likely to echo Jackson's sentiment that this power could be used as a "beneficent force" in our society. Given widespread dissatisfaction with the criminal justice system, prosecutorial power is instead consistently viewed as the cause of all our problems. For instance, some scholars complain that "prosecutors have ended up with almost unfettered, unreviewable power to determine who gets sent to prison and for

always exercised in private, gives prosecutors more power than any other criminal justice officials, with practically no corresponding accountability to the public they serve.").

²⁰ Sklansky, *Prosecutorial Power*, *supra* note 5, at 474.

²¹ *Id.*

²² *Id.* at 475.

²³ Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

²⁴ *Id.*

²⁵ See Sklansky, *Prosecutorial Power*, *supra* note 5, at 483 (noting that Jackson's explanation "is the way prosecutorial power is usually described").

how long.”²⁶ Others describe their ability as “the power to wreck lives, to put people on trial, and to lock them up—in short, to create dire outcomes.”²⁷ And Professor Paul Butler—who previously served as a prosecutor²⁸—has explicitly rejected the notion that “good people” should become prosecutors.²⁹ These sorts of statements caused one scholar to claim that “[p]rosecutors are the Darth Vader of academic writing: mysterious, powerful[,] and, for the most part, bad.”³⁰

A. PROSECUTORIAL ACCOUNTABILITY

Faced with this view of prosecutorial power, David Sklansky has explained that reformists have traditionally reacted by pursuing two paths.³¹ The first was to reduce prosecutors’ power by making them more accountable to the public.³² If part of the problem is the public’s ignorance about what goes on in prosecutors’ offices, then more transparency would allow us to keep prosecutors accountable in the same way we hold other officials accountable. But some worry that this approach would over-politicize prosecutors’ actions.³³ Because of the nature of the office, prosecutors perform many activities that we may think ought to be immune from the

²⁶ JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 70 (2017).

²⁷ Sklansky, *Prosecutorial Power*, *supra* note 5, at 483 (footnote omitted).

²⁸ See Paul Butler, GEO. L., <https://www.law.georgetown.edu/faculty/paul-butler/> [<https://perma.cc/6QQS-8FLA>] (“Prior to joining the academy, Professor Butler served as a federal prosecutor with the U.S. Department of Justice, where his specialty was public corruption.”).

²⁹ PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 20 (2009); *see also* Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 400 (2001) (“I am saying to those who are committed to social and racial justice: Please don’t join a prosecutor’s office.”); Abbe Smith, *Good Person, Good Prosecutor in 2018*, 87 FORDHAM L. REV. ONLINE 3, 7 (2018) (“I would like to believe that good, well-intentioned people who become prosecutors could bring justice back to the criminal justice system in 2018. But I doubt it.”). *But see* Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. L. 411, 421 (2019) [hereinafter Smith, “*The Prosecutors I Like*”] (“[M]y hope is that Larry Krasner becomes a national leader. To my prosecution-minded students, I say, *By all means go to Philly.*”).

³⁰ Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018) [hereinafter Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*].

³¹ Sklansky, *Prosecutorial Power*, *supra* note 5, at 513.

³² *Id.*; *see also* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 298 (2011) (“The conduct of local prosecutors needs to change as well. Two changes are crucial: criminal prosecutions need to become more transparent, and they also must be made more locally democratic.”).

³³ See Sklansky, *Prosecutorial Power*, *supra* note 5, at 518–19.

political process.³⁴ In this spirit, the second path pursued was to make prosecutors more accountable *to the law*.³⁵ To do this, reformists suggested increased prosecutorial oversight performed by outside parties like judges or disciplinary committees.³⁶ In this way, prosecutors could be held accountable while simultaneously insulating them from politics.³⁷

Neither path was successful. “Indeed, what has changed, if anything, is that prosecutors now have even more power.”³⁸ It’s as though efforts to reform prosecutors’ offices were not just unsuccessful; they were counterproductive. This counterproductivity likely deterred efforts to continue pursuing either of these paths to reduce prosecutorial power. And the apparently undeterable power of prosecutors substantially supported declarations that “the prosecutor *is* the criminal justice system.”³⁹

B. LEVERAGING PROSECUTORIAL POWER FOR REFORM

No wonder, then, that reformists have taken an “if you can’t beat them, join them” mentality towards prosecutors. Recent efforts by reformists dissatisfied with the criminal justice system involve pursuing a third path: they focus not so much on reducing the power of prosecutors, but instead on leveraging that power and helping those who are sympathetic to their agenda win elections.⁴⁰ Since “[m]uch of what is wrong with American criminal justice—its racial inequity, its excessive severity, its propensity for error—is increasingly blamed on prosecutors,”⁴¹ it makes sense to expect prosecutors to get us out of this mess. The rationale is that where the traditional prosecutor has used her power to “aggressively pursue charges in as many cases as possible, seek high cash bail, and advocate for lengthy prison

³⁴ See *id.* at 518 (“[C]andor might make it harder for prosecutors to carry out some of their work as intermediaries.”).

³⁵ *Id.* at 513.

³⁶ *Id.* at 512–13.

³⁷ *Id.* at 513 (describing this second path as “often . . . motivated in part by a desire to insulate prosecutors from politics”). Despite the attempt to use judicial oversight as a tool for prosecutorial reform, Sklansky notes, “[j]udicial review of charging decisions and plea bargains remain[ed] virtually nonexistent.” *Id.* at 515.

³⁸ Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 921 (2009); see also Sklansky, *Prosecutorial Power*, *supra* note 5, at 514–15.

³⁹ Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1415 (2010).

⁴⁰ Of course, Sklansky is aware of this third path. He discusses it in a subsequent essay while noting that “[d]istrict attorney races are going off script.” David A. Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 647 (2017) (documenting the recent election of progressive prosecutors).

⁴¹ Sklansky, *Prosecutorial Power*, *supra* note 5, at 474.

sentences,”⁴² the progressive prosecutor “instead could use her power and discretion to institute policies and practices that would reduce the incarceration rate and unwarranted racial disparities.”⁴³

Although the number of progressive prosecutors elected to office has been modest,⁴⁴ the support from reformists dissatisfied with the criminal justice system has been robust. In recognition of these changing times, the editorial board of the *New York Times* has claimed that “the best chance for continued reform lies with state and local prosecutors who are open to rethinking how they do their enormously influential jobs.”⁴⁵ The American Civil Liberties Union (ACLU), which does not officially endorse political candidates, played a role in helping Philadelphia District Attorney Larry Krasner get elected.⁴⁶ Color of Change, a PAC that focuses on African American civil rights, backed various progressive prosecutors across the country in 2018.⁴⁷ Black activists created a PAC with the purpose of helping “reform-minded” prosecutors win local elections.⁴⁸ And many prosecutors across the nation running on a progressive platform have received financial support from George Soros, who has been described as a billionaire “[c]riminal justice reform activist[].”⁴⁹ Indeed, even Supreme Court Justice Sonia Sotomayor, who the *New York Times* has described as “tak[ing] on the

⁴² Davis, *Reimagining Prosecution*, *supra* note 6, at 5.

⁴³ *Id.*

⁴⁴ See BAZELON, *supra* note 3, at xxix (“It’s not clear yet whether the movement to transform American prosecution will be equal to the challenge—whether it will spread beyond a few dozen D.A.’s offices, and thus impact incarceration on a national scale.”).

⁴⁵ Editorial Board, *A Wiser Generation of Prosecutors*, N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/2017/02/06/opinion/a-wiser-generation-of-prosecutors.html> [https://perma.cc/7HQU-MBQR].

⁴⁶ Benjamin Wallace-Wells, *The A.C.L.U. Is Getting Involved in Elections—and Reinventing Itself for the Trump Era*, NEW YORKER (June 8, 2018), <https://www.newyorker.com/news/news-desk/the-aclu-is-getting-involved-in-elections-and-reinventing-itself-for-the-trump-era> [https://perma.cc/QG6T-BQLU] (noting that the A.C.L.U. made a small investment in Philadelphia’s district attorney race by, among other things, helping to send formerly incarcerated persons door to door to discuss the brutality of prison).

⁴⁷ Christopher Connelly, *National Advocacy Groups Back Candidates to Challenge Local Prosecutors*, NPR (Apr. 10, 2018, 5:01 AM), <https://www.npr.org/2018/04/10/598440346/national-advocacy-groups-back-candidates-to-challenge-local-prosecutors> [https://perma.cc/FJX9-HDNX].

⁴⁸ Marans, *supra* note 1.

⁴⁹ Justin Jouvenal & Rachel Weiner, *Money from PAC Funded by George Soros Shakes Up Prosecutor Races in Northern Virginia*, WASH. POST (Apr. 24, 2019, 5:30 AM), https://www.washingtonpost.com/local/public-safety/money-from-pac-funded-by-george-soros-shakes-up-prosecutors-races-in-northern-virginia/2019/04/23/5c754d14-6513-11e9-a1b6-b29b90efa879_story.html [https://perma.cc/7D5Q-QE6L].

criminal justice system,”⁵⁰ has gotten in on the action by celebrating a recent progressive prosecutor elected in San Francisco.⁵¹ Thus, what we have are actors who have traditionally worked to make progressive changes to the criminal justice system instead looking to prosecutors to take charge in criminal justice reform efforts.

There’s a lot more to say here, but I’m not trying to provide a history of the movement. The point is to appreciate the motivation to advance a prosecutor-centered reform movement. Thus, I want to convey a quick sense of why reformists are so eager to get on board with a movement that appears inconsistent with their past efforts. And not much ink needs to be spilled to explain why: prosecutors’ power.

II. PROSECUTORIAL POWER: CONTINGENT, NOT UNILATERAL

A. EXAGGERATING PROSECUTORIAL POWER

This brings us to the first assumption: that prosecutors have unilateral power to change the criminal justice system. The progressive prosecution movement seems to rely on this assumption.⁵² And most reformists endorse the proposition that prosecutors “answer to no one else and make most of the key decisions in the case.”⁵³ Thus, reformists say things like, “[t]he power of the D.A. makes him or her the actor—the only actor—who can start to fix what’s broken without changing a single law.”⁵⁴ The thought is that if prosecutors *are* the criminal justice system, then once a reform-minded prosecutor takes office “the system’s injustices should melt away.”⁵⁵

This is understandable—to a point. The idea is based on closely related, commonplace exaggerations of prosecutorial power. If the various quotes above failed to convey this point, here’s the essayist Adam Gopnik: “[Prosecutors] really hold all the effective power, reporting to no one save

⁵⁰ Adam Liptak, *In Dissents, Sonia Sotomayor Takes On the Criminal Justice System*, N.Y. TIMES (July 4, 2016), <https://www.nytimes.com/2016/07/05/us/politics/in-dissents-sonia-sotomayor-takes-on-the-criminal-justice-system.html> [https://perma.cc/L982-VJ44].

⁵¹ Mark Joseph Stern, *Sonia Sotomayor Celebrates San Francisco’s New Progressive District Attorney*, SLATE (Jan. 9, 2020, 7:12 PM), <https://slate.com/news-and-politics/2020/01/chesa-boudin-sonia-sotomayor-san-francisco-district-attorney.html> [https://perma.cc/XL4G-WC2A].

⁵² See *supra* notes 1–6 and accompanying text.

⁵³ BAZELON, *supra* note 3, at xxvi.

⁵⁴ *Id.* at xxvii.

⁵⁵ Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 174–75 (2019) [hereinafter Bellin, *The Power of Prosecutors*].

God, or their own ambition.”⁵⁶ Here’s Professor Josh Gupta-Kagan: “Prosecutors are the ‘Leviathan’ in our criminal justice system.”⁵⁷ And here’s Judge Jed S. Rakoff, himself a former prosecutor, speaking somewhat begrudgingly: “[F]or the immediate future at least, prosecutors, rather than judges, will be the real rulers of the American criminal justice system.”⁵⁸ There is no shortage of claims like this from commentators.⁵⁹ And the consensus on this point has led one scholar to conclude that “[n]o serious observer disputes that prosecutors drive sentencing and hold most of the power in the United States criminal justice system.”⁶⁰

B. THE CONTINGENT POWER OF PROSECUTORS

Well, let’s be unserious observers for the moment. Sometimes we have to play the role of a “weirdo or an eccentric” to conduct a thorough examination of issues.⁶¹ The topic I want to focus on here is whether reformists are right to think prosecutors have the ability to independently create the sort of reform they seek. But before we get there, note that the view that prosecutors do not hold most of the power in the criminal justice system is not so weird. Since contact with other officials in the criminal justice system is often procedurally antecedent to prosecutors, it makes intuitive sense that these other officials hold more power than prosecutors. For example, police are “first movers” who typically have to make a decision before prosecutors get involved.⁶² And legislatures could prevent cases from

⁵⁶ Adam Gopnik, *How We Misunderstand Mass Incarceration*, NEW YORKER (Apr. 10, 2017), <https://www.newyorker.com/magazine/2017/04/10/how-we-misunderstand-mass-incarceration> [https://perma.cc/HPX6-4PNQ].

⁵⁷ Josh Gupta-Kagan, *Rethinking Family-Court Prosecutors: Elected and Agency Prosecutors and Prosecutorial Discretion in Juvenile Delinquency and Child Protection Cases*, 85 U. CHI. L. REV. 743, 757 (2018).

⁵⁸ Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System—and What Can Be Done About It*, 111 NW. U. L. REV. 1429, 1436 (2017).

⁵⁹ For a very impressive list of broad assertions about prosecutor’s power, discretion, and primacy, see Bellin, *The Power of Prosecutors*, *supra* note 55, at 176–211 (pointing out the oversimplified claims about prosecutorial power).

⁶⁰ Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should the Prosecutors Control the Jails?*, 51 WAKE FOREST L. REV. 677, 677–78 (2016). The one exception that Gershowitz noted as not sharing this view was the United States Supreme Court. *See id.* at 678 n.6 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978)) (noting that prosecutors and defense attorneys “arguably possess relatively equal bargaining power”).

⁶¹ JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS OF LOCKE’S POLITICAL THOUGHT 4 (2002) (“In philosophy generally one sometimes has to pretend to be a weirdo; one has to pretend to take seriously the possibility that the sun will not rise tomorrow in order to address problems like induction, causation, the regularity of nature, and the reality of the external world.”).

⁶² Bellin, *The Power of Prosecutors*, *supra* note 55, at 191–92.

falling on prosecutors' desks by decriminalizing conduct.⁶³ Indeed, even Jackson's account⁶⁴ of prosecutorial power was contingent on prosecutors' ability to make recommendations that others—police, juries, judges, and parole boards—follow.⁶⁵ Ordering arrests, presenting cases to the grand jury, one-sided presentation of facts, and recommending sentences do not mean anything if other criminal justice actors do not respond. “[P]rosecutor[s] get[] law enforcement officers to investigate, magistrates to issue warrants, grand juries to indict, defendants to plead guilty (or, if necessary, trial juries to convict), and judges to imprison.”⁶⁶ So, although it is often assumed that prosecutors have unilateral power,⁶⁷ “when you think about it, pretty much everything a prosecutor does is done through others.”⁶⁸ Rather than viewing prosecutors as having unilateral power to affect mass incarceration and racial justice, it instead appears that prosecutors have a *contingent power*—that is, one that is dependent on other criminal justice officials assisting them in attaining their goals.

Does it follow that prosecutors do not “hold most of the power in the United States criminal justice system?”⁶⁹ It depends. “Power” is a notoriously elusive concept, and there is no consensus on how best to define it.⁷⁰ Statements about prosecutorial power are often lumped together in a way that makes it unclear whether scholars are discussing prosecutorial discretion (the decision not to exercise control), prosecutorial influence (the capacity to influence other officials), or prosecutorial primacy (the power prosecutors have relative to other officials). Indeed, sometimes scholars make no effort

⁶³ *Id.* at 198–203.

⁶⁴ See Jackson, *supra* note 23 and accompanying text.

⁶⁵ See Sklansky, *Prosecutorial Power*, *supra* note 5, at 483 (citing Jackson, *supra* note 23, at 3); see also David Garland, *The Road to Ending Mass Incarceration Goes Through the DA's Office*, AM. PROSPECT (Apr. 8, 2019), <https://prospect.org/justice/road-ending-mass-incarceration-goes-da-s-office/> [https://perma.cc/R776-CX3T] (“Prosecutors bring charges, propose bail, shape plea deals, and specify penalties with little effective resistance from defense attorneys, grand juries, or judges.”).

⁶⁶ Sklansky, *Prosecutorial Power*, *supra* note 5, at 483.

⁶⁷ See, e.g., Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 28 (2009) (describing “[t]he executive's power to make all prosecutorial decisions unilaterally”); Sklansky, *Prosecutorial Power*, *supra* note 5, at 488 (“Concerns about prosecutorial discretion are concerns about the ability of individual prosecutors, or their offices, to exercise their power unilaterally, without checks by other government officials.”); Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUST. 1, 6 (“[The] enormous power [of] prosecutors . . . is tantamount to unilateral power over sentencing.”).

⁶⁸ Sklansky, *Prosecutorial Power*, *supra* note 5, at 483.

⁶⁹ See Gershowitz, *supra* note 60 and accompanying text.

⁷⁰ Sklansky, *Prosecutorial Power*, *supra* note 5, at 482.

whatsoever to be clear about what they are referring to when they are discussing prosecutorial power, stating things such as: “prosecutors have awesome powers.”⁷¹ This lack of clarity is problematic for any reform movement dependent on prosecutorial power. This is especially true where “[r]eformers assign prosecutors the awesome task of unilaterally reversing the actions of other criminal justice actors.”⁷² A progressive prosecution movement that incorrectly depicts prosecutorial power is bound to fail. But a recognition of prosecutors’ contingent power forces us to recognize the other officials that enable this prosecutorial power.

C. ANOTHER LOOK AT PROSECUTORIAL POWER

This last thought could be developed in a few ways. One view calls out scholars for their lack of precision and shows why the contingency feature of prosecutorial power makes prosecutors the least—not most—promising sources of reform. This view reassesses the story about prosecutorial power that is plaguing the legal academy and provides an explanation for why prosecutors are not the true causes of mass incarceration.⁷³ It then explains how legislatures, police, and judges are more powerful than prosecutors, and it contends that those inclined towards reform may realize the best solution would be to target those other officials, not prosecutors.

In a recent set of articles, Jeffrey Bellin has propounded just such a view.⁷⁴ Bellin writes that “a flawed academic consensus enabled by a puzzling lack of dissent,” led to “today’s prosecutorial-power rhetoric [that] is, upon close examination, frustratingly incoherent.”⁷⁵ “This blinkered approach,” Bellin claims, “overlooks the powerful forces that can and do constrain prosecutors and diverts attention from the most promising sources of lasting reform, like legislators, judges, and police, to the least.”⁷⁶ Rather than being the drivers of mass incarceration, “[a]ll prosecutors can do by

⁷¹ H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 54 (2013).

⁷² Bellin, *The Power of Prosecutors*, *supra* note 55, at 175.

⁷³ *Contra* PFAFF, *supra* note 26, at 127–59 (discussing prosecutors’ role in mass incarceration).

⁷⁴ See generally Jeffrey Bellin, *Theories of Prosecution*, 108 CAL. L. REV. 1203 (2020) [hereinafter Bellin, *Theories of Prosecution*] (advancing a theory of prosecution that shifts the perception of the prosecutorial role from an “advocate of justice” to a “servant of the law”); Bellin, *The Power of Prosecutors*, *supra* note 55, at 187–203 (arguing prosecutors are not the most powerful actors in the criminal justice system); Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, *supra* note 30, at 838 (critiquing the “caricature of prosecutors that pervades the legal academy”).

⁷⁵ Bellin, *The Power of Prosecutors*, *supra* note 55, at 174.

⁷⁶ *Id.* at 212.

themselves is let people off—a tactic that does not lend itself to filling prisons.”⁷⁷ Mirroring Jackson’s recognition from eighty years ago, Bellin writes that “[a] prosecutor cannot put anyone in prison without the direct assistance of legislators, police, and judges, and the indirect acquiescence of governors, parole boards, and grand and petit juries.”⁷⁸ Therefore, Bellin concludes, “[c]ontrary to the consensus, prosecutors are not the most powerful actors in the criminal justice system.”⁷⁹ Rather than being the leaders of our reform efforts, “[p]rosecutors, for the most part, dutifully implement the[] commands” of other officials.⁸⁰ “Reforms that myopically focus on prosecutors who ‘rule the system’ overlook that dynamic, jeopardizing their long-term efficacy.”⁸¹ The lesson to take, then, is that prosecutors are the wrong targets for a criminal justice reform project. Instead of following the popular recommendations of looking to prosecutors to lead reform, Bellin suggests that reformers should not be discouraged from “the more natural focus on decriminalization and sentencing reform”⁸² and should use their resources to concentrate on the traditional targets of criminal justice reform: legislators, police, and judges.⁸³

I don’t want to make too much of this argument. Bellin’s work should be applauded for highlighting the lack of precision in which scholars discuss prosecutorial power and disclosing the caricature of prosecutors that plagues the legal academy. But he reaches conclusions about prosecutorial power using questionable methods and covertly sets up his analysis in a way that is unfavorable to assessing prosecutors’ contingent power. For starters, Bellin grounds his analysis on Max Weber’s theory of power, which views power as “the probability that one actor within a social relationship will be in a position to carry out his own will despite resistance.”⁸⁴ This stacks the deck against the contingent power prosecutors possess, which is inherently derived from the assistance of others. A more charitable assessment of prosecutorial

⁷⁷ Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, *supra* note 30, at 857.

⁷⁸ *Id.*

⁷⁹ *Id.* at 845.

⁸⁰ Bellin, *The Power of Prosecutors*, *supra* note 55, at 200.

⁸¹ *Id.* at 211.

⁸² Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, *supra* note 30, at 853.

⁸³ See Bellin, *The Power of Prosecutors*, *supra* note 55, at 174–75 (reporting that misunderstandings about prosecutorial preeminence have inspired “criminal justice reformers [to] divert energy and resources from traditional targets (legislatures and judges) to local district attorney elections”).

⁸⁴ *Id.* at 175 (quoting MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 53 (1956)).

power would instead proceed under a theory of “social power” (“the ability of an actor deliberately to change the incentive structure of another actor or actors to bring about, or help bring about outcomes”),⁸⁵ or “outcome power” (“the ability of an actor to bring about or help to bring about outcomes”).⁸⁶ Indeed, since social power is sometimes described as the “standard theory of power,”⁸⁷ it would make obvious sense that many scholars have this theory in mind when they are referring to prosecutorial power—not Weber’s theory.

In addition, Bellin overlooks that line prosecutors are beholden to the lead prosecutor in a way that individual legislators and judges are not. When arguing that prosecutors have less power than other officials, Bellin’s analysis focuses on how these officials act collectively. As he puts it, “[i]f a claim of prosecutorial power depends on the actions of all prosecutors in a given jurisdiction, the equivalent comparison is to all of that jurisdiction’s police, judges, or legislators.”⁸⁸ But this point fails to appreciate that line prosecutors have an obligation to advance the policies of the elected prosecutor. Individual judges and legislators, on the other hand, operate with a certain level of independence. Thus, when analyzing whether reformists should focus on electing prosecutors, it may be more accurate to assess prosecutorial primacy by comparing how much power these elected officials will have relative to other officials operating individually in the criminal justice system—not as a collective.⁸⁹

Finally, Bellin sometimes overvalues the role that judges may have in decreasing the problems of the criminal justice system. This is perhaps most clear when Bellin analyzes John Pfaff’s hypothetical about “[a] drug-

⁸⁵ KEITH DOWDING, RATIONAL CHOICE AND POLITICAL POWER 48 (1991); Sklansky, *Prosecutorial Power*, *supra* note 5, at 483 n.55.

⁸⁶ DOWDING, *supra* note 85, at 48; Sklansky, *Prosecutorial Power*, *supra* note 5, at 483 n.55.

⁸⁷ John C. Turner, *Explaining the Nature of Power: A Three-Process Theory*, 35 EUR. J. SOC. PSYCHOL. 1, 2 (2005); Sklansky, *Prosecutorial Power*, *supra* note 5, at 483 n.55.

⁸⁸ Bellin, *The Power of Prosecutors*, *supra* note 55, at 189.

⁸⁹ Two points are worth noting here. First, Bellin’s argument would still hold when considering the power that a police chief of a jurisdiction has in comparison to the power an elected prosecutor has in the jurisdiction. Second, although judges are not beholden to any individual judge (as line prosecutors are), it could be argued that lower court judges are, in some way, beholden to the decisions of the higher court. That is, one could argue that trial and intermediate appellate courts are beholden to the supreme court of a jurisdiction. Still, the supreme courts are going to be comprised of multiple judges (or justices) and not an individual official that must be followed. In addition, given that appellate court opinions often leave room for interpretation, these opinions are unlikely to operate as a significant restraint on lower court judges.

addicted twenty-year-old arrested for the first time and accused of stealing a laptop.”⁹⁰ Pfaff poses the quandary as follows:

A second-year prosecutor, just a few years out of law school, is handed a case involving a drug-addicted twenty-year-old arrested for the first time and accused of stealing a laptop to sell for drug money. Does the prosecutor charge this as a felony or a misdemeanor? Does he require the defendant to plead guilty but divert him to a drug court for treatment? Should he decline to charge at all as long as the defendant enters drug treatment outside the criminal justice system? The array of choices available to a prosecutor at the start of a case is dizzying in its complexity, and there are so many ways—both in terms of excess severity and leniency—for the prosecutor to get it wrong.⁹¹

Denying that prosecutorial leniency is an adequate solution, Bellin criticizes the recommendation for “prosecutors to circumvent felony-theft laws (and judges aching to impose prison terms) by charging theft defendants with loitering.”⁹² He instead insists that a better alternative would be to “convince judges who impose theft sentences to recognize that a prison term is unwarranted.”⁹³

Although Bellin’s resolution may be more honest, it does not address the fact that Pfaff’s defendant would still have a felony on his record even if he were to avoid incarceration. In the long run, this may reduce his chances of employment, extend the time he is under the state’s control, and increase the chance he would end up incarcerated later on.⁹⁴ It may be better, then, for reformists to advance policies that do not rely significantly on judges, whose options are often limited.⁹⁵ Reformists may want to intervene before the case gets to a judge.

⁹⁰ Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, *supra* note 30, at 853 (quoting PFAFF, *supra* note 26, at 212–13).

⁹¹ PFAFF, *supra* note 26, at 212–13.

⁹² Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, *supra* note 30, at 855.

⁹³ *Id.*

⁹⁴ For a general account of the consequences that a felony may have on one’s life, see MICHELLE ALEXANDER, THE NEW JIM CROW 137–72 (2010) (discussing collateral consequences of incarceration).

⁹⁵ To a certain extent, even Bellin seems to recognize this. He notes that “[t]he best way” to avoid the disastrous outcome is to have the legislature “raise the statutory threshold for felony theft.” Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, *supra* note 30, at 855. This option, of course, takes effect before a judge or prosecutor gets their hands on a case. For a description of how judges try to utilize their power when the case is finally before them, see Stephanie Clifford, *From the Bench, a New Look at Punishment*, N.Y. TIMES (Aug. 26, 2015), <https://www.nytimes.com/2015/08/27/nyregion/from-the-bench-a-new-look-at-punishment.html> [<https://perma.cc/T4RB-XG47>] (“[A]cross the country, some judges are refashioning sentences, asking prosecutors to drop cases that

For these reasons, I think Bellin overstates his conclusion about prosecutorial power and how it relates to the power of other officials. But I will not dwell on that here. My goal is not to get into the “murky business” of defining power.⁹⁶ And it is less important for me to examine whether prosecutors have the most power in our system than it is to understand how their power can be utilized to assist reform. Even in his most skeptical moments, Bellin notes that “[p]rosecutors are not powerless” and that “virtually every criminal justice outcome can be traced to a prosecutor’s decision.”⁹⁷ And those advocating reform often recognize that prosecutorial reform is merely a shortcut to addressing the problems of the criminal justice system.⁹⁸ As Emily Bazelon states, “[i]t’s still important to persuade legislators to change the laws, elevate judges who care about fairness, and create the conditions for first-rate defense work.”⁹⁹ However, “we can stop caging people needlessly right now if we choose prosecutors who will open the locks.”¹⁰⁰ Thus, considerations of prosecutors’ primacy aside, it seems that many scholars would agree with Bellin’s assertion that “it takes a village to incarcerate someone.”¹⁰¹ Even if prosecutors are “the engines driving mass incarceration,”¹⁰² there are certainly other important parts of the vehicle.

D. PROSECUTORS AND OTHER CRIMINAL JUSTICE OFFICIALS

Still, I want to suggest there is something to worry about here. I noted earlier that the contingent power of prosecutors is often obscured by statements espousing prosecutorial dominance. And exactly who has the most power in the criminal justice system is a tricky matter that we need not get into. As I see it, however, what has the potential to undercut a progressive prosecution movement is misleading rhetoric that suggests other actors are

judges see as unfair, considering how to reduce the long-term impact of old convictions, and writing essays advocating change.”).

⁹⁶ Turner, *supra* note 87, at 5 (“Defining power has long been a murky business.”).

⁹⁷ Bellin, *The Power of Prosecutors*, *supra* note 55, at 212.

⁹⁸ See, e.g., BAZELON, *supra* note 3, at xxxi (“While it would be nice if lawmakers and the courts threw themselves into fixing the criminal justice system, in the meantime, elections for prosecutors represent a shortcut to addressing a lot of dysfunction.”).

⁹⁹ *Id.* at xxx–xxx. Indeed, even President Obama’s proposal doesn’t depend entirely on electing prosecutors. He also recommends that those concerned with the criminal justice system vote “for mayors and sheriffs and state legislators.” *Obama’s Full Speech*, *supra* note 4 and accompanying text.

¹⁰⁰ BAZELON, *supra* note 3, at xxxi (emphasis omitted). In this sense, Bazelon appears to be in agreement with Bellin’s observation that “[i]t is hard to change a system, but easy to elect a local prosecutor.” Bellin, *The Power of Prosecutors*, *supra* note 55, at 174.

¹⁰¹ Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, *supra* note 30, at 837.

¹⁰² PFAFF, *supra* note 26, at 206.

not integral to a project of criminal justice reform. Even if it were true that prosecutors possess most of the power in the criminal justice system, the power given to prosecutors is not accidental—it's deliberate. When other officials share a common goal with prosecutors, it often makes sense for them to give control to prosecutors and permit prosecutorial decision making to happen in the shadows. Because of their unique position in our system, deferring to prosecutors is often cheap, efficient, and presents an image of legitimacy. For these reasons, legislatures are willing to accommodate prosecutors because expansive penal codes containing laws that are rarely enforced make crime control inexpensive.¹⁰³ Judges are willing to accommodate prosecutors and permit broad plea-bargaining discretion so they can manage large caseloads and rapidly secure convictions.¹⁰⁴ And the police are willing to accommodate prosecutors because, unlike most police officers, prosecutors are formally trained in law and could reasonably detect legal and evidentiary flaws that preclude prosecution and present the appearance that their decisions are legally sound.¹⁰⁵ With the “tough on crime” agenda that prosecutors have traditionally pursued, it simply makes no sense for other officials not to defer to them. No harm, no foul.

Now shift the settings. A progressive prosecutor disagrees with the ways in which police officers stop and harass young black men in an effort to detect public gun carrying.¹⁰⁶ As a result, the prosecutor dismisses various cases¹⁰⁷ to deter the police actions. If the police commissioner opposes the prosecutor and determines public safety requires a continuance of this program, it is unlikely that the police commissioner would defer to prosecutors. Instead, what we would likely see is continued harassment of these individuals on the streets, even if they are not ultimately convicted of a crime.¹⁰⁸ Indeed, one of these interactions may even lead to a police officer unilaterally shooting

¹⁰³ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 551 (2001) (“Broadening criminal liability and raising nominal sentences make prosecution cheaper.”).

¹⁰⁴ Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455, 1484 (2017).

¹⁰⁵ Bellin, *Theories of Prosecution*, *supra* note 74, at 1246–47.

¹⁰⁶ This is an altered example of Bellin’s depiction of the NYPD’s stop-and-frisk policy in New York City from 2003–2013. See Bellin, *The Power of Prosecutors*, *supra* note 55, at 193.

¹⁰⁷ Since these stops do not often end up in gun arrests, most of them would be minor. *Id.* (“As most of these stops did not uncover guns, the policing surge sent a wave of minor cases (subway fare evasion, trespassing, marijuana possession) to the courts. From the outset, prosecutors dismissed almost all of these cases, many of which would not stand up in court.”).

¹⁰⁸ In some cases, by sitting in jail waiting for court-ordered dismissal, a defendant would receive a similar punishment as they would have received had they been sanctioned for the minor crime. Bellin, *The Power of Prosecutors*, *supra* note 55, at 199.

someone dead on the street. Although progressive prosecutors may reduce the rate at which people are sentenced, without compliance from police officers the movement may not do much to change the everyday racial mistreatment encountered by persons outside of the courtroom.

Or, consider a situation where legislatures decide not to defer to prosecutors. They may reduce prosecutor offices' budgets, reduce the discretion that prosecutors have in cases, or even—following what is done in several jurisdictions—permit police officers to litigate cases themselves.¹⁰⁹ Further, a legislature dissatisfied with the way a local prosecutor's office is handling cases could follow Pennsylvania's example and give the State Attorney General's office concurrent jurisdiction over those cases.¹¹⁰ Similarly, a governor may reassign cases from a progressive prosecutor's office to another office that is not so progressive.¹¹¹ And the DOJ—which is staffed via presidential appointment—could pursue federal charges against offenders who would ordinarily be prosecuted locally. The real issue with treating prosecutorial power as unilateral is that it fails to realize the ways other officials are able to diminish the power of prosecutors when they refuse to defer. The power to create the problems does not entail the power to fix them.

Thus, statements such as “prosecutors are the most powerful and the most unregulated participants in the U.S. legal system”¹¹² are not problematic

¹⁰⁹ *Id.*; see also Alexandra Natapoff, Opinion, *When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26, 2018), <https://www.nytimes.com/2018/12/26/opinion/police-prosecutors-misdemeanors.html> [<https://perma.cc/G83X-PU4A>] (“In hundreds of misdemeanor courts in at least 14 states, police officers can file criminal charges and handle court cases, acting as prosecutor as well as witness and negotiator.”).

¹¹⁰ See Michael Tanenbaum, *New Law Gives Pa. Attorney General Power to Prosecute Gun Cases Dropped by Philly District Attorney Larry Krasner*, PHILLYVOICE (July 9, 2019), <https://www.phillyvoice.com/larry-krasner-philadelphia-act-58-pennsylvania-gun-cases-fop-shapiro/> [<https://perma.cc/9Y64-6W98>] (describing a recent bill that gave the Pennsylvania Attorney General's office concurrent jurisdiction over gun offenses in Philadelphia, which expires just after the completion of Larry Krasner's first term); see also Smith, *The Prosecutors I Like*, *supra* note 29, at 418 (“[T]he 30-plus ‘bad’ prosecutors Krasner got rid of in Philadelphia have been snapped up by other nearby DA offices.”).

¹¹¹ See Bellin, *The Power of Prosecutors*, *supra* note 55, at 199 (discussing the Florida governor's decision to invoke a statute allowing him to “reassign cases for ‘good and sufficient reason,’ and sen[d] Orlando's death-eligible cases to a hand-picked prosecutor in another jurisdiction”).

¹¹² Paul Butler, *Prosecutors' Role in Causing—and Solving—the Problem of Mass Incarceration*, WASH. POST (Apr. 19, 2019, 11:38 AM), https://www.washingtonpost.com/outlook/prosecutors-role-in-causing--and-solving--the-problem-of-mass-incarceration/2019/04/19/d370d844-5c93-11e9-a00e-050dc7b82693_story.html [<https://perma.cc/CQ77-WVSR>].

because they assume prosecutorial primacy.¹¹³ Rather, the depiction of prosecutorial power as unregulated misstates its contingent nature and risks grounding reform on principles that overlook how progressive prosecutors' efforts could be thwarted by other criminal justice officials. If the progressive prosecution movement is to be successful, it cannot assume that the prosecutor *is* the criminal justice system. It must recognize the contingency of prosecutorial power and the interdependency of various officials in the criminal justice system.¹¹⁴

¹¹³ Indeed, whether prosecutors are the most powerful actor in the criminal justice system may be unimportant when advancing an agenda that requires compliance from multiple actors that do not have to defer to prosecutors. When analyzing prosecutorial power, reformists may be better advised to focus on what is referred to as “power-to” rather than “power-over.” *See* Archon Fung, *Four Levels of Power: A Conception to Enable Liberation*, 28 J. POL. PHIL. 131, 132–33 (2020) (discussing how a “power-to” analysis can enable liberation). Scholars’ disproportionate focus on the latter is understandable given the notion of “power” is often used to examine relationships that produce domination and subordination (Marxists focus on the domination of workers by capitalists; feminists focus on the domination of women by men, etc.). *Id.* at 131. And it is true that prosecutors seeking to decarcerate and pursue racially just policies can expect different kinds of resistance from other powerful actors. But the appropriate measure of progressive prosecutors’ power will be their capacity to achieve sustainable policy changes, not whether they get other criminal justice officials to bend to their will. *Cf. supra* notes 56–60 and accompanying text (discussing exaggerated claims about prosecutorial power that state prosecutors hold most, if not all, of the power in the criminal justice system and answer to no one). Perhaps even less important is whether another individual has a bigger impact on the criminal justice system when it remains the case that those officials with a lesser impact could thwart prosecutors’ efforts at reform. *Cf. supra* note 1 and accompanying text (discussing the claim that local district attorneys have the biggest impact on the criminal justice system). In an intricately interwoven system such as the current U.S. criminal justice system, trying to isolate an individual as the most powerful actor may prove to be a fruitless task for reformists.

¹¹⁴ It is worth distinguishing the contingent power discussed in this section from a trivial sense in which prosecutors depend on other criminal justice officials to achieve their goals. As with many complex organizations, the criminal justice system depends on many agents whose causal powers affect outcomes. Consider, for example, Bellin’s claim that “[a]ll prosecutors can do by themselves is let people off.” *See* Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, *supra* note 30, at 857. There is a sense in which prosecutors cannot even unilaterally “let people off.” The prosecutor may, for example, need the assistance of a sheriff or correctional officer to let someone out of jail; or they may need the assistance of the Clerk of Court to enter an order. Still, these types of causal powers should be distinguished from the legal powers that grant criminal justice officials the authority to frustrate the policies advanced by prosecutors. A judge who refuses to enter an order terminating someone’s probation early because she disagrees with the prosecutor’s assessment that probation is no longer necessary is merely exercising her discretion. *See* Samantha Melamed, *DA Larry Krasner Pitched Judges on Ending Philly’s Probation Addiction. Will They Go for It?*, PHILA. INQUIRER (updated Apr. 1, 2019), <https://www.inquirer.com/news/philly-da-larry-krasner-probation-criminal-justice-reform-20190401.html>

In summary, prosecutorial power is often exaggerated. The sort of power prosecutors possess is a contingent, not unilateral, power that relies on other officials. Although this contingent power appears boundless when other officials (who share a similar goal) defer to prosecutors, it is diminished when these officials challenge them. This, however, does not mean prosecutors are not, in fact, the most powerful officials in the criminal justice system. That assessment would depend on how we define power. Still, any useful understanding of power would recognize that the apparent power of prosecutors fluctuates based on other officials' willingness to submit to it.¹¹⁵ If the problem with the standard view is that it discourages our focus on the traditional targets (legislators, police, judges) of reform, the problem with Bellin's view is that it undervalues the role prosecutors themselves could play. Attention on prosecutors is critical because of their ability to "stop caging people needlessly *right now*,"¹¹⁶ the legitimacy based on their elected status, and the power they accumulated from other officials' decades-long deference that makes them appear as the "gatekeepers of America's justice system."¹¹⁷ The upshot of all this is that reformists should move beyond the assumption that prosecutorial power is unilateral and advance a goal that simultaneously targets all powerful criminal justice officials. A prosecutor with a tenuous relationship to other criminal justice officials (legislators, police, judges, parole boards, etc.) may not be as effective as one who has a

[<https://perma.cc/4K6U-A9UX>] (discussing Larry Krasner's letter to Philadelphia judges "asking them to give a break to people who've done well under probation or parole"). A Clerk of Court that refuses to enter an order for the same reason is simply not doing his job.

¹¹⁵ See 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://perma.cc/TM48-KZWP>] ("[Progressive prosecutors] vowed to change that system, but the system is fighting back. Powerful figures—including lawmakers, governors, police union leaders, fellow district attorneys and Trump administration officials—have been sharply critical, with some saying progressive prosecutors are improperly using their roles to decline charges and arguing that their policies will drive up crime rates."). Some scholars, however, have surprisingly suggested that prosecutorial power has remained relatively unchanged despite reform-minded prosecutors adopting a more progressive agenda that is less punitive and more critical of police. See, e.g., Sklansky, *Prosecutorial Power*, *supra* note 5, at 497–98 (footnote omitted) ("In a small but noteworthy number of recent cases, elected prosecutors made promises that not long ago might have been political suicide: less punitive policies, greater vigilance against wrongful convictions, or more scrutiny of the police. But neither prosecutorial power nor prosecutorial discretion has been significantly curtailed.").

¹¹⁶ See *supra* note 100 and accompanying text.

¹¹⁷ Marans, *supra* note 1.

strong relationship with them.¹¹⁸ The point is not that reformists should not continue to push for progressive prosecutors. The point is that reformists should appreciate the importance of other criminal justice officials as they continue to advance reform.

III: PROGRESSIVE PROSECUTION AND RACIAL JUSTICE

But let's not get ahead of ourselves. All of this talk about the power of progressive prosecutors is only helpful if the policies reformists advance are actually desirable. I now want to challenge a second assumption that advocates of progressive prosecution appear to hold:¹¹⁹ that black Americans would be the beneficiaries of the reform progressive prosecutors advance.

It is not hard to understand the idea behind the thought. If black Americans bear the biggest burden of our current broken system of criminal justice, it seems that black Americans would be the biggest beneficiaries of efforts to fix the system. But surely the picture is more complicated than that. Even if prosecutorial reform is successful (and other criminal justice officials comply with their policies), are the aims advanced by progressive prosecutors likely to right the racial wrongs of our criminal justice system?

I am doubtful. Many of the aims frequently articulated by progressive prosecutors appear to contain tools that are just as likely to exacerbate racial inequalities in our criminal justice system.¹²⁰ My goal here is to identify some

¹¹⁸ For this reason, the search for “progressive judges” seems apt. *See, e.g.*, Maura Ewing, *The Search for Progressive Judges*, ATLANTIC (May 17, 2019), <https://www.theatlantic.com/politics/archive/2019/05/progressive-prosecutors-judges/589222/> [https://perma.cc/7LBD-8KXC]. It is true that district attorneys are sometimes successful in their battles against judges. *See Commonwealth v. Webber*, No. SJ-2019-0366, 2019 WL 4263308, at *1 (Mass. Sept. 9, 2019) (District Attorney Rachel Rollins wins judgment against a judge who refused to accept the entry of a nolle prosequi.). But it often takes other judges to affirm those rights. *See id.* (decision by Supreme Judicial Court of Massachusetts overturning lower court judge).

¹¹⁹ *See supra* notes 1–5 and accompanying text; *see also* Davis, *Prosecution and Race*, *supra* note 19, at 17–18 (“Prosecutors, more than any other official[] in the system, have the power, discretion, and responsibility to remedy the discriminatory treatment of African Americans in the criminal justice process.”).

¹²⁰ This is not to say that all self-identified progressive prosecutors care about racial justice. The term “progressive prosecutor” is currently en vogue, and several (current and former) prosecutors identify as progressive prosecutors even when others are reluctant to give them the label. *See, e.g.*, Steven Greenhut, Opinion, *Kamala Harris Reimagines Herself as a ‘Progressive Prosecutor’*, ORANGE CTY. REG. (Jul. 5, 2019, 6:00 PM), [https://www.ocregister.com/2019/07/05/kamala-harris-reimagines-herself-as-a-progressive-prosecutor/..](https://www.ocregister.com/2019/07/05/kamala-harris-reimagines-herself-as-a-progressive-prosecutor/) Still, attention to alleviating the racial disparities is considered a guiding principle for progressive prosecutors. *See 21 Principles for the 21st Century Prosecutor*, BRENNAN CTR. FOR JUST. (December 2, 2018), <https://www.brennancenter.org/our-work/policy-solutions/21-principles-21st-century-prosecutor> [https://perma.cc/N2B8-NZRZ] (recommending that prosecutors

vulnerabilities of the policies espoused by progressive prosecutors, thereby helping the movement avoid similar traps as other reform movements.¹²¹ Although the issues below are not comprehensive, they raise important concerns to think about as the movement progresses. A survey of policies advanced by progressive prosecutors shows that prosecutorial reform may be counterproductive if reducing racial injustice in the criminal justice system is not explicitly part of the progressive prosecutor agenda. To avoid perpetuating the current racial wrongs of our criminal justice system, progressive prosecutors ought to develop a decarceration program that actively seeks to advance racial justice and avoids asymmetrically harming our most vulnerable populations.

A. DECARCERATION AND RACIAL JUSTICE

At first sight, it seems obvious that progressive prosecution would alleviate the racial injustice in our criminal justice system. “[T]here are unwarranted racial disparities at every step of the criminal process Black men are six times as likely to be incarcerated as white men, and Latino men are twice as likely to be incarcerated as white men.”¹²² In addition, for those born in 2001, the lifetime probability of incarceration for black boys is estimated to be 32%, for Latino boys it is 17%, and for white boys it is 6%.¹²³ And the decisions from prosecutors—from charging, to plea bargaining, to sentencing recommendations—“play a very significant role in contributing to mass incarceration and unwarranted racial disparities.”¹²⁴ Thus, it is natural to think, as Professor Angela J. Davis tells us, “just as the power and discretion of prosecutors have contributed to mass incarceration and racial disparities in the criminal justice system, that same power and discretion may be used to institute reforms to correct these injustices.”¹²⁵

But let’s think more about this. There are multiple layers that we must peel back to grasp what the progressive prosecution movement can and cannot do within its frequently articulated aims. First, we need to distinguish more clearly between when prosecutors are seeking to correct mass

make it part of their office’s mission to address racial disparities). And scholars appear to believe that it is central to the progressive prosecutor agenda. *See* Davis, *Reimagining Prosecution*, *supra* note 6, at 22 (“Progressive prosecutors are committed to reducing mass incarceration and racial disparities in the criminal justice system.”).

¹²¹ Butler, *Limits of Criminal Justice Reform*, *supra* note 14, at 1425.

¹²² Davis, *Reimagining Prosecution*, *supra* note 6, at 3.

¹²³ Adam Tooze, *Quantifying Incarceration*, JACOBIN (Nov. 1, 2017), <https://www.jacobinmag.com/2017/11/mass-incarceration-statistics-united-states> [https://perma.cc/FG66-8MB9].

¹²⁴ Davis, *Reimagining Prosecution*, *supra* note 6, at 4.

¹²⁵ *Id.* at 5.

incarceration and when they are seeking to correct racial injustice. Although there is some overlap between the two,¹²⁶ they also come apart. For example, one could implement policies that decarcerate the population without addressing any of the structural racism on which our criminal justice system is built. Indeed, as Professor Marie Gottschalk has pointed out, “[m]ajor decarcerations” in other countries “were the result of comprehensive changes in penal policy over the short term, not sustained attacks on structural problems and the root causes of crime.”¹²⁷ As mentioned above, one of the virtues of prosecutorial power is its potential for immediate change—prosecutors can stop needlessly incarcerating people “right now.”¹²⁸ Thus, although it is true that “mass incarceration is an abomination that has disproportionately harmed African Americans,” it may not follow that decarceration would disentangle the “carceral state” from “the racial DNA of the United States.”¹²⁹ While not easy, cutting the number of persons who are sent to jail and prison and reducing sentence lengths may be relatively straightforward.¹³⁰ But it may be much harder for prosecutors to correct the use of state punishment to control black people that has been part of this country’s identity for centuries.¹³¹ A prosecutorial reform movement should not assume that eliminating mass incarceration would eliminate the racial injustice embedded in the system.

The last point would not be too problematic if progressive prosecutors’ policies reduced mass incarceration while remaining neutral in its effect on

¹²⁶ See, e.g., ALEXANDER, *supra* note 94, at 2 (“As a criminal, you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesigned it.”); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 247 (2007) (“Racism is the state-sanctioned and/or extralegal production and exploitation of group-differentiated vulnerability to premature death. Prison expansion is a new iteration of this theme.”); MUHAMMAD, *supra* note 7, at 226–77 (explaining the “statistical link” between blackness and criminality); MICHAEL TONRY, PUNISHING RACE: A CONTINUING AMERICAN DILEMMA 26 (2011) (“Many features of the criminal justice system disproportionately hurt black Americans—racial profiling, the War on Drugs, bias and stereotyping—but the worst damage is done by excessive imprisonment.”).

¹²⁷ Marie Gottschalk, *America Needs a Third Reconstruction: The Problem of Mass Incarceration Is a Problem of High Inequality*, ATLANTIC (Sept. 18, 2015), <https://www.theatlantic.com/politics/archive/2015/09/americas-need-for-a-third-reconstruction/405799/> [https://perma.cc/4GNC-X4PH].

¹²⁸ See *supra* note 100 and accompanying text.

¹²⁹ Gottschalk, *supra* note 127.

¹³⁰ For a different take on this point, see JAMES FORMAN, LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 238 (2017) (emphasis omitted) (“[M]ass incarceration . . . was constructed incrementally, and it may have to be dismantled the same way.”).

¹³¹ See *supra* notes 7–9 and accompanying text.

racial inequality in the criminal justice system. Progressive prosecutors could shrug their shoulders while proclaiming that all battles cannot be won at once.¹³² It would be nearly impossible to significantly reduce the current prison population without ensuring that some black people would be released. Thus, as long as the policies advanced reduce the population of black persons in the criminal justice system without increasing racial inequalities in the system, then it would be hard to see why this movement would not be considered a success.

But let's unpeel another layer. When we look at some of the policies of progressive prosecutors, it becomes clear that the movement may not even remain neutral in its effect on the racial injustice in our system.¹³³ Rather, the policies advanced have the potential to undermine racial equality and perpetuate racial disparities.

Take diversion, for example. Diversion programs are often thought to be the "hallmarks of progressive prosecution."¹³⁴ They allow defendants the opportunity to avoid incarceration if they meet certain conditions.¹³⁵ Once a participant completes the program, charges are dismissed, and the participant avoids a criminal conviction and all of its collateral consequences.¹³⁶ Diversion programs are a popular alternative for progressive prosecutors because they provide community-based rehabilitation and conserve judicial resources for what are often considered more serious cases.¹³⁷ However, "[e]very defendant charged with a misdemeanor or nonviolent felony [does] not receive diversion."¹³⁸ "Eligibility is determined by a detailed assessment of each defendant that includes an examination of his criminal record, background, lifestyle, and other relevant factors."¹³⁹ Still, expanding existing diversion programs is sometimes endorsed as a tool for prosecutors to fulfill

¹³² Cf. Anthony Ellis McGee, *State's Attorney Kim Foxx Explains Why She Needs a Second Term*, CHI. DEFENDER (Feb. 3, 2020), <https://chicagodefender.com/states-attorney-kim-foxx-explains-why-she-needs-a-second-term/> [https://perma.cc/G9G8-RV2X] (The article quotes State's Attorney Kim Foxx saying, "We are just scratching the surface . . . I need another term to continue to make those strides").

¹³³ For a nuanced account of the problems of the neutrality rhetoric when discussing prosecutors, see Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 Wis. L. Rev. 837 (2004).

¹³⁴ Bellin, *Theories of Prosecution*, *supra* note 74, at 1239–40.

¹³⁵ Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1081 (2016) [hereinafter Davis, *Prosecutor's Ethical Duty*].

¹³⁶ *Id.*

¹³⁷ Bellin, *Theories of Prosecution*, *supra* note 74, at 1240.

¹³⁸ Davis, *Prosecutor's Ethical Duty*, *supra* note 135, at 1082.

¹³⁹ *Id.* at 1083.

their “ethical duty to seek justice and improve and reform the administration of the criminal justice system.”¹⁴⁰

It does not take much imagination to see how these programs can, and do, perpetuate racial disparities in the criminal justice system. For starters, “any discretionary screening decision in the American criminal justice system raises concerns about racial bias and other pernicious factors.”¹⁴¹ Since diversion requires prosecutors to exercise their discretion, we are likely to see the same bias and false beliefs that infect other areas of the criminal process.¹⁴² For example, “[p]olls suggest that the majority of white people think that blacks are violent.”¹⁴³ And one’s potential to be violent is likely to be one of the “relevant factors” considered when making a decision to place someone in diversion.¹⁴⁴ The likely consequence would be that those who are white and viewed as if they “do not belong in prison” are offered these diversion programs more often than those who are black and viewed as violent.¹⁴⁵ Although these disparities may largely be the result of implicit

¹⁴⁰ *Id.* at 1081.

¹⁴¹ Bellin, *Theories of Prosecution*, *supra* note 74, at 1246; see also Alice Ristroph, *The Thin Blue Line from Crime to Punishment*, 108 J. CRIM. L. & CRIMINOLOGY 305, 327 (2018) (“With discretion, of course, comes the potential for discrimination. It is all too well established that police and prosecutorial discretion yield patterns of racially disparate treatment, in which minorities are more likely to receive the greatest investigative scrutiny, the most serious charges, and the heaviest penalties.”).

¹⁴² For a description of the ways prosecutors’ racial biases contribute to the racial disparities in plea bargaining, see Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1231–38 (2018).

¹⁴³ Butler, *Limits of Criminal Justice Reform*, *supra* note 14, at 1455; see also Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts*, 3 RACE & JUST. 210, 215 (2013) (citation omitted) (“[W]hen asked to match photos of criminals to the crimes they committed, people match photos of Black men to violent crimes. These findings suggest that Americans associate Black men not only with criminality generally but also with violence in particular.”).

¹⁴⁴ See Schlesinger, *supra* note 143, at 228 (“Prosecutors divert very few defendants who are charged with violent crimes and who have prior convictions.”); Laurel Eckhouse, Kristian Lum, Cynthia Conti-Cook, Julie Ciccolini, *Layers of Bias: A Unified Approach for Understanding Problems with Risk Assessment*, 46 CRIM. JUST. & BEHAV. 185, 203 (2019) [hereinafter *Layers of Bias*] (“Judges often worry about the risk of releasing someone (before trial or via a shorter sentence) who goes on to commit a serious or violent crime, both because they care about protecting their communities and because they worry about public backlash.”).

¹⁴⁵ See Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT’G REP. 237, 237 (2015) (“The fact is, risk today has collapsed into prior criminal history, and prior criminal history has become a proxy for race.”).

biases,¹⁴⁶ the outcome is the same: “unfair treatment of black and brown people in the criminal justice system.”¹⁴⁷

Moreover, a diversion program based on race-neutral policies would be unreasonable if it fails to consider the effects that racial injustice had on an offender’s prior arrest, charging, or sentencing. It is typical for diversion programs to consider an offender’s prior contact with the criminal justice system.¹⁴⁸ And many prosecutors’ offices have diversion programs designed for first-time offenders.¹⁴⁹ But progressive prosecutors will likely confront offenders who have prior offenses because of racially-charged policing and prosecution from a prior administration. For example, they may find that because of a previous stop-and-frisk policy in their jurisdiction, black men have multiple prior contacts with law enforcement.¹⁵⁰ Or, they may find that because of the crack–cocaine disparity, the nonviolent drug offenders who are black do worse on a diversion assessment because of the extended stint they spent in prison due to unjust laws. Or, as the New York Times has reported, it may be discovered that rather than serving as an alternative that keeps people out of prison, “in many places, only people with money could afford a second chance.”¹⁵¹ Those who cannot afford the fees typically required to complete diversion programs—often poor, black people—often end up in the state’s control for a longer period than they would have if they

¹⁴⁶ It is worth pointing out that making the (likely white) administrators of these programs aware of these unequal consequences may not remedy the problem. As Paul Butler notes, research suggests that “[w]hen white people learn that criminal justice policies have an adverse impact on blacks, it makes them support the policies more.” Butler, *Limits of Criminal Justice Reform*, *supra* note 14, at 1455 (citing Rebecca C. Hetey & Jennifer L. Eberhardt, *Racial Disparities in Incarceration Increase Acceptance of Punitive Policies*, 25 PSYCH. SCI. 1949, 1952 (2014)).

¹⁴⁷ Davis, *Reimagining Prosecution*, *supra* note 6, at 5.

¹⁴⁸ See Schlesinger, *supra* note 143, at 212–13.

¹⁴⁹ Davis, *Prosecutor’s Ethical Duty*, *supra* note 135, at 1081.

¹⁵⁰ See *Layers of Bias*, *supra* note 144, at 193 (“In a society structured by racism and segregation, many variables commonly included in models, from location to employment to prior police encounters, will be correlated with race.”); *see also*, United States v. Mateo-Medina, 845 F.3d 546, 553 (3d Cir. 2017) (“[P]olice are more likely to stop, and arrest, people of color due to implicit bias.”).

¹⁵¹ Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance; No Money, No Mercy*, N.Y. TIMES (Dec. 12, 2016), https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html?_r=0 [https://perma.cc/PYT2-Q77M]; *see also* Rebecca Burns, *Diversion Programs Say They Offer a Path Away From Court, but Critics Say the Tolls Are Hefty*, PROPUBLICA (Nov. 13, 2018, 4:00 AM), <https://www.propublica.org/article/diversion-programs-illinois-criminal-justice-system-bounceback-correctivesolutions> [https://perma.cc/3WPU-HGGV] (“There is concern, too, that long-standing disparities in the criminal justice system between the poor and well-to-do will only grow, with wealthier defendants able to pay to make criminal trouble disappear.”).

served the full sentence for the offense they were accused of committing.¹⁵² The point here is that any neutral criteria used for these programs are likely to exacerbate the problems that have already plagued black individuals who end up in the criminal justice system because racial inequality is already an essential part of it.¹⁵³

If we keep unpeeling, we're likely to find other illustrations. We may find instances where efforts at reform extend beyond negatively affecting black individuals and spread into black communities. For example, safe injection sites permit prosecutors to treat drug addiction as a medical problem that should be addressed with treatment, not incarceration.¹⁵⁴ And although, at this point, litigation has prevented these sites from being built in the United States, it is expected that these sites will be placed in "the areas where the greatest need exists."¹⁵⁵ Without conscious goals to avoid it, the likely placement of these sites will be in poor, black communities where drug distribution and drug use are known to occur. This may result in decreased property value and other detriments for those living in these communities.¹⁵⁶

¹⁵² See Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 792 (2008) ("[S]tudies found that the sentences for failing participants in New York City drug courts were typically two-to-five times longer than the sentences for conventionally adjudicated defendants."); *see also* Bellin, *Theories of Prosecution*, *supra* note 74, at 1240.

¹⁵³ Butler, *Limits of Criminal Justice Reform*, *supra* note 14, at 1445 ("Mari Matsuda suggests that the law can create racial justice when it focuses on effects rather than neutral principles."). An additional worry here is that once white defendants are no longer at serious risk of prosecution, the chances of getting legislative reform may decrease. *See, e.g.*, Matthew Lassiter, *Impossible Criminals: The Suburban Imperatives of America's War on Drugs*, 102 J. AM. HIST. 126, 132 (2015) (discussing how the prosecution of white Californians led to legislative reform).

¹⁵⁴ See David Sheff, Opinion, 'Meet Them Where They Are': Safe-injection Sites Should Be Allowed to Protect Drug Users, USA TODAY (updated Jul. 22, 2020, 10:11 AM), <https://www.usatoday.com/story/opinion/2020/07/22/opioids-despair-drug-abuse-safe-injection-site-column/5482793002/> [https://perma.cc/YWJ4-ADCB] (describing how safe injection sites reduce crime and save lives).

¹⁵⁵ See *Frequently Asked Questions*, SAFEHOUSE, <https://www.safehousephilly.org/frequently-asked-questions> [https://perma.cc/KVF7-55DZ] (last visited Sept. 17, 2020) (answering the question "Where will Safehouse be located?").

¹⁵⁶ See Alex Kreit, *Safe Injection Sites and the Federal "Crack House" Statute*, 60 B.C. L. REV. 413, 466 n.296 (2019) (citation omitted) ("[A]lleged risks [of safe injection sites] involve mostly uniquely local concerns such as the possibility that they might 'destroy the surrounding community.'"). Likewise, the decision to not prosecute other "quality of life" crimes may disproportionately affect these same communities, while those living in more affluent neighborhoods may avoid the burden of decisions not to prosecute these crimes. It may be true that arrests for quality of life crimes unduly affect black Americans who are arrested for these crimes. At the same time, however, enforcement of many of these crimes (including vandalism, car break-ins, etc.) may increase the quality of life for those living in the communities where these offenses occur.

Some more unpeeling may show that the proposed alternatives to incarceration—such as electronic monitoring and other forms of supervision—have a related, liberty-depriving effect.¹⁵⁷ Rather than being an adequate response to our system of mass incarceration, they simply serve as a reminder that freedom isn’t free.

These programs and policies should exist. If we incarcerate those who commit crimes, we ought to also attempt to address the underlying problems that caused them to commit these crimes in the first place. And some of the programs mentioned above attempt to avoid unnecessary incarceration. However, as we move forward with these programs, we have to consciously avoid placing the burden on the least well off. A decarceration program that does not deliberately seek racial justice could be counterproductive and perpetuate harms against black Americans.

B. PROSECUTORIAL LENIENCY AS A TOOL FOR INJUSTICE

There’s more unpeeling that we can do, but I want to jump straight to—what some may consider—the core. Perhaps the most worrisome aspect of focusing on decarceration without an eye on racial injustice is not that there would be a continued overenforcement of prosecution in racially-marginalized communities, but that there may be a disproportionate *underenforcement* of prosecution in these communities. The worry is that our justice system will repeat its “shameful history of states failing to protect vulnerable populations from violence, placing in stark relief the ‘mattering’ of certain lives more than others.”¹⁵⁸ Instead of serving as a reform movement that creates justice for all, a progressive prosecution movement that prioritizes mass incarceration without awareness of racial justice could exacerbate—not alleviate—the disempowerment of the most vulnerable populations of our society.

¹⁵⁷ See Samantha Melamed & Dylan Purcell, *The Probation Trap: Living in Fear*, PHILA. INQUIRER (Oct. 24, 2019), <https://www.inquirer.com/news/inq/probation-parole-pennsylvania-philadelphia-criminal-justice-system-violations-poverty-20191024.html> [https://perma.cc/6ZB6-WH65] (documenting the problems of alternatives to incarceration in Pennsylvania); *see also* Michelle Alexander, Opinion, *The Newest Jim Crow*, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/opinion/sunday/criminal-justice-reforms-race-technology.html> [https://perma.cc/M86X-ZNYK] (“[D]igital prisons are to mass incarceration what Jim Crow was to slavery.”); Jay-Z, Opinion, *Jay-Z: The Criminal Justice System Stalks Black People Like Meek Mill*, N.Y. TIMES (Nov. 17, 2017), <https://www.nytimes.com/2017/11/17/opinion/jay-z-meek-mill-probation.html> [perma.cc/AW6V-4TZH] (discussing the traps of probation and parole on black people).

¹⁵⁸ Deborah Tuerkheimer, *Criminal Justice and the Mattering of Lives*, 116 MICH. L. REV. 1145, 1146 (2018).

To modern observers this worry may seem unfounded. Our country has the highest incarceration rate in the world.¹⁵⁹ There are more than 2.1 million people in prison or jail, and people of color make up 67% percent of that prison population.¹⁶⁰ Thus, a concern for the underenforcement of prosecution seems peripheral to the problems that plague our system. Today, we are more prone to worry about over-policing and over-prosecution in marginalized communities, and the idea of more state involvement in those communities seems highly undesirable.

This seems right. And by no means am I endorsing a position which claims that “the principal problem facing African-Americans in the context of criminal justice *today* is not over-enforcement but under-enforcement of the laws.”¹⁶¹ Nor am I saying that statements about racial oppression in the system are “overblown [or] counterproductive.”¹⁶² This is not the prevailing sentiment from many black communities¹⁶³ and scholars have pointed out some of the problems with this view.¹⁶⁴ Rather than claiming that black communities need more enforcement *currently*, my point is that as we reduce our incarcerated population we ought to do so in a way that does not asymmetrically harm our most vulnerable populations. One of the consequences of our unjust social system is that not only do blacks disproportionately end up as defendants, blacks also disproportionately end up as victims.¹⁶⁵ Any progressive movement seeking to right the wrongs of our justice system must note that certain crimes disproportionately affect black people in vulnerable communities.¹⁶⁶

¹⁵⁹ Davis, *Reimagining Prosecution*, *supra* note 6, at 3.

¹⁶⁰ *Id.*

¹⁶¹ Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1259 (1994) (emphasis added).

¹⁶² *Id.* at 1255–56.

¹⁶³ Davis, *Prosecution and Race*, *supra* note 19, at 66 (“African Americans led the fight to change federal cocaine sentencing laws which discriminate against them. Numerous civil rights organizations . . . fought to eliminate the sentencing disparities which discriminate against African Americans. The National Black Police Organization, the Progressive Baptist Convention, and the National Black Caucus of State Legislators—African American organizations which represent vastly different constituencies—also lobbied to eliminate the discriminatory aspects of the law.”).

¹⁶⁴ See, e.g., Paul Butler, (*Color*) *Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270, 1273–88 (1998) (criticizing Kennedy’s view).

¹⁶⁵ See FORMAN, *supra* note 130, at 57–60, 223–24.

¹⁶⁶ See Tuerkheimer, *supra* note 158, at 1152 (footnote omitted) (“Gun violence disproportionately harms black men in vulnerable communities.”).

There is a lot more that could be said here. Indeed, James Forman has devoted much of his recent book to a similar subject.¹⁶⁷ As Forman points out, “African Americans have always viewed the protection of black lives as a civil rights issue, whether the threat comes from police officers or street criminals.”¹⁶⁸ While declaring the simultaneous over- and under-policing of crime the “central paradox of the African American experience,” Forman notes that in 1968 “many blacks believed [that] ‘the police maintain[ed] a much less rigorous standard of law enforcement in the ghetto, tolerating illegal activities like drug addiction, prostitution, and street violence that they would not tolerate elsewhere.’”¹⁶⁹ As a result, the passing of many of the laws that ultimately led to increased punishments of black persons were initially celebrated as “a civil rights triumph.”¹⁷⁰ The thought was that after decades of ignoring the harm that occurred in black communities, the government would finally provide “protection to a community so long denied it.”¹⁷¹ Attention to the harm that was plaguing the black community was a way of showing that black lives matter.

If all of this is right, any decarceration program that does not make a conscious effort to avoid the devaluation of black victims will contain the potential to be abused and applied in a biased manner. We cannot forget that leniency is sometimes regarded as the common way in which a state expresses that black lives don’t matter.¹⁷² This point is often overshadowed by calls to end mass incarceration. Indeed, the protection of black victims does not make a single appearance in Sklansky’s “Progressive Prosecution Handbook,” which is meant to provide suggestions for “chief prosecutors

¹⁶⁷ See generally FORMAN, *supra* note 130 (documenting the role of black officials on mass incarceration); see also, Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1717 (2006) (footnote omitted) (“Underenforcement can also be a form of deprivation, tracking familiar categories of race, gender, class, and political powerlessness.”).

¹⁶⁸ FORMAN, *supra* note 130, at 11; Tuerkheimer, *supra* note 158, at 1148.

¹⁶⁹ FORMAN, *supra* note 130, at 35 (quoting THE KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 161 (1968)); Tuerkheimer, *supra* note 158, at 1148.

¹⁷⁰ FORMAN, *supra* note 130, at 73.

¹⁷¹ *Id.*; Tuerkheimer, *supra* note 158, at 1149.

¹⁷² See CHRISTOPHER J. LEBRON, THE MAKING OF BLACK LIVES MATTER: A BRIEF HISTORY OF AN IDEA xi (2017) (“It came as a surprise to some in America when, in the summer of 2013, Zimmerman was found not guilty on all charges related to [Trayvon] Martin’s death Thus, it was the death and failure of our justice system to account for the unnecessary death of a black American that prompted three women to offer these three basic and urgent words to the American people: black lives matter.”); see also Tuerkheimer, *supra* note 158, at 1152 (“Impunity for police officers who kill African Americans arguably constitutes the most powerful expression of the state’s disregard for the value of black lives.”).

who want their offices to do a better job pursuing justice.”¹⁷³ Even when noting that progressive prosecutors should be attentive to racial disparities in the criminal justice system, the focus is often on decarceration methods such as decreasing racial discrimination in charging,¹⁷⁴ monitoring the rate in which prosecutors strike racial minorities from juries,¹⁷⁵ being conscious of an office culture that permits the casual use of racist language,¹⁷⁶ and including racial minorities as part of the prosecutor office’s staff.¹⁷⁷ But what I am suggesting here is that, if the goal is to achieve racial justice, these proposals have the potential to do more harm than good. Many of the policies advanced by progressive prosecutors may at once present a veneer of equality while perpetuating some of the harms that these prosecutors were elected to repair.

Don’t get me wrong—I like progress as much as the next person. But the “perception of progress” created by reform efforts aimed solely at decarceration may “mollif[y] communities of color and sap[] the energy needed for a continued push for substantive equality.”¹⁷⁸ If progressive prosecutors want to achieve successful reform, a simultaneous attack on both mass incarceration and the neglect of injuries to those in marginalized communities must be central to their agenda. This dual approach to reform would reduce the incarcerated population while achieving justice for all. Thus, “if you are really concerned about how the criminal justice system treats African Americans,”¹⁷⁹ it is not enough to elect prosecutors who aim to relieve mass incarceration and follow common scholarly agendas for prosecutorial reform. Rather, those concerned with the variety of ways in which the criminal justice system keeps its hold on black America should do what they can to ensure that prosecutors promote an agenda that attacks overcriminalization and deliberately “bring[s] racial justice to criminal justice.”¹⁸⁰

¹⁷³ David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 27 (2017) [hereinafter Sklansky, *Progressive Prosecutor’s Handbook*]. Of course, Sklansky is hardly alone in this regard. See Abbe Smith, *The Prosecutors I Like*, *supra* note 25, at 420 (discussing the “hallmarks of progressive reform [that] have been oft-stated”). Spoiler alert: the devaluation of victims does not make an appearance.

¹⁷⁴ Sklansky, *Progressive Prosecutor’s Handbook*, *supra* note 173, at 31.

¹⁷⁵ *Id.* at 32.

¹⁷⁶ *Id.* at 39.

¹⁷⁷ *Id.* at 40.

¹⁷⁸ Butler, *Limits of Criminal Justice Reform*, *supra* note 14, at 1467.

¹⁷⁹ Obama’s Full Speech, *supra* note 4.

¹⁸⁰ Butler, *Limits of Criminal Justice Reform*, *supra* note 14, at 1474.

CONCLUSION

Confession time: although I have been criticizing assumptions grounding the progressive prosecutor movement, I, too, have been operating with a background assumption throughout this Article. I have assumed *reforming* the criminal justice system is a worthwhile project. It may not be. Given the insidious nature of criminal punishment and its role in the subjugation of black people, many have concluded that the answer to persistent injustice in criminal law enforcement is not reform, but abolition.¹⁸¹ To imagine a more humane and just society, then, perhaps we need to stop worrying about correcting the system and work to destroy it. “If you are really concerned about how the criminal justice system treats African-Americans,” one might tout, “the best way to protest is to work to abolish the system.”

Perhaps. But I don’t think we’re there yet. Rather than viewing abolitionism as a “contradistinction to reform,”¹⁸² I believe the more promising views of abolition rightly understand it as “a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement.”¹⁸³ Understood this way, reform movements serve as part of that gradual project of dismantling oppressive structures. Still, we have to be careful when presented with seemingly promising reform movements that present immediate benefits; we don’t want to take one step forward now, just to take two steps back later. Even when endorsing progressive prosecutors, we should recognize the complexities of

¹⁸¹ See, e.g., ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND PRISON, TORTURE AND EMPIRE 75 (2005) (“To focus more specifically on prison abolition, I see it as a project that involves re-imagining institutions, ideas, and strategies, and creating new institutions, ideas, and strategies that will render prisons obsolete.”); Amna Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 471 (2018) (“In the anarchist gloss, the abolitionist call is to get the state out of the lives of Black communities.”); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 NW. U. L. REV. 1597, 1605 (2017) (“Approaching the democratization of criminal law as an abolitionist project means releasing the stranglehold of law enforcement on black communities that currently excludes residents from democratic participation so they have more freedom to develop their own democratic alternatives for addressing social harms.”); Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAGAZINE, <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html> [https://perma.cc/RN G3-G5V7] (“Following an incarceration boom that began all over the United States around 1980 and only recently started to level off, reform has become politically popular. But abolitionists argue that many reforms have done little more than reinforce the system.”). There are, of course, many variations of abolitionism that are proposed to deal with these problems.

¹⁸² See Roberts, *supra* note 8, at 114 (“Yet abolitionist philosophy is defined in contradistinction to reform: reforming prisons is diametrically opposed to abolishing them.”).

¹⁸³ Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161 (2015); see also Butler, *Limits of Criminal Justice Reform*, *supra* note 14, at 1477.

their power, the shortcomings of their proposed solutions, and their ability to obstruct our advancements in racial justice.¹⁸⁴ Only then can we really be said to have made progress.

¹⁸⁴ Chicago seems to be in better shape than many other cities on this front. After the election of Kim Foxx, several groups—including Assata’s Daughters, Black Lives Matter-Chicago, BYP 100, and FLY—released a statement that included the following: As long-term organizers, we are fighting for a world where prosecutors do not exist. We intentionally did not endorse Kim Foxx because we intend to hold her administration accountable for how it will explicitly impact the black community. Kim Foxx, and all members of government, should take notice of how young black organizers are impacting electoral politics. Our rage against the system and love for black people have dominated this year’s presidential election and removed two prosecutors, Anita Alvarez (Chicago) and Tim McGinty (Cleveland) so far. We are demonstrating that organized radical black love and rage can impact elections, and ultimately institutions that disproportionately negatively impact black lives. Janell Ross, *Black Lives Matter Won on Tuesday. Prosecutors Lost.*, WASH. POST (Mar. 16, 2016, 4:15 PM), <https://www.washingtonpost.com/news/the-fix/wp/2016/03/16/black-lives-matter-won-on-tuesday-prosecutors-lost/> [<https://perma.cc/RHC8-B4VL>].