

# PROGRESSIVE PROSECUTION FROM POLITICS TO POLICY TO PRACTICE

By Chesa Boudin\* and Tal Klement\*\*

As former public defenders turned progressive prosecutors in one of America's major cities, we have the perspective—and now the power—to radically transform a criminal justice system that is failing all of us.

This system fails us because it does not keep us safe. Instead, it perpetuates a vicious cycle of crime and punishment at the expense of the people it purports to serve. When compared with other modern democracies, the United States consistently ranks among the most punitive in addressing crime. Our sentences are longer,<sup>1</sup> our prison populations are higher,<sup>2</sup> our law enforcement budgets are larger,<sup>3</sup> and yet we are no safer than any comparable democracy.<sup>4</sup> Our “tougher on crime” justice system consistently fails to deter criminal actions. Simultaneously, it falls short of addressing the needs of survivors of sexual assault, supporting families of victims and the accused, including non-English speakers in its processes, and healing the trauma caused by violent crime.

Anyone who sets foot inside a criminal courtroom will see an endless parade of disproportionately Black and Brown faces, most of whom have been systematically denied the opportunities that their white counterparts were granted. As a society, we must continue to recognize these inequities and elect leaders who will address disparities in health, economic opportunity, and housing. Within our

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1. JUST. POL'Y INST., FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS 21-22 (Apr. 2011), <https://perma.cc/U2FQ-BS6X>.

2. *Highest to Lowest—Prison Population Total*, WORLD PRISON BRIEF, <https://perma.cc/QF92-M3A8> (last visited Dec. 10, 2020).

3. GRAHAM FARRELL & KEN CLARK, EUR. INST. FOR CRIME PREVENTION & CONTROL, WHAT DOES THE WORLD SPEND ON CRIMINAL JUSTICE? 16-17 (Paper No. 20, 2004), <https://perma.cc/H6AU-YJ23>.

4. Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate Than Any Other Country*, WASH. POST (July 7, 2015), <https://perma.cc/6XAZ-HA8H>.

justice system, as prosecutors, we must replace the institutionalization of punishment and retaliation with the institutionalization of restoration and redemption. Otherwise, the system will continue to fail those harmed by crime—on both sides of the witness stand.

In our work as public defenders, we fought for individual justice, but we were limited in our ability to achieve systemic change. We successfully litigated to end a cash bail schedule that failed to consider inability to pay before arraignment<sup>5</sup> and pretrial,<sup>6</sup> because we observed our indigent clients remain in jail on cash bail while their wealthy counterparts bought their freedom. But our gains were thwarted when prosecutors and judges repeatedly ignored bail alternatives. We filed motions to suppress evidence when drug or contraband charges stemmed from a racist stop for Driving While Black (or Brown)—but we were constrained by legal precedent that allowed pretextual stops.<sup>7</sup> We fought for the few resources available to those with mental health or substance abuse issues—but our clients had to wait too long (often in custody) to access them. We cross-examined police officers and highlighted issues with their credibility—only to see those same officers repeatedly testify without any consequences. We advocated for alternatives to jail sentences—but witnessed the long-term harm caused by repeated incarceration for low-level offenses on individuals and their communities. This was a system where success was not measured by the healing of the victim or defendant, but by less meaningful metrics: conviction rates and length of sentence obtained.

From these experiences as defenders, we obtained valuable perspective. But as we grew frustrated by our limited abilities to make structural change, we realized that systemic change comes from the institutions that prescribe and implement public policy. In November 2019, San Francisco citizens voted for that historic change. Thanks to their compassion and confidence, we now have an opportunity to create a more equitable justice system from the inside—as progressive prosecutors leading the San Francisco District Attorney’s Office.

Let’s examine that term—”progressive prosecutor.” First, in order to progress, prosecutors must intentionally and proactively create policies and practices that are decarceral, rejecting the notion that society must cage those that frighten the collective. Prosecutors must also reject the idea that the criminal justice system is the most effective mechanism to address social and public

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5. *Buffin v. City and Cnty. of San Francisco*, No. 15-cv-04959, 2019 U.S. Dist. LEXIS 34253, at \*54, \*57 (N.D. Cal. Mar. 4, 2019).

6. *In re Humphrey*, 228 Cal. Rptr. 3d 513, 541 (Cal. App. 2018) (“[U]nquestioning reliance upon the bail schedule without consideration of a defendant’s ability to pay, as well as other individualized factors bearing upon his or her dangerousness and/or risk of flight, runs afoul of the requirements of due process for a decision that may result in pretrial detention.”).

7. Unfortunately, the U.S. Supreme Court’s 1996 *Whren* decision established precedent for an officer to initiate such pretextual stops and searches based on infractions even if the subjective intent of the officer was to secure evidence of another crime. *Whren v. United States*, 517 U. S. 806, 814–15 (1996).

health problems, especially when that same system profits from recidivism. Prosecutors must treat victims of crime as more than mere pieces of evidence; as people who need to feel heard and healed through restorative justice.

As progressive prosecution movements gain momentum and public support, society must be wary of attempts to co-opt the movement's language without a real commitment to decarceral solutions. Imitation may be the sincerest form of flattery, but the principles of progressive prosecution require bold decarceral policies rather than window dressing on the status quo. True progressive prosecution principles have guided our roll-out of numerous policies to address the horrific racial disparities in our criminal justice and mass incarceration systems. In the first week of our administration, we became the first jurisdiction to broadly implement a state law (Senate Bill No. 394) that diverts primary caregivers in a broad range of criminal cases in order to break the cycle of harm that incarceration causes to children and communities.<sup>8</sup> Since that time, we have diverted close to one hundred parents, giving them opportunities to have their charges dismissed while keeping their family together. In our second week, we announced that prosecutors would no longer request cash bail, so that pre-trial detention is now only based on public risk, not wealth.<sup>9</sup> As an institution, we will not perpetuate a system by which innocent people languish in jail because they are poor.

Under our watch, the office of the San Francisco District Attorney has a presumption against charging status-based sentencing enhancements that have had a disproportionate, punitive impact on people of color.<sup>10</sup> These status enhancements are a vestige of the “tough on crime” rhetoric of the 1990s that has overfilled our prisons at great cost and negligible benefit to public safety. “Gang” enhancements<sup>11</sup>—born of an age where children were referred to as “super predators”—too often add lengthy additional sentences for people of color based on who they associate with or where they live, damage the relationship between law

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8. See CAL. PENAL CODE § 1001.83 (enacted as S.B. 394 (Cal. 2019)), <https://perma.cc/EAE5-TJG4>; Press Release, S.F. Dist. Attorney's Off., *San Francisco DA Chesa Boudin Announces Primary Caregiver Diversion Program* (Jan. 14, 2020), <https://perma.cc/GK3J-NS8W>; Vaidya Gullapalli, *Family Separation and 'A Longer View of Public Safety': A Conversation with San Francisco D.A. Chesa Boudin*, APPEAL (Jan. 24, 2020), <https://perma.cc/N9N8-GGS2>; S.F. Dist. Attorney's Off., *Policy Directive: Primary Caregiver Diversion* (updated Mar. 9, 2020), <https://perma.cc/F6TZ-KER3> (the office's primary caregiver diversion policy was updated two months after its issuance in January 2020).

9. Evan Sernoffsky, *San Francisco DA Chesa Boudin Ends Cash Bail for all Criminal Cases*, S.F. CHRON. (Jan. 22, 2020), <https://perma.cc/C3BX-TJN8>; Press Release, S.F. Dist. Attorney's Off., *San Francisco District Attorney Chesa Boudin Announces Elimination of Cash Bail* (Feb. 10, 2020), <https://perma.cc/Q53K-CSML>; S.F. DIST. ATTORNEY'S OFF., *Policy Directive: San Francisco District Attorney's Office Pretrial Detention and Release Conditions* (Jan. 22, 2020), <https://perma.cc/Y5Z5-DNCS>.

10. Press Release, S.F. Dist. Attorney's Off., *District Attorney Boudin Pioneers First in the Nation Policy Directives* (Feb. 28, 2020), <https://perma.cc/ETP2-6VUR>; S.F. Dist. Attorney's Off., *Policy Directive: San Francisco District Attorney's Office Status Sentencing Enhancements* (Feb. 22, 2020), <https://perma.cc/VH6N-GQKV>.

11. CAL. PENAL CODE § 186.22.

enforcement and community, and fail to make us any safer. Similarly, California’s “three-strikes” sentencing framework punishes individuals for behavior from their distant past rather than focusing on the harm they caused or the risk they currently pose.<sup>12</sup> There is no reliable evidence that these enhancements deter crime, rehabilitate those convicted, or heal victims.

Our office has stopped filing contraband cases that arise from illegal searches following a minor traffic violation.<sup>13</sup> These “stop and frisk”-like searches—whether done while a person is walking down the street, driving a car, or riding a bike—violate the civil rights of too many people of color across the nation and in San Francisco. A recent study found that, from July 2018 to March 2020, San Francisco police officers were 4.4 times more likely to stop Black drivers than white drivers.<sup>14</sup> Black men were 4.8 times more likely to be searched after a stop than white men, and Black women 3.7 times more likely than white women.<sup>15</sup> In the first quarter of 2020, Black men and women made up twenty-three percent of police stops in San Francisco—despite making up roughly six percent of the city’s population.<sup>16</sup> Academics, activists and jurists, including Justice Ruth Bader Ginsburg, have called for a reevaluation of the *Whren* decision, which has contributed to widespread disparities in stops and arrests of people of color for over a generation.<sup>17</sup> Tragically, the widespread practice of racial profiling has also led to the unjustified killings of Black and Brown motorists by police officers.<sup>18</sup> Recognizing these injustices and our belief in the harm the *Whren* decision has wrought, we have acted. Our office no longer charges contraband cases that arise from a search following a minor traffic violation where there was

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12. *Id.* § 667.

13. See Press Release, *supra* note 10; S.F. Dist. Attorney’s Off., *Policy Directive: San Francisco District Attorney’s Office Declination of Contraband Charges Based on Pretextual Stops* (Feb. 2020), <https://perma.cc/3VAG-GS5B>.

14. Stephanie Sierra, Lindsey Feingold & Yun Choi, *Black Drivers Are 4.4 Times More Likely to Be Stopped by SFPD Than White Drivers, Data Shows*, ABC7 S.F. (Sept. 14, 2020), <https://perma.cc/LJ8Q-ETXM>.

15. *Id.*

16. *Id.*

17. *District of Columbia v. Wesby*, 138 S. Ct. 577, 594 (2018) (Ginsburg, J., concurring in the judgment in part) (“The Court’s jurisprudence, I am concerned, sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection. A number of commentators have criticized the path we charted in [*Whren*] and follow-on opinions[.]”).

18. See, e.g., Alan Blinder, *Michael Slager, Officer in Walter Scott Shooting, Gets 20-Year Sentence*, N.Y. TIMES (Dec. 7, 2017), <https://perma.cc/XG9T-23UU> (fatal police shooting of Walter Scott in South Carolina after a traffic stop); Jess Bidgood & Richard Pérez-Peña, *Mistrial in Cincinnati Shooting as Officer Is Latest Not to Be Convicted*, N.Y. TIMES (June 23, 2017), <https://perma.cc/W27Z-F3FB> (fatal police shooting of Samuel Dubose in Cincinnati after a traffic stop); Mitch Smith, *Video of Police Killing of Philando Castile Is Publicly Released*, N.Y. TIMES (June 20, 2017), <https://perma.cc/DEQ2-C9FT> (fatal police shooting of Philando Castile in suburban Minneapolis).

no independent probable cause to support the search itself.<sup>19</sup> Unsurprisingly, the policy was met with criticism from the San Francisco Police Officers Association, even though the policy calls for any seized contraband to be destroyed.<sup>20</sup> However, we have stood strong in our beliefs, and this harmful, discriminatory police practice will no longer be rewarded with a conviction.

As former public defenders who have spent countless hours in prisons and jails, we were keenly aware of the potential for disaster if COVID-19 spreads behind bars. At the onset of the pandemic, our office acted quickly. Together with the courts, public health officials, and our counterparts at the Public Defender's Office, we reduced the San Francisco jail population by approximately twenty-five percent in order to facilitate quarantining and social distancing protocols.<sup>21</sup> In order to accomplish this reduction, our office declined to prosecute certain cases, identified sentenced cases for early release, and emphasized dispositions that would result in credit for time served and immediate release. Despite predictions of dire consequences for public safety by commentators, overall crime rates (including violent crime rates) in San Francisco have continued to drop during the pandemic.<sup>22</sup>

As the nation collectively mourned and protested the deaths of Black lives at the hands of police, our office immediately instituted several policies to address police violence and accountability. First, the office issued a policy that declines to prosecute protestors arrested for peacefully asserting their First Amendment rights.<sup>23</sup> Second, in order to address the root cause of the protests, the office instituted an array of policies designed to address police violence. Prosecutors are now required to review all body camera footage and available video surveillance before charging anyone with violence against law enforcement or resisting arrest, as such charges are often used to cover up police misconduct.<sup>24</sup> Third, the office implemented a policy that makes restitution available to victims of police violence,<sup>25</sup> and sponsored legislation that would make this policy apply

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19. S.F. Dist. Attorney's Office, *Policy Directive: San Francisco District Attorney's Office Declination of Contraband Charges Based on Pretextual Stops*, *supra* note 13.

20. *San Francisco DA Boudin Eases Policy on Police Stops; SFPOA Blasts Decision*, CBS5 S.F. (Feb. 29, 2020), <https://perma.cc/KT4M-5KTM>.

21. Joaquin Palomino, *SF's Jail Population Drops 25% After Inmates Are Released to Thwart Virus*, S.F. CHRON. (Mar. 30, 2020), <https://perma.cc/9FU3-WR9M>.

22. Kellie Hwang, *Amid the Pandemic, Overall Crime in SF is Down. But These Crimes Are Up*, S.F. CHRON. (July 15, 2020), <https://perma.cc/96JJ-LV3E>.

23. S.F. Dist. Attorney's Off., *Policy: Right to Peaceful Public Assembly* (June 1, 2020), <https://perma.cc/GRR9-AVPM>.

24. S.F. Dist. Attorney's Off., *Policy Directive: Violence or Resistance Against Law Enforcement* (June 1, 2020), <https://perma.cc/HN3Z-CJBB>.

25. S.F. Dist. Attorney's Off., *Policy Directive: Victims of Police Violence and Officer Involved Shootings* (June 3, 2020), <https://perma.cc/UN4S-DEUH>.

statewide.<sup>26</sup> This policy is rooted in the belief that families of the deceased should be able to pay for funeral expenses and counseling without resorting to online fundraisers or their life savings. The office also announced that we will no longer charge any case that materially relies on the testimony of an officer with a record of serious misconduct.<sup>27</sup> The office also sponsored local legislation to disqualify police officer and sheriff deputy applicants from the San Francisco hiring process if they have a history of complaints of misconduct.<sup>28</sup> The office is also advocating, along with several other California District Attorneys, for the State Bar of California<sup>29</sup> and American Bar Association<sup>30</sup> to ban political contributions from police unions to District Attorney candidates seeking that office in a state-wide campaign we initiated, called #CureTheConflict.<sup>31</sup>

We know that we must change the culture of prosecution if we are to progress towards institutions of true “justice.” Change is hard, but it is made easier by collective effort and aligned goals. That is why we have implemented each of these policies transparently and in writing. Prosecutors in the courtroom can no longer be permitted to diverge in their actions from the policy pronouncements of the elected District Attorney under the guise of prosecutorial discretion. At the same time, for too long, the prosecutors who are closest to a specific case have had to get their supervisor’s approval to craft an alternative, restorative disposition. We have reversed this policy to allow line prosecutors to craft alternative dispositions and directly refer cases to alternative courts or diversion programs. We are also committed to rewarding and promoting individual prosecutors by crafting metrics that capture reduced recidivism and successful reentry, rather than traditional metrics such as conviction rate and length of sentence obtained.

These are just a few of the programs our office has implemented, yet they are the bare minimum of what we should demand of “progressive” prosecutors. Being progressive means investing in institutions to build a better future for everyone. We are committed to the promise of those ideals, with many more structural changes to come. We have plans in progress to launch an immigration unit

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26. Scottie Andrew, *Victims of Police Violence and Their Families Could Receive Restitution in California Under a New Bill*, CNN (Aug. 7, 2020), <https://perma.cc/S5WV-W55A>; Press Release, S.F. Dist. Attorney’s Off., *DA Boudin Releases Statement Supporting AB 767’s Protection of Victims of Police Violence and Responding to Police Unions’ False Attacks* (Aug. 20, 2020), <https://perma.cc/2VAD-G7EX>.

27. S.F. Dist. Attorney’s Off., *Policy Directive: Charging Decisions and Police Accountability* (June 15, 2020), <https://perma.cc/9HRM-35NJ>.

28. S.F. Dist. Attorney’s Off., *Resolution to Disqualify Applicants with a History of Misconduct*, in POLICE REFORM AND ACCOUNTABILITY 6–7, <https://perma.cc/2W4U-A9GU>.

29. S.F. Dist. Attorney’s Off., *State Bar Ethics Rule Change Request to Reduce Conflicts of Interest* (June 1, 2020), in POLICE REFORM AND ACCOUNTABILITY, *supra* note 28, at 8–10.

30. S.F. Dist. Attorney’s Off., *American Bar Ethics Rule Change Request to Reduce Conflicts of Interest* (June 3, 2020), in POLICE REFORM AND ACCOUNTABILITY, *supra* note 28, at 11–12.

31. Eric Westervelt, *Are Prosecutors Too Cozy with Police? Some DAs Say Campaign Contributions Need to End*, NPR (June 18, 2020), <https://perma.cc/8A8Q-Q4LQ>.

founded on building trust between immigrant communities and the justice system. We also continue to work towards creating the most comprehensive restorative justice program in the country, in order to model compassionate and victim-centered policy design.<sup>32</sup>

It will take more than one election, one person, and one district attorney's office to end mass incarceration and racial disparity in our justice system. Our office faces the challenge of attempting to address decades of inequity in the justice system, with jails and prisons that are still overcrowded with people who should be returned to their communities. Our communities must also invest more in public health, economic opportunity, and educational advancement. In order to build improved plans for reentry and rejuvenation, we need strong, committed, well-funded criminal justice partners across the city, region, and state.

Despite these challenges, we are committed to building on the progress of progressive prosecutors in Philadelphia, Boston, Los Angeles, and Chicago, and expanding the movement to the rest of California and the nation — so that we can ultimately spur systemic change that is long overdue.

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32. Michel Martin, *San Francisco's New DA: 'What We Have Been Doing Is Not Working'*, NPR (Jan. 19, 2020), <https://perma.cc/TSC5-PZFF>.