

HOLDING PROSECUTOR OFFICES  
ACCOUNTABLE:  
THE SUFFOLK COUNTY DISTRICT  
ATTORNEY’S OFFICE’S APPROACH TO  
PROGRESSIVE PROSECUTION

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I.	WHY PROGRESSIVE PROSECUTION IS A PROMISING, NECESSARY APPROACH NOW .....	565
II.	THE SUFFOLK COUNTY DISTRICT ATTORNEY’S OFFICE’S APPROACH TO PROGRESSIVE PROSECUTION .....	568
	A. The Declination and Diversion Policy of The Rollins Memo.	568
	B. Data Collection and Analysis.....	570
	C. Discharge Integrity Team .....	570
	D. Integrity Review Bureau .....	571
	E. Community Engagement Efforts .....	572
	F. Crime Strategies Bureau .....	572
	G. Commitment to Restorative Justice .....	573
	H. Measures of Success .....	573
III.	EXPERIENCES AND CHALLENGES .....	574
	A. Judicial Resistance .....	574
	B. Public Safety .....	575
IV.	THINKING AHEAD.....	576

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It is often stated that a criminal case begins and ends with a prosecutor. Indeed, a prosecutor's power derives from the ability to arraign or indict criminal charges and to determine what those charges are. With this power comes responsibility and accountability.<sup>1</sup> A prosecutor's job is critical to public safety. However, if a prosecutor office is not held accountable, citizens may lose trust in prosecutors to keep their communities safe.

Recently, a number of prosecutor offices around the country have been undertaking approaches of progressive prosecution, and many district attorneys have won elections running on a progressive prosecution platform—including the Suffolk County District Attorney's Office in Massachusetts, which I have the unique honor of leading. It employs some 350 people and serves the municipalities of Boston, Chelsea, Revere, and Winthrop.

I write this article to share the Suffolk County District Attorney's Office's approach to progressive prosecution. The Office operates with a high level of transparency and openness and with a commitment to progressive prosecution. Part I defines my Office's approach to progressive prosecution, distinguishes how this approach is different from traditional prosecution, and examines why the progressive approach is an important one to take now. Part II lays out the elements of the Suffolk County District Attorney's Office's approach to progressive prosecution. Part III further discusses the hope of this approach and identifies several challenges in confronted in our first year. Part IV concludes by looking forward and providing suggestions of furthering progressive prosecution.

#### I. WHY PROGRESSIVE PROSECUTION IS A PROMISING, NECESSARY APPROACH NOW

“Progressive prosecution” has become a popular catchphrase. It is thus important to define what is meant by progressive prosecution, and why the approach is different from traditional approaches of prosecutor offices.

Traditionally, candidates who were considered the “toughest” on crime would win district attorney elections. However, that assumption is vastly changing, as seen with recent district attorney elections throughout the country. Many scholars and practitioners agree that old systems that led to mass incarceration are dysfunctional, and new approaches are needed.<sup>2</sup> Many have also sought to demonstrate how mass incarceration impacts certain communities. So-called “million dollar blocks,” a term first utilized by Laura Kurgan and Eric Cadora,

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1. See, e.g., Paul Butler, *Race and Adjudication*, in 3 REFORMING CRIMINAL JUSTICE 211 (Erik Luna ed., 2017); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PENN. L. REV. 959, 960 (2009).

2. E.g., Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301 (2017); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); Peter K. Enns, *The Public's Increasing Punitiveness and Its Influence on Mass Incarceration in the United States*, 58 AM. J. POL. SCI. 857 (2014).

refer to the large number of city blocks whose residents have been incarcerated at a cost of over \$1 million.<sup>3</sup> Progressive prosecutors' offices try to disrupt this trend by using the discretionary tools at their disposal.

Additionally, the traditional approach assumes that communities are safer with each defendant sentenced—even for low-level offenses like drug possession, shoplifting, or loitering. This is often not the case. For example, in many states, recidivism rates are as high as 80 percent.<sup>4</sup> Thus, in addition to the reality of mass incarceration, there is the additional reality of collateral consequences that offenders face upon completing their incarceration term. Defendants generally finish their incarceration term with fewer support systems, opportunities for housing, and opportunities for employment than before. This means that incarcerated offenders often leave their incarceration term less stable and more likely to re-engage in criminal activity. This reality highlights a failure of the legal system. Indeed, a new study analyzing seventeen years of non-violent misdemeanor prosecutions by the Suffolk County District Attorney's Office from 2004 to 2020 found that those who were not prosecuted had substantially lower risk of future arrest or prosecution than those who were prosecuted.<sup>5</sup>

Prosecutors play a vital role in the re-envisioning of criminal justice. Obviously, prosecutors have contributed to mass incarceration and the massive growth in the use of prisons over the last two generations.<sup>6</sup> Studies suggest that prosecutors have played a role in disproportionately harming people of color and communities of color.<sup>7</sup> Thus, the time is ripe to embark on approaches that embrace accountability. In their role, prosecutors should seek to repair the harm and distrust that has occurred through mass incarceration. It is the mission of the Suffolk County District Attorney's Office to take on that role.

This work has never been more important than now. The nation continues to witness law enforcement kill individuals like Michael Brown in Ferguson, Missouri, George Floyd in Minnesota, and Breonna Taylor in Kentucky – as well as similar actions by police proxies, as was the case with Ahmaud Arbery in Georgia, where local law enforcement had close relationships with one of the accused killers, a former police officer who had worked for decades in a local district

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3. See *Million Dollar Blocks*, COLUMBIA UNIV. CTR. FOR SPATIAL RESEARCH, <https://perma.cc/YL5H-PU4C> (archived Apr. 16, 2021); JUSTICE MAPPING, <https://perma.cc/53EB-9BGR> (archived Apr. 16, 2021).

4. MARIEL ALPER, MATTHEW R. DUROSE & JOSHUA MARKMAN, U.S. DEP'T OF JUST., 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005-2014), <https://perma.cc/NBV7-ARUC> (finding an 83% recidivism rate within nine years following release across 30 states).

5. Amanda Y. Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution* (Nat'l Bureau of Econ. Rsch., Working Paper No. 28600, 2021), <https://perma.cc/CMF4-HUVV>.

6. See, e.g., Bains, *supra* note **Error! Bookmark not defined.**, at 197-98; Butler, *supra* note 1, at 215.

7. Butler, *supra* note 1, at 215; Cassia Spohn, *Race and Sentencing Disparity*, in 4 REFORMING CRIMINAL JUSTICE 169, 178-79 (Erik Luna ed., 2017).

attorney's office.<sup>8</sup>

A number of district attorneys have been elected by pledging to use their power and discretion of individualized justice to reduce the incarceration rate.<sup>9</sup> This contrasts with traditional platforms that focus on securing convictions and tough sentences.

Consider the following examples: Scott Colom, District Attorney of the Sixteenth Circuit Court of Mississippi, won his election after running a campaign based on sending fewer convicted defendants to prison.<sup>10</sup> Stephanie Morales, the District Attorney in Portsmouth, Virginia, won her election after a campaign that advocated for combating mass incarceration and reforming the cash-bail system.<sup>11</sup> Mark Gonzalez, District Attorney for Nueces County (Corpus Christi), Texas, ran on a campaign focused on reducing prosecutorial misconduct and won.<sup>12</sup> Kim Foxx, the first African-American woman to become the State's Attorney for Cook County, Illinois, ran on a campaign of restoring public confidence in the criminal legal system, reducing racial disparities by sharing data on charging and plea bargaining decisions, and vowing to have special prosecutors investigate shootings by Chicago police.<sup>13</sup> Other examples include Larry Krasner, the District Attorney for Philadelphia County, Pennsylvania,<sup>14</sup> and James Stewart, District Attorney for Caddo Parish, Louisiana.<sup>15</sup>

Across the country, a movement to elect prosecutors and sheriffs who are willing to make these bold changes is growing. There is consensus among many communities that progressive prosecution is an approach that should be implemented now. What these prosecutors and others recognize is that in order to create a more responsive criminal legal system, prosecutors must have the ability to restrain themselves, even with the ultimate goal of community safety. Clearly,

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8. See Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Feb. 28, 2021), <https://perma.cc/LQZ2-5C4R>; Cleve R. Wootson Jr. & Colby Itkowitz, *New Video Said to Show Moments Leading Up to Georgia Jogger Ahmaud Arbery's Death*, WASH. POST (May 10, 2020, 8:01 AM PDT), <https://perma.cc/B5TM-Z5X6>.

9. See generally Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 22 (2019); see also *McCleskey v. Kemp*, 481 U.S. 279, 291 (1987) (“[T]he capacity of prosecutorial discretion to provide individualized justice is firmly entrenched in American law.”).

10. Leon Neyfakh, *How to Run Against a Tough-on-Crime DA—And Win*, SLATE (Nov. 12, 2015, 12:25 PM), <https://perma.cc/K4P5-TETD>.

11. Maryam Saleh, *Prosecutor Who Convicted White Police Officer for Killing Black Teen is Re-Elected in Contentious Race*, INTERCEPT (Nov. 7, 2017, 5:58 PM), <https://perma.cc/R72G-T2JJ>.

12. Timothy Bella, *The Most Unlikely D.A. in America*, POLITICO (May 6, 2018), <https://perma.cc/QW8Y-44YP>.

13. Steve Schmadeke, *Kim Foxx Promises New Path of Transparency as Cook County State's Attorney*, CHI. TRIB. (Dec. 1, 2016, 6:34 PM), <https://perma.cc/2R2H-SFUL>.

14. Larry Krasner, *Lecture by Larry Krasner*, 3 UCLA CRIM. JUST. L. REV. 99 (2019).

15. See David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO STATE J. CRIM. L. 647, 658-61 (2017) (discussing Stewart's victory).

the Suffolk County District Attorney's Office is not alone in a new kind of "justice league." This worthy goal is necessary in order for citizens to trust the criminal legal system; the system only runs properly with citizens' cooperation and trust.

There is "no roadmap for progressive district attorneys."<sup>16</sup> Though there are many voices pushing this approach, there are individual determinations of what this approach entails. As such, though many district attorney offices recognize the need to be progressive, each office has taken its own, unique approach, reflective of its jurisdiction. By explaining our approach, I hope to encourage others to adopt whichever of our tools make sense for their jurisdictions.

## II. THE SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE'S APPROACH TO PROGRESSIVE PROSECUTION

In recognizing the need for progressive prosecution in Boston and its surrounding communities, we at the Suffolk County District Attorney's Office have unveiled our approach to progressive prosecution. The approach is consistent with a commitment to transformational change to the criminal legal system. The Office's approach includes the following eight elements:

- presumptively declining to prosecute certain non-violent offenses;
- focusing on data collection and analysis, including creating an Innovation and Strategy Bureau and Crime Strategies Bureau;
- creating an external team to investigate fatal shootings and excessive force by police;
- creating a bureau to ensure case integrity;
- focusing on community engagement;
- committing to restorative justice principles; and
- recommitting a focus on employee performance apart from convictions.

### A. The Declination and Diversion Policy of The Rollins Memo<sup>17</sup>

The center of much of a prosecutor's influence is the ability to determine criminal charges.<sup>18</sup> This also includes the options of pursuing appropriate alternative dispositions. My Office starts with the presumption that in many cases,

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16. David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 27 (2017); see also Davis, *supra* note 9, at 16, 50-67 (noting several ways that progressive prosecutors can achieve goals of reducing mass incarceration and reducing racial disparities); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 17-18 (1998) (discussing how prosecutorial discretion is a major cause of racial inequality in the criminal justice system and how prosecutors have the responsibility to use their discretion to eradicate discriminatory treatment in the criminal justice system).

17. SUFFOLK CNTY. DIST. ATTY'S OFF., THE RACHAEL ROLLINS POLICY MEMO (2019), <https://perma.cc/ZD48-KFST> [hereinafter ROLLINS POLICY MEMO].

18. Davis, *supra* note 16, at 21-23.

certain low-level, non-violent charges do not need to be prosecuted. Rather, dismissal, diversion, treatment, and services are much more appropriate outcomes.<sup>19</sup>

In order to explain this policy, the Office released “The Rollins Memo.” This memo memorialized my vision for the Office and included a list of low-level, non-violent offenses that the Office would presumptively decline to prosecute.<sup>20</sup> The list included fifteen categories of offenses for which the Office will presumptively decline to prosecute criminally if the defendant does not have a significant and recent criminal history; the Office then often seeks restitution, treatment, or consequences other than incarceration.<sup>21</sup> The Office created these guidelines to increase consistency and instill a commitment to diversion. They hold the Office accountable and help make the Office transparent.

This approach is supported by research that suggests that a significant reduction in incarcerated people can be accomplished by a “front-end” strategy—that is, a strategy that focuses on the beginning of prosecution rather than the later sentencing stage.<sup>22</sup> Indeed, many non-violent, non-serious misdemeanor defendants are disproportionately poor people and communities of color, as they are often urban disorder offenses, including loitering, trespassing, and disorderly conduct.<sup>23</sup>

Further, this focus includes a reinvestment strategy, where the Office utilizes its limited resources to focus on unsolved homicides and other violent crimes while rebuilding community trust and strengthening the vital relationship it must have with the community that it serves.

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19. See Rachael Rollins, *The Public Safety Myth*, APPEAL (Aug. 29, 2019), <https://perma.cc/6GCR-Q3TY>.

20. ROLLINS POLICY MEMO, *supra* note 17, at 3-9. Notably, the presumption is rebuttable. *Id.*

21. These offenses include, but are not limited to, drug possession and driving without a license. *Id.*

22. See Todd R. Clear & James Austin, *Mass Incarceration*, in 4 REFORMING CRIMINAL JUSTICE 55, 57-59, 74 (Erik Luna ed., 2017) (describing decisions that are “prison-space allocation practices” and describing how New York’s policy of downgrading arrests from felonies to misdemeanors led to major reductions in the number of those entering state prisons); Alexandra Natapoff, *Misdemeanors*, in 1 REFORMING CRIMINAL JUSTICE 71, 91 (Erik Luna ed., 2017) (recommending training misdemeanor prosecutors to dismiss higher percentages of misdemeanors, particularly order-maintenance and possession offenses) [hereinafter Natapoff, *Misdemeanors* 2017].

23. Natapoff, *Misdemeanors* 2017, at 72; Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 101, 154 (2012) [hereinafter Natapoff, *Misdemeanors* 2012]; Spohn, *supra* note 7, at 179; see also Butler, *supra* note 1, at 224 (recommending decriminalizing misdemeanors to reduce punitive aspects of the criminal justice system); Emily Bazelon, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 322 (2019) (recommending not charging misdemeanors).

## B. Data Collection and Analysis

Second, our Office implemented the Innovation and Strategy Bureau to create datasets about the Office's cases, including which criminal charges are most frequently filed by prosecutors in our Office, how those charges are disposed of in court, and what types of sentences are imposed. This allows us to empirically review the success of measures implemented by the Office. Eventually, this will lead the Office to determine whether measures have been an improvement. These data are also used by our Crime Strategies Bureau, which I discuss below, in Subpart F.

Further, and more importantly, this data collection is a way to hold ourselves accountable.<sup>24</sup> As is frequently iterated, “[w]hat gets measured gets noticed.”<sup>25</sup> Our Office collects publicly available police incident data from our primary police partners, and we regularly request caseload data from our court partners and criminal record data from the Department of Criminal Justice Information Systems (DCJIS). Using data collection and analysis ensures that justice and accountability are achieved.<sup>26</sup>

## C. Discharge Integrity Team

An additional immediate change that I made upon taking office was creating the Discharge Integrity Team (DIT). The DIT independently and transparently investigates fatal shootings by the police and allegations that police used excessive force.

Investigations of police shootings are frequently handled by the police agencies themselves.<sup>27</sup> Thus, these investigations lack independence and are questioned by the community when officers are routinely found to have acted appropriately and criminal charges are rarely, if ever, filed against them.

When district attorney offices investigate police shootings, the community

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24. See Bains, *supra* note **Error! Bookmark not defined.**, at 198-99 (noting that data transparency and analysis permits prosecutors' offices to be held accountable to their communities).

25. *E.g.*, Butler, *supra* note 1, at 226 (quoting Hillary Rodham Clinton, Keynote at the Opening Session of the Fourth High-Level Forum on Aid Effectiveness (Nov. 30, 2011)).

26. See Bains, *supra* note **Error! Bookmark not defined.**, at 198-99 (recommending that state prosecution offices be transparent about data in order to create meaningful reform); Ronald F. Wright, *Prosecutor Institutions and Incentives*, 18 CRIMINOLOGY, CRIM. JUST., L. & SOC'Y 85, 87 (2017) (noting a difficulty with prosecution is that prosecutors carry out their duties with little data).

27. See generally AMARI L. HAMMONDS, KATHERINE KAISER MOY, RACHEL R. SUHR & CAMERON VANDERWALL, STAN. CRIM. JUST. CTR., AT ARM'S LENGTH: IMPROVING CRIMINAL INVESTIGATIONS OF POLICE SHOOTINGS 10-11 (2016), <https://perma.cc/P84L-JWD9> (discussing examples of police departments lacking the proper incentives to investigate officer-involved shootings); Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 447 (2016) (noting potential conflicts of interest of local district attorney's offices conducting investigations of police).

is often skeptical due to the close relationship between district attorney offices and police. Police officers are key witnesses in virtually every criminal case, and we work hand in hand with them to solve crimes and keep the community safe. It thus seems difficult for a district attorney's office to be neutral as exclusive investigators of the very people they work and collaborate with every day. This is precisely why our Office created the DIT. The DIT consists of four individuals who are not employed by the Suffolk County District Attorney's Office: a member of the community, a criminal defense attorney, a retired Superior Court Judge, and an active member of law enforcement. Half of the current members are Black, one member is a survivor of homicide, and another is a veteran. These life experiences significantly help our investigations. The District Attorney herself is the fifth member of the DIT, which meets regularly at a location outside of the Suffolk County District Attorney's Office.

Having an independent, civilian-involved group investigate police-involved shootings in a prosecutor office allows for the investigation to be led by an agency separate and apart from the police.<sup>28</sup> And we believe that having community and criminal defense bar involvement lends far more credibility to the process.

#### D. Integrity Review Bureau

Fourth, our Office created an internal Integrity Review Bureau (IRB). The Bureau's initiatives include the Office's Conviction Integrity Program, Sentencing Integrity Program, Case Integrity Program, and the Law Enforcement Automatic Discovery (LEAD) database. The Bureau ensures public integrity through conviction integrity review. The IRB reviews convictions when there is a reasonable belief that (1) the defendant is actually innocent, (2) an error or new evidence indicates that the defendant was wrongfully convicted, or (3) the defendant's conviction was unethically or unconstitutionally obtained, or in some other way was unjust. The IRB reviews a defendant's sentence under its Sentencing Integrity Program when it believes that certain sentences, such as young adults who are convicted of first-degree murder as joint venturers, exceed the ethical culpability of a defendant under specific, factual circumstances. Case integrity requires immediate review of significant, adverse occurrences in a case.<sup>29</sup>

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28. See Debbie Mukamal & David Sklansky, *The Way Forward After Black Men Are Shot Dead*, WASH. POST (Oct. 19, 2016), <https://perma.cc/R6R7-DRJL> (“[W]hen police shootings do occur, it is critical to ensure that the criminal investigations and charging decision are handled in ways that not only are fair but also are perceived to be fair, both by police officers and by the community.”).

29. An adverse decision triggering IRB review includes: a grand jury not issuing an indictment in a case presented to it, i.e., a no bill; an allowed defense motion to suppress or dismiss; a sustained *Batson/Soares* challenge; a mistrial or directed verdict; a critical matter flipped on appeal; an issue not otherwise covered that possibly reflects systemic failures, e.g., the Hinton or Amherst lab scandals; and an adverse credibility finding of a law enforcement officer.

Finally, the LEAD database contains the names of officers who have been discredited, indicted, or otherwise charged with certain offences that bring into question their credibility, reliability, or fitness to serve the communities they oversee. The names of officers in the database are available to defense counsel in any case in which those officers are involved and can be used internally to preclude an officer from testifying. In all, the Bureau will allow for the Office to learn from its previous and current mistakes.<sup>30</sup>

#### E. Community Engagement Efforts

Fifth, our Office has committed to unprecedented community engagement efforts. This includes working collaboratively with external partners, including the public school system, community centers, the Department of Children and Families, and local law enforcement. We also work with residents of Suffolk County, including activists, elected officials, clergy, individuals returning to their communities following incarceration, and individuals who are currently incarcerated. The Office partners on initiatives with these community partners, including forming a youth council to inform and provide feedback on policy reform from a youth's perspective. The Community Engagement team is also committed to building capacity among community partners. These partners are necessary to address the root causes of criminal behavior and to help us begin to rebuild trust in the criminal legal system. This approach answers the call to have those who are most directly impacted by crime, arrests, and prosecutions in communities have some influence over policies that determine prosecution, diversion, dismissal, restorative justice alternatives, treatment, or services.<sup>31</sup> The community team is also responsible for quarterly external town hall meetings. I lead these meetings in the community and provide information to residents while also listening to their suggestions and concerns. We also instituted internal community meetings—all staffs—where we meet with, update, and hear directly from our employees at least quarterly.

#### F. Crime Strategies Bureau

To further ensure our Office's commitment to data-driven prosecution and effective and efficient approaches, we also created the Crime Strategies Bureau (CSB). The CSB is committed to the prevention, reduction, and prosecution of narcotics distribution and trafficking and the resulting neighborhood crimes by adults and juveniles. It integrates prosecutorial intelligence, data gathering, and analysis functions into one central bureau. The Bureau is committed to utilizing

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30. See Sklansky, *supra* note 16, at 33 (comparing wrongful conviction units to doctors with morbidity and mortality conferences, military with after-action reviews, and the aviation industry investigating near-accidents); see also Bazelon, *supra* note 23, at 327.

31. See generally Jocelyn Simonson, *Democratizing Criminal Justice through Contestation and Resistance*, 111 NW. U. L. REV. 1609 (2017).

intelligence and data to engage in proactive and strategic investigations and prosecutions. The Juvenile, Narcotics, Human Trafficking, and Youth Violence Task Force (Gang) Units all report up through CSB. In addition, there are frequent meetings and collaboration with the Homicide Unit. Often a young person who is seen in the Juvenile Unit has been failed in some way—at school, at home, in church. If the Juvenile Unit programs are not effective, then we may see the youth again in the Narcotics or Gang Units. Or, if they escalate, the youth may be seen in the Homicide Unit, either as a victim or a target. The innovations of the CSB are being implemented to avoid this graduation to higher levels of crime, prosecution, and punishment. The goal is to have referral services for our juveniles, young adults, and adults who are experiencing crisis, trauma, or harm, suffering from a mental health or substance use disorder, or experiencing food and housing insecurity. Many could be better served by innovative thinking and assistance, rather than incarceration. And the former often costs much less than the latter.<sup>32</sup>

#### G. Commitment to Restorative Justice

Finally, our Office chose to fully support an initiative of restorative justice practices. This focus now allows the Office to authentically promote safer and healthier communities.<sup>33</sup> We answered the call from the neighborhoods and now provide residents with treatment and other services when necessary, allowing us to hold people accountable while keeping them with their families and loved ones in our communities.<sup>34</sup>

#### H. Measures of Success

In all of these measures, the Suffolk County District Attorney's Office has reaffirmed and committed itself to a focus on measures of success that are distinct and apart from conviction rates. This is in accordance with the growing and accurate belief that prosecutors should seek justice, accountability, and public safety, not simply convictions.<sup>35</sup> With this mindset, the Suffolk County District

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32. See PAMELA LACHMAN & S. REBECCA NEUSTETER, URB. INST. JUST. POL'Y CTR., TRACKING COSTS AND SAVINGS THROUGH JUSTICE REINVESTMENT (2012) (detailing justice reinvestment strategy of identifying key criminal justice population drivers in order to generate cost savings); SUSAN B. TUCKER & ERIC CADORA, OPEN SOC'Y INST., JUSTICE REINVESTMENT (2003).

33. See generally Miriam Krinsky & Taylor Phares, *Accountability and Repair: The Prosecutor's Case for Restorative Justice*, 64 N.Y. L. SCH. L. REV. 32 (2020) (urging prosecutors to participate in restorative justice measures to promote safer and healthier communities).

34. See, e.g., Bazelon, *supra* note 23, at 320 (recommending that prosecutors encourage treating mental illness and drug addiction rather than criminalizing it and promote restorative justice).

35. See DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND

Attorney's Office's approach has the ultimate goal of improving public safety and community health and well-being.

Finite prosecutorial resources should concentrate on crimes that have the highest public safety impact. Unfortunately, roughly 40 percent of the nation's murders and over 60 percent of sexual assaults went unsolved in 2017.<sup>36</sup> Locally, there was an overall clearance rate of about 46 percent, using the standard for calculating clearance rates outlined in federal crime reporting guidelines. Thus, the Suffolk County District Attorney's Office has prioritized these offenses of serious physical harm or death rather than spending the bulk of its limited resources on low-level, non-violent offenses. Tellingly, many homes that have individuals cycling through the criminal legal system for low-level, non-violent crimes also are the survivors of an unsolved violent crime or homicide on a relative or loved one.<sup>37</sup> If communities don't believe that law enforcement can solve the most serious crimes, they lose faith in the legal system. We must do better. An important step is rebuilding trust with communities, which will in turn result in solving more violent and serious crimes.

### III. EXPERIENCES AND CHALLENGES

Creating and implementing a novel approach does not come without challenges. Our Office is no exception. Two of the most significant challenges that we have faced in implementing these progressive prosecution policies are (1) resistance by the judiciary and (2) criticism that the policies will lead to a decline in public safety.

#### A. Judicial Resistance

There is recent consensus among criminal justice scholars that prosecutors are the most powerful actor in a courtroom.<sup>38</sup> Judges, however, also have significant power, and can impede progressive prosecutorial reforms. A recent case in Suffolk County, *Commonwealth v. Webber*, highlights this difficulty.

In *Webber*, a criminal complaint issued that charged the defendant with disorderly conduct.<sup>39</sup> The defendant was protesting at a "Straight Pride Parade" in Boston. As the charge was a low-level offense against a defendant who did not

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ITS IMPACT ON THE INNOCENT 13-51, 145, 169-70 (2012).

36. Crim. Just. Info. Servs. Div., *2017 Crime in the United States*, FBI, <https://perma.cc/9Y4R-X569>.

37. See Amber L. Beckley, Avshalom Caspi, Louise Arseneault, J.C. Barnes, Helen L. Fisher, Honalee Harrington, Renate Houts, Nick Morgan, Candice L. Odgers, Jasmin Wertz & Terrie E Moffitt, *The Developmental Nature of the Victim-Offender Overlap*, 4 J. DEV. LIFE COURSE CRIM. 24-49 (2018) (discussing the victim-offender overlap, where victims and offenders are often the same people, applying to both violent and non-violent crime).

38. See Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 172-73 (2019).

39. No. 1901-CR-004769 (Bos. Mun. Ct. Sept. 3, 2019).

have an extensive criminal history, prosecutors issued a *nolle prosequi*, an order to drop charges. This followed the Rollins Memo and, more generally, accorded with the Office's commitment to focus on serious crime and not penalize individuals for exercising their First Amendment rights.<sup>40</sup> However, a rogue judge of the Boston Municipal Court refused to accept the Office's attempt to decline prosecution of the case, and instead arraigned the case over the prosecutor's objection.<sup>41</sup> This action was a clear violation of separation of powers, as it would have required the Suffolk County District Attorney's Office to prosecute a case that the Office deemed inappropriate for prosecution.

My Office immediately filed an emergency petition with the state's highest court.<sup>42</sup> In an opinion that reaffirmed long-established prosecutorial discretion, a Single Justice of the Supreme Judicial Court of Massachusetts found that the trial judge acted unconstitutionally and without authority in attempting to require prosecutors to prosecute a case that they deemed unworthy of prosecution.<sup>43</sup> The Court also, at the request of the District Attorney, ordered that the criminal record of the defendant be expunged of the improper arraignment and resulting criminal charge.<sup>44</sup>

Though this case had a favorable outcome, it highlights a recurring challenge that progressive prosecutors face in Suffolk County, and elsewhere.

## B. Public Safety

Recent evidence shows that old strategies traditionally employed by pro-carceral district attorney offices have done little to improve public safety.<sup>45</sup> Meaningful reductions in the number of people in prison can, in fact, be accomplished without endangering the public.<sup>46</sup> In order for prosecutor offices to ensure that their policies are successful, the office needs to be able to compare how cases are handled with how they were treated in the past. In order to do that, my Office has

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40. See MASS. GEN. LAWS ch. 278, § 15 (authorizing prosecutors to enter a *nolle prosequi*).

41. See Gal Tziperman Lotan & John R. Ellement, *DA Rollins Prosecuting 8 Straight Pride Protesters Charged With Violent Acts*, BOS. GLOBE (Sept. 5, 2019, 10:44 PM), <https://perma.cc/54HZ-59EW>.

42. Commonwealth's Emergency Pet. Pursuant to G.L. c. 211, § 3 for Relief From the Boston Municipal Court's Unconstitutional Refusal to Accept the Commonwealth's *Nolle Prosequi*, Commonwealth v. Webber, No. SJ-2019-0366 (Sept. 5, 2019), 2019 WL 4241060.

43. *Webber*, No. SJ-2019-366 (Mass. Sept. 9, 2019), 2019 WL 4263308.

44. *Id.* at 4.

45. See, e.g., Equal Justice Initiative, *Mass Incarceration Costs \$182 Billion Every Year, Without Adding Much to Public Safety* (Feb. 6, 2017), <https://perma.cc/2KMB-JYLW> (summarizing a report finding that spending for mass incarceration has had little impact on public safety).

46. Clear & Austin, *supra* note 22, at 73-74 (discussing crime rates declining in New Jersey, New York, and California, where reductions in the number of people in prison have occurred).

prioritized positions responsible for capturing and evaluating reliable and trustworthy data. In fact, the Boston Police Department's own data show that in 2019, serious crime was down by approximately 5 percent compared with the previous year.<sup>47</sup> Larceny and shoplifting have decreased, as well. The Office's goal of transparency with data will help the Office continue to monitor the impact of its policies and adapt as necessary, always with the goal of keeping communities safe.

#### IV. THINKING AHEAD

Though this has been the Suffolk County District Attorney Office's preliminary approach in the last two years, additional steps will need to be taken, some of which cannot be accomplished by a district attorney's office alone.

Prosecutors are not the only actors who affect the process by which individuals enter the criminal legal system. A number of scholars and practitioners have noted that the problems currently facing the criminal legal system are just that: systemic.<sup>48</sup> Thus, the approach of progressive prosecution can only go so far in pushing other agencies or bodies in their own practices.<sup>49</sup> For example, changes within the substantive criminal code itself could effectuate real change.<sup>50</sup> Attempts to decrease incarceration work on the symptoms, but they do not address deeper and wider root causes and inequalities in society. The issues that a prosecutor office handles are significantly larger than its single jurisdiction—we are a catch basin at the end of numerous societal failures.<sup>51</sup> For progressive prosecutors to truly be successful, they desperately need allies.<sup>52</sup>

The progressive prosecution approach is important in order to slowly rebuild trust in this entire criminal legal system. We all rely on law enforcement, including prosecutors, to keep our communities safe. It is too great a danger to allow the trust in the criminal legal system to be lost. The moment we currently find ourselves in brings us to a crossroads. Any reforms must involve input from community stakeholders, and district attorneys need to be transparent about their policies and open to suggestions. Data and technology should be used to inform decisions and adapt quickly when necessary. This calculated and consistent approach can strengthen trust between the community and law enforcement. When

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47. *Crime Statistics: January 1 – December 29: 2018 vs. 2019*, BOS. POLICE DEP'T (Dec. 30, 2019), <https://perma.cc/AU5J-HQ5Q>.

48. See generally Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y. L. SCH. L. REV. 70 (2020); Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018).

49. E.g., Sklansky, *supra* note 16, at 27; Davis, *supra* note 16, at 21-23.

50. Natapoff, *Misdemeanors* 2012, at 142-51.

51. *Statement of DA Rollins Regarding Increased Violence in Suffolk County*, SUFFOLK CNTY. DIST. ATTY'S OFF. (July 6, 2020), <https://perma.cc/4V8T-EZ6T>.

52. Davis, *supra* note 9, at 24-25.

that happens, we can solve more serious crimes, securing more verdicts that allow our victims and survivors to receive accountability and begin the path to healing – all while making our communities safer and healthier.