

# FOREWORD: THE FUTURE OF THE PROGRESSIVE PROSECUTOR MOVEMENT

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What does it mean to be a progressive prosecutor in the United States today? The fact that this question seems so pressing—it is the question at the center of most of the contributions to this special issue—is a sign of how dramatically the expectations placed on prosecutors, and the politics of prosecutor elections, have changed over the past ten years.

A decade ago, no one was asking what it meant to be a progressive prosecutor. Few people had ever heard the term “progressive prosecutor.” Races for district attorney were relatively sleepy affairs. Most incumbents ran unopposed. When races were contested, the campaigns generally focused on character, not on policy. When policy *was* discussed, the candidates competed to see who could sound the toughest. The favored policy prescription was almost always *more*: more prosecutions, more prisoners, more years behind bars. Criminal justice policies seemed governed by one-way ratchet. There seemed to be an unwritten law: tougher is always better.<sup>1</sup>

And then, with remarkable speed, the unwritten law ceased to operate. Incumbent prosecutors began to be defeated by candidates who pledged restraint and moderation in charging practices and sentencing recommendations, along with more scrutiny of the police, greater vigilance against prosecutorial misconduct, and a new focus on racial equity. Often these candidates also promised bail reform, forswore use of the death penalty, or promised not to prosecute low-level drug offenses. By 2015 there were a dozen or so stories like this across the country.<sup>2</sup> It wasn’t clear at that point whether the trend would spread or persist. It did both. Today there are “progressive” prosecutors in every region of the country, in blue states and red states, in big cities and small towns. Several of the most prominent had no experience as prosecutors before running successfully for district attorney but instead had worked as civil rights lawyers or criminal defense attorneys; ten years ago this was an almost unimaginable career trajectory. There

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1. Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 581, 607 (2009).

2. David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 647-49 (2017).

are enough progressive prosecutors now that they have begun to band together to push for statewide and nationwide reforms.<sup>3</sup>

And enough time has passed so that we can ask whether progressive prosecutors can win reelection, even if local crime rates are rising. The answer is yes. Baltimore State’s Attorney Marilyn Mosby won office in 2014 on a reform platform calling for diversion of drug offenders into treatment and aggressive prosecution of police misconduct. She gained national attention when she charged six officers in the death of Freddie Gray. None of the officers were convicted, and by the time Mosby ran for reelection in 2018, homicide rates in Baltimore were soaring. Nonetheless Mosby beat off challengers, in part by highlighting her commitment to criminal justice reform.<sup>4</sup> Two years later, Kim Foxx was reelected state’s attorney in Cook County, Illinois. Foxx ran for her second term as she had run for her first term, as a resolute reformer. She won reelection notwithstanding homicide rates in Chicago that President Donald Trump had turned into a national issue, and notwithstanding widespread criticism of her handling of a high-profile case of an alleged hate crime that later appeared to have been staged.<sup>5</sup> Foxx was reelected the same day as Mark Gonzalez, the reform-oriented District Attorney in Nueces County, Texas. Before running successfully for District Attorney in 2016, Gonzales had spent his entire career as a defense attorney. During his first term he moderated the office’s charging practices, sought shorter sentences, opened case files to defense attorneys, and hung a portrait of Emiliano Zapata behind his desk. He won reelection in 2020 by beating off a challenge from a career prosecutor with a quarter-century of experience who pledged to address “violent” crime in Corpus Christi.<sup>6</sup>

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3. Tim Arango, *New Officials Quickly Bring Major Shifts in Policing*, N.Y. TIMES (Dec. 9, 2020), <https://perma.cc/WS4P-C56M>; Matt Sledge, *Jason Williams Wins New Orleans DA Race, Promising New Era in Prosecutor’s Office*, NOLA.COM (Dec. 5, 2020), <https://perma.cc/C3MJ-8VZX>.

4. Alec MacGillis, *The Tragedy of Baltimore*, N.Y. TIMES MAG. (Mar. 12, 2019), <https://perma.cc/MNZ7-Y7YU>; Tim Prudente, *Marilyn Mosby Wins Re-Election in Three-Way Race for Baltimore State’s Attorney*, BALT. SUN (July 26, 2018), <https://perma.cc/67PS-NL5R>.

5. Alice Yin, *After Winning Second Term, Democratic Cook County State’s Attorney Foxx Thanks Supporters and Promises to Continue Reform Efforts*, CHI. TRIB. (Nov. 4, 2020), <https://perma.cc/FN8A-SZHR>.

6. Justin Jouvenal, *From Defendant to Top Prosecutor, This Tattooed Texas DA Represents a New Wave in Criminal Justice Reform*, WASH. POST (Nov. 19, 2018), <https://perma.cc/S4GV-L2AE>; Alexandria Rodriguez, *Jon West Will Face Mark Gonzalez in Race for Nueces County District Attorney*, CORPUS CHRISTI CALLER TIMES (Mar. 3, 2020), <https://perma.cc/AN58-MYB8>; Alexandria Rodriguez, *Nueces County District Attorney Democrat Mark Gonzalez Wins Reelection Against Jon West*, CORPUS CHRISTI CALLER TIMES (Nov. 3, 2020), <https://perma.cc/TS54-L86S>.

Not everyone is on board with progressive prosecutors. The Trump Administration repeatedly attacked them; the Attorney General for the last two years of Trump's presidency, William Barr, called them "anti-law enforcement" and "dangerous to society."<sup>7</sup> But progressive prosecutors keep getting elected, in blue states and in red states, often drawing support from a remarkably bipartisan consensus in favor of criminal justice reform. It's increasingly common for candidates for the office of district attorney to argue not about who is toughest but about who is the true progressive, who will pursue the most meaningful and far-ranging reforms. It's also increasingly common for prosecutors who were elected as progressives to face criticism for not being progressive enough. What counts as progressive continues to change, as candidates and their supporters grow bolder in pressing for reform.

The activists working to elect progressive district attorneys are right to view prosecutors as key levers of reform. Few public officials have as much power and discretion as prosecutors, and as a result district attorneys can dramatically change many criminal justice policies unilaterally. On his first day in office, for example, the new district attorney in Los Angeles, George Gascón, abolished cash bail, ended the use of sentencing enhancements, barred efforts to seek the death penalty, stopped the practice of trying juveniles as adults, eliminated any prosecution of juveniles for misdemeanors, ended his office's opposition to resentencing of defendants convicted of felony murder, reopened four investigations of police shootings, and created a new board to review more than 600 officer-involved shootings dating back eight years.<sup>8</sup>

Cultural change inside district attorneys' offices takes longer; it is hard to change the attitudes and orientation of line prosecutors. One sign of that: the union representing deputy district attorneys in Los Angeles sued to block part of Gascón's package of reforms.<sup>9</sup> And the decisions that line prosecutors make day in and day out are often critical: what counts as exculpatory evidence that must be disclosed to defense counsel, for example, or what kind of plea bargain to offer, or how to characterize the defendant's degree of culpability, or how to handle sensitive issues of race, religion, or sexuality in court. Over the long term, though, progressive prosecutors are likely changing these kinds of ground-level

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7. Maura Ewing, *The Trump Administration Is Coming for Progressive Prosecutors*, SLATE (Aug. 29, 2019), <https://perma.cc/5NM2-QC5F>.

8. Arango, *supra* note 3; James Queally, *On First Day as L.A. County D.A., George Gascón Eliminates Bail, Remakes Sentencing Rules*, L.A. TIMES (Dec. 7, 2020), <https://perma.cc/KJG7-YCHA>; Frank Stoltze, *LA's New DA George Gascón Ushers in Sweeping Changes, Less Punitive Approach to Crime*, LAIST (Dec. 7, 2020), <https://perma.cc/3JE4-JEG3>; *Policies*, L.A. CNTY. DIST. ATTY'S OFFICE, <https://perma.cc/VN8R-XYFZ> (last visited Apr. 13, 2021).

9. *See, e.g.*, Perry Smith, *Deputy DAs File Suit to Stop DA*, SANTA CLARITA VALLEY SIGNAL (Dec. 30, 2020), <https://perma.cc/VD3E-5Y6P>.

decisions as well. Culture comes from the top down, and the values embraced by the head of the office matter. By shifting the official values of their offices, progressive district attorneys are changing who applies for jobs in their offices, who gets hired, who sticks around, and how they think about and talk about their jobs.

The progressive prosecutor movement thus is changing the American criminal justice system in real and important ways. And as the movement has gained strength, its agenda has broadened. Progressive prosecutors are slashing use of sentencing enhancements, abandoning cash bail, refusing to charge juveniles as adults, bringing new scrutiny to police misconduct, and at least beginning to change the professional self-conception of the prosecutors in their offices. But in the spirit of this special issue, let me highlight two issues that have stayed off the agenda. One major problem in American criminal justice that progressive prosecutors *haven't* challenged is the excessive power of prosecutors themselves. Another, related to the first, is the chronic underfunding of indigent defense.<sup>10</sup>

I'll come back to defense attorneys shortly, but let me start with the power and discretion of prosecutors. Progressive district attorneys have used the powers of the office, and the vast discretion that prosecutors exercise in the American system of criminal justice, to push criminal justice away from excessive harshness and toward greater attention to issues of racial equity, police accountability, and evidence-based initiatives to reduce recidivism. All of this is admirable. But they have rarely if ever questioned the amount of power they exercise and the absence of meaningful checks—aside from the ballot box—on their discretion. They have championed prosecutorial autonomy just as loudly as their tough-on-crime predecessors, insisting that they have an electoral mandate to decide what charges to bring and what penalties to seek.<sup>11</sup>

But critics have complained for decades, with considerable justification, that American prosecutors have too much power and too much unchecked discretion. It's not safe to put that much unilateral power in any the hands of any official, and it is hard to reconcile the vast discretion of American prosecutors with a commitment to the rule of law. These are, as I said, old complaints. But the last four years have provided them with new support, albeit at the federal rather than the local level. The blatant politicization of the U.S. Department of Justice during the Trump Administration has underscored the need for what James Vorenberg

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10. In fairness, I should point out that I didn't include either of these issues in a brief list of recommendations I compiled for progressive prosecutors several years ago. David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25 (2017). Even if the omissions were justified then—which isn't clear to me in retrospect—they do not seem justified today, when progressive prosecutors are and should be expanding their ambitions.

11. See, e.g., Karl Racine, Beth McCann & Miriam Aroni Krinski, *The Constitutional Crisis in Florida We're All Missing*, WASH. POST (July 12, 2017).

long ago called “decent restraint of prosecutorial power.”<sup>12</sup>

The exact form that those restraints should take is open to dispute. There are a range of possibilities, including allowing greater judicial oversight of prosecutorial charging decisions, subjecting prosecutors’ offices to requirements of procedural regularity borrowed from administrative law, revising criminal codes to narrow prosecutors’ charging options, regulating the terms of plea bargains, and separating adjudicatory and adversarial responsibilities within prosecutors’ offices. Each of these possibilities, of course, comes with its own drawbacks.<sup>13</sup> There are also a range of rules and arrangements in foreign legal systems that could be used as models, although these all have pluses and minuses as well, and the enterprise of borrowing between legal systems has well known perils.<sup>14</sup>

Still, by failing to address their own excessive power, progressive prosecutors are leaving a large hole in their reform agenda. Prosecutors themselves, especially prosecutors dedicated to reform, have an important role to play in determining what kinds of restraints on their power would work best. And progressive prosecutors have an additional reason to add this kind of reform to their agenda. Restraining the power and discretion of prosecutors is important not just to make individual prosecutorial decisions less arbitrary and more accountable, but also to guard against a return to the overly harsh, tougher-is-always-better policies of the past several decades. I pointed out earlier that progressive prosecutors have won reelection even in cities with rising crime rates. Nationwide, though, violent crime remains significantly less common than it was in the late 1970s, the 1980s, and the 1990s, and if crime returns to levels of those kind—in reality, not just in the fear-mongering rhetoric of certain politicians—prosecutors might begin to win office again by promising draconian penalties and aggressive policing. The unchecked discretion to charge crimes with excessive penalties, prosecute juveniles as adults, and use misdemeanor charges to sweep vast numbers of people into the criminal justice system—all of this leaves the equivalent of loaded guns lying on the district attorney’s desk. It is good that progressive prosecutors have

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12. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981); see also, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007); KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969); Erik Luna, *Prosecutor King*, 1 STAN. J. CRIM. L. & POL’Y 48 (2014); Manuel Roig-Franzia & Tom Hamburger, *Bill Barr, Unbound*, WASH. POST MAG. (Sept. 15, 2020), <https://perma.cc/GYQ3-PYFZ>.

13. See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 147 U. PA. L. REV. 959 (2009).

14. See Michael Tonry, *Prosecutors and Politics in Comparative Perspective*, 41 CRIME & JUST. 1 (2012); *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* (Erik Luna & Marianne Wade eds., 2012); *PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY* (Máximo Langer & David Alan Sklansky eds., 2017).

pledged not to use them, but it would be even better to put them beyond reach.

I said that it's unclear which constraints on prosecutorial power would work best, but there is one kind of constraint that plainly needs to be part of the package, because our system of justice leans so heavily on it. That is the defense attorney. And because most criminal defendants in the United States are poor, this means publicly funded indigent defense: public defenders' offices and court appointment of lawyers in private practice. These programs are scandalously underfunded, and that has been true, and widely known, for decades. The Supreme Court ruled half a century ago that the Constitution guarantees free legal representation to every defendant who wants it but can't afford it, but the promise of that decision has never come close to being fulfilled.<sup>15</sup> The inadequate funding of indigent counsel is exacerbated by legal rules that fail to guarantee their competence and professional independence, and that often put them at unfair disadvantage in court, for example by limiting what evidence prosecutors are required to disclose and when they have to disclose it.<sup>16</sup>

The wide discretion that prosecutors enjoy over charging, and the reams of draconian sanctions they can threaten, limit how much defense attorneys could accomplish even with more funding, greater independence, higher standards of competence, and better access to evidence. This is why so many criminal justice reformers in recent years have focused on electing progressive prosecutors; it is why Larry Krasner, the reform-minded District Attorney of Philadelphia, likes to say that a progressive prosecutor is "a public defender with power."<sup>17</sup> But there are limits, too, on what better prosecutors alone can do to improve the fairness of a criminal process that relies as much as ours does on the clash of opposing advocates. Some progressive prosecutors make a point of saying that they represent everyone in the community: defendants and their families as well as victims and their families. But our system does not and cannot trust prosecutors alone to look out for the rights and interests of criminal defendants; prosecutors have too many other expectations placed on them, and a large part of their role is inherently adversarial. That is why any comprehensive program of criminal justice reform needs to include greatly increased support for and empowerment of indigent counsel.

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15. *Gideon v. Wainwright*, 372 U.S. 335 (1963); STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* (2004); NAT'L RIGHT TO COUNSEL COMM., *JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* (2009); Carol S. Steiker, *Gideon's Problematic Promises*, DAEDALUS, Summer 2014, at 51.

16. Steiker, *supra* note 15; Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643 (2002); Daniel E. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010).

17. Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, N.Y. TIMES (Oct. 30, 2018), <https://perma.cc/3BXM-GNMQ>.

Prosecutors have critical roles to play in improving indigent defense. They can join forces with public defenders in seeking to bring indigent defense budgets into closer parity with prosecutorial budgets, they can throw their support behind fairer procedural rules sought by defense attorneys in courts and in state legislatures, and they can refuse to charge more defendants than local indigent defense systems have the resources to represent.<sup>18</sup> Prosecutors know firsthand how important an adequate defense is for ensuring the fairness of the criminal process, and their support for measures to improve indigent defense generally will carry great weight. But such support remains rare. Few progressive prosecutors have made the improvement of indigent defense part of their campaign platforms or their agendas once in office—not even small but growing group of progressive prosecutors who used to be defense attorneys themselves.

Over the course of a decade, the progressive prosecutor movement has begun to reverse some of the worst excesses of the tough-on-crime politics of the 1980s, 1990s, and early 2000s. That record of accomplishment shows no signs of slowing. But now is a good time to ask how the agenda of the progressive prosecutor movement can best be further expanded. That question is at the heart of many of the contributions to this special issue, and properly so. As the progressive prosecutor movement moves forward, its ambitions can and should expand—including by questioning the prosecutor’s own power, and by addressing the need to strengthen indigent defense.

The two gaps I’ve identified in the current agenda of the progressive prosecutor movement are related. They both reflect an attraction to, or at least a comfort with, a heroic view of the prosecutor as singlehandedly delivering justice. That’s not how our system works, and it can’t work that way. Prosecutors are human, and they operate within an adversary system. Prosecutors who want to transform American criminal justice, making it more accountable and more just, should want to rein in their own power and discretion, and to ensure every defendant meaningful assistance of counsel.

Progressive prosecutors should pay close attention, too, to the range of other suggestions in this special issue. The editors of the *Stanford Journal of Civil Rights & Civil Liberties* have performed a great service in hosting this excellent conversation about the progressive prosecutor movement—its accomplishments, its weaknesses, and its future promise.

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18. ROY L. AUSTIN, JR., KIRK BLOODSWORTH, CARLOS J. MARTINEZ & ALLISON GOLDBERG, PROSECUTION AND PUBLIC DEFENSE: THE PROSECUTOR’S ROLE IN SECURING A MEANINGFUL RIGHT TO AN ATTORNEY (2019); Bruce A. Green, *Gideon’s Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336 (2013); Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175 (2020).