
THE PARADOX OF “PROGRESSIVE PROSECUTION”

When Freddie Gray woke up on April 12, 2015, he surely did not know that he would soon enter a coma only to die a week later. That morning, he walked to breakfast in his old West Baltimore neighborhood with two of his best friends.¹ The restaurant they wanted to visit was closed, however, so they left.² At some point on the way home, they encountered police officers on bicycles.³ After a brief chase, Gray stopped voluntarily, at which point officers arrested him.⁴ Video footage shows the officers savagely shoving Gray’s face into the sidewalk and twisting his arms and legs.⁵ Unable to stand or walk, Gray was dragged to the back of a police van where he would spend the next forty minutes handcuffed, shackled, unbuckled, and, while conscious, begging for his twenty-five-year-old life as the officers drove around the city making several stops.⁶ Eventually, Gray emerged unconscious with a nearly severed spinal cord and a crushed voice box.⁷ Paramedics later transferred him to the Maryland Shock Trauma Center, where he remained comatose for a week before dying.⁸

For five consecutive days, protesters took to the streets, City Hall, and the police headquarters to denounce Gray’s death at the hands of the Baltimore police officers.⁹ Citizens and community leaders demanded that the city fire the officers and press criminal charges against them.¹⁰ After over a week of intensifying protests and national attention,¹¹ State’s Attorney Marilyn J. Mosby filed criminal charges against

¹ See Catherine Rentz, *New Details Emerge About Morning Freddie Gray Was Arrested*, BALT. SUN (Nov. 13, 2015, 5:06 PM), <https://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-freddie-gray-friends-20151113-story.html> [<https://perma.cc/BY4D-VYNN>].

² See *id.*

³ See *id.*

⁴ See *Timeline: Freddie Gray’s Arrest, Death and the Aftermath*, BALT. SUN, <http://data.baltimoresun.com/news/freddie-gray/> [<https://perma.cc/RXG8-6CZS>] [hereinafter *Timeline*].

⁵ See Catherine Rentz, *Videographer: Freddie Gray Was Folded Like “Origami,”* BALT. SUN (Apr. 23, 2015, 12:37 PM), <https://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-gray-video-moore-20150423-story.html> [<https://perma.cc/6ZZ3-X9DA>].

⁶ See *Timeline*, *supra* note 4; Rentz, *supra* note 5.

⁷ See Colin Campbell, *Man Injured in Gilmore Homes Arrest Has Spine Surgery, Remains in Coma*, BALT. SUN (Apr. 15, 2015, 6:02 PM), <https://www.baltimoresun.com/news/maryland/crime/bs-md-ci-gilmore-homes-arrest-fole-20150415-story.html> [<https://perma.cc/YFA3-733E>]; David Collens, *Spine Nearly Severed in Police Custody, but Few Explanations*, CBS NEWS (Apr. 20, 2015, 8:46 PM) <https://www.cbsnews.com/news/freddie-gray-nearly-severed-spine-police-custody-few-explanations/> [<https://perma.cc/BQ94-D4G4>].

⁸ See *Timeline*, *supra* note 4.

⁹ See *id.*

¹⁰ See *Freddie Gray Death Sparks City Hall Protest*, BALT. SUN, <https://www.baltimoresun.com/news/83342163-132.html> [<https://perma.cc/LZ9F-2BBB>].

¹¹ On April 21, 2015, the U.S. Department of Justice opened a probe to determine the propriety of bringing charges for civil rights violations. *Timeline*, *supra* note 4.

the six police officers who were involved in Gray’s arrest and transportation to the police station.¹²

The civil rights community celebrated this development, which came on the heels of officers in other jurisdictions being cleared of any wrongdoing for killing black men.¹³ Mosby was lauded for wielding her position as the city’s chief prosecutor to insist on police accountability.¹⁴ Mosby herself seemed to have anticipated this support. At the press conference announcing the charges, she spoke directly to the protestors when she assured: “I heard your calls for ‘no justice, no peace!’”¹⁵ But things did not go according to plan. In a rousing press conference after the first three of the officers were acquitted, Mosby announced that she was professionally compelled to drop the charges against the remaining three officers despite the horrific injustice.¹⁶ She decried the trouble and pain “mothers and fathers all across this country, specifically Freddie Gray’s mother Gloria Darden, or Richard Shipley, Freddie Gray’s stepfather, [go] through on a daily basis knowing their son’s mere decision to run from the police proved to be a lethal one.”¹⁷ Despite the acquittals, she described Gray as an “innocent 25-year-old man who was unreasonably taken into custody after fleeing in his neighborhood, which just happens to be a high crime neighborhood.”¹⁸

Mosby’s statements seem to imply that there was something inherently unfair about targeting Gray simply because he was in a high-crime area. It is deeply ironic for Mosby to make this argument. Just a few weeks before Gray’s death, Mosby instructed the Division Chief of her office’s Crime Strategies Unit to target the exact intersection where the officers first encountered Gray — North Ave. and Mount St. — with enhanced drug enforcement efforts.¹⁹ Acting on this directive, the

¹² Jean Marbella, *Six Baltimore Police Officers Charged in Freddie Gray’s Death*, BALTIMORE SUN (May 2, 2015, 12:16 AM), <https://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-freddie-gray-mainbar-20150501-story.html> [https://perma.cc/J72J-FMBG].

¹³ *See id.* (“The case stood in stark contrast to others across the nation in which police officers were cleared of wrongdoing in the deaths of black men. Grand juries declined to indict the officer who put a chokehold on Eric Garner in Staten Island, N.Y., or the officer who fatally shot Michael Brown in Ferguson, Mo.”).

¹⁴ *See, e.g.*, Jonathan Capehart, *Marilyn Mosby’s Amazing Press Conference*, WASH. POST: POST PARTISAN (May 1, 2015), <https://www.washingtonpost.com/blogs/post-partisan/wp/2015/05/01/marilyn-mosbys-amazing-press-conference/> [https://perma.cc/XD43-F85J].

¹⁵ *Id.*

¹⁶ *See Transcript: State’s Attorney Marilyn Mosby on the Dropped Charges*, BALTIMORE SUN (July 27, 2016, 4:45 PM), <https://www.baltimoresun.com/news/maryland/freddie-gray/bal-transcript-state-s-attorney-marilyn-mosby-on-the-dropped-charges-20160727-story.html> [https://perma.cc/A6D5-RN45].

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *See* Supplement to Defendants’ Joint Motion for Recusal of Baltimore City State’s Attorney’s Office at 3–4, *State v. Goodson*, Nos. 115141032, 115141034, 115141033, 115141037, 115141035, 115141036 (Md. Cir. Ct. June 9, 2015).

District Commander instructed the department lieutenants to conduct a daily narcotics initiative at that intersection, using cameras, informants, covert operations, and similar techniques.²⁰ The initiative was an immediate priority and was expected to produce “daily measurables.”²¹

Mosby’s unapologetic prosecution of the officers in Gray’s case places her in the recently emerging league of “progressive prosecutors.” But her zeal obscures her complicity. This Note interrupts the celebration of unusually progressive prosecutors to emphasize the risks associated with relying on prosecutors in the movement to reform the U.S. criminal legal system. It argues that these reforms are “reformist reforms” that fail to deliver on the transformative demands of a fundamentally rotten system. Part I gives an overview of progressive prosecution tactics. These tactics are deployed in a criminal legal system that is fundamentally rotten, as explained in Part II. Part III outlines the inability of the progressive prosecution movement to redistribute power through ushering in transformative reforms. Part IV provides guiding principles for future efforts in reform.

I. REFORM THROUGH DISCRETION — PROGRESSIVE EFFORTS IN PROSECUTION

Across the country, voters are electing nontraditional prosecutors. In November 2017, Larry Krasner was elected District Attorney of Philadelphia after running on a platform that called for an end to mass incarceration.²² A year before that, Kim Foxx’s calls for increased prosecutorial accountability and transparency resulted in her election as State’s Attorney in Cook County, Illinois.²³ Kim Ogg, Houston’s new District Attorney, is passionate about decriminalizing marijuana.²⁴ And Rachael Rollins, who recently won the election for District Attorney of Boston’s Suffolk County, wishes to see mandatory minimums for all drug offenses repealed.²⁵ These attitudes do not square with

²⁰ *Id.* at 4.

²¹ *Id.*

²² See Sophie Tatum, *Progressive Civil Rights Lawyer to Be the Next Philadelphia District Attorney*, CNN (Nov. 8, 2017, 12:59 AM), <https://www.cnn.com/2017/11/08/politics/larry-krasner-philadelphia-district-attorney/index.html> [<https://perma.cc/TX5P-KYA6>]; *On the Issues*, KRASNER FOR DA, <https://krasnerforda.com/platform/> [<https://perma.cc/RMS2-4WJX>].

²³ See Steve Schmadeke, *Kim Foxx Promises “New Path” of Transparency as Cook County State’s Attorney*, CHI. TRIB. (Dec. 1, 2016, 6:34 PM), <https://www.chicagotribune.com/news/local/breaking/ct-kim-foxx-states-attorney-met-20161201-story.html> [<https://perma.cc/FWT9-D3AJ>].

²⁴ See Brian Rogers, *Houston District Attorney Proud of First Year in Office*, HOUS. CHRON. (Dec. 29, 2017, 6:05 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Houston-district-attorney-proud-of-first-year-in-12462622.php> [<https://perma.cc/LM8V-KTV5>].

²⁵ See Andy Metzger, *Rachael Rollins Wins Nod for Suffolk County District Attorney*, WGBH NEWS (Sept. 4, 2018), <https://www.wgbh.org/news/politics/2018/09/04/rachel-rollins-wins-nod-for-suffolk-county-district-attorney> [<https://perma.cc/TA44-4U58>].

the traditional prosecutorial spirit. Typically, promises to be “tough on crime” abound in District Attorney elections,²⁶ and the toughest candidate wins.²⁷

But there is evidence to suggest that this approach no longer resonates with voters as widely in the age of mass incarceration. For example, consider Philadelphia, where Lynne Abraham once served four terms as District Attorney and became known as the most zealous death penalty-seeker in the country.²⁸ Krasner, who has promised to end mass incarceration and never pursue the death penalty, represents a stark contrast.²⁹ In this way, Krasner’s election can be taken as an “indication of how frustrated city voters are with the criminal justice system.”³⁰ The same can be said of Stephanie Morales, reelected in Portsmouth, Virginia, in November 2017 in a landslide after promising to combat mass incarceration and reform the cash-bail system.³¹

Additionally, earlier this year, prominent civil rights activist and writer Shaun King cofounded a political action committee (PAC) to help fund campaigns of reform-minded prosecutors.³² These are prosecutors who “can make a material impact on people’s lives by helping to combat discriminatory policing, limiting or eliminating money bail, and rolling back other practices that lead to mass incarceration.”³³ Well-known philanthropist George Soros is also part of the mission to elect reform-minded prosecutors and has invested millions of dollars into their campaigns.³⁴

This Part attempts to sketch the landscape of tools these nontraditional prosecutors use with the intent to influence criminal legal reforms. Fundamentally, progressive prosecutors seek to rebalance the use of

²⁶ See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 58–59 (1998).

²⁷ See James Forman, Jr., *Why Care About Mass Incarceration?*, 108 *MICH. L. REV.* 993, 993 (2010) (book review) (“Our appetite for vengeance sometimes seems insatiable: politicians make careers out of being tough on crime, only to lose elections to those who are yet tougher . . .”).

²⁸ Holly Otterbein, *Progressive Firebrand Larry Krasner Wins District Attorney Primary*, *PHILA. MAG.* (May 16, 2017, 9:55 PM), <https://www.phillymag.com/news/2017/05/16/larry-krasner-wins-district-attorney-race/> [<https://perma.cc/CF64-VF57>] (citing Tina Rosenberg, *The Deadliest D.A.*, *N.Y. TIMES MAG.* (July 16, 1995), <https://nyti.ms/2BX7xdx> [<https://perma.cc/HH9L-QVHA>]).

²⁹ See *id.*

³⁰ *Id.* (“[Krasner] is a threat to the status quo much in the same way Bernie Sanders and Donald Trump are.”).

³¹ See Maryam Saleh, *Prosecutor Who Convicted White Police Officer for Killing Black Teen Is Re-Elected in Contentious Race*, *THE INTERCEPT* (Nov. 7, 2017, 8:58 PM), <https://theintercept.com/2017/11/07/prosecutor-who-convicted-white-police-officer-for-killing-black-teen-is-re-elected-in-contentious-race/> [<https://perma.cc/W6Y2-ATWL>].

³² See Daniel Marans, *Black Activist Starts Group that Aims to Elect Progressive Prosecutors*, *HUFFINGTON POST* (Feb. 15, 2018, 1:35 PM), https://www.huffingtonpost.com/entry/black-yactivist-elect-progressive-prosecutors_us_5a85b64ee4b0058d55670e4f [<https://perma.cc/K5UD-8VVH>].

³³ REAL JUSTICE, <https://realjusticepac.org/> [<https://perma.cc/5MKN-22T8>].

³⁴ Jason Devaney, *Soros Funded 12 Liberal District Attorney Candidates, 10 Won*, *NEWSMAX* (Dec. 20, 2016, 5:19 PM), <https://www.newsmax.com/Newsfront/soros-funded-liberal-district-attorney/2016/12/20/id/764932/> [<https://perma.cc/2MJZ-3XCT>].

prosecutorial discretion. Where traditional prosecutors have used their enforcement powers in a heavy-handed manner to punish marginalized individuals, progressive prosecutors institute practices that pull back on those punitive measures, or, at least, divert them. And where traditional prosecutors have refused to exercise their expansive powers to hold police accountable for misdeeds, progressive prosecutors (sometimes) actively prosecute police officers.

A. *Nonenforcement*

The heart of a prosecutor's power lies in her ability to decide whether to bring criminal charges and what charges to bring against a defendant. The late Professor William Stuntz analogizes this power to ordering off of a menu at a restaurant:

[C]riminal law and the law of sentencing define prosecutors' options, not litigation outcomes . . . [T]hey are items on a menu from which the prosecutor may order as she wishes. She has no incentive to order the biggest meal possible. Instead, her incentive is to get whatever meal she wants, as long as the menu offers it.³⁵

Many head prosecutors are taking items off the menu in their jurisdictions. For example, the District Attorneys in Brooklyn and Philadelphia have instructed line prosecutors to limit the scenarios in which they prosecute low-level marijuana cases.³⁶ Kenneth P. Thompson, Brooklyn's former District Attorney, explained that he was compelled to implement this policy to help keep nonviolent people out of the criminal justice system and forestall the collateral consequences.³⁷ Mark Gonzalez, the recently elected District Attorney of Nueces County in southern Texas, refuses to prosecute any marijuana offense.³⁸ Instead, Gonzalez offers offenders the opportunity to take a drug class and pay a \$250 fine within thirty days.³⁹

Prosecutors have also taken the death penalty off the sentencing menu. Aramis Ayala, the Orange-Osceola State Attorney, instructed her

³⁵ William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004).

³⁶ See Stephanie Clifford & Joseph Goldstein, *Brooklyn Prosecutor Limits When He'll Target Marijuana*, N.Y. TIMES (July 8, 2014), <https://nyti.ms/VGapDb> [<https://perma.cc/JKS7-8F5V>]; Brian X. McCrone, *Marijuana Criminal Cases Dropped en Masse by Philadelphia District Attorney*, NBC 10 (Feb. 28, 2018, 8:20 AM), <https://www.nbcphiladelphia.com/news/local/Marijuana-Criminal-Cases-Dropped-En-Masse-by-Philadelphia-District-Attorney-Larry-Krasner-474228023.html> [<https://perma.cc/9Y9F-ZZF8>].

³⁷ See Clifford & Goldstein, *supra* note 36.

³⁸ See Henry Gass, *Meet a New Breed of Prosecutor*, CHRISTIAN SCI. MONITOR (July 17, 2017), <https://www.csmonitor.com/USA/Justice/2017/0717/Meet-a-new-breed-of-prosecutor> [<https://perma.cc/PP5A-GM58>].

³⁹ *Id.*

office to not seek the death penalty in any case.⁴⁰ (After much legal and political backlash, she later retreated from this position.⁴¹) While campaigning, Larry Krasner also pledged to never seek the death penalty.⁴² Prosecutors leading these efforts, however, have been criticized for blatantly neglecting their duties and violating separation of powers doctrine.⁴³

B. Diverted Enforcement

Prosecutors always have the option to pursue alternatives to conviction. Commonly referred to as “diversion,” most states permit prosecutors to suspend prosecution for qualified defendants so long as they abide by set conditions.⁴⁴ In some cases, these defendants are processed through community programs or entirely different courts.⁴⁵ George Gascón, San Francisco’s District Attorney, has been in favor of expanding the city’s Law Enforcement Assisted Diversion Program, which he describes as a “thoughtful approach to ensure that communities are safe and that those struggling with addiction are directed toward the help they need.”⁴⁶ In Philadelphia, Krasner recently launched a police-assisted diversion program to send “low-level offenders suspected of prostitution or drug possession to community-based services instead of prosecution

⁴⁰ See Frances Robles & Alan Blinder, *Florida Prosecutor Takes a Bold Stand Against Death Penalty*, N.Y. TIMES (Mar. 16, 2017), <https://nyti.ms/2m7axgQ> [<https://perma.cc/QY7V-SZZ7>].

⁴¹ See Kim Bellware, *Florida Prosecutor’s Refusal to Seek Death Penalties Draws Political Backlash*, HUFFINGTON POST (Mar. 16, 2017, 10:55 PM), https://www.huffingtonpost.com/entry/aramis-ayala-death-penalty_us_58caf6b4e4b00705db4d9a02 [<https://perma.cc/5KG5-68QE>]; Gal Tziperman Lotan, *State Attorney Ayala Rescinds Her Death-Penalty Ban*, ORLANDO SENTINEL (Sept. 1, 2017, 5:40 PM), <https://www.orlandosentinel.com/news/breaking-news/os-aramis-ayala-death-penalty-press-conference-20170831-story.html> [<https://perma.cc/Q669-HG23>].

⁴² See Maryclaire Dale, *District Attorney Nominee: I Wouldn’t Seek the Death Penalty*, AP NEWS (May 17, 2017), <https://www.apnews.com/be54b4bb2fc742ddb6cf957b42fc6927> [<https://perma.cc/3MLG-ZHJG>]. Shortly after being elected, Krasner said “[y]ou never want to say never” when discussing his position on seeking the death penalty. Dann Cuellar, *Days After Shakeup New Philadelphia District Attorney Larry Krasner Outlines His Plan*, 6 ABC (Jan. 10, 2018), <https://6abc.com/politics/days-after-shakeup-new-philadelphia-da-outlines-his-plan/2920192/> [<https://perma.cc/G7FN-ESQF>].

⁴³ See Erin Cady, *Prosecutorial Discretion and the Expansion of Executive Power: An Analysis of the Holder Memorandum*, HARV. J. LEGIS. ONLINE (Oct. 15, 2015), <http://harvardjol.com/2015/10/15/prosecutorial-discretion-holder-memorandum/> [<https://perma.cc/WA4C-HRKU>] (“[T]he Framers of the Constitution believed that the separation of the prosecutorial power from the power to legislate was essential to preserve liberty.”); Robles & Blinder, *supra* note 40 (“The state attorney general, Pam Bondi, called Ms. Ayala’s decision a ‘blatant neglect of duty.’”).

⁴⁴ See Cheri Panzer, Note, *Reducing Juvenile Recidivism Through Pre-Trial Diversion Programs: A Community’s Involvement*, 18 J. JUV. L. 186, 195 (1997).

⁴⁵ See *id.* at 201.

⁴⁶ *BART Partners with SF to Divert Mentally Ill and Addicts from Jail to Treatment*, BAY AREA RAPID TRANSIT (Mar. 31, 2017), <https://www.bart.gov/news/articles/2017/news20170331> [<https://perma.cc/7MKR-AJDM>].

and jail.”⁴⁷ Krasner has also instructed prosecutors to consider diversion in particular cases involving unlicensed guns, DUI, and marijuana.⁴⁸

C. Police Accountability

Traditional prosecutors tend to abandon their zealous investigation and prosecution tendencies when the perpetrator of a crime is a police officer. Progressive prosecutors, however, commonly call for police accountability.⁴⁹ Marilyn Mosby’s full-throated condemnation of and attempt to hold police officers accountable for the killing of Freddie Gray contrasts sharply with the reactions of other prosecutors to police misconduct. Although prosecutors have vast power to pursue charges for the sometimes-egregious crimes police officers have committed, most traditional prosecutors refuse.⁵⁰ Only when public outcry has made nonresponse politically poisonous have traditional prosecutors half-heartedly pursued justice. In August 2014, eighteen-year-old Michael Brown was murdered by Ferguson police officer Darren Wilson, who shot Brown six times.⁵¹ St. Louis County Prosecutor Robert McCulloch grudgingly sought an indictment against Brown’s killer after massive public outcry.⁵² McCulloch had publicly opposed seeking indictments against officers for committing crimes in the past, and he failed to convince the grand jury in the Brown case to return a true bill.⁵³ As a result, justice for Michael Brown was denied. Recently, voters in St. Louis County ousted McCulloch in a rebuke of his inaction, replacing

⁴⁷ See Tom MacDonald, *Philadelphia Going “Outside the Box” with Diversion Program*, WHY (Mar. 16, 2018), <https://why.org/articles/philadelphia-going-outside-box-diversion-program/> [<https://perma.cc/C4HK-JQPP>].

⁴⁸ Memorandum from Larry Krasner, District Attorney of Phila., to Phila. District Attorneys on New Policies Announced Feb. 15, 2018, at 2 (Feb. 15, 2018), <https://www.documentcloud.org/documents/4415817-Philadelphia-DALarry-Krasner-s-Revolutionary-Memo.html> [<https://perma.cc/HQ3C-FXF8>].

⁴⁹ See, e.g., David Alan Sklansky, Commentary, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 647–49 (2017) (recounting examples of district attorneys “getting turned out of office for being too soft on the police,” *id.* at 649); see also David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 38 (2017) (advising prosecutors to “[i]nvestigate police shootings independently and transparently”).

⁵⁰ See, e.g., Opinion, *Voters Tell Prosecutors, Black Lives Matter*, N.Y. TIMES (Mar. 18, 2016), <https://nyti.ms/1R7HwFQ> [<https://perma.cc/4L6E-XD9X>] (“Local prosecutors have historically paid no price for taking up residence in the pocket of the police department.”).

⁵¹ See Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014) <https://nyti.ms/2GG2tuc> [<https://perma.cc/85A9-L3S2>]; Frances Robles & Julie Bosman, *Autopsy Shows Michael Brown Was Struck at Least 6 Times*, N.Y. TIMES (Aug. 17, 2014), <https://www.nytimes.com/2014/08/18/us/michael-brown-autopsy-shows-he-was-shot-at-least-6-times.html> [<https://perma.cc/4S5N-6FCF>].

⁵² See Cleve R. Wootson Jr., *Voters Oust Prosecutor Accused of Favoring Ferguson Officer Who Killed Michael Brown*, WASH. POST (Aug. 8, 2018), <https://wapo.st/2M8orLH> [<https://perma.cc/T2SV-6G5Z>].

⁵³ See *id.*

him with a more progressive candidate, Wesley Bell.⁵⁴ Bell ran in part on a proposal to appoint special prosecutors in police misconduct cases.⁵⁵

Kim Foxx’s election as Cook County State’s Attorney stands as another example of a progressive prosecutor who ran on a platform of police accountability. In 2014, Chicago police officer Jason Van Dyke murdered seventeen-year-old Laquan McDonald by shooting him sixteen times in the back as he was walking away.⁵⁶ McDonald’s murder at the hands of Van Dyke prompted outcry from Chicagoans, but Chicago’s previous prosecutor, Anita Alvarez, failed to prosecute him swiftly.⁵⁷ Foxx successfully ran to replace Alvarez, demanding prosecution of Van Dyke by an independent prosecutor.⁵⁸ McCulloch and Alvarez may have been ousted in disgrace, but as the saying goes, there’s more where that came from.⁵⁹

D. Other Tactics

In addition to the specific tactics such as nonenforcement, diversion, and police accountability, there are more general suggestions for reform-minded prosecution. Professor David Alan Sklansky recently published *The Progressive Prosecutor’s Handbook*, which observes: “There is no roadmap for progressive district attorneys. There are no generally agreed-upon ‘best practices’ for prosecutors’ offices”⁶⁰ Instead, the handbook suggests behavioral and interpersonal tips on “how to improve the day-to-day functioning of a district attorney’s office.”⁶¹ For example, Sklansky recommends that district attorneys “[r]educe case delays”⁶² and “[p]ay attention to office culture.”⁶³ Additionally, the John Jay College of Criminal Justice hosts the Institute for Innovation in Prosecution, which partners with prosecutors to measure success by quantifying safety, equity, and wellness, not conviction rates.⁶⁴ Some of

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See *Dash-Cam Video Released Showing Laquan McDonald’s Fatal Shooting*, NBC CHI. (Dec. 17, 2015, 3:15 PM), <https://www.nbcchicago.com/news/local/Police-Release-Disturbing-Video-of-Officer-Fatally-Shooting-Chicago-Teen-352231921.html> [<https://perma.cc/23Z6-8GRN>].

⁵⁷ See Deborah L. Shelton, *Prosecutor Anita Alvarez May Pay a Price for Her Handling of Cops Who Kill*, THE NATION (Mar. 1, 2016), <https://www.thenation.com/article/anita-alvarez-may-be-the-first-prosecutor-held-accountable-for-not-prosecuting-the-police/> [<https://perma.cc/GVR3-T9NU>].

⁵⁸ See Alexandra Silets, *Kim Foxx on Primary Win, Broken Criminal Justice System*, WTTW NEWS (Mar. 16, 2016, 7:40 PM), <https://chicagotonight.wttw.com/2016/03/16/kim-foxx-primary-win-broken-criminal-justice-system> [<https://perma.cc/7Y9X-CVSF>].

⁵⁹ See Forman, *supra* note 27, at 993.

⁶⁰ Sklansky, *The Progressive Prosecutor’s Handbook*, *supra* note 49, at 27.

⁶¹ *Id.*

⁶² *Id.* at 37.

⁶³ *Id.* at 39.

⁶⁴ *Institute for Innovation in Prosecution at John Jay College of Criminal Justice*, NAT’L NETWORK FOR SAFE COMMUNITIES, <https://nnscommunities.org/our-work/iip> [<https://perma.cc/9XWT-UYQQ>].

the Institute's work has led to specific developments, such as conviction integrity units in Brooklyn and Manhattan.⁶⁵

II. THE ROT AT THE CORE OF THE CRIMINAL LEGAL SYSTEM

This Part more closely considers the system that the progressive efforts described in the previous Part are attempting to reform. If the criminal legal system is organized by laws, it is worth thinking about the character and power of the law. Critical race scholars have already done much of this work by exploring the intersection of race and the law.⁶⁶ For example, Professor Devon Carbado states that “the law does not simply reflect ideas about race. The law constructs race”⁶⁷ The law not only distinguishes on the basis of race but also creates racial hierarchies.⁶⁸ Embedded in the law are frames — such as “colorblindness,” “merit,” “terrorist,” and “the border” — that have disadvantaged people of color.⁶⁹ Additionally, Professor Reva Siegel analyzes equal protection law's narrow focus on racial classification to the exclusion of “facially neutral” laws that “regulated racial status in matters of employment, political participation, and criminal justice.”⁷⁰

The criminal laws that prosecutors seek to enforce⁷¹ and thus maintain are not immune from these same critiques. Racism motivated laws enacted at the birth of mass incarceration; Professor Michelle Alexander brands the entire criminal legal system as a racial caste system.⁷² Political scientist Vesla Weaver's research revealed that around the civil rights era, “debates over crime legislation featured significant attention to race.”⁷³ The members of Congress who voted against civil rights

⁶⁵ *Featured Innovations*, NAT'L NETWORK FOR SAFE COMMUNITIES, <https://nnscommunities.org/our-work/iip/innovations> [<https://perma.cc/59NF-BEBL>].

⁶⁶ For a fuller discussion of critical race theory and claims about the law, see Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1439–46 (2016).

⁶⁷ Devon W. Carbado, *Afterword: Critical What What?*, 43 CONN. L. REV. 1593, 1610 (2011).

⁶⁸ *Id.*

⁶⁹ *Id.* at 1615.

⁷⁰ Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1142 (1997). However, some argue that the power of the law is not uniformly a bad thing but can be used to create racial justice. See Butler, *supra* note 66, at 1445–46.

⁷¹ Prosecutor's office mission statements regularly emphasize their role as law enforcers. See, e.g., MERCER COUNTY PROSECUTOR'S OFF., <http://mercercountyprosecutor.com/> [<https://perma.cc/MP9B-N6UA>] (describing its task as “fostering an environment of law abidingness”); *Mission Statement*, OC DISTRICT ATT'Y, <http://orangecountyda.org/office/mission.asp> [<https://perma.cc/R7RP-TN5P>] (stating a commitment to the “vigorous enforcement of criminal and civil laws”).

⁷² See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* 11–19, 20–58 (2010).

⁷³ Vesla M. Weaver, *Frontlash: Race and the Development of Punitive Crime Policy*, 21 STUD. AM. POL. DEV. 230, 262 (2007).

legislation also voted for more punitive crime bills.⁷⁴ More strikingly, “members of Congress who voted against civil rights measures proactively designed crime legislation and aggressively fought for their proposals.”⁷⁵ Racially motivated criminal laws continued beyond the civil rights era.⁷⁶ Congress endorsed President Reagan’s drug war when it passed the Anti-Drug Abuse Act of 1986, which punished crack distribution significantly more harshly than powder cocaine.⁷⁷ As sentencing data confirm, the former is associated with blacks, the latter with whites.⁷⁸ Although few would deny that crack cocaine inflicted suffering in poor black communities, as Alexander correctly states, “we had a choice about how to respond.”⁷⁹ The response at the time — to harshly criminalize crack cocaine — bears no resemblance to today’s response to the opioid epidemic that has caused overdose deaths among white Americans at a rate that is comparable to cocaine-related overdose deaths among blacks in the 1980s.⁸⁰ And all these observations about the content of the law are to say nothing about its enforcement on the street, which, too, is racially oppressive.⁸¹ Perhaps this is what James Baldwin meant when he asserted: “I do not claim that everyone in prison here is innocent, but I do claim that the law, as it operates, is guilty, and that the prisoners, therefore, are all unjustly imprisoned.”⁸²

On top of this, a constellation of law shields the prosecutorial system from critique. We may hope that prosecutors are “minister[s] of

⁷⁴ See *id.* at 262–63; see also Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 HARV. L. REV. 1525, 1585 (2018) (“Major national media blamed the civil rights movement not only for urban riots, but also more generally, for lawbreaking by Negroes.” (internal quotation marks omitted)).

⁷⁵ Weaver, *supra* note 73, at 262; see also *id.* at 262–63 (noting that these “same actors . . . bitterly opposed a bill for penalties for violence against civil rights workers”).

⁷⁶ See, e.g., Katherine Beckett & Bruce Western, *Governing Social Marginality: Welfare, Incarceration, and the Transformation of State Policy*, 3 PUNISHMENT & SOC’Y 43, 55 (2001) (“[I]n the wake of the Reagan revolution, penal and welfare institutions have come to form a single policy regime aimed at the governance of social marginality.”).

⁷⁷ See ALEXANDER, *supra* note 72, at 53. To make matters worse, Professor Michael Tonry makes a compelling case that the racial impact of mandatory sentencing laws and crack cocaine laws could have easily been predicted *ex ante*. See MICHAEL TONRY, *MALIGN NEGLECT — RACE, CRIME, AND PUNISHMENT IN AMERICA* 104–05 (1995). Beyond the context of drug laws, to Tonry, “the main reason that black incarceration rates are substantially higher than those for whites is that black crime rates for imprisonable crimes are substantially higher than those for whites.” *Id.* at 79.

⁷⁸ See ALEXANDER, *supra* note 72, at 53.

⁷⁹ *Id.* at 51.

⁸⁰ See Jared Keller, *A Tale of Two Drug Wars*, PAC. STANDARD (Dec. 8, 2017), <https://psmag.com/social-justice/a-tale-of-two-drug-wars> [<https://perma.cc/AEW6-PY8H>].

⁸¹ See, e.g., ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 51–59 (2018) (describing how the noncarceral expansion of low-level enforcement has had a concentrated impact on minority communities).

⁸² JAMES BALDWIN, *NO NAME IN THE STREET* 148 (1972).

justice”⁸³ and “servant[s] of the law,”⁸⁴ yet we could not have achieved mass incarceration without them. When John Thompson argued that the Orleans Parish prosecutors should be held liable for withholding exculpatory evidence that was discovered a month before his execution, the Supreme Court disagreed and overturned a \$14 million verdict against that office.⁸⁵ When Thomas Goldstein sued the Los Angeles County District Attorney’s Office for failure to tell his defense attorney that a key witness was a jailhouse informant, a unanimous Court held that the prosecutors were absolutely immune from liability.⁸⁶

Ironically, the Court’s rationale for narrowing the scope of prosecutorial liability includes a “public interest” concern — too much liability would “prevent the vigorous and fearless performance of the prosecutor’s duty.”⁸⁷ This is the model for prosecution. When Attorney Mosby directed officers to intently police the intersection at which Freddie Gray was arrested, she was doing her job. When a prosecutor abandons her arsenal of tough-on-crime tools, such behavior is exceptional. At best, that is what a reform-minded prosecutor is: an exception. They are significantly outnumbered by their nonprogressive counterparts, who are the rule and are necessary to accelerate the wholesale rot of the criminal legal system.

III. TRANSFORMATIVE REFORMS AND THE INADEQUACIES OF PROGRESSIVE PROSECUTION

You have three options when presented with a piece of moldy bread. First, you can eat the bread. Perhaps you think that mold is not that harmful to eat. Second, you can cut around the mold spores, trying to eat just the nonmoldy parts. This is an imprecise process, so sometimes you will eat mold that didn’t get removed. And maybe, in your hunger, you’ll be tempted by bits on the edge with just a little mold — you are hungry, after all. Third, you can refuse to eat any of the bread because, to you, a piece of moldy bread is just not salvageable.

Insistence on maintaining the status quo in the criminal legal system due to some delusion that it’s not oppressive is akin to eating the moldy bread. Advocating for more progressive prosecutors is akin to cutting

⁸³ See MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS’N 2014).

⁸⁴ See *Berger v. United States*, 295 U.S. 78, 88 (1935).

⁸⁵ See *Connick v. Thompson*, 563 U.S. 51, 54 (2011). In *Connick*, the defendant sought § 1983 damages from a district attorney’s office for deliberately failing to train its prosecutors to avoid constitutional violations, but the Court held that one violation did not evince a “failure to train.” See *id.* at 54, 64.

⁸⁶ See *Van de Kamp v. Goldstein*, 555 U.S. 335, 338–39 (2009).

⁸⁷ See *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976). For a more thorough treatment of prosecutorial liability, see generally David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203 (2011).

around the spores. That might be better than going hungry, but it’s still unsatisfying, and risky. This Note pleads with people to stop eating moldy bread.

Put a different way, tweaking the criminal legal system by introducing nontraditional prosecution methods ignores the fundamental truth that this system was never intended to keep marginalized people safe.⁸⁸ Counteracting the harms of an inherently punitive institution requires transformative reforms. Progressive prosecution is best thought of, instead, as a “reformist reform.”⁸⁹ As described by Professor Amna Akbar and Marbre Stahly-Butts, Partnership Director at Law for Black Lives, reformist reforms misdiagnose the depth of the problem.⁹⁰ Such reforms attempt to fix broken systems without realizing that these systems are “working to re-entrench and legitimize current power arrangements.”⁹¹

Transformative reforms recognize that the problem of racial injustice within the criminal legal system is much deeper than anything an individual prosecutor can fix. Reforms should disrupt the power imbalance between the prosecutors and the prosecuted because a criminal legal system that operates as a racial caste system is illegitimate. Most importantly, the prosecuted should be integral to the process of crafting these reforms.⁹² Mainstream progressive prosecution is silent on the project of redistributing power, and instead focuses on encouraging highly empowered individuals to usher in fairer policies.⁹³ Pragmatically, fairer policies are helpful. But they may create a perception of progress that “mollifie[s] communities of color and sap[s] the energy needed for a continued push” toward encouraging deeper transformation.⁹⁴ For example, diversion programs might be celebrated as acts

⁸⁸ See Marbre Stahly-Butts & Amna A. Akbar, *Transformative Reforms of the Movement for Black Lives* 4–5 (2017) (unpublished manuscript), <https://law.rutgers.edu/sites/law/files/attachments/Stahly%20Butts-Akbar%20-%20Transformative%20Reforms%20of%20the%20Movement%20for%20Black%20Lives.pdf> [<https://perma.cc/6A24-H87Y>]; see also PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* 120 (2009) (“Those who work inside [the system] can tinker with the punishment regime, but they probably cannot overhaul it.”).

⁸⁹ ANDRÉ GORZ, *STRATEGY FOR LABOR* 7 (Martin A. Nicolaus & Victoria Ortiz trans., 1967).

⁹⁰ See Stahly-Butts & Akbar, *supra* note 88, at 4; see also GORZ, *supra* note 89, at 7 (“Reformism rejects those objectives and demands — however deep the need for them — which are incompatible with the preservation of the system.”).

⁹¹ Stahly-Butts & Akbar, *supra* note 88, at 4. A characteristic reformist reform in the context of policing is the calls for body cameras, which have become “a justification for the expansion of police budgets and increased surveillance on communities,” *id.* at 6, but do not address the problem of police accountability.

⁹² See Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 NW. U. L. REV. 1609, 1623 (2017) (“There is reason to think that if those most likely to be arrested and incarcerated were given truly equal influence over policy, and if policymaking happened more locally, then the criminal justice system would be less rather than more punitive.”).

⁹³ See Stahly-Butts & Akbar, *supra* note 88, at 4 (noting that “[r]eformist reforms do not seek to interrogate either the impact or intent of systems”; rather, they “shift[] the conversation away from systemic critiques to a focus on the individual”).

⁹⁴ Butler, *supra* note 66, at 1467.

of grace, but they also divert energy from challenging the power of a prosecutor to make an individual submit to state monitoring.

This Part outlines the inadequacies of progressive prosecution against the rubric of transformative reforms. The analysis below contemplates the roles of other actors and highlights the ways in which the institutional and electoral structures of the prosecutorial system work to frustrate progressive reforms. Despite the laudatory goals of progressive prosecution, line attorneys facing perverse incentives and ingrained practices still have power over defendants; police officers still have power over everyone; diversion programs often expand the budget of police and district attorney offices; and voters may never elect, or may decide to remove, progressive prosecutors.

A. Line Prosecutors and the Principal-Agent Problem

Prior to this section, the discussion of prosecutors has focused primarily on head prosecutors — those who are elected or appointed — rather than their supervisees, the more junior “line” prosecutors. The distinction between these two levels of prosecutors has important policy implications. As Professor Paul Butler has explained, “[t]he lead prosecutor — the district attorney or the United States attorney — can make whatever decision he wants about whether to prosecute and no judge or politician can overturn it.”⁹⁵ On the other hand, “line prosecutors don’t have a lot of ‘free’ discretion.”⁹⁶ Because of the major power differentials among types of prosecutors, it is natural that reform efforts would focus on head prosecutors.

Despite the rationality of focusing reform efforts on head prosecutors, this focus has its limits. While line prosecutors must run many charging decisions by their bosses, not every decision they make or interaction they have is supervised. Put another way, head prosecutors cannot run every case (if they could, line prosecutors would not be necessary). Given this reality, there is significant potential for noncompliance from those on the lower rungs of the hierarchy due to a lack of buy-in to the goals of the head prosecutor. This problem of institutional design is not unique: rather, it is a standard principal-agent problem.⁹⁷ The principal (the head prosecutor) has a task that needs to be completed (the prosecution, or not, of a case), but cannot perfectly observe how the agent (the line prosecutor) completes that task. Such situations are known to create the potential for large “agency costs” — these costs

⁹⁵ BUTLER, *supra* note 88, at 106.

⁹⁶ *Id.* at 109.

⁹⁷ See Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. MGMT. REV. 57, 58 (1989) (“[T]he so-called agency problem . . . occurs when cooperating parties have different goals and division of labor. Specifically . . . the ubiquitous agency relationship, in which one party (the principal) delegates work to another (the agent), who performs that work.” (citations omitted)).

are measured by the distance between what the principal would prefer to implement herself and what the agent actually implements.⁹⁸ In the context of criminal prosecutions, where the stakes involve the lives of individuals, agency costs will be high.

Perhaps the most brazenly defiant agents will be fired.⁹⁹ But not all defiance is brazen. There exists a range of subtle acts of defiance that can undermine a chief prosecutor's progressive agenda.¹⁰⁰ For instance, a line prosecutor could quite easily threaten one of her witnesses with potential charges should the witness not agree to testify at trial.¹⁰¹ This practice does not require the filing of actual, pre-approved charges to be an effective means of coercion and is exactly the type of tactic a reformer might seek to ban. Additionally, head prosecutors cannot scrutinize the discovery process of every case. If, for instance, a reform-minded head prosecutor decided to implement a liberal discovery policy, there would still be ample room for the line prosecutors charged with actually carrying out discovery to subvert that goal. So, while head prosecutors may limit the menu of charges and set broad goals for their offices, they cannot directly control, and do not directly observe, the extent to which line prosecutors carry out the tasks assigned to them in a manner that accords with the head prosecutors' goals.

Moreover, we have at least one strong reason to expect defiance. In an adversarial system, prosecutors, not unlike defense attorneys, like to win.¹⁰² If a line prosecutor receives marching orders that create an obstacle to winning, she will likely find it difficult to set her instincts

⁹⁸ See R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* (n.s.) 386, 394–95 (1937); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305, 308, 330 (1976).

⁹⁹ For an extreme example, in Philadelphia, Larry Krasner fired dozens of assistant district attorneys to make room for prosecutors "more engaged and certainly pay[ing] attention to the cases that come, and just not . . . ready to send somebody to jail." Vernon Odom & Dann Cuellar, *Dozens of Prosecutors Fired from Philadelphia District Attorney's Office*, 6ABC (Jan. 6, 2018), <https://6abc.com/politics/dozens-of-prosecutors-fired-from-philadelphia-das-office/2867602/> [<https://perma.cc/FB2Q-X56S>]. It is also true that the head prosecutor's power to hire and fire line prosecutors is limited by political considerations. While the most brazen cases may be easy to identify, reform-minded prosecutors will likely encounter far more instances in which line prosecutors who have questionable records can appeal to the notion that they were simply following the orders of former bosses. The exercise of power to fire in these edge cases will be limited by the extent to which head prosecutors are willing to spend their potentially limited political capital replacing longstanding employees with new hires.

¹⁰⁰ Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 *J. CRIM. L. & CRIMINOLOGY* 1119, 1133 (2012) (noting that despite a chief prosecutor setting policies that restrict line prosecutors' discretion, "bureaucratic life gives an employee plenty of ways to evade the commands of the boss").

¹⁰¹ See generally Bennett L. Gershman, *Threats and Bullying by Prosecutors*, 46 *LOY. U. CHI. L.J.* 327, 334–35 (2014) (describing coercive and threatening tactics available to prosecutors).

¹⁰² BUTLER, *supra* note 88, at 116; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 534 (2001) ("[A]ll litigators prefer winning to losing, and one must assume prosecutors share that preference."); see also Alafair S. Burke, *Prosecutorial Passion, Cognitive*

aside.¹⁰³ Reform efforts in prosecution, however, require precisely that prosecutors not pursue some wins they might normally have pursued. As this Note addresses below, that is a feature of the current reform efforts, and not a bug: the allure of the progressive prosecutor, and the chief selling point among proponents of reform, is that she can use her expansive powers to promote more just outcomes for defendants. What is less often mentioned is that while prosecutors do have vast power, reform requires that they judiciously choose when *not* to exercise it. In other words, reform requires prosecutors to *restrain themselves* in an environment in which they have access to nearly unlimited leverage over defendants and face a near-zero probability of legal liability for malicious acts.¹⁰⁴ In addition, any effort at reform from within a prosecutor's office would take place against the backdrop of received norms and practices, the weight of which is sure to induce inertia among line prosecutors who may not approach reform as zealously as their bosses.

B. Police Officers and the Principal-Agent Problem

It bears repeating that prosecutors are not the only actors who affect the process by which individuals enter the criminal legal system. In the majority of circumstances, before a prosecutor can contemplate whether to charge an individual for a crime, a police officer must decide whether to arrest that person for a crime.¹⁰⁵ Importantly, police do not always operate at the behest of prosecutors and may have conflicting objectives. When those objectives clash with those of progressive prosecutors, efforts at reform may be stalled or reversed. Because progressive prosecutors cannot exert direct control over police, their power to enact reform outside of the courtroom is inherently limited.

Often, police decide not only whether to arrest a person but also *what* to arrest her for: police serve as bedrock witnesses in the state's case for most crimes and so have unique power to probe the limits of what the individuals they encounter can plausibly be accused of.¹⁰⁶ Consider a

Bias, and Plea Bargaining, 91 MARQ. L. REV. 183, 187–88 (2007) (explaining how win rates fit into prosecutors' self-perceptions as "minister[s] of justice," *id.* at 187).

¹⁰³ See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2541 (2004) ("Self-interest and risk aversion motivate most line attorneys to safeguard their reputations, win-loss records, and egos by not risking losses at trial.")

¹⁰⁴ See *supra* pp. 757–58.

¹⁰⁵ Cf. Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 758 (2003) ("Prosecutors are the exclusive gatekeepers over federal court, but they need agents to gather evidence. Agencies control investigative resources, but they are not free to retain separate counsel. If agents want criminal charges to be pursued against the target of an investigation, they will have to convince a prosecutor to take the case.")

¹⁰⁶ See Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2202–04 (2010); Nirej Sekhon, *Mass Suppression: Aggregation and the Fourth Amendment*, 51 GA. L. REV. 429, 460 (2017) ("Prosecutors rely on police to generate defendants and the information used to convict them.")

few examples. First, and most simply, police can choose whether to ignore or punish the various crimes any given person may have committed.¹⁰⁷ Second, police can use their privileged status to force individuals to comply with orders against the threat of charges.¹⁰⁸ Finally, police make a regular practice of encouraging individuals to commit crimes they might not have committed otherwise.¹⁰⁹

In a general sense, police are at liberty to direct their energies to detect whichever crimes they wish among whichever population they wish. Police then present the fruits of their detection efforts — however biased — to prosecutors, who only then decide what to charge based on the evidence provided to them by police. The independence of police, coupled with the reliance of prosecutors on police to detect crimes, creates yet another principal-agent problem, parallel to that faced by head prosecutors attempting to make internal reforms in their offices. Reform-minded prosecutors will face severe agency costs in their interactions with and attempts to bring reform to the police, who may or may not share the goals of reformers.

As the previous section explained, principal-agent problems arise when the principal can only imperfectly monitor the efforts of the agents to whom she has delegated a task. Any concerns that head prosecutors cannot perfectly monitor the efforts of line prosecutors are multiplied by orders of magnitude when considering the relationship between prosecutors and the police. Police performance can be neither supervised by head prosecutors nor evaluated by prosecutors, who do not necessarily have the skills to evaluate their on-the-job work. Further, because police are able to control the way prosecutors perceive their efforts, prosecutors have only limited ability to gauge the distance between their preferred enforcement of the law and how police enforce the law.

While the agency costs involved in police implementation of the reforms of progressive prosecutors are undoubtedly steep, they are exacerbated by the dynamics of prosecutorial reliance on police. Prosecutors’ offices are reliant on the police to provide the essential service of

¹⁰⁷ See Douglas A. Smith, Christy A. Visher & Laura A. Davidson, *Equity and Discretionary Justice: The Influence of Race on Police Arrest Decisions*, 75 J. CRIM. L. & CRIMINOLOGY 234, 249 (1984) (discussing selective police enforcement against people in “lower status” neighborhoods); see also Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1055–56 (2010) (“Racial disparities have not been caused by discriminatory statutes; instead, such results have been achieved through the racialized exercise of discretion, including selective enforcement by police departments . . .”).

¹⁰⁸ See, e.g., Mario Cerame, Note, *The Right to Record Police in Connecticut*, 30 QUINNIPIAC L. REV. 385, 419 (2012) (“Police charge or threaten to charge those individuals who record police activity, and especially those who record police misconduct.”).

¹⁰⁹ The law of entrapment readily acknowledges that “[s]ince some offenses — particularly such offenses as prostitution, gambling, and selling of narcotics — are as a practical matter virtually victimless, effective law enforcement requires affirmative involvement by the police.” 1 WHARTON’S CRIMINAL LAW § 53, at 361 (Charles E. Torcia ed., 15th ed. 1993).

detection of crimes. This reliance gives the police bargaining power over prosecutors, and when prosecutors act in ways the police disapprove of, police can voice that disapproval by withholding their services from prosecutors in the future.¹¹⁰ In this way, even when prosecutors can successfully detect the misdeeds of the police, they may be constrained in their ability to discipline the police by their lack of relative bargaining power.

The problem of prosecutorial reliance on the police is most troubling when reform-minded prosecutors are tasked with holding the police accountable for abusing or killing civilians. As discussed in section I.C, a common demand among those pushing for reform of prosecutors' offices is for prosecutors to bring charges against police officers who improperly use lethal force. For example, consider the shooting of James Boyd by the Albuquerque Police Department (APD), a police force with a long track record of so-called "officer-involved shootings" of mentally ill civilians.¹¹¹ In the five years preceding Boyd's death, APD officers killed twenty-eight people, but not a single one of those shootings had led to charges against the officers behind the trigger.¹¹² That changed when longtime district attorney Kari Brandenburg — hardly a "reform-minded" prosecutor — charged two APD officers in the death of Boyd in response to massive local outcry.¹¹³ A homeless man police encountered camping in the mountains, Boyd had been spotted grasping two small knives.¹¹⁴ He was fatally shot after being targeted with a flash-bang grenade and a police dog.¹¹⁵ Boyd, who was known to suffer from mental illness, was surrounded by no fewer than forty-one police officers when he died.¹¹⁶

The Albuquerque police responded swiftly to the prosecution of one of their own, opening a retaliatory investigation into Brandenburg.¹¹⁷

¹¹⁰ Professor and former prosecutor Paul Butler explains that as a prosecutor, you "need [police officers] to help you make your cases (every prosecutor has experienced having a police officer catch an attitude, sometimes in the middle of a trial, and purposely ruin your case because they don't like you)." Paul Butler, Opinion, *The System Must Counteract Prosecutors' Natural Sympathies for Cops*, N.Y. TIMES ROOM FOR DEBATE (Apr. 28, 2015, 12:26 PM), <https://nyti.ms/2BXdqac> [<https://perma.cc/LA7P-GJFP>].

¹¹¹ See Rachel Aviv, *Your Son Is Deceased*, NEW YORKER (Feb. 2, 2015), <https://www.newyorker.com/magazine/2015/02/02/son-deceased> [<https://perma.cc/MF6S-2MND>].

¹¹² See Nick Pinto, *When Cops Break Bad: Inside a Police Force Gone Wild*, ROLLING STONE (Jan. 29, 2015, 2:10 PM), <https://www.rollingstone.com/culture/culture-news/when-cops-break-bad-inside-a-police-force-gone-wild-69487/> [<https://perma.cc/J8VB-2M4T>].

¹¹³ See Aviv, *supra* note 111.

¹¹⁴ See *id.*

¹¹⁵ See *id.*; Rebecca R. Ruiz, *New Mexico Officers Won't Face Federal Charges in Killing of Mentally Ill Man*, N.Y. TIMES (July 18, 2017), <https://nyti.ms/2uxdU4a> [<https://perma.cc/Y57R-JH6D>].

¹¹⁶ See Aviv, *supra* note 111.

¹¹⁷ See Albert Samaha, *Law vs. Order*, BUZZFEED (Aug. 2, 2016, 10:41 PM) <https://www.buzzfeed.com/albertsamaha/how-an-albuquerque-da-took-on-her-own-police-department-and> [<https://perma.cc/9N3F-2HV3>].

The investigation revolved around payments she made to neighbors who had been burgled by her son, who was addicted to heroin.¹¹⁸ The claims against Brandenburg were made public and led to cries for her resignation.¹¹⁹ When APD officers shot another civilian, Brandenburg’s deputy was barred from the scene of the crime and not allowed into police briefings.¹²⁰ Brandenburg carried out the prosecution of the two officers who killed Boyd, which resulted in a mistrial, but bowed to outside pressure and did not run for reelection in 2016.¹²¹ Brandenburg’s example suggests that even prosecutors who have long records of working with the police, and who have ignored past misdeeds in order to maintain those relationships, can face punishing blowback when they attempt to hold the police accountable for even the most egregious abuses of power. Indeed, the leader of Philadelphia’s police union has publicly accused reform-minded DA Larry Krasner of “intentionally [seeking] to endanger [cadets’] lives,” and called Krasner’s supporters “parasites.”¹²² The ability of police to cripple progressive prosecutors’ efforts seriously limits the efficacy of reform through the appointment or election of reform-minded prosecutors.

C. Feeding Oppression

Progressive prosecutors often make use of diversion programs. As described in section I.B, these programs are enforced in conjunction with police departments and in general allocate more resources to police departments. For example, in Philadelphia, the mayor has proposed allocating \$750,000 to expand the police-assisted diversion program.¹²³ In theory, the police department will use this money to divert individuals away from court and into a community program.¹²⁴ In practice, the police department simply gets richer, and poor defendants are trapped in a cycle of liability. As this Note discusses in Part III, giving more resources to police departments is unlikely to be in service of the very communities they police that acutely need more resources.¹²⁵ When so many resources are already allocated to police, it does not make sense to allocate the marginal dollar to additional police resources; rather, that dollar is better spent funding other social services. Providing additional

¹¹⁸ *See id.*

¹¹⁹ *Id.*

¹²⁰ *See id.*

¹²¹ *See* Ruiz, *supra* note 115; Samaha, *supra* note 117.

¹²² Joe Trinacria, *Philly FOP President Blasts DA Krasner in Letter to Police Cadets*, PHILA. MAG. (Mar. 2, 2018, 2:07 PM), <https://www.phillymag.com/news/2018/03/02/mcnesby-krasner-police-cadets/> [<https://perma.cc/5WEM-XHJS>].

¹²³ *See* MacDonald, *supra* note 47.

¹²⁴ *See id.*

¹²⁵ *See* Stahly-Butts & Akbar, *supra* note 88, at 9.

funding to police departments entrenches the power imbalance between the police and the policed.

Even worse, diversion programs in some jurisdictions are funded by taking money from the very people granted a “break” by being placed under supervision. A 2016 *New York Times* article illustrates how diversion can bankrupt the poor and prolong their entanglement with the criminal legal system by assessing onerous fees that many cannot afford.¹²⁶ This is especially true in jurisdictions in which prosecutors have near unilateral power to request diversion (which can include the power to set the associated fees).¹²⁷ A recently filed Arizona lawsuit challenges the constitutionality of funding diversion programs with fees charged to participants and exposes how these programs can be used to fund more oppression.¹²⁸ Of the approximately \$1,000 charged to participants in the Maricopa County diversion program, \$650 goes toward the budget of the county attorney’s office.¹²⁹

D. Volatile Voters

Progressive prosecutors are possible only when voters elect them (or when politicians appoint them). The electoral process represents an opportunity for installing progressive prosecutors — through committed action, activists and advocates believe they can make a compelling case to the public for the election of nontraditional prosecutors. The reality, however, is much more fraught. There are at least two major limitations to relying on voters to select progressive prosecutors.

The first limitation is that candidates in local prosecutor elections often advertise themselves as being tough on crime — and the candidate perceived as the toughest usually wins.¹³⁰ This dynamic has long been recognized in criminal legal scholarship, documented perhaps most famously by Stuntz.¹³¹ It is only recently, in the wake of media attention on police killings of unarmed black men and the abusive practices of prosecutors, that public views on what makes a good elected prosecutor have begun to change on a scale necessary to affect elections.

Importantly, however, voters are notoriously fickle. Just as egregious cases of police misconduct can catalyze campaigns for progressive prosecutors, so too can egregious cases of individual crime spur calls for a

¹²⁶ See Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), <https://nyti.ms/2hDrOro> [<http://perma.cc/9LXQ-6JJU>].

¹²⁷ See *id.*

¹²⁸ *Maricopa County, AZ: Diversion*, CIVIL RIGHTS CORPS, <https://www.civilrightscorps.org/work/prosecutors-project/maricopa-county-az-diversion> [<https://perma.cc/KT4E-CSGT>].

¹²⁹ *Id.*

¹³⁰ See Forman, *supra* note 27, at 993.

¹³¹ See Stuntz, *supra* note 102, at 509, 534.

more tough-on-crime approach.¹³² Because of this, the election of a progressive prosecutor in a particular jurisdiction should not be seen as a one-way ratchet toward leniency: nothing prevents localities that favor progressive prosecution today from electing a traditional tough-on-crime prosecutor tomorrow. The movement toward progressive prosecutors is so young that few of the recently elected nontraditional prosecutors have faced reelection, and so the durability of these shifts remains to be seen.

The second limitation is that progressive candidates are not embraced in every jurisdiction. In Sacramento, Noah Phillips, a Soros-backed candidate for DA, lost after running on a progressive platform against the backdrop of the jarring police murder of Stephon Clark.¹³³ In San Diego County, a progressive candidate and deputy public defender, Geneviève Jones-Wright, lost soundly to the incumbent DA, who won almost twice as many votes.¹³⁴ The failure of these candidates in Sacramento and San Diego provides an early warning sign that the progressive prosecution platform may hold little currency with voters outside of a limited number of cities.

The demise of the Voting Rights Act can provide a useful analogy that illustrates the pitfalls of leaving issues of racial justice to the whims of voters in individual jurisdictions. Left to their own devices, some jurisdictions avidly perpetuated practices aimed at disenfranchising black voters.¹³⁵ Only a systemic change — in the case of the Voting Rights Act, federal preclearance of congressional districts and other regulations — allowed black citizens to more fully enjoy their constitutionally guaranteed right to vote.¹³⁶ In the same manner, there are simply some places where, either because of racial animus, fear of crime, or personal antipathy, progressive prosecution will not be a winning ballot item. Indeed, despite the optimistic coverage of newly elected progres-

¹³² Consider the use of Willie Horton’s case during the 1988 Presidential election. Horton, who had been accused of a gruesome murder while out of prison on furlough, was used by then-Vice President George H.W. Bush to attack Governor Dukakis as soft on crime. Michael Tonry, *The Social, Psychological, and Political Causes of Racial Disparities in the American Criminal Justice System*, 39 *CRIME & JUST.* 273, 303 (2010); see also DAN T. CARTER, FROM GEORGE WALLACE TO NEWT GINGRICH 72–73 (1996) (noting that “[f]ifteen of the thirty voters” in a research test group “said they had changed their minds” after hearing the story of Horton and “would never vote for Dukakis”).

¹³³ See Abbie VanSickle & Paige St. John, *Big Spending by George Soros and Liberal Groups Fails to Sway D.A. Races in California*, L.A. TIMES (June 6, 2018, 9:55 PM), www.latimes.com/local/california/la-me-da-election-soros-20180606-story.html [<https://perma.cc/FW92-UVW9>].

¹³⁴ Greg Moran, *DA Race: Stephan Easily Defeats Challenger Jones-Wright, Earns Full Term*, SAN DIEGO UNION-TRIB. (June 6, 2018, 5:50 AM), www.sandiegouniontribune.com/news/public-safety/sd-me-elex-da-20180531-story.html [<https://perma.cc/8D5K-B8FW>].

¹³⁵ See *Shelby County v. Holder*, 570 U.S. 529, 560–61 (2013) (Ginsburg, J., dissenting); see also *id.* at 576 (noting some “jurisdictions have a unique history of problems with racial discrimination in voting”).

¹³⁶ See *id.* at 591–92.

sive prosecutors in liberal enclaves, there is a lack of evidence that prosecutors in the vast majority of jurisdictions are facing concerted pressure to change. Perhaps the worst-case outcome of this new movement would be the election of a few highly visible nontraditional prosecutors in a select set of places, lending a patina of morality to a fundamentally immoral system even while the vast majority of prosecutors conduct business as usual.

E. Other Institutional Inadequacy

Long before the recent push for more progressive prosecutors, many scholars argued that prosecutors are not institutionally positioned to truly influence progressive change. This line of scholarship engages the oft-debated question: Should good people be prosecutors?¹³⁷ Those who answer “no” advance a few points. First, they note that power to effect change is concentrated at the top. The examples of prosecutors refusing to charge individuals for certain petty offenses or diverting cases to less punitive settings illustrate the tremendous amount of power prosecutors have. However, this discretionary power is located with “the most unregulated actor in the entire legal system,” the *head* prosecutor.¹³⁸ Additionally, practitioners and scholars critique prosecutors’ interest in securing a conviction; this interest is driven by “the cultural and institutional presumption in most prosecutor offices . . . that *everybody is guilty*.”¹³⁹ This desire to win does not necessarily lessen when the case is weak; rather it manifests itself through more generous plea offers from the prosecutor.¹⁴⁰

IV. IMAGINING A RADICAL REDISTRIBUTION OF POWER

By this point in the Note, pragmatists have likely grown frustrated by the lack of concrete alternatives offered. Specific policy prescriptions are beyond the scope of this project, but the subsequent discussion provides helpful principles.¹⁴¹

¹³⁷ BUTLER, *supra* note 88, at 101.

¹³⁸ *Id.* at 106.

¹³⁹ Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 384 (2001).

¹⁴⁰ *See id.* at 391.

¹⁴¹ Professor Allegra M. McLeod’s essay on criminal legal reforms offers a helpful reminder. Some ideas forwarded in the essay are “unfinished” but that’s “not to be denied as an embarrassment or flaw.” Allegra M. McLeod, *Confronting Criminal Law’s Violence: The Possibilities of Unfinished Alternatives*, 8 HARV. UNBOUND 109, 113 (2013). “[I]nstead [the unfinished quality] should be embraced as a source of critical strength and possibility.” *Id.* Her “essay is a preliminary call for more attention on the part of legal scholars and criminal law reform advocates to unfinished partial substitutes for the order-maintaining work performed by criminal law administration.” *Id.* This Note, too, aims to push the reformers to develop more critical alternatives.

Prosecutors should have less power. As discussed in section I.A, reformist reforms rely on prosecutors to *not* exercise their power. Even if we have faith that a prosecutor might restrain herself, there’s no certainty about what will happen once that prosecutor leaves office. This restriction of power is different from an attempt to restrict discretion, which motivated the development of the federal sentencing guidelines in the mid-1980s (now largely regarded as a failure).¹⁴² Rather than limit a prosecutor’s ability to exercise discretion over how she processes someone through an inherently oppressive system, consider ways to limit the instances in which she is even able to do that.¹⁴³ An analogous reform in the federal sentencing context would have been to remove sentencing from judges’ privileges.

In furtherance of decreasing power, district attorneys’ offices should help repair individuals and communities they have harmed. Without a plan to “remedy[] the accumulated impact of past harms, we are destined to perpetuate them.”¹⁴⁴ Jurisdictions in the United States have found ways to offer reparations. Recently, as the result of lengthy community organizing, the Chicago City Council approved a \$5.5 million reparations package that provides up to \$100,000 to victims of torture by the Chicago Police Commander and those under his supervision between 1972 and 1991.¹⁴⁵ Prosecutors’ offices should embark on similar initiatives. Relying on courts for redress is insufficient — seventeen states do not have compensation statutes for wrongful convictions.¹⁴⁶ This lack of reparative availability is compounded by the immunity to liability prosecutors enjoy in an increasing number of scenarios.¹⁴⁷ Offices should repair more harms than just wrongful convictions. Victims of other forms of bullying and threats¹⁴⁸ should be made whole.

¹⁴² See Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1321–22 (2005).

¹⁴³ Some might argue that nonenforcement is one way to achieve this goal. Limiting prosecutorial power, though, means decreasing the dependence on prosecutors to self-impose nonenforcement policies. A more permanent and reliable solution would be legislators permanently striking crimes off the charging and sentencing “menu” through decriminalization efforts, or adding laws that regulate how prosecutors conduct business. After all, a prosecutor’s nonenforcement decisions are not binding on future administrations.

¹⁴⁴ See Stahly-Butts & Akbar, *supra* note 88, at 10.

¹⁴⁵ See *id.* at 11; Hal Dardick & John Byrne, *Council Panel Endorses \$5.5 Million Reparations Fund for Burge Victims*, CHI. TRIB. (May 5, 2015, 3:23 PM), www.chicagotribune.com/ct-burge-reparations-hearing-met-20150505-story.html [<https://perma.cc/R4M7-EX8A>].

¹⁴⁶ See *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, <https://www.innocenceproject.org/compensating-wrongly-convicted/> [<https://perma.cc/749S-GCER>].

¹⁴⁷ See generally Keenan et al., *supra* note 87.

¹⁴⁸ See Gershman, *supra* note 101 (describing how prosecutors intimidate grand jury witnesses, coerce guilty pleas, attack defense experts, bully prosecution witnesses, compel waivers of civil rights claims, retaliate and engage in demagoguery against defendants and judges, shame defendants, and coerce corporate cooperation).

Resources should be diverted from criminal legal institutions and invested in communities. In addition to providing reparations to victims of prosecutorial abuse, we need to defund the very offices that have done a remarkable job at pulling poor black and brown individuals into the system.¹⁴⁹ We should resist requests from progressive prosecutors to give their offices more money to be progressive,¹⁵⁰ and instead invest in “combatting reasons why people commit crime, like systemic inequality, poverty, education, and health.”¹⁵¹ In so doing, we can dramatically decrease and ideally eliminate reliance on prosecutors.

V. CONCLUSION

The paradox of “progressive prosecution” is that the criminal legal system is an oppressive institution. Attempting to make the “most powerful”¹⁵² actor in such an institution more progressive seems to miss the point. There is no doubt that people in Brooklyn and Philadelphia have enjoyed meaningful benefits from the District Attorneys’ refusal to charge low-level marijuana offenders. But it is troubling that these benefits are so fortuitous — they are a product of how a prosecutor exercises her power. At the risk of seeming ungrateful, this Note argues we can and should do better. Doing better means confronting a regime controlled by dictators: not by asking them to be nice, but by demanding an entirely different form of government.¹⁵³

¹⁴⁹ Professor John Pfaff marshals data and careful empirical analysis to argue that increased hiring of prosecutors beginning the 1990s, in tandem with changes in the use of prosecutorial discretion, accounts for the striking increase in incarceration rates observed over the past three decades. See JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION — AND HOW TO ACHIEVE REAL REFORM* 127–59 (2017).

¹⁵⁰ See, e.g., Joe Trinacria, *Krasner Requests Budget Increase for DA’s Office*, PHILA. MAG. (Apr. 25, 2018, 9:06 AM), <https://www.phillymag.com/news/2018/04/25/krasner-budget-increase-da-office/> [https://perma.cc/Y652-8WZB].

¹⁵¹ See Derecka Purnell, *Don’t Just Boycott Starbucks. Boycott the Police*, MEDIUM (Apr. 16, 2018), <https://medium.com/@derecka/dont-just-boycott-starbucks-boycott-the-police-57747do8f78> [https://perma.cc/USA9-L3BK].

¹⁵² Davis, *supra* note 26, at 25; see *id.* at 18 (stating that discretion gives prosecutors “more power than any other criminal justice officials”); REAL JUSTICE, *supra* note 33 (“District attorneys are among the most powerful local elected officials in the U.S. . . . The Real Justice PAC works to elect reform-minded prosecutors at the county and municipal level who are committed to using the powers of their office to fight structural racism and defend our communities from abuse by state power.”).

¹⁵³ David Patton, Executive Director and Attorney-in-Chief of the Federal Defenders of New York, made a similar analogy during a debate at Stanford Law School on whether good people should be prosecutors. See *Symposium | Good People Should Not Be Prosecutors: A Debate*, YOUTUBE (Aug. 4, 2014), <https://www.youtube.com/watch?v=wLv3UoTiPfg> [https://perma.cc/9JVX-TLGU].