

CRITICAL RACE THEORY & POWER: THE CASE FOR PROGRESSIVE PROSECUTION

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ABSTRACT

This note makes the case for why scholars and members of the polity should identify and support genuinely progressive prosecutors. A key Critical Race Theory tenant—that legislation and favorable judicial decisions are often inadequate avenues to subvert power structures—holds true for criminal justice. Consequently, this note urges advocates to accept that legislative bodies and courts are imperfect agents of change and to turn to another powerful actor to seek criminal justice reform—local prosecutors. But critics of progressive prosecutors take issue with the contention that prosecutors can be a source of meaningful reform. The most common criticism—that other actors in the justice system render prosecutors “powerless” to enact genuinely progressive reform—is sustained by real-life examples. This note addresses these criticisms by exploring how local prosecutors wield both structural and particularized power in the American justice system. Because prosecutors can systematically reduce incarceration and institute more racially just criminal justice policies, advocates should support progressive candidates for district attorney offices.

INTRODUCTION

Skeptical eyes have watched the growing wave of “progressive” prosecutors who have crept into the national conscience since Larry Krasner’s shock victory in the Philadelphia District Attorney Democratic primary grabbed headlines in 2017.² Kim Foxx of Cook County, Kim Ogg of Houston, and Rachel Rollins of Boston quickly followed Krasner’s wake. Progressive candidates for district attorneys’ offices are now hitting the campaign trail en masse.³ These prosecutors’ recent ascendancy is a seismic departure from the “law-and-order,”⁴ “tough-on-crime”⁵ lawyers who have long-filled America’s district attorney offices. Despite progres-

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2. See Chris Brennan, *Krasner declared winner of Democratic primary for DA in Philly*, PHILA. INQUIRER (May 6, 2019), <https://www.inquirer.com/philly/news/politics/city/Krasner-holds-early-lead-in-Democratic-primary-for-DA-in-Philly.html>.

3. See Matt Ferner, *George Soros, Progressive Groups To Spend Millions To Elect Reformist Prosecutors*, HUFFPOST (May 12, 2018, 7:00 AM), https://www.huffpost.com/entry/george-soros-prosecutors-reform_n_5af2100ae4b0a0d601e76f06.

4. See Felice F. Guerrieri, *Law & Order: Redefining the Relationship Between Prosecutors and Police*, 25 S. ILL. U. L.J. 353, 353–5 (2001).

sives' recent electoral victories, reform-minded prosecutors remain a negligible minority of district attorneys. Indeed, Paul Butler estimates that of those 2,400, fewer than 100 identify as progressive.⁶

Notwithstanding any strength they lack in numbers, progressive prosecutors maintain an outsized role in the national dialogue over the future of criminal justice reform. Unsurprisingly, this liberal cohort has ruffled feathers among the justice system's traditional power players—police, judges, and less forward-looking prosecutors. But these progressive bedfellows have also faced an onslaught of criticism from the other end of the political spectrum. Many progressive advocates are dubious that a lone district attorney could enact change, either in their specific district or in wider the criminal justice system. Some argue that a progressive prosecutor could not exist in theory or in practice.

This paper concedes that other actors in the criminal system will unavoidably shackle a theoretically perfectly progressive prosecutor. But, inspired by Critical Race Theory literature, this note makes the case for why identifying and supporting progressive prosecutors is imperative to achieve meaningful criminal justice reform. Part I asks advocates to locate where power exists in the criminal justice system, explains how legislation and courts are inadequate avenues to subvert racial power structures in the criminal justice system, and urges advocates turn to another source of power—local prosecutors—as agents of reform. Part II describes common criticisms of progressive prosecutors as “powerless” to enact meaningful reform. Part III responds to these criticisms, explores how prosecutors wield both structural and particularized power, and urges advocates and members of the polity to elect genuinely progressive local prosecutors.

I. LOCATING POWER IN THE CRIMINAL JUSTICE SYSTEM

This note submits that advocates should identify where power exists in the justice system in order to subvert criminal justice's power structures. Two institutions of power—legislatures and courts—have proven to be a weak guarantor of rights for people of color who are disproportionately victimized by the criminal justice system. Consequently, advocates must turn to another power structure—local prosecutors. The remainder of this note examines whether local prosecutors can truly serve as an agents of criminal justice reform.

As a normative, conceptual starting block, this note submits that the American criminal justice system can be theoretically progressive only if

5. See generally Justin Brooks, *The Politics of Prisons*, 77 MICH. B.J. 154, 155 (1998) (advocating for tough-on-crime policies); c.f. Brackett B. Denniston, III, *Getting Tough on Crime: Does It Work?*, 38-APR BOSTON B.J. 9, 26 (1994) (arguing that tough-on-crime policies do not work).

6. Paul Butler, *Prosecutors' role in causing—and solving—the problem of mass incarceration*, WASH. POST (Apr. 19, 2019), https://www.washingtonpost.com/outlook/prosecutors-role-in-causing—and-solving—the-problem-of-mass-incarceration/2019/04/19/d370d844-5c93-11e9-a00e-050dc7b82693_story.html.

the government (1) treats everyone with dignity;⁷ and (2) implements justice equitably and fairly.⁸ A pragmatic approach⁹ to achieving these lofty goals must center the experiences of people of color living in poor communities who are victimized by police violence, over-prosecution, and mass incarceration. Thus, in practice, the justice system (1) should police, prosecute, and lock up far fewer people; and (2) should not disproportionately police, prosecute, and lock up members of marginalized groups, specifically people of color, sex workers, members of the LGBTQ+ community, immigrants, and so forth. To achieve these twin goals, advocates must grapple with the question of *which actors* wield the power to systematically ratchet down punishment and institute justice in a fashion that will meaningfully and equitably improve the lives of people of color. Only by identifying those actors can advocates meaningfully attempt to subvert the relationship of power and criminal justice.

Critical Race Theory's¹⁰ (CRT's) rich literature can help advocates locate the actors who have the power to bring about a more progressive

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7. See Alison Shames, *Doing The Right Thing: The Evolving Role Of Human Dignity In American Sentencing And Corrections*, 27 FED. SENT. R. 9, 9, (2014) ("If human dignity means to value an individual's inherent worth, and his or her capacity for self-control, empowerment, autonomy, and rationality, then life in prison is its very antithesis."); Mary Margaret Giannini, *The Procreative Power of Dignity: Dignity's Evolution in the Victims' Rights Movement*, 9 DREXEL L. REV. 43, 46–52 (2016) (describing various conceptions of dignity); Anthony V. Alfieri, *Jim Crow Ethics and the Defense of the Jena Six*, 94 IOWA L. REV. 1651, 1683 (2009) (linking subjectivity, identity, and community to the experience of racial dignity and humiliation in the criminal justice system); Donald Specter, *One Road to Prison Reform Runs Through Europe*, 27 FED. SENT. R. 7, 7–8 (contending that the law and the Constitution demand recognition of how prisoners retain the essence of human dignity inherent in all persons); see generally Michal Buchhandler-Raphael, *Drugs, Dignity, and Danger: Human Dignity As A Constitutional Constraint to Limit Overcriminalization*, 80 TENN. L. REV. 291, 307 (2013) (advocating for American constitutional law to incorporate dignity as a means to constrain overcriminalization).
 8. Here, "equitably and fairly" means substantive equality—pursuing equality that looks to outcomes of rules and accounts for differences—and not formal equality. See generally Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1 (2011); see also Paul Stancil, *Substantive Equality and Procedural Justice*, 102 IOWA L. REV. 1633, 1641–48 (2017) (differentiating between substantive and Aristotelian, formal equality).
 9. Pragmatism is not alien to Critical Race Theory (CRT). Indeed, it is wholly compatible with CRT. This note is inspired in part by Cornel West's "Prophetic Pragmatism," see Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1613–14 (1990) (describing West's "prophetic pragmatism" as an approach that "adopts a sense of tragedy alongside a sense of the possibilities for human agency in confronting evil"), and Mari Matusda's "Weighted Pragmatism," see Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1764 ("Rectification of historical injustice, of historical devoicing, requires a weighted pragmatic method.").
 10. CRT is the project of scholars of color who have studied the law's role in sustaining white supremacy, see Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1023–25 (1989) (describing the persistence of white supremacy); see generally DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992), and the relationship between racial power and the law, see, e.g., T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 350–55 (1992) (examining how to racism in constitutional law); Frances Lee Ansley, *Race and the*

criminal justice system. Derrick Bell, the “father” of CRT, has written extensively about the futility of trying to attain racial equality by relying solely on changing the law.¹¹ Countless scholars—including Preeta Bansal,¹² Kevin Brown,¹³ Kimberlé Crenshaw,¹⁴ Mary Dudziak,¹⁵ Alan Freeman,¹⁶ and Linda Green—¹⁷ have expounded on Bell’s premise by highlighting the difficulty of relying on legislative reform and favorable court decisions to achieve material improvements in the lives of people of color

So too does Bell’s premise hold true as applied to criminal justice reform. Just as America’s anti-discrimination,¹⁸ environmental,¹⁹ reproduc-

Core Curriculum in Legal Education, 79 CAL. L. REV. 1511, 1521–71 (1991); Taunya Lovell Banks, *Women and AIDS—Racism, Sexism, and Classism*, 17 N.Y.U. REV. L. & SOC. CHANGE 351, 361–65 (1990) (outlining a “history of racist medicine”). This note cannot draw on each of the many themes that are common to CRT scholarship. See Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 461–63 (1993). Most CRT scholars are hesitant to endorse cautious approaches associated with liberalism to address racism and are proponents of more radical approaches to social transformation. See, e.g., Richard Delgado, *Brewer’s Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1, 8–10 (1991) (rejecting Scott Brewer’s appeals to common cause and coalition building). Many CRT scholars use storytelling and social science literature to challenge shared cultural understandings about race. See, e.g., Charles R. Lawrence, III, *The Word and the River: Pedagogy As Scholarship As Struggle*, 65 S. CAL. L. REV. 2231, 2331–36 (1992); Angela D. Gilmore, *It Is Better to Speak*, 6 BERKELEY WOMEN’S L.J. 74, 74–77 (1990); see generally STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991). Some CRT writers have untangled “structural determinism,” namely, the way in which our legal structure maintains a racist status quo. See Reginald Leamon Robinson, *Human Agency, Negated Subjectivity, and White Structural Oppression: An Analysis of Critical Race Practice/Praxis*, 53 AM. U. L. REV. 1361, 1382–1388 (2005). The intersection of race, sex, class, and other marginalized statuses is a common feature in CRT scholarship. See, e.g., Regina Austin, *Black Women, Sisterhood, and the Difference/Deviance Divide*, 26 NEW ENG. L. REV. 877, 883–84 (1992); Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 539–42 (1989); Paulette M. Caldwell, *A Hair Piece: Perspectives On The Intersection Of Race And Gender*, 365 DUKE L.J. 365, 367–39 (1991); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

11. See generally DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUESTION FOR RACIAL JUSTICE (2008); Derrick Bell, *An American Fairy Tale: The Income-Related Neutralization of Race Law Precedent*, 18 SUFFOLK U. L. REV. 331 (1984); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992).
12. See Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609 (1988).
13. See Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease*, 78 CORNELL L. REV. 1 (1992).
14. See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1334–36 (1988).
15. See Mary L. Dudziak, *The Limits of Good Faith: Desegregation in Topeka, Kansas, 1950–1956*, 5 L. & HIST. REV. 351 (1987).
16. See Alan D. Freeman, *Legitimizing Racial Discrimination through Antidiscrimination law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).
17. See Linda S. Greene, *Multiculturalism as Metaphor*, 41 DEPAUL L. REV. 1173 (1992).
18. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 U. CHI. LEGAL FORUM 139 (1989).

tive rights,²⁰ and public health²¹ laws have proven to be a weak guarantor of people of color's rights, criminal justice laws have similarly proven to be an unsatisfactory avenue to subvert racism in the criminal justice system.

State and federal legislative bodies and courts clearly wield and have repeatedly exerted the power to ratchet up punishment. Decades of increasingly punitive legislation implemented by overly disciplinary courts have fueled a system of mass incarceration that disproportionately punishes black and brown people;²² today, there may be up to 2.3 million people behind bars in America,²³ up to sixty percent of whom are people of color.²⁴

Yet, it would be futile for advocates to target those loci of power to upend the structures of racial power that imbue the American justice system. Too much attention has been given to federal criminal justice legislation, even though America's mass incarceration problem is predominantly one created by the states.²⁵ Ninety-two of every 100 prisoners end up behind bars in state, not federal, prisons. In the past forty years, the number of people confined to state prisons has increased more than 700 percent.²⁶ Meanwhile, the Federal Bureau of Prisons likely houses only ten percent of all prisoners in the country, and federal courts only process five percent of all of the country's defendants.²⁷ Simply put,

19. See Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69 (1991).

20. Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 OH. ST. L.J. 1205 (1992).

21. See Camara Phyllis Jones, *Levels of Racism: A Theoretic Framework and a Gardener's Tale*, 90 AM. J. PUB. HEALTH 1212 (2000).

22. See Angela P. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1065–70 (2016).

23. The nonprofit organization Prison Policy in 2019 puts the figure at 2.3 million people in 1,719 state prisons, 109 federal prisons, 1,772 juvenile correctional facilities, 3,163 local jails, eighty Indian Country jails, and military prisons, immigration detention facilities, civil commitment centers, state psychiatric hospitals, and prisons in US territories. See Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.

24. See Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States*, CENTER FOR AMERICAN PROGRESS (Mar. 13, 2012, 9:00 AM) <https://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/>; see also John Gramlich, *The gap between the number of blacks and whites in prison is shrinking*, PEW RESEARCH CENTER (Apr. 30, 2019), <https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison/>.

25. Certainly, the recently passed First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018), was a meaningful victory for people of color who have been incarcerated under draconian federal drug laws. However, the First Step Act's effect on mass incarceration will be relatively small. See Keith Humphreys, *We have nothing to fear from federal sentencing reform*, THE WASHINGTON POST (Nov. 27, 2018, 1:30 PM), https://www.washingtonpost.com/business/2018/11/27/we-have-nothing-fear-federal-sentencing-reform/?utm_term=.a732d7460a50.

26. See PRISON POLICY INITIATIVE, *supra* note 23.

27. See *Slate Presents: Charged*, SLATE, <https://slate.com/plus/charged-podcast.html>.

any federal legislative reforms will not materially improve the lives of the majority of incarcerated people of color. The data show that state policy drives mass incarceration.²⁸ Yet, state criminal justice reform legislation is next to non-existent.²⁹ Notwithstanding some recent exceptions in California, Delaware, and Oklahoma,³⁰ state criminal justice legislation is generally a one-way, punitive ratchet.³¹ Almost every state has passed a series of laws that have created entirely new crimes and dramatically lengthened sentences for many crimes through mandatory minimums and “truth-in-sentencing” laws.³² Nor can reformers turn to the judiciary. Elected local judges face significant public pressure to impose the maximum sentences available.³³ Likewise, impact litigation is also unlikely to yield meaningful levels of decarceration. Notably, even though the *United States v. Booker*³⁴ Court held that federal sentencing laws could not be mandatory, most federal judges—who are not subject to electoral pressures—continue to apply the maximum sentences prescribed by the federal sentencing guidelines.³⁵ Courts have also proven to be deficient at reining in prosecutorial³⁶ and police misconduct.³⁷

Despite the power endowed in legislative bodies and the courts, they cannot serve as the loci for reform for advocates who wish to subvert power structures in the criminal justice system. But another source of potential power exists—local prosecutors. Critics of the progressive prosecutor agenda would argue that this last avenue is just as foreclosed as the legislative and judicial realms are. This note argues in the opposite.

28. *State Policy Drives Mass Incarceration*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/graphs/state_driver_rates_1925-2015.html (last visited Apr. 21, 2020).

29. See Davis, *supra* note 22, at 1068–69.

30. See Nicole D. Porter, *Top Trends in State Criminal Justice Reform, 2019*, THE SENTENCING PROJECT (Jan. 17, 2020), <https://www.sentencingproject.org/publications/top-trends-in-state-criminal-justice-reform-2019/>.

31. See Lauren-Brooke Eisen, *Criminal Justice Reform at the State Level*, BRENNAN CENTER FOR JUSTICE (Jan. 2, 2020), <https://www.brennancenter.org/our-work/research-reports/criminal-justice-reform-state-level>.

32. See *id.*; see also Davis, *supra* note 22, at 1065–66.

33. See generally Kate Berry, *How Judicial Elections Impact Criminal Cases*, BRENNAN CENTER FOR JUSTICE (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_How_Judicial_Elections_Impact_Criminal_Cases.pdf.

34. 543 U.S. 220, 250–51 (2005).

35. See Davis, *supra* note 22, at 1070 (citing U.S. SENT’G COMM’N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING (2012)); see also Note, *Quantity, Role, and Culpability in the Federal Sentencing Guidelines*, 51 HARV. J. ON LEGIS. 389, 392 (2014).

36. See generally Malia N. Brink, *A Pendulum Swing Too Far: Why the Supreme Court Must Place Limits On Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1 (2009); Michael T. Fisher, *Harmless Error, Prosecutorial Misconduct, And Due Process: There’s More To Due Process Than The Bottom Line*, 6 COLUM. L. REV. 1298 (1988).

37. See generally Rachel A. Harmon, *Legal Remedies for Police Misconduct* in Erik Luna, *Reforming Criminal Justice: Policing* (2017) 27; Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275 (1999).

II. CRITIQUES OF PROGRESSIVE PROSECUTION

Groundbreaking literature by former prosecutors,³⁸ scholars,³⁹ and journalists⁴⁰ has already explored the question of whether a sincerely progressive prosecutor could exist. While some have expressed cautious optimism,⁴¹ others completely dismiss the notion that progressive prosecutors can change a “fundamentally rotten system” in any way.⁴² One common thread throughout these criticisms is that an authentically progressive prosecutor lacks the ability to reduce incarceration or dole out punishment more equitably. This thread stems from two dueling conceptions of the American prosecutor—the “all powerful” prosecutor and the “powerless” prosecutor. These conceptions are not contradictory; taken together, the two images stand for the principle that the American legal system has been constructed to support the worst tendencies of the most anti-defendant, over-punitive prosecutors and cannot support forward-looking prosecutors by design.

The “all-powerful” prosecutor is perhaps the more mainstream, common view of the American prosecutor.⁴³ Nearly eighty years ago, former

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38. See, e.g., PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* (2017); DAVID HEILBRONER, *ROUGH JUSTICE: DAYS AND NIGHTS OF A YOUNG D.A.*, (1990); SCOTT TUROW, *ULTIMATE PUNISHMENT* (2004).
39. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010), Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 *GEO. L.J.* 1419 (2016); Professors Devon Carbado and Priscilla Owen: *Police Violence and Black Women*, UC Berkeley School of Law, YOUTUBE (Apr. 6, 2018), https://www.youtube.com/watch?v=66830_oEgaM; Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 *GEO. J. LEGAL ETHICS* 355 (2001); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure As an Instrument of Reform*, 54 *OHIO ST. L.J.* 1325, 1329 (1993) (“The American prosecutor has been under nearly constant attack in the criminal procedure literature.”).
40. New York Times journalist and Yale Law School fellow Emily Bazelon and journalists writing for the blog “The Appeal” have conducted comprehensive news coverage of individual prosecutors and developments in criminal justice reform. See EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019); *THE APPEAL*, <https://theappeal.org/> (last accessed Nov. 22, 2019).
41. See Del Quentin Wilber, *Once tough-on-crime prosecutors now push progressive reforms*, *L.A. TIMES* (Aug. 5, 2019), <https://www.latimes.com/politics/story/2019-08-02/once-tough-on-crime-prosecutors-now-push-progressive-reforms> (quoting Angela J. Davis on the promise of progressive prosecutors).
42. See Note, *The Paradox of “Progressive Prosecution” Paradox*, 132 *HARV. L. REV.* 748, 758 (2018) (“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.”); see also Josie D. Rice, *Cyrus Vance and the Myth of the Progressive Prosecutor*, *N.Y. TIMES* (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/opinion/cy-vance-progressive-prosecutor.html> (chastising progressive prosecutors as “faux reformer[s]”).
43. Jeffrey Bellin has compiled a long list of articles that have espoused the “prosecutors are all-powerful” viewpoint. See Jeffrey Bellin, *The Power of Prosecutors*, 94 *N.Y. L. REV.* 171, 189 (2019) (citing Davis, *supra* note 23, at 832 (“Prosecutors are the most powerful officials in the criminal justice system.”); Adam M. Gershowitz, *Consolidating Local Criminal Justice: Should Prosecutors Control the Jails?*, 51 *WAKE FOREST L. REV.* 677, 678 (2016) (“No serious observer disputes that prosecutors . . . hold most of the power in the United States criminal justice system.”); Shima Baradaran Baughman, *Subconstitutional Checks*, 92 *NOTRE DAME L. REV.* 1071, 1076 (2017) (argu-

Attorney General Robert H. Jackson opined, “[t]he prosecutor has more control over life, liberty, and reputation than any other person in America.”⁴⁴ Prosecutors have accumulated their great power in large part due to our prosecution-friendly criminal law jurisprudence, which has cushioned prosecutors with lenient and non-neutral disclosure,⁴⁵ criminal procedure,⁴⁶ evidence,⁴⁷ and immunity⁴⁸ rules. There is next to no state or federal legislation that regulates prosecutors, largely because there is a lack of political will to regulate them.⁴⁹ The pro-prosecution tilt of the law has accommodated prosecutors’ most anti-defendant tendencies and has allowed prosecutors to become all-powerful. Accordingly, the mighty American prosecutor faces little to no discipline or attempts to curb their authority. This is not isolated to individual instances where prosecutors have been involved in high-profile wrongful conviction

ing that “the Prosecutor Problem” is “what modern scholars claim is responsible for the astronomical increase in incarceration in America in the last fifty years”); see also Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018) (“Prosecutors are the Darth Vader of academic writing: mysterious, powerful and, for the most part, bad.”).

44. See Bellin, *Power of Prosecutors*, *supra* note 43, at 173 (citing Robert H. Jackson, *The Federal Prosecutor*, 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940)). President Barack Obama has allegedly stated that DAs have more power than the President of the United States to effect change in the criminal justice system. See Evan Hughes, *America’s Prosecutors Were Supposed to Be Accountable to Voters. What Went Wrong?*, POLITICO (Nov. 5, 2017), <https://www.politico.com/magazine/story/2017/11/05/cyrus-vance-jr-americas-prosecutor-problem-215786>.
45. Although *Brady v. Maryland* held that the failure to turn over favorable evidence to the defense violated the right to due process, the *Brady* court left prosecutors to decide which evidence should be disclosed. 373 U.S. 83, 87 (1963). This wiggle room has been a boon to prosecutors in an era of mass incarceration. See Liebman et. al., *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* (Feb. 11, 2002), <http://www2.law.columbia.edu/brokensystem2/report.pdf> (finding that where prosecutors might be more likely to lose if they turn over the evidence, it may be more likely that they don’t disclose it); *Exonerations in 2018*, NAT’L REGISTRY EXONERATIONS (Apr. 9, 2019), <https://www.law.umich.edu/special/exoneration/Documents/Exonerationspercent20inpercent202018.pdf> (finding failure to disclose evidence was major factor in a significant portion of wrongful convictions); BAZELON, CHARGED, *supra* note 40, at 329 (quoting a Kansas City DA who stated: “admitted evidence is a major reason for wrongful conviction and for people taking pleas that they shouldn’t have taken”); see also Emily Bazelon, *She Was Convicted of Killing Her Mother. Prosecutors Withheld the Evidence That Would Have Freed Her*, N.Y. TIMES (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/magazine/she-was-convicted-of-killing-her-mother-prosecutors-withheld-the-evidence-that-would-have-freed-her.html>; Ari Shaprio, *Guilt By Omission: When Prosecutors Withhold Evidence Of Innocence*, NPR (Aug. 4, 2017), <https://www.npr.org/2017/08/04/541675150/guilt-by-omission-when-prosecutors-withhold-evidence-of-innocence>.
46. See generally Sheri Lynn Johnson, Comment, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988).
47. See Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243 (2017).
48. See Frederic Block, *Let’s Put an End to Prosecutorial Immunity*, THE MARSHALL PROJECT (Mar. 13, 2018 10:00 PM), <https://www.themarshallproject.org/2018/03/13/let-s-put-an-end-to-prosecutorial-immunity>.
49. See Irene Oritseweyinmi Joe, *Regulating Mass Prosecution*, UC DAVIS L. REV. 1175, 1194 (2020).

cases—⁵⁰ the problem is systemic. Some notable examples are illustrative. Dating as far back as the 1970s, prosecutors from the New Orleans DA's office possessed evidence that would have helped the accused but failed to disclose such evidence to the defense in at least 45 prosecutions.⁵¹ More recently, prosecutors working for former Orange County district attorney Tony Rackauckas between 2010 and 2015 systematically obtained illegal jailhouse confessions and withhold information that could help defendants.⁵² Data from New York is similarly damning—ProPublica studied ten years of New York state court appeals and found thirty cases where judges found sufficiently serious prosecutorial misconduct that merited a new trial.⁵³ Yet only one of the prosecutors involved in those thirty cases were dismissed, sanctioned, or demoted.⁵⁴ In short, many scholars draw on countless studies and anecdotes to paint a picture of an “epidemic”⁵⁵ of DA's offices with win-at-all-costs cultures that take advantage of the lenient law to lock up large numbers of people with total impunity.

The second, “powerless prosecutor” image debuted recently in response to the emergence of progressive prosecutors on the national stage. Most poignantly, Jeffrey Bellin has criticized literature describing the “all-powerful prosecutor” for relying on a mistaken premise of what power means. Bellin argues “it takes a village” of legislators, police, judges, jurors, governors, parole boards, mayors, and probation officers to send someone to prison”⁵⁶ For Bellin, prosecutors' ability to steer a case to a preferred prison term is not power, since prosecutors cannot achieve that goal when other actors—legislators, judges, and the police—resist.⁵⁷ Bellin relies on the effective metaphor of the executioner.⁵⁸ The executioner wields the awesome power to take life; yet, it would be futile for opponents of capital punishment to lobby the executioner, who has no discre-

50. See, e.g., *WHEN THEY SEE US* (Netflix 2019) (miniseries about the Central Park 5); *THE THIN BLUE LINE* (Miramax 1988) (documentary about Randall Dale Adams's wrongful conviction); *MAKING A MURDERER* (Netflix 2015) (documentary miniseries about the flawed prosecution of Steven Avery and Brendan Dassey).

51. See Complaint at 31, *Jones v. Cannizzaro* (2019) (No. 2:18-cv-00503); see also Innocence Staff, *Innocence Project Files Civil Rights Lawsuit on Behalf of Exoneree Robert Jones*, INNOCENCE PROJECT (Jan. 16, 2018).

52. See Jennifer Medina, *U.S. Examines Whether Orange County Violated Defendants' Rights*, N.Y. TIMES (Dec. 15, 2016), <https://www.nytimes.com/2016/12/15/us/orange-county-justice-department.html>; Elizabeth Weill-Greenberg, *Orange County's 'Standard Operating Procedure'*, THE APPEAL (Jun. 19, 2019), <https://theappeal.org/orange-countys-standard-operating-procedure/>; James Quealley, *Five Years Later, some fear Orange County jail snitch scandal will go unpunished*, L.A. TIMES (Apr. 21, 2019); <https://www.latimes.com/local/lanow/la-me-orange-county-informant-scandal-answers-20190421-story.html>.

53. See Joaquin Sapien, *Criminal Justice Legislation Will Force New York Prosecutors to Disclose More Evidence*, SOONER, PROPUBLICA (Apr. 8, 2019), <https://www.propublica.org/article/criminal-justice-legislation-will-force-new-york-prosecutors-to-disclose-more-evidence-sooner>; see also BAZELON, CHARGED, *supra* note 40, at 289.

54. See BAZELON, CHARGED, *supra* note 40, at 289.

55. See *U.S. v. Olson*, 704 F.3d 1172 (2013) (Kocziński, J., dissenting in denial of certiorari) (“There is an epidemic of *Brady* violations abroad in the land. Only judges can put a stop to it.”).

56. See Bellin, *Power of Prosecutors*, *supra* note 43, at 181.

57. See *id.* at 175–76.

58. See *id.* at 178.

tion over whom they kill.⁵⁹ Instead, death penalty opponents lobby the public servant who enacts capital punishment policy.⁶⁰ Bellin contends that prosecutors merely wield “reflective power”—they reflect the power of legislators, police, and judges and are only powerful when those actors are inactive.⁶¹ As a result, argues Bellin, the power of prosecutors to singlehandedly reform the criminal justice system has been greatly exaggerated.⁶²

Real-life evidence has sustained Bellin’s theoretical conception of the “powerless prosecutor.” Indeed, the most persuasive criticism of the progressive prosecutor project is that other actors in the criminal justice system will inevitably clip the wings of any reformist prosecutor’s agenda. Police officers, judges and local officials have thrown the kitchen sink of obstacles to stymie the progressive prosecution agenda. The police reacted negatively and viscerally to Larry Krasner’s, Rachel Rollins’s, and Kim Foxx’s respective elections. The Philadelphia Fraternal Order of Police (FOP) President John McNesby has called Krasner “anti-law enforcement,” has demanded that Krasner resign, and has taken out billboards along the I-95 that read “Help Wanted: New Philadelphia District Attorney. Please contact FOP Lodge #5.”⁶³ Recently, FOP has ratcheted up its war with Krasner by suing him over his decision to publish a “not-to-call” list of police officers to testify in court who had a history of lying and racial bias.⁶⁴ One week before Rollins took office, the National Police Association filed a Massachusetts state bar complaint against her, alleging that she was violating ethics rules by promising that she would not prosecute non-violent property crimes.⁶⁵ Chicago’s police union slammed Kim Foxx for pandering to a “powerful anti-police movement” after she exonerated defendants whose wrongful convictions were obtained through

59. *See id.*

60. *See id.* at 178–79.

61. *Id.* at 203–04.

62. *See* Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. (forthcoming 2020).

63. *See* ‘Help Wanted’: Philadelphia Police Union Calling For New District Attorney In I-95 Billboards, CBS PHILLY (Jun. 27 2019, 5:25 PM), <https://philadelphia.cbslocal.com/2019/06/27/help-wanted-philadelphia-police-union-calling-for-new-district-attorney-in-i-95-billboards/>; *see also* Kimberly Davis, ‘He Betrayed Us, He Lied To Us’: Police Officer’s Widow, FOP Call For DA Krasner’s Resignation Over Abu-Jamal Appeal, CBS PHILLY (Apr. 23, 2019, 11:43 PM), <https://philadelphia.cbslocal.com/2019/04/23/daniel-faulkner-widow-fop-call-for-da-larry-krasners-resignation-mumia-abu-jamal-appeal/>; Kristen Johansen, ‘He’s Anti-Law Enforcement’: Head Of Philly’s Police Union Expresses Concern Over DA’s Race, CBS PHILLY (May 17, 2017, 3:24 PM), <https://philadelphia.cbslocal.com/2017/05/17/hes-anti-law-enforcement-head-of-phillys-police-union-expresses-concern-over-das-race/>.

64. *See* Judge Throws Out FOP Lawsuit Over District Attorney’s So-Called ‘Do Not Call’ List, CBS PHILLY (Aug. 23, 2019, 10:42 PM), <https://philadelphia.cbslocal.com/2019/08/23/judge-throws-out-fop-lawsuit-over-district-attorneys-so-called-do-not-call-list/>.

65. *See* adminpolice, *National Police Association Files Bar Complaint Against District Attorney Elect Rachael Rollins*, NATIONAL POLICE ASS’N. (Dec. 28, 2018), <https://nationalpolice.org/national-police-association-files-bar-complaint-against-district-attorney-elect-rachael-rollins/>; Kaitlin Flanigan, *Police Group Accuses Suffolk DA-Elect of ‘Reckless Disregard’ for Massachusetts Laws*, NBC BOS. (Dec. 28, 2018, 11:58 PM), <https://www.nbcboston.com/news/local/Rachael-Rollins-Suffolk-District-Attorney-Elect-National-Police-Association-Bar-Complaint-503616441.html>.

police coercion and unlawful interrogation methods⁶⁶ and demanded that Foxx resign for refusing to charge shoplifting as a felony unless the value of what allegedly was stolen was more than \$1,000.⁶⁷

Judges have proven to be a significant roadblock for local criminal justice reform. Philadelphia's elected judges have consistently refused to sign off on plea deals recommended by Krasner's office for being too lenient.⁶⁸ And judges can always interpret the law in ways that constrain prosecutors. For example, the Pennsylvania Supreme Court recently construed the state's law in a fashion that severely limits Larry Krasner's attempts to reform his office's death penalty practices.⁶⁹ Further, judges are active players in local politics and can use their offices to stymie progressive advocacy that takes place outside the courtroom. The local judges of Harris County, Texas are demonstrative. In 2016, a federal judge ruled that the bail system for misdemeanors in Harris County was unconstitutional. In response, fourteen county judges spent more than six million dollars of taxpayer money appealing the ruling.⁷⁰ Although the judges' appeal ultimately failed, the case brought legislative bail reform to a grinding halt.⁷¹

Some of the most obstinate actors who are responsible for stymieing progressive prosecutors' agendas are subordinate, line prosecutors who subvert their boss's agenda. Prosecutors' offices are complex organizations with hundreds of employees who are drawn to prosecution for a wide variety of conflicting reasons, some of which are more forward-thinking than others.⁷² Emily Bazelon saw this on full display as she observed Brooklyn line prosecutors refusing to comply with District Attorney Eric Gonzalez's official policies on bail, non-prosecution, and

66. See Mitchell Armentrout, *Police union president slams Foxx, prosecutors after exoneration*, CHI. SUN-TIMES (Nov. 18, 2017, 6:23 PM), <https://chicago.suntimes.com/2017/11/18/18401698/police-union-president-slams-foxx-prosecutors-after-exonerations>.

67. See Andrew Cohen, *Reformist Prosecutors Face Unprecedented Resistance From Within*, BRENNAN CTR. JUSTICE (Jun. 19, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/reformist-prosecutors-face-unprecedented-resistance-within>.

68. See *id.*

69. See Julie Shaw, *DA Larry Krasner gives up fight in more death-row appeals, stirring concern from courts, families*, PHILA. INQUIRER (May 23, 2019), <https://www.inquirer.com/news/philadelphia-district-attorney-larry-krasner-death-penalty-cases-2019-0523.html>.

70. See Maura Ewing, *Harris County Judges May Face A Reckoning Over Bail On Election Day*, THE APPEAL (Nov. 4, 2018), <https://theappeal.org/harris-county-judges-may-face-a-reckoning-over-bail-on-election-day/>.

71. See *id.*; see also DiDi Martinez, *After losing re-election, Texas judge releases several juvenile defendants after asking one question*, NBC NEWS (Nov. 8, 2018), <https://www.nbcnews.com/news/us-news/after-losing-re-election-bid-texas-judge-releases-most-juvenile-n934121>; Bazelon, *Charged*, *supra* note 43, at 285. Each of the 14 judges, who were all Republican, lost their seats in 2018 midterm elections to 14 black women Democrats. See Andrew Schneider, *Meet 'Black Girl Magic,' The 19 African-American Women Elected As Judges In Texas*, NPR (Jan. 16, 2019), <https://www.npr.org/2019/01/16/685815783/meet-black-girl-magic-the-19-african-american-women-elected-as-judges-in-texas>.

72. See David A. Sklansky, *The Progressive Prosecutor's Handbook*, 50 UC DAVIS L. R. ONLINE 25, 27 (2017).

evidence disclosure. After shadowing members of Gonzalez's office, she found that Brooklyn Assistant District Attorneys were still relying on police officers who had histories constitutional violations in making arrests and issuing charges.⁷³ She also witnessed the following in criminal court:

*"On days when I went to criminal court in Brooklyn, I still regularly saw flashes of indifference and cruelty. A teenager was rejected from diversion because he did not have stable housing. One prosecutor demanded a fine for a homeless person who couldn't pay for it. Another sought unaffordable bail for a girl coming out of foster care who'd gotten into a fight. The everyday machinery of prosecution ground on, impervious to change at the top. It would take serious patience and stamina to change the system on a large scale."*⁷⁴

The stubbornness of underling prosecutors exceeds their refusal to toe the line in the courtroom—they can also undermine their progressive supervisors by playing games in the political arena. In December 2019, before Wesley Bell was sworn in as the new St. Louis District Attorney, prosecutors in his own office voted to join the St. Louis County Police Association, the county's largest police union that had endorsed Bell's opponent in the election. This unprecedented move was criticized as a conflict of interest by watchdog groups like the ACLU.⁷⁵ Prosecutors like Krasner, Bell, and Beth McCann, have been forced to fire prosecutors who refuse to comply with their memoranda and policies to eliminate resistance from within. But it is questionable as to whether mass firings are enough when many actors are working in tandem to ensure that the progressive prosecutorial agenda fails.

Even if the genuinely progressive prosecutor could exist, their power is limited by the fact that they are so few in number and confined to only certain pockets of the country. Paul Butler estimates that only some 100 of America's 2,400 elected prosecutors can be considered "progressive."⁷⁶ And the progressive electoral wave has hit some roadblocks—the fact that progressive prosecutor candidates were defeated in Sacramento,⁷⁷

73. See BAZELON, CHARGED, *supra* note 40, at 280.

74. See *id.* at 273; see also @CourtWatchNYC, TWITTER, <https://twitter.com/courtwatchnyc?lang=en>.

75. The union also called for the reinstatement of prosecutors that Bell had discharged. See Alice Speri, *Five Years After Ferguson, St. Louis County's New Prosecutor Confronts A Racist Criminal Justice System*, INTERCEPT (Jan. 24, 2019, 1:58 PM), <https://theintercept.com/2019/01/24/wesley-bell-st-louis-prosecutor-ferguson/>; Abdul Rad & Arthur Rizer, *A dangerous conflict of interest*, ST. LOUIS POST-DISPATCH (Jan. 15, 2019), https://www.stltoday.com/opinion/columnists/a-dangerous-conflict-of-interest/article_527bcecb-603d-5044-a96e-e6901b5190e3.html; David Hunn, *St. Louis County prosecutors vote to unionize*, ST. LOUIS POST-DISPATCH (Dec. 18, 2018), https://www.stltoday.com/news/local/crime-and-courts/st-louis-county-prosecutors-vote-to-unionize/article_e8422a8f-0fbb-584c-96b6-ff4391b6c6b0.html.

76. See Butler, *supra* note 38.

77. See Marcos Bretón, *Sacramento's DA race is done: Why progressives never should have backed Noah Phillips*, SACRAMENTO BEE (Jun. 15, 2018), <https://www.sacbee.com/news/local/news-columns-blogs/marcos-breton/article213205949.html>.

San Diego,⁷⁸ and Las Vegas⁷⁹ is indicative of the public's discomfort with totally embracing prosecutors with reformist agendas. Despite the high-profile nature of Krasner's, Foxx's, and Rollins's electoral victories, progressive candidates have not systematically replaced less forward-thinking incumbents. Color of Change found that eighty-four percent of elected prosecutors ran unopposed in 2018 general elections.⁸⁰ In the rare race where an incumbent faced a contest, the challengers won only eighteen percent of the time.⁸¹

Progressive prosecutors are also confined to certain urban pockets of America and their reforms simply may not be implementable in the rest of the country. Although progressive prosecutors have cropped up in Louisiana, Texas, and Colorado, they are still largely located in cities and towns—the wave does not seem to have crashed on rural shores yet. Pamela Metzger has contended that reforms discussed in the context of city prosecutors' offices only apply to areas with the population density to support such facilities.⁸² Rural areas face geographic challenges, such as limited numbers of public defenders and infrequent court dates, that are beyond the scope of most progressive prosecution platforms.⁸³

Others have expressed concern that progressive prosecution is a fad that may disappear once America's declining crime levels begin to increase again. Rachel Barkow questions whether the recent progressive prosecution surge has any staying power. To enact serious criminal justice reform, argues Barkow, the politics of district attorney elections cannot merely shift to the left. Indeed, the role of politics and elections must be minimized in district attorney elections—serious criminal justice reforms cannot be enacted by prosecutors “playing a political game differently.”⁸⁴ Those in Barkow's camp are wary that the voting public's comfort with progressive prosecutors is dependent on current low crime levels and predict that the prosecutorial reform movement will “fizzle” should crime rise again.⁸⁵

In sum, the American prosecutor is “all-powerful” in the sense that the law gives them the tools and other actors in the system enables them to lock up civilians en masse without constraint. But those actors will eschew their inactive status and flex their punitive muscles when a forward-thinking prosecutor wishes to constrain punishment, rendering

78. See Greg Morgan, *DA race: Stephan easily defeats challenger Jones-Wright, earns full term*, SAN DIEGO UNION-TRIBUNE (Jun. 6, 2018), <https://www.sandiegouniontribune.com/news/public-safety/sd-me-elex-da-20180531-story.html>.

79. See Rachel Crosby, *Wolfson beats Langford to retain Clark County DA seat*, LAS VEGAS REV.-J. (Jun. 12, 2018), <https://www.reviewjournal.com/news/politics-and-government/clark-county/wolfson-beats-langford-to-retain-clark-county-da-seat/>.

80. See Hughes, *supra* note 44.

81. See *id.*

82. See Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW360 (Apr. 7, 2019, 8:02 PM), <https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor>.

83. See *id.*

84. *Id.* (citing RACHEL BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019)).

85. See BAZELON, CHARGED, *supra* note 40, at 289 (citing BARKOW, *supra* note 84).

prosecutors “powerless.” Even if a genuinely progressive prosecutor could overcome the machinations of other actors, there are not enough progressive prosecutors in diverse geographic constituencies to enact widespread criminal justice reform.

III. JUSTIFYING THE PROGRESSIVE PROSECUTION AGENDA

Just as CRT scholars have urged reformers who are interested in anti-subordination to turn to non-law mechanisms to achieve racial equality, this note urges the reader to consider how local prosecutors can effect more radical change in the every-day lives of people of color than any legislative criminal justice reform possibly could.⁸⁶ Albeit, the concept of the “powerless prosecutor” has theoretical merit. But data show that prosecutors are the single main driver of mass incarceration. Consequently, it is imperative that scholars support the progressive prosecutor agenda and that members of the polity identify and elect prosecutors who are keen to enact sincerely progressive reforms. From a critical, pragmatist lens, studying and supporting the progressive prosecution agenda is a key means to achieve the twin conceptual goals of a genuinely progressive American justice system.

Bellin contends that prosecutors merely wield “reflective power” that is limited by other actors in the system. He is mistaken. Bellin’s error lies in equating “power” solely with the ability to dictate the outcome of an individual’s case.⁸⁷ This note rejects such a particularized conception of power—instead, power should also be construed as the ability to affect

86. This is not the first piece to article to argue for prosecutorial changes using a critical race lens—countless CRT scholars have advocated for prosecutorial reform as a mechanism to pursue racial equality. In the 1980s, Sherry Lynn Johnson examined the phenomenon of cross-racial misidentification and criticized the lack of prosecutorial safeguards to protect people of color from false identification. See Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984). In the early 1990s, Dwight Greene advocated for the creation of prosecutorial research, information, and reporting boards that would gather information on prosecutorial discretion to minimize the effects of racial bias and criticized reliance contemporaneous criminal approaches to drug policies for failing to account for key constituents in communities of color. See Dwight L. Green, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737 (1991). In the late 1990s and early 2000s, Anthony Alfieri argued in favor of a race-conscious, community-oriented model of prosecutorial as a substitute for the “dominant colorblind prosecutorial canon of race neutrality.” Anthony V. Alfieri, *Prosecuting Race*, 48 DUKE L.J. 1157, 1158 (1999); see also Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227 (2001); Anthony V. Alfieri, *Retrying Race*, 101 MICH. L. REV. 1141 (2003); Anthony V. Alfieri, *Community Prosecutors*, 90 CAL. L. REV. 1465 (2002). More recently, I. Bennett Capers has envisioned an Afrofuturistic world where greater criminal procedure protections will be afforded to individuals, fewer prosecutions occur, and prosecutorial biases will be eliminated. I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. LAW. REV. 101 (2019); see also I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. L. REV. 43 (2009). But this is the first CRT-influenced piece addresses criticisms of the relatively recent phenomena of progressive prosecutors and justifies selecting and supporting prosecutors who will pursue sincerely progressive policies. Of course, sundry scholars have written about race and criminal justice more generally.

87. See Bellin, *Power of Prosecutors*, *supra* note 43, at 172, 175, 188.

structural change in the criminal justice system. Bellin's theoretical picture belies data that indicate that prosecutors are a significant driver, if not the main driver, of America's soaring incarceration rate. John Pfaff's empirical study has found that the explosive growth in the US prison population is driven almost entirely by increase in felony filings per arrest,⁸⁸ over which prosecutors have exclusive control. Pfaff found that other possible sites of growth—arrests, admissions per filing, convictions per filings, admissions per conviction, and time served per admission, have barely changed over the past four decades.⁸⁹ These possible sites of growth involve the other actors in the system that Bellin claims share power in concert with prosecutors—it is the police who arrest, jurors who convict, and judges who sentence. Accepting, while not conceding, that Bellin is correct that prosecutors wield reflective power in determining the outcomes of individual cases, the data is clear that prosecutors wield massive structural power and attention should be given to installing genuinely progressive prosecutors who will pursue more forward-thinking filing policies. Pfaff's empirical research is sustained by the reality of defendants' lived experiences. Drawing on the experiences of individual people of color whose cases were affected by prosecutors' disparate charging and plea bargaining decisions,⁹⁰ Angela J. Davis persuasively contends that "prosecutors have the power and discretion to implement practices and policies that can reduce the prison population in significant ways."⁹¹

Even if the concept of the "powerless prosecutor" is taken at the most particularized level—that power equals dictating the outcome of an individual's case—the argument that actors can seize power from prosecutors does not cohere with reality. The power to charge is a kind of power that simply is not interchangeable between prosecutors and other actors. Mandatory minimum and truth-in-sentencing laws enacted since the 1980s transferred discretion and power from judges to prosecutors that simply cannot be seized back by the judiciary.⁹² Albeit, police wield the discretion over enacting the state's monopoly on violence through searches, seizures and arrests. But it is the prosecutor who decides whether to charge an individual with a crime and what those charges should be—which, per Pfaff's research, is the single largest driver of mass incarceration.

In short, the particular or structural power that prosecutors wield simply is not reflective or transferrable. The executioner analogy is not apt. Indeed, anti-capital punishment advocates should not lobby the executioner. But prosecutors are not executioners; they are not discretionless hammers exerting the state's monopoly over violence. Prosecutors are powerful policy makers that are key loci of potential subversion of the criminal justice system's power structures.

88. See John F. Pfaff, *The Causes of Growth in Prison Admissions and Populations* (2012) at 3. <https://ssrn.com/abstract=1990508>.

89. See *id.* at 3–4.

90. See Davis, *supra* note 22, at 1072–75.

91. *Id.* at 1085.

92. See *id.* at 1069.

The potential and actual impact of progressive prosecutors should not be understated. State and local prosecutors still handle 95 percent of all criminal cases in America.⁹³ And ninety-four percent of criminal cases at the state level are resolved through plea bargaining, over which prosecutors wield total power. Many of the incarcerated have yet to be even convicted of a crime: 482,000 people in jail are awaiting a court action on a current charge.⁹⁴ Leaving the structural plane aside, who your prosecutor matters to each individual defendant who is improperly prosecuted or over-sentenced. Just ask Curtiss Flowers⁹⁵ or any of the many people who were wrongfully convicted or over-punished by “tough-on-crime” prosecutors. Certainly, their fates would have been different if their prosecutor prioritized justice over securing guilty pleas.

It is true that progressive prosecutor candidates have not been successful in getting elected across the board. But in the same midterm elections where progressive candidates lost elections in Sacramento, San Diego, and Las Vegas, self-proclaimed reformers were victorious in Boston, Western Massachusetts, Durham, Birmingham, Dallas, San Antonio, Contra Costa and St. Louis.⁹⁶ Although few in number, progressive prosecutors oversee jurisdictions that cover a significant portion of the U.S. population. Now, forty million Americans (i.e., more than 12 percent of America’s population) live in a city or county with a “progressive” prosecutor.⁹⁷ Progressive prosecutors’ growing number and national prominence are representative of a burgeoning national push to reform the role of the modern American prosecutor.⁹⁸

Admittedly, society has historically supported tough-on-crime district attorneys at the voting booth and concerns that enthusiasm for the progressive prosecutor agenda may wane if crime increases are merited. Yet the data show that voters have whetted their appetite to learn more about nontraditional prosecutors. In 2017, the ACLU conducted the first nationwide public opinion poll of voters’ views of prosecutors and found that there was strong bipartisan and geographically diverse support for prosecutors who were committed to alleviating mass incarceration, reducing racial bias in the criminal justice system, and holding police officers accountable for wrongdoing.⁹⁹ There is real interest among voters in elect-

93. See Emily Bazelon & Miriam Krinsky, *There’s a Wave of New Prosecutors. And They Mean Justice*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html>.

94. See Brooke-Eisen, *supra* note 31.

95. See Gilbert et al., *Reversed*, APM REPORTS (Jun. 21, 2019), <https://www.apmreports.org/story/2019/06/21/curtis-flowers-wins-scotus-appeal>.

96. See BAZELON, CHARGED, *supra* note 40, at 290.

97. See *id.*

98. See Bellin, *Power of Prosecutors*, *supra* note 43, at 3–4.

99. Eighty-nine percent of voters say it is very important for prosecutors to actively work towards ending mass incarceration with alternatives to prison. Eighty-eight percent of voters are more likely to support a prosecutor who believes in reducing racial bias in the criminal justice system. Ninety-one percent believe it is important for a prosecutor to prioritize reducing unequal treatment of individuals because of race, including ninety percent of white voters, ninety percent of Latino voters, and ninety-five percent of Black voters. Seventy-nine percent of voters say they are much more likely to support a candidate for prosecutor who believes it is their

ing prosecutors who genuinely want to pursue meaningful criminal justice reform.

What do this note's conclusions about prosecutorial power mean for advocates and members of the polity who wish to enact meaningful criminal justice reform? Accepting this note's contention that local prosecutors *can* serve as effective agents of change in criminal justice as true, progressive prosecutors' efficacy remains to be seen in reality. It is easy to draw on forty decades of history to identify legislatures and courts as sources of power that cannot serve as avenues of effective reform. But given progressive prosecutors' recent debut, robust studies measuring how effective they have been at pursuing the twin goals of a progressive justice system do not yet exist. Notwithstanding future studies of progressive prosecutor's performance, this note submits that supporters of criminal justice reform should exploit the immense power held by local prosecutors. Theories of power interplay between prosecutors and other actors should not obscure the very real discretion and authority that prosecutors wield. Not only can local prosecutors enact widespread decarceration through their filing policies, they can materially benefit the everyday lives of people of color in marginalized communities. Until evidence comes back that puts prosecutors in the same camp as legislatures and courts, it is imperative that advocates support the progressive prosecutor agenda.

CONCLUSION

Regardless of how external actors and the law have hampered progressive prosecutors, truly progressive prosecutors have the power to enact widespread structural and particularized change for people of color living in their districts. Advocates should turn away from legislation and courts and focus their attention on identifying and supporting progressive candidates for district attorney offices in order to pursue meaningful criminal justice reform.

responsibility to hold officers that break the law accountable and will work to increase overall transparency in the criminal justice system. See *Americans Overwhelmingly Support Prosecutorial Reform, Poll Finds*, ACLU (Dec. 12, 2017), <https://www.aclu.org/press-releases/americans-overwhelmingly-support-prosecutorial-reform-poll-finds> (citing *National Voter Survey Summary Memo*, David Binder Research (Dec. 12, 2017)).

