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“Progressive” Prosecutors and “Proper” Punishments

Benjamin Levin
Washington University in St. Louis School of Law, benl@wustl.edu

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Benjamin Levin

Abstract: *After decades of relative inattention to prosecutorial elections, academics and activists recently have focused on "progressive prosecutors" as a promising avenue for criminal justice reform. That said, the growing literature on progressive prosecutors reflects little clarity about what makes a prosecutor "progressive." Recent campaigns reflect disparate visions of how to operationalize "progressive prosecution." In this chapter, I describe four ideal types of progressive prosecutor: (1) the progressive who prosecutes, (2) the proceduralist prosecutor, (3) the prosecutorial progressive, and (4) the anti-carceral prosecutor. Looking to sentencing policy as a case study, I examine how these different ideal types reflect different visions of criminal justice reform.*

I. Introduction

The last decade has seen a dramatic shift in academic and media attention paid to prosecutorial elections and district attorneys (DAs). Despite the importance of DAs to the administration of U.S. criminal law, their campaigns historically have garnered little voter or scholarly interest in most jurisdictions. Many elections were, and still are, uncontested, and despite much research into prosecutorial behavior, few academics and activists wrote about DAs as levers for reform or institutional change (Wright, et al. 2021). Most work on elected prosecutors treated them as an objectionable feature of the U.S. model of criminal law—they represented yet another place where the institutions had been designed in a way that would increase punitiveness and disadvantage marginalized communities (e.g., Davis 1998). In short, even though it's been common to describe prosecutors as the most powerful or most important actors in the criminal system, commentators tended to treat that power as fundamentally objectionable (Bellin 2019). And, to the extent that prosecutors were ostensibly politically accountable via the electoral process, commentators treated that accountability as deeply problematic—either flawed because of imperfect voter information or susceptible to public crime panics and racial prejudice (Davis 2007; Stuntz 2001).

That common narrative about prosecutors and politics is changing. Instead of treating prosecutorial discretion and democratic accountability as bugs, commentators increasingly frame them as features and recognize elected prosecutors as a possible lever for change (Sklansky 2017). By opposing traditional "tough on crime" prosecutors and supporting reformers committed to institutional change, commentators argue, elected DAs could become a vehicle to shrink the carceral state, to address racial inequalities in the criminal system, and to reverse the course of mass incarceration (Bazelon 2019). As a result, activists and reform organizations increasingly devote significant resources to electing "progressive prosecutors" and candidates increasingly identify themselves as "progressive prosecutors." Many have backgrounds as public defenders or civil rights attorneys, and a growing number are women or people of color (Bazelon 2019). Academics now devote significant attention to the role of "progressive prosecutors" in addressing the injustices of the U.S. criminal system (e.g., Godsoe 2022; Green and Roiphe 2020; Wright, et al. 2021).

But what is a "progressive prosecutor?" It's not at all clear that there is a generally accepted or agreed-upon definition. Press coverage and scholarly treatments hardly reflect a shared understanding. Despite some academic efforts to construct a rubric (Pickerell 2020; Sklansky, 2017), there isn't a common framework for assessing when some reformist impulses make someone a progressive

prosecutor as opposed to a conscientious prosecutor, a non-regressive prosecutor, or some other sort of non-traditional prosecutor.

Elsewhere, I have expressed skepticism about the utility of the "progressive prosecutor" label, in part because of the lack of clarity about its meaning (Levin 2021a). I have argued that "progressive prosecutors" might be understood as reflecting four different approaches to prosecution: (1) the progressive who prosecutes; (2) the proceduralist prosecutor; (3) the prosecutorial progressive; and (4) the anti-carceral prosecutor. These are ideal types—few prosecutors or DA candidates fit neatly into one of the four, and some exhibit tendencies or commitments associated with more than one (Levin 2021a).

There is value to teasing out the different visions of what it means to be a "progressive prosecutor." Each approach to prosecution might yield a different set of policies or office priorities. And, depending on one's preferred vision or model, assessments of a given DA's success or failure might vary dramatically. A DA might frame her decisions about charging, plea bargaining, jury selection, bail, and discovery practice as reflecting a progressive platform. But, to understand whether they actually do, academics, activists, advocates, and voters need to understand what it means to call a platform "progressive" and what such a platform means for broader questions of criminal law and policy.

This chapter takes those theoretical questions as a starting point and looks to debates about sentencing policy through the lens of "progressive prosecution." The United States locks up a historically unprecedented number of people. Lengthy prison sentences have become the norm—many jurisdictions have swapped the death penalty for life without parole, and it's not uncommon to encounter prison sentences that extend up to or beyond ordinary human life expectancy (Zimring and Hawkins 1991). And, studies have shown that Black defendants and others from marginalized populations are more likely to receive harsher sentences (Beck and Blumenthal 2018; Rehavi and Starr 2014).

In a system dominated by plea bargaining and defined by statutes that impose mandatory minimum prison terms, prosecutors play a tremendous role in who is incarcerated and for how long (e.g., Hessick 2021; Ortman 2019; Plaff 2017; Stith 2008). So, how should "progressive prosecutors" approach sentencing decisions? What would it mean for a candidate or an office to have progressive policies for sentencing? Shorter sentences for everyone? If so, what is the correct length of a "shorter" sentence? Focusing on carceral sentences for some defendants and avoiding incarceration for others? If so, how should prosecutors distinguish between those classes of defendants?

I suggest that the answers to those questions might vary tremendously among DAs commonly identified as progressive prosecutors. That variation should come as no surprise and provides an opportunity for understanding sentencing and punishment. Looking at those variations should help us (voters, academics, criminal justice stakeholders) understand competing visions not only of prosecution and sentencing, but criminal justice reform more broadly. That is, different models of progressive prosecution reflect different understandings of what "proper" punishment might look like and how to go about achieving it.

This chapter first outlines the four competing visions of progressive prosecution. Then, it provides a general overview of what it might look like to operationalize each vision, before digging

into how the competing approaches might play out in designing a set of sentencing policies. Surfacing and examining these differences should help reveal which—if any—visions of progressive prosecution are desirable. As I will argue, even if some are desirable, it is important to acknowledge the tension between lofty anti-carceral campaign rhetoric and the realities of carceral punishment as feature of most approaches. I conclude by emphasizing the limits of progressive prosecution as a model for broader structural change.

II. Models of Progressive Prosecution

Before looking to sentencing and the particular questions that arise there, this part outlines what I see as the dominant models for, or strands of, progressive prosecution (Levin 2021a). To be clear, my suggestion is not that any sitting DA or candidate for office would identify herself with one of these; prosecutors often reflect more than one model. My goal is to outline four different impulses or ideological projects that might lead to a "progressive prosecutor" brand.[1]

A. The Progressive Who Prosecutes

The progressive who prosecutes is—first and foremost—a progressive. Or, at least, she holds positions on many issues identified with being a liberal or progressive Democrat in contemporary U.S. politics. To be clear, though, these are not positions on criminal justice. Her progressive *bona fides* stem from general political positions (or even specific positions on controversial topics), not positions on criminal law.

When it comes to criminal law, there is not necessarily anything progressive about the progressive who prosecutes. She did not necessarily run with a specific reformist vision or hold views on criminal policy associated with left or progressive activists. It is possible that she may come to take some positions or handle some cases in ways that please left-leaning constituents. But, if she does, it is probably a coincidence. Put simply, she is a *progressive* prosecutor, not necessarily a *progressive prosecutor*.

I am somewhat hesitant to include the "progressive who prosecutes" as one of the categories because many commentators probably would agree that prosecutors in this category obviously are not "progressive." I include this type here because it does play a role in public discourse.[2] The progressive prosecutor is bandied about frequently and often appears in media and campaign materials, whether as an appeal ("candidate x would be the most progressive and is worth your vote") or an attack ("candidate x is one of those 'progressive prosecutors' who will cause crime to increase"). So, it is worth recognizing that some prosecutors commonly associated with the "progressive prosecutor" movement, actually might not have a carefully drawn reformist plan. Further, this model reflects the mistaken view that mass incarceration is not a bipartisan problem—that electing more Democrats

[1] There is an important question to be asked here about perception and audience—who identifies or categorizes "progressive prosecutors?" We might think of three distinct audiences for whom the "progressive prosecutor" label is particularly significant: (1) voters who might make decisions about which candidate to support based on who was understood as the "progressive" candidate; (2) media members whose understanding of the term might come to shape how they present a DA or candidate's actions (and, in turn how the public at large understands those actions); and (3) academics, reformers, and policy makers, whose understanding of the term might shape how the role that the they imagine prosecutors playing in criminal justice reform efforts.

[2] I think the best way to understand public debate about whether Vice President Kamala Harris was a "progressive prosecutor" during her time as the San Francisco DA reflects media reliance on the "progressive who prosecutes" model or understanding of progressive prosecution (Levin 2021a).

would reduce the injustices of the criminal system. In fact, support for harsh punishments and an expanded carceral state has crossed party and ideological lines (Forman 2017).

B. The Proceduralist Prosecutor

The proceduralist DA focuses on ensuring that her office fulfills its constitutional obligations and making sure that that defendants receive fair process. Rather than holding grand ambitions for decarceration or radical reform, the proceduralist prosecutor is primarily focused on making sure that her office is functioning *properly*, and properly implies an emphasis on procedural justice. That is, the proceduralist prosecutor need not be concerned about massive prison populations or the metastization of criminal law (Levin 2018). Instead, she prioritizes cleaning up her offices and its practices.

In a sense, the proceduralist prosecutor reflects an early-twentieth-century progressivism or a variant of good government liberalism: aggressive state intervention (here, prosecution) might well be an important social good (Green and Roiphe 2020). However, the reformer must combat the forces of inertia and the intrenched interests that might lead to normalizing misconduct. In this respect, the procedural prosecutor might be concerned with race- or class-based disparities or might worry about *over* incarceration, but her answer is not dramatic change in approach. Rather, the answer is a recalibration of the system and audits or careful interventions to prevent bad old habits from continuing (Fairfax 2021). Contrary to claims made by more radical critics (e.g., Kaba 2021), the racism of the criminal system is not inevitable; rather, it is the product of specific bad policy decisions and bad actors. Therefore, racial justice and criminal justice can coexist with the right reforms.

The proceduralist prosecutor might be a progressive in the sense of a left-liberal or person with left-leaning politics. The proceduralist prosecutor also might have a sweeping vision of criminal justice reform, looking to decarceration and decriminalization. But in the end, the proceduralist prosecutor's primary commitments are to some vision of an office, an institutional ethic, and a system that respects constitutional values and procedural justice.

C. The Prosecutorial Progressive

Unlike the proceduralist prosecutor or the progressive who prosecutes, the prosecutorial progressive brings a decidedly left approach to prosecution. That is, the prosecutorial progressive understands the DA's office as a place to advance a broader left or progressive political project. That project is decidedly reformist (or perhaps even transformative)—the system as it exists has been hostile to progressive causes. Viewed through this lens, traditional DAs' offices have helped to drive racial disparities in enforcement and have functioned to entrench a system that hardly lives up to the phrase "criminal justice." They have prosecuted poor people, people of color, and others from marginalized communities, often for conduct that shouldn't even be criminal in the first place (Boudin 2021).

Importantly, the prosecutorial progressive is not an abolitionist or at least is not engaged in an abolitionist project. She believes that there is an important place for criminal law and punishment. Indeed, the prosecutorial progressive sees the problem of traditional DAs' offices as one not only of *overenforcement*, but also one of *underenforcement*. The resources of the criminal system have been

misdirected—they have targeted marginalized defendants when they should be redirected towards powerful defendants (e.g., Buchhandler-Raphael 2022; Natapoff 2006). To the prosecutorial progressive, shifting away from prosecuting low-level drug crime or so-called crimes of poverty should be accompanied by going after the *real* "bad guys"—violent police officers, abusive bosses and landlords, corrupt corporate executives, or people committing violent crime against racial, religious, or sexual minorities (e.g., Murray 2021; Schweitzer 2019). Different prosecutorial progressives might have different focal points or different enforcement priorities. Nevertheless, the overarching understanding of the prosecutorial function remains the same. For these prosecutors, criminal law has the potential to do great work as an engine of racial justice, economic inequality, and egalitarianism; but achieving those ends requires a dramatic shift in the politics and priorities of most DAs' offices (e.g., Aviram 2020; Levin 2021b).

D. The Anti-Carceral Prosecutor

The final model of "progressive" prosecutor would offer the most radical vision for change. Unlike the other three models, the anti-carceral prosecutor does not see prosecution as a good, or even as a government function that can be repurposed for good. Rather than redirecting resources to prosecute the *deserving* defendants (as the prosecutorial progressive would) or to prosecute defendants more fairly (as the proceduralist prosecutor would), the anti-carceral prosecutor would be committed to prosecuting fewer people. Indeed, the anti-carceral prosecutor's ultimate goal would be abolition, or something like it.[3] Carceral punishment would be undesirable for all defendants, as would the institutions of penal administration. That is, in the purest or strongest form, the anti-carceral prosecutor would use her discretion and her power to stop prosecuting *all* types of defendants in *all* types of cases.

For radical activists and commentators who are critical of criminal punishment, the anti-carceral prosecutor would be the most appealing model—or perhaps the only appealing model. Certainly, reducing the emphasis on crimes of poverty (as the prosecutorial progressive would) or respecting defendants' constitutional rights might be desirable. However, if criminal punishment is fundamentally objectionable (e.g., Davis 2003; Mathiesen 1974; Kaba 2021), then the anti-carceral prosecutor would be the only model that directly speaks to the criminal system's essential flaw. The other models of prosecution reflect a desire to reform the system, not to abolish it (Butler 2022; Godsoe 2022).

As noted, each of the ideal types described in this chapter is, well, ideal. My suggestion is not that individual prosecutors or candidates reflect only one of these models—or that they reflect any of these models across the board. Just as the criminal system writ large reflects competing motivations, so too do individual prosecutors. That said, there is good reason to think that the anti-carceral prosecutor might well exist more in theory than in practice (Butler 2022; Foran, et. al 2021). Put differently, more radical anti-carceral rhetoric might be common during campaigns, but the broad promises of decarceration that any prosecutor actually could (or would) deliver on may be more

[3] Of course, there are different definitions of abolition, and abolitionists have different goals or targets—prison abolition, police abolition, abolition of the "prison industrial complex," etc. Different abolitionist activists and theorists hardly embrace a single project (Langer 2020). Here, though, I use abolition to reflect what I take to be its dominant use in the contemporary U.S. context: the abolition of *all* criminal justice institutions, not just prisons or specific forms of punishment (Kaba 2021).

limited. Even if a candidate entered office with a radical endgame in mind, there's reason to think that other structural impediments might quickly dampen her energy (Bellin 2019). In addition, even putting aside challenges posed by other actors, the prosecutorial role itself might have a de-radicalizing effect.[4]

III. "Progressive Prosecution" in Action

Assuming the four models described above accurately reflect the competing approaches to progressive prosecution, how might we go about putting them into action? What would it look like to operationalize each theory of prosecution (or theory of prosecutorial reform)? DAs or DA candidates might take a range of approaches or adopt a range of policies. The chart below offers some possibilities, highlighting how the concrete steps might be understood as solutions to the problems identified by each model.

Table 1: Policy Implications of Each Model

Model	**Problem with the Criminal System**	**Solutions**
The progressive who prosecutes	Republicans or conservatives holding office as DAs	Electing Democrats (especially liberal or progressive ones)
The proceduralist prosecutor	Prosecutors failing to respect defendants' constitutional rights and advance procedural justice	Adopting liberal discovery policies Implementing *Brady* lists Declining to rely on police witnesses with records of lying on the stand Increasing office transparency and announcing clear statements on charging policy, etc.
The prosecutorial progressive	Prosecutors punishing the powerless and letting the powerful behave with impunity	Declining to prosecute "crimes of poverty" Focusing on prosecutions of violent police officers, abusive bosses and landlords, or financial executives

[4] Unlike career prosecutors, reformist candidates coming from criminal defense or civil rights practice might benefit from bringing an outsider's perspective. And, that perspective certainly might help in spotting flaws or in fighting inertia and the ingrained punitive practices of many DAs' offices. But, how long will that outsider's perspective last? Regardless of their backgrounds, once they are elected, DAs are DAs. Time spent as a public defender or civil rights attorney might continue to shape the reformist prosecutor's outlook. Yet, it is worth considering whether or to what extent that outlook might change with time as the DA comes to inhabit her new role and understand her professional identity as a prosecutor (albeit a "progressive" one). In a sense, then, the discussion of progressive prosecutors and their radical potential (or lack therefor) ties into larger conversations about the ability to effect sweeping change by working within systems of power (Farbman 2022).

The anti-carceral prosecutor	Criminal prosecution and punishment themselves	Not prosecuting Refusing resources Lobbying for decriminalization, decarceration, and spending on indigent defense

As should be clear, the "progressive who prosecutes" model offers us little guidance on what policies might be desirable and therefore little to operationalize. Granted, it is conceivable that empirical work *might* show that party affiliation correlates with less punitive prosecutorial politics. Yet I remain skeptical, particularly given the lack of ideological homogeneity among Democrats. So, it is not worth discussing this model further.

Putting that model aside, we are left with a wide menu of policy options that might reflect the other three "progressive" approaches to prosecution. Some of these policies might be a part of the platform for prosecutors with different approaches. For example, improving discovery compliance or refusing to rely on the testimony of officers with a history of lying certainly would be critical planks in the proceduralist prosecutor's platform. These steps presumably would also appeal to the prosecutorial progressive and the anti-carceral prosecutor. While improving process would not be the ultimate goal of these other prosecutors, procedural justice presumably would play a role as an adjunct to advancing substantive justice.[5]

Similarly, establishing a declination list (*i.e.*, a list of crimes that that the office will not prosecute) might advance the interests of different types of "progressive" prosecutors. These lists have become increasingly common as a means of signaling a DA candidate's priorities (e.g., Murray 2021; Murray 2022).[6] From Rachael Rollins in Boston (Pfaff 2018), to Kim Foxx in Chicago (Davis 2018), to Larry Krasner in Philadelphia (Gonnerman 2018), to Wesley Bell in St. Louis (Pickerell 2020), some of the most visible "progressive prosecutors" in the country have made headlines by announcing that they would decline to prosecute certain classes of crimes. Indeed, a DA candidate's public proclamation about declining to prosecute crimes has become a common way of signaling a commitment to criminal justice reform. During the contentious Democratic primary leading up to the 2021 election for Manhattan DA, several candidates vying for the "progressive prosecutor" mantle shared declination lists as a part of their platforms (Ellsberg 2021; Nichanian 2021).

These lists might be a part of different political projects or reflect different visions of what prosecution should look like. At first blush, declination lists might look like the province of the anti-carceral prosecutor—not pursuing new charges is, after all, an essential step on the way to decarceration (Godsoe 2022; Nichanian 2021). During the 2021 Manhattan primary, civil rights lawyer Tahanie Aboushi promised not to file charges for over forty offenses including "drug crimes, sex

[5] Put differently, there might be reason to question whether some of these proceduralist reforms reflect "progressive" prosecution as much as a proper—or lawful—approach to prosecution. In the words of prosecutor-turned law professor Jeffrey Bellin, "[d]eclining to prosecute the innocent is not a progressive position. It is a consensus position" (Bellin 2020).

[6] Declination decisions can take different forms—from blanket policies to case-specific approaches (Roth 2020).

work, driving without a license, disorderly conduct, some theft charges, [and] fortune telling" (Jones 2021; Nichanian 2021). Aboushi argued that declining to prosecute in these types of cases would "reduce the footprint" of the DA's office and show voters that "we don't need an office of this size" (Nichanian 2021). That is, the list of offenses was not intended to be exhaustive; rather, declining charges in these cases was a first step towards a broader project of shrinking the DA's office.

The declination list also might advance the interests of the prosecutorial progressive—by avoiding charges in the "wrong" types of cases, the DA might conserve resources so that she could prioritize the "right" type of crimes and charges against the "right" sorts of defendants (Murray 2021; Schweitzer 2019). During her unsuccessful campaign for the Queens DA in 2019, public defender and Democratic Socialist Tiffany Cabán promised to "decriminalize poverty" by ceasing to prosecute a host of low-level crimes (Castro 2019; Schweitzer 2019). The shift away from criminal enforcement in one area didn't necessarily mean downsizing the DA's office. Instead, the criminal enforcement apparatus would have a new target—powerful defendants who preyed upon the most vulnerable. As the socialist publication *Jacobin* described her platform in a ringing endorsement: "by ending prosecution of crimes of poverty and prioritizing prosecution of abusive and exploitative landlords and bosses, she sent a simple message: Free the poor and jail the rich" (Schweitzer 2019).

My claim is not that (if elected) Cabán would have been a prosecutorial progressive and Aboushi would have been an anti-carceral prosecutor; indeed, many of Cabán's campaign promises suggested a primary focus on decarceration. Rather, my suggestion is that different policies or platforms (here, their approach to charging decisions) have similarities, but reflect different impulses. That numerous DAs have taken public stances against prosecuting marijuana possession cases hardly means that they are all on the same page generally. It also would be a mistake to assume that such charging decisions reflect the same underlying commitments or will translate to the same policies in other areas. Indeed, it is common for a single candidate or DA to take positions that reflect different impulses, approaches, or models of progressive prosecution. Those impulses even might be contradictory or reflect deep tensions. Understanding the promise and limitation of progressive prosecution requires understanding not only specific policy decisions, but also their impetus—how they might serve a broader vision of prosecution and criminal justice reform.

IV. "Progressive" Approaches to Sentencing

In the literature on progressive prosecution, sentencing policy doesn't necessarily receive the same attention as charging practices, discovery policies, or approaches to bail (e.g., Sklansky 2017). Nevertheless, sentencing is a critically important area to appreciate both the potential impact of progressive prosecution and the significant differences among progressive prosecutors. In a system where plea bargaining has practically replaced trial and where mandatory minimum punishments have become commonplace, prosecutors play an outsized role in sentencing determinations (e.g., Hessick 2021; Pfaff 2017). Not only do their recommendations tend to hold a lot of water with sentencing judges, but by manipulating sentence or charge bargains, prosecutors often can choose both the specific crime a defendant will plead guilty to and the exact punishment that she will face. That is, if a judge lacks significant discretion at the sentencing stage, then the primary place of discretion in the system lies at the charging stage (and, of course, also at the arrest stage).

Viewed through a more traditional lens of skepticism about prosecutorial power, this dynamic represents yet another place where prosecutors have too much influence—they have usurped the role of judges and other actors better equipped to determine the proper punishment for defendants. Indeed, many common approaches to sentencing reform since at least the 1980s have relied on technocratic interventions or expert commissions (e.g., Reitz 1995; Reitz 2006; Stith and Cabranes 1998). The embrace of sentencing guidelines and recommendations from the American Bar Association and the Model Penal Code tend to reflect a view that mass incarceration was caused at least in part by irrational decisions (Reitz and Klingele 2019; Reitz and Reitz 1993). Voters, lawmakers, and prosecutors swayed by punitive impulses and racialized fear of crime had embraced an approach to punishment that ignored whether a sentence was necessary or what actually worked to achieve public safety or to rehabilitate defendants (Barkow 2019). Many academics and reformers therefore have emphasized "data-driven" or technocratic solutions that would emphasize rational approaches to sentencing (e.g., Barkow 2019; Reitz 2006). In these accounts, moving away from prosecutor-dominated sentencing would represent an important step toward less punitive (and more rational) criminal justice policy.

Adopting the increasingly popular lens that reflects a renewed interest in reformist DAs, though, prosecutorial power at sentencing opens up another avenue for progressive interventions. If prosecutors really do run the show at sentencing (Stith 2008), it follows that prosecutors also have the power to reshape the sentencing landscape. Rather than entrenching harsh trial penalties or adopting a reflexive posture of seeking to maximize punishment, "progressive" prosecutors—the argument goes—might reimagine what proper punishment looks like. Just as they have done at the charging stage, prosecutors might treat sentencing as a new frontier where they might forge a new path and implement their agendas.

As should be clear by this point, what that agenda might look like will vary significantly. The treatments of the progressive prosecutor movement in the media and the academy alongside the rhetoric adopted by many reformist DA candidates might lead us to assume that the goal of all such prosecutors will be the same—shorter sentences (or at least shorter sentences for "nonviolent" crimes) and perhaps also a reduction in racial disparities. It is not at all clear that any such consensus or any shared vision of a desirable sentencing policy exists.[7] In one helpful effort to map progressive prosecutors' policies, Heather Pickerell suggests three possible sentencing approaches that progressive prosecutors might embrace: (1) the most radical position would be to "[a]bolish prison and expunge and seal all criminal records;" (2) the most practical "progressive" position would be to "[s]upport elimination of mandatory minimums, support sentencing reform legislation, support efforts to commute existing sentences, [and] set up expungement and sealing mechanisms for criminal records;" and (3) the most regressive position would be to "[c]ompletely refuse to advocate for forward-looking or backward-looking sentencing reform (commutations, expungements, sealings)" (Pickerell 2020, 293–297). While I see the progressive prosecution movement as containing a broader range of perspectives than Pickerell does, I appreciate the move—to recognize that the path forward is not

[7] Indeed, this lack of consensus reflects larger disagreement about what a properly functioning criminal system would look like or what ends criminal justice reformers should advance (Levin 2018). But, it also may reflect what law professor Doug Berman describes as an "absence of any dominant, clear new sentencing theory" in many reform discussions (Berman 2009, 717).

clear and there are many potential forks in the road. In the end, the progressive prosecutor's position on sentencing will depend on what sort of progressive prosecutor she is.

Table 2: Sentencing Policy Implications of Each Model[8]

Model	**Problem with the Criminal System**	**Solutions**
The proceduralist prosecutor	Excessive trial penalties or sentences/plea deals that are not carefully crafted to serve the interests of the community. Racial disparities in sentences.	Ending or reducing the trial penalty Reducing reliance on uncharged conduct at sentencing Capping and/or carefully calculating sentence recommendations based on office priorities Increasing office transparency and auditing sentencing outcomes based on offense and defendant characteristics
The prosecutorial progressive	Sentences for defendants from marginalized communities and defendants convicted of crimes of poverty are too harsh; sentences for powerful defendants are too lenient	Offering favorable plea deals or seeking diversion or non-carceral sentences for "lower level" crimes Seeking harsher penalties or refusing to offer favorable deals to powerful defendants Lobbying for statutes that increase penalties for "crimes of power"
The anti-carceral prosecutor	Carceral sentences (particularly, long carceral sentences)	Not prosecuting at all or avoiding statutes with mandatory minimum sentences Pursuing diversion, restorative-justice-based solutions, or alternative sanctions

[8] Because the "progressive who prosecutes" offers no particular insight into how sentencing policy should be reformed, that model of prosecutor has been omitted here.

Table 2 provides an overview of some possible approaches to sentencing reform that might reflect the competing models of progressive prosecution. Once again, it is important to recognize that differing approaches to sentencing or visions of a just system might lead to some overlap in the actual policies adopted. Or, some policies might be deployed in service of different ends.

By way of example, consider the sentencing policy that Philadelphia DA Krasner implemented in his first year in office. Under the policy, "each time a prosecutor wanted to send somebody to prison, he had to calculate the cost of that imprisonment (an estimated forty-two thousand dollars per inmate per year), state it aloud in court, and explain the 'unique benefits' of the punishment" (Gonnerman 2018). The policy might reflect several different approaches. From a proceduralist perspective, the policy might be attractive because it effectively amps up the process that a defendant would receive and assures that a sentence is reached after careful consideration. That is, rather than a line-level prosecutor asking for a carceral sentence out of habit, this approach might ensure that prosecutors are carefully weighing the social costs and benefits of imprisonment (and inviting sentencing judges to engage in a similar analysis).

From the prosecutorial progressive perspective, this approach highlights a key distinction—between defendants who are deserving of punishment and those who are not. By highlighting the cost to the public and justifying the decision, the policy speaks in a language of "right-sizing" criminal law (Levin 2018). To the extent that the problems of criminal justice are understood as its excesses or its misdirected harshness, a policy like Krasner's offers to "rationalize" punishment. For the prosecutorial progressive, then, it might allow for punishment to be more narrowly tailored and to reflect a specific political or ideological project, rather than simply an unthinking reliance on one-size-fits-all punitive politics.

V. The Promises and Perils of Sentencing Reform via "Progressive Prosecution"

As a general matter, there is reason to be skeptical of progressive prosecution as a focal point for academic and activist energy (e.g., Butler 2022; Foran, et al. 2021; Godsoe 2022). That is not to diminish the material benefits that communities or individual defendants might enjoy as a result of improvements in prosecutorial policies. Rather, it's to say that there might be cause for concern if progressive prosecution is embraced uncritically or becomes the primary locus of reformist energy.

Looking specifically at sentencing policy, there are reasons for cautious optimism. Electing prosecutors who will charge fewer crimes and seek shorter sentences should reduce the number of people incarcerated and directly affected by the criminal system. During Krasner's first two years in office as the Philadelphia DA, the jail population had decreased by about 30% and the average sentence had shrunk by about 46% (Dehghani-Tafti, et al. 2019). During Bell's first six months in office as Prosecuting Attorney for St. Louis County, the jail population shrunk by 20% (Dehghani-Tafti, et al. 2019; Pickerell 2020). Those are significant and important gains.[9] Further, approaches like Krasner's that shift the default away from seeking incarceration (at least in some cases) or that

[9] It is possible that jail population drops reflect changes in charging and bail policies more than changes in sentencing policy. On any given day, jails hold a large number of people who are incarcerated pretrial. So, decisions not to request cash bail or not to seek charges might be responsible for at least some of the jail population decline.

emphasize the social costs of imprisonment should provide at least some cause for optimism among proponents of decarceration (Gonnerman 2018). In short, even if some of the benefits are speculative or we are unsure whether prosecutors will follow through on their promises, there's much to be said for a move away from reflexive punishment maximization.

That said, there are good reasons to remain skeptical about the promise of progressive prosecutors as sentencing reformers. Some of those objections might be fundamentally ideological in nature—supporting prosecutors, regardless of their politics, reinforces and strengthens the institutions of the carceral state (e.g., Butler 2022; Foran, et al. 2021; Godsoe 2022; Levin 2021a). Other objections might be strategic—perhaps resources devoted to electing "progressive prosecutors" would be better spent elsewhere. Finally, commentators increasingly highlight the backlash that "progressive prosecutors" face from voters and politicians who come to blame "progressive" policies for increases in crime (e.g., Bellin 2019; Godsoe 2022). Recall elections and legislative efforts to preempt local prosecutors' decisions suggest that the obstacles to DA-led reform efforts are substantial (e.g., Bellin 2019; Godsoe 2022). Here, though, I highlight two other causes for concern that I see as speaking particularly to sentencing policy: (a) the limits of prosecutorial power over the experience of punishment; (b) the lack of agreement on what "progressive prosecution" is and what ends it should advance.

A. The Limits of Prosecutorial Power Over the Experience of Punishment

Even if prosecutors are the most powerful actors in the criminal system, their power is hardly unlimited. As a formal matter, prosecutorial power remains constrained by judges, legislators, and voters (Bellin 2019). As a practical matter, police, probation officers, and even line-level prosecutors might hamstring a DA's effort to implement sweeping change (Pickerell 2020). That's not to mention the continuing role of media in pushing back against reformist prosecutors and helping to breathe life into narratives about "soft-on-crime" prosecutors endangering their constituents (Thusi 2022).[10] These constraints are important—no matter how progressive (or even radical) a reformist DA's platform might look on paper, it's not worth much if it can't be implemented.

In the sentencing context, one key limitation of the DA's power should give us pause: the DA doesn't control what goes on in jails, prisons, halfway houses, or probation departments. That is, once a DA obtains a conviction and a judge enters the sentence, other actors take over. A decision not to charge in the first place keeps the power in a prosecutor's hands. Otherwise, the prosecutor is essentially turning defendants over to other actors who will shape and define the actual punishment that defendants experience. A progressive prosecutor could seek a comparatively short carceral sentence, believing that incarceration will serve some rehabilitative purpose. However, that decision assumes that the prison will be a humane place focused on individual improvement, not a place of brutality. And, the warden of that prison might not have such a vision—she could treat her prison as a place where incarcerated people should suffer for the wrongs that they've done. Similarly, a prosecutor might believe that a probationary sentence could help a defendant stay away from bad influences and get her life back on track. Such a decision presumes that the probation officer and department share this understanding of their function. In practice, they might; or they might view

[10] Law professor India Thusi has argued that this media criticism appears to be concentrated most heavily on non-white progressive prosecutors, particularly Black women (Thusi 2022).

their job as one of enforcement—trying to catch the defendant in a lie or mistake and see her returned to custody.

The literature on sentencing often treats punishment as though it can be understood in abstract terms—in days, months, and years (Hanan 2020; Kolber 2009). If the subjective experience of punishment matters, though, we should be worried about much more than the formal sentence that a defendant receives (Kolber 2009; Levin 2020). We should be worried about what punishment actually looks like (Reitz and Klingele 2019). We should be worried about collateral consequences and the impact of individual punishments on families and communities (Traum 2013). Try as she might, even the most progressive of prosecutors cannot fully control what punishment will look like. Jails and prisons are brutal places—incarcerated people often lack access to decent medical care or nutritious food and are exposed to the threat of violence and sexual abuse (e.g., DeVeaux 2013; Simon 2014). Any approach to sentencing reform that leaves these back-end conditions unchanged means that "progressive" approaches to prosecution still will funnel defendants into these same regressive institutions. At the very least, then, a progressive approach to prosecutors' sentencing policies would require significant reforms to the correctional or penal system in order to effect meaningful change.

B. The lack of Agreement on What "Progressive Prosecution" Is and What Ends It Should Advance

Ultimately, the inability to identify a shared definition of progressive prosecution isn't simply an academic problem. It is a practical problem for the progressive prosecutor movement and a problem for academics, advocates, and activists who see electing reformist prosecutors as a way to fix decades of overly punitive sentencing policy. In short, the policies and priorities discussed in the above can vary dramatically. Perhaps all of them would be an improvement to the status quo, or at least the status quo in many jurisdictions. But that's a big assumption. And, judging whether they would be an improvement requires us to have some metric—some understanding of what ends that punishment should be serving and what it would mean for the state to mete out "proper" punishment in a given case.

One way of understanding the competing positions traced out in this chapter is that each of them reflects a different vision of what it would mean for the state to seek and obtain proper punishments. The extent to which each of us finds a progressive prosecutor appealing rests in turn on our own priorities—our own understandings of what ends criminal law should serve and what proper punishments should look like.

I worry that "progressive prosecution" becomes an uninterrogated label in the growing literature and political discourse. Without an analysis of these first-principles, there's reason to be concerned that the focus on progressive prosecutors shuts down more conversations than it opens. Ideally, the rise of the progressive prosecutor movement would force a broader reckoning with what criminal law is for. Considering whom to vote for or support might lead to more of us asking first-principles questions about what it means for a prosecutor to do her job well. Indeed, prosecutor-turned law professor David Sklansky has argued that one of the most important things a progressive DA can do is to "make clear how [they] want to be judged" (Sklansky 2017, 28). As Sklansky argues, a DA beginning her term should ask herself "[w]hat do you want to have achieved by the end of your time in office, and how will you know if you have succeeded? . . . You want to 'do justice.' But how

will you know if you've accomplished that—not in isolated cases, but day in and day out?" (Sklansky 2017, 28).

There are no obvious right answers to Sklansky's questions. I imagine that many prosecutors commonly identified as "progressive" would have different answers. I am also confident that many of us who study, work in, or care about criminal policy would as well. So, the answer to the problems of U.S. sentencing policy can't be "electing progressive prosecutors." It needs to be figuring out what proper sentencing policy looks like—when (if ever) incarceration is desirable and how the state should respond to harm, risk, and lawbreaking. If a given prosecutor actually can and will advance that vision, that would be cause for enthusiasm (that might be a plausible outcome for anyone interested in "right sizing" the prison population; that probably won't be a plausible outcome for abolitionists or other radical critics). In the meantime, precision is important—assuming that reformers share the same vision would be a mistake. Understanding both the problem to be solved and the acceptable, practicable solutions are prerequisites to deciding both what progressive prosecutors are and whether we want them.

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