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## Pitfalls of Progressive Prosecution

Carissa Byrne Hessick

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# PITFALLS OF PROGRESSIVE PROSECUTION

*Carissa Byrne Hessick\**

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## INTRODUCTION

Much has been written about the rise of progressive prosecutors — prosecutors who, rather than pursuing tough-on-crime policies, instead seek to use their office to help reduce incarceration rates and other punitive outcomes. Over the past decade, a number of candidates have run on progressive, decarceral platforms. Many have won. These wins have been hailed as great achievements within the criminal justice reform community, but they have also engendered backlash from outside of that community. Progressive prosecutors have come under attack, facing not only harsh public criticism, but also impeachment,<sup>1</sup> gubernatorial removal from office,<sup>2</sup> and election losses.<sup>3</sup>

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1. Ellie Rushing, *DA Larry Krasner's Impeachment Trial Gets Indefinitely Postponed by the Pa. Senate*, PHILA. INQUIRER (Jan. 11, 2023), <https://www.inquirer.com/news/larry-krasner-impeachment-trial-postponed-pa-senate-20230111.html> [https://perma.cc/8H3Q-DEFU].

2. Sue Carlton, Lawrence Mower & Dan Sullivan, *Ousted Hillsborough State Attorney Sues DeSantis, Claiming Violations of Free Speech*, MIAMI HERALD (Aug. 18, 2022), <https://www.miamiherald.com/news/politics-government/state-politics/article269344527.html> [https://perma.cc/MZY3-HQ4].

3. See *infra* notes 56–57 and accompanying text.

Some of the attacks directed at progressive prosecutors appear to be little more than political opportunism. But others appear to be attributable, at least in part, to various problems with the progressive prosecution brand. These problems — or pitfalls, as I call them — make progressive prosecutors especially vulnerable to attack, and unless they are addressed, these pitfalls may stymie the progressive prosecution movement.

This Essay identifies two major pitfalls for progressive prosecution. The first is that, in styling themselves as substantively different than other prosecutors, progressive prosecutors may have obscured the extent to which they are relying on otherwise well-worn and well-accepted prosecutorial tools. For example, prosecutorial charging discretion has a lengthy history in America; prosecutors have long declined to bring charges even when they possessed enough evidence to indict or convict. In casting themselves as a different type of prosecutor, progressive prosecutors have contributed to (if not caused) the impression that their declination of charges is somehow radical or unique. This impression has, in turn, fueled attacks on progressive prosecutors, enabling others to use them as scapegoats for the failings of police and other government actors.

The second pitfall is related to public safety. One of the oft-repeated progressive prosecution goals is to reduce mass incarceration. One way that prosecutors have implemented this goal is to “do less” — i.e., use their powers more sparingly and thus keep more cases out of the criminal justice system. Sometimes the “do less” concept is coupled with an assertion that reduction of crime and the protection of public safety is better achieved through non-criminal means, such as efforts to reduce poverty and efforts to increase education, treatment programs, and job opportunities.

These sentiments found ready audiences when crime rates were falling, but they may prove deeply unpopular as crime begins to rise. Ordinarily, when crime and disorder increase in a local community, the traditional prosecutor seeks to reduce crime by becoming more punitive — filing more serious charges and refusing to offer favorable plea deals. The progressive prosecutor, in contrast, believes that reducing crime is best achieved by addressing “root causes” — e.g., by increasing spending on social services that address poverty and increase other opportunities. But ultimately, a prosecutor’s power is criminal in nature — she can directly control the filing or dismissal of criminal charges and negotiations over plea agreements; she cannot increase local budgets or administer social service programs.

The pitfalls that I identify are not insurmountable. Progressive prosecutors (and their allies) can adjust their messaging to highlight the lengthy history of the tools that they use. Progressive prosecutors can also take affirmative steps, through relationships with other public officials and by using their own non-criminal powers to actively pursue the non-criminal public safety strategies that they champion. Such steps may not fully insulate

progressive prosecutors from politically motivated attacks. But failing to acknowledge and address these pitfalls is likely to make such attacks more frequent and more effective.

This Essay proceeds in three parts. Part I discusses how progressive prosecutors have successfully gained office in the past decade.<sup>4</sup> It focuses on two key themes in progressive candidates' campaigns—the revolutionary nature of the movement and the vow to use prosecutorial power more sparingly—highlighting how these themes are part of a successful national “brand” for would-be local prosecutors.

Part II explains how these two themes in successful campaigns have the capacity to become political liabilities for incumbent progressive prosecutors.<sup>5</sup> Using real world examples, it demonstrates how the two features leave progressive prosecutors politically vulnerable.

Part III offers suggestions for how to tweak the progressive prosecutor brand to better avoid these pitfalls.<sup>6</sup> In particular, it suggests that progressive prosecutors emphasize the long traditions associated with their actions, and it encourages them to cooperate with non-criminal enforcement agencies and to highlight that cooperation as affirmative steps toward reducing crime and promoting public safety.

To be clear, progressive prosecutors will face opposition and backlash no matter what tactics they adopt. Some people are simply too invested in the traditional, punitive role that modern prosecutors play in American society, and thus they will always find fault with those who seek the office to bring about criminal justice reform. Others are looking for a convenient political foil which allows them to use crime as a wedge issue.

But there are a great number of persuadable members of the public—people who are both supportive of criminal justice reform *and* concerned about public safety. It is important for those people to understand that reform and safety can coexist. Tweaking the message of progressive prosecutors could help bring about that understanding and ensure that progressive prosecution remains a popular political brand.

### I. PROGRESSIVE PROSECUTION AS A POLITICAL BRAND

The past decade has witnessed the rise of the progressive prosecutor — prosecutors who use their power to reduce the footprint of the criminal justice system. While some prosecutors had been doing this work for some

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4. *See infra* Part I.

5. *See infra* Part II.

6. *See infra* Part III.

years prior,<sup>7</sup> the national movement to elect reform-oriented candidates hit its stride in the mid-2010s.<sup>8</sup> Since then, the term “progressive prosecutor” has become a national brand,<sup>9</sup> allowing candidates across the country to distinguish themselves from other, traditional prosecutors. By 2021, candidates in large urban jurisdictions were competing in Democratic primaries for the “progressive” label.<sup>10</sup>

Political brands can be helpful in reaching voters. Most American voters are relatively uninformed—they know very little about the important policy issues of the day.<sup>11</sup> Rather than researching the relevant policies before casting a ballot, the typical voter relies on cues, like party affiliation, using

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7. See Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER (May 4, 2015), <https://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment> [<https://perma.cc/A47J-BKT5>] (profiling Milwaukee district attorney John Chisholm); see also Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719, 741–42 (2020) (stating that “progressive prosecutors may be regarded as successors to liberal and reform-minded predecessors of a few years earlier such as Craig Watkins, the Dallas prosecutor . . . [and] Milwaukee prosecutor John Chisholm”).

8. See David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 647–49 (2017) (recounting the election of candidates in 2013 through 2016 who ran as progressives); see also Leon Neyfakh, *Big Wins for Black Lives Matter*, SLATE (Mar. 16, 2016), <https://slate.com/news-and-politics/2016/03/the-prosecutors-in-the-tamir-rice-and-laquan-mcdonald-cases-lose-their-primary-races.html> [<https://perma.cc/ACH4-GHAD>] (reporting on two prosecutor upsets as “represent[ing] a major victory for the Black Lives Matter movement, whose organizers have now decisively demonstrated their ability to mobilize voters and change the direction of local politics”); see also David Weigel, *Down the ballot, liberal reformers take over the criminal justice system*, WASH. POST (Sept. 5, 2018), <https://www.washingtonpost.com/politics/2018/09/05/down-ballot-liberal-reformers-take-over-criminal-justice-system/> [<https://perma.cc/WB7W-6D8U>] (quoting Larry Krasner referring to progressive prosecutors as a “movement”).

9. See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1422 (2021) (“Recent years have seen a surge in DA candidates branding themselves (or embracing the mantle of ‘progressive prosecutors.’”). For more on the idea of branding in politics, see CIARA TORRES-SPELLISCY, *POLITICAL BRANDS* (2019).

10. See, e.g., Jonah E. Bromwich, *8 Candidates Compete for a Job That May Involve Prosecuting Trump*, N.Y. TIMES (Mar. 25, 2021), <https://www.nytimes.com/2021/03/25/nyregion/manhattan-district-attorney-election.html> [<https://perma.cc/CVY7-GNSH>] (characterizing the 2021 Manhattan district attorney race as “dominated by low-profile progressives”).

11. See Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 371–73 (2013) (collecting and describing the political science literature on voter ignorance).

those cues as rough proxies for policy preferences.<sup>12</sup> Those party labels are a political brand that has been cultivated over time.<sup>13</sup>

While party labels may be effective in general elections, they cannot serve as an effective proxy for policy preferences in non-partisan elections or primary elections. In those elections there is no difference in party label to distinguish between candidates.<sup>14</sup> What is more, as Chris Elmendorf and David Schleicher have explained, party labels are also relatively unhelpful in state and local elections, where the national party brand does not meaningfully speak to the sub-national issues that those officials must address.<sup>15</sup>

When progressive prosecutors came onto the scene, local prosecutor elections were ripe for a new political brand. Traditional party labels were insufficient for the reasons described above: prosecutor elections are sometimes non-partisan,<sup>16</sup> they are often decided in a primary election,<sup>17</sup> and the issues that local prosecutors must decide — *e.g.*, whether to pursue a diversion program for first-time drug offenders, what the plea offer should look like for a residential burglary — are not meaningfully addressed by the national party brand. The “progressive prosecutor” label gave voters additional information about the candidates who adopted it — it was not only available even in primary and non-partisan elections, but it also spoke directly to criminal justice issues.

The progressive prosecution brand has proved popular. In elections held between the years 2014 and 2019, candidates who ran on progressive platforms won at a higher rate than non-progressive candidates.<sup>18</sup> Their

12. *See, e.g.*, Cheryl Boudreau & Scott A. MacKenzie, *Informing the Electorate? How Party Cues and Policy Information Affect Public Opinion about Initiatives*, 58 AM. J. POL. SCI. 48, 49 (2014) (finding that “party cues and policy information substitute for one another”).

13. *See* TORRES-SPELLISY, *supra* note 9, at 100–15 (discussing the branding of partisan labels).

14. *See* Elmendorf & Schleicher, *supra* note 11, at 385–90.

15. *Id.* at 393–408.

16. *See* Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1552 (2020) (noting that local prosecutor is a nonpartisan office in five states).

17. *Id.* at 1563 tbl.5 (finding that 16% of primary elections for local prosecutor are contested, as compared to 18% of general elections).

18. “While non-progressive challengers won only 30% of the time, progressive challengers won 55% of the time. And progressives did even better when running for open seats — of the twenty progressive candidates in races without an incumbent, only two lost. In contrast, open seat candidates generally won only 36% of the time.” Carissa Byrne Hessick, Michael Morse, & Nathan Pinnell, *Donating to the District Attorney*, 56 U.C. DAVIS L. REV. 1769, 1835 (2023) (reporting results for elections from 2014 to 2019); *see also* Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 525 (2020) (“Prosecutorial elections over the last several cycles have seen candidates increasingly campaigning—and winning—on platforms of reforming bail, charging, and plea-bargaining

appeal was reflected not only in their victories at the polls, but also their prolific fundraising.<sup>19</sup> But while the label itself has proven popular, the term “progressive” has proven somewhat tricky. Many candidates have run campaigns that embrace the “progressive” label. Others have eschewed that particular term, even when running on platforms of reform.<sup>20</sup> And perhaps because the term “progressive” is tied to a broader movement within the modern American left, some academics and activists have disputed whether particular reform-oriented candidates ought to be considered “progressive.”<sup>21</sup>

Academics have noted the lack of consensus about what it means to be a “progressive prosecutor.”<sup>22</sup> The label is sometimes used to refer to prosecutors who are willing to address misconduct and errors in their own offices.<sup>23</sup> Other times it refers to a prosecutor who is willing to use her powers to investigate and prosecute powerful interests such as police, white collar defendants, or those who exploit the marginalized.<sup>24</sup>

While there is no consensus about what, precisely, it means to be a progressive prosecutor, there are two major themes that are closely tied to the progressive prosecution movement. First, there is an emphasis on how radical or different the reform candidates are as compared to more traditional candidates. Second there is an emphasis on shrinking the criminal justice system—in particular, by using prosecutorial power less. These themes look different in different campaigns, and these two themes are not the only concepts that progressive candidates have emphasized. But they play a key role in how progressive candidates describe themselves while campaigning or once elected, and thus they are undoubtedly part of the progressive prosecutor brand.

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practices.”); Elizabeth Webster, *Postconviction Innocence Review in the Age of Progressive Prosecution*, 83 ALB. L. REV. 989, 989 (2020) (“A growing number of prosecutors are running and winning elections on criminal justice reform platforms of progressive prosecution.”).

19. Hessick et al., *supra* note 18, at 67.

20. See, e.g., Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707, 711 (“Kim Foxx, speaking at this Symposium, stressed that she does not see herself as a progressive prosecutor.”).

21. See, e.g., Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1372–74 (2021) (criticizing Kim Ogg and Mark Gonzalez for failing to deliver on their progressive promises).

22. See generally Levin, *supra* note 9 (exploring different definitions of what it means to be a “progressive prosecutor”).

23. See, e.g., Webster, *supra* note 18, at 989–90 (noting that “correcting wrongful conviction issues is a key platform issue” for “many of these progressive prosecutors”).

24. See, e.g., MIRIAM ARONI KRINSKY, *CHANGE FROM WITHIN: REIMAGINING THE 21ST-CENTURY PROSECUTOR* 187 (2022) (emphasizing Marilyn Mosby’s prosecution of police misconduct); see also Levin, *supra* note 9, at 1438–40 (identifying this theme in the progressive prosecutor movement).

### A. Fundamentally Different

At its most fundamental level, the progressive prosecution brand serves to distinguish a prosecutor or a candidate from the traditional prosecutor.<sup>25</sup> The progressive prosecutor is a new type of prosecutor who sees things differently and who aims to change the way the criminal justice system works. This account appears frequently in the academic and media accounts discussing these prosecutors.<sup>26</sup>

The prosecutors have characterized themselves in similar terms. Several prosecutors describe themselves as having “a different concept of justice” than traditional prosecutors.<sup>27</sup> Parisa Dehhani-Tafti, a prosecutor in Virginia said: “To make the world more just, . . . [we must] move from the idea of punishment to repair, and from prosecution to protection.”<sup>28</sup> Mark Gonzalez, a prosecutor in Texas put it more simply: “Justice doesn’t look like what I think a lot of people think it is.”<sup>29</sup> Chesa Boudin framed his election in terms of voters demanding “radical change to how we envision justice . . . I’m humbled to be a part of this movement that is unwavering in its demand for transformation.”<sup>30</sup>

Some prosecutors suggest that they are transformational because they bring a completely different point of view to the office. This concept is sometimes couched in terms of how the prosecutors had different life experiences than more traditional prosecutors, such as family members who had committed crimes<sup>31</sup> or personal experiences as victims of crime.<sup>32</sup> These experiences influenced their views about what the system ought to seek to achieve.

Progressive prosecutors perceive themselves as fundamentally different not only because they have a different view of justice or different life

25. See Green & Roiphe, *supra* note 7, at 743 (emphasizing the extent to which candidates have called attention to “how they differ . . . from other traditional prosecutors”)

26. See, e.g., KRINSKY, *supra* note 24, at vii, ix (describing progressive prosecutors as “fundamentally reimagining and re-creating their role as prosecutors” and “upending the status quo”); Jeffrey Bellin, *Defending Progressive Prosecution: A Review of Charged by Emily Bazelon*, 39 YALE L. & POL’Y REV. 218, 221 (2020) (referring to progressive prosecutors as “a major new phenomenon” in the criminal justice system); Talia Peleg, *The Call for the Progressive Prosecutor to End the Deportation Pipeline*, 36 GEO. IMMIGR. L.J. 141, 141 (2021) (“Progressive prosecutors’ seek to redefine the role of prosecutors.”).

27. See KRINSKY, *supra* note 24, at 39 (quoting Aramis Ayala).

28. *Id.* at 57.

29. *Id.* at 154.

30. Elizabeth Weill-Greenberg, *Public Defender Chesa Boudin Wins San Francisco D.A. Race in Major Victory for Progressive Prosecutor Movement*, APPEAL (Nov. 9, 2019), <https://theappeal.org/public-defender-chesa-boudin-wins-san-francisco-da-race-in-major-victory-progressive-prosecutor-movement/> [https://perma.cc/V9DA-K3RH].

31. KRINSKY, *supra* note 24, at 198, 216.

32. *Id.* at 84, 125–26.

experiences, but also because they use their office and their power as a vehicle for change. Chicago prosecutor Kim Foxx refers to several of her policies as “disruption of the system.”<sup>33</sup> In describing the work that he and other progressive prosecutors do, Chesa Boudin said, “[t]he system is set up in and has long operated in a particular way. We’re trying to fundamentally change it.”<sup>34</sup> This view has also been expressed by North Carolina prosecutor, Satana Deberry: “You’ve got to make the system work differently.”<sup>35</sup>

### B. Doing Less

In addition to labeling themselves as different or transformational, a defining feature of the progressive prosecutor movement appears to be a commitment to shrinking the criminal justice system. Sometimes that commitment is framed in terms of taking affirmative steps to correct past injustice or mitigate the harsh decisions of previous elected prosecutors. This can be found in the establishment of conviction integrity units,<sup>36</sup> resentencing initiatives,<sup>37</sup> and efforts to obtain expungements.<sup>38</sup> But more often the commitment is framed in terms of using their power to prosecute less often.

Using prosecutorial power less is the framing that is most often highlighted in the burgeoning academic literature about the movement.<sup>39</sup> Ben Levin identifies this as the “anti-carceral” “flavor” of prosecutorial progressivism, noting that “this approach has gained ground” within the movement.<sup>40</sup> And Jeff Bellin distinguishes a progressive prosecutor from a “traditional by-the-book prosecutor,” by focusing on how prosecutors

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33. *Id.* at 87.

34. *Id.* at 19.

35. *Id.* at 39.

36. *See* Webster, *supra* note 18, at 997.

37. *See* CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 210–11 (2021) (describing Rachel Rollins’ sentencing integrity unit).

38. Mark Dupree, a prosecutor in Wyandotte County, Kansas, has highlighted why the expungement of criminal records can reduce crime: people with jobs are less likely to commit crimes, and criminal records make it more difficult for people to find employment. KRINSKY, *supra* note 24, at 74–75.

39. Bruce Green and Rebecca Roiphe note scholars’ and journalists’ emphasis of the progressive’s platforms and policies “on when and how to use prosecutorial power,” including policies “declining low-level charges,” and “not pursuing marijuana cases.” Green & Roiphe, *supra* note 7, at 741.

40. *See* Levin, *supra* note 9, at 1438, 1444–45.

employ the power of “prosecutorial lenience.”<sup>41</sup> Other scholars have made similar observations,<sup>42</sup> as have media accounts.<sup>43</sup>

Sometimes prosecutors express their commitment to prosecuting less often by pledging not to enforce certain laws. For example, Satana Deberry campaigned on a promise not to seek the death penalty. That promise required her to shift course in a case in which the office had announced its intention to seek the death penalty before she was elected.<sup>44</sup> Marilyn Mosby, the prosecutor in Baltimore, Maryland, adopted a policy against prosecuting possession of marijuana cases, regardless of weight and regardless of criminal history.<sup>45</sup> And Sarah George, a prosecutor in Vermont, promised to stop bringing criminal charges for unauthorized possession of medication used to treat opioid addiction.<sup>46</sup>

Other times the commitment is framed in more general terms of “doing less.” For example, Brooklyn prosecutor Eric Gonzalez has said: “Not every offense needs to be prosecuted. I’m moving more cases out of the criminal legal system, opting to send people for services instead.”<sup>47</sup> Gonzalez talks about this commitment in more than just general terms; he also quantifies it. “In just a few short years as DA, we drove the number of cases that this office prosecutes down by more than 40 percent. We continue to do pre-arraignment diversion, sending a lot of our cases to services without bringing them into the criminal legal system.”<sup>48</sup>

The idea of doing less is what eventually led Seattle prosecutor Dan Satterburg to transition from a more traditional prosecutor to a progressive prosecutor. As he explained, “the more I did the work, the more I realized

41. Bellin, *supra* note 26, at 245.

42. See Hessick & Morse, *supra* note 16, at 1541 (using the term “progressive prosecutor” “to refer to prosecutors who have specifically championed or adopted prosecutorial practices that are intended to make the criminal justice system less punitive”); Zachary S. Price, *Faithful Execution in the Fifty States*, 57 GA. L. REV. 651, 655 (2023) (noting that the traditional model of prosecutorial discretion “has eroded, giving way to a different model, associated for the moment with progressive politics and criminal-justice reform, in which prosecutors actively reshape the operative law in their jurisdictions by openly suspending enforcement of disfavored statutes” and characterizing this model as “one hallmark of the self-described “progressive prosecutors” who have won office in local jurisdictions across the country”).

43. Benjamin Wallace-Wells, *The Trial of Chesa Boudin*, NEW YORKER (July 29, 2021), <https://www.newyorker.com/news/annals-of-inquiry/the-trial-of-chesa-boudin> [<https://perma.cc/6L3N-L6AW>] (characterizing Boudin and other progressive prosecutors as having “promised to work to reform the criminal-justice system by focusing on, among other tactics, decarceration and addressing root causes of crime”).

44. KRINSKY, *supra* note 24, at 36.

45. *Id.* at 187.

46. *Id.* at 110. George credits this decision with a decrease in drug overdose deaths in her jurisdiction. *Id.* at 110–11.

47. *Id.* at 132.

48. *Id.* at 136–37.

that we needed to think about what we were actually doing and not try to do so much, not to criminalize so much.”<sup>49</sup> Satterburg said this question and the question whether prosecuting cases was doing any good or just harming marginalized people “led us to continually shrink the number of cases we prosecute.”<sup>50</sup>

The power to do less is what initially led Kim Foxx to run for the office. As she has said: “I wanted to become a prosecutor armed with the ability to say no. A lot of people want the power to *do*, I wanted the power to *not* do . . . . My decision to run for office was about not only the power to say no for myself and my individual caseload, but for my entire office and the millions of families impacted by our justice system.”<sup>51</sup>

Philadelphia district attorney Larry Krasner’s autobiography includes a chapter titled “Do Less Harm,”<sup>52</sup> in which he speaks about abandoning “America’s punitive, prohibitionist approach to the use of drugs” and instead offering those who use drugs “support and treatment.”<sup>53</sup> Krasner is not alone in his belief that, as prosecutors do less, others outside of the criminal justice system should do more to address crime. Dan Satterberg has emphasized the need for drug treatment programs and social services.<sup>54</sup> And Kansas prosecutor Mark Dupree has highlighted how education and economic growth can reduce crime.<sup>55</sup>

## II. PROGRESSIVE BRANDING AND PITFALLS

The progressive prosecutor movement has suffered some recent setbacks. Several incumbent progressive prosecutors lost their reelection campaigns, including two prominent progressives — Marilyn Mosby in Baltimore, Maryland, and Tori Salazar in San Joaquin, California.<sup>56</sup> Two other progressives were removed from office before the end of their terms: Chesa Boudin of San Francisco, California lost a recall election, and Andrew Warren of Tampa, Florida was suspended from office by Governor Ron DeSantis.<sup>57</sup> Additional prosecutors have seen serious pushback from state

49. *Id.* at 220.

50. *Id.* at 222.

51. *Id.* at 82–83.

52. LARRY KRASNER, *FOR THE PEOPLE: A STORY OF JUSTICE AND POWER* 101–15 (2022).

53. *Id.* at 114.

54. KRINSKY, *supra* note 24, at 156–65.

55. *Id.* at 74 (stating that “the best form of [crime] prevention is education and economic growth. If you want folks to stop robbing people, give them the ability to put money in their own pocket”).

56. See John Pfaff, *Reform Prosecutor Races*, [https://docs.google.com/spreadsheets/d/1iSs\\_8gSOYGzLaxvFLFMdkUNhsqv1at6—FuK4w2Dc5U/edit#gid=0](https://docs.google.com/spreadsheets/d/1iSs_8gSOYGzLaxvFLFMdkUNhsqv1at6—FuK4w2Dc5U/edit#gid=0) [https://perma.cc/M5VH-DTAZ] (last visited Apr. 16, 2023).

57. See *id.*

legislatures. Several states have introduced legislation to limit the power of progressive prosecutors.<sup>58</sup>

While the attacks on progressive prosecutors have come in many forms, the two major themes discussed above have often appeared in those attacks. In particular, attacks against progressive prosecutors have capitalized on the idea that these prosecutors are using their power in a new and unprecedented fashion, as well as on the idea that the prosecutors are doing too little to address the crime in their communities. In other words, the defining features of the progressive prosecutor brand appear to be the source of political attacks — some of which have been quite successful.

Take, for example, the intense criticism that Rachael Rollins faced when she took office as the elected prosecutor in Boston. Rollins ran on the progressive brand, and after taking office she characterized her work as a fight against the status quo.<sup>59</sup> Rollins also promised to do less; among other things, she adopted a policy against filing charges in several categories of low-level offenses.<sup>60</sup>

Rollins's victory resulted in significant pushback from law enforcement and lawyers, particularly about her non-prosecution policy.<sup>61</sup> It also resulted in significantly negative media coverage.<sup>62</sup> A *Boston Globe* article about Rollins, published less than a year after she took office, opened with the following sentences:

58. See, e.g., Jeff Amy, *Georgia Bill is Latest GOP Effort Targeting Prosecutors*, ASSOCIATED PRESS (Mar. 28, 2023), <https://apnews.com/article/georgia-prosecutor-district-attorney-remove-discipline-dd06c56d0d0672e38ef11f4c63dda468> [<https://perma.cc/RD6C-VLB8>]; Henry Grabar, *The GOP Has Its Knives Out for 'Rogue' Prosecutors*, SLATE (Nov. 3, 2022), [https://slate.com/business/2022/11/progressive-prosecutors-republican-targets-krasner-chisholm.html?via=rss\\_socialflow\\_twitter](https://slate.com/business/2022/11/progressive-prosecutors-republican-targets-krasner-chisholm.html?via=rss_socialflow_twitter) [<https://perma.cc/HR37-LQGA>]; Scott S. Greenberger, *Republicans Try to Rein in 'Rogue' Progressive Prosecutors*, PEW STATELINE (Mar. 23, 2023), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2023/03/23/republicans-try-to-rein-in-rogue-progressive-prosecutors> [<https://perma.cc/9TU3-BUJB>].

59. KRINSKY, *supra* note 24, at 211.

60. Rachael Rollins for Suffolk DA, *Charges to be Declined*, <https://web.archive.org/web/20220424231513/https://rollins4da.com/policy/charges-to-be-declined/> [<https://perma.cc/A7T7-T4PC?type=image>] (last visited Apr. 13, 2023).

61. Maria Cramer, *DA Candidate Rachael Rollins Hailed Nationally, but Locally Her Plan Not to Prosecute Petty Crimes Alarms Some*, BOSTON GLOBE (Sept. 12, 2018), <https://www.bostonglobe.com/metro/2018/09/12/candidate-hailed-nationally-but-locally-her-plan-not-prosecute-petty-crimes-alarms-some/pyQX8MT4iWpyJ8XMi6SsFO/story.html> [<https://perma.cc/WER9-6LDW>].

62. James M. Doyle, *Why Rachael Rollins Makes Boston's 'Courthouse Regulars' Nervous*, CRIME REP. (July 15, 2019), <https://thecrimereport.org/2019/07/15/why-rachel-rollins-unnerves-bostons-justice-establishment/> [<https://perma.cc/LRX9-DCBD>] (noting that the Boston Globe published a series of negative stories in a short period of time).

“Rachael Rollins came into office promising to shake things up at the Suffolk district attorney’s office.

“Armed with a list of 15 ‘low-level’ nonviolent offenses that her office would no longer prosecute, Rollins said she planned to help stop a ‘freight train moving toward mass incarceration of poor people and black and brown people.’

“Now, less than six months into her tenure as the first African-American woman to serve as Suffolk County’s top prosecutor, Rollins is making good on her promise, but getting strong pushback as her office increasingly dismisses charges at the very beginning of a case, sparing defendants a criminal record.”<sup>63</sup>

Those who read much deeper into the article would discover — a full 35 paragraphs later — that Rollins’ decisions to dismiss were not much different than her predecessor. Rollins dismissed 46 of the first 200 cases her office received as compared to 33 dismissals by her predecessor during the same time period of the previous year. Rollins was using the same tools as the previous DA, but doing so at a slightly higher rate. Yet the story’s headline read “Stopping injustice or putting the public at risk? Suffolk DA Rachael Rollins’s tactics spur pushback,” and the first half of the article was filled with multiple quotes from sources stating that Rollins’ policy of dismissing charges was dangerous.

To be clear, the *Boston Globe* could have written this story about any district attorney whose dismissal policy differed from their predecessor. It is not hard to find *someone* who will give a quote about how the failure to prosecute compromises public safety. But having run on a campaign of fighting the status quo and shaking things up made Rollins a more likely target for such an article.

It is not only that they ran on platforms of bringing about significant change, but also the *particular type* of change they promised that has helped drive the attacks on progressive prosecutors. Shrinking the footprint of the criminal justice system by using their power less is a key feature of the brand, but it has two major liabilities. First, it allows others to blame the prosecutor when crime (or the perception of crime) increases. Second, it seems to close off the traditional — and thus expected — response when crime and anxiety about crime increase, namely an aggressive approach of more charges and more punitive outcomes.

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63. Andrea Estes & Shelley Murphy, *Stopping injustice or putting the public at risk? Suffolk DA Rachael Rollins’s tactics spur pushback*, BOSTON GLOBE (July 6, 2019), <https://www.bostonglobe.com/metro/2019/07/06/stopping-injustice-putting-public-risk-suffolk-rachael-rollins-tactics-spur-pushback/IFC6Rp4tVHiVhOf2t97bFI/story.html> [<https://perma.cc/HJ36-PG2Q>].

Perhaps nowhere was this pitfall on greater display than in San Francisco. When concerns about crime increased in 2021, police, the mayor, and other public officials blamed then-district attorney Chesa Boudin. Of course, officials anywhere could attempt to lay blame with the local prosecutor when crime increases. But the charge against Boudin seemed all the more plausible because he had run on a decarceral platform.<sup>64</sup> It does not seem like a particularly large logical leap to say that the person who is supposed to prosecute crime and who has said that he will decrease the prosecutions he brings is responsible when crime increases. That logical leap depends only on the belief that crime rates are tied to prosecution rates. Importantly, the available empirical evidence suggests that belief may not be accurate.<sup>65</sup> But it *seems* like it should be — which is enough when it comes to political battles.<sup>66</sup>

It likely did not help that, when blamed for rising crime (or the perception of rising crime), Boudin tended to blame others. In one interview, Boudin blamed police for failing to make arrests, private retail companies for changing their policies about detaining shoplifters, lack of housing, lack of access to health care, and insufficient access to employment for the change in San Francisco’s crime.<sup>67</sup> To be clear, Boudin is likely correct that these issues either made it impossible for his office to act or were the root causes of these crimes. But that is unlikely to satisfy those who are concerned about rising crime.

More importantly, because “doing less” is a key feature of the progressive prosecutor brand, it may be difficult for progressive prosecutors to successfully communicate when they take affirmative action to address crime. The uninformed voter sees the progressive prosecutor label, assumes that the prosecutor is doing less, and never bothers to inform herself about whether the prosecutor is actually “doing more.”

For example, when concern about shoplifting in San Francisco dramatically increased, Chesa Boudin responded by targeting the large-scale

64. This was pointed out in the skeptical media coverage that Boudin received. *See, e.g.*, Wallace-Wells, *supra* note 43 (characterizing Boudin and other progressive prosecutors as having “promised to work to reform the criminal-justice system by focusing on, among other tactics, decarceration and addressing root causes of crime”).

65. *See, e.g.*, Amanda Agan et al., *Misdemeanor Prosecution*, *QUART. J. ECON.* (Jan. 23, 2023), <https://academic.oup.com/qje/advance-article/doi/10.1093/qje/qjad005/6998589> [<https://perma.cc/H7JQ-8VC7>] (finding that nonprosecution of some misdemeanor defendants significantly reduces recidivism over two years).

66. *See* TORRES-SPELLISCY, *supra* note 9, at 19–20 (discussing how oft-repeated ideas can be well-accepted, even if false).

67. *See* David Marchese, *San Francisco’s D.A. Says Angry Elites Want Him Out of Office*, *N.Y. TIMES MAG.* (Feb. 28, 2022), <https://www.nytimes.com/interactive/2022/03/01/magazine/chesa-boudin-interview.html> [<https://perma.cc/VX88-FVC3>].

fencing operations which are responsible for the majority of retail thefts. His office led a task force that made several arrests<sup>68</sup> and ultimately recovered eight million dollars in goods from those operations.<sup>69</sup> While this would be hailed as a successful outcome for a more traditional prosecutor, it did not seem to change the narrative that Boudin's lack of enforcement had caused more crime. To add insult to injury, some criticized Boudin for taking these steps, noting that this approach "didn't really amount to what [Boudin had] promised in his campaign — a new vision for criminal justice."<sup>70</sup>

### III. AVOIDING THE PITFALLS

The progressive prosecution brand is known for its fundamentally new and different approach — in particular for shrinking the footprint of the criminal justice system by doing less. How can progressive prosecutors retain their successful brand without allowing the key features of that brand to become a political liability? I see three possible approaches.

First, progressive prosecutors could use their political power to lobby for the non-criminal justice approaches to public safety that so many progressive prosecutors support. Specifically, progressive prosecutors could use their political power in support of increased funding for social services and drug treatment programs — emphasizing the public safety benefits of such programs. In general, prosecutorial lobbying to shrink the criminal justice system has a successful track record.<sup>71</sup> It is not clear whether that general track record will translate into success for legislation about funding. Prosecutors have not been particularly successful when lobbying to increase their own funding, perhaps because when seeking more funding for their own agencies, they seem no different than other interest groups.<sup>72</sup> But advocating for funding for *other* agencies might not create that same appearance of self-interest, and so they might be more successful.

Second, progressive prosecutors can use non-criminal powers to address crime. For example, when Eli Savit, the elected prosecutor in Ann Arbor,

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68. See Vanguard Administrator, *More Arrests Announced by SF District Attorney Boudin in Crackdown on Organized Retail Theft*, DAVIS VANGUARD (Apr. 30, 2022), <https://www.davisvanguard.org/2022/04/more-arrests-announced-by-sf-district-attorney-boudin-in-crackdown-on-organized-retail-theft/> [<https://perma.cc/LQD9-7RQ6>].

69. Wallace-Wells, *supra* note 43.

70. *Id.*

71. For example, Kim Foxx has worked to draft and pass legislation in Illinois that would decriminalize small amounts of marijuana and create automatic expungement for cannabis possession convictions. KRINSKY, *supra* note 24, at 90. And a nationwide study found that the support of prosecutors for criminal justice reform legislation was correlated with a much higher rate of such legislation passing. Carissa Byrne Hessick, Ronald F. Wright, & Jessica Pishko, *The Prosecutor Lobby*, 80 WASH. & LEE L. REV. 143, 195–204 (2023).

72. See Hessick et al., *supra* note 71, at 208–09.

Michigan, discovered that more than a dozen sexual assaults were tied to parties at a fraternity, he did not simply try to prosecute individual cases of sexual assault. He obtained an injunction against the fraternity, which prohibited the fraternity from hosting parties.<sup>73</sup> An injunction is not a tool traditionally used by prosecutors. But in this case, preventing parties at the fraternity seems well-tailored to prevent future sexual assaults.

Third, progressive prosecutors can partner with other groups and agencies to address the root causes of crime. For example, Dan Satterburg has created a successful diversion program that relies heavily on the participation of community non-profit organizations.<sup>74</sup> The diversion programs not only shrink the footprint of the criminal justice system, but they also allow crime to be treated as a public health issue. These programs are consistent with the progressive prosecutor brand, but they are framed as affirmative actions to address crime, rather than simply doing less. As Satterburg explained, “the role of the prosecutor is not just to file cases and earn convictions. It is to build a safer and healthier community. You do that in partnership with the government and public health entities — and with the community.”<sup>75</sup>

These three approaches are not mutually exclusive. For example, Manhattan District Attorney Alvin Bragg has decided to use non-carceral tools while partnering with other agencies to address illegal marijuana smoke shops. He partnered with the NYC Law Department and other elected officials to use nuisance abatement complaints and the power that all state officials have under the state’s real estate laws to force evictions.<sup>76</sup> His efforts have earned him praise from other political leaders in his community.<sup>77</sup>

To be clear, these approaches may not be enough to address the pitfalls of progressive prosecution. Chesa Boudin employed similar tactics. He sued

73. See Samuel Dodge, *No more parties at EMU fraternity linked to sexual assaults, judge rules*, MLIVE (Feb. 23, 2022), <https://www.mlive.com/news/ann-arbor/2022/02/no-more-parties-at-emu-fraternity-linked-to-sexual-assaults-judge-rules.html> [<https://perma.cc/W9MF-MZWE>].

74. KRINSKY, *supra* note 24, at 217.

75. *Id.* at 227–28.

76. N.Y. REAL PROP. ACTS. LAW § 715 (McKinney 2016).

77. New York City Councilmember Gale Brewer stated: “I saw firsthand how we’ve been relying on the New York City Sheriff’s authority over untaxed cigarettes as a way in the door to seize illegal products. It has been a necessary stopgap but was never going to be enough on its own to close 1,400 or more stores or even disrupt them for more than a couple of days in many cases. We needed a creative solution to shutter stores quickly without bringing criminal charges, and D.A. Bragg found it. I hope the city’s four other district attorneys are able to take the same approach in their jurisdictions.” *Mayor Adams, D.A. Bragg Announce Joint Efforts to Combat Proliferation of Illegal, Unlicensed Cannabis Dispensaries*, CITY OF N.Y. (Feb. 27, 2023), <https://www.nyc.gov/office-of-the-mayor/news/094-23/mayor-adams-d-a-bragg-joint-efforts-combat-proliferation-illegal-unlicensed#0> [<https://perma.cc/84VK-VDQY>].

ghost-gun companies, asking the courts to prohibit them from shipping weapons into San Francisco, and he worked with the state attorney general to confiscate guns from prohibited possessors.<sup>78</sup> But he still lost his recall election — though it is hard to know whether that is because those efforts were not politically helpful or because the electoral math of recall elections is simply different.<sup>79</sup>

In any event, if affirmative and innovative action could become a defining feature of the progressive prosecution brand, it might help to insulate progressive prosecutors against some political attacks. Unlike “doing less,” it is responsive to the concerns of voters who are troubled by rising crime rates and who are looking for immediate action by those in power. Taking steps that are designed to actually prevent crime, rather than just to punish it, may help to reassure voters and shore up the progressive prosecution brand.

### CONCLUSION

The progressive prosecution brand was formed when the United States was experiencing low levels of crime. As crime has started to rise and as anxiety about crime has sharply increased, it may be necessary to update the brand. Rather than “doing less,” progressive prosecutors could become known for innovative, affirmative approaches to crime.

Importantly, this is not so much a recommendation that progressive prosecutors change what they are doing. Many are already employing such tactics. The recommendation is, instead, that progressive prosecutors and their allies should talk more about these innovations, and less about “doing less.” If more progressive prosecutors adopt these approaches and — perhaps more importantly — publicize these approaches, then the progressive prosecution brand could become more resilient.

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78. See Marchese, *supra* note 67.

79. As John Pfaff explains in his symposium contribution, that loss may be explained by the fact that it was a recall election, rather than a traditional election with other candidates. John Pfaff, *The Poor Reform Prosecutor: So Far From the State Capital, So Close to the Suburbs*, 50 FORDHAM URB. L.J. 1013 (2023).