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## Prosecuting the Crisis

Benjamin Levin

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# PROSECUTING THE CRISIS

*Benjamin Levin* \*

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## INTRODUCTION

Over the past decade, activists and academics have celebrated the rise of the so-called “progressive prosecutor” movement.<sup>1</sup> District attorney (DA) candidates — often former public defenders or civil rights lawyers — have promised to use prosecutorial discretion to address the injustices of the criminal system.<sup>2</sup> A proliferation of such campaigns, and the electoral

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1. See, e.g., EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION xxv–xxxii (2019) (describing the movement); Jeffrey Bellin, *Defending Progressive Prosecution: A Review of Charged by Emily Bazelon*, 39 *YALE L. & POL’Y REV.* 218, 218–27 (2020); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 *UCLA CRIM. JUST. L. REV.* 1, 1–3 (2019).

2. See, e.g., David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 *OHIO ST. J. CRIM. L.* 647, 647–49 (2017); Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 *J. CRIM. L. & CRIMINOLOGY* 719, 739 (2020); Carissa Byrne Hessick & Michael Morse, *Picking*

successes of some of these candidates have raised questions about progressive prosecution: what does it actually mean to be a progressive prosecutor?<sup>3</sup> Does progressive prosecution work?<sup>4</sup> Do progressive candidates follow through on campaign promises?<sup>5</sup> And, how enthusiastic should defense attorneys, reformers, and critics of the carceral state be about progressive prosecution?<sup>6</sup> The election of “progressive prosecutors” also has led to backlash, with resistance from police departments and efforts to impeach or recall prosecutors seen as “soft on crime.”<sup>7</sup>

In this Essay, I examine media and popular reactions to progressive prosecutors and what those reactions reveal about societal understandings of the prosecutorial function. Looking at media coverage of the recall election and ouster of public defender-turned-San Francisco-DA Chesa Boudin as a

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*Prosecutors*, 105 IOWA L. REV. 1537, 1540 (2020) (“[A] motivated group of advocates and their supporters have started a movement to elect progressive prosecutors.”).

3. See, e.g., Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1415–16 (2021) [hereinafter Levin, *Imagining the Progressive Prosecutor*].

4. See, e.g., Heather L. Pickerell, *How to Assess Whether Your District Attorney Is a Bona Fide Progressive Prosecutor*, 15 HARV. L. & POL’Y REV. 285, 331 (2020); Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 192 (2021); KATHERINE K. MOY, DENNIS M. MARTIN & DAVID ALAN SKLANSKY, STANFORD CRIM. JUST. CTR., RATE MY DISTRICT ATTORNEY: TOWARD A SCORECARD FOR PROSECUTORS’ OFFICES 5 (2018).

5. See, e.g., Malik Neal & Christina Matthias, *Broken Promises: Larry Krasner and the Continuation of Pretrial Punishment in Philadelphia*, 16 STAN. J. C.R. & C.L. 543, 544–45 (2021). See generally David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25 (2017) (setting out a rubric for progressive DAs to use to make sure their office is in line with progressive prosecution goals, thus helping voters assess whether the DA is living up to her promises as a “progressive prosecutor”).

6. See, e.g., Paul Butler, *Progressive Prosecutors Are Not Trying to Dismantle the Master’s House, and the Master Wouldn’t Let Them Anyway*, 90 FORDHAM L. REV. 1983, 1984 (2022); Rachel Foran et al., *Abolitionist Principles for Prosecutor Organizing: Origins and Next Steps*, 16 STAN. J. C.R. & C.L. 496, 496–500 (2021); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 164 (2022); Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About “Criminal Justice Reform,”* 128 YALE L.J. F. 848, 916–18 (2018–19) (criticizing the idea of progressive prosecution); Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 749–50 (2018); Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. L. 411, 422 (2019) (“I remain unsure about whether prosecution can truly be progressive over the long haul — and whether prosecutors can bring real, fundamental, progressive change to the criminal justice system.”). See generally Hana Yamahiro & Luna Garzón-Montano, *A Mirage Not a Movement: The Misguided Enterprise of Progressive Prosecution*, 46 HARBINGER 130 (2022).

7. See, e.g., Campbell Robertson, *Lawmakers’ Report Says Philadelphia D.A.’s Policies are a Factor in the Crime Rate*, N.Y. TIMES (Oct. 24, 2022), <https://www.nytimes.com/2022/10/24/us/larry-krasner-philadelphia-committee-report.html> [https://perma.cc/A24C-RXK4]; Sean Kennedy, *In Marilyn Mosby’s Baltimore, Repeat Criminals Go Free to Kill*, WALL ST. J. (July 22, 2022), <https://www.wsj.com/articles/in-marilyn-mosbys-baltimore-repeat-criminals-go-free-to-kill-murder-binding-plea-agreement-sentencing-prison-time-maryland-11658526203> [https://perma.cc/T5YJ-MS93].

case study, I focus on popular expectations of what it means to be a prosecutor. I argue that the specter of governmental failure and urban disorder continues to haunt contemporary discussions of prosecutorial policies. And, the common focus on prosecutors as either the solution to or cause of social problems reflects the continued resonance of a model of “governing through crime.”<sup>8</sup>

My claim is not that there is a single explanation for Boudin’s recall. There is good reason to be wary of overemphasizing the national lessons from a single local election.<sup>9</sup> Instead, I see media treatment of Boudin’s time in office and recall as useful illustrations of popular discourse about the promises — and limits — of “progressive” prosecution. Media narratives about declining urban quality of life frame the issues — from homelessness and drug addiction to interpersonal violence — as crises that must be resolved via criminal law. Whether prosecutors are imagined as tough-on-crime punishers tasked with administering harsh justice or progressive regulators tasked with providing services and addressing structural inequality, they remain some of the most visible state actors on the local level. And so, for each issue — each crisis — the prosecutor becomes the responsible party and the face of the state’s response.

Ultimately, I express concern about an overreliance on prosecutors — whether understood in traditional “tough on crime” terms or “progressive” ones. I argue that the common understanding of the DA’s office as the place where the government solves social problem will remain a significant impediment to any project of dismantling the carceral state.

My argument unfolds in three Parts. In Part I, I set out the theoretical claim that the language of “crisis” has shaped U.S. crime policy and, by extension, the contemporary understanding of prosecutors’ social and political functions.<sup>10</sup> Drawing on the work of cultural theorist Stuart Hall and criminologist Jonathan Simon, I argue that criminal law and prosecution have come to operate as primary sites of governance — as the vehicles for the state to respond to social problems.<sup>11</sup> And, I argue that the turn to

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8. See JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 3–5 (2007).

9. See John Pfaff, *What the San Francisco DA Recall Really Tells Us*, SLATE (June 10, 2022), <https://slate.com/news-and-politics/2022/06/chesa-boudin-recall-what-it-means-and-what-it-doesnt.html> [<https://perma.cc/QS3B-9556>].

10. See *infra* Part I.

11. See generally STUART HALL ET AL., *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* (1978). See also SIMON, *supra* note 8; Jonathan Simon, *Law’s Violence, the Strong State, and the Crisis of Mass Imprisonment (for Stuart Hall)*, 49 WAKE FOREST L. REV. 649, 675 (2014) [hereinafter Simon, *Law’s Violence*].

criminal law and the demand for harsher punitive policies often come in response to public perception of a crisis or exceptional amount of crime.<sup>12</sup>

In Part II, I describe media coverage of the election and subsequent recall of public defender-turned-San Francisco-DA Chesa Boudin as a case study of this phenomenon.<sup>13</sup> I suggest that Boudin's election was commonly characterized as responsive to crises (*e.g.*, the racial disparities of mass incarceration and harms done by law enforcement), but so too was his ouster (*e.g.*, the rise in crimes against Asian Americans and increases in homelessness and associated "quality of life" offenses).

In Part III, I step back to argue that a path forward towards decarceration and dismantling the carceral state requires a different frame and different understanding of prosecution.<sup>14</sup> Rather than arguing for "progressive prosecution" or DAs' offices as promising sites for social change, I argue that DAs' offices must recede as sites of governance. Without rejecting the DA's office as the place to solve social problems and respond to crises of governance, I argue, we will not be able to escape the politics of crime control that have led to the current moment of hyper policing and hyper-incarceration.

### I. CRIMINAL LAW AND CRISES

In academic and popular discourse, criminal law is often framed as the state's response to crises. Criminal law and punishment address the small-scale crisis (*e.g.*, an individual case of interpersonal violence) and the large-scale crisis (*e.g.*, widespread interpersonal violence in the community). This crisis frame and "[t]he language of exceptional misbehavior justifies punishment, new laws, and new methods of social control."<sup>15</sup> There certainly are other state (and private) institutions designed to respond to wrongdoing, harm, and risk creation. But, criminal law is frequently understood as exceptional — as the response that targets the worst conduct, that carries the greatest moral condemnatory force, and that imposes the most severe sanctions.<sup>16</sup> Criminal law and the discourse surrounding crime therefore imply that there are "normal" social problems that may be

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12. See HALLET AL., *supra* note 11, at 16–18. This insight owes much to Stanley Cohen's foundational work on "moral panics." See generally STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS* (1972).

13. See *infra* Part II.

14. See *infra* Part III.

15. Benjamin Levin, *Criminal Law in Crisis*, COLO. L. REV. F. 1, 16 (2020).

16. See Alice Ristorph, *An Intellectual History of Mass Incarceration*, 60 B.C. L. REV. 1949, 1953–56 (2019) (describing and critiquing this view of criminal law); Benjamin Levin, *Criminal Law Exceptionalism*, 108 VA. L. REV. 1381, 1390 (2022) [hereinafter Levin, *Criminal Law Exceptionalism*] (same).

regulated but that there are exceptional areas, exceptionally bad conduct, and exceptionally serious problems that demand a specific, punitive response.<sup>17</sup> In the U.S. system, it is the prosecutor who operates as the state's chief law enforcer and therefore the actor responsible for managing crises and responding to exceptional dangers.

### A. Crisis Narratives and Crime Control as Governance

Writing in the late 1970s, cultural theorist Stuart Hall and a group of scholars from the Centre for Contemporary Cultural Studies at the University of Birmingham framed questions of crime policy in terms of media portrayals and popular consciousness.<sup>18</sup> They argued that media should be central to our understanding of crime and law enforcement and how they are constructed in the cultural imagination.<sup>19</sup> In their influential book, *Policing the Crisis: Mugging, the State, and Law and Order*, Hall and his coauthors focused on the contemporary British media coverage of muggings.<sup>20</sup> Through a close analysis of reports and media narratives, they argued that media had constructed a “crisis,” tapping into raced and classed fears of urban disorder.<sup>21</sup> As the state and the media amplified “street crime,” they argued, “society [came] to perceive crime in general, and ‘mugging’ in particular, as an index of the disintegration of the social order.”<sup>22</sup> The political reaction to these narratives was an amplification of state violence, particularly against Black people and poor people.<sup>23</sup>

Hall's work has enjoyed renewed interest of late, as U.S. legal commentators have adopted an increasingly critical posture with respect to police and criminal legal institutions.<sup>24</sup> But, Hall's insights into how the relationship among ideology, culture, and criminal law have been applied perhaps most comprehensively in the U.S. context by criminologist Jonathan Simon. Simon has argued that criminal law has become the dominant tool

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17. Cf. GIORGIO AGAMBEN, *STATE OF EXCEPTION* 31 (2003) (Kevin Attell trans., Univ. Chi. Press, London 2005) (“Far from being a response to a normative lacuna, the state of exception appears as the opening of a fictitious lacuna in the order for the purpose of safeguarding the existence of the norm and its applicability to the normal situation.”).

18. See generally HALL ET AL., *supra* note 11.

19. See *id.*

20. See *id.*

21. See *id.* at 362–80.

22. *Id.* at vii–viii.

23. See *id.*

24. See, e.g., Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1799 n.66 (2020); Barbara A. Fedders, *The End of School Policing*, 109 CALIF. L. REV. 1443, 1470 n.176 (2021); Brendan D. Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. F. 213, 224 n.65 (2021).

that U.S. state actors use to respond to social problems.<sup>25</sup> As Simon describes it, society “governs through crime.”<sup>26</sup> That is, “people are seen as acting legitimately when they act to prevent crimes or other troubling behaviors that can be closely analogized to crimes.”<sup>27</sup> Therefore, Simon suggests that “we can expect people to deploy the category of crime to legitimate interventions that have other motivations.”<sup>28</sup> And as a result, “the technologies, discourses, and metaphors of crime and criminal justice have become more visible features of all kinds of institutions, where they can easily gravitate into new opportunities for governance.”<sup>29</sup>

In a neoliberal (or, perhaps, a post-neoliberal) moment when the welfare state has shrunk, criminal institutions have come to replace it.<sup>30</sup> Policing and prosecution have remained state functions largely insulated from other deregulatory impulses. So, where legislative reticence has defined much social policy since at least the Reagan years, criminal law and criminal legal institutions have thrived. Fed by the language of crisis and fear, the modern U.S. state does much of its governing through crime.

Two decades into the twenty-first century, then, Hall’s insight about the centrality of media to our cultural understanding of crime remains important. The changing media landscape plays a role in constructing crisis narratives and crime scares — and in amplifying perceived public concerns.<sup>31</sup> Certainly, long-established, or so-called “legacy,” media outlets continue to play a significant role in fomenting fear of crime. But the rise of social media

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25. See SIMON, *supra* note 8, at 3–6.

26. *Id.* at 4.

27. *Id.*

28. *Id.*

29. *Id.* at 4–5.

30. Different scholars have offered different accounts of the relationship between neoliberalism and mass incarceration, but this central claim about the carceral state replacing the welfare state remains a staple of much left-leaning and progressive scholarship. See, e.g., HADAR AVIRAM, CHEAP ON CRIME: RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT 1–9 (2015); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 53–73 (2001); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA 5–23 (2007); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 258–82 (2015); BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 1–52 (2011); ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 1–2 (2016); LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY xi–xxiii (2009).

31. Indeed, there might be a sort of cyclical relationship between public concerns and media narratives. That is, it’s not always clear which direction the causal arrows point — it might be easier said than done to identify people’s concerns drive media focus and when media focus drives people’s concerns.

provides new dimensions in the construction of crime scares.<sup>32</sup> And, in particular, there's something powerful and troubling about the way that legacy media organizations aggregate and feed off of social media posts. The use of one-off stories or socially salient anecdotes is hardly a new practice. In the 1970s, Hall made much of letters to the editor as drivers of the British mugging panic.<sup>33</sup> Yet the contemporary aggregation of such stories easily allows for the impression of widespread phenomena. Anecdotes become anecdota. What once might have been a story featuring a couple of stray interviews with passersby on the street can easily become a news story that parlays several online posts (even anonymous ones) into a broad claim that "people" believe x or are worried about y.<sup>34</sup> The vicious cycle between official media narrative and more organic expressions of public opinion can become more vicious, and the lines between those categories can become harder to draw. In other words, the current media climate and the way that we consume information strike me as particularly susceptible to the crisis frame.<sup>35</sup>

A critique of these crisis narratives might take one of two forms. First, in some cases, a critical approach might suggest that a given crisis simply isn't real. Perhaps the media frenzy or moral panic has centered around conduct that is not occurring or that is occurring extremely rarely. Perhaps rumor, mischaracterization, fears, or biases have allowed media or public opinion to

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32. To be clear, many of the pathologies of social media might well be understood as extensions of pre-existing issues with U.S. media culture. See Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311, 374 (2011).

33. See HALL ET AL., *supra* note 11, at 135.

34. I am reminded of living in Massachusetts in 2008 when the New England Patriots' star quarterback, Tom Brady, suffered a season-ending injury. On the night following the injury, I recall watching the local evening news, which featured an extended segment of a reporter standing in a suburban grocery store parking lot and asking shoppers how serious they thought the injury was and what it meant for the Patriots. I must admit that it made for enjoyable TV. But, the limitations of the segment as a journalistic endeavor were clear. I hardly would have taken any of the shoppers' comments as evidence of either: (a) medical opinion; or (b) the definitive statement on public opinion in the greater Boston metro area. And, I doubt that many other viewers would. There was a certain transparency to seeing only a handful of willing shoppers interviewed in an empty parking lot. When reporters aggregate social media posts, though, that transparency is lacking. Discerning readers and viewers still may take claims about what "everyone is saying" with a grain of salt. But, I worry that — or, at least, wonder whether — it's easier to believe the sorts of sweeping claims that make for good copy when you can't watch the footage of a reporter trying to find the one or two people willing to pause their shopping trip on a fall New England evening.

35. That said, recent years also have seen a rise in more serious and nuanced coverage of prosecutors and criminal policy. See Carissa Byrne Hessick et al., *Understanding Uncontested Prosecutor Elections*, 60 AM. CRIM. L. REV. 31, 46 (2023) ("Media coverage of prosecutor elections may have improved in recent years — especially in races featuring a reform candidate.").



invent a crisis whole cloth. Or, a cultural preoccupation with crime might have turned a one-off event into an illustration of a broader trend — even if there is no such trend. Consider, for example, the “satanic panics” of the 1980s, the medically questionable preoccupation, with “shaken baby syndrome,” or contemporary law-enforcement-driven claims about fentanyl as lethal to the touch. Each of these examples has been framed in such a way by media and state officials as to indicate that they are exceptional and exceptionally urgent, demanding harsh and swift responses and leaving no room for skepticism.

Second, a more nuanced — and, in some cases, more accurate — approach might accept that there really is an ongoing and (at least relatively) widespread problem. In our current moment, this approach might accept that there really is a significant increase in opioid overdose deaths, that property crimes in certain cities have risen, or that homicides have increased since the start of the COVID-19 pandemic.<sup>36</sup> (Indeed, one of Hall’s findings in *Policing the Crisis* wasn’t that crime was down; it was that crime had been rising consistently for years and that the “exceptional” crime wave was a media creation.)<sup>37</sup> But, it is not inevitable that criminal law and criminal legal institutions should be deployed as the means of addressing these issues.<sup>38</sup> Put differently, that there are problems for government to solve doesn’t require the conclusion that there are tears in the social fabric that necessitate extreme forms of state violence. And, even if the state has a role to play in criminal enforcement, that doesn’t mean that criminal law should become a governing paradigm — that criminal law should become a broader framework for the management of populations and the resolution of questions about how society should be structured.<sup>39</sup>

## B. Prosecuting the Crises

Assuming that the state governs through crime, then the prosecutor becomes the central authority figure. This isn’t to downplay the critical function of police, sheriffs, and other law enforcement actors.<sup>40</sup> Rather, it is

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36. See, e.g., Deborah W. Denno, *How Experts Have Dominated the Neuroscience Narrative in Criminal Cases for Twelve Decades: A Warning for the Future*, 63 WM. & MARY L. REV. 1215, 1238 (2022) (collecting sources).

37. See HALL ET AL., *supra* note 11, at 10.

38. Cf. GILMORE, *supra* note 30, at 54 (arguing that “[c]risis is not objectively bad or good,” instead, “it signals systemic change whose outcome is determined through struggle”).

39. To use Simon’s formulation, there may well be a difference between “governing crime” and “governing through crime.” SIMON, *supra* note 8, at 5. That said, if we understand “criminal law as a system of public ordering,” that distinction may be largely illusory. Alice Ristroph, *Criminal Law As Public Ordering*, 70 U. TORONTO L.J. 64, 66 (2020).

40. Cf. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171 (2019) (arguing that prosecutorial power is more circumscribed than most commentators recognize).

to recognize that prosecutors possess a “special claim to represent the local community as a whole.”<sup>41</sup> Conventional wisdom tells us that — due in large part to almost unfettered prosecutorial discretion and the rise of plea bargaining — prosecutors are the most powerful actors in the U.S. criminal system.<sup>42</sup> And, prosecutorial charging decisions play an enormous role in incarceration rates.<sup>43</sup>

That said, DAs don’t only set priorities for what crimes to charge, what plea deals to offer, and what sentences to seek; they also shape how the public understands the criminal system. Much of criminal adjudication plays out behind closed doors — the vast majority of criminal cases are resolved via plea bargain, and public participation in criminal law is quite limited.<sup>44</sup> The DA, as the elected face of the system, therefore, retains great power to control narratives about criminal law — about what goes on behind those closed doors.<sup>45</sup> So, even if the public doesn’t have a great sense of how the criminal system operates day to day, DAs can promote certain messages — about their values and priorities or about what “criminal justice” looks like.<sup>46</sup>

And, this power is reflected not only in the increasing attention paid to prosecutorial elections but also in the public rhetoric about prosecutors and their power. As Simon argues, “the influence of the prosecutor over American politics and culture extends beyond its current distended

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41. SIMON, *supra* note 8, at 33.

42. See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 875 (2009); Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3, 3 (1940) (“The prosecutor has more control over life, liberty, and reputation than any other person in America.”); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004) (“The law-on-the-street — the law that determines who goes to prison and for how long — is chiefly written by prosecutors, not by legislators or judges.”). But see Bellin, *supra* note 40.

43. See generally JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017).

44. See, e.g., Jocelyn Simonson, *The Criminal Court Audience in A Post-Trial World*, 127 HARV. L. REV. 2173, 2175 (2014); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014).

45. In this Essay, I focus primarily on elected prosecutors. But, appointed prosecutors — from the Attorney General to U.S. Attorneys — retain similar power to use their platform to set priorities and shape messaging about criminal policy.

46. The public perception of prosecutors based on this message may differ from the reality of day-to-day prosecutorial operations. For example, David Patton, the chief Federal Defender for the Southern District of New York, criticized the public narrative of then-U.S. Attorney Preet Bharara as “the sheriff of Wall Street” as obscuring what Bharara’s office actually did most of the time — prosecute poor people of color for drug and gun offenses. See David Patton, *An Honest Assessment of Preet Bharara’s Record: Harsh Prosecutions Put More African-Americans and Hispanics Behind Bars*, N.Y. DAILY NEWS (Mar. 15, 2017, 7:04 PM), <https://www.nydailynews.com/opinion/honest-assessment-preet-bharara-record-article-1.2999367> [<https://perma.cc/R86G-K2NL>].

jurisdiction through the construction of a prosecutorial model of leadership, one promoted by popular culture as much as by real news let alone actual practice.”<sup>47</sup> Governance and prosecutorial power have become all but synonymous in many contexts.<sup>48</sup> Regulation and criminalization are frequently equated,<sup>49</sup> and media treatments frequently frame governors, presidents, and other executive office holders in prosecutorial terms.<sup>50</sup>

As the welfare state has shrunk, it’s not just that criminal punishment has come to replace it; it’s that criminal justice actors have become the state actors left to deliver social services and take on other functions that have effectively been defunded.<sup>51</sup> Criminal justice actors insulated from austerity measures have been forced (or empowered) to take on functions not traditionally associated with the criminal system.<sup>52</sup> Particularly in “urban areas,” the prosecutor has become

one of the most important officials in local government with tremendous potential to affect the lives of citizens . . . . One signal of this increasingly broad government role for the prosecutor is the growing interest among prosecutors in claiming a broad mandate to be involved in public policy under the banner of ‘community prosecution.’ A wide range of specific practices are collected under this term, ranging from a role in paying for social services that are not directly law enforcement-related to targeting particular offenders . . . using tough federal laws.<sup>53</sup>

In short, the elected DA isn’t only the face of the criminal system. The elected DA is the face of the state.

## II. A CASE STUDY IN CRISIS

What does it mean to over-prioritize and over-emphasize the role of the prosecutor? It means not only entrenching and legitimating prosecutorial

47. SIMON, *supra* note 8, at 36–37.

48. See Benjamin Levin, *Mens Rea Reform and Its Discontents*, 109 J. CRIM. L. & CRIMINOLOGY 491, 529 (2019).

49. See, e.g., Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 581 (2012); Darryl K. Brown, *Criminal Law’s Unfortunate Triumph over Administrative Law*, 7 J.L. ECON. & POL’Y 657 (2011); Benjamin Levin, *Wage Theft Criminalization*, 54 U.C. DAVIS L. REV. 1429, 1496 (2021) [hereinafter Levin, *Wage Theft Criminalization*].

50. See SIMON, *supra* note 8, at 33–74.

51. See *supra* note 30 and accompanying text.

52. See, e.g., Jessica M. Eaglin, *To “Defund” the Police*, 73 STAN. L. REV. ONLINE 120, 128 (2021); Green & Roiphe, *supra* note 2, at 747–48 (“Today’s would-be progressive prosecutors’ campaign platforms address not only considerations of criminal justice policy, but also broader considerations of social policy . . .”).

53. SIMON, *supra* note 8, at 36. Interestingly, prosecutorial elections in urban jurisdictions are more likely to be contested than ones in rural jurisdictions. See Hessick & Morse, *supra* note 2, at 1545.

discretion.<sup>54</sup> It also means strengthening the stranglehold that criminal law has on our imagination of how to respond to harm and risk.<sup>55</sup> And, it means that huge conversations about social policy are too easily sublimated into debates about criminal law enforcement. In this Part, I offer a brief case study of this troubling dynamic: the short-lived administration of public defender-turned prosecutor Chesa Boudin as DA of San Francisco.

In November 2019, Boudin was elected DA of San Francisco.<sup>56</sup> Boudin had run on an explicitly reformist platform.<sup>57</sup> But, even if he hadn't, and even if he hadn't been a public defender before taking office, Boudin wasn't your typical DA candidate. Boudin came from a long line of prominent leftwing academics, attorneys, and activists. His parents — members of the left radical group the Weather Underground — had been incarcerated since their convictions for murder in the early 1980s.<sup>58</sup> And, he had been raised by William Ayers and Bernadine Dorne, themselves infamous members of the Weather Underground.<sup>59</sup>

Given Boudin's background, then, it hardly should come as a surprise that he became a target for criticism and that his tenure in office was controversial.<sup>60</sup> Indeed, the *San Francisco Chronicle's* initial coverage of his campaign for DA focused not only on his family and his advocacy for bail reform but also on his previous "support" for "socialist President Hugo Chavez's efforts to alleviate poverty in Venezuela and . . . vocal criti[cism]

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54. See, e.g., Godsoe, *supra* note 6; Yamahiro & Garzón-Montano, *supra* note 6.

55. See I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1609 (2020).

56. See Evan Sernoffsky, *Chesa Boudin, Reformer Public Defender, Wins Election as San Francisco's New DA*, S.F. CHRON. (Nov. 9, 2019), <https://www.sfchronicle.com/bayarea/article/Chesa-Boudin-reformer-public-defender-wins-14823166.php> [<https://perma.cc/JR8H-2PQP>].

57. See, e.g., *id.*; Michelle Robertson, *Chesa Boudin Wins San Francisco D.A. Election*, SF GATE (Nov. 9, 2019), <https://www.sfgate.com/elections/article/Chesa-Boudin-wins-San-Francisco-D-A-election-14823180.php> [<https://perma.cc/UEZ5-544>]; Thomas Fuller, *Voters in San Francisco Topple the City's Progressive District Attorney, Chesa Boudin*, N.Y. TIMES (June 8, 2022), <https://www.nytimes.com/2022/06/07/us/politics/chesa-boudin-recall-san-francisco.html> [<https://perma.cc/L6R4-M7ZH>].

58. See Emma Green, *His Dad Got a Chance at Clemency. Then His Baby Was Born*, ATLANTIC (Sept. 24, 2021), <https://www.theatlantic.com/politics/archive/2021/09/chesa-boudin-san-francisco-crime/620063/> [<https://perma.cc/YL43-BF3Q>].

59. See *id.*

60. In focusing on Boudin here, I don't mean to suggest that the criticism or pushback he received was unique or that other "progressive prosecutors" were not targets of similar or more vehement criticism. Cf. I. India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795, 803 (2022) (arguing that Black women prosecutors appear to be subject to harsher criticism from across the political spectrum).

of American foreign policy.”<sup>61</sup> Therefore, it’s important to recognize that the criticism of Boudin and his ultimate ouster probably are overdetermined.

Trying to generalize or take too much from a given candidate’s fortunes would be a mistake. There is a lot to say about Boudin, the politics of San Francisco, the COVID-19 pandemic, and an array of other contextual factors that might help explain the fate of Boudin’s administration.<sup>62</sup> And, because of how San Francisco’s ranked-choice voting works, it’s not clear that Boudin’s popularity (or unpopularity) was significantly different when he first won and when he was recalled.<sup>63</sup> To be clear, then, my goal in this Part and in this Essay isn’t to critique or defend Boudin’s time in office. I actually don’t focus on his specific policies at all.<sup>64</sup> Instead, I see it as helpful to look to his short-lived tenure because it provides us with an example of how the rhetoric of “progressive prosecution” interacts with crisis narratives.

As the progressive prosecutor movement has gained traction, these media narratives have taken on a new significance. Journalists have begun to “devot[e] more attention to prosecutor election campaigns that highlight real philosophical differences between the candidates.”<sup>65</sup> In this short Essay, I can’t begin to attempt the sort of detailed discourse analysis that Hall and his coauthors provided forty-five years ago. Instead, I simply offer some examples and a taste of what it looks like when the crisis narratives and the specter of urban disorder interact with contemporary politics of prosecutorial reform. These examples aren’t meant to reflect what “the public” thought about Boudin — I think drawing such a conclusion would be a mistake, or at least would require much stronger evidence.<sup>66</sup> Rather, they are offered to illustrate the way that widespread media narratives evolve and shape discourse about prosecution and criminal policy.

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61. Evan Sernoffsky, *Chesa Boudin, Son of Imprisoned Radicals, Looks to Become SF District Attorney*, S.F. CHRON. (Jan. 15, 2019), <https://www.sfchronicle.com/crime/article/Chesa-Boudin-son-of-imprisoned-radicals-looks-13533584.php> [<https://perma.cc/YC53-VZMQ>].

62. See Pfaff, *supra* note 9.

63. See *id.*

64. There’s other valuable work being done and to be done on what makes a progressive prosecutor’s policies “progressive” and what constitutes success for a progressive prosecutor. See *supra* note 4 and accompanying text.

65. Ronald F. Wright, Jeffrey L. Yates, & Carissa Byrne Hessick, *Electoral Change and Progressive Prosecutors*, 19 OHIO ST. J. CRIM. L. 125, 125 (2021).

66. See *supra* note 37. Were that my goal, I wouldn’t incorporate coverage from national and international media sources — I would be focused exclusively on local news sources. Given that my interest is in the construction of public narratives about prosecution, crime, and crime control, though, I see this broader universe of sources as worth considering.

When Boudin launched his campaign in 2019, he “promised to reduce the city’s reliance on incarceration and end cash bail.”<sup>67</sup> In this respect, Boudin was hardly exceptional among reformist candidates, emboldened by an apparent wave of DAs unafraid of challenging conventional wisdom about prosecution.<sup>68</sup> Boudin promised to “build[] on the progress of progressive prosecutors in Philadelphia, Boston, Los Angeles, and Chicago, and expand[] the movement to the rest of California and the nation — so that we can ultimately spur systemic change that is long overdue.”<sup>69</sup> He emphasized the need for a less punitive system, the importance of providing more social services, and the urgency of creating an “anti-racist prosecutorial system.”<sup>70</sup> Boudin’s victory in November 2019 was described as a “win for the progressive prosecutor movement.”<sup>71</sup> And following the election, he declared that “[t]he people of San Francisco have sent a powerful and clear message: It’s time for radical change to how we envision justice.”<sup>72</sup>

In January 2020, Boudin took office. Two months later, the global pandemic led to lockdowns in San Francisco and nationwide.<sup>73</sup> And criticism of Boudin and his office’s policies came swiftly. By spring 2021, two campaigns to recall Boudin were underway — one led by a former Republican mayoral candidate and the other by “moderate Democrats.”<sup>74</sup> According to CBS News, “[m]omentum to recall Boudin picked up steam throughout 2021 as hate crimes against Asian Americans in San Francisco increased dramatically and victims blamed Boudin, saying he was siding

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67. Elizabeth Weill-Greenberg, *How Chesa Boudin is Pursuing his Promise to Reduce Incarceration*, APPEAL (Mar. 18, 2021), <https://theappeal.org/chesa-boudin-san-francisco-district-attorney-reduce-mass-incarceration-criticism/> [<https://perma.cc/Q4DX-Y2F2>].

68. See generally BAZELON, *supra* note 1.

69. Chesa Boudin & Tal Klement, *Progressive Prosecution from Politics to Policy to Practice*, 16 STAN. J. C. R. & C. L. 489, 495 (2021).

70. Chesa Boudin, *Prosecutors, Power, and Justice: Building an Anti-Racist Prosecutorial System*, 73 RUTGERS UNIV. L. REV. 1325 (2021).

71. 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/3SJ5-HSBT>].

72. *Id.*

73. See, e.g., Thomas Fuller & Tim Arango, *California Set the Tone on Coronavirus Shutdowns. What’s Its Next Move?*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/california-coronavirus-shutdown.html> [<https://perma.cc/2M65-HT3D>].

74. Megan Cassidy, *Battle over Crime Centers on Boudin*, S.F. CHRON. (Aug. 22, 2021), <https://www.pressreader.com/usa/san-francisco-chronicle-late-edition-sunday/20210822/281487869432483> [<https://perma.cc/KQX8-AWG7>].

with criminals.”<sup>75</sup> The Associated Press described the recall as driven in part by public reactions to a “frightening pandemic in which viral footage of brazen shoplifting and attacks against Asian American people.”<sup>76</sup> And Boudin’s critics claimed that “viral smash-and-grab robberies at major retail stores . . . were becoming common occurrences as a consequences of [his] policies.”<sup>77</sup>

By the summer of 2022, two-thirds of voters said that “they [felt] less safe than in 2019,” and 57% said they supported the recall effort.<sup>78</sup> On June 7, just a year and a half into Boudin’s term, the recall election took place, and San Francisco voters brought an end to his reign as DA.<sup>79</sup>

Again, it’s important to resist accepting a single explanation for the recall. Between high profile cases, allegations of mismanagement, personal politics and general pandemic-era dissatisfaction, there might be many contributing factors.<sup>80</sup> In looking at media coverage both before and after the recall, though, criticism tended to reflect a common concern with “lawlessness” and a perception that Boudin’s reformist policies or priorities were leading to a lawless city. And, in turn, those characterizations of lawlessness take two forms.

First, much criticism (and, indeed, much media coverage, generally) focused on the perception that crime was up. Specifically, media reports focused on a rise in “smash and grab” retail thefts,<sup>81</sup> violent crimes

75. Musadiq Bidar, *San Francisco Votes Overwhelmingly to Recall Progressive DA Chesa Boudin*, CBS NEWS (June 8, 2022), <https://www.cbsnews.com/news/chesa-boudin-san-francisco-da-recalled/> [<https://perma.cc/28Z7-YGW8>].

76. Janie Har, *San Francisco Recalls Progressive Prosecutor Chesa Boudin*, PBS NEWSHOUR (June 8, 2022), <https://www.pbs.org/newshour/politics/san-francisco-recalls-progressive-prosecutor-chesa-boudin> [<https://perma.cc/3BTv-ME3H>].

77. Bidar, *supra* note 75.

78. Francine Kiefer, *Criminal Justice Reform on Trial in San Francisco Recall Vote*, CHRISTIAN SCI. MONITOR (June 6, 2022), <https://www.csmonitor.com/USA/Politics/2022/0606/Criminal-justice-reform-on-trial-in-San-Francisco-recall-vote> [<https://perma.cc/PF3X-PNXX>].

79. Megan Cassidy, *San Francisco D.A. Chesa Boudin Was Ousted in a Historic Recall. Here’s What Happens Next*, S.F. CHRON. (June 8, 2022), <https://www.sfchronicle.com/election/article/Chesa-Boudin-ousted-as-San-Francisco-District-17226641.php> [<https://perma.cc/3MQ4-TEGP>].

80. See Pfaff, *supra* note 9; Trisha Thadani, *Recall of S.F. D.A. Chesa Boudin Likely to Head to Voters, with Many More Signatures Submitted Than Needed*, S.F. CHRON. (Oct. 23, 2021), <https://www.sfchronicle.com/sf/article/Recall-of-S-F-DA-Chesa-Boudin-likely-to-head-to-16555970.php> [<https://perma.cc/KF3W-VR92>].

81. See, e.g., James Oliphant, *Ahead of U.S. Midterms, Democrats Struggle to Find Footing on Violent Crime*, REUTERS NEWS (June 3, 2022), <https://www.reuters.com/world/us/ahead-us-midterms-democrats-struggle-find-footing-violent-crime-2022-06-03/> [<https://perma.cc/JNQ4-SUU3>]; Karen Tumulty, *California is Sending Warning Signals for Democrats*, WASH. POST (Feb. 17, 2022), <https://www.washingtonpost.com/opinions/2022/02/17/san-francisco-school-board-recall->

committed against Asian Americans,<sup>82</sup> car thefts,<sup>83</sup> and homicides.<sup>84</sup> The actual empirical claims about crime rates in San Francisco remain controversial and often reflect over-simplified analysis.<sup>85</sup> And, even to the extent that some types of crime rose during Boudin’s time in office, it’s difficult to establish a clear causal relationship between specific policy changes and increased offending. But, the specter of out-of-control crime became a major component of the local and national narrative about San Francisco.

Articles referred to San Franciscans — particularly Asian Americans — afraid to leave their homes for fear of violence.<sup>86</sup> In early 2022, “a Bay Area Council poll of registered voters, a majority said the Bay was not a safe place to live, an increase from prior years. An additional 65% said they avoid going to big-city downtowns like San Francisco’s because of crime.”<sup>87</sup> And,

democrats-warning/ [https://perma.cc/J54G-CQKT]; Thomas Elias, *Organized Theft Wave Shows Law Needs to Change*, DESERT SUN (Jan. 26, 2022), <https://www.desertsun.com/story/opinion/2022/01/24/prop-47-ripe-rewrite-wave-shoplifting-hitting-california/9199274002/> [https://perma.cc/GJA6-AWAD]; *Pay Attention to San Francisco Debate Over Crime. Is ‘Defund the Police’ What Public Wants?*, SAN DIEGO UNION-TRIB. (Dec. 23, 2021), <https://www.sandiegouniontribune.com/opinion/editorials/story/2021-12-23/opinion-san-francisco-debate-over-crime-defund-police-london-breed> [https://perma.cc/MA7C-CL66].

82. See, e.g., James Hohmann, *Boudin’s Recall Proves Democrats Have Lost the Public’s Trust on Crime*, WASH. POST (June 9, 2022), <https://www.washingtonpost.com/opinions/2022/06/08/chesa-boudin-recall-san-francisco-crime/> [https://perma.cc/L7CG-8WG9]; Ronald Li, *‘I’m Afraid to Leave My Own Home’: Poll Finds Asian Americans Feel Less Safe in S.F. Than Other Groups*, S.F. CHRON. (Sept. 14, 2022), <https://www.sfchronicle.com/sf/article/sfnext-poll-asian-community-17439551.php> [https://perma.cc/SV2E-PKWY]; Joshua Sharpe, *Brooke Jenkins Told a Chinatown Crowd the D.A.’s Office Finally Hears Them*, S.F. CHRON. (Aug. 18, 2022), <https://www.sfchronicle.com/sf/article/S-F-public-safety-officials-join-Asian-community-17378627.php> [https://perma.cc/QE5V-JRJQ].

83. See, e.g., Scott Wilson, *A Liberal DA is Rocked by Shift in S.F. Voters’ Moods*, WASH. POST (June 7, 2022), <https://www.washingtonpost.com/nation/2022/06/06/chesa-boudin-recall/> [https://perma.cc/3D77-ZTWF]; Susie Neilson, *Citywide Crime in S.F. is Looking Like it Did Pre-COVID—With One Major Exception*, S.F. CHRON. (Oct. 5, 2022), <https://www.sfchronicle.com/sf/article/san-francisco-crime-rates-17487348.php> [https://perma.cc/GN2F-V3E9].

84. See, e.g., Laura J. Nelson et al., *Could a Boudin Loss Deter Reform?*, L.A. TIMES (June 5, 2022), <https://www.latimes.com/california/story/2022-06-04/boudin-recall> [https://perma.cc/9NEB-EMPW]; Megan Cassidy, *Chesa Boudin’s Recall Is in the National Spotlight.*, S.F. CHRON. (June 5, 2022), <https://www.sfchronicle.com/politics/article/sf-voters-chesa-boudin-17218751.php> [https://perma.cc/MUN5-9EL8].

85. See, e.g., Eric Ting, *We Fact Checked the Most Common Claims About San Francisco Crime*, SFGATE (Jan. 7, 2022), <https://www.sfgate.com/crime/article/San-Francisco-crime-Chesa-Boudin-London-Breed-16751930.php> [https://perma.cc/B4VT-VWG5]; Susie Nelson, *San Francisco Crime Rates Drastically Shifted in the Pandemic. These Charts Show What’s Happening Now*, S.F. CHRON., Apr. 8, 2022, 2022 WLNR 11245685.

86. See, e.g., Sharpe, *supra* note 82; Li, *supra* note 82.

87. Neilson, *supra* note 83.



“[i]n a separate poll conducted by the same research firm, nearly 70% of likely S.F. voters said they would vote to recall . . . Boudin.”<sup>88</sup> Put simply, the coverage reflected several interrelated crime panics. And, they led to a widespread impression that the “strong state” — here led by a prosecutor with questionable enforcer *bona fides* — was failing.<sup>89</sup> To the extent that prosecutors’ primary functions are keeping their constituents safe and responding to crime, the dominant media accounts suggested that Boudin had failed.

Second, much of the coverage also reflected broader dissatisfaction with life in San Francisco and a perception of urban decay or disorder. Boudin was perceived as presiding over a city that was not only dangerous, but also one that was in general decline.<sup>90</sup> Concern about increasing (or at least increasingly visible) homelessness and drug use was a staple of media treatments of Boudin.<sup>91</sup> According to one recall supporter, “the recall conveyed a much larger sense of ambivalence in San Francisco, where residents are enamored of progressive ideals but also fixated on livability issues, such as homeless encampments and drug overdoses.”<sup>92</sup> And, as one *San Francisco Chronicle* reporter described it, “[w]hile these [quality of life]

88. *Id.*

89. Cf. Simon, *Law’s Violence*, *supra* note 11, at 654–55 (describing this pattern of media and law enforcement interplay).

90. See Dan Simon, *San Francisco Confronts Surging Crime, Drugs and Homelessness as It Tries to Bounce Back from COVID-19*, CNN (June 23, 2021), <https://www.cnn.com/2021/06/23/us/san-francisco-crime-homeless-opioid-pandemic/index.html> [<https://perma.cc/XQ7X-PZCE>].

91. See, e.g., Heather Knight, *S.F. City Attorney Seeks to Clean up Tenderloin Drug Dealing Using a New Approach. Will it Work?*, S.F. CHRON. (Sept. 24, 2020), <https://www.sfchronicle.com/bayarea/heatherknight/article/S-F-city-attorney-seeks-to-clean-up-Tenderloin-15592986.php> [<https://perma.cc/H2WS-3HEH>]; Rachel Swan & Mallory Moench, *As New D.A., Jenkins Vows to Be Tougher Than Boudin*, S.F. CHRON. (July 10, 2022), <https://www.pressreader.com/usa/san-francisco-chronicle-late-edition-sunday/20220710/284258123967097> [<https://perma.cc/LKA5-JXTX>]; Editorial, *The Criminal Streets of San Francisco*, WALL ST. J. (May 31, 2022), <https://www.wsj.com/articles/the-criminal-streets-of-san-francisco-progressive-prosecutor-chesa-boudin-crime-cities-11653855019> [<https://perma.cc/QN9S-R8QG>]; *San Francisco Prosecutor Ousted for Being Soft on Crime*, DAILY TEL. (June 9, 2022), <https://www.telegraph.co.uk/world-news/2022/06/08/san-francisco-prosecutor-booted-voters-liberal-west-coast-city/> [<https://perma.cc/2MNA-M7WS>] (“District Attorney Chesa Boudin lost a recall vote sparked by anger over rising crime and homelessness that blight what was once one of the most livable cities in the United States.”); Dan Simon, *San Francisco Confronts Surging Crime, Drugs and Homelessness as It Tries to Bounce Back from COVID-19*, CNN (June 23, 2021), <https://www.cnn.com/2021/06/23/us/san-francisco-crime-homeless-opioid-pandemic/index.html> [<https://perma.cc/LZB5-777T>].

92. Rachel Swan, *What Do Residents in San Francisco’s Most Pro-Recall Neighborhoods Want in a New D.A.? This is What They Said*, S.F. CHRON. (June 12, 2022), <https://www.sfchronicle.com/bayarea/article/What-do-residents-in-San-Francisco-s-most-17234349.php> [<https://perma.cc/7DWB-DGR6>].

problems might not fall directly within the purview of the city's top prosecutor, the intersection seemed strong enough that people blamed Boudin for San Francisco's street conditions. A general sense of unease and disorder and an appetite for more law enforcement appeared to fuel the recall.<sup>93</sup> As one *New York Times* article following the vote put it, the recall "was seen by many as an accumulation of frustration by city residents over squalid street conditions, including the illicit drug sales, homeless encampments and untreated mental illness."<sup>94</sup>

Boudin, then, was framed as a failure in traditional, prosecutorial terms — he was not preventing crime and holding law-breakers accountable. But, importantly, he also was understood as a failure in governance terms — he was not solving the problems of urban poverty and addressing the day-to-day realities of a city marked by dramatic disparities in wealth and quality of life. In the next Part, I step back to suggest that these two lines of critique reflect two limitations of both "progressive prosecution" and the larger cultural tendency to rely on prosecutors to govern.

### III. (THE PROBLEM OF) PROSECUTION AS GOVERNANCE

The media treatment of Boudin as responsible for a range of problems — from murder spikes to homelessness — should provide a sobering reminder of the limits of "progressive prosecution." In this Part, I argue that the case study reflects two different limits to a model of governing through prosecution. First, more straightforwardly, the potential for backlash to reformist prosecution is great. Crisis narratives and fear of crime are socially salient, and so there's reason to think that — even with increasing support for criminal justice reform — any perception of crime increasing can easily stymie efforts to repurpose DAs' offices into sites of decarceration. Second, and relatedly, it's important that Boudin's opposition painted him as responsible for general urban decay and disorder. That is, the conventional narrative of lenience leading to violence certainly was on display. But, there also was another dynamic at play — a narrative that the DA was responsible for making the city livable (in broad terms) and for ensuring a certain quality of life. As I will argue, that narrative — perhaps even more so than the traditional tough-on-crime objections — reflects the limits of reformist prosecution. It highlights the way that a continued focus on prosecutors leads to an elision of government and the DA's office. Even if not explicitly punitive, that narrative further entrenches a model of governing through crime and criminal legal institutions.

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93. *Id.*

94. See Fuller, *supra* note 57.

### A. Tough-on-Crime Backlash

The sorts of media narratives that fueled Boudin's ouster are dangerous. The clear descendants of the mugging stories that Hall critiques, they reinforce the idea that danger is ubiquitous and signals deep tears in the social fabric. That danger is understood as a result of "soft on crime" politics, and the only way to address it is via harsh, punitive policies.<sup>95</sup> Crisis demands the "strong state."<sup>96</sup> From the Willie Horton attack ads in the 1988 presidential election,<sup>97</sup> to public characterizations of Black boys and young men as "superpredators,"<sup>98</sup> this cultural imagination of criminality and threat has been a central component of mass incarceration. Reflecting a sort of "moral panic," "the media, politicians, and the public reinforce each other in an escalating pattern of alarmed reaction to a perceived social threat."<sup>99</sup> The construction of ongoing and continuous crises, then, has helped undergird commonplace calls for prosecutors to prosecute more, to seek longer sentences, and to advance a particular punitive vision of criminal justice.

These narratives and this conception of the prosecutorial function pose significant obstacles for reformist prosecutors. They should cause serious concerns for anyone worried about backlash. We have no clear empirical basis for concluding that any of Boudin's policies (let alone his campaign promises) can explain the increases in crime. But, the clear link drawn in the media between Boudin's reformist commitments and the number of crimes against Asian Americans, the number of homicides, or the number of property crimes demonstrates that backlash doesn't require a sturdy empirical foundation.

Granted, we seem to be witnessing a moment of relative interest in criminal justice reform and "progressive" prosecutors, but that interest or enthusiasm is tenuous. In a culture with deeply ingrained punitive impulses and fear of criminality, accusations of being soft-on-crime still resonate

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95. See HALL ET AL., *supra* note 11, at 9. *But cf. id.* at xv ("Resolutions to the crisis can take different forms; there is no preordained result.").

96. See *id.* at 304–05; see also Simon, *Law's Violence*, *supra* note 11, at 676 ("Rather than debating which flavor of the Strong State we prefer, policing or carceral, domestic or immigration oriented, we need to challenge the heart of its claim to legitimacy to protect communities from violence . . .").

97. See IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 105–08, 180–81 (2014) (describing the Horton attack ads as "dog whistle" racism that played on a fear of Black criminality).

98. See WILLIAM J. BENNETT ET AL., *BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS* 27 (1996).

99. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 *TEX. L. REV.* 799, 807 (2003) (citing ERICH GOODE & NACHMAN BEN-YEHUDA, *MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE* (1994)).

broadly. We shouldn't expect the appetite for punishment or criminalization to disappear overnight. Support for criminal justice reform, decarceration, and de-policing could turn on a dime (or on a bad case or set of crime statistics). And, these punitive instincts transcend party lines or ideological commitments. Just as conservative, tough-on-crime commentators decry prosecutors for lenience in many contexts, liberal, progressive, and left commentators criticize prosecutors for failing to be sufficiently punitive when addressing police violence, financial crimes, race- and gender-based violence, and so forth.<sup>100</sup> That is, the risk of backlash is always lurking just around the corner. And, regardless of its specific ideological content, backlash frequently reflects a belief that failure to prosecute the right defendants or seek the right sorts of penalties is contributing to the exacerbation of a given crisis.

In the past, I have written skeptically about the promise of “progressive” prosecutors,<sup>101</sup> but my skepticism doesn't prevent me from appreciating that prosecutors who advance a decarceral agenda might bring some real, tangible benefits.<sup>102</sup> More empirical work on the effects of “progressive” prosecution is needed.<sup>103</sup> We do have some evidence of positive developments, though. During Larry Krasner's first two years in office as the Philadelphia DA, the jail population had decreased by about 30% and the average sentences had shrunk by about 46%.<sup>104</sup> During Kim Foxx's first

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100. See, e.g., AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION* 6 (2020); Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 *BUFF. L. REV.* 199, 212 (2020); Levin, *Wage Theft Criminalization*, *supra* note 49, at 1497; Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 *WASH. U. L. REV.* 997, 1010 (2021).

101. See Levin, *Imagining the Progressive Prosecutor*, *supra* note 3, at 1442–43.

102. And, all “progressive prosecutors” might not bring such an agenda. See *id.* at 1418, 1450.

103. Recent years have seen a welcome increase in such studies. See, e.g., Hessick & Morse, *supra* note 2 at 1561; Carissa Byrne Hessick & Nathan Pinnell, *Special Interests in Prosecutor Elections*, 19 *OHIO ST. J. CRIM. L.* 39, 41 (2021).

One of my concerns when it comes to the progressive prosecutor movement is that campaign promises, radical rhetoric, and even media coverage might not reflect the actual realities on the ground once a DA takes office. See Neal & Matthias, *supra* note 5, at 550 (critiquing bail practices in Philadelphia); *cf.* Sklansky, *supra* note 5, at 28 (arguing that a major goal of the progressive prosecutor movement should be clearly articulating goals and promoting transparency so that voters can assess accurately whether their DA is achieving those goals). It's not entirely clear how to account for the difference between rhetoric and reality — perhaps the failure to live up to promises might reflect nothing more than campaign bluster in some cases, while in other cases it might reflect the reality of the unexpected obstacles to reform that a prosecutor might face once in office. See Davis, *supra* note 1, at 15–20.

104. Parisa Dehghani-Tafti et al., *Reform Prosecutors Are Committed to Making Society Fairer — and Safer*, *WASH. POST* (Aug. 16, 2019),

three years in office as the Cook County (Chicago) State's Attorney, the prison population dropped 19%.<sup>105</sup> And, during Wesley Bell's first six months in office as Prosecuting Attorney for St. Louis County, the jail population shrunk by 20%.<sup>106</sup> Whatever one's feelings about the costs and benefits of "progressive" prosecution, crisis narratives like the ones that captured media and voter attentions in San Francisco risk reversing these gains altogether.

### B. Entrenching Criminal Institutions

The second narrative that I see reflected in the criticism of Boudin has some similarities to the first. But, I understand this one as less explicitly focused on crime — or at least on sensational crime. Instead, this narrative reflects a preoccupation with urban decay and disorder. According to Boudin's critics, San Francisco was falling apart — homelessness, people experiencing mental health issues, and public drug use seemed to be increasing.<sup>107</sup> Certainly, violence was often a piece of these accounts and complaints about visible poverty were accompanied by concerns about burglaries and vehicle break-ins. Yet, the problem was something more than a classic broken-windows argument about small crimes leading to big ones.<sup>108</sup> The critiques presented an image of a city in decline — there was a disconnect between San Francisco as a desirable, incredibly expensive housing market and the site of widespread homelessness. That decline was traced to Boudin and the failures of the DA's office. Indeed, some

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[https://www.washingtonpost.com/opinions/reform-prosecutors-are-committed-to-making-society-fairer—and-safer/2019/08/16/eba231ce-bf85-11e9-a5c6-1e74f7ec4a93\\_story.html](https://www.washingtonpost.com/opinions/reform-prosecutors-are-committed-to-making-society-fairer—and-safer/2019/08/16/eba231ce-bf85-11e9-a5c6-1e74f7ec4a93_story.html) [https://perma.cc/LCX6-4BTK].

105. Pickerell, *supra* note 4, at 317; Nancy Loo, *Incarceration Rates Drop 19% Under Kim Foxx, Report Says*, WGNTV (July 30, 2019, 12:49 PM), <https://wgntv.com/2019/07/30/incarceration-rates-drop-19-under-kim-foxx-report-says/> [https://perma.cc/9MR2-9CUP].

106. Deghani-Tafti et al., *supra* note 104.

107. See Adam Johnson, *Four Toxic Tropes Surrounding Homelessness*, S.F. CHRON. (May 29, 2022), <https://www.sfchronicle.com/opinion/openforum/article/homelessness-California-17203211.php> [https://perma.cc/5R9L-YRZU] ("Electeds like San Francisco District Attorney Chesa Boudin get demagogued for 'not cleaning up the streets.' The media has the habit of catering to public unrest over homelessness by targeting those in charge — namely district attorneys and local police chiefs — for not doing enough to 'deal with' the homelessness problem.").

108. On broken-windows policing, see generally Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 342 (1998); James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [https://perma.cc/2M65-MX2C].

commentary linked the recall to other frustrations with the city government.<sup>109</sup> The city was falling apart, and the responsibility lay — at least in part — with Boudin.<sup>110</sup>

Certainly, these critiques often implicitly or explicitly identified under-prosecution, under-policing, or under-punishment as the problem. And, the answer to urban social decay often was framed as a return to traditional, law-and-order politics. Yet, it's not clear that was always the case or that many critics even had a clear plan for how to deal with homelessness, mental illness, and the problems of conspicuous poverty. Instead, they saw the DA as the agent of the state tasked with solving these problems. Boudin should have had the answer to these difficult questions, they argued, and he didn't.

Progressive reformers are often enthusiastic about replacing criminal law with social services or re-purposing police and prosecutors as civil servants rather than punishers.<sup>111</sup> The reactions in San Francisco, though, highlight a central issue with this approach: why are prosecutors and criminal justice actors the right people to be resolving these crises? Certainly, some of the stated concerns might have been overblown, but to the extent they weren't, they speak to broader issues of housing, health care, and economic inequality. As towns and cities across the nation grappled with the devastating consequences of the COVID-19 pandemic, these issues were exacerbated, resulting in much press suggesting that the country and its cities were in crisis.<sup>112</sup> And, reading the media coverage of Boudin leads to the impression that many voters believed that he had failed to manage those crises.<sup>113</sup>

Asking whether a prosecutor is doing a good job handling a given crisis, though, can all too easily distract us from the question of *why* it should be

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109. Sam Levin, *San Francisco Recalls DA Chesa Boudin in Blow to Criminal Justice Reform*, GUARDIAN (June 8, 2022, 1:48 PM), <https://www.theguardian.com/us-news/2022/jun/07/san-francisco-vote-chesa-boudin-recall> [<https://perma.cc/97TL-TCF6>] (“Boudin’s ousting came on a day of high-stakes primary races up and down the state, with the rising cost of living, policing and the state’s growing homelessness crisis high on voters’ minds.”).

110. See Swan, *supra* note 92; Johnson, *supra* note 107.

111. See Levin, *Criminal Law Exceptionalism*, *supra* note 16, at 1409–14 (describing this position).

112. See, e.g., Emily Davies & Michael Brice-Saddler, *D.C.’s Lost Year: How the Pandemic Upended Lives and Businesses Across a Region*, WASH. POST (Mar. 16, 2021), <https://www.washingtonpost.com/dc-md-va/2021/03/16/dc-covid-one-year-anniversary/> [<https://perma.cc/64K9-4CZK>]; Deborah Netburn & Soumya Karlamangla, *L.A. is Primed for Disaster, but COVID-19 Took it to Another Level*, L.A. TIMES (Mar. 11, 2021, 5:00 AM), <https://www.latimes.com/science/story/2021-03-11/la-covid-19-life-brings-isolation-anxiety-trauma> [<https://perma.cc/DV8H-JMEB>].

113. How realistic that perception is, and how representative these voters were remain, of course, open questions. See Pfaff, *supra* note 9 (critiquing media characterizations of public opinion in San Francisco).

the prosecutor's job to solve that particular problem. Why, exactly, do we think that a DA or line prosecutor is particularly well-suited to address broad structural issues of social policy? Indeed, one of the fundamental limitations of criminal law is its transactional model — police can arrest individuals, and prosecutors can prosecute them; problems are addressed one at a time on a retail, rather than wholesale basis. The “solutions” at the prosecutor's disposal are forms of punishment or state supervision. Or, perhaps the decision not to prosecute.<sup>114</sup> Prosecutors, though, don't have the tools or institutional capacity to provide housing or healthcare — unless, of course, incarceration counts. So, why should we expect a DAs office to respond to widespread issues that appear to require sweeping political solutions? And, honestly, why would we want a DA's office to do this?

Indeed, one of my concerns with “progressive prosecution” as a model for criminal justice reform is how much it relies on traditional criminal justice institutions. In progressive prosecution's more radical (or at least progressive) forms, I understand it as reflecting a change in prosecutorial philosophy, such that a DA would treat incarceration, punishment, and perhaps even prosecution as last resorts to be used sparingly — if at all. I would welcome that change in philosophy, and I would see it as a marked improvement over the status quo. But, that change wouldn't necessarily challenge one of my biggest concerns about U.S. criminal policy: that criminal legal institutions are understood as the place to solve social problems. Instead, it accepts that DAs' offices are the proper sites for enacting sweeping social policy. If anything, this change might lead to an even more expansive understanding of the DA's role.<sup>115</sup> In fact, Boudin described his decision to leave public defense for prosecution because of a “frustration” with his “limited abilities to make structural change” and a “realiz[ation] that systemic change comes from the institutions that prescribe and implement public policy.”<sup>116</sup>

Even the most reformist vision essentially legitimates some version of governing through crime — albeit a mode of governing through crime that

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114. See generally Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization*, 19 OHIO ST. J. CRIM. L. 391 (2022).

115. I see this concern as similar to a critique of drug courts and diversion — they continue to entrench power in criminal legal institutions, rather than shifting issues of public health to alternate realms. See, e.g., Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1628 (2021); Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 597 (2016) (“[T]he drug court paradigm encourages treatment-oriented criminal justice interventions. Though facially benign, such reforms expand the scope of state control over the lives of those entangled in the justice system.”).

116. Boudin & Klement, *supra* note 69, at 490.

may be more humane than the mode that has predominated for decades.<sup>117</sup> Rather than an individual committed to punishment maximization, the prosecutor would embrace her role as an agent of “penal welfare.”<sup>118</sup> And, accepting this vision of progressive prosecutor as policymaker would suggest a very different project from scaling back criminal legal institutions. Indeed, accomplishing the sorts of structural changes that the ideal socially conscious, de-carceral prosecutor would support actually would require *more* resources going to DAs’ offices. A prosecutor who understands her project as providing social services would need to build and finance a new and expanded infrastructure and would need to hire and train staff capable of advancing this vision. In other words, the resources for social change would remain invested in criminal legal institutions, and the prosecutor would remain the most powerful actor in the system — vested with expansive power to set the agenda for governance and the state’s response to social problems and community needs.<sup>119</sup>

I don’t mean to suggest that a departure from the prosecutorial status quo isn’t welcome — it is. Reflexive preferences for punishment and win-at-all-costs attitudes certainly have contributed to the injustices of the contemporary criminal system. And, there’s much to be said for DAs and DA candidates who are pushing back on those prevailing logics of mass incarceration. But, I remain worried that a prioritization or celebration of heroic, reformist prosecutors actually doesn’t get us far enough away from the conventional prioritization and celebration of heroic, crusading prosecutors.<sup>120</sup> Prosecutorial primacy, like criminal law primacy, constrains our menu of policy options and continues to constrain our imagination of how to govern and how to respond to pressing social problems.<sup>121</sup> Shifting the philosophy of prosecution or the identity of prosecutors doesn’t address

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117. See, e.g., Aya Gruber et al., *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1333 (2016); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1591 (2012).

118. See GARLAND, *supra* note 30, at 27 (describing the theory of penal welfare).

119. Such a project would involve a (perhaps inevitable) mutually dependent relationship between the welfare state and the penal state. See Green & Roiphe, *supra* note 2, at 761–62; Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law’s Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 802 (2005).

120. See Foran et al., *supra* note 6, at 519 (“Discussions of ‘good,’ ‘bad,’ ‘progressive,’ or ‘regressive’ prosecutors keep the focus on individuals and are a distraction that impedes the need for structural and systemic change.”).

121. Cf. LISA L. MILLER, *THE MYTH OF MOB RULE: VIOLENT CRIME & DEMOCRATIC POLITICS* 7 (2016) (arguing that voters don’t prefer punitive policies in the abstract; rather, they choose punishment if other desirable alternatives aren’t available); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* 10 (2017) (arguing that support for criminal institutions has often been accompanied by — or understood as a part of — public demands for more investment in social institutions).



broader problems: the continued cultural resonance of crisis narratives and continued reliance on governing through crime.

### CONCLUSION

Ultimately, I hope that a call for a de-prioritization of prosecutors might appeal to readers of different ideological or political stripes. Certainly, an argument against governing through crime should appeal to more radical critics who see criminal law and punishment as inherently suspect or in need of dramatic reduction. It is, after all, a call to take resources away from prosecutors and criminal legal institutions.<sup>122</sup> At the same time, I see the argument as consonant with the positions advanced by many reformers and critical commentators who believe that criminal law plays an important and vital function in society.<sup>123</sup> That is, shrinking criminal law to its core necessitates getting criminal law and prosecutors out of the business of governing *everything*.<sup>124</sup>

To be clear, it's very different to believe that there shouldn't be prosecutors at all than to believe that prosecutors should have limited powers to pursue a small universe of cases. Even among commentators who share the second view, there might be great disagreement as to what the proper scope of criminal law (and prosecutorial attention) should be and what punishment should look like. Surfacing and grappling with those disagreements are critical to addressing the injustices of the modern criminal system.<sup>125</sup> And, by extension, reckoning with those disagreements will be essential to figuring out what the future of prosecution should look like. As a first step, though, I suggest that the path forward for prosecutors — no matter how well-meaning — should involve aspiring to do less, not more.

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122. See Foran et al., *supra* note 6, at 519; Benjamin Levin, *Victims' Rights Revisited*, 13 CAL. L. REV. ONLINE 30, 44 (2022); Benjamin Levin, *Decarceration and Default Mental States*, 53 ARIZ. ST. L.J. 747, 766 (2021).

123. See, e.g., Douglas Husak, *The Price of Criminal Law Skepticism: Ten Functions of the Criminal Law*, 23 NEW CRIM. L. REV. 27 (2020).

124. There's much more to be said here about the broader pathology of expecting criminal legal institutions to do too much or to be all things to all people. Certainly, society has looked to criminal law for many purposes, and theorists have identified many different functions that criminal law might serve. See *generally id.* But, it's not at all clear to me why we would want the same actors and institutions to be responsible for seeking punishment in the name of the community (if that's how you understand criminal law) and also providing drug rehabilitation or dealing with homelessness. Indeed, I would think that an institution designed to do the former would be ill-equipped to do the latter, and vice versa. Cf. Anna Roberts, *LEAD Us Not into Temptation: A Response to Barbara Fedders's "Opioid Policing"*, 94 IND. L.J. SUPPLEMENT 91, 103 (2018–19) (examining similar tensions in the context of "law enforcement assisted diversion").

125. See Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259, 318 (2018).