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Progressive Prosecution in a Pandemic

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CRIMINAL LAW

PROGRESSIVE PROSECUTION IN A PANDEMIC

CHAD FLANDERS & STEPHEN GALOOB*

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INTRODUCTION

The authors presented the articles in this volume in February 2020 at a conference that was open to students, lawyers, and the general public. As we write this Introduction several months later, we are keenly aware that such a conference would not have been possible under our changed circumstances.¹ An even greater change has occurred within the legal system. Most trials have been delayed, and only the most urgent hearings happen in person.² Courts are wrestling with when, and how, they will reopen. Given this new legal

* Thanks to Lyz Riley for exceptional editing help. An earlier version of the ideas in this introduction was presented at an ABA Criminal Justice workshop by Chad Flanders, and he is grateful for the comments of Kate Weisburd, Andrew Ferguson, and Avlana Eisenberg on that occasion.

¹ In April, Governor J.B. Pritzker of Illinois extended Illinois’ “stay-at-home” order through May 30. *Read the Full Modified Stay-at-Home Order from Gov. Pritzker Now in Question*, NBC CHICAGO (Updated Apr. 30, 2020, 12:01 PM), <https://www.nbcchicago.com/news/local/read-the-full-modified-stay-at-home-order-from-gov-pritzker-now-in-question/2262609/> [<https://perma.cc/MEK6-3DU7>].

² See, e.g., Alanna Durkin Richer & Michael Tarm, *Justice Delayed: COVID-19 Crisis Upends Courts System Across US*, CHATTANOOGA TIMES FREE PRESS (Apr. 9, 2020), <https://www.timesfreepress.com/news/breakingnews/story/2020/apr/09/justice-delayed-covid-19-crisis/520208/> [<https://perma.cc/LF3B-95UG>].

reality, the articles in this volume might seem, at first blush, not only as if they were written *in* a prior time, but also as if they were written *for* a prior time.

Yet the urgency of the questions addressed in this volume has been, if anything, heightened by the COVID-19 pandemic. We have seen striking changes in the attitudes of state officials to incarceration in a very short time. Since the beginning of the pandemic, many more people have been released, rather than detained, before trial.³ Low-level offenders are being sentenced to home confinement.⁴ More police are giving warnings for low-level offenses rather than making arrests,⁵ and prosecutors have established policies against prosecuting those arrested for low-level offenses.⁶ As a result, prison and jail populations are declining, although it is too soon to tell how dramatic or permanent that decline will be.

These moves are driven by the fear—and, in many cases, the reality—of COVID-19 outbreaks in jails and prisons.⁷ Correctional institutions are now virus hot spots,⁸ and states and localities do not want to be responsible for the human suffering or for the costs of caring for a rash of new patients. At the same time, these reforms are in line with what so-called progressive

³ See *Responses to the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE (Updated Sept. 11, 2020) <https://www.prisonpolicy.org/virus/virusresponse.html> [<https://perma.cc/G62T-FTE8>].

⁴ See Jacqueline Policastro, Allison Maass & Tyler Smith, *More Inmates Released to House Arrest Because of COVID-19, but Some Officers Have Concerns*, WABI (May 9, 2020, 7:22 AM), <https://www.wabi.tv/content/news/more-inmates-released-to-house-arrest-because-of-covid-19-but-some-officers-have-concerns-570334621.html> [<https://perma.cc/9JPM-QP8S>].

⁵ *Police Responses to COVID-19*, BRENNAN CTR. FOR JUSTICE (updated July 8, 2020), <https://www.brennancenter.org/our-work/research-reports/police-responses-covid-19> [<https://perma.cc/UZM8-8E7U>].

⁶ CHRIS W. SURPRENANT, COVID-19 AND PRETRIAL DETENTION 2 (Mar. 27, 2020), <https://www.mercatus.org/publications/covid-19-policy-brief-series/covid-19-and-pretrial-detention> [<https://perma.cc/66KS-5DJX>].

⁷ See *UCLA Law Covid-19 Behind Bars Data Project*, UCLA LAW, <https://law.ucla.edu/centers/criminal-justice/criminal-justice-program/related-programs/covid-19-behind-bars-data-project/> [<https://perma.cc/6EXT-UJPZ>]; see also Alice Speri, *Mass Incarceration Poses a Uniquely American Risk in the Coronavirus Pandemic*, INTERCEPT (May 6, 2020, 10:01 AM), <https://theintercept.com/2020/05/06/coronavirus-prison-jail-mass-incarceration/> [<https://perma.cc/277W-SYLY>].

⁸ See Anna Flagg & Joseph Neff, *Why Jails Are So Important in the Fight Against Coronavirus*, N.Y. TIMES (updated May 20, 2020), <https://www.nytimes.com/2020/03/31/upshot/coronavirus-jails-prisons.html> [<https://perma.cc/55S8-JAN4>] (“Both in large jails located in virus hot spots like New York and Seattle and in smaller jails across the country, the churn of people moving in and out threatens to accelerate the spread of the disease, endangering the incarcerated, the staff and the larger community.”). Additionally, there is probably serious undercounting of the number of prisoners who have contracted the virus. Speri, *supra* note 7.

prosecutors have proposed and fought to implement during the past several years.⁹ In March 2020, many progressive prosecutors joined the chorus of voices calling on the criminal justice system to protect the well-being of those “behind prison walls.”¹⁰

Of course, the vision of a smaller and more humane criminal justice system that motivates progressive prosecutors is not shared by all, even during the pandemic. Still, significant reforms can be motivated by crisis.¹¹ One might even argue that the progressive prosecution movement teed up these reforms by changing the terms of the conversation, making mass release not only thinkable, but also practically feasible. Progressive prosecutors were showing how release could be done before it absolutely *needed* to be done.

The spread of COVID-19 has slowed many other promising reforms, however, including some pushed by progressive prosecutors. For example, treatment courts are more difficult to run when there is little or no chance for in-person hearings or meetings.¹² Some prosecutors in overwhelmingly Democratic jurisdictions, such as King County in Washington, have opposed release efforts.¹³ Additionally, it is not obvious whether, or how long, some

⁹ See *infra* Part I.

¹⁰ *Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of Those in Custody*, FAIR AND JUST PROSECUTION 1 (Updated Mar. 25, 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf> [<https://perma.cc/VRR5-HYT5>] [hereinafter *FJP Joint Statement*]. These prosecutors were explicit that the proposed reforms were not just good ideas in the middle of a crisis, but good ideas, period. See *id.* at 4 (“Even after the urgent threat of the coronavirus subsides, these sensible and smart policies should remain.”); see also Nora V. Demleitner, *State Prosecutors at the Center of Mass Imprisonment and Criminal Justice Reform*, 32 FED. SENT’G REP. 187, 190 (2020) (“Generally, highly cooperative jurisdictions in which prosecutors have spearheaded release efforts seem to have made more progress in bringing jail populations down quickly in response to COVID-19.”).

¹¹ See Benjamin Levin, *Criminal Law in Crisis*, COLO. L. REV. F. (forthcoming 2020) (manuscript at 2) (on file with authors) (“This exceptional situation and crisis mentality offer an important opportunity to appreciate the hardships experienced by people affected by the criminal system and potentially to save lives in the process.”).

¹² Robert V. Wolf, *In Practice: Drug Courts in the Time of COVID-19*, CTR. FOR COURT INNOVATION (Mar. 2020), <https://www.courtinnovation.org/publications/drug-courts-covid19> [<https://perma.cc/6ED4-QJ36>] (“Treatment courts rely on face-to-face interactions with participants. They also typically require frequent in-person drug testing. And those who receive medication, such as methadone, typically have to show up on a daily basis to receive it.”).

¹³ See, e.g., Radley Balko, Opinion, *Stopping COVID-19 Behind Bars was an Achievable Moral Imperative. We Failed.*, WASH. POST (May 1, 2020, 4:18 PM), <https://www.washingtonpost.com/opinions/2020/05/01/stopping-covid-19-behind-bars-was-an-achievable-moral-imperative-we-failed/> [<https://perma.cc/9XQ8-YYD8>] (“In King County, Wash., an

of the recent changes to the criminal justice system will last. It may be only a matter of time before the ranks of prisons and jails swell back to the status quo ante. Before the pandemic, there were already signs of backlash against the progressive prosecution movement.¹⁴ It is unclear whether this backlash will grow in the coming months and years.

This Introduction seeks to place the articles in this volume into the context of a post-pandemic world. COVID-19 has accelerated the timetable for many debates that might otherwise have percolated or simply stalled. The viability of progressive prosecution is one such debate. Part I provides a broad overview of progressive prosecution, focusing mainly on the promises made by progressive prosecutors on the way to election and the early returns on those promises. Part II sketches how, in the early days of the COVID-19 pandemic, some state and local officials worked to promote specific goals associated with progressive prosecution, including releasing low-level offenders from jails and reducing arrests. We also consider the extent to which these moves, driven mostly by short-term expediency, are likely to endure after the crisis has passed or receded. We conclude by articulating some of the challenges progressive prosecutors will likely face in the future.

I. WHAT IS “PROGRESSIVE PROSECUTION”?

The story of the rise of progressive prosecution has been told in many places and in many ways, and it is retold by several of the articles in this volume.¹⁵ The key idea behind progressive prosecution, however, bears some articulation, as it will frame much of what will be discussed in these pages. It is somewhat hoary, but not less true for being so, to say that prosecutors should see that “justice be done.”¹⁶ The notion of justice implicit in this

early epicenter of the outbreak, public defenders filed motions to release low-level offenders, the sick and elderly, and those nearing the ends of their sentences. One attorney told me that while she and her colleagues attended release hearings in person, prosecutors voiced their opposition over the phone to avoid exposure.”).

¹⁴ See TCR Staff, *Prosecutors on the Firing Line: Backlash Against ‘Progressives’ Grows*, CRIME REP. (June 24, 2019), <https://thecrimereport.org/2019/06/24/prosecutors-on-the-firing-line-backlash-against-progressives-grows/> [<https://perma.cc/C2FV-KMR3>] (“So-called ‘progressive’ prosecutors around the country are coming under renewed attack from critics who say their policies are encouraging crime.”); see also *infra* notes 85–87 and accompanying text.

¹⁵ See Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707 (2020).

¹⁶ See *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be

dictum implicates the community as a whole—it is a justice for victims of crime as well as for those accused of crimes. Prosecutors win when justice prevails.¹⁷ Conversely, prosecutors do not win when someone is falsely accused, wrongly convicted, or unjustly sentenced.

Somewhere along the line, the story continues, the notion of being on the side of justice faded as an animating ideal of prosecution. “Good” prosecution became defined in terms of success rates, and success was defined in terms of convictions and length of sentences.¹⁸ Pursuing justice became more about winning at trial or (more often) in plea bargaining. Elected prosecutors campaigned on their experience processing cases rather than their commitment to treat everyone fairly or promote alternatives to incarceration.¹⁹ Rather than being informed by the needs of the community and the treatment of the accused, justice became “harsh justice.”²⁰ It was against this vision of prosecution that Professor Abbe Smith memorably argued that being a good prosecutor was incompatible with being a good person.²¹ Maybe prosecutors had not by themselves created mass

done.”); A.B.A., CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION AND DEFENSE FUNCTIONS Standard 3-1.2(b) (2017) (“The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.”).

¹⁷ See Bruce A. Green, *Why Should Prosecutors “Seek Justice”?*, 26 FORDHAM URB. L.J. 607, 642 (1999) (“[P]rosecutors must not only battle lawbreakers, in furtherance of the government’s objective of convicting the lawless. Additionally, prosecutors must resist various forces that would undermine the government’s other aims.”).

¹⁸ See, e.g., David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. CRIMINOLOGY 451, 458 (2018) (citation omitted) (“American prosecutors are often faulted for excessive zeal in pursuing convictions and harsh sentences and for their frequently strident opposition to criminal justice reforms that could lower sentences, curtail prosecutors’ discretion, or weaken their bargaining position when negotiating pleas and cooperation agreements.”).

¹⁹ See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 591 (2009) (summarizing results of empirical study on prosecutor elections to find that “candidates tend to focus on individual qualifications rather than the performance of the entire office. When the campaign rhetoric does turn to office performance, the claims relate to quantity of cases processed rather than the quality of results”).

²⁰ William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 781 (2006) (emphasis omitted) (“The constitutional proceduralism of the 1960s and after helped to create the harsh justice of the 1970s and after.”).

²¹ Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 396 (2001) (“My answer to the question, ‘Can You Be a Good Person and a Good Prosecutor?’ is now probably evident. But, let me say it plainly. . . . My answer is both harsh and tempered: I hope so, but I think not.”).

incarceration—it took a village²²—but they were certainly key drivers of the phenomenon.²³ Mass incarceration could not exist without mass prosecution.

Enter the progressive prosecutors.²⁴ Progressive prosecutors focused on the power and discretion of prosecutors, which could be wielded either for harsh justice or for mercy and leniency.²⁵ On the logic of the progressive prosecution movement, lenient prosecutors could make cases go away faster than aggressive defense attorneys.²⁶ After all, it is far easier to dismiss a case than to fight a rear-guard battle with suppression motions and objections, only to settle on a plea deal. The prosecutor could do more than simply play defense on an uneven playing field. She could resolve cases with the stroke of a pen or even decide not to charge in the first place.

To be sure, the ideal of progressive prosecution still involves *prosecuting*. Yet, here, too, progressive prosecutors have articulated different priorities. They devote resources to resolving violent crimes rather than low-level drug, property, and “quality of life” offenses.²⁷ Their office policies are driven by data, not by perception. The defaults are no longer high bail requests, long sentences, and charging the most serious offenses with the hopes of getting a good plea deal. Perhaps not all defendants should go to prison, even for a short time. For those sentenced to incarceration, shorter

²² Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 181 (2019).

²³ See JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 133 (2017) (describing prosecutors as “the most powerful actors in the criminal justice system” and concluding that prosecutors “have used this power to drive up prison populations even as crime has declined over the past twenty or so years”); *but see* Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018) (contending that the primary empirical bases of Pfaff’s conclusion that prosecutorial decision making drives mass incarceration are either disputed by other empiricists or are “artifact[s] of changes in . . . court reporting practices”).

²⁴ For a good overview of the early stages of the movement, see Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW360 (Apr. 7, 2019, 8:02 PM), <https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor> [<https://perma.cc/A5DQ-EV94>].

²⁵ See Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 5 (2019) (“[J]ust as the power and discretion of prosecutors have contributed to mass incarceration and racial disparities in the criminal justice system, that same power and discretion may be used to institute reforms to correct these injustices.”).

²⁶ See Jeffrey Bellin, *Defending Progressive Prosecution*, 39 YALE L. & POL’Y REV. (forthcoming) (manuscript at 10), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3479165 [<https://perma.cc/9PKP-2QR7>] (“Reform-minded prosecutors animated by a principle of lenience would work to broadly ratchet down, not redistribute, the system’s severity.”).

²⁷ See, e.g., Rachael Rollins, *The Public Safety Myth*, APPEAL (Aug. 29, 2019), <https://theappeal.org/the-public-safety-myth/> [<https://perma.cc/6CHW-398R>] (“I believe in prioritizing the offenses that cause serious physical harm or death rather than mispending our limited resources on low-level offenses. Murders, shootings, and sexual assaults should be our highest priority; offenses like drug possession, loitering, and driving on a suspended license should not.”).

sentences might improve overall welfare. The right kind of prosecution policies could lead to “less crime and less incarceration, to the benefit of victims and offenders alike.”²⁸

The promise of such reforms could be exaggerated, of course. In many areas, the tactics of so-called progressive prosecution would not, in fact, dramatically change the status quo. Murders, sexual assault, and other violent crimes would still be prosecuted, perhaps even more aggressively. However, progressive prosecutors premised their electoral appeals on confronting mass incarceration rather than being a party to it. As such, many progressive prosecutors ran on platforms that sometimes read like wish lists for criminal defendants. These platforms might be seen as restoring the equilibrium of a system that had become misaligned.

This shift of focus amounted to something of a sea change, and the progressive prosecutors announced it as such. The typical prosecutor either ran unopposed or based on their record of convicting offenders.²⁹ Progressive prosecutors could not run the same way since they lacked “tough on crime” records and, in some cases, prosecutorial experience altogether (for example, Philadelphia District Attorney Larry Krasner, one of the highest-profile progressive prosecutors, was a former criminal defense lawyer).³⁰ Instead, progressive prosecutors ran on what they would do and, once in office, provided detailed policy papers and platforms indicating the reforms they enacted.³¹

The goals articulated by progressive prosecutors can be placed into three broad categories: reducing the total incarcerated population, reforming

²⁸ MARK A. R. KLEIMAN, *WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT* 5–6 (2009).

²⁹ See Wright, *supra* note 19, at 593 (finding that 85% of prosecutorial elections in a nationwide study involved a prosecutor running unopposed).

³⁰ Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, *NEW YORKER* (Oct. 29, 2018), <https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration> [<https://perma.cc/MY76-DJC6>] (“Until Larry Krasner entered the race for District Attorney of Philadelphia last year, he had never prosecuted a case. He began his career as a public defender, and spent three decades as a defense attorney.”).

³¹ See, e.g., THE RACHAEL ROLLINS POLICY MEMO (Mar. 2019), <http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> [<https://perma.cc/DN3K-DKKY>]; see also *Philadelphia DA Larry Krasner's Revolutionary Memo*, *INTERCEPT* (Mar. 20, 2018, 8:21 AM), <https://theintercept.com/document/2018/03/20/philadelphia-da-larry-krasners-revolutionary-memo/> [<https://perma.cc/GLB6-GT3U>]; Sam Clancy, *Wesley Bell's Office Announces Policy Changes Including Bond Reform, Marijuana Prosecution*, *5 ON YOUR SIDE KSDK NEWS* (updated Jan. 2, 2019, 7:52 PM), <https://www.ksdk.com/article/news/politics/wesley-bells-office-announces-policy-changes-including-bond-reform-marijuana-prosecution/63-288d0f14-d7ed-4688-bccc-d7c8430f32a3> [<https://perma.cc/KY55-LQLA>].

the institutions of the criminal justice system, and changing the “tone” of prosecution.³² These categories are not silos, of course, and certain reforms fit in more than one category. Still, they provide a rough taxonomy of what progressive prosecutors ran on and hoped to accomplish if they were elected (as many were).³³

Nearly every progressive prosecutor ran on ending mass incarceration.³⁴ Interpreted one way, this is an almost impossible goal. Mass incarceration is a complex phenomenon that has unfolded over a long period of time and involved interactions among numerous different actors within the criminal justice system. No prosecutor, no matter how large her jurisdiction, could eliminate it unilaterally. The goal is more tractable if read more modestly as a concern with diminishing the large-scale, long-term, racially disparate system of incarceration in the United States. Progressive prosecutors proposed three broad ways of accomplishing this goal. First, they would focus on reducing pretrial incarceration, either by lowering bail amounts or eliminating cash bail altogether.³⁵ Second, and more controversially, they would enact non-prosecution policies regarding certain categories of crimes,

³² See generally THE BRENNAN CTR. FOR JUST., 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR, (Dec. 3, 2018), <https://www.brennancenter.org/our-work/policy-solutions/21-principles-21st-century-prosecutor> [<https://perma.cc/VDP3-3KCT>].

³³ For a good overview of the goals of progressive prosecutors, one could do worse than this summary by David Garland:

[P]rosecutors have the power to steer the system toward a more equitable, temperate, and racially conscious criminal justice. They can use diversion programs rather than jail, charge with restraint, plea-bargain fairly, end cash bail, treat drug addiction as an illness and kids as kids, establish conviction review, expunge criminal records, and utilize data and cost-benefit analysis to improve decision-making.

David Garland, *The Road to Ending Mass Incarceration Goes Through the DA’s Office*, AM. PROSPECT (Apr. 8, 2019), <https://prospect.org/justice/road-ending-mass-incarceration-goes-da-s-office/> [<https://perma.cc/3VD7-AAGZ>] (discussing the premise of EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019)).

³⁴ The audacity of this part of the agenda was quickly picked up by major media outlets. See, e.g., Gonnerman, *supra* note 30; see also Daniel A. Medina, *The Progressive Prosecutors Blazing a New Path for the U.S. Justice System*, GUARDIAN (July 23, 2019, 2:00 PM), <https://www.theguardian.com/us-news/2019/jul/23/us-justice-system-progressive-prosecutors-mass-incarceration-death-penalty> [<https://perma.cc/W54E-YY3F>] (“The protester was now the prosecutor. And [Wesley] Bell had won on a radical platform promising to end mass incarceration, dramatically reform the cash bail system, end the death penalty and decriminalize marijuana possession in the county of just under a million people.”).

³⁵ See, e.g., THE RACHAEL ROLLINS POLICY MEMO, *supra* note 31, at 14–15 (outlining policies regarding cash bail); Read Wesley Bell’s New Policies, Issued Jan. 2, 2019, ST. LOUIS POST-DISPATCH (Jan. 3, 2019), https://www.stltoday.com/news/multimedia/read-wesley-bells-new-policies-issued-jan-2-2019/pdf_d4a5a66c-31b5-5c38-a5f7-f526ad0144cc.htm [<https://perma.cc/MZ8M-MWLM>].

such as low-level drug offenses and, in some jurisdictions, prostitution and failure to pay child support.³⁶ They might also charge some crimes—such as shoplifting—as misdemeanors, rather than felonies—even under statutes allowing for felony charges.³⁷ Third, line prosecutors would be instructed not to exercise full leverage in plea negotiations, systematically pushing for shorter sentences and alternatives to incarceration for certain classes of cases.³⁸

The second category of reforms involved the creation or bolstering of a set of new institutions. Two such institutions stand out. First, progressive prosecutors sought to create conviction integrity units.³⁹ Such units would be less about reducing incarceration in the present (although they might have that result on a case-by-case basis) and more about righting past wrongs—for example, convictions where exculpatory evidence was withheld or cases where an innocent person was found guilty. Second, progressive prosecutors favored the increased use of specialty courts.⁴⁰

Finally, a more amorphous goal of progressive prosecutors involved changing the tone of what it means to be a prosecutor, manifesting and talking about a more open, less punitive, more holistic approach to criminal justice.⁴¹ Sometimes this goal had specific policy implications. For example,

³⁶ *E.g.*, ST. LOUIS POST-DISPATCH *supra* note 35, at 5–6 (articulating new child support policies for Prosecuting Attorney’s office in St. Louis County, Missouri); *see also Philadelphia DA Larry Krasner’s Revolutionary Memo*, *supra* note 31, at 1 (instructing prosecutors to decline marijuana charges and certain prostitution charges).

³⁷ *E.g.*, RECLAIM CHI., THE PEOPLE’S LOBBY & CHI. APPLESEED FUND FOR JUSTICE, SENTENCES OF INCARCERATION DECLINE SHARPLY, PUBLIC SAFETY IMPROVES DURING KIM FOXX’S SECOND YEAR IN OFFICE 2 (July 2019) <https://www.thepeopleslobbyusa.org/wp-content/uploads/2019/07/2019-07-Final-Report-Kim-Foxx-ForPrint.pdf> [<https://perma.cc/65M7-PRRX>]; *see also* RACHAEL ROLLINS POLICY MEMO, *supra* note 31, at app. c.

³⁸ *See, e.g.*, THE RACHAEL ROLLINS POLICY MEMO, *supra* note 31, at 37; *Philadelphia DA Larry Krasner’s Revolutionary Memo*, *supra* note 31, at 2–5.

³⁹ Benjamin Levin, *Imagining the Progressive Prosecutor*, MINN. L. REV. (forthcoming 2020) (manuscript at 16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3542792 [<https://perma.cc/L8TP-N3Q9>] (“[A] number of ‘progressive prosecutors’ have instituted or increased emphasis on conviction integrity units that are designed to double-check line prosecutors’ work and ensure that the office isn’t securing wrongful convictions.”).

⁴⁰ THE RACHAEL ROLLINS POLICY MEMO, *supra* note 31, at 6, 35; Larry Krasner, *Lecture by Larry Krasner*, 3 UCLA CRIM. JUST. L. REV. 99, 118–19 (2019) (describing efforts in the Philadelphia District Attorney’s office to provide services to defendants with mental illnesses).

⁴¹ Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667, 1709 (2018) (discussing policies championed by groups such as Prosecutor Impact and the Institute for Innovation in Prosecution and how these “policy shifts

some advocated for open file discovery policies regarding evidence or specific protocols on charging criminal offenses.⁴² Other times, the goal showed itself in support of broad public health measures as alternatives to resolving public health problems by arresting the people subject to them. Perhaps most idealistically, the goal involved projecting an image of care and concern not only for victims, but also for criminal defendants who themselves might in some sense be victims of social circumstances or systemic racial injustice. If this broad goal was realized, then prosecutors would be accountable not simply for the number of people they locked up or for convictions they obtained in high-profile cases, but rather for their contributions to making society fairer and more just. Prosecutors would win if they treated *everybody*—suspects, defendants, victims, and concerned community members—with dignity and respect.

II. PROGRESSIVE PROSECUTION IN A PANDEMIC

When the extent of the COVID-19 pandemic became clear, many reformers identified prisons and jails as possible sites of massive outbreaks. The crowded conditions of these institutions make disease transmission more likely, both within the institution and in the surrounding communities.⁴³ Worse, prisons and jails are notoriously unsanitary places—some residents do not have regular access to soap, let alone hand sanitizer.⁴⁴ State and local officials thus began to plan how to decrease the prison and jail population quickly, and progressive prosecutors in many localities championed these efforts.⁴⁵ Pandemic-based decarceration was supported by critics of the

require prosecutors to embrace a more holistic, responsible conception of how law enforcement resources ought to be used, and to consider the detrimental impact of prosecution on traditionally disadvantaged groups”).

⁴² David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 35 (2017) (advocating that prosecutors adopt “open file” policies).

⁴³ Mark Osler, Opinion, *We Must Thin the Prison Populations Before Pandemic Hits Them*, MINNEAPOLIS STAR TRIB. (Mar. 27, 2020, 5:43 PM), <https://www.startribune.com/we-must-thin-the-prison-populations-before-pandemic-hits-them/569174562/> [<https://perma.cc/TXY5-WD4Y>] (“Jails and prisons are petri dishes for disease in normal times. These are not normal times. . . . If the virus runs through a prison, too, it inevitably will come back to surrounding communities through prison workers; what goes in will come back out.”).

⁴⁴ See Rachel Barkow, *Our Leaders Have the Power to Release People in Prison. Now They Must Use It.*, APPEAL (Mar. 27, 2020), <https://theappeal.org/coronavirus-prison-commutations/> [<https://perma.cc/9QF7-MU4H>] (“Most U.S. detention facilities force people to bunk with one or two others, and some require them to sleep and eat in large communal areas. Social distancing in these environments is impossible. Even basic hygiene is a luxury: Many people in prison have no access to hand sanitizer and struggle to pay for soap.”).

⁴⁵ See *FJP Joint Statement*, *supra* note 10, at 2–3.

progressive prosecution concept, including Attorney General William Barr.⁴⁶ The result was a nationwide push along at least three lines.

The first major push was to reduce the population of pretrial detainees.⁴⁷ In some offices, the default changed to releasing on recognizance those charged with low level, non-violent offenses⁴⁸ Likewise, those awaiting trial were either to be given new bail hearings or else simply released on their own recognizance if the prosecutor and judge determined that the detainee was not a danger to the community. Implicit in these calculations were the general restrictions of quarantine—if most people are sheltering in place and most businesses are closed, then those released would present less danger to the community than in normal conditions.

A second, less intense push involved releasing those sentenced to terms in prison or jail.⁴⁹ The focus here was on those imprisoned for low- level, non-violent offenses, who could be let out without significantly increasing the danger to the community. This goal could be accomplished by early release (in jurisdictions that would allow it) or by changing the terms of confinement—for example, through some form of house arrest or release to

⁴⁶ See Memorandum from William Barr, Att’y Gen., U.S. Dep’t of Justice, to All Department Components and All United States Attorneys 2 (Apr. 6, 2020), <https://www.justice.gov/file/1266901/download> [<https://perma.cc/8DBD-D8ZL>] (“[Y]ou should now consider the medical risks associated with individuals being remanded into federal custody during the COVID-19 pandemic. Even with the extensive precautions we are currently taking, each time a new person is added to a jail, it presents at least some risk to the personnel who operate that facility and to the people incarcerated therein.”); Michael Balsamo, *Barr Defends Police, Takes Swipe at Progressive Prosecutors*, PBS NEWSHOUR (Aug. 12, 2019, 1:48 PM), <https://www.pbs.org/newshour/nation/barr-defends-police-takes-swipe-at-progressive-prosecutors> [<https://perma.cc/G7M8-YGWR>] (“Barr took a hard swing at prosecutors who don’t embrace the same tough-on-crime stance. He said appointing such progressive district attorneys is ‘demoralizing to law enforcement and dangerous to public safety’ because they ‘spend their time undercutting the police, letting criminals off the hook, and refusing to enforce the law.’”); see also William P. Barr, Att’y Gen., U.S. Dep’t of Justice, Remarks at the Major County Sheriffs of America Winter Conference, (Feb. 11, 2020), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-major-county-sheriffs-america-winter> [<https://perma.cc/YSX4-SPBK>].

⁴⁷ See Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, NW. L. REV. (forthcoming 2020) (manuscript at 11–12) (citing examples), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3576163 [<https://perma.cc/86LL-E5G2>].

⁴⁸ See, e.g., Kira Lerner, *California Makes Major Bail Change to Slow the Spread of Coronavirus in Jails*, APPEAL (Apr. 6, 2020), <https://theappeal.org/california-bail-coronavirus-covid-19/> [<https://perma.cc/9ANX-ZXSM>] (“The California Judicial Council on Monday issued a statewide emergency order setting bail at \$0 for most misdemeanor and lower-level felony offenses. The sweeping measure is the state’s latest effort to empty its jails to curb the spread of the novel coronavirus.”).

⁴⁹ See *FJP Joint Statement*, *supra* note 10, at 3.

a third-party custodian.⁵⁰ Executive branch officials could also simply commute offenders' sentences.⁵¹ Judges might release inmates who were already close to the end of their sentences.⁵² Early efforts along these lines emphasized removing especially vulnerable populations from the prison system—for instance, inmates who were immunocompromised, sick, or elderly.⁵³ The implicit logic was that leaving vulnerable populations in prison would be tantamount to sentencing them to death.

A third, related push involved changes in enforcement policies.⁵⁴ Police and prosecutors articulated clear policies that only the most serious offenses would be subject to imprisonment.⁵⁵ Lower-level offenses could be dealt with by warnings or, at worst, summons to appear in court at later dates. Given the changed conditions, arrests for low-level or nonviolent offenses, accompanied by even brief stays in jail awaiting resolution, constituted a public health risk.

In these three ways, the COVID-19 pandemic gave additional momentum to measures progressive prosecutors were endorsing and endeavoring to advance already. The movement to end cash bail, already popular among progressive prosecutors prior to the pandemic,⁵⁶ was effectively put into place overnight in many places and for many offenses.⁵⁷

⁵⁰ See Carroll, *supra* note 47, at 11.

⁵¹ See Jonathan Capehart, Opinion, *Trump and Governors Can Slow the Spread of COVID-19 in Prisons and Jails*, WASH. POST (Apr. 1, 2020, 9:25 AM), <https://www.washingtonpost.com/opinions/2020/04/01/trump-governors-can-slow-spread-covid-19-prisons-jails/> [https://perma.cc/UA4H-2EJC]; Joe Sonka, *Gov. Beshear Commutes Sentences of Additional 352 State Inmates in Response to COVID-19*, COURIER J. (Apr. 28, 2020, 4:55 PM), <https://www.courier-journal.com/story/news/politics/2020/04/28/beshear-commutes-sentences-352-kentucky-inmates-response-covid-19/3038367001/> [https://perma.cc/E4X5-5J49]; Press Release, Washington State Governor's Office, *Inslee Issues New Orders to Reduce Prison Populations During the COVID-19 Outbreak* (Apr. 15, 2020), <https://www.governor.wa.gov/news-media/inslee-issues-new-orders-reduce-prison-populations-during-covid-19-outbreak> [https://perma.cc/GSH9-CXAH].

⁵² See Douglas A. Berman, *Another Robust Week for COVID-Influenced Federal Sentence Reductions Using § 3582(c)(1)(A)*, SENT'G L. & POL'Y (May 8, 2020), https://sentencing.typepad.com/sentencing_law_and_policy/2020/05/another-robust-week-for-covid-influenced-federal-sentence-reductions-using-3582c1a.html [https://perma.cc/VB65-QRSJ].

⁵³ See *FJP Joint Statement*, *supra* note 10, at 3.

⁵⁴ See *FJP Joint Statement*, *supra* note 10, at 2–3.

⁵⁵ BRENNAN CTR. FOR JUST. *supra* note 5; *FJP Joint Statement*, *supra* note 10, at 2.

⁵⁶ See Aurélie Ouss & Megan Stevenson, *Bail, Jail, and Pretrial Misconduct: The Influence of Prosecutors*, 8–9 (June 22, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335138 [https://perma.cc/NEE7-EZQ7].

⁵⁷ See, e.g., Lerner, *supra* note 48.48

Prosecutions for drug crimes were deprioritized.⁵⁸ Prisons and jails released scores of inmates, and alternatives to incarceration were adopted.⁵⁹ People were put on some form of supervised release or home arrest.⁶⁰ Many were simply let go. Of course, these changes were not universal, nor were they uniformly adopted. In some jurisdictions, it was business as usual.⁶¹ In jurisdictions where progressive prosecution never obtained a foothold or was rejected, reforms were hard to come by and, in some instances, actively resisted.⁶² Indeed, in some places the pandemic was used to justify more punitive measures—for example, that people should stay in jail *precisely*

⁵⁸ See Chip Mitchell, *During the COVID-19 Pandemic, Low-Level Drug Cases Won't Be Prosecuted in Cook County*, NPR (Mar. 23, 2020), <https://www.npr.org/local/309/2020/03/23/820148938/during-the-c-o-v-i-d-19-pandemic-low-level-drug-cases-won-t-be-prosecuted-in-cook-county> [https://perma.cc/8GZD-3293]; Tim Prudente & Phillip Jackson, *Baltimore State's Attorney Mosby to Stop Prosecuting Drug Possession, Prostitution, Other Crimes Amid Coronavirus*, BALT. SUN (Mar. 18, 2020, 8:33 PM), <https://www.baltimoresun.com/coronavirus/bs-md-ci-cr-mosby-prisoner-release-20200318-u7kneb6o5gqvnqmtpejftavia-story.html> [https://perma.cc/MEA3-5VL2].

⁵⁹ Matt Hamilton, James Queally, & Alene Tchekmedyan, *California's Prisons and Jails Have Emptied Thousands into a World Changed by Coronavirus*, L.A. TIMES (May 17, 2020, 5:00 AM), <https://www.latimes.com/california/story/2020-05-17/coronavirus-prison-jail-releases> [https://perma.cc/W8P2-S7BE]; Emily Hoerner, *Hundreds of Illinois Prisoners Released as COVID-19 Spreads, but Few Elderly See Reprieve*, INJUSTICE WATCH (May 6, 2020), <https://www.injusticewatch.org/news/prisons-and-jails/2020/hundreds-of-illinois-prisoners-released-as-covid-19-spreads-but-few-elderly-see-reprieve/> [https://perma.cc/7CHJ-WKYE]; Catherine Kim, *Why People Are Being Released from Jails and Prisons During the Pandemic*, VOX (Apr. 3, 2020, 2:10 PM), <https://www.vox.com/2020/4/3/21200832/jail-prison-early-release-coronavirus-covid-19-incarcerated> [https://perma.cc/ASU2-7LBH]; Maggie Vespa, *Days After Gov. Brown Calls for Release of 100 Inmates, Lawmakers Call for 2,000*, KGW 8 (June 15, 2020, 9:11 PM), <https://www.kgw.com/article/news/health/coronavirus/oregon-coronavirus-prisons-inmates-early-release/283-615460a6-5451-4772-a3e1-3fd769c8a839> [https://perma.cc/GPJ4-DGUH].

⁶⁰ Policastro, Maass & Smith, *supra* note 4.

⁶¹ The federal prison system has been especially slow to release inmates. See, e.g., Joseph Neff & Keri Blakinger, *Few Federal Prisoners Released Under COVID-19 Emergency Policies*, THE MARSHALL PROJECT (Apr. 25, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/25/few-federal-prisoners-released-under-covid-19-emergency-policies> [https://perma.cc/NTZ6-YNF7].

⁶² For example, in May 2020 one district attorney in Oklahoma argued that Oklahoma's Pardon and Parole Board lacked the authority to recommend the commutation of certain kinds of sentences and that its consideration of commutation applications "has got to stop. They have gone way too far, and public safety and the verdicts and sentences of judges and juries are being attacked on a monthly basis . . ." Press Release, Payne Cty. Dist. Att'y, (May 4, 2020), <https://www.1600kush.com/news/payne-county-da-press-release-5-4-2020> [https://perma.cc/K7CS-VZGD]; see also *infra* notes 77–78, 80.

because they needed to be contained.⁶³ On this logic, the general public needed protection from incarcerated people not only because they were dangerous, but also because they might be sick. If decarceration policies cannot gain traction in such jurisdictions despite the public health rationale provided by a historic emergency, will they ever?

Moreover, the salience of public-health-focused efforts at decarceration could complicate many ongoing policies that are at the core of the progressive prosecution agenda. Consider treatment courts.⁶⁴ Intake procedures for new clients have been postponed until the pandemic breaks or suitable online procedures are developed.⁶⁵ If treatment staff cannot show up to court or have regular meetings with clients, then treatment programs generally—and their clients in particular—might suffer.⁶⁶ Likewise, many treatment courts require in-person employment as part of their curriculum.⁶⁷ If discussions about relaxing in-person work restrictions escalate and become more politicized, then treatment courts may be faced with new quandaries—

⁶³ In response to a lawsuit by the ACLU of Connecticut seeking the release of incarcerated people in order to slow the spread of COVID-19, the defense argued that releasing “large numbers of inmates” would be “unreasonably dangerous to the community and the public,” since “the social support networks in the communities in the cities and towns to which these offenders would be released [have] been dramatically impacted by the COVID-19 public health emergency” and “a dramatic increase in releases would make [the reintegration] process not only much more difficult, but also would inevitably increase the health risk to the public by releasing individuals prematurely, without adequate risk assessments, health reviews, referrals and transition plans” Defendants’ Objection to Motion for Temporary Order of Mandamus at 3–4, Conn. Criminal Def. Lawyers Ass’n v. Lamont, No. HHD-CV20-6126477-S, 2020 Conn. Super. Ct. LEXIS 504, (Apr. 7, 2020), (No. HHD-CV20-6126477-S), <http://civillinquiry.jud.ct.gov/DocumentInquiry/DocumentInquiry.aspx?DocumentNo=18978030> [<https://perma.cc/9DEN-9GN8>].

⁶⁴ For a sensitive discussion of one treatment court’s adjustment to the pandemic, *see, e.g.*, Jonathan Gallardo, *Adult Treatment Courts Adjust to Life in Quarantine*, GILLETTE NEWS REC. (May 16, 2020), https://www.gillettenewsrecord.com/news/local/article_ede1c2d0-9c2e-5698-bb9e-d896903e84ed.html [<https://perma.cc/E549-PEL5>].

⁶⁵ *See* Rob Abruzzese, *Court System Expands Virtual Operations and Opens Up Problem-Solving Courts*, BROOK. DAILY EAGLE (May 7, 2020), <https://brooklyneagle.com/articles/2020/05/07/court-system-expands-virtual-operations-and-opens-up-problem-solving-courts/> [<https://perma.cc/7ZJL-EPE8>].

⁶⁶ *See* Wolf, *supra* note 12.

⁶⁷ *See* Lisa M. Shannon, Afton Jackson, Elizabeth Perkins, & Connie Neal, *Examining Gender Differences in Substance Use, Participant Characteristics, and Treatment Outcomes Among Individuals in Drug Court*, 53 J. OFFENDER REHABILITATION 455, 470 (2014) (“In most [drug courts], there is an employment requirement associated with drug court participation; the lack of ability to comply with this requirement typically results in programmatic sanctions unless there is a specific medical reason why the participant is unable to work and/or if the individual is enrolled in a school/educational program.”).

for example, if clients are forced to choose between risking their health and risking their freedom. Further, the newly-mediated forms of social interaction can dramatically complicate even the simple act of drug testing, a foundational element of most treatment courts.⁶⁸ In short, the viability of existing treatment court models has already been challenged during the pandemic, and the efficacy of many such programs will likely depend on the wise exercise of discretion by program officials.

Conviction and sentencing review units can at least proceed in one respect: past cases can still be reviewed. Yet efforts to rectify such cases still require in-person contact to conduct investigations and to hold hearings. Review of past cases will be delayed because *everything* is being delayed, and priority may go to moving current cases, not in relitigating past ones.⁶⁹ Court systems are shutting down⁷⁰ and will reopen only gradually. Moreover, if conviction integrity units are not fully staffed to begin with, then they are unlikely to command greater resources given the state and local budget

⁶⁸ See Regina LaBelle & Shelly Weizman, *Drug Courts and COVID-19*, O'NEILL INST. (Mar. 20, 2020), <https://oneill.law.georgetown.edu/drug-courts-and-covid-19/> [<https://perma.cc/Q8BS-MK37>]; Henry Sotelo, Opinion, *Due Process: Specialty Courts and COVID-19*, THISISRENO (Apr. 28, 2020), <https://thisisreno.com/2020/04/due-process-specialty-courts-and-covid-19-opinion/> [<https://perma.cc/G6LE-P55N>].

⁶⁹ In Missouri, the pandemic has not prevented the state from vigorously arguing *against* one prosecutor's efforts to re-open a case. See Jordan Smith, *Missouri's Attorney General Is Fighting for the Right to Keep an Innocent Man in Prison*, INTERCEPT (May 4, 2020, 7:00 AM), <https://theintercept.com/2020/05/04/missouri-attorney-general-lamar-johnson-prison/> [<https://perma.cc/GW8F-MFAU>]; see also Jessica Miller, *Utah's Attorney General Is Fighting Salt Lake County Over Efforts to Review Cases Where Convicts Say They Are Innocent*, SALT LAKE TRIB. (Feb. 24, 2020), <https://www.sltrib.com/news/2020/02/24/utahs-attorney-general-is/> [<https://perma.cc/J5A7-3SJC>].

⁷⁰ See Sarah Stillman, *Will the Coronavirus Make Us Rethink Mass Incarceration?*, NEW YORKER (May 25, 2020), <https://www.newyorker.com/magazine/2020/05/25/will-the-coronavirus-make-us-rethink-mass-incarceration> [<https://perma.cc/5BHH-92Z5>] (“Even after mass releases began, [grassroots organizer Raj] Jayadev feared that many defendants were being ‘left off the rescue boat,’ particularly those charged with felonies. ‘Just because someone has been accused of a crime with a higher bail schedule doesn’t mean they deserve a potential death sentence,’ he said. With court systems shutting down because of the pandemic, it was harder to advocate for defendants. ‘I don’t even have access to my clients right now—that whole system is out the window,’ [public defender Carson] White told me, in March.”).

constraints that will likely exist post-pandemic.⁷¹ Time matters in light of the pandemic. Many defense attorneys are racing against the clock.⁷²

How will the pandemic ultimately affect the progressive prosecution movement? There are several possible ways that public health arguments for decarceration could interact with the extant justifications championed by progressive prosecutors. An optimistic story is that the relationship will be additive—that the original arguments against mass incarceration will be supplemented by a health-based rationale, and the progressive reform movement will gain a new urgency.⁷³ In other words, those who are not persuaded that reducing prison populations is a moral requirement and consistent with public safety might nonetheless accede to decarceration policies out of concern for public health. Moreover, progressive prosecutors will obtain powerful new evidence for their case if the increased release of persons from incarceration does not produce significant increases in crime. A self-reinforcing cycle might be created: release does not lead to a rise in crime or increased risks to public safety, which helps support the case for further release.⁷⁴

A less optimistic, but still hopeful, prediction is that COVID-19 creates a *modus vivendi* on decarceration policies, rather than a robust and lasting consensus. The problem here is that once the pandemic wanes or becomes manageable, support for decarceration policies might follow suit. There will be change, but that change will be short-lived. In this scenario, people will be more than willing to default to the pre-pandemic status quo. It is thus worth considering that the movement for reform may become too tied to the public health rationale for decarceration to be seen as an end worth achieving

⁷¹ See, e.g., Caroline Beck & Mary Sell, *DAs Look to Legislature for Funding Help After COVID-19*, TIMES DAILY (May 4, 2020), https://www.timesdaily.com/news/das-look-to-legislature-for-funding-help-after-covid-19/article_5fef3f49-5f0c-5dd9-a1e1-dd2d2797e995.html [https://perma.cc/29XE-UCUT].

⁷² Barbara Bradley Hagerty, *Innocent Prisoners Are Going to Die of the Coronavirus*, ATLANTIC (Mar. 31, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/americas-innocent-prisoners-are-going-die-there/609133/> [https://perma.cc/ZRS3-3HJP] (“Across the country, innocence lawyers are filing emergency petitions to get their clients released from prison before the virus can kill them.”).

⁷³ This is not unlike what Derrick Bell considered under the broad heading of “interest convergence.” Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

⁷⁴ See Alexi Jones, *Stagnant Populations and Changing Demographics: What the New BJS Reports Tell Us About Correctional Populations*, PRISON POL’Y INITIATIVE (May 5, 2020), <https://www.prisonpolicy.org/blog/2020/05/05/bjs-reports/> [https://perma.cc/M58S-5LXE] (“It remains to be seen whether jail populations will bounce back up after the pandemic subsides, or whether decarceration will become the ‘new normal’—or at least a more politically acceptable strategy in places that have been reluctant to reduce jail populations.”).

for other reasons. For example, suppose prisons and jails become cleaner, more hygienic, and less densely populated as a result of reforms. This status would be consistent with the public health rationale for decarceration, but it would not address the concern—explicit in many progressive prosecution agendas—that decreasing the population of jails and making them sanitary and hygienic places to house people is not just a matter of preventing another outbreak; it is a matter of treating prisoners humanely.⁷⁵ As soon as the public health crisis passes or public attention is diverted, prisons and the people inside them may again be neglected, and the warehousing of people might resume. The policies of progressive prosecutors may take place without taking hold. There will have been a pause, but not a stop, to mass incarceration.

Indeed, the most pessimistic prediction might be that the public health case for decarceration *displaces* the arguments that progressive prosecutors have built: emergencies are the *only* time to decarcerate.⁷⁶ Perhaps even more cynically, one can imagine that those who oppose the broader progressive prosecution agenda will use this crisis to frustrate decarceration by expanding the list of behaviors subject to criminal penalties or by insisting that keeping people in prison is necessary to prevent further spreading of the virus.⁷⁷ One might even worry about the counter-narrative: that it is not fair that those who

⁷⁵ See, e.g., VERA INST. OF JUST., WE MUST URGENTLY DO MORE TO ADDRESS COVID-19 BEHIND BARS AND AVOID MASS INFECTION AND DEATH: GUIDANCE FOR ATTORNEY GENERAL BARR, GOVERNORS, SHERIFFS, AND CORRECTIONAL ADMINISTRATORS (updated May 12, 2020), (emphasis omitted) <https://www.vera.org/downloads/publications/coronavirus-guidance-crisis-behind-bars.pdf> [<https://perma.cc/RQ4G-LRHF>] (“Enact emergency policies, practices, and conditions to maintain the dignity and health of incarcerated people consistent with COVID-19 best practices for social distancing and protective measures against infection and spread.”).

⁷⁶ See Levin, *supra* note 11, at 11 (“[S]uggesting that a particular crisis or set of crisis conditions are exceptional risks legitimat[es] the non-crisis conditions and accepting the desirability of the old normal.”).

⁷⁷ See Nicholas Chrastil, *As Calls for Release of Inmates Increase, DA’s Office Argues Against Bond Reductions, Saying Defendants Could Spread Virus if Freed*, LENS (Mar. 18, 2020), <https://thelensnola.org/2020/03/18/as-calls-for-release-of-inmates-increase-das-office-argues-against-bond-reductions-saying-defendants-could-spread-virus-if-freed/> [<https://perma.cc/RJ2X-ED7Z>] (quoting members of the Orleans Parish DA’s office: “If the defendant is released on bond during the Coronavirus outbreak and goes into public places, it will pose a threat to the general public by potentially spreading the virus to others and increasing the rate at which others are exposed to the virus”); see also Chad Flanders, Courtney Federico, Eric Harmon & Lucas Klein, “*Terroristic Threats*” and COVID-19: *A Guide for the Perplexed*, 169 U. PA. L. REV. ONLINE 63 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3575700 [<https://perma.cc/D7HS-JQ6P>]; Derek Maiolo, *Policing in a Pandemic: Citations, Arrests Raise Concern over COVID-19 Public Health Orders*, STEAMBOAT PILOT & TODAY (Apr. 17, 2020), <https://www.steamboatpilot.com/news/policing-in-a-pandemic-citations-arrests-raise-concern-over-covid-19-public-health-orders/> [<https://perma.cc/DS4M-C454>].

have committed crimes get to go free, while everyone else must shelter in place.⁷⁸ More worrisome still is the push in some places to combat the spread of COVID-19 in prisons by going on lockdown,⁷⁹ effectively placing all inmates in solitary confinement regardless of their conduct.⁸⁰ Here, the public health rationale works in a decidedly *counter*-progressive direction by being used to further harsh treatment of the incarcerated.⁸¹ This prediction, if realized, would see the public health self-interest rationale displacing the progressive prosecution agenda. Of course, some places will resist any attempt to trade off public safety with public health on the idea that criminals belong in jail and progressives should not “exploit” the pandemic to achieve reforms.⁸² In such jurisdictions, the thinking goes, the pandemic is no reason to deviate from harsh justice.

⁷⁸ See, e.g., John Shindlebower, *Group Protests Shut Down of State for Virus*, PIONEER NEWS (Updated May 6, 2020, 4:01 AM), <https://www.pioneernews.net/content/group-protest-s-shut-down-state-virus> [<https://perma.cc/D7CZ-YHAB>] (quoting a protestor as saying, “We’ve allowed a police state to be created, complete with a snitch line for neighbors to rat out other neighbors, all the while we have a governor taking down license plates of churchgoers, while at the same time, letting prisoners go free”); Sean Kennedy, *Maryland Should Not Release Prisoners. It’s Safer for Everyone*, WASH. POST (Apr. 27, 2020, 11:30 AM), <https://www.washingtonpost.com/opinions/2020/04/27/maryland-should-not-release-prisoners-its-safer-everyone/> [<https://perma.cc/QM7B-PWNY>], (“In Gov. Larry Hogan’s Maryland, honest citizens are confined to their homes on the pain of prison while prisoners go free. It seems we live in an upside-down world.”).

⁷⁹ Keri Blakinger, *What Happens When More than 300,000 Prisoners Are Locked Down?*, THE MARSHALL PROJECT (Apr. 15, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/15/what-happens-when-more-than-300-000-prisoners-are-locked-down> [<https://perma.cc/5BA7-TZUQ>].

⁸⁰ See Tony Messenger, *Messenger: Outbreak of COVID-19 Infects Juveniles, Staff at St. Louis County Detention Facility*, ST. LOUIS POST-DISPATCH (Apr. 30, 2020), https://www.stltoday.com/news/local/columns/tony-messenger/messenger-outbreak-of-covid-19-infects-juveniles-staff-at-st-louis-county-detention-facility/article_291c8498-6d6c-5fef-aa01-3d83483a5477.html [<https://perma.cc/724C-S2TX>]; Joseph Shapiro, *As COVID-19 Spreads in Prisons, Lockdowns Spark Fear of More Solitary Confinement*, NPR (June 15, 2020, 4:53 PM), <https://www.npr.org/2020/06/15/877457603/as-covid-spreads-in-u-s-prisons-lockdowns-spark-fear-of-more-solitary-confinemen> [<https://perma.cc/96T9-RXLY>].

⁸¹ See, e.g., Carroll, *supra* note 47, at 15–16 (noting that some policy reactions to COVID-19 implicitly adopt the logic that “detaining all persons indefinitely will effectively insulate the remaining population from any risk of infection as a result of any period of detention,” which would imply that “a defendant should continue to be held even after completing a sentence”).

⁸² See, e.g., Chrastil, *supra* note 77 (internal quotation marks omitted) (quoting Ken Daley, the spokesperson of DA Leon Cannizzaro) (“It is disheartening that the Orleans Public Defenders would seek to exploit this public health emergency by asking our police and courts to turn a blind eye toward criminal conduct”); Jenny Graham, *Rep. Jenny Graham: Releasing Criminals Early Will Make Our Families and Communities Less Safe*, SPOKESMAN-REVIEW (Apr. 25, 2020), <https://www.spokesman.com/stories/2020/apr/25/rep-jenny-graham-releasing-criminals-early-will-ma/> [<https://perma.cc/4553-V2Z8>].

CONCLUSION

Prior to the pandemic, the progress of progressive prosecution was mixed. Many policies that could be changed by fiat were enacted and effectuated immediate results.⁸³ In some jurisdictions, the number of incarcerated people declined without a major uptick in crime, although the significance of these declines is an open question.⁸⁴ In some places, however, progressive prosecution was at best a distant dream.⁸⁵ Yet, even the early efforts of progressive prosecutors have come under new scrutiny, especially at the federal level. The system, as some put it, was “fighting back” against reform efforts.⁸⁶ Attorney General William Barr publicly excoriated the policies of some progressive prosecutors.⁸⁷ Moreover, some attorneys general and state legislatures have taken steps to limit the power of specific

⁸³ See, e.g., Matt Daniels, *The Kim Foxx Effect: How Prosecutions Have Changed in Cook County*, THE MARSHALL PROJECT (Oct. 24, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/10/24/the-kim-foxx-effect-how-prosecutions-have-changed-in-cook-county> [<https://perma.cc/7GP8-V4DC>] (emphasis omitted) (“We found that since she took office she turned away more than 5,000 cases that would have been pursued by previous State’s Attorney Anita Alvarez, mostly by declining to prosecute low-level shoplifting and drug offenses and by diverting more cases to alternative treatment programs.”).

⁸⁴ See, e.g., Del Quentin Wilber, *Once Tough-on-Crime Prosecutors Now Push Progressive Reforms*, L.A. TIMES (updated Aug. 5, 2019, 9:29 AM), <https://www.latimes.com/politics/story/2019-08-02/once-tough-on-crime-prosecutors-now-push-progressive-reforms> [<https://perma.cc/8KRV-LCFT>] (“[U.S. Attorney William] McSwain pointed to police statistics that showed homicides up 8% and shootings up 7% during Krasner’s first 18 months in office. Krasner’s supporters point to statistics that show overall violent crime is down 7% during that same period.”).

⁸⁵ See Maybell Romero, *Rural Spaces, Communities of Color, and the “Progressive” Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803 (2020).

⁸⁶ Mark Berman, *These Prosecutors Won Office Vowing to Fight the System. Now, the System Is Fighting Back.*, WASH. POST (Updated Nov. 9, 2019, 4:52 PM), https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3da_story.html [<https://perma.cc/L58Z-FA26>]; Lars Trautman, *Why Prosecutorial Discretion Must Be Less Discreet for Criminal Justice*, HILL (Feb. 21, 2020, 12:00 PM), <https://thehill.com/opinion/criminal-justice/484032-why-prosecutorial-discretion-must-be-less-discreet-for-criminal-justice> [<https://perma.cc/KWK3-HB7G>], (“Yet [state] legislators are in an uproar because some prosecutors have started using their discretion to presumptively dismiss or divert all cases involving certain low level offenses.”).

⁸⁷ See Mairead McArdle, *AG Barr: Progressive Prosecutors Portend ‘More Crime, More Victims,’* NAT’L REV. (Aug. 12, 2019, 4:49 PM), <https://www.nationalreview.com/news/ag-barr-progressive-prosecutors-portend-more-crime-more-victims/> [<https://perma.cc/S6CX-BK4Q>].

prosecutors.⁸⁸ And press attention has been paid to offenders, the supposed beneficiaries of progressive prosecution or policies, who have committed additional crimes.⁸⁹ This reoffending, however anomalous, is used by critics to condemn all decarceration policies.⁹⁰ Some critics on the left have argued that the changes enacted by progressive prosecutors have not only failed to effect real change, they may also have impeded efforts towards a more revolutionary transformation of the criminal justice system.⁹¹

It is also difficult to tell how COVID-19 might change the trajectory of progressive prosecution. When courts reopen, all prosecutors will face a glut of trials and grand juries to complete. In the short term, this may lead to much better deals for defendants as prosecutors work to clear their dockets because they cannot handle the multiple trials for which public defenders may now call. But this may only happen for a time. A return to normalcy, whenever it happens, will reinstate the inherently unequal power dynamics of this system. In places where prosecutors have been forced by public health crises to implement decarceration tactics, the restoration of business as usual seems

⁸⁸ See Allan Smith, *Progressive DAs Are Shaking Up the Criminal Justice System. Pro-Police Groups Aren't Happy*, NBC NEWS (updated Aug. 19, 2019, 11:01 AM), <https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-1033286> [<https://perma.cc/3T58-HCRU>].

⁸⁹ See Corey Jones & Curtis Killman, *Project Commutation: Few Reoffend, but Face Hundreds of Thousands in Court Debt*, TULSA WORLD (Dec. 25, 2019), https://www.tulsaworld.com/news/state-and-regional/project-commutation-few-reoffend-but-face-hundreds-of-thousands-in-court-debt/article_0fd9c483-ceb4-5974-ae04-0767b94ccb3.html [<https://perma.cc/4LMJ-GENH>] (finding that among a population whose low-level drug sentences were commuted, “[f]ew had reoffended” after one year). This type of disproportionate attention is also present in the post-COVID-19 world. See, e.g., Jonathan Choe, *Prisoners Released from Facilities to Limit COVID-19 Spread Arrested Again for Crimes*, KOMO NEWS (May 8, 2020), <https://komonews.com/news/coronavirus/prisoners-released-from-facilities-to-limit-covid-19-spread-arrested-again-for-crimes> [<https://perma.cc/2LJK-HUUP>].

⁹⁰ Speri, *supra* note 7 (“‘It’s the Willie Horton factor, which is what kills reform and decarceration in the United States all the time,’ said [ACLU Justice Division director Udi] Ofer, citing the recent backlash against New York’s bail reform. ‘You could have a 97 percent success rate, where people are going home, being with their families. All you need is one case—which is inevitable—of someone committing a crime again and the backlash begins. And unfortunately, that’s what motivates many politicians.’”).

⁹¹ See, e.g., Note, *The Paradox of Progressive Prosecution*, 132 HARV. L. REV. 748, 759 (2018) (citations omitted) (“Counteracting the harms of an inherently punitive institution requires transformative reforms. Progressive prosecution is best thought of, instead, as a ‘reformist reform.’ . . . Such reforms attempt to fix broken systems without realizing that these systems are ‘working to re-entrench and legitimize current power arrangements.’”).

likely and may even be welcomed.⁹² Moreover, if there is a rise in violent crime, even progressive prosecutors may well turn out to look more like old, tough-on-crime prosecutors.⁹³

These risks of retrenchment point to an additional, possibly inherent, problem with the progressive prosecution movement—namely, that its success depends on the implementation of specific reforms in specific offices and not just at the prosecutorial level. Absent significant legislative or executive changes, the scope and longevity of these decarceration efforts will be limited.⁹⁴ A district attorney can refuse to charge minor drug possession, but only a legislature can repeal the law that makes drug possession illegal.⁹⁵ In general, because mass incarceration is a *systemic* phenomenon, it is unclear whether decarceration policies that do not address systemic issues can succeed in the long term. Even one-time mass commutations will not fix the structural, systemic nature of mass incarceration. It took a village to create mass incarceration. It will take an array of reforms at all levels to get rid of it.

⁹² For a discussion of the impetus toward aggressive prosecution in ordinary times, see Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y.U. L. REV. 69, 79 (2019) (asserting that “[t]he structure of our justice system, and the cultural phenomenon this design often produces in prosecutors’ offices, makes even ‘progressive’ line prosecutors more punitive. Over time, their forbearance of punishment will dwindle”).

⁹³ See Ross Barkan, *Exterminating Angels*, BAFFLER (July 2019), <https://thebaffler.com/outbursts/exterminating-angels-barkan> [<https://perma.cc/GNJ8-2CZW>] (“Prosecutorial reformers—or those who look to elections as the answer—are dependent on the wisdom of individuals and a political climate that encourages their best instincts. Give Eric Gonzalez or even Larry Krasner another violent crime wave of the likes we saw forty years ago, and will they keep restraining themselves? As voters, who do not pay much attention to the nuances of a district attorney’s office, cry out for more convictions in the erroneous belief that these alone will halt rising crime, will these prosecutors be able to defy popular appeal and stay the course?”).

⁹⁴ See Demleitner, *supra* note 10, at 187–88, 191 (noting limitations on prosecutorial power and “dependence on other criminal justice actors” in reducing jail populations during the pandemic).

⁹⁵ Moreover, even significant legislative changes can be insufficient to realize decarceration outcomes amid opposition by front-line criminal justice actors. For example, in 2016 Oklahoma de-felonized possession of a controlled dangerous substance through a state referendum. In the year after this de-felonization went into effect, there was a 20% increase in charges for the more serious felony of possession with intent to distribute (PWID). This pattern is consistent with the hypothesis that Oklahoma prosecutors, who were adamantly opposed to de-felonization, charged PWID instead of misdemeanor possession in cases that before would have been charged as simple possession. See Stephen R. Galoob, Colleen McCarty & Ryan Gentzler, *Oklahoma’s State Question 780: Criminal Justice Reform and Resistance*, 31 FED. SENT’G REP. 182, 182–84 (2019).

It is difficult, in general, to determine whether progressive prosecution has effected, or will bring about, lasting and beneficial change to the criminal justice system.⁹⁶ A lot of the goals of progressive prosecutors are long-term and cannot be measured by what happens this year or next. We are also still working out the proper metrics for measuring success.⁹⁷ This analytic difficulty is compounded by the phenomenon of COVID-19. In the near future, specific policies championed by progressive prosecutors, such as expansion of treatment courts and conviction integrity units, may take a backseat to more urgent, docket-clearing concerns. Increases in crime rates could lead to public backlash against prosecutors who favored mass release. Any decarceration brought about by the crisis may be short-lived. In fact, it may only last as long as the pandemic.

Still, some arguments point in the other direction. COVID-19 has provided a new rationale for many of the same reforms championed by progressive prosecutors. The crisis has created an opportunity for the creation of a virtuous cycle wherein early release of prisoners (or release on recognizance of defendants) does not create much in the way of additional crime. This, in turn, provides momentum for even greater decarceration. Prisons and jails may become less crowded and more humane. Moreover, the medicalization of criminal justice policies—treating crowded jails as a public health concern—may increase support for treating crime more generally as a public health problem. Given the unlikely triumph of progressive prosecutors in winning elections and instituting reforms during the past half-decade, hope for the movement’s further success might be rational. Although the COVID-19 pandemic has been an unspeakable tragedy and a public policy disaster, it may yet provide the impetus for further reform.

⁹⁶ See Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769 (2020).

⁹⁷ See Jeffrey Bellin, *How Do We Know If Prosecutors Are Doing a Good Job?*, LAW360 (Mar. 31, 2019, 8:02 PM), <https://www.law360.com/articles/1143620> [<https://perma.cc/297K-E85U>] (“Until we can give prosecutors more precise guidance than ‘do justice,’ our disappointment with their performance may be as much our fault as theirs.”).