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Expanding the Reach of Progressive Prosecution

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EXPANDING THE REACH OF PROGRESSIVE PROSECUTION

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INTRODUCTION

This Symposium comes at a critical juncture for America’s prosecutors. One important question—“Is there room for a new kind of prosecutor?”—has already been answered. Self-styled “progressive prosecutors” are flourishing in jurisdictions across the country. The question remains whether the progressive prosecutor movement will have a lasting impact and, if so, what that impact will be. One way this question will be answered is through the movement’s influence on the many prosecutors who are open to reform but unlikely to adopt the “progressive” label or accompanying rhetoric.

This Essay explores this theme by discussing, first, the rise of progressive prosecution and, second, how this movement’s initial success can stimulate the long-overdue development of a generally applicable, normative theory of the prosecutor’s role. It suggests a conceptualization of the American prosecutor as a caretaker for the criminal justice system, who should default to lenience when that system becomes so congested and punitive that it cannot deliver on its constitutional ideals.

I. THE RISE OF THE PROGRESSIVE PROSECUTOR

Two societal trends are key ingredients in the rise of the progressive prosecutor: (1) a growing recognition of the problem of mass incarceration,

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and (2) a gradual downward trend in crime. These two factors feed an emerging consensus that severe penal policies are unwarranted, if not immoral. Critics attack both the system's motives and its competence.¹ Progressives are not alone. Conservatives, too, criticize the penal system as a massive government program with unclear goals and questionable claims to success.²

In a democracy, local elections are the natural place to direct popular energy. While a desire for criminal justice reform could reasonably be channeled toward electing legislators or state judges, some organizers focus on another target—district attorneys.

District attorney races offer a rare bargain in the money-fueled arms race of American politics. District attorney elections are characterized by low voter interest.³ Candidates regularly run unopposed.⁴ In some jurisdictions it is difficult to find anyone willing to take the job.⁵ This plays to two strengths of progressive reformers: (1) a passionate voter base and (2) access to campaign financing from wealthy donors like George Soros.⁶ Strategic infusions of campaign funds allow reform challengers with a progressive message to mobilize like-minded voters and oust incumbent district attorneys.

¹ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (2012) (framing the criminal justice system as a continuation of historical racism); *Making a Murderer*, NETFLIX, <https://www.netflix.com/title/80000770> (raising questions about convictions); *Serial*, NPR, Season 1, <https://serialpodcast.org/season-one> [<https://perma.cc/W5GC-38BJ>], (suggesting that Adnan Syed was wrongfully convicted); *Serial*, NPR, Season 3, <https://serialpodcast.org/> [<https://perma.cc/676U-XJ2L>]; (reporting on chaotic criminal courts in Cleveland). <https://www.netflix.com/title/80000770> [<https://perma.cc/V5G4-5GRP>].

² Arthur Rizer & Lars Trautman, *The Conservative Case for Criminal Justice Reform*, *GUARDIAN* (Aug. 5, 2018), <https://www.theguardian.com/us-news/2018/aug/05/the-conservative-case-for-criminal-justice-reform> [<https://perma.cc/J2VG-EGU5>].

³ Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 *LEWIS & CLARK L. REV.* 573, 592 (2017) (“Prosecutorial elections are historically low-information, low-turnout affairs.”).

⁴ See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 *OHIO ST. J. CRIM. L.* 581, 591 (2009).

⁵ See Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 *IOWA L. REV.* 1537, 1544–46 (2020).

⁶ Justin Jouvenal & Rachel Weiner, *Money from PAC Funded by George Soros Shakes Up Prosecutor Races in Northern Virginia*, *WASH. POST* (Apr. 24, 2019, 5:30 AM), https://www.washingtonpost.com/local/public-safety/money-from-pac-funded-by-george-soros-shakes-up-prosecutors-races-in-northern-virginia/2019/04/23/5c754d14-6513-11e9-a1b6-b29b90efa879_story.html [<https://perma.cc/9ZT8-Q6AF>] (“Soros-aligned PACs have given heavily to local prosecutor races across the country in recent years, helping tip contests to reformist Democratic candidates in Philadelphia, Chicago, Houston and elsewhere.”); Hessick & Morse, *supra* note 5, at 1540 (“[A] motivated group of advocates and their supporters have started a movement to elect progressive prosecutors.”).

Apart from the political advantages noted in the preceding paragraph, there are structural reasons reformers target district attorneys, as opposed to judges, police, or legislators. District attorneys have no boss. They answer solely to the voters. This means that District Attorneys do not need to clear their policies with other officials. They can act unilaterally. By contrast, conservative and progressive legislators must often compromise to pass laws. Trial courts, in turn, are checked by appellate courts, which themselves require compromise in order to generate a controlling opinion. Police chiefs, another powerful source of reform, are similar to district attorneys with respect to local independence. But police chiefs in large cities are generally not elected.⁷ And the mayors who appoint chiefs are often multi-issue candidates running in broadly contested elections.⁸

Reformers also tapped into decades of hyperbolic scholarly commentary on prosecutors.⁹ The scholarly conversation began with famous rhetorical flourishes highlighting the once-overlooked importance of prosecutorial discretion.¹⁰ Building on this rhetoric, modern scholarly commentary reached a head-turning crescendo. Scholars regularly suggest that prosecutors are the most powerful actors in the criminal justice universe, if not the sole drivers of criminal justice policy.¹¹ Reformers astutely capitalize on this rhetoric to motivate progressive funders and voters to focus on district attorney elections.¹²

The distinctive political and structural factors described above explain reformers' focus on electing prosecutors. District attorneys are single-topic candidates competing in low-turnout elections who, once elected, can act unilaterally albeit in narrow jurisdictional spheres. Overheated scholarly rhetoric on prosecutorial power was just icing on the cake. It likely does not matter to the political actors driving the movement that prosecutors (writ

⁷ Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 741 (2020) (“While police chiefs are somewhat democratically accountable—most are appointed by their mayors or a board of other elected officials.”).

⁸ See, e.g., Mitch Smith, *Lori Lightfoot, Chicago's Incoming Mayor, Ran on Outsider Appeal*, N.Y. TIMES (Apr. 3, 2019), <https://www.nytimes.com/2019/04/03/us/chicago-mayor-lori-lightfoot.html> [<https://perma.cc/A4WT-SA5U>] (describing issues in 2019 Chicago Mayor race, including education, political corruption, crime, economic development, and income inequality).

⁹ See generally Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171 (2019) (documenting hyperbolic commentary) [hereinafter Bellin, *The Power of Prosecutors*]; Jeffrey Bellin, *Defending Progressive Prosecution*, 39 YALE L. & POL'Y REV. (forthcoming 2020) (illustrating the connection between commentary and the reform movement) [hereinafter Bellin, *Defending Progressive Prosecution*].

¹⁰ Bellin, *The Power of Prosecutors*, *supra* note 9, at 178, 187–88.

¹¹ *Id.* at 187–88.

¹² See Bellin, *Defending Progressive Prosecution*, *supra* note 9, at 3.

large) are the fourth most powerful criminal justice actors, trailing legislatures (#1), police (#2), and judges (#3). Daniel Fryer's contribution to the Symposium takes up this question in more detail, reaching similar, if distinct, conclusions.¹³ If reformers could, they would happily pick any—or all—of these powerful potential sources of reform. But District Attorneys in cities with large progressive populations are low hanging fruit.

Importantly, fourth-most powerful is still quite powerful.¹⁴ In addition, the distinctive power that prosecutors possess—the power to let people go—maps nicely onto portions of the progressive agenda.¹⁵ There is no question that reform-minded prosecutors can influence the criminal justice system.

Recognizing the limits on prosecutor power is nevertheless important to evaluating the long-term impact of progressive prosecution. While typically unable to directly overrule a prosecutor's decisions, judges, legislators, governors, and police can still check prosecutors in a variety of ways.¹⁶ As I have written elsewhere, “it takes a village” to send someone to prison and even prosecutorial leniency can be undermined by police, legislators, and judges.¹⁷ In addition, the populist energy that enabled the swift rise of progressive prosecutors could also bring about their downfall. If crime spikes again or politics shift for other reasons, voters may become less receptive to progressive prosecution, even in liberal jurisdictions.¹⁸ Similarly, competing

¹³ See Daniel Fryer, *Race, Reform & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769 (2020).

¹⁴ ¹⁴ See David Ewalt, *The World's Most Powerful People 2018*, FORBES (May 8, 2018, 7:02 AM), <https://www.forbes.com/sites/davidewalt/2018/05/08/the-worlds-most-powerful-people-2018/#6029bc836c47> [https://perma.cc/FCQ8-PTYD] (citing that Germany's Angela Merkel was Forbes' fourth most powerful person in the world in 2018); see also *Top 10 List of the World's Strongest Animals*, ONEKINDPLANET, <https://onekindplanet.org/top-10/top-10-list-of-the-worlds-strongest-animals/> [https://perma.cc/99CN-WQ9R] (declaring that the Gorilla is the world's fourth strongest animal); Callie Ahlgrim, *A Definitive Ranking of All the Avengers, from Least to Most Powerful*, INSIDER (May 1, 2019, 8:20 AM), <https://www.insider.com/avengers-who-is-the-strongest-after-endgame-2019-5> [https://perma.cc/M8AB-UBQY] (asserting that Captain America is the fourth most powerful Avenger).

¹⁵ See Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 846 (2018) (reviewing JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION: AND HOW TO ACHIEVE REAL REFORM (2017)) [hereinafter Bellin, *Reassessing Prosecutorial Power*].

¹⁶ Bellin, *The Power of Prosecutors*, *supra* note 9, at 181, 192, 199.

¹⁷ *Id.* at 181.

¹⁸ This volatile mixture of rising crime against a perception of penal leniency appears, for example, at the beginning of the era of Mass Incarceration. See NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES 46 (2014) (describing increasing penal severity against a backdrop of “a large increase in crime from the early 1960s until the 1980s”); Jeffrey Bellin, *The Changing Role of the American Prosecutor*,

funding sources may rise in opposition to progressive funders. These developments could undo progressive prosecutors' work. What's more, the heightened politicization of district attorney elections and a new consensus about the benefits of enhancing (not reducing) prosecutorial power, could remain long after the current wave of progressive prosecutors depart.¹⁹ As Rebecca Roiphe and Bruce Green's contribution to this Symposium highlights, this is actually the second time progressive prosecutors appeared on the landscape.²⁰ While few remember the first wave, which took place during the Progressive Era of the late-nineteenth and early-twentieth centuries, its legacy remains long after the movement disappeared.²¹

Even if society's moods do not shift, there is a danger that progressive prosecutors will remain consistently viable only in a discrete minority of jurisdictions. Prosecutorial independence is offset by limited, county-specific spheres of influence. An emerging dichotomy of American prosecution could neutralize prosecutor-driven reform. Urban prosecutors could send fewer people to prison, while rural prosecutors send more. Police could accelerate this trend by bypassing progressive prosecutors and taking arrests to federal prosecutors or seeking out other alternative paths to prosecution.²² Conservative legislators and judges may react to progressive prosecutors by constructing broadly applicable constraints on prosecutorial leniency.

II. A UNIVERSAL MODEL: PROSECUTORS AS CARETAKERS

As progressive prosecutors themselves have learned, they can reduce backlash with careful framing. Kim Foxx, speaking at this Symposium, stressed that she does not see herself as a progressive prosecutor. Building on her experience as a line prosecutor,²³ Foxx sought the State's Attorney position to ensure that Cook County prosecutes the right way. As this

OHIO ST. J. CRIM. L. (forthcoming 2020) [hereinafter Bellin, *Changing Role*] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3621474 [<https://perma.cc/ES93-8JNF>] (explaining how populist perceptions led to mass incarceration) [hereinafter Bellin, *Changing Role*].

¹⁹ Jeffrey Bellin, *Theories of Prosecution*, 108 CAL. L. REV. 1203, 1251 (2020) (presenting similar caution) [hereinafter Bellin, *Theories of Prosecution*].

²⁰ Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719.

²¹ *Id.*

²² Bellin, *The Power of Prosecutors*, *supra* note 9, at 199 (noting that "legislatures could permit police to litigate [minor] cases themselves, already a common occurrence in a number of jurisdictions").

²³ Hal Dardick & John Chase, *Foxx Capitalizes on Personal Story, Political Ties in State's Attorney Race*, CHI. TRIB. (Mar. 4, 2016, 6:37 PM), <https://www.chicagotribune.com/politics/ct-kim-foxx-states-attorney-profile-met-20160303-story.html> [<https://perma.cc/VB5P-YRGC>].

suggests, bifurcation between progressive and traditional prosecutors is not a necessary or even desirable outcome of the progressive prosecution movement. Although commentators often describe progressive prosecution as a challenge to a traditional prosecutor model, that dichotomy is misleading and likely counterproductive. Progressive prosecutors take advantage of the fact that there is no consensus about what prosecutors should be doing. True, there are prosecutors who leverage the amorphous “duty to do justice” to justify penal severity. But there is no reason to accept this as a default prosecutorial position. Severity is not an inherent component of the role of the American prosecutor. The degree to which it has come to be seen that way is simply another symptom of the lack of a normative theory of prosecutors.

Instead of embracing a dichotomous (progressive versus traditional) model, scholars could channel the energy of progressive prosecution into an updated normative model for all American prosecutors. This model would be informed by the seismic changes in the criminal justice system during the past few decades. The previous “do justice” vision of the prosecutor arose in a time of modest case volume, abundant trials, and broad sentencing discretion.²⁴ Now the system is characterized by overwhelming case volume, few trials, severe punishment, and mass incarceration.²⁵ Against this new backdrop, scholars should seek to identify generalizable principles to guide the conversation about what we should expect from today’s prosecutors. General principles are critically important because, as Maybell Romero’s contribution to this Symposium makes clear, the American prosecutorial landscape includes more than just big cities.²⁶

The core challenge is to craft a normative vision of the prosecutor’s role that is distinct from the idea that “prosecutors should do the things that I like.” A concrete theory could span rural and urban jurisdictions and time periods. It could also reduce inconsistency. By offering an answer to the “why” question, a normative theory would help prosecutors and voters figure out “what” prosecutors should be doing.

It is easier to identify flawed theories of the American prosecutor’s role than to come up with good ones. For the curious, here is my list of nonviable normative theories of prosecution:

²⁴ Bellin, *Theories of Prosecution*, *supra* note 19, at 1207, n.22 (describing how “doing justice” as the prosecutorial touchstone arose from a 1935 Supreme Court case, with similar origins in even earlier sources).

²⁵ See Bellin, *Reassessing Prosecutorial Power*, *supra* note 15, at 835–36, 840, 848 (describing the rise of mass incarceration, severe sentences, and plea bargaining).

²⁶ Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803 (2020).

- Collecting Convictions
- Implementing the Will of Voters
- Representing the Victim
- Representing the Police
- Abolishing the Criminal Justice System
- Doing Justice
- Public Safety
- Maximizing Severity

I discuss the problems with some of these theories elsewhere, specifically: “doing justice,” channeling voter preferences, severity, and representing police or victims.²⁷ The other listed theories, apart from public safety, have self-evident problems and are rarely seriously invoked as generalizable approaches to the prosecutor’s role. I include abolition on the nonviable list not because I think abolition itself (however defined) is nonviable, but because prosecutors cannot be the source of abolition. To my mind, abolition would have to come from those who create the system—currently judges and legislators—not those who work within it.

Public safety is increasingly invoked by American prosecutors across the ideological spectrum.²⁸ Some prosecutors use the phrase to justify harsh policies grounded in penal theories like incapacitation and deterrence.²⁹ More recently, progressive prosecutors invoke public safety as a negating principle. They reject certain punitive interventions, like lengthy prison terms, based on the absence of evidence that these interventions protect the public.³⁰

The problem for public safety-focused prosecutors is twofold. It is difficult to determine what course of action promotes public safety. And even when that can be determined, it is harder still to utilize the limited tool kit prosecutors possess to promote that course of action. When these obstacles are overcome, additional problems arise. Will progressive prosecutors really

²⁷ Bellin, *Theories of Prosecution*, *supra* note 19, at 1216–20; Bellin, *Changing Role*, *supra* note 18, at 17–18

²⁸ See Bellin, *Theories of Prosecution*, *supra* note 19, at 1216–20 (surveying landscape of prosecutorial invocations of justice and public safety as guiding principle).

²⁹ *Id.*

³⁰ *Id.*; see also Bellin, *Changing Role*, *supra* note 18, at 10 (“For a long time, people critiqued reformers by saying there’s not a proven track record for incarceration alternatives. Now, people are asking ‘What’s the evidence that *prison* works?’ What do we get in return for spending all this money on punishment (conservatives), and inflicting all this suffering (liberals)?”).

embrace harsh polices and conservative prosecutors embrace lenient ones when crime trends or empirical research suggests that doing so advances public safety? Regardless, even if we can reasonably expect such shifts, a public safety approach to prosecution supports a worrying expansion of the prosecutor's role in our society. Each incremental shift (e.g., delivering social services through diversion programs, overseeing police activities, monitoring polling places)³¹ may seem attractive, but these steps continue to enhance rather than diminish prosecutorial power.

What, then, is a viable normative theory of the prosecutorial role? In a recent article, "Theories of Prosecution,"³² I explore the possibility of conceptualizing the prosecutor as a servant of the law rather than a champion of justice or public safety. I take the "servant of the law" label from *Berger v. United States*, the famous Supreme Court case better known for its "do justice" directive.³³ I use "servant of the law," as the Court does, to emphasize the prosecutor's obligation to adhere to the protections the system offers the accused.³⁴ As *Theories of Prosecution* explains, the phrase is not intended to suggest that prosecutors should "robotically" charge every case that comes through the door.³⁵ Another label that perhaps better captures this aspect of my proposed normative approach is "caretaker of the criminal justice system." This label reflects the broad range of defendant-protective duties I mean to invoke by suggesting that prosecutors should serve the law.

A caretaker conceptualization mandates unwavering adherence to the many constitutional and statutory obligations that apply directly to prosecutors. But it goes further. Prosecutors as caretakers would seek to facilitate the ability of other actors, such as defense attorneys and judges, to

³¹ Kim Foxx's opening remarks for this Symposium noted that her focus on public safety includes embedding prosecutors in local police stations; cf. Cook County State's Attorney Office, *Innovative State's Attorney's Office Program Results in Dramatic Increase in Repeat Gun Charges* (Nov. 26, 2019), <https://www.cookcountystatesattorney.org/news/innovative-state-s-attorney-s-office-program-results-dramatic-increase-repeat-gun-charges> [https://perma.cc/NAV3-C4BN] (press release promoting "her office's initiative of taking prosecutors out of the courtroom and putting them directly into police districts struggling with high rates of gun- violence"); John N. Mitchell, *D.A.'s Office Promises Secure Election Day Across the City*, PHILA. TRIB. (Nov. 3, 2018), https://www.phillytrib.com/news/d-a-s-office-promises-secure-election-day-across-the/article_6588df2f-47b4-54fb-9202-412654907b87.html [https://perma.cc/YM6A-MX3M]. (discussing progressive prosecutors securing polling places).

³² Bellin, *Theories of Prosecution*, *supra* note 19.

³³ *Berger v. United States*, 295 U.S. 78, 88 (1935).

³⁴ Bellin, *Theories of Prosecution*, *supra* note 19, at 1212 (introducing servant of the law concept).

³⁵ *Id.* at 1213 ("Importantly, a prosecutor who embraces the servant-of-the-law model would not robotically enforce every criminal statute in every case.").

fulfill their constitutional and statutory obligations. Thus, a prosecutor should seek to ensure that defense attorneys are able to perform their constitutionally mandated roles by providing open file discovery and taking remedial measures when defense lawyering is constitutionally ineffective. In a caretaker role, prosecutors' concern with the system's fairness and legitimacy override any desire to obtain convictions or to foster public safety and justice.

In evaluating the caretaker approach, it is important to recognize the broad scope of prosecutors' legal obligations. These obligations are often overlooked because of the practical difficulty of proving violations. Problems of proof vanish, however, when thinking about normative aspirations. It may be difficult to prove that a prosecutor has, for example, exercised a peremptory challenge based on race in violation of *Batson v. Kentucky*.³⁶ But a prosecutor who internalizes that obligation will not need a judicial corrective.

A more powerful example can be found in the broader requirements of the Equal Protection Clauses of the Fifth and Fourteenth Amendments.³⁷ These provisions prohibit charging or plea bargaining based on race. Reformers have largely given up on this legal protection due to the difficulty of proving a violation.³⁸ But enforcement is not the issue when prosecutors internalize constitutional proscriptions. Caretaker prosecutors would work to ensure that no violations occur, whether or not challengers could substantiate an Equal Protection challenge in court. That means collecting and analyzing aggregate charging and plea-bargaining data to ensure that race plays no role.

One of the primary benefits of the caretaker conception of the prosecutor's role is that it resists framing prosecutors as white knights who must be given free rein to deliver justice. A caretaker model emphasizes that the criminal justice system is bigger than the prosecutor. (This was part of the attraction of the "servant of the law" label.) The caretaker prosecutor's

³⁶ *Batson v. Kentucky*, 476 U.S. 79, 79 (1986); see also Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1093 (2011) (highlighting difficulties of proving a *Batson* violation).

³⁷ See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("One of these constraints, imposed by the equal protection component of the Due Process Clause of the Fifth Amendment . . . is that the decision whether to prosecute may not be based on 'an unjustifiable standard such as race, religion, or other arbitrary classification.'") (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

³⁸ See *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) (emphasizing that "the standard for proving [selective prosecution claims] is particularly demanding, requiring a criminal defendant to introduce 'clear evidence' displacing the presumption that a prosecutor has acted lawfully").

primary role is to hold the system to its lofty ideals, not to manipulate the system to achieve particular outcomes.

As the preceding discussion suggests, many of the themes of progressive prosecutors fit neatly into the caretaker conceptualization, even if the rhetoric sounds different.³⁹ An important similarity arises in the desire to reduce the number of cases flowing through the system. All prosecutors can (and should) reduce the burden on our overloaded system by declining and dismissing the many low-severity cases that produce little except misery for defendants, witnesses, and victims. Eliminating these cases reduces jail overcrowding, incessant court delays, and general strain on the system and the folks caught in it. A caretaker would embrace those goals. Exactly how to craft dismissal policies is an important question, one that Ron Wright's contribution to the Symposium deftly takes on.⁴⁰

Beyond dismissals, both the caretaker prosecutor and the progressive prosecutor should eagerly offer lenience when the circumstances warrant. Presently, American jurisdictions are characterized by excessive volume and severity.⁴¹ To combat this penal sprawl, prosecutors should default to lenience whenever possible. Doing so would not violate some imagined need for prosecutorial severity or the separation of powers. Prosecutors are part of a complex system of checks and balances on the State's power to punish. We should worry about prosecutors who accumulate so much power that they override other checks and balances, like grand juries, petit juries, and judges. But there is far less reason to worry about prosecutorial leniency. Lenience is a critical component of prosecutors' structural role. In addition, elected prosecutors will be reluctant to exercise unwarranted leniency in the cases that matter, which will typically be cases that matter to voters.⁴²

As the foregoing suggests, there are good reasons to conceptualize the American prosecutor as a caretaker for the criminal justice system, defaulting to lenience when that system becomes so congested and punitive that it fails to deliver on its constitutional ideals. Doing so generates a variety of benefits. It offers the prospect of spinning off generalizable principles that can, in turn,

³⁹ See Chad Flanders & Stephen Galoob, *Progressive Prosecution in a Pandemic*, 110 J. CRIM. L. & CRIMINOLOGY 685, 692–93 (2020) (describing themes of progressive prosecution).

⁴⁰ Ronald F. Wright, *Prosecutors and Their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823 (2020).

⁴¹ See generally Bellin, *Reassessing Prosecutorial Power*, *supra* note 15 (describing problems of mass incarceration).

⁴² I develop this argument in Bellin, *Defending Progressive Prosecution*, *supra* note 9, at 27–28.

be used to craft specific guidelines for concrete action.⁴³ It does not rely on ideological labels, allowing adoption (to varying degrees) by reform-minded prosecutors regardless of political affiliation. It also does not incentivize zealotry or expanding prosecutor power. Finally, folding progressive prosecution into a generalizable norm of behavior eliminates the temptation to exclude non-ideologically progressive prosecutors or, even worse, push those prosecutors toward a severity-focused caricature.

Even as progressive prosecution remains an ongoing source of reform in liberal jurisdictions, it is important to consider the movement's impact outside of those jurisdictions. Nonprogressive prosecutors and the voters who elect them are also open to reform.⁴⁴ But they are not likely to embrace the "progressive" label or its accompanying rhetoric. The key to the overall success of progressive prosecution in the long run may be to invite these prosecutors in and offer them an alternative frame for prosecutor-driven reform. A new unifying norm of prosecutorial behavior, better suited to the modern era, could turn out to be the most important legacy of progressive prosecution.

⁴³ See generally Bellin, *Theories of Prosecution*, *supra* note 19 (sketching a framework for prosecutorial decision making).

⁴⁴ See generally Bellin, *Changing Role*, *supra* note 18 (exploring the appeal of progressive prosecution for non-progressive prosecutors).