

PREFACE

PREFACE: NEW DIRECTIONS IN PROSECUTORIAL REFORM

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ABSTRACT

This Preface, which introduces the American Criminal Law Review’s Symposium Issue on Reform-Minded Prosecution, begins by describing the power that prosecutors hold in the criminal legal system, which has historically gone unchecked and unquestioned. As mass incarceration, police violence, and wrongful convictions began to permeate the public consciousness, many communities focused their attention on the critical role of their local elected prosecutor and elected leaders who promised to do the job differently. Reform-minded prosecutors have enjoyed remarkable electoral successes over the past decade such that close to twenty percent of the U.S. population now resides in a jurisdiction with a reform-minded District Attorney (“DA”). The Preface goes on to discuss some of the groundbreaking accomplishments of these newly elected DAs, including establishing conviction integrity and sentence review units; ending prosecution of certain low-level offenses; holding law enforcement accountable; changing the treatment of young people in the criminal legal system; and more. Despite these promising initiatives, the Preface concludes with a discussion of the strong pushback, criticism, and opposition DAs have experienced. The DAs’ use of their discretion has been a focal point of many attacks and has even led to attempts at supersession from state-level officials who oppose the reform efforts. Nevertheless, reform-minded prosecutors continue to advocate for the needs of their communities and to inspire those who believe in the possibility of a fair and just criminal legal system.

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INTRODUCTION: AN IMPORTANT CONVERSATION AT A CRITICAL MOMENT OF CHANGE

November 5, 2019: San Franciscans elected Chesa Boudin—an unlikely candidate for District Attorney (“DA”)—on a bold reform agenda.¹ As a career public defender whose parents were incarcerated for their roles in an act of leftist political criminal activity decades earlier,² Boudin brought a highly unusual perspective to the role of chief law enforcement officer. And his campaign platform reflected that perspective. Instead of vowing to prosecute and imprison an ever-growing share of the population or angling to convince voters that he was “tougher” than his opponent—the sum and substance of far too many DA races in past decades (and still today)—Boudin promised, among other things, to end cash bail, halt prosecutions for a range of low-level offenses, expand programs to address root causes of criminal activity, reduce racial disparities in criminal enforcement, and foster police accountability.³ Boudin’s victory, together with other groundbreaking electoral wins in the preceding years by reform-minded DA candidates in Boston, Chicago, Dallas, Durham, Kansas City, and elsewhere, was seen by many at the time as “reflect[ing] a nationwide shift in public attitudes away from jailing and imprisoning offenders and toward rehabilitating them.”⁴

June 7, 2022: San Franciscans voted to recall Boudin, removing him midway through his term. Career prosecutor Brooke Jenkins—who had resigned from the DA’s office early in Boudin’s tenure and became a key player in the recall campaign against him—was appointed by the mayor to take his place.⁵ Jenkins immediately sought to undo many of Boudin’s signature reforms: within days of her

1. Jordan Freiman, *Chesa Boudin Wins Tightly Contested San Francisco District Attorney’s Race*, CBS NEWS (Nov. 9, 2019, 11:28 PM), <https://www.cbsnews.com/news/san-francisco-da-race-chesa-boudin-wins-tightly-contested-election-over-suzy-loftus-2019-11-09/>.

2. MIRIAM ARONI KRINSKY, CHANGE FROM WITHIN: REIMAGINING THE 21ST-CENTURY PROSECUTOR 5 (2022); Benjamin Wallace-Wells, *The Trial of Chesa Boudin*, NEW YORKER (July 29, 2021), <https://www.newyorker.com/news/annals-of-inquiry/the-trial-of-chesa-boudin>.

3. See Melissa Gira Grant, *San Francisco Deputy Public Defender Chesa Boudin Announces Run for District Attorney*, APPEAL (Jan. 15, 2019), <https://theappeal.org/san-francisco-deputy-public-defender-chesa-boudin-announces-run-for-district-attorney/>.

4. E.g., Derek Hawkins, *Progressive Lawyer Wins San Francisco District Attorney Race, Continuing National Reform Trend*, WASH. POST (Nov. 10, 2019, 2:51 AM), <https://www.washingtonpost.com/nation/2019/11/10/progressive-lawyer-wins-san-francisco-district-attorney-race-continuing-national-reform-trend/>; Ariel Ramchandani, *A Texas Prosecutor Fights for Reform*, ATLANTIC (Oct. 24, 2019), <https://www.theatlantic.com/politics/archive/2019/10/can-john-creuzot-reform-texas-prosecution/600592/>; Chris Williams, *New Durham County DA Working to Change Justice System*, SPECTRUM NEWS (Jan. 4, 2019, 3:40 PM), <https://spectrumlocalnews.com/nc/triangle-sandhills/news/2019/01/04/new-durham-county-da-works-to-change-justice-system>; Emily Bazelon & Miriam Krinsky, *There’s a Wave of New Prosecutors. And They Mean Justice.*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html>.

5. See Mallory Moench & Megan Cassidy, *S.F.’s New D.A. Is Brooke Jenkins, the Prosecutor Who Left Chesa Boudin’s Office and Joined the Recall*, S.F. CHRON. (July 7, 2022, 10:26 PM), <https://www.sfchronicle.com/sf/article/S-F-s-new-D-A-is-Brooke-Jenkins-the-17290873.php>.

appointment, she elevated the priority of drug crime prosecutions, restricted access to diversion programs, and pushed out prosecutors and staffers hired by Boudin to advance his reform initiatives.⁶ Many journalists and criminal justice observers interpreted Boudin's ouster as a bellwether event signaling that ambitious prosecutorial reform no longer has political cachet and that voters—not just in San Francisco but across California and, indeed, the country—were eager to turn back the clock and return to the tough-on-crime prosecutors and policies of the past.⁷ After all, if prosecutorial reform could not survive in a city famous for its leftist political orientation and vibrant counterculture, why would anyone expect it to flourish elsewhere?

In reality, Boudin's loss reveals more about the idiosyncrasies of California's recall process, which enabled a small yet energized opposition bankrolled by ultra-wealthy donors and police unions to attack Boudin without having to put forward a candidate of their own, than it does about the political viability of prosecutorial reform or criminal justice reform writ large.⁸ Indeed, on the very same day Boudin was recalled, reform-minded candidates running for local DA offices and state attorney general won or advanced in key races elsewhere in California, including in Bay Area jurisdictions larger than San Francisco.⁹ And during the year or so leading up to the recall and in the months that have elapsed since, numerous reform-minded prosecutorial candidates were elected for the first time or won their races for re-election.¹⁰ Fair and Just Prosecution, a nonprofit project dedicated to prosecution-focused criminal justice reform, estimates that *reform-minded prosecutors*—a descriptor we prefer to the widely used term *progressive prosecutor*¹¹—now represent nearly twenty percent of all U.S. residents.¹² In short, reports predicting that prosecutorial reform is on its way out are greatly exaggerated.

But while Boudin's recall and other recent setbacks hardly mark the beginning of the end of the struggle to reform prosecution in the United States, they do highlight the need in this moment for reform-minded DAs, advocates, and academics to reflect on what that movement has achieved to date, what obstacles loom on the

6. See Rachel Marshall, *Brooke Jenkins Can't Have It Both Ways*, APPEAL (Aug. 5, 2022), <https://theappeal.org/brooke-jenkins-san-francisco-district-attorney/>.

7. See, e.g., Charles Fain Lehman, *The Broken Windows Election*, WASH. FREE BEACON (June 8, 2022), <https://freebeacon.com/democrats/the-broken-windows-election/>; Sam Levin, *Bid to Recall San Francisco DA Could Be Bellwether for Progressive Prosecutors*, GUARDIAN (June 2, 2022, 1:17 PM), <https://www.theguardian.com/us-news/2022/jun/02/chesa-boudin-san-francisco-da-recall>.

8. For discussion of these and other idiosyncratic features of the Boudin recall election see, for example, John Pfaff, *What the San Francisco DA Recall Really Tells Us*, SLATE (June 10, 2022), <https://slate.com/news-and-politics/2022/06/chesa-boudin-recall-what-it-means-and-what-it-doesnt.html>.

9. See Miriam Aroni Krinsky, *Can Progressive DAs Beat the 'Tough on Crime' Backlash?*, CRIME REP. (June 13, 2022), <https://thecrimereport.org/2022/06/13/how-progressive-das-can-beat-the-tough-on-crime-backlash/>.

10. *Id.*

11. We discuss some of the reasons behind our choice of terminology below. See *infra* pp. 1375–76.

12. See Miriam Aroni Krinsky, *How (Some) Prosecutors Changed the Face of Justice in 2021*, CRIME REP. (Dec. 7, 2021), <https://thecrimereport.org/2021/12/07/memo-to-biden-establish-a-task-force-on-21st-century-prosecution/>.

horizon, and where to go from here. In the span of less than a decade, reform-oriented DAs have already accomplished more than many criminal justice scholars and advocates once thought possible. They have slashed jail populations, reduced or eliminated requests for cash bail, leveraged their discretion to divert or decline to prosecute low-level offenses, launched conviction integrity units and (more recently) sentence review units, embraced restorative justice practices, prosecuted police officers for criminal misconduct, embraced new thinking around non-carcer harm reduction approaches to address problematic drug use, and much more.¹³ This important work deserves to be recognized, celebrated, and built upon.

At the same time, though, reform-minded DAs across the country—not just Boudin in San Francisco—are being attacked and undermined by a host of tough-on-crime forces (including prominent media figures, politicians, police unions, judges, and even line prosecutors in their offices), while also facing criticism from reform advocates¹⁴ concerned that they are failing to move quickly enough in pursuing urgently needed transformative change. Should prosecutorial reformers temper or reframe their goals and aspirations in order to preempt or alleviate blowback from tough-on-crime stakeholders? Or, instead, should they redouble their efforts so as to try to make a deeper, more lasting impact? How should reform-minded DAs respond to critics to their right who claim they are improperly usurping the legislature's role in setting crime policy or that their decarceral interventions are fueling a rise in crime, and critics to their left who argue that their reforms are insufficiently ambitious and may even risk reproducing and legitimating the entrenched systemic problems they hope to ameliorate? These are just a few of the vexing questions that reform-oriented prosecutors, together with advocates striving for change and scholars who study prosecution, must grapple with as they aspire to transform how the criminal justice system operates in their jurisdictions. This probing dialogue is necessary both to embed and deepen long overdue change in places where the work of reform has already begun and to enable it to gain a foothold in the many cities and counties—as well as state-level and federal prosecution offices—where conventional notions about the role of the prosecutor remain the dominant paradigm.

This Symposium, hosted by the *American Criminal Law Review* and held at Georgetown University Law Center on October 28, 2022, brought together elected DAs who embrace reform principles, nonprofit leaders who support their work, and academics who have spent years researching and analyzing the prosecution function, for a conversation about these and other questions concerning the role of prosecutors in the broader struggle to reform criminal justice. Six Articles are being published in connection with the Symposium that articulate a range of views on key issues such as: what are the ethical implications of internal resistance to prosecutorial reform; how can and should DAs seeking to propel change deal with

13. See *infra* p. 1376.

14. See *infra* pp. 1377–78.

pushback within their offices; what is the appropriate way to exercise discretion; what are the barriers to reforming prosecution; what should students consider when deciding between a career in prosecution or public defense; and more.¹⁵ The Symposium also offered a look at *Change from Within: Reimagining the 21st-Century Prosecutor*, a book published in fall 2022 by Fair and Just Prosecution and The New Press that features profiles of thirteen transformative DAs who describe in their own words how they have used the power of the prosecutor's office to change business as usual in the justice system, and what has driven their commitment to change even in the face of organized resistance and heated attacks.¹⁶ Our aim in this Preface is to contextualize the Symposium's panel discussions and Articles and to share some observations of our own regarding the importance, and limitations, of prosecutorial reform, as well as the increasingly powerful and organized backlash currently confronting many reform-minded DAs.

I. THE GROWING MOVEMENT TO REFORM CRIMINAL PROSECUTION IN AMERICA

Prosecutors wield a great deal of power in the U.S. criminal legal system. Through their influence or control over charging, bail setting, plea negotiation, sentencing, and the criminal lawmaking process, they have considerable say over who gets formally accused of criminal wrongdoing, whether individuals facing accusations are confined in a cell or released while their cases are pending, what charges are filed, and, if convictions result, how severe the resulting disposition and sentence will be.¹⁷ Yet until very recently, prosecutors have been subjected to remarkably little scrutiny by the media, voters, judges, bar disciplinary authorities, or any other mechanism of accountability.¹⁸ Limited data and research existed to shine a light on how prosecutors actually used the broad discretion the law entrusted to them. For this and other reasons, prosecutorial elections—which in theory are supposed to serve as the primary mechanism in most U.S. jurisdictions for holding

15. See Brooks Holland & Steven Zeidman, *Progressive Prosecutors or Zealous Defenders, From Coast-to-Coast*, 60 AM. CRIM. L. REV. 1467 (2023); Abbe Smith, *Progressive Prosecution Or Zealous Public Defense? The Choice For Law Students Concerned About Our Flawed Criminal Legal System*, 60 AM. CRIM. L. REV. 1517 (2023); Taled El-Sabawi, Jennifer J. Carroll & Morgan Godvin, *Drug Induced Homicide Laws And False Beliefs About Drug Distributors: Three Myths That Are Leaving Prosecutors Misinformed*, 60 AM. CRIM. L. REV. 1381 (2023); Laurie L. Levenson, *Progressive Prosecutors: Winning The Hearts And Minds Of Line Prosecutors*, 60 AM. CRIM. L. REV. 1495 (2023); Bruce A. Green & Rebecca Roiphe, *A Fiduciary Theory Of Progressive Prosecution*, 60 AM. CRIM. L. REV. 1431 (2023); Cynthia Godsoe & Maybell Romero, *Prosecutorial Mutiny*, 60 AM. CRIM. L. REV. 1403 (2023).

16. See KRINSKY, *supra* note 2. Each chapter is accompanied by an image inspired by the prosecutor's vision of justice and created by an artist who was once incarcerated. *Change from Within* brings to life many of the complexities of prosecution reform described in this preface and throughout the Articles that follow and underscores the need for courageous leadership in prosecutors' offices to promote transformational change grounded in fairness, equity, transparency, and compassion.

17. See, e.g., FAIR & JUST PROSECUTION, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 3 (2018), https://www.fairandjustprosecution.org/staging/wp-content/uploads/2018/12/FJP_21Principles_Interactive-destinations.pdf.

18. See, e.g., ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 15 (2007).

chief prosecutors (and through them, line prosecutors) accountable for their policies and discretionary decisions—were rarely contested.¹⁹ Even when an incumbent was challenged, campaigns tended to revolve around the occasional high-profile case or scandal rather than an informed picture of the elected leader’s philosophy and vision of “justice,” or how the prosecutor’s office functions in the typical case.²⁰

This situation is finally beginning to change. Less than a decade ago, amid mounting criticism and protest directed against an incarceration rate in our nation that is second to none, as well as police violence, wrongful convictions, racial disparity in criminal law enforcement, and the complicity of prosecutors in producing these pathologies, tough-on-crime incumbent DAs who once felt safe in their seats suddenly faced credible threats from reform-minded candidates who promised to be fundamentally different kinds of prosecutors.²¹ Journalist Emily Bazelon traces the origins of this shift to 2015, when national criminal justice reform networks and funders partnered with death penalty abolitionists to launch three campaigns, two in Mississippi and one in Louisiana, to unseat district attorneys who had frequently sought death sentences.²² Once those campaigns succeeded, reform advocates selected another set of targets, chief among them Anita Alvarez, the top prosecutor in Cook County (which includes Chicago).²³ Former prosecutor and reformer Kim Foxx defeated Alvarez by a landslide in the Democratic primary, all but ensuring victory in the general election, with a voting base energized by the nascent Black Lives Matter movement and outraged over the notorious police murder of Laquan McDonald that Alvarez and police officials had unsuccessfully tried to cover up.²⁴

Foxx’s win in Chicago inspired dozens of other non-traditional candidates across the country to run for the position of chief prosecutor. Though not all of them prevailed, many did. As of 2019, Bazelon estimated that “about 40 million Americans, more than 12 percent of the population, live[d] in a city or county with a D.A. who . . . could be considered a reformer.”²⁵ In the years that followed, the increasingly organized national effort to elect reform-minded prosecutors

19. Carissa Byrne Hessick, Sarah Treul & Alexander Love, *Understanding Uncontested Prosecutor Elections*, 60 AM. CRIM. L. REV. 31, 31 (2023).

20. See, e.g., Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582–83 (2009). But cf. Ronald F. Wright, Jeffrey L. Yates & Carissa Byrne Hessick, *Electoral Change and Progressive Prosecutors*, 19 OHIO ST. J. CRIM. L. 125, 125, 150–51 (2021) (finding that prosecutor elections are contested more often than they used to be).

21. See EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 78–79 (2019).

22. *Id.* at 80. In Bazelon’s telling, before 2015 there were a few “partial exceptions to harsh law-and-order prosecution,” citing as examples the “long-serving D.A.s” in Seattle and Milwaukee, as well as Kamala Harris in San Francisco. *Id.*

23. See Mark Guarino, *Chicago’s Prosecutor Loses Reelection Battle in the Shadow of the Laquan McDonald Video*, WASH. POST (Mar. 15, 2016, 11:22 PM), <https://www.washingtonpost.com/news/post-nation/wp/2016/03/15/chicagos-prosecutor-faces-a-reelection-battle-in-the-shadow-of-the-laquan-mcdonald-video/>.

24. *Id.*

25. BAZELON, *supra* note 21, at 290.

continued to gain momentum as the police killings of George Floyd, Breonna Taylor, and far too many others sparked a wave of protests against police violence, and as the COVID-19 pandemic exposed jails, prisons, and unwarranted police contact as “potential public health hazard[s].”²⁶ Today, nearly twenty percent of the U.S. population resides in a place where the DA’s office is headed by a reformer.²⁷ While some might assume that reform-minded DAs could not hope to win elections outside large urban centers, reformers are now leading DA’s offices in small and midsize cities in both rural and urban jurisdictions.²⁸ And projects such as the Beyond Big Cities Initiative are underway to support and build networks among reform-oriented prosecutors in small and rural jurisdictions.²⁹

But what exactly is a reform-minded prosecutor—or a progressive prosecutor, for that matter?³⁰ Though the term *progressive prosecutor* is in vogue now, we find the term *reform-minded prosecutor* (or reform-oriented, etc.) more accurate and helpful in this context for a number of reasons, not least that DAs who happen to be Democrats—but who are not serious about criminal justice reform—can all too easily declare themselves progressive without taking meaningful steps to change how their offices approach crime and make themselves accountable to the public. Additionally, some committed reformers are Republicans or prefer not to describe their approach to prosecution using terms that have a particular partisan or political valence. Framing discussions in terms of “progressive” prosecution needlessly excludes these reformers from the conversation.

As we use the term here, a reform-minded prosecutor is a chief prosecutor who uses the power of their office to make the criminal justice system smaller, fairer, and more accountable.³¹ While no single policy or practice can provide a litmus test for a prosecutor’s commitment to reform, Fair and Just Prosecution, in collaboration with Emily Bazelon, the Brennan Center for Justice, and The Justice Collaborative, has published a statement of principles that articulates what a thoroughgoing program of prosecutorial reform might look like.³² The principles cover

26. E.g., Maybell Romero, *Law Enforcement as Disease Vector*, 87 U. CHI. L. REV. ONLINE 35, 42 (2020) (referring to policing as a potential source of COVID-19 in communities).

27. See Shaila Dewan, *The Lessons Liberal Prosecutors Are Drawing from San Francisco’s Backlash*, N.Y. TIMES (June 15, 2022), <https://www.nytimes.com/2022/06/13/us/justice-reform-boudin-recall-san-francisco.html>.

28. See *Prosecution Beyond Big Cities*, INST. FOR INNOVATION IN PROSECUTION, <https://www.prosecution.org/beyond-big-cities> (last visited Mar. 1, 2023).

29. *Id.*

30. See generally Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1418 (2021) (discussing various ways of responding to the question about what a progressive prosecutor is by defining four ideal types of progressive prosecutors).

31. Line prosecutors, of course, can also be reformers—a complex and important topic we do not delve into here. For further discussion, see PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 118–20 (2009) (discussing progressive head prosecutors and subversive prosecutors); Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1542 (2012); Smith, *supra* note 15.

32. See FAIR & JUST PROSECUTION, *supra* note 17, at 3.

a lot of ground, urging reform-minded prosecutors to decline to prosecute and divert cases whenever feasible; minimize reliance on imprisonment, probation, and parole; lend support to drug treatment and restorative justice initiatives; collect data and make that data accessible to the public; launch conviction integrity units; strive to reduce racial disparities; and much more. These guideposts help to concretize what it means for a prosecutor to seek “justice within the bounds of the law”³³ while working for and within a grotesquely oversized criminal justice system that all too often serves as an engine of racial and social inequality and harm rather than safety and healing.

The DAs who are part of this exciting new national reform effort have already accomplished extraordinary things in a relatively short span of time. Kings County (Brooklyn, NY) DA Eric Gonzalez,³⁴ Philadelphia DA Larry Krasner,³⁵ and Multnomah County (Portland, OR) DA Mike Schmidt³⁶ have all established units that look not just at innocence claims but also past extreme sentences that no longer benefit public safety. “In Georgia’s Western Judicial Circuit, DA Deborah Gonzalez ended prosecution of simple possession of marijuana.”³⁷ New research on the DA’s office in Suffolk County, Massachusetts, and the policies of its former DA Rachael Rollins, “found that non-prosecution of low-level offenses can decrease future criminal activity,” rather than, as her critics feared, cause crime to rise.³⁸ In Michigan’s Washtenaw County, Prosecuting Attorney Eli Savit “has implemented groundbreaking policies ending the charging of consensual sex work, possession of buprenorphine and methadone, and contraband cases that arise from non-public safety traffic stops.”³⁹ Los Angeles County DA George Gascón “created an independent panel to review use-of-force cases his predecessors opted not to prosecute.”⁴⁰ And, in Pima County, Arizona, County Attorney Laura Conover committed to treating kids like kids by not transferring juvenile justice cases into adult criminal court.⁴¹ These illustrations could be multiplied many times over.⁴² For a movement that first got off the ground less than a decade ago, the idea of electing and then supporting DAs who are committed to criminal justice reform is showing great promise.

33. CRIM. JUST. SECTION, AM. BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-1.2(b) (4th ed. 2015).

34. Brooklyn District Attorney’s Office, *Post-Conviction Justice Bureau*, <http://www.brooklynda.org/post-conviction-justice-bureau/> (last visited Feb. 28, 2023).

35. Philadelphia District Attorney’s Office, *Conviction Integrity Unit*, <https://phillyda.org/safety-and-justice/investigations/conviction-integrity-unit-ciu/> (last visited Feb. 28, 2023).

36. Krinsky, *supra* note 12.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. PIMA CNTY. ATT’Y LAURA CONOVER & THE PEOPLE’S OFF., PIMA CNTY. ATT’Y’S OFF., YEAR ONE REVIEW 5 (Dec. 27, 2021), <https://www.pcao.pima.gov/wp-content/uploads/2021/12/2021PCAOyear-endreportWEBwLinks.pdf>.

42. For discussion of these and other examples, see Krinsky, *supra* note 12.

II. CROSSCURRENTS

With bold change inevitably comes strong resistance, and these change agents have not been shielded from crosscurrents. Prosecutors seeking to implement reform initiatives have frequently—and increasingly—encountered fierce opposition from various quarters.⁴³ The most intense pushback often comes from local police, who are accustomed to working hand in glove with their prosecutorial partners, when they see that DAs are willing to hold individuals accountable regardless of the uniform they wear.⁴⁴ Some reform-minded prosecutors have faced crippling blowback not just from the police but also from governors, legislatures, judges, and other officials, as well as local and national media.⁴⁵ And the new wave of prosecutors must also grapple with the quiet yet insidious risk of subversion from within: the risk that line prosecutors or their supervisors will ignore reform policies and aspirations by carrying on with business as usual when making high-stakes, low-visibility decisions about charging, bail, plea offers, sentencing, and other matters. The remainder of this Preface addresses challenges posed by the ongoing COVID-19 pandemic, resistance to reform-minded prosecution both from within as well as outside of DA's offices, and conflicts between reform-minded prosecutors and other actors in state government.

With prosecutorial reform still in its infancy, the arrival of the COVID-19 pandemic complicated even the best-laid plans to institute promised changes. Perhaps even more dangerous to the cause of reform-minded prosecution, the pandemic altered crime patterns in profound yet often contradictory ways and occurred at a time of record levels of gun purchases.⁴⁶ While property crimes have decreased in most places, certain kinds of violent crime, notably including homicides, have increased nationwide, and many have pointed fingers at reform-minded prosecutors despite the absence of any credible evidence of causal effect.⁴⁷ In fact, this rise has occurred not only in urban centers but also in suburbs, small towns, and rural areas,⁴⁸

43. See generally Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization*, 19 OHIO ST. J. CRIM. L. 1, 4 (2022) (describing opposition to prosecutorial nonenforcement from within DA's offices, judges, state and federal officials, and police departments).

44. *Id.* at 4, 8–9, 27.

45. *Id.* at 23–25, 33.

46. RICHARD ROSENFELD & ERNESTO LOPEZ, NAT'L COMM'N ON COVID-19 & CRIM. JUST., PANDEMIC, SOCIAL UNREST, AND CRIME IN U.S. CITIES: MARCH 2021 UPDATE 3 (May 2021), https://counciloncj.org/wp-content/uploads/2021/11/Pandemic_Social_Unrest_and_Crime_in_US_Cities_-_March_2021_Update.pdf; Mark Berman, Lenny Bernstein, Dan Keating, Andrew Ba Tran & Artur Galocha, *The Staggering Scope of U.S. Gun Deaths Goes Far Beyond Mass Shootings*, WASH. POST (July 8, 2022), <https://www.washingtonpost.com/nation/interactive/2022/gun-deaths-per-year-usa/>.

47. Ames Grawert & Noah Kim, *Myths and Realities: Understanding Recent Trends in Violent Crime*, BRENNAN CTR. (July 12, 2022), <https://www.brennancenter.org/our-work/research-reports/myths-and-realities-understanding-recent-trends-violent-crime>.

48. See Maya King, *First Covid Raised the Murder Rate. Now It's Changing the Politics of Crime*, POLITICO (Oct. 28, 2021, 4:30 AM), <https://www.politico.com/news/2021/10/28/covid-murder-crime-rate-517226>; Dan Frosch, Kris Maher & Zusha Elinson, *Rural America Reels from Violent Crime. 'People Lost Their Ever-Lovin'*

and in places with tough-on-crime prosecutors at the helm.⁴⁹

Even before the pandemic, some prosecutors and law enforcement were speaking out against reform-minded DAs and their efforts to bring about positive change, with some prosecutors going so far as to join unions and professional associations with police to counter such measures.⁵⁰ From the beginning, conservative news media played a central role in framing and amplifying backlash against reform-minded prosecutors. Black women who have been elected on platforms of reform have been subjected to particularly virulent forms of harassment, including racial slurs, stereotypes, and even death threats.⁵¹

The blowback against reform-minded prosecutors grew even more strident and fractious as the movement expanded in size and scope. In Georgia, for instance, Deborah Gonzalez, running to be the first Latina DA in the state, campaigned on a reform agenda focused on, among other things, addressing systemic racism in the criminal legal system, declining to prosecute low-level drug offenses, and jailing fewer people.⁵² The reprisals she faced came quickly. The governor attempted to delay the election, originally scheduled to occur on November 3, 2020, until November of 2022, claiming he had the authority to appoint an interim district attorney in the meantime.⁵³ Gonzalez had to sue the governor to ensure that the election was held in a timely fashion.⁵⁴

California has also been an ongoing site of struggle when it comes to prosecutorial reform. The recall of San Francisco DA Chesa Boudin has been covered above.⁵⁵ Multiple efforts to recall Boudin's colleague in Los Angeles County, DA George Gascón, have also been attempted but have failed so far.⁵⁶ But Gascón has also faced formidable opposition from within his own office. Much of the controversy centers on a set of policy directives he issued on his first day in office instructing line prosecutors to stop filing sentence enhancements—including Three

Minds., WALL. ST. J. (June 10, 2022), <https://www.wsj.com/articles/violent-crime-rural-america-homicides-pandemic-increase-11654864251>.

49. See Rachael Eisenberg & Allie Preston, *Progressive Prosecutors Are Not Tied to the Rise in Violent Crime*, CTR. FOR AM. PROGRESS (Oct. 26, 2022), <https://www.americanprogress.org/article/progressive-prosecutors-are-not-tied-to-the-rise-in-violent-crime/>.

50. See Maybell Romero, *Prosecutors and Police: An Unholy Union*, 54 U. RICH. L. REV. 1097, 1099 (2020).

51. I. India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795, 830–31 (2022).

52. Keri Blakinger, *Prosecutors Who Want to Curb Mass Incarceration Hit a Roadblock: Tough-on-Crime Lawmakers*, MARSHALL PROJECT (Feb. 3, 2022), <https://www.themarshallproject.org/2022/02/03/prosecutors-who-want-to-curb-mass-incarceration-hit-a-roadblock-tough-on-crime-lawmakers>.

53. Foster Steinbeck, *Deborah Gonzalez Sues Gov. Brian Kemp for Delayed DA Election*, RED & BLACK (May 21, 2020), https://www.redandblack.com/athensnews/deborah-gonzalez-sues-gov-brian-kemp-for-delayed-da-election/article_975b2ada-9b0d-11ea-837f-c330d81f37ae.html.

54. See *Gonzalez v. Governor of Georgia*, 978 F.3d 1266, 1268–70 (11th Cir. 2020).

55. See *supra* notes 5–12 and accompanying text.

56. *Second Attempt to Recall Los Angeles Prosecutor George Gascón Fails to Make Ballot*, NBC NEWS (Aug. 15, 2022, 9:10PM), <https://www.nbcnews.com/news/us-news/second-attempt-recall-los-angeles-prosecutor-george-gascon-fails-make-rcna43243>.

Strikes enhancements—in new cases and to withdraw previously filed enhancements in older cases.⁵⁷ Less than a month into Gascón’s term, the county prosecutors union sued him and the DA’s office, asking the L.A. Superior Court to halt Gascón’s prohibition on alleging prior strikes and certain other aspects of his policy.⁵⁸ The superior court agreed with some parts of the union’s arguments, an intermediate appellate court affirmed some of the superior court’s ruling, and the case is now pending before the California Supreme Court.⁵⁹ In recognition of the broader implications of the issues, sixty-seven current and former elected prosecutors and attorneys general filed an *amicus* brief in support of Gascón in this litigation.⁶⁰

Writing in 2018, Professor Quinn Yeargain presciently anticipated the conflicts now arising between locally elected reform-minded DAs and state-level officials, particularly governors, who oppose their reform efforts. Yeargain explained:

Admittedly, the election of reformers as local prosecutors does not directly affect the *legal* structure of the prosecutorial discretion regime. But the anticipated response by state governments, especially in the form of supersession, may impose some new de facto limits on prosecutorial discretion. Under the current statutory regimes, cases of supersession have been exceedingly rare: local prosecutors and statewide officials appear to have developed an equilibrium over the last half-century, which explains the historically low rate of supersession. However, this equilibrium is likely based on an implicitly-agreed upon set of mutual expectations: state officials expect that local prosecutors will vigorously enforce the laws passed by the state legislature, and local prosecutors expect that, in all but the rarest cases, their discretion will not be superseded. But those expectations will undergo stress as reformers—especially those who opt to refrain altogether from prosecuting certain crimes or seeking certain punishments—come into office.⁶¹

Supersession is the end result of Florida governor Ron DeSantis’ suspension of an elected prosecutor, State Attorney Andrew Warren, from office in Hillsborough County this past August for (among other reasons) stating that he would use his discretion to not prosecute cases relating to abortion or the provision of gender-

57. Special Directive from George Gascón, Dist. Att’y, to All Deputy Dist. Att’ys (Dec. 7, 2020), <https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-08.pdf>.

58. Matthew Ormseth, *Union Representing Deputy District Attorneys Sue Gascón Over Enhancements Policy*, L.A. TIMES (Dec. 30, 2020), <https://www.latimes.com/california/story/2020-12-30/union-deputy-district-attorneys-sues-gascon-enhancements-policy>.

59. See Murray, *supra* note 43, at 20, 32.

60. Brief of Amici Curiae Current & Former Elected Prosecutors & Attorneys General in Opposition to Petitioner’s Application for Preliminary Injunction, Ass’n of Deputy Dist. Att’ys for L.A. Cnty. v. Gascón, No. 20STCP04250 (L.A. Cnty. Super. Ct. Feb. 2, 2021), <https://perma.cc/X7SQ-Q2FM>.

61. Tyler Q. Yeargain, Comment, *Discretion versus Supersession: Calibrating the Power Balance between Local Prosecutors and State Officials*, 68 EMORY L.J. 95, 108–09 (2018) (citations omitted).

affirming health care for transgender minors.⁶² As political rifts continue to deepen in red (and purple) states between state-level officials representing more conservative constituencies and reform-minded DAs elected in more liberal localities, we should expect to see more extensive use of supersession and other tools to attempt to assert state control over the prosecutors elected by voters in cities and counties in the years to come.

CONCLUSION

Despite these attempts to limit the ability of reform-minded prosecutors to enact meaningful change, the movement continues to grow in response to the critical need for criminal legal reform and the demands of communities who are tired of business as usual. It is our hope that the conversations and Articles emerging from this Symposium will offer insight and inspiration as the project of prosecutorial reform evolves and searches for its proper place within the larger struggle to reform the U.S. criminal legal system.

62. Kim Bellware & Lateshia Beachum, *DeSantis Sued by Prosecutor Suspended Over Stance on Abortion-related Crime*, WASH. POST (Aug. 17, 2022, 8:45 PM), <https://www.washingtonpost.com/nation/2022/08/17/andrew-warren-desantis-lawsuit/>.