

PROGRESSIVE PROSECUTION OR ZEALOUS PUBLIC DEFENSE?
THE CHOICE FOR LAW STUDENTS CONCERNED ABOUT OUR
FLAWED CRIMINAL LEGAL SYSTEM

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ABSTRACT

This Article addresses a question asked by many law students concerned about our flawed criminal legal system: should they become a prosecutor in an office run by a progressive prosecutor, or a public defender in an office devoted to zealous, client-centered (or holistic) defense? The Article starts with an anecdote about Philadelphia District Attorney Larry Krasner’s road show to recruit law students and young lawyers, and then proceeds as follows: First, this Article makes the case for progressive prosecution; then, it makes the case for zealous indigent defense; then, it identifies the obstacles and challenges for both kinds of lawyers and offers a brief comment on prosecutor and defender “personalities;” finally, it offers thoughts on who, in the end, has more power to make meaningful change.

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INTRODUCTION

When he was first elected, the now twice-elected, Philadelphia District Attorney Larry Krasner¹ had a traveling roadshow. The aim was recruitment² of law students and lawyers to what would be one of the country’s first truly progressive

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1. See Katie Meyer, *Philly DA Larry Krasner Cruises to Reelection Victory*, WHY? (Nov. 2, 2021), <https://why.org/articles/philly-da-larry-krasner-cruises-to-reelection-victory/> (reporting that Krasner soundly beat both an unconventional and poorly funded Republican rival in the general election and a more conventional Democratic rival during the primary race).

2. See Chris Palmer, *Larry Krasner’s First Year as Philly DA: Staff Turnover, Fewer Cases, Plenty of Controversy*, PHILA. INQUIRER (Jan. 6, 2019), <https://www.inquirer.com/news/larry-krasner-philadelphia-district->

prosecutor offices.³ One of Krasner's stops was at Georgetown University Law Center, where I teach. His central pitch was kind of insulting. As part of his exhortation to join his office, he said to law students: "If you want to be a hippie, wear a beret, and have no power, be a public defender. But if you want to have real power to effect change in the criminal legal system, join me."⁴

The *beret* part was especially annoying. What decade are we in? I've been an indigent criminal defense lawyer—first a public defender (at the same office where Larry Krasner began his legal career)⁵ and now a law professor running a criminal law clinic—for 40 years, and I've never worn a beret. My clinic students knew how I felt about that beret comment. They gave me a bright red beret as an end-of-the-year gift.

I had no problem with the "hippie" reference if what Krasner meant was someone with a countercultural or antiauthoritarian bent. This would be a fair characterization of a lot of public defenders.⁶ On the other hand, we are *lawyers*—a conventional profession if ever there was one. Our hippie hearts are not always apparent under our suits.

attorney-staff-reform-cases-first-year-20190106.html (noting Krasner's national recruitment efforts amid turnover of thirty percent of the office's staff).

3. Many scholars and commentators have offered definitions of the progressive prosecutor. *See, e.g.*, Darcy Covert, *The False Hope of the Progressive Prosecutor Movement*, THE ATLANTIC (June 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/06/myth-progressive-prosecutor-justice-reform/619141/> (describing a commitment to reducing mass incarceration, ending harsh sentencing practices, being mindful of the role prosecutorial misconduct plays in wrongful convictions, and eliminating racial disparities at all stages of the criminal legal process); Angela J. Davis, *Reimagining Prosecution: In Search of the True Progressive*, 3 UCLA CRIM. JUST. L. REV. 1, 27 (2019) (arguing against a "litmus test or list of requirements for progressive prosecutors" and urging support for prosecutors committed to reducing the incarceration rate and ending racial disparities in the system); Paul Butler, *Progressive Prosecutors Are Not Trying to Dismantle the Master's House, and the Master Wouldn't Let Them Anyway*, 90 FORDHAM L. REV. 1983, 1988 (2022) (describing a commitment to reducing incarceration, holding police officers accountable, reallocating funds to public services, declining to prosecute low-level offenses, expanding diversion programs, and appointing reform-minded people to critical positions in the office); Avanindar Singh & Sajid A. Khan, *A Public Defender Definition of Progressive Prosecution*, 16 STAN. J. C.R. & C.L. 475, 476–77 (2021) (describing a more extensive and specific list of what it means to be progressive from a public defender perspective); Allison Young, *The Facts on Progressive Prosecutors*, CTR. FOR AM. PROGRESS (Mar. 19, 2020), <https://www.americanprogress.org/article/progressive-prosecutors-reforming-criminal-justice/> (describing a commitment to improving public safety, reducing mass incarceration, and refusing to prosecute cases brought by police officers with a history of dishonesty). This paper takes a broad view of progressive prosecution instead of getting mired down in definitions.

4. According to colleagues at other law schools, this was not unique to Georgetown but part of his standard stump speech.

5. We are both alumni of the Defender Association of Philadelphia. I was a Trial Attorney, Special Defense Unit Attorney, and then Senior Trial Attorney from 1982 to 1990.

6. *See* ABBE SMITH, GUILTY PEOPLE 142 (2020) (describing the prototypical defender as "antiauthoritarian, nonconformist, irreverent, skeptical, slightly voyeuristic, slightly exhibitionist, and resilient"); *see also* Barbara Allen Babcock, Commentary, *Defending the Guilty*, 32 CLEVELAND ST. L. REV. 175, 175 (1983) (noting that "[c]riminal defense work takes a peculiar mind-set, heart-set, soul-set"); Mary Halloran, *An Ode to Criminal Lawyers*, CALIFORNIA LAWYER, June 1998, at 96 (describing criminal defense lawyers as "eccentric" and a "breed unto themselves").

It was the “no power” versus “real power” pitch that truly galled me. Krasner is a former public defender. He has experienced the kind of power defenders have: the power to face down a brutal criminal legal system on behalf of another person; to keep a ruthless prosecutor at bay; to stand beside and embrace the humanity of a fellow human being at his or her most vulnerable.

Krasner surely felt that power as both a public defender and, later, a civil rights lawyer; he must have experienced the importance of holding those in power accountable.⁷ So must his various former-defender-turned-progressive-prosecutor colleagues, including Chesa Boudin (former San Francisco public defender elected San Francisco District Attorney in 2020 and recalled in 2022 after a vicious law enforcement and right-wing campaign against him),⁸ Parisa Dehghani-Tafti (former D.C. public defender elected Commonwealth’s Attorney for Arlington County, Virginia in 2019),⁹ Wesley Bell (former St. Louis public defender who became St. Louis County Prosecuting Attorney in 2019),¹⁰ and Mark Gonzalez (former criminal defense lawyer who became District Attorney of Nueces County, Texas, in 2016).¹¹

Have they all jumped ship in pursuit of the next best cause? Is it ego-driven—are they seeking a bigger stage, larger audience, wider acclaim? Or, as Krasner claims, have they ascended to a superior, more powerful platform for progressive change?¹²

It’s a curious phenomenon. Prosecutors often leave prosecutor offices to hang a shingle as a defense attorney or join a firm specializing in white collar criminal

7. See generally *Philly D.A.* (PBS: Independent Lens 2021), <https://www.pbs.org/independentlens/documentaries/philly-da/> (examining Krasner’s transition from criminal defense and civil rights lawyer to District Attorney during his first term).

8. See Annie Lowrey, *What Chesa Boudin Revealed About an Undemocratic Election System*, THE ATLANTIC (June 10, 2022), <https://www.theatlantic.com/ideas/archive/2022/06/chesa-boudin-recall-election-trend-san-francisco/661248/> (examining critically the recall of Chesa Boudin from the perspective of our democratic processes).

9. See Parisa Dehghani-Tafti, *Why I Am Fighting for Prosecutorial Discretion in Arlington*, WASH. POST (Aug. 21, 2020), https://www.washingtonpost.com/opinions/local-opinions/why-i-am-fighting-for-prosecutorial-discretion-in-arlington/2020/08/20/9395512e-e0c6-11ea-b69b-64f7b0477ed4_story.html (laying out her progressive agenda); Parisa Dehghani-Tafti, ARLINGTON VA. (2023), <https://www.arlingtonva.us/Government/Departments/Courts/Commonwealth-Attorney/Meet-Parisa>.

10. See Ron Allen & Brittany Noble Jones, *Game Changer: Wesley Bell Ousts Bob McCulloch for Prosecutor in St. Louis County*, NBC NEWS (Aug. 10, 2018), <https://www.nbcnews.com/news/nbcblk/game-changer-wesley-bell-ousts-bob-mcculloch-prosecuting-attorney-stl-n899671> (discussing Bell’s victory over McCulloch, who had served in the role for over twenty-five years).

11. See Justin Jouvenal, *From Defendant to Top Prosecutor, This Tattooed Texas DA Represents a New Wave in Criminal Justice Reform*, WASH. POST (Nov. 19, 2018), https://www.washingtonpost.com/local/public-safety/from-defendant-to-top-prosecutor-this-tattooed-texas-da-represents-a-new-wave-in-criminal-justice-reform/2018/11/19/e1dca7cc-d300-11e8-83d6-291fceed2ab1_story.html (reporting about Gonzalez’s unique life story, including having been a criminal defendant).

12. See Chesa Boudin & Tal Klement, *Progressive Prosecution from Politics to Policy to Practice*, 16 STAN. J. C.R. & C.L. 489, 490 (2021) (describing why the authors left public defense offices to become prosecutors, including their realization that “systemic change comes from the institutions that prescribe and implement public policy”).

defense or civil litigation. But public defenders do not often become prosecutors.¹³ Instead, they leave PD offices for better pay, or because they were not prepared for the volume and pressure, they don't like how a particular office functions, or someone in their life wants them to become a "real lawyer."¹⁴

Yet, maybe Larry Krasner and the others are on to something. It's worth considering. In this Article, I will discuss the question at the heart of Krasner's road show pitch: whether law students who want to do something about our flawed criminal legal system should join a progressive prosecutor office instead of a public defender office. The Article will proceed as follows: First, it will make the case for progressive prosecution; then, it will make the case for zealous indigent defense; the Article will then identify the obstacles and challenges for both kinds of lawyers and offer a brief comment on the prosecutor and defender "personality;" finally, it will offer some thoughts on who, in the end, has more power to make meaningful change.

I. THE CASE FOR PROSECUTION

Prosecutors have enormous power.¹⁵ Their power to punish—through charging decisions, bail practices, and plea-bargaining—has grown with the arc of mass incarceration.¹⁶

Krasner is not the first person to suggest that you can do more good as a prosecutor than a defender because of this power. My dear friend and coauthor, the late Monroe Freedman, maintained that a "conscientious prosecutor" can do more good than a zealous defender.¹⁷ He believed that prosecutors who exercise their power wisely¹⁸ go after those most deserving of criminal punishment while refraining from prosecuting those for whom criminal punishment is too blunt an instrument. He also believed that, while defense lawyers may be able to expose unlawful police behavior and prosecutorial misconduct, "a prosecutor of 'honor, temperament, and professionalism,' . . . can prevent it from ever happening."¹⁹

Freedman was ever mindful of the destructive power of prosecutors. He knew that the power to charge is the "power to destroy"—lives, reputations, and life

13. *But see* Randy Bellows, *Notes of a Public Defender*, in PHILIP B. HEYMANN & LANCE LIEBMAN, *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 69, 97 (1988) (recounting the author's growing despair defending guilty people as a public defender at the Public Defender Service for the District of Columbia and his decision to become a federal prosecutor).

14. These reasons have regularly been reported to the Author.

15. *See generally* MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 289–327 (5th ed. 2016) (discussing prosecutors' ethics).

16. *See generally* JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017) (examining the prosecutor's role in mass incarceration); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835 (2018) (reviewing Pfaff's book).

17. FREEDMAN & SMITH, *supra* note 15, at 325.

18. *Cf.* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1521–23 (1981) (arguing for a more principled and accountable system of prosecutorial discretion).

19. FREEDMAN & SMITH, *supra* note 15, at 325.

savings.²⁰ He also rued the growth of prosecutorial power in sentencing, which has been a contributing force in mass incarceration.²¹ But he believed in the potential of honorable and conscientious prosecutors to do the right thing. These prosecutors could keep the system fair.

Freedman's positive view of prosecutorial power came from both professional experience and scholarly analysis, but it might also have been personal. His beloved son Caleb, who died at thirty-three of heart failure, was a prosecutor at the Miami-Dade County State Attorney's Office for several years. Freedman believed in his son's ability to do justice.²²

Freedman might have had others in mind, as well—like Philip Heyman, a Harvard law professor who headed the Criminal Division of the Justice Department during the Carter administration, was Deputy Attorney General in the Clinton administration (a position from which he resigned, partly because of his opposition to the enhanced sentencing provisions and new prison construction in the Clinton Crime Bill), and worked with Archibald Cox as Special Counsel investigating and prosecuting crimes connected with the Watergate scandal.²³ Heyman served four presidents over six decades: Kennedy, Johnson, Carter, and Clinton.²⁴ He was a devoted public servant and civil libertarian who believed in speaking “truth to power.”²⁵ Sounding eerily relevant today, he wrote in an unpublished memoir:

For those who wish to enter public service, remember that your duty runs deeper than the orders of any president . . . Do not trade away your credibility and reputation for political favor or advancement . . . Be loyal to the law, the values of the country, and have the courage to stand up when others threaten those ideals.²⁶

20. See *id.* at 289 (quoting Joseph E. DiGenova, *Investigated to Death*, N.Y. TIMES, Dec. 5, 1995); see also Monroe H. Freedman & Abbe Smith, *Machen Tramples on the Mayor's Due Process*, WASH. POST (Mar. 21, 2014), https://www.washingtonpost.com/opinions/machen-tramples-on-the-mayors-due-process/2014/03/21/f780eca6-afaa-11e3-9627-c65021d6d572_story.html (arguing that United States Attorney for the District of Columbia, Ronald Machen, sullied then-Mayor Vincent Gray's reputation and derailed his reelection by making a lengthy statement at a press conference in which Machen detailed a series of allegedly illegal and corrupt acts by someone who was obviously Gray, without issuing charges).

21. See generally PFAFF, *supra* note 16; see also Matt Watkins, *Prosecutor Power #1: Mass Incarceration: John Pfaff on Mass Incarceration*, CTR. FOR CT. INNOVATION (Apr. 2018), <https://www.courtinnovation.org/publications/john-pfaff-podcast> (podcast featuring Professor John Pfaff, pointing out how unfettered prosecutorial discretion, especially in the charging decision, has contributed to mass incarceration).

22. See generally MODEL RULES OF PRO. CONDUCT r. 3.8, cmt. 1 (AM. BAR ASS'N 2020) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

23. See Katharine Q. Seelye, *Philip B. Heymann, 89, Dies; Prosecuted Watergate and Abscam*, N.Y. TIMES (Nov. 30, 2021), <https://www.nytimes.com/2021/11/30/us/philip-heyman-dead.html>; Christine Perkins, *In Memoriam: Philip B. Heymann, 1932-2021*, HARV. L. BULL. (Dec. 2, 2021), <https://hls.harvard.edu/today/in-memoriam-philip-b-heyman-1932-2021/>.

24. See Perkins, *supra* note 23; Seelye, *supra* note 23.

25. Perkins, *supra* note 23.

26. Seelye, *supra* note 23.

Freedman might have also thought about James Vorenberg, another Harvard law professor who played a prominent role in the Watergate investigation as a senior assistant to Cox, and also served as executive director of the President's Commission on Law Enforcement and the Administration of Justice, known as the Katzenbach Commission, during the Johnson administration.²⁷ In his work on the Commission, Vorenberg championed the view that crime was a complex social problem that needed to be addressed by a range of services, not simply by increasing police budgets.²⁸ He served on commissions reviewing bail and police interrogation procedures, the right to counsel, and pretrial publicity, and he was the first director of the Justice Department's Office of Criminal Justice.²⁹ He also wrote a seminal article on the role of the prosecutor as a matter of law and ethics.³⁰

Of course, Freedman and these Harvard law professor exemplars—who preceded the progressive prosecutor “movement”³¹ but were surely progressive—are not the only arguments for progressive prosecution. Emily Bazelon's 2019 book *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration* is both a critique of conventional prosecution and an embrace of new district attorneys who “hold the key to change” and can “protect against convicting the innocent[,] . . . guard against racial bias[,] . . . [and] curtail mass incarceration.”³²

Again, all politics might be local. As it happens, Emily Bazelon's sister, Dana Bazelon, was once a public defender and is now a Senior Policy Advisor for Larry Krasner.³³ She is proud of what her sister is doing (full disclosure: Dana is a former student of mine).

Emily Bazelon recognizes the critical role that prosecutors have played in the various pathologies of our criminal legal system and laments the ease with which prosecutors do damage to people, families, and communities. But she is optimistic about the future because of the rise of progressive prosecutors—Bazelon estimates that currently twelve percent of the United States population lives in a city or

27. See William Glaberson, *James Vorenberg, Watergate Prosecutor's Right-Hand Man, Dies at 72*, N.Y. TIMES (Apr. 13, 2000), <https://www.nytimes.com/2000/04/13/us/james-vorenberg-watergate-prosecutor-s-right-hand-man-dies-at-72.html>.

28. See *id.*

29. See Adam Bernstein, *James Vorenberg Dies*, WASH. POST (Apr. 14, 2000), <https://www.washingtonpost.com/archive/local/2000/04/14/james-vorenberg-dies/23fa81e0-0fe8-4a22-8b56-e61bec4a5188/>.

30. See Glaberson, *supra* note 27.

31. See generally EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019); see also Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 194–202 (2021); Covert, *supra* note 3; Hana Yamahiro & Luna Garzón-Montano, *A Mirage Not a Movement: The Misguided Enterprise of Progressive Prosecution*, 46 N.Y.U. REV. L. & SOC. CHANGE 130, 134–39 (2022).

32. BAZELON, *supra* note 31, at xxvii.

33. Dana Bazelon, UNIV. OF PA. CAREY L. SCH., <https://www.law.upenn.edu/faculty/bazelond> (last visited Oct. 16, 2022); Indep. Lens, *Who's Who in Philly D.A.*, PBS (Apr. 27, 2021), <https://www.pbs.org/independentlens/blog/whos-who-in-philly-d-a/>.

county with a reform-minded district attorney³⁴—and the speed with which chief prosecutors can make change. Bazelon writes: “[W]e can stop caging people needlessly *right now* if we choose prosecutors who will open the locks.”³⁵

Bazelon fairly gushes about the promise of the progressive prosecution movement: “The movement to elect a new kind of prosecutor is the most promising means of reform I see on the political landscape.”³⁶ Ironically, Bazelon identifies the prosecutor as the single most important figure in criminal justice reform because of the prosecutor’s unregulated, nearly boundless power, something she complained about in her critique of old-breed prosecutors: “The power of the D.A. [] makes him or her the actor—the only actor—who can start to fix what’s broken without changing a single law.”³⁷ As Professor Jeffrey Bellin remarks, “[T]he reform conversation no longer centers prosecutorial power as the disease afflicting the criminal justice system. Prosecutors are the cure. The Darth Vader of criminal justice commentary has become its Captain Marvel.”³⁸

Of course, Bazelon is not alone in her enthusiasm for the progressive prosecutor project, whether or not it is truly a movement.³⁹ The enthusiasm is shared by voters (at least in those jurisdictions where twelve percent of the population resides, minus residents of San Francisco after Chesa Boudin’s recall),⁴⁰ some activists,⁴¹ some law students,⁴²

34. BAZELON, *supra* note 31, at 290.

35. *Id.* at xxxi.

36. *Id.* at 296.

37. *Id.* at xxvii.

38. Jeffrey Bellin, *Defending Progressive Prosecution: A Review of Charged by Emily Bazelon*, 39 YALE L. & POL’Y REV. 218, 221 (2020).

39. *See generally* Covert, *supra* note 3; Yamahiro & Garzón-Montano, *supra* note 31.

40. *See* Lowrey, *supra* note 8.

41. *See, e.g.*, Juana Summers, Lexie Schapitl & Barrie Hardyman, *John Legend Wants to Transform the Criminal Justice System, One DA at a Time*, NPR (May 23, 2022, 5:09 AM), <https://www.npr.org/2022/05/23/1099690649/john-legend-progressive-prosecutors-district-attorneys-activism> (featuring an interview with award-winning entertainer, and “activist and advocate for criminal justice reform and voting rights” John Legend regarding his support for progressive prosecutors and their power to decarcerate); Daniel Marans, *Black Activist Starts Group That Aims to Elect Progressive Prosecutors*, HUFFINGTON POST (Feb. 15, 2018, 1:35 PM), https://www.huffingtonpost.com/entry/black-activist-elect-progressive-prosecutors_us_5a85b64ee4b0058d55670e4f (reporting that activist Shaun King has founded Real Justice PAC to help elect “reform-minded prosecutors” at the county and city levels); *see also* Scott Bland, *George Soros’ Quiet Overhaul of the U.S. Justice System*, POLITICO (Aug. 30, 2016, 5:25 AM), <https://www.politico.com/story/2016/08/george-soros-criminal-justice-reform-227519> (reporting that Soros has given financial support to progressive prosecutors); Jesse McKinley, *Soros Adds Intrigue and \$800,000 to D.A. Race, Backing Progressive*, N.Y. TIMES (Nov. 4, 2019), <https://www.nytimes.com/2019/11/04/nyregion/soros-election-da.html> (reporting that Soros supported Shani Curry Mitchell, progressive candidate for D.A. in Monroe County, New York).

42. *See, e.g.*, Heather L. Pickerell, *Critical Race Theory & Power: The Case for Progressive Prosecution*, 36 HARV. BLACKLETTER L.J. 73, 74 (2020) (featuring a Harvard law student making the case for why people who are concerned about the disproportionate impact of mass incarceration on people of color should support progressive prosecutors based on critical race theory).

some legal scholars,⁴³ and, of course, those who have led or joined progressive prosecutor offices.⁴⁴

Professor Rebecca Roiphe, a legal ethics scholar and former Manhattan prosecutor, believes that anyone “devoted to social justice and concerned about flaws in the criminal justice system should seriously consider a career in prosecution.”⁴⁵ For support, she points to the independence and professionalism of Special Prosecutor Robert Mueller’s investigation of former President Donald Trump’s dealings with Russia, and the election of Larry Krasner,⁴⁶ calling this a “unique moment” for criminal justice reform.⁴⁷

Although the twice-elected Krasner might indicate something about the future of progressive prosecution—if he is not undemocratically removed from office by the Pennsylvania legislature⁴⁸—it is not clear how the Mueller investigation supports the point that this is a unique moment for reform. There have always been independent and professional prosecutors who take their duties seriously, including holding those in power accountable. But this doesn’t mean they haven’t played a role in maintaining our wretched system.⁴⁹

Roiphe’s plea to join prosecutors’ offices is not tied only to those led by an independent prosecutor or self-proclaimed progressive. She argues that, in this moment, no matter what prosecution office a lawyer joins, the conversation will now include the perspectives of the Black Lives Matter movement⁵⁰ and Innocence Movement,⁵¹ as well as a concern about over-criminalization and over-incarceration. She urges thoughtful people to seize the moment: “We need people

43. See Rebecca Roiphe, *Revisiting Abbe Smith’s Question, “Can A Good Person Be a Good Prosecutor?” in the Age of Krasner and Sessions*, 87 *FORDHAM L. REV.* 25, 26 (2018) (arguing that good, concerned people should become prosecutors, especially given the rise of progressive prosecution).

44. See Boudin & Klement, *supra* note 12, at 490.

45. Roiphe, *supra* note 43, at 26.

46. *Id.* at 25–28.

47. *Id.* at 29.

48. See Jacey Fortin, *Pennsylvania House Votes to Impeach Philadelphia’s Progressive D.A.*, *N.Y. TIMES* (Nov. 16, 2022), <https://www.nytimes.com/2022/11/16/us/krasner-impeached-pennsylvania.html>.

49. See PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* 101-03 (2009) (detailing the story of a former federal prosecutor acknowledging his own complicity).

50. See *About*, BLACK LIVES MATTER, <https://blacklivesmatter.com/about/> (last visited Feb. 17, 2023) (describing the founding of Black Lives Matter in 2013 and its increasing global presence as a movement working to eradicate white supremacy and stop violence inflicted on Black communities by both the state and vigilantes).

51. See Keith A. Findley, *Defining Innocence*, 74 *ALB. L. REV.* 1157, 1157 (2010) (“The discovery of hundreds of wrongful convictions in the past twenty years has reshaped the debate about criminal justice in this country, spawning what has become known as the ‘Innocence Movement.’”); Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 *B.U. L. REV.* 779, 779–88 (2018) (discussing the Innocence Movement’s influence on misdemeanors); see generally DANIEL S. MEDWED, *BARRED: WHY THE INNOCENT CAN’T GET OUT OF PRISON* (2022) (featuring a founding member of the board of directors of the Innocence Network, a consortium of innocence projects throughout the world, arguing that the system prefers finality to fairness, even when the accused or convicted are innocent); DANIEL S. MEDWED, *PROSECUTION COMPLEX: AMERICA’S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT* 2–3 (2013) (examining how prosecutors are more driven by obtaining convictions than fairness, even where there is a strong claim of innocence).

inside prosecutors' offices who will engage in this conversation in a meaningful way and help reform their offices to pursue a more just kind of prosecution with a more nuanced understanding of crime, race, poverty, and the criminal justice system."⁵² This is a fine, if modest, exhortation. A prosecutor capable of "nuance" is better than the alternative—but this is hardly a prototype for real change.

II. THE CASE FOR PUBLIC DEFENSE

This is the fun part of the Article for me to write. I am a career indigent defense lawyer—a dyed-in-the-wool, deeply committed, *diehard defender*. I still consider myself a public defender notwithstanding my fancier digs at Georgetown. In a time of identity politics, this is my identity.

I believe my defender colleagues and I are on the right side of history during a time of persistent mass incarceration.⁵³ I have felt this way for a long time.⁵⁴ No matter the call from across the political spectrum to change the direction of American criminal justice, or the reduction in prison and jail populations during the COVID-19 pandemic, we still have nearly two million people behind bars in this country.⁵⁵ Americans seem to have gotten used to that number, but it ought to prompt a moment of stunned silence. *Two million people*.

And here's the bottom line about prosecutors, defenders, and mass incarceration: prosecutors lock people up and defenders get people out.

Put another way, zealous indigent defenders try to accomplish on the inside what activists for Black Lives and others are trying to accomplish on the outside.⁵⁶ We do everything we can to free our clients or limit their loss of freedom one by one by one. We focus on the individual as a matter of necessity⁵⁷ and ethics.⁵⁸ But

52. Roiphe, *supra* note 43, at 29.

53. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 8 (2011) (discussing the factors that gave rise to the "arbitrary, discriminatory, and punitive beast" that the American criminal justice system has become).

54. See generally Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 *GEO. J. LEGAL ETHICS* 355 (2001) (examining the forces, both external and internal, that make prosecutors complicit in our punishment-hungry criminal legal system).

55. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), <https://www.prisonpolicy.org/reports/pie2022.html> (documenting the almost two million people currently held "in 1,566 state prisons, 102 federal prisons, 2,850 local jails, 1,510 juvenile correctional facilities, 186 immigration detention facilities, and 82 Indian country jails, as well as in military prisons, civil commitment centers, state psychiatric hospitals, and prisons in U.S. territories").

56. See Abbe Smith, *Defending Gideon*, 26 *U.C. DAVIS SOC. JUST. L. REV.* 235, 264–66 (2022) (arguing that defenders are "allies" and "accomplices" of various movements seeking to change the criminal legal system).

57. Defending an individual against the enormous power of the state requires hard work, careful preparation, and *focus*.

58. See MODEL RULES OF PRO. CONDUCT, r. 1.3, cmt. 1 (AM. BAR. ASS'N 2020) ("A lawyer should pursue a matter on behalf of a client . . . and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); CRIM. JUST. STANDARDS FOR THE DEFENSE FUNCTION, standard 4-1.2(b) (AM. BAR. ASS'N 2017) ("The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients' counselor and advocate with

this does not mean we are disengaged from broader efforts to change the criminal legal system. Historically, the invention of the public defender and the movement for a universal right to counsel in criminal cases arose as a progressive cause.⁵⁹ In keeping with this tradition, many indigent defenders see themselves as part of a social movement advancing the interests of the poor, disproportionately Black and Brown people caught up in the criminal legal system. Many are supporters of Black Lives Matter, the prison abolition movement,⁶⁰ and other efforts for social and racial justice.

Zealous defenders fight for the least among us and push back against the ruthless processing of human beings and destruction of human potential. We do this by building trusting relationships with clients, conducting thorough investigation, filing pretrial motions that challenge how the state got its claws into our clients, engaging in negotiations that provide our clients with choices, and thoroughly preparing for trial and (if necessary) sentencing.

We try the hell out of our cases. We do what we can to interrupt and impede the prison pipeline.

The work of public defenders is essential to the pursuit of racial and social justice—and to upholding individual dignity and humanity. We stand up for the meek, the flawed, and the unruly. Our clients have often been beaten down by life and it shows. They may mean less than nothing to others, but they are everything to us. Barbara Babcock, the first full-time director of the Public Defender Service for the District of Columbia and first tenured woman at Stanford Law School, captures this well:

[W]e had our clients. As maddening as they could be, they were the best part of the job. The fragility and difficulty of their lives, the humanity we came to see in each, and our hopes of making a difference for them were the ever-sustaining constants of the work. Though I have spent many

courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.”).

59. See SARA MAYEUX, *FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA* 24–56, 187 (Heather Ann Thompson & Rhonda Y. Williams eds., 2020) (referring to the “vision of modern democracy in which lawyers stood at the center and in which every individual, no matter how poor or friendless, could count on the state to provide him with a lawyer to make his case against that same state,” and tracing the origin of public defense to the Progressive Era); see also BARBARA BABCOCK, *WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ* 1–3 (2011) (recounting the life and work of Clara Foltz, the first woman admitted to the California Bar and a pioneer of the idea of the public defender); Barbara Allen Babcock, *Inventing the Public Defender*, 43 *AM. CRIM. L. REV.* 1267, 1280–94 (2006) (same).

60. See PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 2–7, 229–35 (2017) (arguing for a radical rethinking of criminal law enforcement in the U.S. and endorsing the prison abolition movement); Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 *HARV. L. REV.* 1613, 1616 (2019) (arguing that prison abolition challenges existing ideas of legal justice by focusing on “accountability and repair” rather than punishment); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 *UCLA L. REV.* 1156, 1161–72 (2015) (bringing prison abolition into conversation with criminal justice theory); Dorothy E. Roberts, *Democratizing Criminal Law as an Abolitionist Project*, 111 *NW. U. L. REV.* 1597, 1604–07 (2017) (arguing that making criminal law democratic and fully inclusive requires an abolitionist approach).

rewarding years writing and teaching, I still count my public defender days as the most fulfilling of my career because the need of my clients for my help was so urgent and the demands of my role were so clear.⁶¹

III. THE OBSTACLES AND CHALLENGES FOR PROGRESSIVE PROSECUTION AND ZEALOUS INDIGENT DEFENSE

Neither progressive prosecution nor zealous indigent defense is easy. Each endeavor has serious obstacles and challenges. Law students and lawyers considering one or the other should have eyes wide open.

A. Obstacles and Challenges for Progressive Prosecution

The most important thing to note about prosecutors is that most do not start out as the chief district attorney. Nor are they starting out in the heady positions that Philip Heymann and James Vorenberg occupied. Most rookie prosecutors begin as line prosecutors.⁶²

The work of line prosecutors in most offices, even those run by progressives, is not very different from that of past generations, notwithstanding an increased number of diversionary programs, greater access to pretrial release, and the advent of conviction integrity units.⁶³ The work is not glamorous. Line prosecutors have lots of cases, especially in various calendar courts. They start out with a towering stack of case files and the goal is to dispose of these files—and the cases they reflect—as quickly as possible.⁶⁴

Most prosecutors start out with misdemeanors—petty crimes committed by petty criminals.⁶⁵ Young prosecutors get used to prosecuting hapless people in a range of contexts, against whom there is often police testimony, making it easy to convict.⁶⁶ Then, when they have shown they can try cases to conviction, they move up to felonies, by which time, meting out punishment has become a matter of course.⁶⁷

61. BARBARA BABCOCK, *FISH RAINCOATS: A WOMAN LAWYER'S LIFE* 89 (2016).

62. See David E. Patton, *A Defender's Take on "Good" Prosecutors*, 87 *FORDHAM L. REV. ONLINE* 20, 23 (2018).

63. Georgetown's criminal defense clinics hold an annual class session on "The Prosecutor's Perspective." Every year, we invite local prosecutors to talk about their work—what they find challenging, what they find gratifying, and so on. Their description of the work in 2022 is not very different from what their predecessors said twenty-five years ago.

64. See DAVID HEILBRONER, *ROUGH JUSTICE: DAYS AND NIGHTS OF A YOUNG D.A.* 23–45 (1990) (a former Assistant District Attorney in Manhattan recounting his first days as a D.A. when the docket consisted of 250 cases, most of which were misdemeanors); *id.* at 36 (calling it "assembly-line litigation, the battle of the forms").

65. See SMITH, *supra* note 6, at 7–36 (sharing stories from misdemeanor court and commentary on what goes on there).

66. See generally ISSA KOHLER-HAUSMANN, *MISDEMEANOR LAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS* POLICING (2019) (critically examining misdemeanor court); ALEXANDRA NATAPOFF, *PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL* (2018) (same).

67. See SMITH, *supra* note 6, at 37–66 (offering narratives and analysis of "ordinary felons" in the criminal legal system).

As Professor Paul Butler has written, the “day-to-day work of [line] prosecutor[s] is geared toward punishing people whose lives are already messed up . . . [and to] applying the criminal law, not ameliorating its negative effects.”⁶⁸ He explains that this does not mean that people who victimize other people should not be held accountable; some people should be in prison to protect the rest of us. But, he says, we should be honest about what prosecutors do, and “piling on is the main work.”⁶⁹ “Adding up the costs of a lifetime of deprivation and then presenting the bill to the person who suffered it seems an odd job for a humanitarian.”⁷⁰

Even the best-intentioned young prosecutors can lose their way. Butler recalls his own approach to becoming a prosecutor as that of a “liberal critic,” an “avenging Undercover Brother who would change the system from the inside.”⁷¹ Instead, he ended up “collaborat[ing] with the system’s injustice.”⁷² Butler writes:

What happened to that progressive guy who joined the office? My aspirations of changing the system got shot down because I liked winning too much, and I was good at it. I wanted to be well regarded by my peers, to be successful in my career, and to serve my community. And the way to do that, I learned on the job, was to send as many people to jail as I could. I wasn’t so much hoodwinked as seduced.⁷³

It is important to note that although some progressive chief prosecutors have come up through the ranks—Kim Foxx in Chicago,⁷⁴ Marilyn Mosby in Baltimore⁷⁵—many did not, including Larry Krasner, Chesa Boudin, Wesley Bell, and Parisa Dehghani-Tafti, all of whom were public defenders. As federal defender David Patton remarked about Krasner not having been a prosecutor, “[I]t is hard to imagine he would be as bold in his work now if he had.”⁷⁶

Patton notes that mass incarceration was not brought to us by “bad people,” but by “perfectly ordinary people”—

People who, by and large, have always thought that they were “doing justice” or who generally felt that they were serving their communities

68. BUTLER, *supra* note 50, at 102. Butler has not changed his mind about what line prosecutors do. Although he would counsel a person interested in prosecution to work for a progressive prosecutor, he remains a “friendly skeptic of the utility of a person becoming a line prosecutor as a route to instituting change or transformation in the criminal legal system.” Butler, *supra* note 3, at 1992–93.

69. BUTLER, *supra* note 50, at 102.

70. *Id.*

71. *Id.* at 101.

72. *Id.*

73. *Id.* at 105.

74. Davis, *supra* note 3, at 7–10 (discussing Foxx’s efforts and challenges as a progressive prosecutor); Butler, *supra* note 3, at 1996–98 (same).

75. John Woodrow Cox, Keith L. Alexander & Ovetta Wiggins, *Who Is Baltimore State’s Attorney Marilyn J. Mosby?*, WASH. POST (May 1, 2015) https://www.washingtonpost.com/local/who-is-baltimore-states-attorney-marilyn-j-mosby/2015/05/01/12be80e2-f013-11e4-8abc-d6aa3bad79dd_story.html; Butler, *supra* note 3, at 1990–91 (discussing Mosby’s efforts and challenges as a progressive prosecutor).

76. Patton, *supra* note 62, at 23.

and simply getting good experience as young trial lawyers before going into politics or getting better-paying jobs elsewhere. Perhaps by process of self-selection, prosecutors tend to have more of a judgmental bent than the population at large, but that hardly qualifies as a national crisis. The crisis, to my mind, is not that we have the wrong people in positions of such enormous power. It is that we have anybody in positions of such enormous power.⁷⁷

Yet, there seems to be a culture of prosecution that gets inculcated early on that includes a certain arrogance, rigid thinking, and a focus on whether a case can be proven rather than whether it should be prosecuted.⁷⁸

Patton argues that a big problem with prosecutors is that they are given a “dual role” in the system: On the one hand, they are “ministers of justice,” concerned not about winning, but whether justice is done—for the community, the alleged victim, and the accused. On the other hand, they are adversarial lawyers who “win when they *win*.”⁷⁹ As part of their work,

[P]rosecutors are predisposed to push the law and the facts in their favor. In their daily practice, they routinely argue for fewer Fourth, Fifth, Sixth, and Eighth Amendment protections for criminal defendants. They routinely defend disturbing conduct of police officers. They routinely advocate for evidentiary rulings that are favorable to the State. And they routinely argue on the side of severity in sentencing.⁸⁰

A recent case I tried with a post-graduate fellow illustrates this point. Our client—I will call him Mr. Williams—was charged with stealing a car battery from a wrecked car that had been sitting in a rundown auto repair lot. The defense theory was lack of intent (Mr. Williams believed the car was abandoned) and necessity (he took the battery because he was in terrible pain, and a drug dealer offered to give him Percocet in exchange for a car battery). Mr. Williams was in his 60s, but looked 90, weighed 86 pounds, and had a dreadful combination of health problems including HIV, acute kidney disease, wasting syndrome, and avascular necrosis (dying bone tissue due to a lack of blood supply), which causes debilitating pain. He was so frail the night he took the battery he ended up setting it down on the ground because it was too heavy for him to carry. Unfortunately, the police saw the whole thing and arrested him. They retrieved the battery and returned it to the owner.

77. *Id.* (Patton notes that the youth and certainty of prosecutors is not a winning combination: “To be sure, the fact that many of them happen to be twenty-nine years old and dogmatic does not help.”)

78. See Smith, *supra* note 54, at 380–87; see also Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. L. 411, 414–15 (2019); Abbe Smith, *Good Person, Good Prosecutor in 2018*, 87 FORDHAM L. REV. ONLINE 1, 6 (2018); Abbe Smith, *Are Prosecutors Born or Made?*, 25 GEO. J. LEGAL ETHICS 943, 950 (2012).

79. Patton, *supra* note 62, at 23 (emphasis added).

80. *Id.* at 24.

We did everything we could to get the case dismissed. Mr. Williams was not long for this world. We had pages of medical records to corroborate his frailty. He committed a petty crime, and the victim had been made whole. But the prosecutor was unbudging.

The prosecutor was older than most prosecutors in misdemeanor court. We hoped he might have some perspective. It turned out he was on loan from the Justice Department, doing a stint in the D.C. Superior Court to gain trial experience. He had no perspective. Moreover, for some reason, the battery owner was eager to come to court, as were the two police officers who had arrested Mr. Williams (who would be paid overtime for their testimony). The case was going to trial.

When Mr. Williams came into the courtroom using a walker and wearing a suit that hung loosely from his thin frame, the prosecutor did not blink. He objected to us calling our client's doctor, objected to the necessity defense, and contemptuously cross-examined Mr. Williams. When the judge convicted Mr. Williams (unfortunately, Mr. Williams did not have a right to a jury trial for this misdemeanor offense), the prosecutor argued for jail time and supervision.

I wish I could say this prosecutorial behavior was an anomaly. It is not. It happens in courtrooms every day. I wish I could say the prosecutor was the product of a prosecutor's office that was not progressive. But the United States Attorney's Office for the District of Columbia is the agency that prosecutes street crime in the District of Columbia. The U.S. Attorney who runs that office was appointed by President Joe Biden, who was once a public defender.⁸¹

Alas, this kind of behavior is just part of being a prosecutor. It is part of the role, the institutional structure, the culture. It takes extraordinary leadership to change the way prosecutors think and act, and it does not always trickle down. It takes a single-minded focus on real, systemic change to make it happen. But, as Butler writes, "reform is not the main work of any prosecutor, including a progressive one."⁸²

Butler says that fair-minded law students who become prosecutors out of a concern for racial and social justice, and who believe there are too many people in prison, will find themselves working at cross-purposes because of what the job entails.⁸³ He puts it bluntly:

Becoming a prosecutor to help resolve unfairness in the criminal justice system is like enlisting in the army because you are opposed to the current war. It's like working as an oil refiner because you want to help the

81. See Steve Zeidman, *The Year of the Public Defender*, GOTHAM GAZETTE (July 11, 2019), <https://www.gothamgazette.com/130-opinion/8662-the-year-of-the-public-defender>; Jef Feeley, *Biden Taps Ex-D.C. Fraud Chief to Lead Capitol Riot Prosecutions*, BLOOMBERG (July 26, 2021, 12:21 PM) <https://www.bloomberg.com/news/articles/2021-07-26/ex-fraud-prosecutor-nominated-to-be-the-u-s-attorney-in-d-c>.

82. Butler, *supra* note 3, at 1993.

83. See BUTLER, *supra* note 50, at 102–03.

environment. Yes, you get to choose the toxic chemicals. True, the boss might allow you to leave one or two pristine bays untouched. Maybe, if you do really good work as a low-level polluter, they might make you the head polluter. But rather than calling yourself an “environmentalist,” you should think of yourself as a polluter with a conscience.⁸⁴

In other words, progressive prosecutors—no matter how much we might prefer them to the alternative—are not the answer to our deeply flawed criminal legal system.⁸⁵

And then there is the backlash against progressive prosecutors who are truly “anti-carceral,”⁸⁶ or who otherwise pose a serious challenge to the system—by old guard prosecutors, judges, law enforcement, and state lawmakers.⁸⁷ Sometimes these efforts are supported by right-wing funders⁸⁸ and sometimes by disgruntled members of the same party as the progressive prosecutor.⁸⁹ Many progressive prosecutors have experienced intense backlash.⁹⁰ Chesa Boudin was successfully recalled as a result of it.⁹¹ George Gascón in Los Angeles managed to escape a recall effort, but he still has his detractors.⁹²

This backlash is not a fanciful conspiracy theory. Instead, the successful recall effort against former San Francisco D.A. Chesa Boudin was painfully real. The young lawyers who joined Boudin’s office to participate in the transformation of the Bay Area’s criminal legal system are now working for Brooke Jenkins, a former San Francisco prosecutor who quit Boudin’s office in protest and joined the

84. *Id.*

85. See generally Yamahiro & Garzón-Montano, *supra* note 31, at 132 (arguing that progressive prosecution will not end mass incarceration and is a distraction from the urgent need for the “wholesale dismantling and re-envisioning” of the criminal legal system).

86. See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1418, 1428–29, 1432–33, 1445–46 (2021) (offering definitions for four types of “progressive prosecutors”: the progressive who prosecutes (an ideological progressive who decides to be a prosecutor but whose politics do not drive the work); the proceduralist prosecutor (a prosecutor who cares about fair process, the Constitution, “doing justice”); the prosecutorial progressive (a prosecutor who leans left politically and cares about systemic racism and inequality and whose goals are aligned with political progressives); and the anti-carceral prosecutor (a prosecutor who is committed to decarceration and wants to shrink the State’s punishment apparatus)).

87. See *Philly D.A.*, *supra* note 7 (eight-part series on the tumultuous first term of Larry Krasner).

88. See Janie Har, *San Francisco Ousts Liberal DA Chesa Boudin in Heated Recall*, AP NEWS (June 8, 2022), <https://apnews.com/article/2022-california-primary-san-francisco-district-attorney-29f92d448a0281fd6d8e647e4edb3ede> (Chesa Boudin stated he was “outspent by ‘right-wing billionaires’”).

89. See Lowrey, *supra* note 8.

90. See Peter Hall, *Philly DA Krasner Not Alone Among Progressive Prosecutors Fighting GOP Attacks*, PA. CAP.-STAR (Sept. 11, 2022), <https://www.penncapital-star.com/criminal-justice/philly-da-krasner-not-alone-among-progressive-prosecutors-fighting-gop-attacks/> (reporting about the prosecutors in California, New York, and Florida who “advanced policies to end mass incarceration, cash bail and rethink the approach to prosecuting minor crimes [who] have faced efforts . . . to remove them from office”).

91. See Har, *supra* note 88.

92. See Sasha Abramsky, *Gascón Survives Another Recall*, THE NATION (Aug. 19, 2022), <https://www.thenation.com/article/society/gascon-recall/> (reporting that progressive Los Angeles prosecutor George Gascón survived a second recall attempt when recall proponents failed to get a sufficient number of signatures to put the issue on the ballot).

campaign to recall him. Jenkins is putting *public safety* first: “San Franciscans do not feel safe,” declared Jenkins upon being appointed by Mayor London Breed.⁹³

And yet, a perception of increased *shoplifting*, not a surge in violent crime, was a galvanizing force in the recall. To the embarrassment of the mayor and others, “brazen retail theft[]” in San Francisco had received national attention.⁹⁴ Sounding like any traditional prosecutor, notwithstanding a platitudinous mention of “reform,” new D.A. Brooke Jenkins stated:

I have dedicated my life and my career . . . to being an advocate for victims, for fighting for justice and being dedicated to making [S]an [sic] Francisco a safer place for people to live, work and visit As your next district attorney, I will restore accountability and consequences to our criminal justice system here in San Francisco.⁹⁵

Although Larry Krasner seems to have prevailed over his enemies by being elected twice, each time handily,⁹⁶ he is still not out of the woods. In September 2022, the Republican-dominated Pennsylvania House of Representatives voted to hold Krasner in contempt for refusing to cooperate with a legislative committee investigating his possible impeachment.⁹⁷ The impeachment effort was prompted by rising gun violence in Philadelphia, for which House Republicans blame Krasner.⁹⁸ Krasner maintains that the legislature’s investigation is antidemocratic and illegitimate.⁹⁹

The list of prosecutors under attack—which includes prosecutors who might not even identify as progressive prosecutors—grows daily. In Florida, Governor Ron DeSantis suspended elected State Attorney Andrew Warren because Warren promised not to criminalize trans people or gender-affirming health care and would also

93. NBC Bay Area Staff, *Mayor Breed Appoints Brooke Jenkins as San Francisco’s New District Attorney*, NBC BAY AREA (July 7, 2022), <https://www.nbcbayarea.com/news/local/san-francisco/san-francisco-district-attorney-brooke-jenkins/2938774/> [hereinafter *Mayor Breed Appoints Brooke Jenkins*].

94. See Michael Barba, *Data Shows Chesa Boudin Prosecutes Fewer Shoplifters than Predecessor*, S.F. EXAM’R (July 9, 2021), https://www.sfexaminer.com/archives/data-shows-chesa-boudin-prosecutes-fewer-shoplifters-than-predecessor/article_7dbc7d85-cde9-59d9-8f23-7b240ee6f26d.html (reporting that the prosecution rate for shoplifting cases involving a misdemeanor petty theft charge for a loss of \$950 or less fell under Boudin, from 70 percent under former District Attorney George Gascón in 2019 to 44 percent in 2020 and 50 percent as of mid-June 2021). It seems important to note that these were the COVID years when many jurisdictions were not prosecuting or punishing low-level crimes. See *Prosecutors Responses to COVID-19*, BRENNAN CTR. FOR JUST. (Nov. 18, 2021), <https://www.brennancenter.org/our-work/research-reports/prosecutors-responses-covid-19> (documenting prosecutors’ efforts across the country to not jail low-level offenders during the pandemic).

95. *Mayor Breed Appoints Brooke Jenkins*, *supra* note 93.

96. Chris Brennan & Jonathan Lai, *How Philly DA Larry Krasner Won—and Won Big*, PHILA. INQUIRER (May 19, 2021), <https://www.inquirer.com/politics/election/larry-krasner-philadelphia-district-attorney-victory-pa-primary-20210519.html>.

97. Shaila Dewan, *Philadelphia Prosecutor Is Found in Contempt by State Representatives*, N.Y. TIMES (Sept. 13, 2022), <https://www.nytimes.com/2022/09/13/us/larry-krasner-contempt-impeachment.html>. Things have since gotten worse for Krasner, as the Pennsylvania House has voted to impeach him. See Fortin, *supra* note 48.

98. Fortin, *supra* note 48.

99. *Id.*

not prosecute anti-abortion laws.¹⁰⁰ To Warren's credit, he sued DeSantis on First Amendment grounds.¹⁰¹ Florida governors seem especially inclined to strip prosecutors of their power when a prosecutor declines to prosecute.¹⁰² But it's not just Florida. The political and institutional roadblocks to progressive prosecution are fierce and widespread.¹⁰³

B. Obstacles and Challenges for Zealous Public Defense

The obstacles and challenges for zealous indigent defense are well known. Much has been written about the unmet promise of *Gideon v. Wainwright*¹⁰⁴ and the systematic efforts to undermine it.¹⁰⁵ The word "crisis" inevitably accompanies any discussion of the current state of indigent defense, no matter when the discussion happens.¹⁰⁶ *Gideon* has always been and remains an "unfunded mandate" that

100. See Steve Contorno, *DeSantis Suspends Tampa Prosecutor Who Took Stance Against Criminalizing Abortion Providers*, CNN (Aug. 4, 2022, 10:42 PM), <https://www.cnn.com/2022/08/04/politics/desantis-suspends-prosecutor/index.html>.

101. Kim Bellware & Latesha 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/>.

102. See *Florida Supreme Court Upholds Removal of Prosecutor From Death-Eligible Cases*, DEATH PENALTY INFO. CTR. (Aug. 31, 2017), <https://deathpenaltyinfo.org/news/florida-supreme-court-upholds-removal-of-prosecutor-from-death-eligible-cases> (reporting that Florida's high court upheld Governor Rick Scott's removal of elected Orange and Osceola County State Attorney Aramis Ayala from all death-eligible murder cases and replacement of her with a proponent of capital punishment because of Ayala's position that the death penalty is "not in the best interests of this community or in the best interests of justice"); Butler, *supra* note 3, at 1995–96 (discussing Ayala's removal from capital cases).

103. See Yamahiro & Garzón-Montano, *supra* note 31, at 135–54 (discussing the roadblocks and offering three examples from Pennsylvania, California, and Florida).

104. 372 U.S. 335 (1963).

105. See, e.g., BRYAN FURST, BRENNAN CTR. FOR JUST., A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY 5–10 (2019), <https://www.brennancenter.org/our-work/research-reports/fair-fight> (outlining structural contributors to defender resource disparity, such as improperly structured indigent defense systems, chronic underfunding, unsustainable workloads, prosecutor-defender salary disparity, and insufficient support staff); NAT'L RIGHT TO COUNS. COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 50–101 (2009) (documenting the country's failure to provide a meaningful right to counsel to the poor); see generally KAREN HOUPPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE (2013) (illustrating the crisis in indigent defense in the United States through the stories of four criminal defendants and arguing that *Gideon* remains vitally important); Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150 (2013) (discussing the failure to realize the right to counsel); Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html> (quoting the American Bar Association's observation that public defenders' "outlandish, excessive workloads" make a "mockery of the constitutional right to counsel"); Steven Zeidman, *Gideon: Looking Backward, Looking Forward, Looking in the Mirror*, 11 SEATTLE J. SOC. JUST. 933, 933–37 (2013) (discussing the disappointing state of indigent criminal defense).

106. See Zeidman, *supra* note 105, at 934 (noting that any "reference to 'the promise of *Gideon*' is usually immediately preceded by reference to 'the crisis in indigent defense'").

many states and counties “go[] out of their way to make sure . . . stays unfunded.”¹⁰⁷ Renewed alarm seems to occur at every anniversary of *Gideon*.¹⁰⁸

The right to counsel remains more aspirational than real because of the lack of resources and size of caseloads in many public defender offices. This is the central struggle: how to represent every client with devotion and zeal when there are too many cases, not enough lawyers or investigators, no money for experts, and increasingly high stakes for clients.¹⁰⁹ Some defender offices have more resources than others and manage to maintain reasonable caps on caseloads. Most do not. The offices that don’t are those that could use an influx of well-educated, well-trained lawyers. But these lawyers usually prefer to go to the “elite” offices that offer more resources and support.¹¹⁰

How to do the work and make an impact in places that need good defenders most?¹¹¹ First, defenders need to know they *are* making a difference even when it feels like they are banging their heads against a wall. As *Gideon’s Promise* founder Jonathan Rapping explains, every time a zealous defender walks into a courtroom in which a judge expects her to process cases and the defender says, “I am sorry, Judge, but I’m not doing [that],” that defender makes a difference.¹¹² Every time she says “no” to a prosecutor, she makes a difference. And when her colleague in the courtroom next door does the same thing, and other colleagues join in, and defenders in the next county over are inspired by what the neighboring defender office is doing, this is the kind of collective action that is transformative.¹¹³

107. John Pfaff, *Why Public Defenders Matter More Than Ever in a Time of Reform*, THE APPEAL (Apr. 18, 2018), <https://theappeal.org/why-public-defenders-matter-more-than-ever-in-a-time-of-reform-9b018e2184fe/>; see also THOMAS GIOVANNI & ROOPAL PATEL, BRENNAN CTR. FOR JUST., *GIDEON AT 50: THREE REFORMS TO REVIVE THE RIGHT TO COUNSEL* 3–7 (2013), https://www.brennancenter.org/sites/default/files/2019-08/Report_Gideon-at-50.pdf (summarizing the deleterious consequences of *Gideon’s* “unfunded mandate”).

108. See, e.g., Yale Kamisar, Abe Krash, Anthony Lewis & Ellen S. Podgor, *Gideon at 40: Facing the Crisis, Fulfilling the Promise*, 41 AM. CRIM. L. REV. 135, 148 (2004) (lamenting the crisis in indigent defense at the fortieth anniversary of *Gideon*); Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1312 (2013) (examining “the entrenched crisis in indigent defense that is as old as the *Gideon* decision itself” at the fiftieth anniversary); Ethan Bronner, *Right to Lawyer Can Be Empty Promise for Poor*, N.Y. TIMES (Mar. 15, 2013), <https://www.nytimes.com/2013/03/16/us/16gideon.html> (noting that, at *Gideon’s* fiftieth anniversary, the promise of legal representation remains unrealized); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564, 1566 (2018) (same at fifty-five years).

109. For a discussion of the motivations that sustain public defenders as they deal with the challenges of the work, see Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1207–08 (2004).

110. See, e.g., *Mission and Purpose*, PUB. DEF. SERV. FOR D.C., <https://www.pdsdc.org/about/mission-purpose> (last visited Apr. 15, 2023).

111. For a discussion of paradigms for “sustaining motivations for public defender work,” see Smith, *supra* note 109, 1208.

112. Jonathan A. Rapping, *The Power to Transform Is Stronger than the Power to Punish: Public Defenders Are the Key to Equal Justice*, 6 L.A. PUB. INT. L.J. 72, 87 (2017).

113. *Id.* at 87–88. Rapping calls public defenders the “conscience of the system.” *Id.* at 84. That’s a nice way of putting it.

C. A Comment about Personality

Being a prosecutor is not for everyone. It takes its own “mind-set, heart-set, soul-set.”¹¹⁴ It might also take a certain personality. As does being a public defender. I sometimes quip that a natural public defender is the kid in first grade who gets a report card that says, “Abbe talks too much in class, disturbing her neighbors.”¹¹⁵ The natural prosecutor is the kid in first grade who raises his hand and says, “Abbe is chewing gum.”

I’m not the only one who has pointed out personality differences between prosecutors and public defenders. As David Heilbroner writes in his memoir about his three years at the Manhattan District Attorney’s Office, historically regarded as one of the more progressive prosecutor offices:

Defenders looked different from ADAs. They wore tweed jackets, blue jeans, and sneakers; one of the men had a ponytail that hung halfway down his back. Every male prosecutor I had seen came to work in a dark suit, starched shirt, and silk tie. Female ADAs, too, wore “power clothes.” Though we were all lawyers just beginning our careers, we had apparently chosen sides: ADAs were the State, Legal Aid was Everyman, and each looked the part.¹¹⁶

This bears some resemblance to Larry Krasner’s recruitment pitch with which I began this Article. There is a prosecutor type and a public defender type, each with its hallmarks. Prosecutors are judgmental, defenders not so much. Prosecutors are ambitious, defenders not so much. Prosecutors live in the land of certainty, defenders in the land of doubt.¹¹⁷ Prosecutors are “pro-authoritarian,”¹¹⁸ defenders anti-authoritarian.

Of course, not every prosecutor or defender fits squarely within a type. Additionally, although there might be “naturals” on either end of the criminal lawyer spectrum—some people are clearly suited for one role or the other—many in the “middle” could probably both prosecute or defend under the right circumstances.

Still, for young lawyers, there is a choice to be made, especially if they are concerned about our flawed criminal legal system.

Let me be clear about the need for conscientious, honorable prosecutors. Among other things, I much prefer to try a case against such a prosecutor. They can ameliorate some of the harshness of the system and are vital to our adversarial system of

114. Babcock, *supra* note 6, at 175.

115. When he was in fourth grade, my son, Joe, who has some of the qualities of a natural public defender, came home from school and announced, “I have talkativity.”

116. HEILBRONER, *supra* note 64, at 24.

117. See ABBE SMITH, *CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER’S STORY* 165 (2008) (recounting an exchange with a prosecutor who, after reviewing the file in a troubling one-witness identification case, said her office “had no doubt” about the defendant’s guilt). Meanwhile, I am awash in doubt reading a restaurant menu.

118. A neologism whose time has come.

criminal justice. Moreover, I am not such an abolitionist—or a Pollyanna—that I believe there is no such thing as a dangerous person, whether that person is my client, a corporate polluter, a corrupt and brutal police officer, or a lying, stealing, anti-democratic demagogue who becomes President.

Although Paul Butler does not advise law students and young lawyers who want to transform the criminal legal system to become prosecutors, he does say to those who are headed to prosecution to try to work with a progressive prosecutor rather than the alternative.¹¹⁹ This makes sense to me.

CONCLUSION: WHO HAS MORE POWER?

It is difficult to define power. I am no philosopher, but even the great Michel Foucault had trouble capturing its meaning over the more than twenty years he spent examining it.¹²⁰ Does power lie in institutions or individuals? Probably both. Is power inextricably connected to violence and/or the choice to not employ violence? Much of the time, but not always. Can knowledge, power, and social control be separated? Probably not, but we should still try to recognize the ways in which they are interconnected.

Okay, let us apply all that to the subject at hand. What is the *power to transform*? Is it gaining a political platform so that you might educate the public about the disaster of over-criminalization and mass incarceration, perhaps inspiring other like-minded reformers to do the same, and at least implementing a few reforms? This is what progressive prosecutors do. Or is it giving a person caught up in an insatiable, soul-crushing system a second chance, perhaps inspiring other like-minded lawyers to do the same? This is what zealous defenders do.

Although this Article takes a broad view of “progressive prosecution,”¹²¹ I confess that I am underwhelmed by what passes as “progressive” in our criminal legal system. Reforming cash bail so that a poor person is not jailed because he lacks \$100, increasing diversionary programs or “treatment courts,” creating conviction integrity units or one-witness identification committees, releasing nonviolent drug offenders, being mindful of racial bias in law enforcement, and holding dishonest or brutal police accountable seem like low-hanging fruit to me, not transformative change.

119. Butler, *supra* note 3, at 1993 n.66.

120. See generally Michel Foucault, *The Subject and Power*, 8 CRITICAL INQUIRY 777 (1982) (discussing more than twenty years of research and analysis on the meaning of power and the way human beings become “subjects”); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 9–11 (1975) (analyzing the social and theoretical mechanisms behind the changes that occurred in Western penal systems during the modern age, focusing on power and the body); MICHEL FOUCAULT, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (1965) (examining the meaning of madness from the late Middle Ages, when insanity was still considered part of everyday life and “lunatics” walked the streets freely, to the time when such people began to be considered a threat and asylums were first built to separate the “insane” from the rest of humanity); MICHEL FOUCAULT, THE BIRTH OF THE CLINIC: AN ARCHAEOLOGY OF MEDICAL PERCEPTION (1963) (examining the transformation of medical knowledge into “science”).

121. See sources cited *supra* note 3.

The above reforms will not end mass incarceration. To end it, we must stop locking up so-called *violent offenders* for as long as we do,¹²² and we must stop locking up so many people in the first place.¹²³ What is labeled a violent offense often includes nonviolent crimes like burglary and drug distribution. Moreover, even violent offenses like sexual assault and murder have very low recidivism rates.¹²⁴ But so far at least, no progressive prosecutor candidate has run on a platform to release “violent criminals” or shorten their sentences. Nor, to my knowledge, has anyone run for District Attorney calling for the elimination of draconian sex offender regulations, no matter how counterproductive or criminogenic they are.¹²⁵

But I have experienced the transformative power of obtaining a fellow human being’s freedom. Of hearing the words “Not Guilty.” Of seeing a person incarcerated for decades emerge from captivity. Of watching people gradually rid themselves of shackles, both metaphorical and real.

Over these COVID years, I have seen the transformative impact of criminal defense every time Georgetown’s criminal clinics get a long-serving prisoner out of prison through compassionate release or juvenile resentencing. In the past few years, we have gotten dozens of people out—sons, brothers, fathers, and *grandfathers*. They come to the law school wearing their new Georgetown sweatshirts (a gift we give every re-entering client). The years of captivity are etched in their faces, but their eyes glow with freedom.

For me, the answer to the question posed in this Article is easy. As it says in the Talmud, “If you save one life it’s as if you have saved the entire world.”¹²⁶ Prosecution is prosecution, no matter the adjective before it.

In the end, law students must ask themselves questions that are both institutional and personal. Should we look to progressive prosecutors to lead a revolution of our criminal legal system? I hope not. But I am not suggesting that defenders lead the revolution either.¹²⁷ Leadership needs to come from the ground up—from individuals, families, and communities that understand the devastation the criminal legal system has wrought.

122. See generally PFAFF, *supra* note 16.

123. See *id.*

124. See ASHLEY NELLIS, THE SENTENCING PROJECT, A NEW LEASE ON LIFE 4–5 (2021), <https://www.sentencingproject.org/publications/a-new-lease-on-life/> (report on recidivism drawing on international, national and state-level research showing that people convicted of homicide and other crimes of violence were extremely unlikely to commit another violent crime after release from prison).

125. See generally Allegra McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CAL. L. REV. 1553, 1557–58 (2014) (arguing that our criminal regulatory scheme for sex offenders is misguided).

126. Philologos, *The Origins of the Precept “Whoever Saves a Life Saves the World,”* MOSAIC (Oct. 31, 2016), <https://mosaicmagazine.com/observation/2016/10/the-origins-of-the-precept-whoever-saves-a-life-saves-the-world/>.

127. See Smith, *supra* note 54, at 397 (recognizing that “all those who work in the criminal justice system have something to do with its perpetuation and legitimacy”).

Law students should also ask themselves personal questions—about their personality, values, and interests. Is prosecution the right fit, or is defense? I believe in visceral, gut feelings. Some things feel right almost from the start.

My abiding advice is to choose carefully, mindful of the privilege and power lawyers have. Given everything you know about yourself and the system, which side do you want to be on at this moment in history?