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The Perils of Private Prosecutions

Angela J. Davis

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INTRODUCTION

In *Against Prosecutors*, Bennett Capers proposes that we largely abandon the current system of public prosecutions and return to private prosecutions.[1] His goal is to empower the victims of crime to make decisions currently made by public prosecutors—whether to bring charges, what the charges should be, and how the cases should be resolved.[2]

Professor Capers' goals are laudable. As he notes, the United States has the highest incarceration rate in the world,[3] and the criminal legal system is rife with unwarranted racial disparities.[4] Professor Capers correctly notes that prosecutors play a substantial role in perpetuating these problems.[5] However, his proposed solution will not only fail to remedy the problems, but in some instances will likely exacerbate them. Professor Capers is right that prosecutors often ignore the needs of victims and treat them unfairly. However, his laser focus on the

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1. I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1562, 1564 (2020).

2. *Id.* at 1590-96 (arguing that private prosecution would reduce mass incarceration because empowered victims may seek alternatives to the criminal legal system and victimless crimes could be addressed outside of the criminal legal system); *id.* at 1600-02 (discussing how private prosecution could facilitate empathy between a victim and defendant who come from the same community, as opposed to public prosecutors who are overwhelmingly white).

3. *Id.* at 1564; WORLD PRISON BRIEF, https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (last visited July 23, 2022).

4. Capers, *supra* note 1, at 1585-86, 1600.

5. *Id.* at 1567-71 (discussing the enormous power of prosecutors).

interests of victims ignores other impacted individuals whose interests matter, too—namely members of the community and the defendant. Prosecutors have an ethical duty to "do justice" for all, not just victims.[6] Private prosecutors' singular focus on victims can produce outcomes that do not benefit *all* of society because victims represent their own interests and are accountable to no one. Progressive public prosecutors, on the other hand, have demonstrated that considering the interests of victims does not have to come at the expense of others with legitimate interests in the outcome of criminal cases. A system with prosecutors committed to a fair and just criminal legal system for all will alleviate the ills of the current system more than moving to a system of private prosecution.

I.
THE HARMS CAUSED BY PUBLIC PROSECUTORS

There are two million people in America's prisons and jails, with about seven million people on probation or parole, and unwarranted racial disparities exist at every step of the criminal process.[7] People of color in the criminal legal system are treated worse than their similarly-situated white counterparts—whether they are accused of a crime or a victim of a crime.[8] There are many complex reasons for these unwarranted racial disparities, including socioeconomic factors such as poverty, trauma, and the lack of healthcare, education, and employment opportunities.[9] These factors are all connected to the legacy of slavery and the subsequent presence and persistence of racism in America.[10]

However, criminal justice officials' discretionary decisions also contribute to these disparities. When police officers engage in racial profiling, they create a racial disparity.[11] When prosecutors charge Black and Brown people and don't charge whites who are engaged in the same behavior and have the same criminal record, or lack thereof, they are creating a racial disparity.[12] When judges impose

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6. See Fourth Edition of *Criminal Justice Standards for the Prosecution Function 3-1.2(b)*, AM. BAR ASS'N (2017) [hereinafter ABA *Criminal Justice Standards: Prosecution*], https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict.").

7. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL'Y INITIATIVE (Mar. 24, 2020), https://www.prisonpolicy.org/reports/pie2020.html.

8. *See, e.g.*, Elizabeth Hinton et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA INST. OF JUST. (May 2018).

9. *Id.* at 10.

10. *Id.*

11. *See* David A. Harris, *Racial Profiling: Past, Present, and Future?*, AM. BAR ASS'N. (Jan. 21, 2020), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2020/winter/racial-profiling-past-present-and-future/.

12. *See* Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 LEG. AND PUB. POL'Y 821, 827-31 (2013), https://www.nyujlpp.org/wp-content/uploads/2014/01/Davis-In-Search-of-Racial-Justice-16nyujlpp821.pdf.

higher bail on people of color, or sentence them to longer prison terms than their similarly-situated white counterparts, they create a racial disparity.[13]

Although no one criminal justice official is responsible for the overuse of incarceration and unwarranted racial disparities, prosecutors bear the brunt of the responsibility for these problems because they are the most powerful officials in the system. They, in essence, control the system through their discretionary charging and plea bargaining decisions.[14] It is the prosecutor who decides whether an individual will be charged and what they will be charged with.[15] It is the prosecutor who decides whether a person gets a plea bargain and what that plea bargain is going to be.[16] Prosecutors need only meet the low probable cause standard to bring charges, which permits them to pile on charges they know they can't prove beyond a reasonable doubt at the trial stage of the process.[17] This overcharging gives prosecutors an advantage in the plea bargaining process because defendants facing numerous charges, sometimes with mandatory minimum sentences, feel compelled to plead guilty to avoid the risk of being convicted of all charges at trial.[18] Prosecutors also control the timing of when a plea must be accepted, causing many defendants to plead guilty before their attorneys can investigate the cases properly.[19] Additionally, most defendants are represented by overworked public defenders with few resources.[20] When one considers the fact that about ninety-four percent of felony convictions at the state level and about ninety-seven percent at the federal level are the result of plea bargains,[21] it is easy to see how prosecutors control the criminal legal system.

Prosecutors also cause and exacerbate unwarranted race and class disparities in the criminal legal system. When prosecutors charge people of color with crimes and fail to charge their similarly-situated white counterparts (white people who have engaged in the same behavior and with the same criminal record or lack thereof), they create an unwarranted, unjust racial disparity.[22]

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13. *See* Cynthia E. Jones, *"Give Us Free": Addressing Racial Disparities in Bail Determinations*, 16 LEGIS. & PUB. POL'Y 919, 938-44 (2013); U.S. SENT'G COMM'N, *Demographic Differences in Sentencing: An Update to the 2012* Booker *Report* (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

14. ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 19-59 (2009).

15. *Id.* at 22-23.

16. *Id.* at 43-45.

17. *Id.* at 31.

18. *Id.*

19. *Id.* at 45.

20. *See, e.g.*, Emma Andersson, *If You Care About Freedom, You Should Be Asking Why We Don't Fund Our Public Defender Systems*, AM. C.L. UNION (Mar. 8, 2022).

21. *The Truth About Trials*, THE MARSHALL PROJECT, https://www.themarshallproject.org/2020/11/04/the-truth-about-trials (last updated Nov. 04, 2020).

22. *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, THE SENT'G PROJECT 7-8 (Apr. 19, 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/ (finding that prosecutors are more likely to charge people of color under habitual offender laws and with crimes that carry higher sentences compared to white people).

Similarly, vigorously prosecuting cases involving white victims while dismissing cases with Black and Brown victims further exacerbates racial disparities.[23] Prosecutors cause similar harms when they make bail and pretrial detention recommendations, plea bargaining decisions, and sentencing recommendations.[24]

It is unlikely that prosecutors are intentionally creating these disparities. Like all criminal justice officials, they suffer from implicit bias and thus may not show empathy towards a person of color in the criminal legal system, whether they are charged with a crime or a victim of a crime.[25] In addition to implicit bias, the legitimate, race-neutral factors prosecutors often consider when making charging and plea bargaining decisions may also have a racial impact. Factors like the strength of the evidence, the likelihood of conviction, and the interest of the victim in prosecution are legitimate factors that prosecutors should take into account in making charging and plea bargaining decisions.[26] However, the consideration of these legitimate factors may result in racial disparities. A case with a well-dressed, well-spoken victim who shows up for witness conferences will likely strengthen the prosecutor's case and enhance the chance of getting a conviction. The prosecutor will be more likely to pursue that case vigorously, resulting in the victim's desired outcome. Conversely, a case with a victim who is poor, uneducated, and inarticulate may not be prosecuted vigorously because the prosecutor may not believe the victim will convince a jury. Or the poor victim may fail to show up for a witness conference because he can't afford to miss a day's work, leaving the prosecutor with the mistaken impression that the victim is not interested in the prosecution. The prosecutor may choose to give the defendant in that case a favorable plea bargain or even dismiss the case. Thus, these race-neutral, legitimate considerations may create unwarranted class and race disparities. In sum, prosecutors are largely responsible for the overuse of incarceration and the unwarranted racial disparities in the criminal legal system.

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23. *See* Jeffery J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L. J. 1, 41-43 (2017) (showing the racial impact of prosecutors' charging decisions through studies finding that prosecutors were more likely to file charges in sexual assault cases with a white victim).

24. *See, e.g.*, VERA INST. OF JUST., *Race and Prosecution in Manhattan* (July 2014), https://www.vera.org/downloads/publications/race-and-prosecution-manhattan-summary.pdf; BRENNAN CTR. FOR JUST., *Racial Disparities in Federal Prosecutions*, https://www.brennancenter.org/sites/default/files/2019-08/Report_Racial-Disparities-Federal-Prosecutions.pdf.

25. Hinton, *supra* note 8, at 7 ("Implicit bias is the 'automatic positive or negative preference for a group, based on one's subconscious thoughts,' which can produce discriminatory behavior even if individuals are unaware that such biases form the basis of their decisions . . . [s]uch biases impact individual stages of the process, like policing, and also accumulate over multiple stages, through case processing, prosecution, and disposition."). *See generally* Jerry Kang, et. al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1135-51 (2012) (examining research on implicit bias and racial disparities throughout the criminal process).

26. *ABA Criminal Justice Standards: Prosecution 3-4.4*; *see also* Pokorak, *supra* note 23, at 41 (providing examples of how these factors impact sexual assault charging decisions).

II.
THE HARMS CAUSED BY PRIVATE PROSECUTORS

The race and class disparities in the criminal legal system will not likely improve in a private prosecution system. In fact, there is reason to believe they would be worse. A system in which victims decide whether and how they want to prosecute would have problems similar to those that existed in the private prosecution system during the colonial period.

In colonial America, the crime victim was required to investigate and prosecute their own case or hire a detective and private lawyer to perform those functions.[27] If the defendant was convicted, the court would often require them to pay restitution to the victim.[28] If they were too poor to pay, they would often work for the victim as their servant or have their services sold for the financial benefit of the victim.[29] If the victim did not want these services, they were required to pay the cost of incarcerating the defendant.[30]

This system discriminated against poor people who obviously could not afford to bring private prosecutions.[31] In addition to lacking the resources, many did not have the education to handle the cases themselves.[32] Even among those who could afford to privately prosecute, there was no uniformity in how criminal cases were prosecuted because the resolution of the cases depended on the proclivities of the victims.[33] One robbery victim might want restitution while another might prefer that the defendant be incarcerated, producing unfair disparities in sentencing. The defendant whose victim wanted restitution may have been a repeat offender while the defendant whose victim wanted incarceration may have been a first-time offender.

These same unfair disparities would exist in a modern private prosecution system for the same reasons. Professor Capers is right that the current public prosecution system has resulted in the disparate treatment of victims based on class and race. But how and why would that problem change with a move to private prosecutions? It is doubtful that victims who currently don't show up for witness conferences and grand jury preparation because they have to work or can't afford transportation will have the time, resources, and wherewithal to initiate their own prosecutions.

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27. *See, e.g.*, Juan Cardenas, *Crime Victim in the Prosecutorial Process*, 9 HARV. J. L. & PUB. POL'Y 357, 367 (1986).

28. *Id.*

29. *Id.*

30. *Id.* at 367-68.

31. *See id.* at 368-69 (noting that private prosecutions resulted in low pay for public officials in the judicial system because those with means often settled privately, reducing fines collected and freezing poor victims out of the system).

32. *Id.* at 367; *see also* Michael Edmund O'Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 666 (2010) (describing the trial as a "lawyer-free contest of amateurs").

33. Cardenas, *supra* note 28, at 369.

III.
THE PERILS OF A VICTIM-FOCUSED SYSTEM

Crime victims deserve to be heard and treated fairly, and to have their needs and desires taken seriously. However, a system that is controlled by victims is fraught with peril and would potentially result in even greater unwarranted disparities among victims and defendants. Crime victims have all kinds of motivations—some worthy and some not so worthy. Certainly, they deserve justice, but justice may come in many different forms. In some cases, restitution may be appropriate. In others, victims may want restorative justice[34]—an opportunity to confront the defendants and force them to confront the harm they caused. Other victims may want the defendant to be punished with a term of incarceration.[35] There are also victims who may be motivated by unworthy goals, falsely accusing an enemy of a crime, for example.[36]

Regardless of the motivations and desires of the victim, a victim-focused system ignores others with legitimate interests in the outcome of criminal cases and creates unfair disparities in outcomes for victims and defendants. Although the victim has a direct interest in a criminal case because of the harm they experienced, the defendant and other members of the community also have an interest in the outcome. The defendant has the right to be treated fairly in the process and to have his rights respected, and the community has an interest in a fair and just system and a safe community. A system that permits the victim to decide how a case will be prosecuted will result in similarly-situated defendants being treated differently—an outcome that is unfair to the defendant and the entire community. These disparities may or may not be based on race or class. The victim in a case in which the defendant caused great harm may decide to request a lenient sentence because she doesn't believe in incarceration, while a

34. *See Restorative Justice Program*, OFF. OF THE ATT'Y GEN. FOR THE DISTRICT OF COLUMBIA, https://oag.dc.gov/public-safety/restorative-justice-program (explaining that restorative justice "is a victim-centered approach to addressing crime and conflict, which provides the victim and the . . . person who caused harm a chance to opt into a facilitated conversation about what happened, how everyone was affected, and what needs to happen to resolve the matter so that it never happens again"). District of Columbia Attorney General Karl Racine launched an innovative Restorative Justice Program in 2017.

35. *Crime Survivors Speak: The First-Ever National Survey of Victims' Views on Safety and Justice*, ALL. FOR SAFETY AND JUST. 20, http://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf ("By a margin of 3 to 1, victims prefer holding people accountable through options beyond just prison, such as rehabilitation, mental health treatment, drug treatment, community supervision, or community service.").

36. Professor Capers suggests that judges and grand juries would serve the gatekeeping function of screening out malicious or unmeritorious cases. Capers, supra note 1, at 1587. However, grand juries currently do little more than rubber stamp prosecutorial decisions. *E.g.*, Debra Cassens Weiss, *Grand Juries Almost Always Indict, Federal Stats Show; Is There a Shooting Exception for Cops?*, AM. BAR ASS'N J. (Nov. 26, 2014), https://www.abajournal.com/news/article/grand_juries_almost_always_indict_federal_stats_show_is_there_a_cop_shootin. Additionally, judges only have the opportunity to dismiss such cases if and when defense counsel files an appropriate motion. It is unclear how either would operate differently in a system of private prosecution.

victim in a minor case may request a harsh sentence because she believes in tough sentences.

The public prosecutor does not and should not represent the victim. She represents the entire community, which includes the victim, the defendant, and everyone who lives in her jurisdiction. The prosecutor should consider the victim's views when making decisions about whether and how to prosecute a criminal case, including how the case should be resolved. The American Bar Association Standards for the Prosecution Function list "the views and motives of the victim or complainant" among the factors prosecutors should consider when making decisions about charging and dismissal.[37] However, the prosecutor's job is not to follow the direction of the victim or of any one person, but to do justice for all. As the Supreme Court noted in *Berger v. United States*,[38]

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."[39]

Justice sometimes means seeking a conviction, but justice sometimes means dismissing a case or reaching an alternative resolution involving restitution for the victim or treatment for the defendant. A crime victim is not well-suited to "do justice" because she is an interested party who has neither the experience nor knowledge to decide which option is the most just for all. A neutral and fair prosecutor elected by the people is the best person to perform that function.

Professor Capers discusses the unfair treatment of victims of sexual assault and domestic violence, noting the failure of police and prosecutors to investigate and prosecute rape cases.[40] This problem will not be solved by moving to a private prosecution system. An example from my prior experience as a public defender illustrates the problem. In 1984, I was appointed to represent a man who had allegedly beaten his wife with a carpet sweeper. My client and his wife were African-American. He was charged with Simple Assault and Possession of a Prohibited Weapon (b).[41] I accompanied my investigator when he went to interview the victim. When she opened the door to her apartment, I was shocked to see a woman who had been severely beaten. Her face was bruised, and her

37. *ABA Criminal Justice Standards: Prosecution* 3-4.4.

38. 55 S. Ct. 629 (1935).

39. *Id.* at 633.

40. Capers, *supra* note 1, at 1565-67.

41. D.C. CODE § 22-404 (assault); *id.* § 22-4514 (possession of prohibited weapon). The charging decision in this case was typical of how domestic violence cases were prosecuted at that time. Instead of charging my client with aggravated assault (a felony), he was charged with two misdemeanors – simple assault and possession of a prohibited weapon. Section (b) of the weapons statute permitted charging the defendant with any object used as a weapon. The "weapon" in this case was the carpet sweeper. Misdemeanor cases were handled by less experienced prosecutors and the defendants faced fewer consequences.

eyes were almost swollen shut. She wore a tattered house dress and there were several small children clinging to her. I identified myself as her husband's lawyer and asked if my investigator could speak with her about what happened and take a written statement. She immediately said that she did not want her husband to be locked up because she didn't have a job and needed him to support her family. As my client's defense attorney, I had an ethical responsibility to zealously represent his interests so I instructed my investigator to take a written statement from her. In her written statement, she indicated that she did not want her husband to be prosecuted. I told the victim that only the prosecutor could make this decision and that she should speak with the prosecutor about her concerns. When the prosecutor did not respond to her calls, she appeared at the next status hearing with her children in tow. When my client's case was called, I informed the judge and the prosecutor of the victim's wishes and gave a copy of the statement to the prosecutor. I also informed them that the victim was in the courtroom. The judge and the prosecutor berated the victim for suggesting that the case be dismissed. The prosecutor threatened to get a warrant for her arrest if she did not show up for the trial, and the judge promised to lock her up to compel her testimony. I later lobbied the prosecutor to accept an alternative resolution. I found a treatment program for batterers and urged the prosecutor to dismiss the case if my client successfully completed the program. Reluctant to proceed with an uncooperative witness, the prosecutor ultimately agreed.

The prosecutor, a white woman who was a self-avowed crusader against domestic violence, treated the victim with contempt and ignored her needs. She never asked the victim what she needed or wanted, and obviously did not care. The prosecutor wanted my client locked up, with no regard for the victim's needs. But would a system of private prosecution have helped the victim or produced a just result for the community or the defendant? The victim would not have pursued a prosecution, and the defendant would have returned to their home and likely beaten her again, possibly resulting in even more serious injury to the victim or even death. This victim would not have pursued a treatment program for her husband. She would not have known about such a program and would have been too afraid to suggest it even if she did. She certainly would not have been able to hire a private prosecutor to assist her.

Professor Capers advocates for returning power to "we the people." However, for Professor Capers, "the people" seem to only include crime victims. In reality, "the people" consist of all of the residents of a public prosecutor's jurisdiction, including the victim and the defendant. In all but four jurisdictions, state and local prosecutors are elected officials who run for office, usually every four years.[42] The electoral system is the mechanism that purports to hold

42. *Prosecutors in State Courts, 2001*, BUREAU OF JUST. STATS. 2-3 (May 2002), https://bjs.ojp.gov/content/pub/pdf/psc01.pdf. Federal prosecutors (U.S. Attorneys) are not elected officials but are instead nominated by the President and confirmed by the Senate. I focus on state and local prosecutors because 90% of all criminal cases are prosecuted in state and local courts. Anisha

prosecutors accountable. If the people don't like how the prosecutor does his job, they can vote him out. In reality, the electoral system is a flawed method of accountability for a variety of reasons. First, prosecutors perform their most important functions—charging and plea bargaining—behind closed doors. Since there is no transparency, their constituents cannot hold them accountable for how they perform these functions. Second, most prosecutors run unopposed and serve for decades,[43] although this phenomenon is starting to change with the onset of the progressive prosecutor movement.[44] Third, voter turnout is low[45] and most people don't pay attention to district attorney races.[46] However, if these problems could be remedied, public prosecutors duly elected by the people who are committed to transforming the criminal legal system present the best option for achieving justice in the criminal legal system.

IV.
THE PROGRESSIVE PROSECUTION MOVEMENT

Professor Capers imagines "a world without prosecutors, or at least with far fewer prosecutors"[47] and the abandonment of crimes "that run the gamut from sex work to selling or possessing sex toys to status crimes which essentially criminalize homelessness."[48] Fortunately, he no longer has to imagine this world because there are public prosecutors who are declining the prosecution of many low-level offenses, diverting cases out of the system, and working to achieve justice for all—victims, defendants, and their communities.[49]

A small but growing number of progressive prosecutors have been elected as chief prosecutors in states across the country.[50] There is no litmus test for what constitutes a progressive prosecutor, but most who claim membership in this group ran for office promising to implement policies and practices to reduce the

Singh & Billy Corriher, *State or Federal Court?*, CTR FOR AM. PROGRESS (Aug. 8, 2016), https://americanprogress.org/article/fact-sheet-state-or-federal-court/.

43. Ronald F. Wright, *Beyond Prosecutor Elections*, 67 S.M.U. L. REV. 593, 603-04 (2014); *Tipping the Scales: Challengers Take On the Old Boys' Club of Elected Prosecutors*, REFLECTIVE DEMOCRACY CAMPAIGN 3 (Oct. 2019), https://wholeads.us/wp-content/uploads/2019/10/Tipping-the-Scales-Prosecutor-Report-10-22.pdf (study detailing five years of data found prosecutors run unopposed 80% of the time).

44. Taylor Pendergrass, *In District Attorney Races Across the Nation, Reform is Still On the Agenda*, AM. C.L. UNION (Oct. 29, 2018), https://www.aclu.org/blog/smart-justice/mass-incarceration/district-attorney-races-across-nation-reform-still-agenda (discussing the progressive candidates and increased voter engagement in contested prosecutor elections across the country).

45. Zoltan L. Hajnal, *Why Does No One Vote in Local Elections?*, N.Y. TIMES (Oct. 22, 2018).

46. *Id.*

47. Capers, *supra* note 1, at 1586.

48. *Id.* at 1588.

49. *See, e.g.*, Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187 (2021).

50. Daniel A. Medina, *The Progressive Prosecutors Blazing a New Path for the US Justice System*, THE GUARDIAN (Jul. 23, 2019), https://www.theguardian.com/us-news/2019/jul/23/us-justice-system-progressive-prosecutors-mass-incarceration-death-penalty.

prison and jail populations, eliminate unwarranted racial disparities, and promote overall fairness and justice in the criminal legal system.[51] Although the policies and practices vary from office to office, most of these prosecutors have made progress towards fulfilling their promises.

Data for Progress, a progressive think tank and polling firm, surveyed nineteen progressive prosecutors about their policies and practices.[52] All of the surveyed prosecutors either expanded existing diversion programs or added new ones.[53] Ninety-five percent of the prosecutors have requested the release of defendants held on cash bail unless they pose a risk of flight or danger to the victim or community.[54] Eighty-nine percent of the prosecutors decline the prosecution of certain categories of cases, and eighty percent do not prosecute low-level misdemeanor and felony drug offenses, especially marijuana offenses.[55] Ninety-five percent reported that their policies reduced their jail and prison populations.[56]

Larry Krasner and Rachael Rollins provide two examples of how progressive prosecutors can facilitate reforms in the criminal legal system while addressing the needs of crime victims. Philadelphia District Attorney Larry Krasner ran for office on a progressive platform[57] and established fundamental changes in the prosecution of criminal cases.[58] Krasner directed his staff to decline the prosecution of marijuana possession and other low-level offenses, divert many cases out of the system, make plea offers below the bottom end of the Pennsylvania Sentencing Guidelines, and request shorter probationary periods.[59] By the end of his first term, the jail population in Philadelphia fell by almost thirty percent.[60] Despite strong resistance to his policies from the police union, judges, and other government officials, Krasner was reelected to a second

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51. Covert, *supra* note 48, at 201-03; *see also* Heather L. Pickerell, *How to Assess Whether Your Attorney is a Bona Fide Progressive Prosecutor*, 15 HARV. L. & POL'Y REV. 285 (2020-2021) (providing metrics to assess whether a district attorney is actually progressive).

52. Prerna Jagadeesh et al., *A New Generation of Prosecutors Is Leading the Charge to Reimagine Public Safety*, DATA FOR PROGRESS (Nov. 2021), https://www.filesforprogress.org/memos/new-generation-of-prosecutors-reimagine-public-safety.pdf.

53. *Id.* at 5.

54. *Id.* at 7.

55. *Id.* at 4.

56. *Id.* at 3.

57. *On the Issues*, LARRY KRASNER FOR DIST. ATT'Y, https://krasnerforda.com/platform.

58. *New Policies Announced February 15, 2018*, https://s3.documentcloud.org/documents/4412996/Krasner-Memo-March-13-2018.pdf [hereinafter *Krasner Memo*]; Maura Ewing, *Philadelphia's New Top Prosecutor Is Rolling Out Wild, Unprecedented Criminal Justice Reforms*, SLATE (Mar. 1, 2018), https://slate.com/news-and-politics/2018/03/phillys-new-top-prosecutor-is-rolling-out-wild-unprecedented-criminal-justice-reforms.html.

59. *Krasner Memo* at 1-3, 5.

60. Joshua Vaughn, *The Successes and Shortcomings of Larry Krasner's Trailblazing First Term*, THE APPEAL (Mar. 22, 2021), https://theappeal.org/the-successes-and-shortcomings-of-larry-krasners-trailblazing-first-term/.

term.[61] Like Krasner, former Suffolk County District Attorney Rachael Rollins issued a policy memo soon after she took office in 2019 that would "dramatically change the way we approach criminal prosecution in Suffolk County."[62] She pledged to decline the prosecution of numerous charges previously prosecuted in that office and divert many more.[63] Rollins also instituted a policy of presumptively recommending pretrial release without conditions unless there was clear evidence of a flight risk or dangerousness.[64]

District Attorneys Krasner and Rollins focused on the needs of victims as well by establishing robust, well-staffed units in their offices that provide comprehensive services to victims.[65] Krasner's Victim Support Services Division includes Victim and Witness Liaisons whose job is to "limit any further trauma, ease the burden of new legal responsibilities, and help ensure victims' voices are heard throughout the criminal justice process."[66] They also work to assure that victims feel "that their rights as victims and witnesses were upheld, and their experience, perspective and opinions were taken into account."[67] The Division includes a Crisis Assistance, Response and Engagement for Survivors (CARES) Unit that provides assistance for survivors of homicide.[68] In her county, Rollins established a Victim Witness Assistance Program that provides specialized counseling and assistance to victims based on the type of crime they encountered.[69] The program includes units with advocates for victims of child abuse, domestic violence, hate crimes, homicides, human trafficking, and sexual

61. Katie Meyer, *Philly DA Larry Krasner Cruises to Reelection Victory*, WHYY (Nov. 2, 2021), https://whyy.org/articles/philly-da-larry-krasner-cruises-to-reelection-victory/ (highlighting that Krasner won reelection in a campaign that specifically affirmed his progressive approach to criminal justice); Brakkton Booker, *This D.A. Won By a Landslide. He's Still Mad.*, POLITICO (June 11, 2021), https://www.politico.com/newsletters/the-recast/2021/06/11/larry-krasner-philadelphia-district-attorney-election-policing-493220 (discussing the opposition to Krasner's reelection during the Democratic primary).

62. *The Rachael Rollins Policy Memo*, SUFFOLK CNTY. DIST. ATT'Y, 2 (Mar. 25, 2019) (on file with the Suffolk County District Attorney's Office). Rachael Rollins currently serves as the United States Attorney for the District of Massachusetts. She has served in that position since January 2022 after serving three years as the Suffolk County District Attorney.

63. *Id.* at 25-27.

64. *Id.* at 14-15.

65. *Victims & Witnesses*, PHILADELPHIA DIST. ATT'Y'S OFF., https://phillyda.org/victims-and-witnesses/; *Victim Assistance*, SUFFOLK CNTY. DIST. ATT'Y, https://www.suffolkdistrictattorney.com/victim-assistance; Brian Saunders, *DA's Office Announces Leaders of Victims Services Unit*, THE PHILADELPHIA TRIB. (Feb. 7, 2022), https://www.phillytrib.com/news/local_news/das-office-announces-leaders-of-victim-services-unit/article_b93a3bf7-9f9e-5e06-9a7c-19deb5cd8b2c.html.

66. *Victims & Witnesses*, PHILADELPHIA DIST. ATT'Y'S OFF., https://phillyda.org/victims-and-witnesses/.

67. *Id.*

68. *CARES Peer Crisis Responders for Homicide Survivors*, PHILADELPHIA DIST. ATT'Y'S OFF., https://phillyda.org/victims-and-witnesses/cares-peer-crisis-responders-for-homicide-survivors/.

69. *Victim Assistance*, SUFFOLK CNTY. DIST. ATT'Y, https://www.suffolkdistrictattorney.com/victim-assistance.

assault.[70] Each unit is staffed with advocates who have expertise in each area and are able to connect victims with resources to address their needs.[71] For example, the domestic violence unit website notes that "not every survivor is ready to report abuse to law enforcement or participate in a prosecution. Even so, we have resources available for anyone who wants to leave an abusive relationship, as well as for friends and family who want to help a loved one."[72]

Krasner and Rollins are just two of the chief prosecutors whose approaches to public safety include a focus on reducing the jail and prison populations and fair treatment of defendants and victims.[73] Most progressive prosecutors also attempt to use their power and discretion to eliminate racial disparities.[74] Some of them have worked with the Reshaping Prosecution Initiative of the Vera Institute of Justice.[75] This Initiative partners with progressive prosecutors' offices to help establish data-informed policies that will eliminate racial disparities, reduce the use of incarceration, and increase accountability to directly impacted communities.[76] The Reshaping Prosecution team has worked with prosecutors' offices in DeKalb and Chatham Counties in Georgia; Ramsey County, Minnesota; Suffolk County, Massachusetts; Fairfax and Arlington Counties in Virginia; Ingham County, Michigan; and Chittenden County, Vermont, among others.[77]

The progressive prosecutor movement is not a panacea for the problems in the criminal legal system. First, the movement is very small. There are over 2,300 chief prosecutors in the United States,[78] and less than 100 are part of the movement.[79] Second, the progressive prosecutors who are implementing the most meaningful policies and practices have faced challenges from opponents of

70. *Id.* The program also includes advocates for undocumented immigrants, the elderly, and persons with disabilities. *Id.*

71. *Id.*

72. *Domestic Violence, Victim Assistance*, SUFFOLK CNTY. DIST. ATT'Y, https://www.suffolkdistrictattorney.com/victim-services/domestic-violence.

73. *Meet the Movement*, FAIR AND JUST PROSECUTION, https://fairandjustprosecution.org/meet-the-movement/.

74. *See* Covert, *supra* note 48, at 233-39 (discussing how progressive prosecutors can do more to explicitly address racial discrimination as part of their reform efforts).

75. *Reshaping Prosecution Initiative*, VERA INST. OF JUST., https://www.vera.org/ending-mass-incarceration/criminalization-racial-disparities/prosecution-reform/reshaping-prosecution-initiative.

76. *Id.*

77. *Id.*

78. George Coppolo, Chief Att'y, *States That Elect Their Chief Prosecutors*, OLR RSCH. REP. (Feb. 24, 2003), https://www.cga.ct.gov/2003/rpt/2003-R-0231.htm.

79. *See Meet the Movement*, FAIR AND JUST PROSECUTION, https://fairandjustprosecution.org/meet-the-movement/ (profiling some of the leaders in the progressive prosecution movement); Caren Morrison, *Progressive Prosecutors Scored Big Wins in 2020 Elections, Boosting a Nationwide Trend*, THE CONVERSATION (Nov. 18, 2020), https://theconversation.com/progressive-prosecutors-scored-big-wins-in-2020-elections-boosting-a-nationwide-trend-149322.

the movement that have hindered their progress.[80] Third, although prosecutors are the most powerful officials in the system, judges, police officers, and other government officials play key roles in the criminal legal system, and without their cooperation, meaningful change is very difficult.[81] Nonetheless, the movement has potential and presents an opportunity for meaningful improvements in the criminal legal system—public safety with less incarceration, elimination of unwarranted racial disparities, and fair treatment of all interested parties, including victims of crime.

CONCLUSION

In an address at the Second Annual Conference of United States Attorneys in 1940, then Attorney General Robert H. Jackson noted that "[t]he prosecutor has more control over life, liberty, and reputation than any other person in America."[82] He further noted that "[w]hile the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst."[83] After discussing the many ways that prosecutors can abuse their power and cause harm, Jackson concluded by stating,

> "[a] sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility."[84]

There is always the potential for the abuse of prosecutorial power, whether the prosecutor is public, private, or the victim herself. In fact, the potential for abuse of that power is greater when left in the hands of a crime victim acting solely in her own interest, with no concern for others who have a valid interest in a just outcome, and accountable to no one. The greatest hope remains in a fair, just, and humble prosecutor, duly elected by and accountable to the people, committed to justice for victims, defendants, and the community. The progressive prosecution movement is not the perfect solution, but it offers the greatest potential for the realization of justice in the criminal legal system.

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80. Angela J. Davis, *Transforming the Culture: Internal and External Challenges to a New Vision of Prosecution*, *in* PROGRESSIVE PROSECUTION: RACE AND REFORM IN CRIMINAL JUSTICE 95 (Kim Taylor-Thompson & Anthony C. Thompson, N.Y.U. Press, 2022).

81. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 191-99 (2019) (discussing the relative power of police officers, judges, legislators, and prosecutors).

82. Robert H. Jackson, Att'y Gen. of the U.S., The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys 1 (Apr. 1, 1940), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/04-01-1940.pdf.

83. *Id.*

84. *Id.* at 7.