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Progressive Facade: How Bail Reforms Expose the Limitations of the Progressive Prosecutor Movement

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Progressive Facade: How Bail Reforms Expose the Limitations of the Progressive Prosecutor Movement

Sarah Gottlieb*

Abstract

Progressive prosecutors have been acclaimed as the new hope for change in the criminal legal system. Advocates and scholars touting progressive prosecution believe that progressive prosecutors will use their power and discretion to address systemic racism and end mass incarceration. Just as this hope has arisen, however, so have concerns that meaningful change cannot be enacted within the criminal system by the very actors whose job it is to incarcerate. This Article highlights these concerns by looking at the bail reforms enacted by four different progressive prosecutors and analyzes the initial promises made, the actions taken to reform and eliminate monetary bail, and the resulting impacts on pretrial incarceration rates and existing racial disparities. This analysis shows how these prosecutors failed to deliver on their promises of reduced incarceration and more equitable treatment in the criminal system, and examines why these efforts often resulted in a shift to more conservative rhetoric and refocused efforts to incarcerate. Finally, this Article

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will use bail reform to show why progressive prosecutors are not a reliable method for transforming the criminal legal system due to their lack of transparency and accountability, role as political and adversarial actors, and lack of power to dismantle the carceral state.

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INTRODUCTION

When the COVID-19 pandemic began in March of 2020, approximately 500,000 defendants with pending trial dates were incarcerated across the United States.[1] This included Baltimore City, where an average of 740 defendants were held in pretrial incarceration daily during 2020.[2] To stop the spread of COVID-19, the Governor of Maryland proclaimed a state of emergency and ordered the closure of businesses and government agencies.[3] The judiciary quickly followed suit.[4] Courthouse proceedings in Maryland were suspended, bringing trials to a halt.[5] There was no realistic idea of when the judiciary would resume full functioning.

Public defenders immediately started filing bail review petitions, arguing that it was cruel and unusual punishment to continue holding their clients in facilities where there was no ability to social distance and mitigate the risk of contracting a potentially deadly virus.[6] Public defenders had multiple clients who were held without bail, waiting for their day in court when

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1. ZHEN ZENG, U.S. DEP'T JUST., NCJ 304888, JAIL INMATES IN 2021—STATISTICAL TABLES (2022), https://perma.cc/D6QU-2GBV (PDF).

2. *See DPDS Annual Data Dashboard*, MD. DEP'T PUB. SAFETY & CORR. SERVS., https://perma.cc/ZB92-SS2V (last visited Oct. 10, 2022) (including only those that were held in the Baltimore Central Booking and Intake Center). The daily average increased to 786 in 2021, while the pandemic was still ongoing. *Id.*

3. *See COVID-19 Pandemic: Orders and Guidance*, OFF. GOVERNOR LARRY HOGAN, https://perma.cc/PZ9A-SA35 (last visited July 22, 2023) (providing the various proclamations and orders related to COVID-19 that Governor Larry Hogan issued).

4. *See (COVID-19) Administrative Orders*, MD. CTS., https://perma.cc/H4XM-NABV (last updated Mar. 28, 2022) (providing the various orders related to COVID-19 that the Maryland judiciary issued).

5. *See* COURT OF APPEALS OF MARYLAND, ADMINISTRATIVE ORDER ON THE STATEWIDE SUSPENSION OF JURY TRIALS (Mar. 12, 2020), https://perma.cc/GY66-QMLT (PDF); COURT OF APPEALS OF MARYLAND, ADMINISTRATIVE ORDER ON THE STATEWIDE CLOSING OF THE COURTS TO THE PUBLIC DUE TO THE COVID-19 EMERGENCY (Mar. 13, 2020), https://perma.cc/4LCM-CKB7 (PDF).

6. *See US: COVID-19 Threatens People Behind Bars*, HUM. RTS. WATCH (Mar. 12, 2020), https://perma.cc/5Q4C-M3P8 (advocating for "supervised release and other non-custodial alternatives for detained individuals" due to COVID exposure risk); *see also* Helling v. McKinney, 509 U.S. 25, 33 (1993) ("It is cruel and unusual punishment to hold convicted criminals in unsafe conditions." (internal quotation omitted)).

their cases could finally resolve.[7] While some of these defendants had been recently arrested and detained, many had already been held for months, some for years.

The prosecutor for Baltimore City was Marilyn Mosby, who had risen to fame as a progressive prosecutor after filing charges against the officers involved in the death of Freddie Gray.[8] She publicly announced steps to help reduce the jail population during the unprecedented crisis.[9] But the reality of what was occurring in the courtrooms of Baltimore City did not align with Mosby's public proclamations. The assistant state's attorneys were continuously objecting to pleas for the release of vulnerable defendants during telephonic bail review hearings.[10]

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7. At the time, I was a public defender in Baltimore City. I typically represented approximately fifty to seventy clients at a given time. The majority were held without bail.

8. *See* Heidi Mitchell, *Meet Marilyn Mosby: The Baltimore Prosecutor in the Eye of the Storm*, VOGUE (June 23, 2015), https://perma.cc/7E7D-2Q6B (detailing Marilyn Mosby's career leading up to her role as the prosecutor of Baltimore City).

9. *See* Letter from Marilyn J. Mosby, State's Att'y, Off. State's Att'y Balt. City, to Larry Hogan, Governor of Md. (Mar. 18, 2020) [hereinafter Letter from Mosby to Governor Hogan], https://perma.cc/7TSU-VZF7 (PDF) (detailing steps to reduce the jail population during COVID such as releasing "to parole individuals 60 and older who have five years or less on their sentence"). A joint statement by thirty elected prosecutors recommended actions to mitigate the spread of COVID-19, including immediate actions to release individuals who were held because they could not afford cash bail, unless they posed a risk to public safety. *See* Press Release, Fair & Just Prosecution, Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of Those in Custody (Mar. 25, 2020) [hereinafter Fair & Just Prosecution, Joint Statement from Elected Prosecutors], https://perma.cc/X3SF-HHXG (PDF). The list of signatories included Marilyn Mosby. *Id*.

10. In response to the closure of the courts, the judiciary utilized a telephonic conference line to conduct bail review hearings. Initially, the conference line for the bail review calls was only given out to the participating attorneys. *See* Benjamin Herbst, *Bail Reviews During Maryland Court Closure*, HERBST FIRM (Mar. 14, 2020), https://perma.cc/JH29-WNEB ("It is unclear at this point whether family members will be permitted to attend bail review hearings. The most likely scenario is that attendance will be limited to the defendant's lawyer."). Unprecedented virtual access was ultimately made available to the larger public. Once they were able to join these calls, Baltimore Courtwatch posted daily on Twitter and was able to publicize the reality of the criminal legal system in Baltimore City. *See* @bmorecourtwatch, X, https://perma.cc/U93E-9A7N (last visited Oct. 11, 2022); *Shining a Light in the Dark Corners of Baltimore City's Courts*, BALT. COURTWATCH, https://perma.cc/LD89-EAGS (last visited July 23, 2023) (quantifying Baltimore City judicial bail review decisions); *see also* BALT. COURTWATCH, A

Repeatedly, public defenders heard the state requesting that judges continue holding incarcerated defendants without bail, instead of releasing them to a place where they could be safe from the transmission of COVID-19 and could receive proper medical treatment.[11]

As a public defender in Baltimore City, it was not novel to see my clients treated inhumanely, but this was uniquely cruel. For some of my clients who were incarcerated, requesting that they continue to be held during the pandemic was a potential death sentence.[12] Many of my clients had medical conditions—such as asthma, diabetes, and obesity—that made them more likely to get sick and possibly die if infected with COVID-19.[13] While the actions taken by prosecutors objecting to

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LOOK BACK: 2021–2022, BALTIMORE CITY CIRCUIT COURT—BAIL REVIEWS 3–4 (2022), https://perma.cc/F7QA-T62N (PDF) (explaining the origins, methodology, and goals of Baltimore Courtwatch).

11. To date, 693 defendants in Central Booking and Intake Center have tested positive for COVID-19. *COVID-19 Dashboard*, MD. DEP'T PUB. SAFETY & CORR. SRVS., https://perma.cc/6CSE-Y4C6 (last visited Jul. 20, 2023). Infections spread like wildfire through multiple jails and prisons in the country. *See, e.g.*, Timothy Williams & Danielle Ivory, *Chicago's Jail Is Top U.S. Hot Spot as Virus Spreads Behind Bars*, N.Y. TIMES (Apr. 9, 2020), https://perma.cc/53K2-DJHS (last updated Apr. 23, 2020) (detailing the virus outbreak in Chicago jails); Pascal Sabino, *181 Cook County Jail Staffers Have Coronavirus. Remaining Guards Are Overworked, Forced to Cut Corners, Union Says*, BLOCK CLUB CHI. (Apr. 14, 2020), https://perma.cc/DXZ9-FLR7 ("Staffing at the jail is stretched by the growing number of sick employees . . . ."); Bill Chappell & Paige Pfleger, *73% of Inmates at an Ohio Prison Test Positive For Coronavirus*, NPR (Apr. 20, 2020), https://perma.cc/TL2Y-ABGN ("A state prison has become a hot spot of the COVID-19 outbreak in Ohio, with at least 1,828 confirmed cases among inmates—accounting for the majority of cases in Marion County, which leads Ohio in the reported infections.").

12. Tragically, 2,933 people across the United States died of COVID-19 while incarcerated. *The COVID Prison Project Tracks Data and Policy Across the Country to Monitor COVID-19 in Prisons*, COVID PRISON PROJECT, https://perma.cc/PWS6-RDBE (last visited July 22, 2023). Countless incarcerated people in jails and prisons were infected with COVID-19. *Id.* The case rate for prisoners was five times higher than the U.S. population. Brendan Saloner et al., *COVID-19 Cases and Deaths in Federal Prisons,* 324 JAMA 602, 602–03 (2020).

13. Prior to the pandemic, Baltimore City already had an asthma-induced emergency department visit rate of three times the state's. LEANA WEN, BALT. CITY HEALTH DEP'T., WHITE PAPER: STATE OF HEALTH IN BALTIMORE 3 (2018), https://perma.cc/Y2DM-WLXL (PDF). Studies have shown that those incarcerated in jails and prisons are 1.5 times more likely than the general

release during these bail review hearings were largely hidden from the public, Mosby took a very public stance, calling on Governor Hogan to protect those incarcerated in Maryland's prisons and jails by releasing various categories of individuals, such as those who had a chronic illness, were over the age of sixty, already approved for parole, or close to completing their sentences.[14] Mosby was hailed for her efforts as a progressive prosecutor and her response to the pandemic by calling for this reduction in the prison population, while her line attorneys called into court from the safety of their offices and requested the opposite.[15]

The progressive prosecutor movement rests on the belief that prosecutors can use their power and discretion to enact criminal legal reforms.[16] They are elected by those who believe that these prosecutors will take steps to address mass incarceration and systemic racism in the criminal legal system.[17] Though progressive prosecutors make promises to voters in their campaigns, the reality of their actions on the

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population to report having high blood pressure, diabetes, or asthma. LAURA M. MARUSCHAK & MARCUS BERZOFSKY, U.S. DEP'T JUST., NCJ 248491, MEDICAL PROBLEMS OF STATE AND FEDERAL PRISONERS AND JAIL INMATES, 2011–12, at 2 (2015), https://perma.cc/2CNB-2FCL (PDF).

14. *See* Marilyn Mosby et al., Opinion, *Larry Hogan Can Lead by Addressing Covid-19 in Prisons and Jails*, WASH. POST (Mar. 25, 2020), https://perma.cc/8GN3-RG3Q.

15. *See* Justine Barron, *National Media Promote 'Progressive' Baltimore Prosecutor, Ignoring Local and Alternative Exposés*, FAIRNESS & ACCURACY REPORTING (July 21, 2020) https://perma.cc/JMT6-AZ6N (explaining that despite Mosby's announcement "that her office would drop more than 500 warrants for arrests for low-level drug and other offenses . . . the same percentage of defendants has been held without bail in Baltimore City district court before and since Covid-19").

16. *See The Power of Prosecutors: Prosecutors Can End Mass Incarceration—Today*, ACLU [hereinafter *The Power of Prosecutors*], https://perma.cc/9SC4-UJBJ (last visited July 21, 2023) ("Prosecutors have the power to flood jails and prisons, ruin lives, and deepen racial disparities with the stroke of a pen. But they also have the discretion to do the opposite."). *See generally* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019).

17. *See* Malik Neal, Opinion, *What the Pandemic Revealed About 'Progressive' Prosecutors*, N.Y. TIMES (Feb. 4, 2021), https://perma.cc/42TH-PZHW ("All of these prosecutors were elected on promises to radically change the criminal legal system in their charge. Their victories were possible only after years of tireless organizing and mobilizing from the movement to end mass incarceration . . . .").

ground often leave those promises unfulfilled.[18] Mass incarceration and systemic racism still plague the criminal legal system, despite progressive prosecutors being at the helm of numerous cities and counties across the United States.[19] My firsthand experience in Baltimore revealed that a progressive prosecutor was not the newfound solution to address these problems; the progressive prosecutors analyzed in this Article[20] show why: they lack transparency and accountability, while residing at the intersection of politics and the adversarial system.[21] The new label of "progressive" has not changed these attributes of the prosecutorial role. Most notably, their power is only present when they are upholding the status quo and is quickly removed when they challenge the carceral state.[22]

Prior to the progressive prosecutor movement, proclaiming prosecutors to be the most powerful actors in our criminal legal system was seen as a criticism.[23] Prosecutors have been

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18. *See id.* (providing various examples of when progressive prosecutors have not followed through on their promises to decrease the jail population).

19. It is difficult to find a comprehensive and updated list because there is no generally accepted definition of "progressive prosecutor." Jennifer M. Balboni and Randall Grometstein compiled a list of progressive prosecutors, using the term "progressive" to describe any candidate who supports recommendations for criminal justice reform involving mass incarceration, the war on drugs, or the role of the police. *See* Jennifer M. Balboni & Randall Grometstein, *Prosecutorial Reform from Within: District Attorney 'Disrupters' and Other Change Agents, 2016–2020*, 23 CONTEMP. JUST. REV. 261, 268 tbl.1, 283 n.1 (2020). While there is no widely accepted definition of "progressive prosecutor," there is general acceptance that progressive prosecutors are committed to addressing systemic racism and mass incarceration. *See* Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 22 (2019) [hereinafter Davis, *Reimagining Prosecution*] ("Progressive prosecutors are committed to reducing mass incarceration and racial disparities in the criminal justice system."). For the purposes of this Article, the prosecutors chosen both self-define as progressive and were defined by the media and advocates as progressive prosecutors, regardless of whether the designation can fluctuate.

20. As case studies, I researched Wesley Bell (St. Louis County, Mo.), Larry Krasner (Philadelphia, Pa.), Marilyn Mosby (Baltimore, Md.), and Kim Ogg (Houston, Tex.). These four prosecutors all come from cities that had sources of secondary data that could be utilized for the analysis in this Article.

21. *See infra* Part III.A.

22. *See infra* Part III.A.

23. *See* RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 126 (2019) ("Prosecutors have come to dominate decisions about criminal justice policies . . . . The result has been a

identified as the main drivers of mass incarceration, which has exacerbated the systemic racism inherent in the criminal legal system.[24] The progressive prosecutor movement has caused prosecutors' power to be evaluated by scholars and advocates through a different lens. Rather than a criticism, their immense power is seen as a positive attribute that can provide a path to reducing mass incarceration and addressing inequality.[25]

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framework commanded by prosecutors and a weakening of other forces to act as a check against them."); PROGRESSIVE PROSECUTION: RACE AND REFORM IN CRIMINAL JUSTICE 9 (Kim Taylor-Thompson & Anthony C. Thompson eds., 2022) [hereinafter PROGRESSIVE PROSECUTION] (explaining that due to high percentages of plea bargaining, "prosecutors actually control the outcome of the vast majority of criminal cases"); Erik Luna & Marianne Wade, *Introduction*, 67 WASH. & LEE L. REV. 1285, 1285 (2010) ("For all intents and purposes, prosecutors *are* the criminal justice system through their awesome, deeply problematic powers.").

24. *See* Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1070 (2016) [hereinafter Davis, *The Prosecutor's Ethical Duty*] ("Prosecutors have played a significant role in the crisis of mass incarceration."). *See generally* David Alan Sklansky, *The Problems With Prosecutors*, 1 ANN. REV. CRIM. 451 (2018) (describing seven different problems with prosecutors: the power they have, the discretion they exercise, the illegality in which they too frequently engage, the punitive ideology that shapes many of their practices, their often-frustrating unaccountability, the organizational inertia that afflicts prosecutors' offices, and the ambiguity surrounding the prosecutor's role); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM (2017) (arguing the single largest cause of mass incarceration is charging decisions made by prosecutors). *But see* Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018) [hereinafter Bellin, *Reassessing Prosecutorial Power*]

> [T]he enchanting empirical analysis . . . to conclude that the prosecutor "is the most important actor shaping prison population size" is flawed . . . [the] finding that increased sentence lengths contributed little to mass incarceration—is strongly disputed by other empiricists . . . a boom in state felony filings . . . appears to be, at least partially, an artifact of changes in state court reporting practices.

25. *See* Davis, *The Prosecutor's Ethical Duty*, *supra* note 24, at 1064 (referring to mass incarceration: "prosecutors are uniquely situated to have the greatest and most immediate impact on this problem because of their vast discretion and power"); Heather L. Pickerell, Note, *How to Assess Whether Your District Attorney Is a Bona Fide Progressive Prosecutor*, 15 HARV. L. POL'Y REV. 285, 285 (2020) (arguing progressive prosecutors should be supported because they can reduce incarceration and institute racially just criminal policy); *see also* Lauren-Brooke Eisen & Inimai M. Chettiar, *Criminal Justice: An Election Agenda for Candidates, Activists, and Legislatures*, BRENNAN CTR. FOR JUST. (Mar. 22, 2018), https://perma.cc/B22R-5DBU (advocating for

Progressive prosecutors have embraced this new interpretation of their role. In their campaigns, they acknowledge racial disparities and promise to use their power to reform the system from within.[26] They dismiss the typical law-and-order messaging that has been used for decades.[27] Rejecting incarceration-led approaches, they recognize the failed war on drugs and the role their offices can play to rectify the damage done to minority communities.[28] Many have run for office on the promise of various reforms, including ending cash bail, decriminalizing minor misdemeanor offenses like drug possession and prostitution, forming conviction integrity units, and reviewing draconian sentences.[29] The increased popularity

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reformation of the criminal justice system to end mass incarceration). *But see* Rachel Foran et al., *Abolitionist Principles for Prosecutor Organizing: Origins and Next Steps*, 16 STAN. J. C.R. & C.L. 496, 499 (2021) ("[P]rosecutors are law enforcement and prosecution is a systemic component of the criminal punishment system, a death-making system of racialized social control; no matter the personal politics of an individual candidate or officeholder, abolitionists believe that *prosecution*—as an integral part of the criminal punishment system—cannot be progressive."); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 168 (2022) ("[E]ven this new type of prosecutor remains an arm of law enforcement, contributing to the carceral state.").

26. *See, e.g.*, RACHAEL ROLLINS, THE RACHAEL ROLLINS POLICY MEMO 39 (2019), https://perma.cc/RV26-CUHV (PDF) (committing to addressing disparity in convictions due to race); *Safety and Justice for All: A Platform for a Fairer and Safer Durham*, RE-ELECT SATANA DEBERRY DIST. ATT'Y, https://perma.cc/F833-EWDT (last visited July 21, 2023) ("Satana will . . . [a]ddress inequity and bias in the criminal legal system . . . .").

27. *See* BAZELON, *supra* note 16, at 315—35 (providing "Twenty-One Principles for Twenty-First-Century Prosecutors," which is a list of goals for progressive prosecutors broken into Part One: How to Reduce Incarceration and Part Two: How to Increase Fairness, and was written in collaboration with Fair and Justice Prosecution, The Brennan Center for Justice, and The Justice Collaborative); FAIR & JUST PROSECUTION ET AL., 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR (2018) [hereinafter 21 PRINCIPLES REPORT], https://perma.cc/XG9C-YF2K (PDF) (providing rules of prosecution for progressive prosecutors).

28. *See* FAIR & JUST PROSECUTION, FJP AT A GLANCE, https://perma.cc/ZSK3-XG4V (PDF) (last visited July 20, 2023) (explaining that FJP supports prosecutors who do not follow incarceration-led approaches).

29. *See, e.g.*, *Twin Cities & Suburbs County Attorney Candidate Questionnaire*, DECRIMINALIZING CMTYS., https://perma.cc/4K44-9L5T (last visited July 21, 2023) (demonstrating how Mary Moriarty promised to decriminalize sex work and create a police accountability unit within the

of these progressive messages has meant that progressive prosecutors' clout has spread far outside of courthouses and the traditional legal community,[30] captivating the general public's attention, and further propelling the idea that prosecutors provide the pathway to reform.[31]

This attention surrounding progressive prosecutors and their policy agendas comes at a time when bail reform has also

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county attorney's office); Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, NEW YORKER (Oct. 22, 2018), https://perma.cc/Z8XG-L62Z ("[Larry Krasner] likes to say that he wrote his campaign platform—eliminate cash bail, address police misconduct, end mass incarceration—on a napkin.").

30. Various celebrities are using their spotlights and money to back progressive candidates. *See, e.g.*, Juana Summers et al., *John Legend Wants to Transform the Criminal Justice System, One DA at a Time*, HOUS. PUB. MEDIA (May 23, 2022), https://perma.cc/G8V9-EKA5 ("[John Legend is] also throwing his support behind a number of progressive prosecutors who are running on a promise to reform a criminal justice system that they say is outdated and that disproportionately punishes and over incarcerates people of color."). Political action committees spend large amounts of money backing progressive candidates. *See* Astead W. Herndon, *George Soros's Foundation Pours $220 Million into Racial Equality Push*, N.Y. TIMES (July 13, 2020), https://perma.cc/VMC6-BDUB ("Of the $220 million, the foundation will invest $150 million in five-year grants for selected groups, including progressive and emerging organizations like the Black Voters Matter Fund . . . ."); Scott Bland, *George Soros' Quiet Overhaul of the U.S. Justice System*, POLITICO (Aug. 30, 2016), https://perma.cc/5V6Y-FGC3 ("Democratic mega-donor George Soros has directed his wealth into an under-the-radar 2016 campaign to advance one of the progressive movement's core goals—reshaping the American justice system."). Podcasts have interviewed various prosecutors and highlighted the progressive policies they are implementing across the country. *See, e.g.*, The Gray Area, *Philadelphia's Progressive Prosecutor*, VOX (July 29, 2021), https://perma.cc/8Q75-TNBA (featuring Larry Krasner); *Progressive Prosecuting*, CITY ARTS & LECTURES (Apr. 3, 2022), https://perma.cc/UFK8-KZJ4 (featuring San Francisco District Attorney Chesa Boudin and Cook County State's Attorney Kim Foxx); The Daily, *The Real Meaning of Chesa Boudin's Recall*, N.Y. TIMES (June 10, 2022), https://perma.cc/6XXE-W5B9. The docuseries *Philly D.A.* focuses on the election of Larry Krasner in Philadelphia and asks: "Can he change the criminal justice system from the inside?" *See generally Philly D.A.* (PBS 2021) (exploring Philadelphia District Attorney Larry Krasner's implementation of progressive policies).

31. Multiple books and articles have argued that progressive prosecutors will reform and transform the criminal legal system. *See* BAZELON, *supra* note 16, at xxvii (arguing prosecutors hold the "key to change . . . can protect against convicting the innocent . . . guard against racial bias . . . [and] curtail mass incarceration"). *See generally* PROGRESSIVE PROSECUTION, *supra* note 23 (stating fundamental criminal justice reform can and must be spearheaded by the office of the district attorney).

been at the forefront of criminal legal discussions.[32] Bail reform has gained traction nationwide, sparked by media attention of horrific cases and leading to outrage across the United States.[33] Progressive prosecutors have joined in these efforts for reform, recognizing the inequity in having two different criminal systems, one for the rich and one for the poor.[34] Thus, the elimination of monetary bail has become one of the central tenets of the progressive prosecutor movement.[35] Bolstered by states and cities attempting to reform their cash bail systems,[36]

32. *See* Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 947 (2020) ("There are few issues in criminal law with greater momentum than bail reform.").

33. *See, e.g.*, Jesse McKinley & Ashley Southall, *Kalief Browder's Suicide Inspired a Push to End Cash Bail. Now Lawmakers Have a Deal*, N.Y. TIMES (Mar. 29, 2019), https://perma.cc/T4Z3-R6BE (reporting that Kalief Browder spent three years on Rikers Island because his family could not post his $3,000 bail, his charges were ultimately dismissed, and tragically, he later committed suicide); *see also Poll: How Do Americans Feel About Pretrial Bail Reform?*, STAND TOGETHER TR. (July 13, 2018), https://perma.cc/4BGW-FZSD (finding that there is strong support for bail reform in America). There has also been media exposure to the troubling bail bonds apparatus that is invested in continuing the status quo. *See* Allie Preston & Rachael Eisenberg, *Profit Over People: The Commercial Bail Industry Fueling America's Cash Bail Systems*, AM. PROGRESS (July 6, 2022), https://perma.cc/JJH9-BPMP ("The commercial bail industry actively defends cash bail systems that produce racially and economically unjust outcomes, high rates of pretrial incarceration, significant costs to taxpayers, and negative public safety consequences.").

34. *See Addressing the Poverty Penalty and Bail Reform*, FAIR & JUST PROSECUTION, https://perma.cc/Q7XP-2XYE (last visited July 22, 2023) ("Common sense dictates that people should not be held in jail or penalized simply because they cannot afford a monetary payment. But in many ways, we have a two-tiered system of justice that imposes a 'poverty penalty' on individuals who are financially strapped.").

35. *See* 21 PRINCIPLES REPORT, *supra* note 27, at 6 ("[R]ecommend[ing] release for defendants, including those charged with felonies, unless there is a substantial risk of harm to an individual or the community.").

36. *See* Baughman, *supra* note 32, at 949 ("Many American jurisdictions have undertaken bail reform efforts in recent years. States and cities have eliminated money bail, adopted new state laws and regulations, and changed factors for considering bail."); *see, e.g.*, Coral Murphy Marcos, *Detroit to Reform Cash Bail System to End Practices That Jail People "Too Poor to Purchase Their Freedom"*, GUARDIAN (July 13, 2022), https://perma.cc/8Y5T-YCLZ ("A Michigan district court will implement reforms that will force judges in Detroit to state on record how implementing cash bail will protect the community."); *see also* Nikita Biryukov, *Bail Reform Pays Dividends as Number of Low-Risk Defendants Jailed Pre-Trial Drops Again*, N.J. MONITOR (Oct. 11, 2021), https://perma.cc/KQ52-M93R ("In 2014, New Jersey voters backed a

progressive prosecutors' campaigns have run on the promise to reform the bail system and eliminate monetary bail.

If progressive prosecutors believed in reducing incarceration, reforming the bail system, abolishing monetary bail, and releasing more defendants,[37] there was an opportunity to stand by those principles by releasing defendants during the COVID-19 pandemic, when their very lives hung in the balance. Yet, the opposite occurred in numerous cities that had progressive prosecutors at the helm.[38] The important question of why many progressive prosecutors failed to stop requesting largescale pretrial incarceration during this global crisis, despite making countless public commitments to do just that, remains unanswered.[39]

For criminal defendants who are deprived of their liberty awaiting trial, the failure of progressive reforms in the bail reform movement has permanent and devastating results.[40] If progressive prosecutors are swept up with policies that cannot match the goals of the movement, they will not enact the wholesale changes the progressive movement is based upon. If advocates rely on progressive prosecutors' failed policies to lead to less pretrial incarceration, the devastation of mass incarceration will continue.

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constitutional amendment to allow judges to order certain criminal suspects be detained without bail and pushed the courts away from holding minor offenders awaiting trial.").

37. *See* 21 PRINCIPLES REPORT, *supra* note 27, at 6 (recommending actions that prosecutors can take to move toward ending cash bail).

38. *See* Neal, *supra* note 17 ("In the midst of a pandemic, when bold, radical change is needed most, too many 'progressive' prosecutors have largely not shown up . . . .").

39. More attention has been paid to evaluating how Covid-19 propelled progressive reforms. *See* Chad Flanders & Stephen Galoob, *Progressive Prosecution in a Pandemic*, 110 J. CRIM. L. & CRIMINOLOGY 685, 697 (2020) (lauding the reduced incarceration made possible by progressive prosecutors, while also acknowledging in some jurisdictions, no changes occurred, or more punitive measures were put into place).

40. Multiple studies have shown that defendants who are held on a monetary bail pretrial are more likely to be convicted than those who are released. *See* Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUDS. 471, 471 (2016) ("Our estimates suggest that the assignment of money bail leads to a 12 percent increase in the likelihood of conviction . . . .").

Scholars continue to disagree about whether progressive prosecutors can be relied on to successfully enact the reforms that the movement has promised. Some believe it is essential to elect progressive prosecutors to correct the impact their previous law-and-order policies have wrought.[41] Others do not believe the criminal legal system, or the attributes of the prosecutorial role in and of itself, will allow progressive prosecutors to enact the sweeping changes they envision.[42] Throughout this debate, there has not been a thorough comparison of progressive prosecutors' attempts to reform bail and how that success, or failure, informs the analysis of their role.

This Article uses the lens of bail reform and the elimination of monetary bail—hallmarks of the progressive prosecutor movement—to evaluate progressive prosecutors' efficacy to reform the criminal legal system. Using four case studies, it analyzes why the efforts to reform bail did not reduce pretrial incarceration or address systemic racism, and instead, led to refocused efforts to incarcerate and a return to the law-and-order playbook of the past. These four case studies

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41. *See* Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. ONLINE 8, 12 (2018) [hereinafter Davis, *The Progressive Prosecutor*] ("The election of progressive prosecutors willing to use their power and discretion to effect change is essential to bringing fairness and racial equity to our criminal justice system, and that will only happen if good people become prosecutors.").

42. *See* 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, 1990 (2022) (arguing reform is not the main work of any prosecutor); *see also* India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795, 796 (2022) (arguing that the white-male paradigm of punitiveness impacts progressive prosecutors' ability to enact change or reform the system); Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 187 (2021) (arguing progressive prosecutors will not achieve the movement's objectives); Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y. L. SCH. L. REV. 69, 70 (2020) (arguing the structure of the system and culture of prosecutors' offices poses a serious challenge for progressive reform); Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 803 (2020) (urging caution and skepticism of progressive prosecutors); Foran et al., *supra* note 25, at 499 (arguing abolition requires divesting power from prosecutors); Godsoe, *supra* note 25, at 171 (arguing that, while reformers should prosecute, progressive prosecutors cannot fix the system from within).

show why progressive prosecutors are not the actors to drive truly progressive criminal reform. They lack accountability and transparency while residing at the intersection of politics and the adversarial system, and their immense power is quickly challenged or stripped away when they are opposing the carceral state.

Part I gives a brief history of how the tough-on-crime agenda and increased power and discretion of prosecutors led to mass incarceration, as well as an overview of the national shift to acknowledge the harms of the criminal legal system. It describes how the bail reform movement became prevalent in the zeitgeist and how pushing for abolishment of monetary bail became commonplace for progressive prosecutors.[43] It then reviews the various claims and promises that four progressive prosecutors have made about bail reform policies: Wesley Bell (St. Louis County), Larry Krasner (Philadelphia), Marilyn Mosby (Baltimore), and Kim Ogg (Houston).[44]

Part II reviews the records of those four prosecutors and analyzes them to reveal common themes and challenges faced when implementing bail reforms. It examines any internal actions or orders given to line attorneys and evaluates, to the extent possible, what occurred in court during bail hearings.[45] It determines whether progressive bail reform policies produced positive results by evaluating if they were able to reduce overall incarceration rates or bring equity to the glaring racial disparity present in pretrial incarceration, ultimately addressing the question of whether these prosecutors were able to change the system from within.[46]

Part III draws lessons from the review in Part II and evaluates why prosecutors were unable to achieve the change they promised. It describes how the failure to reduce pretrial incarceration by eliminating monetary bail led to refocused incarceration and an embrace of the law-and-order policies of the past, rather than increased efforts to reform or bring progressive change.[47] It explores the impact of the political role

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43. *See infra* Part I.B.
44. *See infra* Part I.C.
45. *See infra* Part II.B.
46. *See infra* Part II.C.
47. *See infra* Part III.A.

and adversarial nature of the system on the actions taken by progressive prosecutors, including how the lack of accountability and transparency has enabled them to ignore the data that could inform their approach.[48] Finally, it discusses how prosecutorial power is only present when upholding the carceral nature of the criminal legal system and is quickly stripped from prosecutors when they take a decarceral or reformist position.[49]

I. PROGRESSIVE PROSECUTION AND BAIL REFORM

A. *The Shift from Law-and-Order to Progressive Prosecution*

1. How Law-and-Order Led to Mass Incarceration

Traditionally, prosecutors have run for election on platforms that include a tough-on-crime agenda, highlighting cases where they won convictions and promising draconian sentencing.[50] This tactic utilizes emotion and fear to convince people that crime is out of control, regardless of the reality reflected in crime rates and statistics, and then equates safety in a community with more punitive sentencing.[51] The war on drugs in the 1980s provided an opening to double down on this agenda, when fear and race-baiting were used to convince legislators to increase the severity of sentences, often in racially

48. *See infra* Part III.A.3–4.

49. *See infra* Part III.A.5.

50. These platforms ensured systemic racism was a continuing feature of both their policies and the criminal legal system. *See* BARKOW, *supra* note 23, at 2–9 (presenting the historical trend that prosecutors used a tough-on-crime agenda to help win campaigns).

51. *See id.* at 4–5 ("Politicians . . . consistently seek to gain an electoral advantage by catering to these instincts and pandering to public anxiety and intuitions with ever-more-severe policies instead of pursuing policies that would be more effective at maximizing public safety."); *see also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 534 (2001) ("Presumably the public seeks not only prosecutions, but convictions; if so, prosecutors have a substantial incentive to win the cases they bring. One piece of evidence for this fairly obvious proposition is the frequency with which elected prosecutors cite conviction rates in their campaigns.").

disparate ways, and pass more mandatory minimum sentences.[52]

These changes in sentencing resulted in power and discretion being transferred away from judges and into the hands of prosecutors.[53] Prosecutors now had a larger variety of charges with higher penalties to choose from and were in a position where they could choose who to charge, what to charge, and whether to charge someone with a mandatory penalty that a judge could not diverge from imposing, essentially usurping the role of the judge in sentencing.[54] As a scare tactic, prosecutors could charge the highest possible penalty, which had been substantially increased by legislation, and could do so regardless of its applicability or existence of proof.[55] Then, they could use the threat of asking for the maximum penalty of the highest charge against a defendant who was contemplating whether to plea or exercise their constitutional right to trial.[56] To manage their snowballing caseloads, prosecutors could now utilize mandatory penalties, overcharge, and threaten a trial tax to anyone who did not wish to plea, rather than spend the time

52. *See* Michael Tonry, *Mandatory Penalties*, 16 CRIME & JUST. 243, 251 (1992) (examining the enactment of mandatory minimums in all fifty states as a tough-on-crime measure, even though they are "unsound as a matter of policy"); *see, e.g.*, DEBORAH J. VAGINS & JESSELYN MCCURDY, ACLU, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 1–5 (2006) (discussing the racial disparity created by the 1986 Anti-Drug Abuse Act and dispelling myths regarding crack cocaine).

53. *See* Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1420 (2021) ("[J]udges have consistently deferred to prosecutorial decision-making and, with vague nods to separation of powers and democratic accountability, have declined to impose significant checks on prosecutorial conduct. The plea bargaining process, coupled with a shift away from indeterminate sentencing regimes, has taken power out of the hands of judges.").

54. *See* Stuntz, *supra* note 51, at 519–20 (discussing how the criminal code shifts power from courts to law enforcers, specifically noting sentencing power and charge stacking).

55. *See* Tonry, *supra* note 52, at 255 ("[T]here were clear indications that prosecutors used mandatory provisions tactically to induce guilty pleas.").

56. The substantial difference between a pretrial offer and the sentence given to a defendant after losing at trial is colloquially called the trial tax. *See generally* Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313 (2019) (demonstrating the "trial tax" phenomenon through research which shows trial convictions consistently result in harsher sentences than plea bargains).

and effort required of a trial.[57] This gave them vast power in every stage of the criminal legal process, especially during plea negotiations where most criminal cases are resolved.[58]

The result of this immeasurable power and draconian sentencing was an unprecedented increase in prison admissions. Since 1970, the United States' jail and prison population has increased by over 500 percent.[59] There is scholarly agreement that prosecutors are the main drivers behind that surge.[60] Between 1994 and 2008, prosecutors' charging decisions were the single most significant factor causing the increase in prison admissions.[61] By the end of 2020, the United States incarcerated 1,215,800 individuals in state and federal prisons.[62] Lest this

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57. *See* Stuntz, *supra* note 51, at 537

> The literature on plea bargaining suggests that most prosecutors insist on bargains very early in the process, and punish defendants who resist settlement until shortly before trial. So prosecutors have some incentive to keep costs down, which they can do either by limiting the number of cases filed or by limiting the amount of time and energy expended per case.

see also PFAFF, *supra* note 24, at 130–31 ("Over the years, legislators have expanded this discretion by giving prosecutors a growing array of often-overlapping charges from which to choose.").

58. *See* Stuntz, *supra* note 51, at 578 ("The cumulation of criminal prohibitions that we have seen over the past half-century has made it ever easier for prosecutors to generate guilty pleas in street crime cases, making prosecutors the system's prime adjudicators in such cases.").

59. *Mass Incarceration*, ACLU, https://perma.cc/L5SM-TWCD (last visited July 23, 2023).

60. *See* PFAFF, *supra* note 24, at 206 ("Prosecutors have been and remain the engines driving mass incarceration."); *see also* Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123, 1143 (2020) (providing a study to test whether prosecutors' charging decisions were the main factor contributing to incarceration which found that, while arrests decreased steadily from 2016 to 2018 by 28.3%, prosecutors' filings only decreased to 21.3%, meaning prosecutors were charging more people that the police arrested, disproportionately causing incarceration). *But see* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 178 (2019) (arguing prosecutors are not causing mass incarceration alone).

61. *See* PFAFF, *supra* note 24, at 72–73 ("In short, between 1994 and 2008, the number of people admitted to prison rose by about 40 percent, from 360,000 to 505,000, and almost all of that increase was due to prosecutors bringing more and more felony cases against a diminishing pool of arrestees.").

62. E. ANN CARSON, U.S. DEP'T JUST., PRISONERS IN 2020—STATISTICAL TABLES 1 (2021).

number seem impossibly large, this was actually a decrease of 28% from 2010, due in large part to the COVID-19 pandemic's impact on court operations and the resulting substantial decrease in admissions to state and federal prisons.[63] Incarceration, and prosecutors' leading role in the effort to incarcerate substantial numbers of people, has become a defining feature of the American criminal legal system.[64]

2. Changing Views and the Progressive Prosecutor Movement

A combination of factors over the last ten years produced a shift, causing a large portion of the public to recognize the failed utility of mass incarceration and the pervasiveness of systemic racism in every facet of the criminal legal system.[65] Research publicizing unprecedented levels of incarceration cast a glaring spotlight on the failures of the criminal legal system.[66] An increasing awareness that the war on drugs was a war on Black and Brown communities transformed into a general acceptance

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63. *Id.*

64. *See* Baughman & Wright, *supra* note 60, at 1143–45 (providing empirical data showing the evolution of prosecutorial increase in charging over time). *But see* Bellin, *Reassessing Prosecutorial Power*, *supra* note 24, at 837 ("While prosecutors can unilaterally open exits, it takes a village to incarcerate someone; and when it comes to incarceration, the criminal justice village is full of figures with as much or more power than prosecutors.").

65. While there is a subset of our country that does not agree, there is overwhelming acceptance that mass incarceration has been an epic failure that has devastated communities. *See New Poll Finds That Urban and Rural America Are Rethinking Mass Incarceration*, VERA (Apr. 19, 2018), https://perma.cc/NNB5-23D7 (reporting that the poll "shows widespread sentiment that our criminal justice system is not working, reflects support for reform candidates, and emphasizes that communities would prefer to focus on priorities other than spending millions on prisons and jails").

66. *See* BARKOW, *supra* note 23, at 2 (illustrating that "America's criminal justice policies have little to no effect on crime" and many "*increase* the risk of crime instead of fighting it—all while producing racially discriminatory outcomes and devaluing individual liberty"); *see, e.g.*, PFAFF, *supra* note 24, at 72 ("Given the drop in the number of arrests during this time, the implications of this [40%] rise [in felony cases] are striking, with the chance that an arrest would lead to a felony case growing from about one in three to about two in three.").

that we cannot incarcerate our way out of society's problems.[67] Through books and movies, popular culture educated millions about the systemic racism inherent in the criminal legal system.[68] The murders of Black men and women by the police were increasingly documented on video for the world to see, making it imperative and possible to hold accountable and prosecute the police. The conglomeration of these factors combined to change the political landscape.

Against this backdrop, the progressive prosecutor movement developed. While the initial movement began with activists and grassroots organizers, it was quickly picked up in national campaigns by large non-profits trying to educate the public about the power and impact of prosecutors in criminal reform.[69] It was also broadened and given more publicity by political action committees that poured large amounts of money into local elections by supporting progressive candidates.[70]

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67. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (arguing the criminal system is used as a method of control on Black and Brown communities).

68. *See* David Remnick, *Ten Years After "The New Jim Crow"*, NEW YORKER (Jan. 17, 2020), https://perma.cc/K45K-SW4G ("'The New Jim Crow' was hardly an immediate best-seller, but after a couple of years it took off and seemed to be at the center of discussion about criminal-justice reform and racism in America."); *e.g.*, 13TH (Kandoo Films 2016) (presenting a documentary film by director Ava DuVernay that analyzes the criminalization of African Americans and the intersection of race, justice, and mass incarceration in the United States); *see also When They See Us* (Netflix 2019) (presenting a crime drama miniseries by director Ava Duvernay based on the wrongful convictions of the Central Park five).

69. *See The Power of Prosecutors*, *supra* note 16 (exhibiting that ACLU, a large non-profit, has advocated for progressive prosecution); *see also* 21 PRINCIPLES REPORT, *supra* note 27, at 3 (providing principles that prosecutors can use "to improve the overall fairness and efficacy of the criminal justice system and champion priorities that improve the safety and well-being of our communities").

70. *See* Bland, *supra* note 30 (explaining that the Safety and Justice PAC was used to funnel millions into local prosecutors' campaigns); *see also* Ernest Owens, *Shaun King's PAC and Philly DA Scratched Backs, Suit Claims*, DAILY BEAST (May 25, 2021), https://perma.cc/SZ47-ETDS (reporting on an alleged conspiracy that the Real Justice PAC was trying to manipulate the judicial system); *About Real Justice*, REAL JUST., https://perma.cc/NQ76-9GFU (last visited July 23, 2023) (enumerating the Real Justice PAC's strategy to get progressive prosecutor candidates "in office to change the system"); *About Color of Change*, COLOR OF CHANGE, https://perma.cc/L3BV-GKFN (last visited July 21, 2023) (providing "holding prosecutors accountable and accelerating prosecutor reform" as one of the ways Color of Change "challenge[s] injustice,

While platforms across elections differ and scholars have different typologies for what being progressive truly means,[71] what is consistent across the progressive movement are the goals of reducing mass incarceration and addressing systemic racism.[72] Leading scholarly experts agree that progressive prosecutors are committed to those goals.[73] Organizations

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hold[s] corporate and political leaders accountable, commission[s] game-changing research on systems of inequality, and advance[s] solutions for racial justice that can transform our world"); *Our Endorsements*, VOTING WHILE BLACK, https://perma.cc/746X-J96M (last visited June 29, 2023) (listing endorsements for prosecutors).

71. The various definitions of progressive prosecutor and what they mean are not the focus of this Article, although it is an area ripe for further exploration. Benjamin Levin appears to have the most comprehensive review of what it means to be a progressive prosecutor. He identifies four ideal types: 1) the progressive who prosecutes, 2) the proceduralist prosecutor, 3) the prosecutorial progressive, and 4) the anti-carceral prosecutor. *See* Levin, *supra* note 53, at 1447–51 (defining four typologies of progressive prosecutors and what ill of the criminal legal system they are attempting to cure). Interestingly, other articles add to the discussion by providing a test with various categories where one can judge if their local prosecutor is truly progressive. *See* Pickerell, *supra* note 25, at 293–98 (providing metrics that help to determine the progressiveness of district attorneys); *see also* Davis, *Reimagining Prosecution*, *supra* note 19, at 6–7 (discussing the emergence of progressive prosecutors and then explaining how the article will analyze the paths of three elected progressive prosecutors); Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. L. 411, 419–20 (2019) (using Larry Krasner and Kim Foxx as helpful blueprints for progressive prosecution and focusing on how they recognize humanity in defendants); Butler, *supra* note 42, at 1988–89 ("Progressive prosecutors push for reform from within the criminal legal system, including by making commitments to reduce incarceration, hold police officers accountable, and reallocate funds to public services."); Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1366 (2021) (arguing that a "key metric" for a real reformer is if they push for limits on their own discretion and power).

72. *See A New Vision for the Justice System*, FAIR & JUST PROSECUTION, https://perma.cc/32Y4-T2ER (last visited July 22, 2023) ("Reform-minded prosecutors represent around 20 percent of Americans, and the strength of this movement grows with each election cycle as voters increasingly realize that the outdated policies of mass incarceration have deepened racial inequality . . . .").

73. *See* Davis, *Reimagining Prosecution*, *supra* note 19, at 22 ("Progressive prosecutors are committed to reducing mass incarceration and racial disparities in the criminal justice system."); David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 26 (2017) (noting the pledge of chief prosecutors in their campaigns to be "more attentive to racial disparities, the risk of wrongful conviction, the problem of police violence, and the failures and terrible costs of mass incarceration").

formed by prosecutors who identify as progressive talk about moving beyond incarceration-driven approaches.[74] Political action committees fund campaigns where prosecutors are working to end mass incarceration, racism, and injustice.[75] To the extent that there is a consensus, it is that these prosecutors must work to end mass incarceration and racism in the criminal system.[76]

The four prosecutors that have been selected for this Article's analysis are self-defined as progressive, as well as labeled progressive by the media at some point during their campaigns.[77] As part of their progressive platforms, they each made promises during their initial campaigns (or soon thereafter) regarding bail reform and the elimination of

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74. *See About FJP: Our Work and Vision*, FAIR & JUST PROSECUTION [hereinafter *About FJP*], https://perma.cc/HDM5-X82F (last visited July 19, 2023) ("Fair and Just Prosecution is enabling a new generation of leaders to move beyond incarceration-driven approaches and develop policies that promote a smarter and more equitable justice system.").

75. *See About Real Justice*, *supra* note 70 ("Real Justice has been at the forefront of local elections, ushering in prosecutors who have promised to transform a criminal legal system that is racist, oppressive, and preys on the poor and marginalized."); *About Color of Change*, *supra* note 70 ("Already, we've pushed prosecutors and candidates in a dozen cities make pledges to put an end to mass incarceration.").

76. The way in which racism is addressed differs across political action committees, associations, and individual prosecutors who run for election. Given that there is racism in every part of the criminal system, from corrupt police practices to bail to plea bargaining to sentencing, there are several ways for progressive prosecutors to work towards recognizing and attempting to correct racism.

77. *See Real Change in the DA's Office*, KRASNER FOR DIST. ATT'Y, https://perma.cc/2BX9-AULP (last visited July 19, 2023) ("See what a real progressive can bring to Philadelphia's DA office."); Kim Ogg (@ReElectDAKimOgg), X (Feb. 22, 2020), https://perma.cc/54V4-83YW ("Known as a progressive prosecutor, (#kimogg2020) has worked to reform the cash bail system, stop arresting people for marijuana possession, and champion mental health diversion programs."); Marilyn J. Mosby, LINKEDIN, https://perma.cc/H6NS-BET6 (last visited Dec. 22, 2023) ("As a member of the progressive prosecutor movement, [Mosby] has traveled across the globe alongside Kim Foxx, Larry Krasner, and other reform-minded prosecutors . . . ."); St. Louis Cnty. Prosecuting Att'y (@stlcopa), X (Apr. 5, 2022), https://perma.cc/L4SD-4RZQ (describing Wesley Bell speaking to students about progressive prosecution as a career option).

monetary bail.[78] This analysis will evaluate whether the promises made about monetary bail during their campaigns, and the actions taken by the prosecutors to eliminate monetary bail once elected, meet the goals of the larger movement to reduce incarceration and rectify racial disparities in pretrial incarceration.

B. *The Bail Reform Movement*

1. A Brief History of Bail in the United States

Historically, in the United States, pretrial release was presumed for all defendants, largely due to the presumption of innocence. A defendant was presumed innocent and should be released unless and until they were found guilty at trial and subject to punishment.[79] Bail was imposed solely to ensure that the defendant would return to court.[80] It was not for other purposes, such as the safety of the community or to reduce the likelihood of the defendant committing future crimes.[81] When determining whether to release a defendant or impose bail, there was no consideration of dangerousness.[82] Generally, in both state and federal courts, the crime the person was charged with did not matter unless it was a capital case, and the defendant's prior criminal record was not at issue in the bail determination.[83]

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78. *See infra* Part I.C.2. In addition, they come from cities that had large sources of secondary data to analyze and assist in evaluating their efficacy in bail reform.

79. *See* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 728 (2011) ("Historically, the presumption of innocence and the due process principles included a presumption of bail for noncapital cases and guaranteed that guilt would not be determined before trial.").

80. *See id.* at 733 ("The focus of a surety was only to return the defendant to court, not prevent him from committing further crimes.").

81. *See id.* ("Bail was not denied based on justifications of public safety or dangerousness posed by these defendants, and was solely denied when the court was not assured that defendant would appear at trial.").

82. *See id.* at 732 ("Early state courts very rarely weighed the evidence against the defendant openly pretrial, mentioned concerns for safety of the community, or considered dangerousness of the defendant—even to dismiss them as improper justifications for denying bail.").

83. *See id.* at 731.

This presumption of release slowly began to erode in federal courts due, in part, to the enactment of the Federal Rules of Criminal Procedure in 1944.[84] The Federal Rules added additional considerations that shifted what a judge was instructed to consider when determining whether to grant release, including the character and the weight of the evidence against a defendant.[85] The defendant's prior record was also added as a requirement for judges to consider in 1946.[86] Thereafter, the previous focus on risk of flight took a back seat to these additional considerations and shortly trickled down to state courts.

Over time, a practice developed whereby judges would set bail amounts so large that a defendant would have no hope of posting it.[87] They did this to ensure that defendants would be held pretrial, as there was no legal authority to hold someone based solely on dangerousness or protecting the safety of the larger community.[88] A growing concern recognized that this method targeted only the defendants that lacked the ability to pay and that having money ensured release.[89] In response, Congress passed the Bail Reform Act of 1966.[90] This Act strongly

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84. *See* SHIMA BARADARAN BAUGHMAN, THE BAIL BOOK: A COMPREHENSIVE LOOK AT BAIL IN AMERICA'S CRIMINAL JUSTICE SYSTEM 22 (2018).

85. *See* FED. R. CRIM. P. 46; BAUGHMAN, *supra* note 84, at 22 ("Rule 46 provided that courts could take into account several factors in setting a bail amount to ensure the defendant's appearance at trial.").

86. *See* CHRISTINE S. SCOTT-HAYWARD & HENRY F. FRADELLA, PUNISHING POVERTY: HOW BAIL AND PRETRIAL DETENTION FUEL INEQUALITIES IN THE CRIMINAL JUSTICE SYSTEM 22 (2019).

87. *See* SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990, at 55 (1993) ("Traditionally, [pretrial detention of many suspects] has been accomplished covertly with the judge setting a bail amount that is clearly beyond the means of the defendant.").

88. *See id.* at 56 ("Because the law (until recently) did not authorize pretrial detention for the purpose of protecting the community, judges did it covertly.").

89. *See id.* at 65 ("The result was a sense of national outrage at the money bail system and the emergence of a national consensus on the need to ensure justice for the poor.").

90. 18 U.S.C. §§ 3146–3152; *see* WALKER, *supra* note 87, at 65 ("One index of the strength of the national consensus [to ensure justice for the poor] was the fact that Congress passed the 1966 Bail Reform Act with a unanimous vote in the Senate and only fourteen opposing votes in the House of Representatives.").

favored pretrial release.[91] It mandated that all defendants, unless charged with a capital offense, should be released on their own recognizance except if there were no conditions that could reasonably assure their attendance at trial.[92] The Act was written to refocus the determination of pretrial incarceration on whether or not the defendant was a flight risk and was intended to expand release.[93] Despite these specific measures, the Act ultimately resulted in opening the door to additional considerations for courts to use in deciding whether to release someone pretrial, such as dangerousness and risk of future harm, and the determination of bail remained focused on the offense rather than the considerations dictated in the Act.[94]

A perception of rising crime rates and the war on drugs pushed federal bail reform efforts in the opposite direction.[95] To encourage more restrictive pretrial release, Congress passed the Bail Reform Act of 1984.[96] This Act directly contradicted the previous reforms that favored pretrial release and allowed judges to deny bail to defendants on a determination of dangerousness.[97] In essence, it allowed a judge to ignore the

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91. *See* SCOTT-HAYWARD & FRADELLA, *supra* note 86, at 25 ("But the act went even further . . . by creating a statutory presumption in favor of pretrial release . . . .").

92. *See id.*

93. *See* BAUGHMAN, *supra* note 84, at 23–24 ("Under the Bail Reform Act, persons charged with noncapital crimes were required to be released before trial unless the judge 'determined, in the exercise of his discretion, that such a release would not reasonably assure the appearance of the person as required.'" (citation omitted)).

94. *See* SCOTT-HAYWARD & FRADELLA, *supra* note 86, at 26 ("Nonetheless, the seriousness of the offense remained the central question for decisions about whether to grant bail and the amount of bail.").

95. *See* WALKER, *supra* note 87, at 54 ("In response to rising crime rates, interest in crime control replaced concern for poor defendants. The result was a second bail reform movement, seeking preventive detention laws designed to allow judges to deny bail to defendants deemed 'dangerous' to the community.").

96. 18 U.S.C. §§ 3141–3156. The constitutionality of the Bail Reform Act of 1984 was upheld by the Supreme Court in *United States v. Salerno*. 481 U.S. 739, 741 (1987) ("We hold that . . . the Act fully comports with constitutional requirements.").

97. *See* 18 U.S.C. § 3142(g); BAUGHMAN, *supra* note 84, at 25

> The [Bail Reform Act of 1984] contained much of the language of the 1966 Act . . . . However, the 1984 Act went a step further and provided that judges making bail decisions could, for the first time,

likelihood that a person would return to court and instead focus on a determination that was ripe for bias and prejudice.[98] It mandated pretrial incarceration for certain offenses if a clear and convincing standard was met.[99] When determining whether to grant release, judges were instructed to consider the nature and circumstances of the crime, the weight of the evidence, the history and characteristics of the person, and the nature and seriousness of the danger to any person or the community.[100] One category of offenses with mandated pretrial incarceration were violent crimes,[101] beginning the shift towards violent crimes being treated differently than others. It was also a shift from permissive release to preventive pretrial incarceration.[102]

While these actions happened at the federal level, states were not immune to the move towards punitive incarceration.[103] They also implemented the use of violent crimes, findings of dangerousness, and community safety as reasons to hold defendants without bail pending trial.[104] These laws still exist today: in forty-five states and D.C., if a judge finds a defendant poses a danger to an individual or the community, the judge is permitted to detain them.[105]

take into account "the nature and seriousness of the danger to any person or the community that would be posed by the person's release." (quoting 18 U.S.C. § 3142(g)(4)).

98. *See* BAUGHMAN, *supra* note 84, at 25.

99. *See* 18 U.S.C. § 3142(e)(3) (outlining those offenses which carry with them a rebuttable presumption against pretrial release).

100. *See id.* § 3142(g).

101. *See* BAUGHMAN, *supra* note 84, at 25.

102. *See* WALKER, *supra* note 87, at 54–55, 77 (noting the 1966 Bail Reform Act was enacted to rectify the pretrial incarceration of too many people, especially those that could not afford bail, while the 1984 Bail Reform Act was enacted to curtail pretrial release and allow judges to deny bail based on dangerousness).

103. *See id.* at 55 ("By 1978, twenty-three states had some form of preventive detention; by 1984, the total had reached thirty-four states.").

104. *See* BAUGHMAN, *supra* note 84, at 27 ("Many states did not create presumptive categories for detention but most now allow judges to consider the evidence against defendants and community safety in the detention decision.").

105. *See id.*

2. The New Bail Reform Movement

In recent years, a new push for bail reform, focused in large part on the elimination of monetary bail, has swept the nation.[106] While a conglomeration of factors likely led to this movement's rise, it cannot be discounted how powerful it has been for the public to hear firsthand accounts of those who have suffered in the horrendous conditions of pretrial detention because they cannot afford to pay bail and to learn how incarceration can financially and emotionally devastate a person well after their case ends.[107] Multiple news accounts, books, and a documentary detailed the horrifying story of Kalief Browder, who was only sixteen years old when he was arrested and given a bail of $3,000.[108] He was held at Rikers Island for three years while awaiting trial for allegedly stealing a backpack.[109] For two of those three years, he was held in solitary confinement.[110] The charges against him were ultimately dismissed.[111] Tragically, Kalief Browder took his own life a few years after his release.[112] This case and others shocked those who were not aware of the horrors of pretrial incarceration and

106. *See, e.g.*, Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People From Jail, Explained*, VOX (Oct. 17, 2018), https://perma.cc/DH8G-DPHH ("There's a rising movement to fight the money bail system."); Tana Ganeva, *The Fight to End Cash Bail*, STAN. SOC. INNOVATION REV., Spring 2019, at 18, 19, https://perma.cc/HPR4-CBY9 (PDF) ("[The Bronx Freedom Fund] cautions that as the call to 'end cash bail' goes mainstream—even occasionally viral, with celebrities and other public figures taking up the cause—lawmakers must ensure that cash bail is not replaced with other unjust and coercive systems . . . ."); Beatrix Lockwood & Annaliese Griffin, *The State of Bail Reform*, MARSHALL PROJECT, https://perma.cc/VB35-8BJX (last updated Oct. 30, 2020) ("As huge protests swept the country in the wake of the police killings of George Floyd and Breonna Taylor these bail funds have seen an unprecedented flood of financial support, raising questions about how best to leverage their newfound prominence.").

107. *See, e.g.*, Shaila Dewan, *When Bail Is Out of Defendant's Reach, Other Costs Mount*, N.Y. TIMES (June 10, 2015), https://perma.cc/3RXE-SYCY (describing how a defendant charged with disorderly conduct and rioting after protesting the death of Freddie Gray was given the same $250,000 bail amount as two of the officers charged with causing the death of Freddie Gray).

108. *See* McKinley & Southall, *supra* note 33.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

how arbitrarily the most severe of sanctions can be applied.[113] This shock prompted action.[114]

Activists, advocates, and the United States government began to take steps to publicize the problem and change the bail system.[115] "Pretrial justice" became a common phrase.[116] Successful legal challenges were made to the monetary bail system in various courts.[117] The White House and Department of Justice took action to bring attention to the problem of discriminatory bail practices in state courts.[118] Legislation was passed in multiple states to reform existing bail statutes that were outdated at best and illegal at worst.[119] Multiple non-profit organizations made monetary bail reform a more central part of

113. *See id.* ("Since his death, the movement to abolish cash bail has grown stronger . . . .").

114. *See* SCOTT-HAYWARD & FRADELLA, *supra* note 86, at 4 (detailing the impacts of Browder's media attention, including Mayor Bill de Blasio citing Browder as a reason to reform the court system and the six-part documentary series made for Spike television).

115. These changes have included wholesale elimination of the use of monetary bail, changes to the considerations judges evaluate when setting bail, and new laws that implement risk assessment tools. *See* Baughman, *supra* note 32, at 949.

116. *See Pretrial Justice Institute*, ART FOR JUST. FUND, https://perma.cc/UJG5-FUMK (last visited Dec. 12, 2023) ("The Pretrial Justice Institute (PJI) . . . is dedicated to advancing safe, fair and effective juvenile and adult pretrial justice practices and policies that honor and protect all people.").

117. *See, e.g.*, Baughman, *supra* note 32, at 949 n.2 (citing cases where monetary bail systems have been successfully challenged).

118. *See Fact Sheet on White House & Justice Department Convening—A Cycle of Incarceration: Prison, Debt and Bail Practices*, U.S. DEP'T JUST. (Dec. 3, 2015), https://perma.cc/84HP-TSGG ("OJP's Office of Civil Rights is also evaluating discrimination complaints against several court systems to determine whether their pretrial and bail policies violate federal laws.").

119. *See Justice Department Announces Resources to Assist State and Local Reform of Fine and Fee Practices*, U.S. DEP'T JUST. (Mar. 14, 2016), https://perma.cc/3ZYV-8Y89 ("The letter also discusses . . . the need to avoid unconstitutional bail practices . . . .").

their platforms.[120] Monetary bail reform became a cause *célèbre*.[121]

3. The Importance of Bail Reform to Progressive Prosecution

Whether a defendant is incarcerated pretrial is often the "single best predictor of case outcome."[122] Incarcerated defendants are more likely to plea, to be found guilty at trial, and to be sentenced to incarceration.[123] In the United States, a person who is charged with a criminal offense is supposed to be innocent until they are proven guilty. [124] By incarcerating defendants prior to trial, they are coerced into pleading guilty to get out of jail rather than waiting for trial dates that can be delayed for years.[125] Often, they plead guilty even though they are innocent.[126] A defendant may plead guilty because they do

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120. *See* Monika Graham, *It Is Time for Bail Reform in America: How Nonprofits Can Join the Fight for Pretrial Justice*, BOLDER ADVOC., https://perma.cc/AXN9-XYEE (last visited Nov. 12, 2023) (stating that several non-profit organizations, including Texas Fair Defense Project, RAICES, The Bail Project, Florida Rights Restoration Coalition, and more, actively challenge the cash bail system, provide funds to individuals and other advocacy groups, educate the public, and urge legislatures to pass bail reform acts); *see also The Bail Project*, BAIL PROJECT, https://perma.cc/E4S4-6F48 (last visited Nov. 12, 2023) (providing the Bail Project's mission, which is to pay bail for those in need and actively advocate for bail reform by taking the "money out of justice").

121. As with all criminal legal progress, the pendulum may be swinging in the opposite direction. *See, e.g.*, Jamiles Lartey, *New York Tried to Get Rid of Bail. Then the Backlash Came*, POLITICO (Apr. 23, 2020), https://perma.cc/VGE9-23CW (explaining how New York's bail reform package, which abolished cash bail for all misdemeanors and nonviolent crimes, serves as a "cautionary tale" because, following the abolition, New York City has seen an increase in crime).

122. SCOTT-HAYWARD & FRADELLA, *supra* note 86, at 5.

123. *See* Baughman, *supra* note 32, at 961–62 ("Pretrial detention induces innocent defendants to plead guilty, causes defendants to be convicted three times as often, receive three times longer sentences, higher bail amounts, and even commit more future crime.").

124. *See* Baradaran, *supra* note 79, at 723 ("The most commonly repeated adage in U.S. criminal justice is the presumption of innocence: defendants are deemed innocent until proven guilty.").

125. *See* BAUGHMAN, *supra* note 84, at 5 ("Not only do defendants who cannot afford bail plead guilty to get out of jail faster, they also often receive and accept harsher punishments than those who are released before trial.").

126. The National Registry for Exonerations has 841 exonerations that were originally guilty pleas, approximately 24% of all recorded exonerations.

not want to wait a long period of time for trial and lose their job, housing, and economic security in the interim.[127] They may plead guilty because they have been threatened with what is called a "trial tax"[128] and know that if they exercise their right to trial and lose, they could be sent to prison for much longer than the sentence they are offered during a plea negotiation.[129] The Supreme Court has even found that it is legal for prosecutors to threaten a defendant with the maximum penalty if they elect to go to trial.[130] During the pandemic, many defendants pled guilty because they did not want to die in jail by being exposed to a deadly virus.[131]

Pretrial incarceration has negative impacts far beyond coercing pleas and impacting the outcome of a case.[132] While someone is incarcerated, they cannot attend medical

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Exoneration Details List, NAT'L REGISTRY EXONERATIONS, https://perma.cc/XXU3-D9G9 (last visited Nov. 12, 2023).

127. *See* SCOTT-HAYWARD & FRADELLA, *supra* note 86, at 5 ("The effects of not being able to post bail go beyond the loss of liberty while awaiting trial.").

128. Trial tax is defined as "[t]he difference between the prosecution's last offer in a plea bargain and a harsher sentence imposed by a court." *Trial Tax*, BLACK'S LAW DICTIONARY (11th ed. 2019).

129. *See* NAT'L ASS'N CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 13 (2018), https://perma.cc/L9WB-ACCJ (PDF) (recognizing the problem of proportionality between pretrial and posttrial sentencing).

130. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices is an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiations of pleas.'" (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973))).

131. *See generally* Ryan T Cannon, *Sick Deal: Injustice and Plea Bargaining During COVID-19*, 110 J. CRIM. L. & CRIMINOLOGY ONLINE 91 (2020) (arguing that the COVID-19 pandemic had the potential to greatly exacerbate the coercive nature of pretrial detention and plea bargaining).

132. *See, e.g.*, Dewan, *supra* note 107 (listing job loss, eviction, and loss of custody of children as some of the negative impacts of pretrial incarceration).

appointments.[133] They cannot work and often lose their job.[134] A cascading economic effect impacts their family and the entire community.[135] Rent goes unpaid.[136] Children are without caregivers.[137] Safe, secure homes are upended. Given how impactful bail reform is to liberty, health, economic security, and the ultimate outcome in a criminal case, it is logical that it is one of the founding pillars of the progressive prosecutor movement.

Accordingly, bail reform has been highlighted as a central issue in campaigns by progressive prosecutors across the country.[138] In response to recognition of glaring racial inequities in pretrial incarceration and the blatant inequality of targeting people who cannot afford to pay for their release,[139] there has been a massive movement to reduce or eliminate the use of cash bail by progressive prosecutors.[140] Many news outlets and activists initially heralded this shift in rhetoric and policy.[141] It

133. *See* Sam McCann, *Health Care Behind Bars: Missed Appointments, No Standards, and High Costs*, VERA (June 29, 2022), https://perma.cc/3TNY-8FD7 (pointing out that life expectancy in the United States could be as much as five years greater, if not for incarceration, because incarcerated individuals miss scheduled appointments or receive no to little healthcare).

134. *See* Dewan, *supra* note 107 (providing that Mr. William Cedric Wheeler lost his job due to his criminal record and jail time of six weeks).

135. *See id.* (explaining that keeping low-risk poor individuals in jail unravels families and is a great cost to taxpayers).

136. *See id.* (stating that Mr. Wheeler's family was evicted from their home due to Mr. Wheeler's inability to find a steady job after his incarceration).

137. *See* Emma Peyton Williams, *How 12 States Are Addressing Family Separation by Incarceration—and Why They Can and Should Do More*, PRISON POL'Y INITIATIVE (Feb. 27, 2023), https://perma.cc/2N6T-9HNF (explaining that trends in the incarceration of mothers "suggest that the number of kids separated from their primary caregivers by incarceration may be growing").

138. *See, e.g.*, *Priorities*, KIM FOXX, https://perma.cc/SCD6-8SH9 (last visited Nov. 19, 2023) ("I'm running to reform the system and bring equity and fairness to a system that, for too long, has disenfranchised low-income people and communities of color, like the ones I grew up in.").

139. *See* 21 PRINCIPLES REPORT, *supra* note 27, at 6 (indicating that most people are in jail in the United States because they cannot afford bail, something that affects racial minorities disproportionately).

140. *See id.* at 3 (stating that a prosecutor's enormous influence over and discretion in the criminal process puts them in the best place to initiate bail reform).

141. *See, e.g.*, Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, N.Y. TIMES MAG. (Oct. 30, 2018), https://perma.cc/V64R-A96L (stating that "Krasner represents a profound

was seen as a huge departure from the traditional, law-and-order use of pretrial incarceration as a means to disproportionately hold poor minority defendants and pressure them to plea.[142] This change brought with it hope and excitement—it seemed to be the required moral and ethical next step to reduce pretrial incarceration and address systemic racism.[143]

Initially, election platforms were based on promises to stop requesting cash bail for a variety of pretrial charges.[144] The reality of what policies were then enacted is a bit more nuanced.[145] Some prosecutors internally issued new policies or orders to line attorneys that dictated a change in pretrial bail procedure.[146] Others published their new policies in an effort to be transparent with the public.[147] Some prosecutors promised they would only ask for a defendant to be released on their own recognizance or, in the alternative, for an exorbitantly high bail in the instances where the defendant posed a safety risk to the

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reimagining of the D.A. role" by revising policies and introducing new approaches to the criminal justice system, beginning with bail reform).

142. *See, e.g.*, Colin Doyle, *Chesa Boudin's New Bail Policy Is Nation's Most Progressive. It Also Reveals Persistence of Tough-on-Crime Norms*, BOLTS (Jan. 30, 2020), https://perma.cc/KHT3-CWUD (describing Chesa Boudin's bail policy forbidding prosecutors from requesting money bail under any circumstances).

143. *See* Austen, *supra* note 141 (quoting District Attorney Krasner of Philadelphia as stating, "We're going to turn the country into a place where criminal records are not documents of racism").

144. *See, e.g.*, Will Tanzman, *How We Ended Cash Bail in Illinois*, NATION (Nov. 15, 2023), https://perma.cc/K5NA-DWQY (explaining that ending cash bail was a core issue in Kim Foxx's campaign for Illinois's state's attorney in 2016).

145. *See infra* Parts II–III.

146. *See, e.g.*, Memorandum from Wesley Bell on Interim Office Policies: Effective January 2, 2019 [hereinafter Memorandum from Wesley Bell], https://perma.cc/BBE2-36UW (PDF).

147. *See, e.g.*, ROLLINS, *supra* note 26, at 41 ("The goals and values in this memo are the philosophical foundation for a real-world job: the task of transforming criminal justice in Boston, Chelsea, Revere, and Winthrop.").

community or was a flight risk.[148] Still others pushed for the wholesale elimination of monetary bail.[149]

Various progressive prosecutors' organizations published bail reform measures and guidance. Fair and Just Prosecution ("FJP") is a national network of progressive prosecutors.[150] Their platform focused on the elimination of monetary bail as the remedy for those held in pretrial incarceration.[151] The *21 Principles for the 21st Century Prosecutor*, FJP's "roadmap" to reform,[152] advises how to reduce incarceration by suggesting that prosecutors move towards ending cash bail and recommending release for defendants unless there is a risk of harm to an individual or community.[153] As an example, they cite Cook County State's Attorney Kim Foxx's announcement that her office would recommend pretrial release of people who had no violent criminal history, were charged with a misdemeanor or low-level felony, and had no other risk factor that suggested that they would fail to appear in court or were a danger to the community.[154]

It is due to bail reform's status as a longstanding and central tenet of the progressive prosecutor movement that it is now possible to dissect the actions taken by multiple prosecutors and evaluate the results.[155] The prosecutors that are discussed

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148. *See, e.g.*, *id.* at 15 (allowing requests for monetary bail if there is clear evidence of a flight risk); *Larry Krasner Announces End to Cash Bail in Philadelphia for Low-Level Offenses*, PHILA DIST. ATT'Y OFF. (Feb. 21, 2018) [hereinafter *Krasner Memo*], https://perma.cc/B369-6WW2 (PDF) (instructing the end of cash bail requests for low-level offenses).

149. *See supra* note 142; *see also* 21 PRINCIPLES REPORT, *supra* note 27, at 6 (advocating for an end to cash bail).

150. *See About FJP*, *supra* note 74 (providing the vision of FJP is to create a network of elected local prosecutors with the goal of "promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility").

151. *See id.*

152. *See* Press Release, Fair & Just Prosecution, Roadmap Charts a New Path for Prosecutors to Reduce Incarceration and Enhance Fairness 1 (Dec. 3, 2018), https://perma.cc/PR9J-NPJU (PDF).

153. *See* 21 PRINCIPLES REPORT, *supra* note 27, at 6 (recommending courts conduct a risk assessment to determine whether to incarcerate a defendant pretrial and that only those defendants assessed to bring a substantial risk of harm to an individual or the community be jailed).

154. *See id.*

155. For example, Larry Krasner's policy became effective in February of 2018 and should have been immediately measurable in his line attorneys'

in this Article have been selected from areas with a large amount of data, making it possible to analyze the policies they attempted to enact and the actual, on-the-ground impact of those policies on defendants.[156] It is also possible to conduct a robust analysis of the records of these prosecutors because of the immense amount of data gathered by non-profits in multiple cities.[157] These organizations enable a real-time check on the success of the reforms and policies these progressive prosecutors enact by viewing bail review hearings daily and publishing the results.[158] They shine a light on the daily injustices that occur

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actions and shortly thereafter in the percentage of those held pretrial. *See* Krasner Memo, *supra* note 148.

156. *See infra* Part I.C.

157. In Philadelphia, the Philadelphia Bail Watch was formed by the Philadelphia Bail Fund in April of 2018 to broadcast how pretrial determinations were being made and later compiled the results in a report. *See Bail Watch Reflections*, PHILA. BAIL FUND, https://perma.cc/4JU2-LF5M (last visited Nov. 20, 2023) ("After each bail watching session, we ask that volunteers share their impressions of the bail process."). In St. Louis County, the main source of data came from the research and report done by The Research Network on Misdemeanor Justice, a project of the Data Collaborative for Justice at John Jay College. *See generally* BETH M. HUEBNER ET AL., UNDERSTANDING TRENDS IN JAIL POPULATION IN ST. LOUIS COUNTY, MISSOURI: 2010–2019 (2021), https://perma.cc/KSB2-KZ9E (PDF). In Baltimore, two organizations enabled a thorough review of Courthouse proceedings: Baltimore Courtwatch and Baltimore Action Legal Team. Baltimore Courtwatch is an organization comprised of volunteers, who listen to bail review hearings daily in Baltimore City Circuit Court and tweet the results. *See About Us*, BALT. COURTWATCH [hereinafter *About Us*, BALT. COURTWATCH], https://perma.cc/C4XU-W3W4 (last visited Nov. 20, 2023) ("We watch court proceedings and report what we see in order to hold court actors accountable and end the injustice that is the criminal legal system."). Baltimore Action Legal Team is an organization that supports community efforts to address inequities in the criminal legal system, including publishing bail data. *See About Us*, BALT. ACTION LEGAL TEAM, https://perma.cc/3LFF-UCRC (last visited Nov. 20, 2023) (stating that some of their many objectives include "supporting grassroots organizations and providing much needed legal education and assistance to the Baltimore community"). All of these organizations compile their data and publish the results. *See* BALT. COURTWATCH, A LOOK BACK: 2021–2022, *supra* note 10, at 3–11; *Data Entry*, BALT. ACTION LEGAL TEAM, https://perma.cc/ZJ8W-FAPF (last visited Nov. 20, 2023) (providing a sign up for volunteers to collect data); BALT. ACTION LEGAL TEAM, 2019 BAIL HEARINGS AND CASE OUTCOMES 3–12 (2022), https://perma.cc/25XW-WPZ5 (PDF).

158. *See generally Bail Watch Reflections*, *supra* note 157; *About Us*, BALT. COURTWATCH, *supra* note 157; BALT. COURTWATCH, A LOOK BACK: 2021–2022, *supra* note 10; BALT. ACTION LEGAL TEAM, *supra* note 157.

otherwise unnoticed in courtrooms every day. The requests made by prosecutors for a defendant to be released, held on monetary bail, or held without bail would be unknowable without these non-profits.[159]

C. *Progressive Promises*

1. Changing of the Guard

The progressive prosecutor movement brought with it immense and important changes in the personal and professional background of those running for and elected to these positions.[160] Lawyers who had never prosecuted before, with resumes that included public defense, criminal defense, and civil rights entered the ring.[161] Historically, white males have predominantly held the office of elected prosecutors.[162] These new progressive prosecutors were much more diverse,

159. Or, for Kim Ogg in Houston, the reports of the Court-Appointed Monitors from the Harris County bail settlement enabled a thorough review, although they were focused on the impact of reductions in monetary bail on recidivism. *See* BRANDON L. GARRETT ET AL., MONITORING PRETRIAL REFORM IN HARRIS COUNTY: FIRST SIXTH MONTH REPORT OF THE COURT-APPOINTED MONITOR 5–6 (2020) [hereinafter GARRETT ET AL., FIRST REPORT], https://perma.cc/7NZ9-LG4Z (PDF) (providing the goals and duties of the Court-Appointed Monitors); BRANDON L. GARRETT ET AL., MONITORING PRETRIAL REFORM IN HARRIS COUNTY: FOURTH REPORT OF THE COURT-APPOINTED MONITOR 78–80 (2022) [hereinafter GARRETT ET AL., FOURTH REPORT], https://perma.cc/2CAU-97ZV (PDF) (outlining the goals of the Fourth Report, which are similar to those of the First Report).

160. *See* Thusi, *supra* note 42, at 815 ("Some opportunistic candidates appeared to adopt the progressive prosecutor label because of its popularity. However, many self-identified progressive prosecutorial candidates genuinely believed that they could best reduce the harms of the criminal system from within the prosecutor's office."); *id.* at 820 (arguing white privilege brings a presumption of competence to the prosecutor).

161. *See id.* at 815 ("Many are former defense attorneys or public defenders or civil rights attorneys. Some grew up in marginalized communities and have family members who are or were incarcerated. One has been a victim of police harassment or violence.").

162. *See id.* at 820 ("Prosecutorial power may derive in part from the Whiteness of the prosecutors themselves."). In 2019, 95% of elected prosecutors were white, 73% male. *See* REFLECTIVE DEMOCRACY CAMPAIGN, TIPPING THE SCALES: CHALLENGERS TAKE ON THE OLD BOYS' CLUB OF ELECTED PROSECUTORS 2 (2019), https://perma.cc/XT2E-SSRJ (PDF).

including women, people who identify as LGBTQ, and people of color.[163]

The four prosecutors whose promises, actions, and records are examined in this Article were a large change in the cities and counties where they were elected.[164] Whether it was by removing those entrenched in power, challenging the police, or changing the race or sexual orientation of the prosecutor themselves, these new candidates were a shift from the traditional story of the law-and-order, white male career prosecutors who have traditionally held these seats of power.[165]

Before progressive prosecutors had fully captured the zeitgeist, Marilyn Mosby upset incumbent Gregg Bernstein, a white, male prosecutor in the city of Baltimore.[166] She won the Democratic primary for Baltimore City State's Attorney in 2014, a de facto win in the primarily Democratic city.[167] Mosby's prosecutorial experience made her similar to a typical prosecutorial candidate; the fact that she was a Black female candidate put her in a category with just one percent of elected prosecutors nationwide.[168] Her run came before the first wave of progressive prosecutors swept the nation, so it is not surprising that, despite her eventual progressive reputation, Mosby's election was achieved without a particularly progressive platform.[169] She used law-and-order messaging and emphasized

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163. *See Meet the Movement*, FAIR & JUST PROSECUTION, https://perma.cc/XWK2-B9AF (last visited Nov. 20, 2023) (providing images and biographies of selected prosecutors in the FJP movement).

164. *See infra* notes 166–186 and accompanying text.

165. *See supra* notes 160–163 and accompanying text.

166. *See* Ian Duncan & Luke Broadwater, *Mosby Cut into Bernstein's Support in White Neighborhoods, Data Suggest*, BALT. SUN (July 12, 2014), https://perma.cc/X767-ZERW (last updated June 30, 2019) (providing the details of Mosby's win over Bernstein).

167. *See Mosby Defeats Bernstein in Baltimore Prosecutor's Primary*, DAILY REC. (June 25, 2014), https://perma.cc/GYY6-4SKS.

168. *See* David A. Graham, *Most States Elect No Black Prosecutors*, ATLANTIC (July 7, 2015), https://perma.cc/74NA-KUN9 (reporting that elected prosecutors are 95% white, 79% white men, fourteen states have no elected prosecutors of color, and only 1% of elected prosecutors are minority women).

169. While Mosby did promise change and suggested many reforms, those reforms lacked the hallmarks of promising to reduce mass incarceration and address systemic racism. *See Meet the Candidates: Marilyn Mosby*, MSU SPOKESMAN (Oct. 30, 2014), https://perma.cc/DT9P-CPEH (running on a strict campaign of putting those in jail who cause harm to others). Rather, they

targeting violent offenders, stating on the campaign trail, "I'm the individual that will go into the courtroom and put those individuals in jail."[170] She often touted her background as the daughter and granddaughter of law enforcement officers.[171] It was not until she charged the officers that were responsible for the death of Freddie Gray that her transition to a progressive prosecutor truly began.[172]

In what many call the first wave of the progressive prosecutor movement, Kim Ogg made history as Houston's first openly gay District Attorney when she was elected in 2016.[173] She had a combination of typical and atypical professional experience for the role: Ogg was a former prosecutor, led Houston's Anti-Gang Task Force, and ran the nonprofit Crime Stoppers of Houston.[174] When she won, she was also the first Democrat to win the position in over forty years.[175]

In 2017, a lawyer who sued the police, rather than working alongside them, decided to run for District Attorney of Philadelphia.[176] Civil rights attorney Larry Krasner had an

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focused on the relationship between officers and the community and how to heal them. *See id.* However, she is now described as having been progressive. *See, e.g.*, Matt Naham, *Top Baltimore Progressive Prosecutor Who Insisted She Did 'Nothing Wrong' and Blamed Federal Indictment on 'Political Adversaries' Is Convicted of Lying About COVID Hardships*, L. & CRIME (Nov. 10, 2023), https://perma.cc/8E62-JDJK (calling Mosby a "progressive prosecutor").

170. *Meet the Candidates: Marilyn Mosby*, *supra* note 169.

171. *See* Mitchell, *supra* note 8 (implying that Mosby's upbringing around law enforcement led her to conclude that "the majority of police officers are outstanding, dedicated, loyal public servants," like her family).

172. *Cf. id.* (explaining how the swift charges Mosby brought against officers in Gray's death turned her into a national figure).

173. *See* Michael Hardy, *Criminal Justice Reform Moves Pretty Fast. Just Ask Harris County DA Kim Ogg*, TEX. MONTHLY (Feb. 19, 2020) [hereinafter Hardy, *Criminal Justice Reform*], https://perma.cc/RE66-HV4U.

174. *See* St. John Barned-Smith, *After a String of High-Profile Losses, Harris County DA Kim Ogg Is Left to Battle Critics on All Sides*, HOUS. CHRON. (Mar. 16, 2022), https://perma.cc/W8AV-RBHY.

175. *See* Michael Barajas, *Reform Candidates Are Trying to Change the Definition of a 'Progressive Prosecutor' in Texas*, TEX. OBSERVER (Feb. 7, 2020), https://perma.cc/DJW3-5F5U ("[Ogg] beat the incumbent by 8 percentage points to become Harris County's first Democratic DA in 40 years.").

176. *See* Nick Tabor, *What if Prosecutors Wanted to Keep People Out of Prison?*, N.Y. INTELLIGENCER (Mar. 27, 2018), https://perma.cc/42RA-NUBK (explaining that Larry Krasner had an unconventional resume, which

atypical background for a prosecutor.[177] He was not a career prosecutor and had done pro-bono work for Black Lives Matter activists.[178] However, while Krasner's professional background is atypical of traditional prosecutors, his race and gender are not.[179] His white male identity likely impacted his unexpected electoral victory, as well as enabled his ability to enact change, impacted public perceptions of his proposed reforms, and allowed him to buck the status quo without the vitriol lodged at Black and female progressive prosecutors.[180]

When he won the Democratic primary in St. Louis County, Missouri, in 2018, Wesley Bell beat an entrenched incumbent who had held the office for twenty-eight years.[181] Bell's victory was due, in large part, to support by grassroots activists who demanded change after incumbent Bob McCulloch failed to bring charges against the white officer who killed Michael Brown in 2014.[182] With no Republican candidate running, it was a de facto win for Bell and a shock to the power structure that

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included dozens of lawsuits against the police and pro-bono work for Black Lives Matter activists).

177. *See id.*

178. *See id.*

179. The extent of how Krasner's race and gender has potentially impacted his successes in implementing progressive reforms, as well as a lack of criticism focused on him personally, is beyond the scope of this paper but has been examined by India Thusi. *See* Thusi, *supra* note 42, at 824 (arguing that the white male paradigm of punitiveness impacts progressive prosecutors' ability to enact change or reform the system).

180. *See id.* at 855–62.

181. *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://perma.cc/NKX9-UANG (explaining that Bell beat the longtime incumbent in the primary with nearly 57% of votes, making him the de facto winner of the office).

182. *See* Matt Ferner, *How Activists Ousted St. Louis County's Notorious Top Prosecutor Bob McCulloch*, HUFFPOST (Aug. 11, 2018), https://perma.cc/R8Z4-NJA2 ("McCulloch . . . drew the ire of members of the black community when he declined to bring charges against Darren Wilson, the white police officer who shot [Michael] Brown, an unarmed 18-year-old black man, in the street"). *But see* Jessica Wolfrom & Reis Thebault, *Prosecutor Will Not Charge the Police Officer Who Shot and Killed Michael Brown in Ferguson*, WASH. POST (July 30, 2020), https://perma.cc/4D3F-9YAA (stating that, after an independent examination of the case, Bell also declined to prosecute the officer in 2020).

had been in place.[183] Bell was twenty-five years younger than his law-and-order predecessor.[184] Like other progressive prosecutors, he brought diversity in experience with a background in public defense.[185] He was also, notably, the first Black person to serve in the position in St. Louis County.[186]

2. Promises to Reform

Krasner, Ogg, and Bell immediately leaned into the progressive movement and ran on platforms to reform bail in varying degrees, while Mosby initially took some time to come around to progressive policies. Krasner and Bell both ran on promises to reduce incarceration and address disparities in the legal system. Krasner coined himself a "real progressive," and ran on a platform to end mass incarceration.[187] Bell ran on a platform that recognized the harm that pretrial incarceration inflicted on defendants by causing them to "lose jobs, home and custody of their children."[188]

Further, both Bell and Krasner made specific pledges to stop or reduce monetary bail. Bell promised to eliminate cash bail for nonviolent offenses.[189] Krasner's platform explicitly included a commitment to stop cash bail imprisonment.[190] Citing the statistic that the average wait time for trial while incarcerated was more than three months, Krasner's platform

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183. *See* Allen & Jones, *supra* note 181.

184. *Id.*

185. *A Vision for Justice*, ST. LOUIS CNTY. PROSECUTING ATT'Y, https://perma.cc/LSV8-M44H (PDF) (last visited Oct. 31, 2022) (explaining that Bell previously served as a public defender, defense attorney, judge, professor, and prosecutor).

186. *Id.*

187. *See Real Change in the DA's Office*, LARRY KRASNER FOR DIST. ATT'Y, https://perma.cc/2BX9-AULP (last visited July 19, 2023) ("See what a real progressive can bring to Philadelphia's DA office."); *Plans for the Future*, LARRY KRASNER FOR DIST. ATT'Y, https://perma.cc/965D-2795 (last visited July 22, 2022).

188. Allen & Jones, *supra* note 181.

189. *See id.*; *see also End Mass Incarceration & Reform Cash Bail*, VOTE WESLEY BELL, https://perma.cc/SY6U-VEHE (last visited Nov. 7, 2023) (promising to implement alternatives to cash bail for those charged with nonviolent offenses).

190. *See Real Change in the DA's Office*, *supra* note 187 (promising to stop cash bail imprisonment as a means to end mass incarceration).

further detailed: "Larry will implement alternatives to cash bail for those charged with nonviolent offenses, including monitoring and regular check-ins, an approach similar to the one used successfully in Washington, D.C."[191]

Ogg similarly criticized the time a defendant would spend incarcerated awaiting trial and blamed monetary bail. Her campaign website contrasted the presumption of innocence with the reality that, at that time in Harris County, over 70% of the pretrial detainees were held because of an inability to pay bail.[192] A section of her platform was identified as "Bail Reform," where she pledged to support bail reform at every level.[193] The website did not promise a repeal of monetary bail but described it as "a tool to oppress the poor."[194] Further, Ogg was also critical of the sitting District Attorney for being the subject of a multimillion-dollar lawsuit because of an unconstitutional bond schedule.[195]

Mosby took a couple of years to fully warm up to the progressive policies she is now known for and so, initially, her campaign focus was not on bail reform.[196] Even though she would ultimately be considered part of the progressive reform movement after the decision to charge the officers responsible for the death of Freddie Gray,[197] it was not until a rule change

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191. *Id.*

192. *See* Jaime Mercado, *Bail Reform*, KIM OGG: HARRIS CNTY. DIST. ATT'Y (Aug. 16, 2016), https://perma.cc/38CJ-JJEH.

193. *Id.*

194. *Id.*

195. *Id.*

196. Mosby's campaign had been and continued to be focused on the fractured relationship between the police and local communities, even during the turmoil of the failed prosecution of the officers responsible for the death of Freddie Gray. *See* Barron*, supra* note 15.

197. Mosby ultimately adopted multiple progressive policies that were not a part of her original campaign, such as announcing in February of 2019 that she would no longer prosecute marijuana cases. *See* Lulu Garcia-Navarro, *Baltimore State's Attorney Will No Longer Prosecute Marijuana Possession Cases*, NPR (Feb. 3, 2019), https://perma.cc/L8VW-7K28 (stating that Mosby decided to no longer prosecute marijuana cases because they "have no public safety value, disproportionately impact[] communities of color and erode[] public trust, and [are] a costly and counterproductive use of limited resources"). She aligned herself with other progressive prosecutors who were experiencing similar pushback from police unions and governors by cowriting op-eds and traveling to various cities to show her support in person. *See* Tim Prudente, *Baltimore State's Attorney Stands with Progressive Prosecutors,*

promoting release and discouraging cash bail took effect in 2017 that she was forced to declare a position on monetary bail and bail reform writ large.[198] Accordingly, when Mosby began to proclaim a position on bail reform and elimination of money bail, she was in line with the changes occurring on the state level.[199] In 2017, her office supported the defeat of a bill that would have prevented the new rule promoting release and discouraging cash bail from taking effect.[200]

3. Initial Actions

Bell and Krasner swiftly took specific actions to try to enact changes that would be followed by their line attorneys. Bell's actions to address bail reform were almost immediate. On his second day in office, he issued new policies regarding bail recommendations, instructing assistant prosecuting attorneys to request summonses instead of warrants on all misdemeanor offenses, and not to request cash bond for any misdemeanor without obtaining consent from a supervisor.[201] The new policy also instructed the assistant prosecuting attorneys to agree to release for any defendant incarcerated on a misdemeanor offense, subject to two exceptions that would require supervisor approval.[202] The policy mandated that for misdemeanors, the

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Also Airs Dispute with Gov. Hogan at St. Louis Rally, BALT. SUN (Jan. 15, 2020), https://perma.cc/A5NZ-6VCZ (detailing Mosby's op-eds on criminal justice reform and trip to support St. Louis' top prosecutor Kim Gardner). She is also listed as part of "The Movement" on Fair & Just Prosecution's website. *See Meet the Movement*, *supra* note 163.

198. The change was prompted by a letter from Attorney General Brian Frosh to the Rules Committee of the General Assembly, in which he alleged the bail system in Maryland was potentially unconstitutional. Press Release, Brian E. Frosh, Att'y Gen., AG Frosh Urges Standing Committee on Rules of Practice and Procedure to Consider Changes to Maryland Rule 4-216 (Oct. 25, 2016), https://perma.cc/SB3Q-5BLM (PDF).

199. Rule 4-216.1 was amended to promote a defendant's release on recognizance or an unsecured bond, rather than cash bail. It contemplated additional conditions but encouraged those without a monetary penalty. *See* MD. R. 4-216.1 (West 2023).

200. *See* OFF. STATE'S ATT'Y BALT. CITY, FULL TERM REPORT (2015–2018): MARILYN J. MOSBY STATE'S ATTORNEY FOR BALTIMORE CITY 15 (2018), https://perma.cc/RQB6-MU6Y (PDF).

201. *See* Memorandum from Wesley Bell, *supra* note 146, at 1–2.

202. *See id.* at 2

presumption was release and written approval was necessary for anything above that ceiling.[203]

The policy also included new summons and bail recommendation policies for D and E felony offenses, the fourth and fifth lowest category of classification for felonies.[204] Bell's new policies instructed the assistant prosecuting attorneys to request summonses instead of warrants on these types of offenses as well, and to obtain written approval for any warrant or cash bond.[205] The assistant prosecuting attorneys were instructed to produce a list of cases within nine days with the defendants who were held on a D or E felony charge and, at the request of defense counsel, to agree to release on those cases subject to three exceptions that would require supervisor approval.[206] The most progressive part of the policy was what the assistant prosecuting attorney was instructed to do if a defendant was held on monetary bail. In that case, "a rebuttable presumption exists that the accused cannot afford the monetary condition and the APA must request an alternative condition of release."[207]

Though he took longer to enact change, Krasner issued a memorandum during his second month in office detailing his new policies to "end mass incarceration and bring balance back

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> If an APA determines the answer to any of the questions enumerated below is a "yes," APA shall obtain written approval from a supervisor in writing prior to issuance of a warrant/request for cash bond.
> 1. Does a witness and/or victim exhibit signs of physical injury, and
> 2. Does clear and convincing evidence exist to determine there is a danger to a witness and/or victim that cannot be alleviated by conditions of release, including, but not limited to: an order or protection?

203. *See id.* at 1–2.

204. *See id.* at 2; *see also* MO. REV. STAT. § 558.011 (2023) (stating that Class D felonies have a maximum sentence of seven years of incarceration and Class E felonies have a maximum sentence of four years of incarceration).

205. *See* Memorandum from Wesley Bell, *supra* note 146, at 2.

206. These exceptions were the same as those quoted *supra* note 202 with the addition of, "3. Were there more than two failures to appear within the last two years? A. If so, does information show that failures to appear were in an effort to avoid prosecution, such as evading police upon arrest or using an alias in a police encounter?" *Id.*

207. *Id.* at 2–3.

to sentencing."[208] While the memorandum did not explicitly address bail reform, it attempted to reduce pretrial incarceration rates by instructing assistant district attorneys to charge lower gradations for certain offenses, such as retail theft cases.[209] On February 21, 2018, Krasner held a press conference announcing prosecutors would no longer seek cash bail for low-level offenses, stating: "We do not imprison the poor in the United States for the so-called crime of poverty."[210] Krasner identified twenty-five different crimes where the assistant district attorneys should presume a recommendation of release and not request cash bail.[211] While the assistant district attorneys do not ultimately make the bail determinations, Krasner acknowledged that their recommendations carry some weight with the judge.[212]

Once in office, Ogg set out to introduce modest bail reform, such as recommending personal bonds rather than cash for

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208. Memorandum from Larry Krasner on New Policies Announced February 15, 2018, at 1 (Feb. 15, 2018), https://perma.cc/L96W-8P9P (PDF).

209. *See id.*

210. Philadelphia District Attorney's Office, *VIDEO: DA Larry Krasner, Joined by Faith and Political Leaders, Announces Cash Bail Reform for Low-Level Offenses*, FACEBOOK (Feb. 21, 2018) [hereinafter *Krasner Bail Reform Press Conference*], https://perma.cc/BRK8-4HPT.

211. *See* @aliciavlozano, *List of Low Level Offenses No Longer Requiring Cash Bail*, X (Feb. 21, 2018), https://perma.cc/X6CU-AGH7

> Breakdown of Charges no Longer Requiring Cash Bail: Access Device Fraud; Burglary F2—Not for Overnight Accommodation, No Person Present; Contraband; Criminal Mischief; DUI; Forgery; Fraud in Obtaining Food Stamps/Public Assistance; Identity Theft; Intentional Possession of a Controlled Substance; Paraphernalia; Possession of Marijuana; Possession with Intent to Deliver (marijuana, 5lbs or under); Possession with Intent to Delivery (non-marijuana, subject to listed caveats); Prostitution; Providing False Identification to Law Enforcement; Retail Theft; Resisting Arrest; Receiving Stolen Property (not graded as F2); Theft by Deception or False Imprisonment; Theft by Unlawful Taking (not graded as F2); Theft from Motor Vehicle (not graded as F2); Trademark Counterfeiting; Trespass (non-residential); Unlawful Purchase of a Controlled Substance (BFP); and Unauthorized Use of a Motor Vehicle.

see also Krasner Bail Reform Press Conference, *supra* note 210 (naming some crimes that will no longer require cash bail).

212. *See Krasner Bail Reform Press Conference*, *supra* note 210 (noting how the decision only affects what the prosecutor will recommend but that this carries weight with the judge).

those charged with minor offenses.[213] She reiterated her belief that it was not fair to hold low-level offenders due to poverty.[214] She continued to tout herself as progressive: "I am part of the national reform movement."[215]

Mosby again took a bit longer to join the progressive fold, but ultimately was pushed to act given the rule changes that went into effect in Maryland in July of 2017 and asserted that her office had stopped requesting cash bails.[216] Further, she publicly pronounced her stance on bail reform in November of 2017 by becoming a signatory of the amicus curiae brief in *Walker v. City of Calhoun*,[217] which argued that holding a defendant "based solely on their inability to pay a money bail . . . offends the Constitution, undermines confidence in the criminal justice system, impedes the work of prosecutors . . . and fails to promote safer communities."[218]

213. *See* Tom Dart, *Houston's New District Attorney Stands by Her Bold Move to Decriminalize Marijuana*, GUARDIAN (Apr. 18, 2017), https://perma.cc/SPL8-2SCN ("[T]hose charged with minor offences may be released from jail while they await trial on personal bonds rather than being asked to put up cash.").

214. *See id.* (quoting Ogg as saying, "Holding low-level offenders who can't bond out because they're too poor is against the basic principles of fairness").

215. Sam DeGrave, *The Interview: Harris County District Attorney Kim Ogg*, TEX. OBSERVER (July 26, 2017), https://perma.cc/XG3S-A8AU.

216. *See* Justin Fenton, *Mosby Signs on to Brief Opposing Cash Bail, Which City Prosecutors No Longer Seek*, BALT. SUN (Nov. 21, 2017), https://perma.cc/4G87-P79H; Ovetta Wiggins & Ann E. Marimow, *Maryland's Highest Court Overhauls the State's Cash-Based Bail System*, WASH. POST (Feb. 7, 2017), https://perma.cc/MAJ2-NN95 (stating that the new July 2017 rule change by Maryland's highest court "requires judges to impose the least onerous conditions when setting bail for a defendant who is not considered a danger or a flight risk" (internal quotation omitted)). In the first foregoing article, there is also a description of a bail review docket where prosecutors asked for all nine defendants in the first group to be held without bail, eight of the defendants were ultimately held without bail. *See* Fenton, *supra*.

217. 682 F. App'x 721 (11th Cir. 2017).

218. Brief of Amici Curiae Current and Former District and State's Attorneys et al. in Support of Plaintiffs-Appellees at 11, *Walker*, 682 F. App'x 721 (No. 17-13139); *see id.* at 3 (including Mosby's name on the Certificate of Interested Persons).

II. THE CASE STUDIES: "PROGRESSIVE" BAIL REFORMS

A. *Initial Results*

1. Resistance and Stagnation

Initially, Krasner's new policies encountered some pushback from local judges who were unwilling to agree to the assistant district attorneys' new requests, immediately showing how a progressive prosecutor alone may not be enough to enact change.[219] In a letter to discuss reforms of the First District Judicial bail practices, the ACLU of Pennsylvania alleged that in the first eight months of 2018, 42.5% of the people arraigned in Philadelphia received cash bail at arraignment;[220] 73.6% of those people were indigent, and 26% of the bails were $50,000 or higher.[221] While Krasner's new bail policy did not begin until late February of 2018,[222] the policy should have impacted the next six months, especially given that "for a significant number of these defendants, the lead charge was a misdemeanor."[223] However, despite an initial reluctance to reduce the use of cash bail overall, the reforms may have caused a 22% increase in the likelihood of a defendant being granted release on their own

219. *See* Ian Ward, *How Progressives Are Knocking Out Local Judges Across the Country*, POLITICO (Sept. 3, 2021), https://perma.cc/B42H-8JFZ (describing how Krasner's attempts have been pushed back on by judges). While representatives from the District Attorney's office and public defender's office advocate their own recommendations to the court, it is ultimately a bail authority (magistrate judge) who determines what, if any, release conditions are set in Philadelphia municipal courts. *See* 234 PA. CODE § 524 (2023); *see also* PHILA. MUN. CT. CRIM. DIV. LOC. RULES: ARRAIGNMENT CT. MAGIS. RULES § 8.01 (2019).

220. *See* Letter from Mary Catherine Roper, Deputy Legal Dir. & Nyssa Taylor, Crim. Just. Pol'y Couns., to Hon. Sheila Woods-Skipper, President J., Hon. Marsha H. Neifield, Pres. J. & J. Juanita Kidd on Request for Meeting to Discuss Reform of First Judicial District Bail Practices 6 (Sept. 11, 2018) [hereinafter ACLU Letter 2018], https://perma.cc/HA6G-9NMY (PDF). Prior to enactment, 67% of the cases filed in Philadelphia were charges that should have received a release recommendation pursuant to the bail policy. AURELIE OUSS & MEGAN STEVENSON, DOES CASH BAIL DETER MISCONDUCT? 10 n.21 (2022), https://perma.cc/6FHC-ZBGY (PDF).

221. ACLU Letter 2018, *supra* note 220, at 6–7.

222. *See Krasner Bail Reform Press Conference*, *supra* note 210 (announcing new policy in February 2018).

223. ACLU Letter 2018, *supra* note 220, at 6 n.10.

recognizance.[224] At the same time, regardless of this almost quarter increase in releases, there was not a concurrent reduction in pretrial detention rates.[225]

A reduction did not occur for two reasons: first, the types of crimes that result in pretrial incarceration did not benefit from this change;[226] and second, those that did benefit would have typically been released on a low monetary bail, pretrial conditions, or a surety without the change.[227] Essentially, the policy only covered lower level charges, when someone was typically released without a bail, and did not target the types of crimes that lead defendants to be held for long periods of pretrial incarceration pending trial.[228] That is not to say that the policy for those lower-level misdemeanors should not have been put to paper, but the end results—given that the practice of releasing defendants for those types of cases was already occurring—was a wash.[229]

Bell also encountered obstacles in his efforts to reform the bail system in St. Louis County.[230] The new policy he implemented on his second day on the job did not happen in a

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224. *See* OUSS & STEVENSON, *supra* note 220, at 2 (noting that bail-setting behavior changed with the "No-Cash-Bail" policy in place, resulting in a "22% . . . increase . . . in the likelihood of being granted release on recognizance").

225. *See id.*

226. *See id.* (noting that most defendants who received release on recognizance would have otherwise been released on other terms pre-trial).

227. *See id.* at 2–3 (acknowledging that most of those who received release on recognizance because of the reform would have otherwise been released after paying low monetary bail, agreeing to pre-trial supervision, or agreeing to unsecured bail, which is where a defendant agrees to owe money to the court should she fail to appear).

228. *See id.* (explaining that the defendants most affected by the reform are facing less serious charges and often would have otherwise been released without bail); *id.* at 3 n.2 ("There was no effect on larger bail amounts, which are more likely to lead to pretrial detention.").

229. *See id.* at 2–3 (critiquing Philadelphia's prosecutorial No-Cash-Bail policy, as pre-trial detention rates did not change after the policy came into effect).

230. *See* Sandra Jordan, *Wesley Bell Explains Interim Policy Changes in Prosecution that Were Leaked to Media*, ST. LOUIS AM. (Jan. 9, 2019), https://perma.cc/NF4J-3MNB ("The first week in office for St. Louis County Prosecutor Wesley Bell included . . . leaks to the media of an internal policy document, which was in part misreported.").

vacuum.[231] The internal document[232] containing the policies was almost immediately leaked to the media, showing significant pushback from the line attorneys within the office.[233] This pushback was not a surprise. The line prosecutors in Bell's office held a secret vote in December of 2018, just two weeks before he took office, to join the police union that had endorsed his opponent.[234] The 33-11 vote to unionize with law enforcement was a source of concern for Bell.[235] At a panel discussion shortly after taking office, he stated, "[I]t is troubling . . . it's simply unacceptable and I, for one, will not tolerate it."[236]

However, Bell had the distinct advantage of implementing progressive bail reform while the Missouri Supreme Court adopted a rule change, which became effective on July 1, 2019, and his interim office policies stated explicitly that they were based on these new rules.[237] The rule change instructed courts

231. *See id.* (describing the leak of the internal document and the controversial changes the document contained).

232. The Interim Office Policies had a watermark stating "Internal Office Discussion/Circulation Only" that appears at the bottom of every page. *See* Memorandum from Wesley Bell, *supra* note 146; *see also* Jordan, *supra* note 230 (describing Bell firing some employees and the leak of the internal document to the press).

233. *See* Jordan, *supra* note 230 (describing leak of internal policy document within the first week Bell was in office). Scholars Godsoe and Romero have called this pushback from line attorneys "prosecutorial mutiny." *See* Cynthia Godsoe & Maybell Romero, *Prosecutorial Mutiny*, 60 AM. CRIM. L. REV. 1403, 1403 (2023) (arguing that prosecutorial mutiny and others forms of backlash make progressive prosecutors the wrong source for change in the criminal legal system).

234. *See* Akela Lacy, *Before Criminal Justice Reformer Is Even Sworn in, St. Louis Prosecutors Have Joined a Police Union*, INTERCEPT (Dec. 20, 2018), https://perma.cc/P6KK-YFTH ("The [St. Louis Police Officer's Association] endorsed McCulloch over Bell.").

235. *See* Danny Wicentowski, *Prosecutors Wesley Bell and Kim Gardner Take Shots at Police Union During Panel*, RIVERFRONT TIMES (Jan. 25, 2019), https://perma.cc/7SJU-EDYU (noting Bell's concerns on how the unionization may undercut community trust by furthering the notion that law enforcement and the prosecutor's office are interdependent).

236. @DiarioDigitalStLouis, Broadcast of Prosecutors and the Future of Public Safety in St. Louis Panel, YOUTUBE (Jan. 24, 2019), https://perma.cc/9FV9-7SBN.

237. *See* Memorandum from Wesley Bell, *supra* note 146, at 1 ("[T]his office has based its Interim Office Policies on the [Missouri Supreme Court's rule revisions] . . . . These policies, based on the new rules, will be the basis for all recommendations to the court.").

to release defendants on their own recognizance and, in the event a court did not release a defendant on their own recognizance, the court should first consider non-monetary conditions of release and impose the least restrictive conditions or combination of conditions.[238] Bell had legal authority and support behind some of the changes he was enacting, regardless of whether those changes were supported by his line prosecutors.[239]

Due in part to the concurrent efforts of Bell's bail reforms, the judiciary's new bail statute, and the launch of the Bail Project in St. Louis, the average stay in the county jail was shortened in St. Louis County from 26.4 days in 2018 to 23.3 days in 2019.[240] However, even with the declines in length of stay, 69.8% of those who were held pretrial in 2019 had a bail.[241] Unfortunately, without court-watchers to report on the recommendations by the State or decisions by the judiciary, it is unclear why there was still this large percentage of defendants held on monetary bail. It could be a result of the types of crimes people were charged with, a failure of line attorneys to follow instructions, or the judiciary refusing to change course.[242]

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238. *See* MO. SUP. CT. R. 33.01(c).

239. *See* Alice Speri, *Five Years After Ferguson, St. Louis County's New Prosecutor Confronts a Racist Criminal Justice System*, INTERCEPT (Jan. 24, 2019), https://perma.cc/LR69-VUQU (voicing support for Bell's changes and pointing to the voters that chose him). This does not mean that Bell did not encounter racism and pushback from his first day in office, despite his rationale and support for enacting various reforms. *See id.*

240. HUEBNER ET AL., *supra* note 157, at 4; *see id.* at 6 ("[The Population Review Team], coupled with the election of Wesley Bell in 2019, a progressive prosecutor, and the launch of the Bail Project in St. Louis in the summer of 2018 are likely key factors in the [average daily jail] population change."); *see also id.* at 4 ("Length of stay is a key determinant of the jail population."). The scholars also posited the reduction could be due to the Population Review Team ("PRT") funded by the MacArthur Safety + Justice Challenge. *See id.* at 6 ("The PRT . . . systematically reviews cases of jailed persons to expedite case resolution and pinpoint avenues for systems reform.").

241. *Id.* at 39.

242. *See id.* at 6 (noting that jail populations are driven by courts and that court actors can have significant influence on outcomes). Interestingly, the large percentage of those held on bail was not because those held were predominantly booked into jail on violent felony charges. After 2014, non-violent felonies were the most common charge. In fact, from 2010 to 2019, misdemeanors were consistently a higher percentage of admissions than violent felony charges. *See id.* at 27–28 figs.14 & 14a.

While the research from St. Louis County ultimately found that from 2018 to 2019 there was a decrease in admissions to the jail, the average daily number of those incarcerated did not decrease at the same rate.[243] Instead, while the reduction in admissions was occurring, an increase in length of stay was also happening, particularly for violent crimes.[244] Either prosecutors were charging more serious crimes, and if convicted, longer sentences were imposed, or the wait for trial had substantially increased, or both. The result is that, despite fewer people entering the system, the number of those incarcerated stayed the same.

There also appears to be much more work to be done to address the criminal legal system's disparate impact on Black defendants in St. Louis County. In 2019, 55% of admissions to the jail were of Black defendants, even though only 25% of St. Louis County residents are Black.[245] This was a similar percentage of admissions as in 2018, meaning there was little reduction.[246] Black defendants were also found to have an average stay that was almost twelve days longer than white defendants.[247] While Bell's initial policies may have reduced admissions, the larger problem of systemic racism was not impacted.

Unlike Bell, Mosby did not put into place a policy instructing her line attorneys to no longer request cash bail.[248] She did not mandate release to any set of charges or task her line attorneys with reviewing the status of a defendant if they were held.[249] The results from six months after the rule change

243. *Id.* at 20.

244. *See id.* at 41 fig.21; *id.* at 54 tbl.11 (showing lengths of stay by reason for being in jail).

245. *Id.* at 31, 32–33 figs.16, 16a, & 16b.

246. *See id.* at 32 figs.16 & 16a (showing very little reduction from 2018 to 2019 in racial disparities of admission).

247. While this length of stay was a slight reduction from 2018, the length of stay for white defendants also decreased from 2018 to 2019, but by a greater amount. The disparity did not decrease. *See id.* at 58 fig.29.

248. No memorandum or policy was distributed or made public.

249. *See Prosecutors Responses to Covid-19*, BRENNAN CTR. FOR JUST. (Mar. 27, 2020), https://perma.cc/W7NG-YZWK (last updated Nov. 18, 2021) ("Despite the fact that jails and prisons are often epicenters for Covid-19, Maryland State Attorney Marilyn Mosby's office has continued to hold people

in Maryland showed only the slightest decrease of 2% for those held in pretrial incarceration in Baltimore City.[250] The decrease in those held on monetary bail—from 33.4% in January 2017 to 12% in September of 2017—was almost directly canceled out by the increase in those held without bail—from 17.4% in January of 2017 to 37.8% in September of 2017.[251] The increase in those held without bail made the decrease in those held on monetary bail inconsequential.[252] These numbers show that the promise to stop requesting monetary bail was meaningless.[253] It merely transformed a system that held people for being poor into a system that held poor people without bail.

2. The Inconsistency Between Rhetoric and Action

During her first term, Ogg's progressive rhetoric was not accompanied by parallel action. A pattern emerged where she would publicly proclaim to be against monetary bail or sign amicus briefs indicating her opposition to incarcerating someone due to an inability to pay, but then oppose the reforms occurring at home and instruct line attorneys to request bail.[254]

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without bond during the pandemic. Since March 20, the defendants in roughly a third of the cases charged in Maryland have been held without bail.").

250. Alicia Cherem & Carly Taylor, *Bail Reform's Impact Still Not Felt in Maryland*, TRADING AWAY JUST. (Dec. 21, 2018), https://perma.cc/3YU5-2JXS.

251. The difference is 21.4% and 20.4%, respectively. MD. JUDICIARY, IMPACT OF CHANGES TO PRETRIAL RELEASE RULES 16–33 tbl.1 (2017), https://perma.cc/ZD27-PHQM (PDF).

252. *See id.*; *see also* Cherem & Taylor, *supra* note 250 ("[M]ore defendants are being held without bail, according to data from the Maryland Judiciary, because the number of defendants held without bail has increased—despite bail reform that intended to let more people remain free before trial.").

253. The missing piece from this data is whether prosecutors were requesting the defendants be held without bail. If future behavior is any indication of past behavior, they were. Since 2021, Baltimore Courtwatch has tallied when the State requests that a defendant be held without bail. While the percentages range, the state typically requests 70% to 80% of all defendants be held without bail. *See Prosecutor Data*, BALT. COURTWATCH, https://perma.cc/8DJ8-CF9V (last visited Nov. 19, 2023).

254. *See, e.g.*, Andrew Schneider, *In DA Race, Ogg Faces Multiple Challenges from the Left*, HOUS. PUB. MEDIA (Feb. 20, 2020), https://perma.cc/KLG6-H2H2 (discussing how Ogg has faced pressure from the Left for her opposition to a plan that eliminates cash bail); *see also* Andrew Schneider, *Harris County DA Kim Ogg on Bail Reform*, HOUS. PUB. MEDIA (Sept. 3, 2019) [hereinafter Schneider, *Kim Ogg on Bail Reform*], https://perma.cc/FU3D-EW27 (mentioning an interview with Ogg where she

An internal email from Ogg, dated December 21, 2017, was published by *The Appeal* in August of 2018.[255] The email contradicted Ogg's campaign platform by instructing line prosecutors to request exorbitantly high bonds of $15,000 in misdemeanor cases.[256] Examples of her line attorneys following her instructions include asking for a bail of $20,000 for a defendant charged with trespass and a bail of $100,000 for a defendant charged with violating a protective order by messaging the protected person.[257] Yet, just three months prior, Ogg had filed a brief supporting bail reform in the lawsuit brought against Harris County misdemeanor judges.[258] In that brief, she wrote, "Holding un-adjudicated misdemeanor offenders in the Harris County Jail solely because they lack the money or other means of posting bail is counterproductive to the goal of seeing that justice is done," and further explained that public money should not be spent to house these defendants when "the crimes themselves may not merit jail time."[259]

When the federal court ruled that Harris County's bail system was fundamentally unfair to indigent defendants arrested for low-level offenses, Ogg praised the decision.[260] Yet, she either permitted, condoned, or explicitly instructed those working for her to make decisions that would continue the

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addresses her support for bail reform but states that the proposed amendment does not "adequately protect[] the public").

255. *See* Alex Hannaford, *Harris County D.A. Ran as a Reformer. So Why Is She Pushing High Bail for Minor Offenses?*, APPEAL (Aug. 9, 2018), https://perma.cc/D7JZ-T9GX.

256. *See id.*

257. *See id.* In Texas, trespass is typically a class B misdemeanor, TEX. PENAL CODE ANN. § 30.05(d)(1) (West 2023), which carries a potential sentence of 180 days. *Id.* § 12.22(b). Violation of a protective order is a class A misdemeanor, *id.* § 25.071(d), which carries a maximum sentence of one year. *Id.* § 12.21(b). Luckily for the defendants in those cases, the judges did not grant the prosecutors' requests. *See* Hannaford, *supra* note 255.

258. *See generally* Odonnell v. Harris County, 227 F. Supp. 3d 706 (S.D. Tex. 2016), *aff'd in part, rev'd in part*, 892 F.3d 147 (5th Cir. 2018), *overruled by* Daves v. Dallas Cnty., 64 F.4th 616 (5th Cir. 2023).

259. Position of District Attorney Kim Ogg About Bail Bond Litigation Pending in the United States District Court at 1–2, *Odonnell*, 227 F. Supp. 3d 706 (No. 4:16-cv-01414).

260. *See* Gabrielle Banks, *Harris County Bail System Unconstitutional, Federal Judge Rules*, CHRON. (Feb. 14, 2018), https://perma.cc/J7N8-W95Z.

unfair treatment of indigent defendants.[261] In August of 2018, her first assistant explained that the office was purposefully using cash bail to de facto hold individuals without bail because Texas only allows preventive detention under strict conditions.[262] These individuals were charged with misdemeanors, yet prosecutors were strategically requesting monetary bails the defendant could not afford because they could not meet the legal conditions to have them held in preventive detention.[263]

On January 30, 2019, an amicus curiae brief was filed in *Daves v. Dallas County*,[264] a case challenging the constitutionality of cash bail in the United States Court of Appeals for the Fifth Circuit.[265] The group of signatories included Ogg, Krasner, and Mosby.[266] The brief supported the District Court's decision that incarcerating someone due to an inability to pay a monetary bail is a violation of due process and equal protection requirements.[267] The brief further argued that money bail undermines confidence in the criminal system and

261. *See, e.g.*, *supra* notes 255–257 and accompanying text. Ogg's email sent in December 2017 reminded her staff that it was their "duty as prosecutors to preserve public safety and to help assure the appearance of defendants in court" but stated that it was "imperative that we file motions for high bond & bond conditions at intake (misdemeanor and felony)." Hannaford, *supra* note 255.

262. Preventive detention is when an individual is held without bail pretrial. *See* LINDSEY LINDER, TEX. CRIM. JUST. COAL., PREVENTIVE DETENTION SHOULD BE THE CAREFULLY LIMITED EXCEPTION, NOT THE RULE 1 (2017), https://perma.cc/D5L3-46JN (PDF). Interestingly, Texas allows preventive detention in a wide arrange of circumstances. *See id.* (listing the circumstances under which a person in Texas may be denied bail and preventively detained).

263. *See* Hannaford, *supra* note 255.

264. 984 F.3d 381 (5th Cir. 2020). *See generally* Brief of Amici Curiae Current and Former Prosecutors, Department of Justice Officials, Law Enforcement Officials, and Judges in Support of Plaintiffs-Appellants, *Daves*, 984 F.3d 381 (No. 18-11368) [hereinafter Brief of Amici Curiae Current and Former Prosecutors].

265. *See* Press Release, Georgetown Law, More Than 80 Current and Former Prosecutors and Law Enforcement Leaders Call for Bail Reform in Legal Filing (Jan. 30, 2019) [hereinafter Press Release, Georgetown Law], https://perma.cc/FN8U-ZTQ7.

266. *See id.*; Brief of Amici Curiae Current and Former Prosecutors, *supra* note 264, at app.

267. *See* Brief of Amici Curiae Current and Former Prosecutors, *supra* note 264, at 11.

impedes the work of prosecutors.[268] Press releases were put out to show that a large group of thirty-six sitting elected prosecutors had signed onto the brief.[269]

For Mosby, a dichotomy had begun to exist in her external statements versus on-the-ground actions.[270] At the same time that she was signing amicus curiae briefs about due process and equal protection, over 50 percent of the defendants in Baltimore City were held without bail awaiting trial.[271] While proclaiming that monetary bail undermines confidence in the criminal system, she simultaneously enacted a bail policy that was equally or more punitive.[272]

A different story was emerging on the ground in Philadelphia courts as compared to Krasner's public pronouncements as well. The Philadelphia Bail Fund observed 125 bail hearings at random over three weeks in March and April of 2019.[273] In 70% of those hearings, Krasner's line attorneys requested bail at a higher amount than that ultimately set by the magistrate.[274] This was over a year after his initial bail policy was announced and implemented.[275] The magistrate called certain requests by Krasner's line attorneys

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268. *See id.* at 1.

269. *See* Press Release, *supra* note 265.

270. *See, e.g.*, Neal, *supra* note 17

> Baltimore's state's attorney, Marilyn Mosby, signed a national letter from prosecutors promising to reduce jail admissions during the pandemic. While she said her office should be credited for decreasing arrests and lowering the jail population, according to a July analysis by The Appeal, her office continued to hold defendants without bail in roughly the same percentages as before the pandemic.

271. *See* BALT. ACTION LEGAL TEAM, *supra* note 157, at 4 (stating that 54% of bail review hearings resulted in pretrial incarceration without bail).

272. *See* Jerry Iannelli, *As COVID-19 Permeates Prisons and Jails, Baltimore Defendants Continue to Be Held Without Bail*, APPEAL (July 14, 2020), https://perma.cc/NYC6-PFGZ ("Mosby's prosecutors seem to be blanket-requesting no bond for those accused of gun possession or domestic violence, no matter what the underlying facts of a case might be.").

273. *See* Malik Neal & Christina Matthias, *Broken Promises: Larry Krasner and the Continuation of Pretrial Punishment in Philadelphia*, 16 STAN. J. C.R. & C.L. 543, 553 (2021).

274. *Id.*

275. *Id.*

"punitive" and "ridiculous."[276] As previously noted, it is always difficult to determine if these actions were a unitary move by line attorneys or a shift in the larger policy of the office. However, it has been suggested that Krasner shifted to using more traditional prosecutorial rhetoric when discussing his policies on pretrial incarceration and had moved in a more law-and-order direction.[277]

Ogg's pretense was also on full display. In September of 2019, Ogg was interviewed and described a bail recommendation system vastly different from the leaked email with conservative and punitive instructions in 2017:

> Right now, the only time I urge our prosecutors to ask for high bail is when an offender has committed a dangerous crime and presents a high risk, a threat to the public or is a flight risk. We agree to PR bonds on all the low-level misdemeanors that were the original point of the lawsuit. So, I did what I supported. We stopped trying to hold people in jail simply because they were poor when they were accused of a low-level crime.[278]

But by October, the federal reforms from the consent decree hit too close to home, and Ogg was emailing police chiefs to ask them to attend a federal court hearing with her to oppose bail reform in Harris County.[279] She also did not support the release of most defendants who were charged with minor offenses without posting up-front cash bail.[280]

However, despite Ogg's clear efforts to protest bail reform and use bail to hold defendants, the data appears to show a decline in Houston during 2015 to 2019 in the average length of stay in pretrial incarceration for misdemeanor defendants.[281] Pretrial detention rates fell from 68% in 2016 to 43% in 2021.[282]

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276. *Id.*

277. *See id.* at 555.

278. Schneider, *Kim Ogg on Bail Reform*, *supra* note 254.

279. *See* Jen Rice, *What to Know About Democrats' Proposed Resolution Condemning Harris County DA Kim Ogg*, HOUS. CHRON. (Nov. 16, 2023), https://perma.cc/4VER-AHEW.

280. *See* Gabrielle Banks, *District Attorney Kim Ogg Summons Police Chiefs to Oppose Historic Bail Settlement*, HOUS. CHRON. (Oct. 12, 2019), https://perma.cc/4BUY-VVKV.

281. *See* GARRETT ET AL., FOURTH REPORT, *supra* note 159, at 35 tbl.3.

282. *Id.* at viii.

This was despite Ogg's efforts to the contrary and due in large part to the Consent Decree and Monitoring put into place by the federal judiciary.[283] The Consent Decree included prompt release for most misdemeanor charges and, for the first time, mandated representation by defense attorneys at bail hearings.[284]

B. *COVID-19 Impacts*

When the COVID-19 pandemic hit, there was an opportunity for progressive prosecutors to show their commitment to reducing incarceration. In March of 2020, Mosby appeared to step into this role and joined a Joint Statement put out by Fair and Just Prosecution that called for reducing the prison population and urging "local officials to stop admitting people to jail absent a serious risk to the physical safety of the community."[285] On March 23, 2020, Mosby sent a letter to Governor Hogan urging him to take emergency action to develop decarceral guidelines for the state's prisoners and jails.[286]

Simultaneously with her public declarations, between January 2nd and July 7th of 2020, the percentage of those held without bail in Baltimore City remained the same. [287] This level of incarceration is particularly noteworthy because the total number of cases dropped 34% after the COVID-19 shutdowns and closures.[288] This was due to a combination of reasons, including a reduction in arrests by police, the mandatory

283. *See ODonnell Consent Decree*, HARRIS CNTY. OFF. CNTY. ADMIN., https://perma.cc/MHT9-V6VW ("The consent decree represents the first federal court-supervised remedy governing bail.").

284. *See* BRANDON L. GARRETT ET AL., MONITORING PRETRIAL REFORM IN HARRIS COUNTY: THIRD REPORT OF THE COURT-APPOINTED MONITOR iv (2021) [hereinafter GARRETT ET AL., THIRD REPORT], https://perma.cc/QT5V-QGDC (PDF) ("Defense attorneys continue to represent people at bail hearings, as required by Rule 9 and the Consent Decree. Before 2017, people arrested in Harris County had no defense attorney at these hearings."); *see also* GARRETT ET AL., FOURTH REPORT *supra* note 159, at 19 ("Under Rule 9 and the Consent Decree, most people charged with misdemeanors are entitled to prompt release on General Order Bonds.").

285. *See* Fair & Just Prosecution, Joint Statement from Elected Prosecutors, *supra* note 9, at 2.

286. *See* Letter from Mosby to Governor Hogan, *supra* note 9.

287. *See* Iannelli, *supra* note 272.

288. *Id.*

lockdown of all non-essential personnel by Governor Hogan, and an announcement in May that Mosby would no longer prosecute low-level drug possession, prostitution, trespassing, and other minor offenses because of the pandemic.[289] Those who continued to be held without bail were mostly arrested on three charges: second degree assault, first degree assault, and drug possession with the intent to distribute.[290] Mosby's office explained that there was a blanket policy of requesting that a defendant be held without bail any time there was an assault case involving domestic violence or a drug case involving a gun.[291] This policy, based solely on the charge without any consideration of the individual defendant, meant that a request of no bail was made regardless of whether the defendant had a previous criminal record, posed a flight risk, had ever failed to appear in the past, caused any injury, or had possession of a gun that was functional, loaded, or even real.[292]

In contrast to how Mosby's office did not change procedures to align with her announcements, the COVID-19 pandemic

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289. *See* Justin Fenton & Tim Prudente, *A Pandemic Sped Baltimore's Push Toward Fewer Arrests. It Didn't Quell the Murders, Even if Crime Did Slow in 2020*, BALT. SUN (Dec. 29, 2020), https://perma.cc/NG3N-9ZQ4 ("In a year defined by the coronavirus pandemic, Baltimore experienced steep drops in most crime categories, amid a plunging number of arrests and increases in pretrial and post-conviction detention releases."); *see also* Luke Broadwater et al., *Maryland Gov. Hogan Announces Closure of Nonessential Businesses Due to Coronavirus Pandemic*, BALT. SUN, https://perma.cc/R8FT-QLRM (last updated Mar. 23, 2020); Juliana Battaglia, *Baltimore Will No Longer Prosecute Drug Possession, Prostitution and Other Low-level Offenses*, CNN (Mar. 27, 2021), https://perma.cc/4SPQ-3XAQ ("Baltimore City State's Attorney Marilyn Mosby says the city will no longer prosecute for prostitution, drug possession and other low-level offenses.").

290. In Maryland, second degree assault is a misdemeanor. *See* MD. CODE ANN., CRIM. LAW § 3-203(b) (LexisNexis 2023). It can be an assault that includes physical contact, but it can also be merely a threat with no actual contact of any kind. *See* Md. State Bar Ass'n, Comm. on Pattern Jury Instructions, *Criminal Offenses: Second Degree Assault*, *in* Maryland Criminal Pattern Jury Instructions (2d ed. 2022). Drug possession with intent to distribute is a felony. *See* CRIM. LAW § 5-607(a)(1). It can be charged without any evidence of actual distribution, and there is no threshold amount required to bring the charge. *See id.* § 5-602.

291. *See* Iannelli, *supra* note 272.

292. *See id.* ("[D]espite the pandemic, Mosby's prosecutors seem to be blanket-requesting no bond for those accused of gun possession or domestic violence, no matter what the underlying facts of a case might be.").

significantly altered the policies of Krasner's office publicly.[293] A new policy was announced where defendants were split into two categories for the purposes of a bail recommendation.[294] The first category included defendants who were charged with a non-violent felony or misdemeanor.[295] In those cases, the recommendation was for release without cash bail.[296] The second category included those cases where the state determined a defendant was a public safety threat.[297] In those cases, a request would be made for them to be held on a bail of $999,999; in effect, holding the person without bail.[298] This policy was in direct contradiction to Pennsylvania law, which mandates release on a monetary condition that "shall not be greater than is necessary to reasonably ensure the defendant's appearance and compliance with conditions of the bail bond."[299] In Pennsylvania, prosecutors are not supposed to use an unreasonably high bail to de facto hold someone without bail.[300]

293. *See* Phila. DAO, *District Attorney Krasner Announces Acceleration of DAO Reforms in Response to COVID-19 Emergency*, MEDIUM (Mar. 16, 2020), https://perma.cc/HHT9-NYTR (explaining that Krasner "announced a series of measures to protect the public's health . . . and prevent the spread of the novel coronavirus . . . in the Philadelphia criminal justice system," such as not holding defendants charged with non-violent felonies and misdemeanor offenses "for any amount of cash bail").

294. *See* Samantha Melamed, *Amid Coronavirus Threat, Philadelphia Will Follow New Jersey and New York City in a Push to Cut the Jail Population*, PHILA. INQUIRER (Mar. 25, 2020), https://perma.cc/HH6V-HQ5N ("Krasner also rolled out a new bail policy over the weekend, to decouple pretrial incarceration from ability to pay."); *see also* Joshua Vaughn, *The Successes and Shortcomings of Larry Krasner's Trailblazing First Term*, APPEAL (Mar. 22, 2021), https://perma.cc/7QB6-H3R6 ("In March 2019, [Krasner] instituted a policy where his office now only seeks a maximum of 12 months of probation or parole for a person convicted of a misdemeanor and a maximum of three years for a person convicted of a felony.").

295. *See supra* note 293.

296. *See* Vaughn, *supra* note 294 ("[I]n March, at the beginning of the COVID-19 pandemic, his office instituted a binary policy to either request judges hold people pretrial if they are charged with certain violent crimes, or release people without cash bail.").

297. *See id.* ("The office asked to hold any person it felt was a public safety threat, including people charged in a shooting, people charged with rape, and people with felony convictions charged with illegal possession of firearm.").

298. *See id.*

299. 234 PA. CODE § 524(c)(5) (2023).

300. *See* PA. CONST. art. I, § 13 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.").

This new policy used an exorbitantly high bail as the mode by which to hold a defendant without bail. The Philadelphia Bail Fund did an analysis of 451 randomized bail hearings from March 21 to May 21, 2020.[301] They found that the unreasonably high amount of $999,999 was requested by an assistant district attorney in over 53% of the cases reviewed.[302] These cases included cases where the lead charge was a misdemeanor.[303] Further, almost 80 percent of the defendants that the assistant district attorney was trying to hold in pretrial incarceration were Black and more than 90 percent were assigned a public defender due to indigency.[304]

Despite the reality of what has occurred in Philadelphia courts, Krasner has continued his public stance against monetary bail while simultaneously criticizing the use of low monetary bail in gun cases.[305] On his campaign website for the 2021 election, under "Plans for the Future," it lists "Continue the Effort to End Money Bail and Expand Pre-Trial Release."[306] Interestingly, there is no information under the "Promises Kept" section for how Krasner has stopped cash bail imprisonment, even though he committed to do so as part of his original campaign.[307] More noteworthy is how he has changed his rhetoric in response to rising amounts of violence in Philadelphia. Rather than attack the use of monetary bail to hold the poor, he has attacked the bail commissioners for not following his line attorneys' requests for the high bails of $999,999.[308]

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301. *See* PHILA. BAIL FUND, RHETORIC VS. REALITY: THE UNACCEPTABLE USE OF CASH BAIL BY THE PHILADELPHIA DISTRICT ATTORNEY'S OFFICE DURING THE COVID-19 PANDEMIC 5 (2020), https://perma.cc/QZ62-45SC [hereinafter PHILA. BAIL FUND, RHETORIC VS. REALITY].

302. *Id.*

303. *See id.* at 14 (providing that 17% of the 451 requests for $999,999 were either misdemeanors or possession with intent to distribute, a non-violent offense).

304. *Id.* at 13.

305. *See Plans for the Future*, *supra* note 187 (providing that the "office charges and prosecutes gun violence with vigor").

306. *Id.*

307. *See Promises Kept*, LARRY KRASNER FOR DIST. ATT'Y, https://perma.cc/NRA3-JC5Z (last visited July 22, 2022).

308. *See* Mensah M. Dean & Chris Palmer, *Amid Rising Gun Crime in Philly, DA Larry Krasner Blasts Low Bail*, PHILA. INQUIRER (Jan. 11, 2021),

Similarly, Ogg has continued to stray from her initial campaign rhetoric and, despite insistence on her progressive label, appears to have fully adopted a law-and-order, fear-mongering message about misdemeanor bail reform. When federally appointed monitors, including leading social scientists and law professors from Duke University and Texas A&M University, produced a fifty-six-page report detailing how the mandated changes to bail practices on low-level cases have not led to increased recidivism, Ogg would not believe the independent report and instead had four members of her staff write their own.[309] Amongst other assertions, Ogg's report alleged that bail reform was "a driving factor in the crime crisis gripping our community."[310]

In 2020, her progressive failures came to bear, and Ogg was primaried by two of her former assistant district attorneys.[311] Both accused Ogg of not fulfilling her progressive promises, specifically her opposition to the legal settlement that eliminated cash bail for most low-level offenses.[312] Despite these challenges to her progressive bona fides, Ogg's campaign

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https://perma.cc/UJP4-53Z9 (recounting Krasner saying that bail amounts in gun cases must be increased to prevent the violence that led to nearly 500 murders last year).

309. *See* Samantha Ketterer, *DA Kim Ogg Challenges Monitors over Bail Reform Reports*, HOUS. CHRON. (Sept. 2, 2021), https://perma.cc/N4SY-94CE (providing that while Ogg criticized the monitors' report for using "extraneous" cases, a Duke University law professor said it would have been "misleading" to omit those cases).

310. *See* HARRIS CNTY. DIST. ATT'Y'S OFF., BAIL, CRIME & PUBLIC SAFETY: A REPORT BY THE HARRIS COUNTY DISTRICT ATTORNEY'S OFFICE TO THE HARRIS COUNTY COMMISSIONERS COURT 3 (2021), https://perma.cc/K6GZ-99M2 (PDF) (alleging that re-offending by criminal defendants who had been released, bond failures, and violent offenses committed by defendants free on bail had all increased since the bail reforms were implemented in Harris County). *But see* STEPHEN DEMUTH, EXPERT REPORT IN RESPONSE TO DISTRICT ATTORNEY KIM OGG'S REPORT ON "BAIL, CRIME & PUBLIC SAFETY" 1 (2021) (arguing that the Report's findings were misleading, false, or irrelevant to the courts and public's assessment of misdemeanor bail reform).

311. *See* Mike Snyder, *Democrats Took Control of Texas's Largest County. Then Party Leaders Went to War With Each Other*, TEX. MONTHLY (July 13, 2022), https://perma.cc/92DJ-9KWW (mentioning that Ogg lost the backing of Texas Organizing Project and the Houston LGBTQ+ Caucus).

312. *See* Hardy, *Criminal Justice Reform*, *supra* note 173 (citing one of Ogg's former prosecutors as saying she could no longer be a part of Ogg's office since "she did pretty much a 180 from what she promised").

continued to proudly proclaim: "Texas['] most progressive District Attorney is Kim Ogg."[313] Ogg contradicted her own campaign by repeatedly criticizing local judges for not following the high bail requests of her office and calling on the public to join her in pressuring the judiciary to bend to her will.[314]

In contrast, Bell initially stayed consistent with his campaign promises and progressive reforms. Shortly after closures started to occur, his office began working with the public defenders and judiciary to release more than 140 defendants from jail.[315] In order to effectuate these releases, Bell met with officials from the jail and circuit court judges.[316] Combined with other efforts, these actions decreased the population in the jail by approximately 15%.[317] However, within one year the jail was already exceeding pre-COVID levels, despite the fact that there were fewer admissions to the jail during this time.[318]

Despite the pandemic continuing to delay trials, Mosby's office maintained the practice of asking for a majority of defendants to be held without bail.[319] From June 1 through July

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313. Kim Ogg Harris County District Attorney, FACEBOOK (Feb. 17, 2020), https://perma.cc/Y8TT-7BZJ.

314. *See* Michael Hardy, *Kim Ogg Blames Rising Crime on Houston Judges. 14 of Her Prosecutors Are Vying to Unseat Them*, TEX. MONTHLY (Mar. 2022), https://perma.cc/S6EC-N6ZQ (referencing a Zoom meeting with felony judges and prosecutors that was meant to discuss the backlog of cases in the wake of the COVID-19 pandemic during which "Ogg's top lieutenant . . . informed the judges that there would be a 'reckoning' if they didn't start setting higher bonds").

315. *See* Jeremy Kohler & Joel Currier, *St. Louis City and County to Release More Than 140 Inmates Amid Virus Concerns*, ST. LOUIS POST-DISPATCH (Mar. 26, 2020), https://perma.cc/3EMS-6B7B (identifying inmates with low-level offenses or significant health issues that could be immediately released to help prevent the spread of COVID-19).

316. *See id.* (reporting that Bell's office has been working with courts, jail staff, and public defenders' offices to release inmates to limit the spread of COVID-19).

317. *See* HUEBNER ET AL., *supra* note 157, at 10 (providing that these decreases occurred from February 2020 to May 2020).

318. *See id.* at 5 (explaining that while the backlog of cases caused by pandemic closures may have contributed to the increased length of stay for those incarcerated pretrial, it is unclear what other factors may have impacted the rise in pretrial defendants).

319. *See* Doug Colbert & Colin Starger, *A Butterfly in COVID: Structural Racism and Baltimore's Pretrial Legal System*, 82 MD. L. REV. 1, 18 (2023)

31, 2020, the state's attorneys in District Court[320] asked for 94% of defendants to be held without bail.[321] In October and November of 2021, the state's attorneys observed in Circuit Court asked for 78% and 82% of the defendants who had bail reviews to be held without bail, respectively.[322] This trend continued into 2022: the State requested 87% of defendants be held without bail in January, 85.6% in February, 89.6% in March, 82.6% in April, 81.3% in May, 75.8% in June, and the lowest of 68.4% occurring in July.[323]

Mosby's public declarations to progressive priorities continued to clash with the reality of the day-to-day decisions in courtrooms. On April 26, 2022, Mosby attended a panel discussion on a recently released report regarding racial disparities in prosecution.[324] During the discussion, Mosby stated: "I will never be, as a State's Attorney for Baltimore City now, until I die, never be complicit in the discriminatory enforcement of laws against poor Black and Brown people."[325] The study that was the subject of the panel discussion concluded that Black defendants were overrepresented in Circuit Court cases, faced more serious initial charges, and were more likely to have charges initially brought to the "War Room" bail docket,

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(finding that Baltimore's legal system during COVID-19 kept pretrial detention "the default rule even during a dangerous global pandemic").

320. Generally, all bail reviews are initially held in District Court at the initial appearance of a defendant. *See* MD. R. § 4-213 (West 2023). If a defendant is held without bail and their case is indicted, they can later file for a bail review in Circuit Court. *See id.* § 4-216.3.

321. *See* Colbert & Starger, *supra* note 319, at 18.

322. Baltimore Courtwatch is a grassroots organization that began observing Baltimore City bail reviews and reporting on their findings in April of 2020. *See* BALT. COURTWATCH, *supra* note 10.

323. *Prosecutor Data*, *supra* note 253.

324. *See The Report on Racial Disparity in Prosecution in Baltimore: A Discussion on the Findings and the Path Forward*, UNIV. MD. DEP'T CRIMINOLOGY & CRIM. JUST., https://perma.cc/J3C9-QMTW (last visited Nov. 18, 2023) (listing Marilyn Mosby as a speaker at this panel hosted at the University of Baltimore School of Law).

325. UBalt Law, *Racial Disparities in Prosecution in Baltimore: A Discussion on the Findings and the Path Forward*, YOUTUBE, at 30:34 (Apr. 27, 2022), https://perma.cc/LDQ2-VSD4.

making them more likely than white defendants to be incarcerated during the pendency of their case.[326]

C. *End Results*

Many still hail Krasner as the epitome of the progressive prosecutor who is enacting reforms that deliver on the promises of reducing mass incarceration and addressing systemic racism.[327] The reality of what has transpired in Philadelphia courts with bail recommendations from his office is much more complicated. It appears that during his time in office, he has changed from eliminating the use of monetary bail to using monetary bail to incarcerate a smaller, more targeted group if, in his judgment, they are the right group to incarcerate.[328] This strategy does not reduce incarceration or address systemic racism. Targeting a smaller group charged with violent offenses does not reduce incarceration rates,[329] and the systemic racism inherent in the criminal legal system is only reinforced with this type of approach.[330]

Scholars have long pushed for the power of the prosecutor to be reined in, yet the rise of the progressive prosecutor brought

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326. The "War Room" is the bail docket where cases typically involve serious charges or repeat offenders. *See* BRIAN D. JOHNSON ET AL., UNIV. MD. & OFF. STATE'S ATT'Y BALT. CITY, FINAL REPORT ON RACIAL JUSTICE IN PROSECUTION IN BALTIMORE 15 (2022), https://perma.cc/H6VX-VVGC (PDF). Of note, the report also found that the Black defendants who were overrepresented and more likely to be held were also more likely to have those charges dismissed or reduced. *Id.* This could indicate a problem with overcharging or a problem with charging unprovable cases. *Id.*

327. In fact, Krasner was targeted because of his progressive policies, accused of causing a crime crisis, and impeached by the Pennsylvania legislature prior to the 2022 elections. *See* Brooke Schultz & Marc Levy, *Senate Delays Philly DA's Impeachment Trial Amid Court Case*, ASSOCIATED PRESS (Jan. 11, 2023), https://perma.cc/XG4J-5HPC. He was reelected and the impeachment hearings have been suspended indefinitely. *See id.*

328. *See* Intercept, *A Conversation with Larry Krasner on Criminal Justice Reform*, YOUTUBE, at 15:38, 16:35 (Nov. 4, 2021) [hereinafter *A Conversation with Larry Krasner*], https://perma.cc/WW4Z-85AK.

329. *See supra* Parts II.A–B. This is likely because those charged with such offenses are typically held for longer periods of time while awaiting trial.

330. *See* Godsoe, *supra* note 25, at 199 ("The focus on prosecuting 'the right people' perpetuates many of the same pathologies found in the current approach to prosecution, such as racial disproportionality and erasure of structural causes of harm.").

a new spin wherein this power was lauded as the path to reform. The real risk in this strategy is exactly what is transpiring with Krasner and bail reform: he has subtly shifted to a more traditional, law-and-order message when it comes to using bail to hold those that he deems cannot be released, does not accept that the current policies are continuing the harms of the past, and has not shifted his strategies when it did not lead to the right results.[331]

Ogg may also fit into an old, established story of the prosecutor who becomes swept up in both the adversarial nature and the politics of her position. Multiple judges have criticized Ogg for bringing beltway politics to Houston.[332] Anonymous sources have stated that she shifted from progressive policies after pushback from Republican judges and commissioners, as well as a feeling that the electorate was shifting away from progressive reform.[333] But more importantly, she has repeatedly taken a stance that it is her job to fight for a community of prosecutors, police and crime victims, and used fear-instilled language that a crime crisis gripping the community has been caused by bail reform.[334] She has burrowed into an us-against-them position that does not allow for any flexibility.

While Ogg has been criticized by the Right for being progressive and the Left for failing to deliver on her progressive promises, she has not had even a fraction of the pushback of other progressive prosecutors who have found themselves at crosshairs with local officials.[335] The police union has not raided her office.[336] She has not been publicly lambasted in a personal fashion, and when, she does go toe-to-toe with local authorities,

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331. *See supra* Part II.A.

332. *See* Banks, *supra* note 260.

333. *See* Snyder, *supra* note 311 (citing pressure from the court's two Republican members, Jack Cagle and Steve Radack, "to shift to a more tough-on-crime approach").

334. *See* Schneider, *supra* note 254.

335. *See, e.g.*, Thusi, *supra* note 42 (surveying eight other prosecutors).

336. Police officers raided the office of St. Louis State's Attorney Kim Gardner in 2018 after a special prosecutor was appointed to investigate her at the request of, and potentially in retaliation to, resigned Governor Greitens. *See* Tom Jackman, *Sen. Josh Hawley Calls for Civil Rights Probe of St. Louis Prosecutor Kim Gardner over McCloskey Case*, WASH. POST (July 16, 2020), https://perma.cc/U9QE-3X8D. Gardner subsequently filed a federal lawsuit alleging violations of the 1985 Civil Rights Act. *See id.*

she is the one using her public office to target them, not the other way around.[337] She has benefited from her white privilege and been able to easily walk a middle line where she can use the progressive label to gain funding and fame, before discarding it when it becomes politically advantageous for her to do so.

A review of Ogg's record shows that she is not implementing the bail reform policies that she promised in her election campaign and that are a staple of the progressive movement.[338] While she began her career campaigning on the evils of the cash bail system, she quickly evolved when it became politically advantageous to do so. She now claims that lenient bail practices by local judges are fueling a rise in crime.[339] Accordingly, her line attorneys request high cash bails for misdemeanors at her instruction as a method to de facto hold people without bail.[340] What's worse, she has taken to attacking those that are enacting the policies she originally campaigned on, filing multiple complaints against sitting judges for releasing too many defendants.[341] Kim Ogg encapsulates why progressive prosecutors must be viewed with the utmost skepticism if the goals of the movement are truly to reduce incarceration and address systemic racism.

In stark contrast, Bell's actions to reform bail mirrored his promises.[342] He immediately put in place policies that, in theory, would eliminate cash bail to hold individuals pretrial, at least for non-violent and low-level felony offenses.[343] The result was a

337. *See, e.g.*, Snyder, *supra* note 311.

338. *See supra* Part II.A.2–B.

339. *See* Adam Zuvanich, *How Rhetoric About Bail Reform Is Shaping the Upcoming Election in Harris County*, HOUS. PUB. MEDIA (Oct. 4, 2022), https://perma.cc/GN6Y-7VFG (citing Ogg as stating during an interview with Houston Public Media, "We're fighting those bonds—low, insufficient bonds—daily in court. It has become the new battleground for public safety").

340. *See supra* notes 255–257 and accompanying text.

341. *See* Michael Hardy, *Kim Ogg Wants a Democratic Socialist Judge Thrown Off the Bench*, TEX. MONTHLY (July 27, 2022), https://perma.cc/YQR8-D3LF (describing Kim Ogg's complaint against Judge Bynum, accusing him of releasing too many defendants and reducing too many sentences).

342. *See* Allen & Jones, *supra* note 181 (describing Bell's promise to stop or reduce monetary bail); *see also* Memorandum from Wesley Bell, *supra* note 146, at 1–2 (explaining Bell's actions in relation to his promises as almost immediate, starting on his second day in office).

343. S*ee supra* Part II.A.1.

reduction in the average population of the jail and the number of days a defendant spent in jail in St. Louis County.[344] While these reductions show how Bell's policies were a success, it was marginal at best and certainly not the sweeping change one would expect when other systemic actors are concurrently working towards the same goal.[345] The increase in the length of stay for those charged with violent offenses and the racial disparities occurring in the jail population show how buy-in from multiple actors does not necessarily lead to change.[346]

St. Louis County demonstrates the insurmountable hurdles progressive prosecutors face when attempting to counteract the embedded principle of systemic racism and the carceral purpose of the criminal legal system.[347] In Bell's case, the judiciary had enacted a rule change and a robust bail fund was operating in the jurisdiction.[348] Every possible player in the St. Louis system was working on bail reform, yet only this marginal improvement occurred.[349] This is not to discount how incredibly important it is for one single person to be released from jail, nor is it to say that marginal improvement cannot be viewed as a step forward.[350] Rather, it shows how, even when there was a

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344. *See* HUEBNER ET AL., *supra* note 157, at 6 (explaining that the program called the Population Review Team "coupled with the election of Wesley Bell" were key factors in the "decrease in the average daily population and cumulative bed days used in 2019").

345. *See id.* (suggesting caveats to the decrease in annual jail populations, specifically discussing alterative factors for the decrease in 2019).

346. *See id.* at 3 (stating that the average length of jail stays "has increased from 14 days in 1983 to 23 days in 2013" and that racial disparities are an issue, evidenced by the fact that three times more Black people were held in jail than white people in 2018).

347. *See generally id.* (laying out a comprehensive analysis for understanding trends in St. Louis County, Missouri).

348. *See id.* at 14 (detailing various changes relating to bail that occurred in St. Louis County, including how the "Bail Project St. Louis" began operations in 2018 and the Missouri Supreme Court set new bail rules that were implemented on July 1, 2019).

349. *See id.* at 4 ("Although there was a decline in admissions over the study period, the reduction in the average daily population (ADP) was smaller, just 21%.").

350. *But see* Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1548 (2022) (describing a radical reform as not itself creating fundamental change, but rather like non-reformist reforms or abolitionist steps, aiding the "ongoing collective project of transformation"); CMTY. JUST. EXCH., ABOLITIONIST PRINCIPLES &

combination of a progressive prosecutor, a judicial rule change, and a robust bail fund, there was still not a substantial reduction in the jail population or an elimination of racial disparities in those incarcerated.[351] Relying solely on a progressive prosecutor's policies to accomplish these ends is clearly not going to right the entangled history of mass incarceration and racism in the criminal legal system.[352] Further problems arise when the reliance is placed on progressive prosecutors that are progressive in name alone and not in policies or actions.

Another set of problems can occur when a progressive policy, such as ceasing to prosecute low-level offenses, creates a dynamic that paradoxically either increases or has no impact upon incarceration rates.[353] For example, the natural result of no longer charging lower-level cases in which defendants are released pretrial is that the remaining cases are mostly felony charges, leading to a disproportionate number of cases where the state asks for a defendant to be held without bail.[354] Given that Mosby had stopped prosecuting low-level, non-violent misdemeanor offenses,[355] it is not surprising that the remaining cases brought into court would primarily be felony charges that are typically considered more serious and thus result in a

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CAMPAIGN STRATEGIES FOR PROSECUTOR ORGANIZING 1, https://perma.cc/YM87-NQR2 (PDF) (last visited Nov. 16, 2023) (stating that prisons and other systems of punishment "rely on, reinforce, and perpetuate structures of oppression: white supremacy, patriarchy, capitalism, xenophobia, ableism, and heterosexism" which they aim to abolish, not reform).

351. *See* HUEBNER ET AL., *supra* note 157, at 3, 8, 14 (concluding that there was not a significant decrease in jail populations or the occurrence of racial disparities despite the policy context which should have acted as a catalyst for significant change).

352. *See id.* at 13 (describing the election of Wesley Bell and his policies as contributing factors for the marginal change described in this study but falling short of substantial change).

353. *See, e.g.*, Stephanie Holmes Didwania, *Redundant Leniency and Redundant Punishment in Prosecutorial Reforms*, 75 OKLA. L. REV. 25, 42 (2022) (discussing the problem of "redundant leniency" in which a purported "reform" replicates lenient treatment that was already occuring).

354. *See, e.g.*, Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 588 (2020) (describing progressive prosecutor Kim Foxx's success in reducing low-level shoplifting cases, but her struggle to generate change in bail outcomes).

355. *See* Garcia-Navarro, *supra* note 197.

request to be held without bail.[356] What was surprising is that an incarceration-led approach was adopted, where pretrial incarceration was presumed for every person charged with a particular type of crime.[357] It was not a progressive position to take on bail, and it did not square with the goals of reducing mass incarceration or reducing systemic racism.

Mosby was truthful in her statements to the media that her line attorneys had stopped requesting cash bail.[358] The problem is that this "solution" to the money bail problem did not reduce incarceration or address the disparate treatment of Black defendants.[359] The numbers show that this shift did not result in more people being released. Rather, it merely caused her line attorneys to request holding defendants without bail.[360] It was not a progressive reform. Ending the request for cash bail put Mosby in line with the legislature, the Attorney General, and the newly enacted rule change by the judiciary. It was a consensus position in Maryland and one that did not reduce pretrial incarceration.[361] The real reform would have been to respond to the data about how the change ended up holding the same amount of or more people without bail, directly in opposition to the progressive goals of reducing mass incarceration and disparate treatment of minority communities.

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356. *See Baltimore Ends Prosecution of Drug Possession and Other Low-Level Offenses*, EQUAL JUST. INITIATIVE (Apr. 2, 2021), https://perma.cc/5F9J-3SQD (stating that the "decision not to prosecute drug and minor nonviolent offenses led to changes in policing" evidenced by "80% fewer arrests for drug possession in Baltimore in the past year").

357. *See supra* note 271.

358. *See* Fenton, *supra* note 216.

359. *See* BALT. ACTION LEGAL TEAM, *supra* note 157, at 12 ("71% of cases where defendants were exclusively incarcerated and not given bail had all charges dropped, acquitted, or a mixture of both."); Colbert & Starger, *supra* note 319, at 1 (describing how, despite the pivotal movements against mass incarceration and for racial injustice, 62% of all defendants were held without bail and "stark racial inequalities persisted"); *Prosecutor Data*, *supra* note 253 (concluding that the state often requested 70%–80% of all defendants to be held without bail).

360. *See Prosecutor Data*, *supra* note 253 (concluding that the state requesting 70%–80% of all defendants to be held without bail was more than usual).

361. *See id.* (indicating that there was not a decrease but rather an increase in the percentage of defendants incarcerated without bail during the time before their trial).

Instead, what occurred was the public recommitment to the principles of the movement and either an unwillingness or inability to address reality in the courtroom.[362]

III. LESSONS

A. *The Reality of the Role of the Prosecutor*

1. Lack of Transparency

The lack of transparency inherent in prosecution plagues even those that are committed to the progressive prosecutor movement. It is largely hidden from the public when a lack of cohesion exists between a head prosecutor's outward rhetoric and their line attorneys' on-the-ground actions and results. On the very extreme end is a prosecutor like Ogg, who publicly proclaims to be in favor of bail reform and signs amicus briefs arguing for the elimination of monetary bail,[363] while simultaneously communicating the exact opposite in internal memos to her line attorneys.[364] But it is rare to have such clear hypocrisy made public. More commonplace are those prosecutors, such as Mosby and Krasner, who initially pushed for reduced incarceration[365] and may have instructed their attorneys in that direction, yet the reality of what their line attorney did in court did not match what they had committed to delivering.[366] Ultimately, their goals and message shifted.[367] Regardless of the reason behind this disjunction, the result is

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362. *See supra* note 359 and accompanying text.

363. *See* Press Release, Georgetown Law, *supra* note 265 (including Ogg in the group of signatories of an amicus brief challenging the constitutionality of cash bail).

364. *See* Hannaford, *supra* note 255 (discussing an email sent from Ogg expressly asking "prosecutors in her office to request high bond amounts for select defendants").

365. *See* Memorandum from Larry Krasner, *supra* note 208, at 1 (describing his policies as "an effort to end mass incarceration and bring balance back to sentencing"); Fenton, *supra* note 216 (explaining Mosby's commitment to no longer requesting cash bails).

366. *See Prosecutor Data*, *supra* note 253 (explaining that Mosby's office normally requested 70–80% of all defendants to be held without bail); OUSS & STEVENSON, *supra* note 220, at 2 (describing Krasner's policy as affecting a specific group of defendants).

367. *See supra* note 328 and accompanying text.

the same—the public is presented with one picture of what a prosecutor will do, while what actually occurs is markedly different, producing harm and results that do not align with the goals of the progressive movement.

This lack of transparency in prosecutors' offices is allowing unintended misrepresentations in the best circumstances and malicious deceptions in the worst. So long as prosecutors operate in secret, with no transparency to how their line attorneys are being instructed, they will continue to lack any real accountability. Ogg's explicit instructions to request high bails within her office would have remained an internal memo without the leak to the media.[368] If that information had never become public, progressive voters who put her in office would not be aware that her public statements were directly contrary to her orders in office. There likely would not have been challengers to her position, regardless of their eventual loss.[369] Without the memo leak, when her line attorneys requested high bails for misdemeanors, there would be no way to know if the requests were because of or in defiance of Ogg's directions. Defense attorneys, defendants, and judges could think it was a rogue young prosecutor, refusing to toe the line of the newly elected progressive, and would all be none the wiser.

This is not how functional electoral offices operate, and it should be rejected as the accepted model for prosecutors as well. Legislators are put on record for how they vote. There should be no confusion about what their position is on a recorded bill when they publicly cast their ballot.[370] Advocates should learn from this example and push for legislation that would force prosecutors to be as open and transparent as all other elected officials: sharing memoranda with the public that detail their orders to line attorneys, as well as gathering and publishing statistics about how they are charging, recommending bail, and sentencing defendants.

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368. *See* Hannaford, *supra* note 255.

369. *See* Roxanna Asgarian, *Harris County D.A. Kim Ogg Didn't Deliver on Her Promise of Reform. Now Another One of Her Former Prosecutors Is Running Against Her*, APPEAL (Dec. 5, 2019), https://perma.cc/PH39-JNP9 (stating that two of Oggs' former prosecutors, Audia Jones and Carvana Cloud, entered the race against Ogg).

370. This is not to say that legislators are inherently honest in their campaigns, but once in office there should be a record of their actions.

More importantly, advocates should push progressive prosecutors to allocate part of their own budgets to fund independent watch groups and non-profits that will report on daily courtroom actions and overall trends in how a prosecutor's office is treating defendants. These services are critical to inform the electorate. They are also a vital tool for progressive prosecutors to know what their line attorneys are doing, day in and day out. The only way to know if the larger impact of an office is contributing to mass incarceration or systemic racism is to evaluate the data. Without that, head prosecutors can continue to deny the harm being caused by their own line attorneys.[371] Without data to confront these public declarations, progressive prosecutors will never be held accountable for their continued participation in the devastation that mass incarceration is currently causing across our country.[372]

2. Lack of Accountability

The prosecutors analyzed here did not respond to the data when confronted with it. Rather, they either denied its existence, ignored it, or refused to accept it and change policies to address it.[373] Much like police departments need consent decrees to monitor and force change, prosecutors are unable to internally police themselves.[374] If progressive prosecutors cannot be forced to respond when their policies are shown to cause disparate racial impact or no decrease in pretrial incarceration, they cannot be the path to reform.

When the Final Report on Racial Justice in Prosecution in Baltimore was published in February of 2022, analyzing racial differences in Baltimore City Circuit Court cases,[375] there were concrete actions that could have been taken to address the results. The two largest red flags were: (1) the high numbers of

371. Mosby continued to state that she would never be complicit in discriminatory policies when the data indicated otherwise. *See* UBalt Law, *supra* note 325, at 30:34; *see also* JOHNSON ET AL., *supra* note 326, at 2.

372. *See supra* note 19 and accompanying text.

373. *See supra* Part II.

374. *See supra* Part II.

375. *See* BALT. ACTION LEGAL TEAM, *supra* note 157 (describing the report's purpose "to uncover the quantitative realities of the Baltimore City District Court system using the information that has been publicly available in Maryland Judicial Case Search").

Black defendants funneled through the "War Room" bail docket, making them more likely to be incarcerated during the pendency of their cases;[376] and (2) the high percentage of dismissed felony charges against Black defendants, indicating a potential to overcharge or file charges without the evidence necessary to prove those cases beyond a reasonable doubt.[377] No changes were implemented to the policies or procedures based on these results, despite multiple ways to address these findings.

First, the State's Attorney could have disbanded the "War Room." The name itself connotates a toxic and failed relationship between the community and police, one that Mosby ran on mending.[378] The creation of a docket for the "War Room" frames the hearings as though the judge and prosecutor are in a war against the defendant, unnecessarily injecting extreme prejudice. Simply by including a particular defendant in the "War Room," the judge is made aware that they either have a very serious charge, a lengthy or violent criminal record, or both.[379]

Second, regarding the high percentage of cases filed against Black defendants that are later dismissed, Maryland law provides that a felony charge should have a preliminary hearing within thirty days, if timely requested.[380] These have been essentially abandoned in Baltimore City for years, but given these disparate findings, the State's Attorney could have reinstituted preliminary hearings as a general practice in the District Court. This would have given an opportunity for judicial

376. *See* JOHNSON ET AL., *supra* note 326, at iii (discussing "War Room" charges, used to designate repeat offenders, which are most likely to involve young Black male defendants).

377. *See id.* ("Among convicted cases, the most serious charge is reduced 36% of the time for Black defendants and 31% of the time for White defendants, a statistically significant difference in multivariate analyses.").

378. *See Baltimore Police Set Up "War Room" to Combat Homicides*, CBS NEWS (July 14, 2015), https://perma.cc/4XAN-VKUB (quoting Mosby declaring war on a small group of individuals and maintaining that the effort was in collaboration with the police).

379. *See* JOHNSON ET AL., *supra* note 326, at 54 (describing how some Circuit Court cases were designated as "War Room" cases, typically if they involved "serious and repeat offenders, including those on parole for violent or handgun offenses, repeat violent offenders, and certain felony drug offenders").

380. *See* MD. R. § 4-221(b) (West 2023).

review of the evidence in a case much earlier in the proceedings, so that defendants could have a hearing months before the case would work its way through the Circuit Court.[381] Ideally, this could reduce the time defendants are held without bail awaiting dismissal of their felony charges.[382]

These minor proposed changes would not have been a sea change. Indeed, the first is merely changing the name of a particular courtroom, and the second would be adhering to the Maryland Rules and criminal procedure as originally intended.[383] Yet, even with a progressive prosecutor who routinely confirmed a commitment to the Black and Brown communities of Baltimore,[384] there was no genuine public dialogue about how to address the findings in the report. With no method or mechanism to force accountability, the report was largely ignored.[385]

Likewise, there was an opportunity in Philadelphia to respond to the analysis done by The Philadelphia Bail Fund showing that, in over 50 percent of cases, a bail of $999,999 was being requested, including cases where the lead charge was a misdemeanor.[386] This means that in over half of the cases that were arraigned in Philadelphia, the line attorneys were asking

381. In the Circuit Court of Maryland, an offense may only be tried on an indictment or a criminal information. *Id.* § 4-201. Typically, felony charges originate with a Statement of Probable Cause filed by police officers in the District Court and then must either have a preliminary hearing or be dismissed via the entry of a Nolle Prosequi (often when an indictment is filed). *Id.* § 4-247. It can take months for a felony case to work its way from the District Court to its place of proper jurisdiction in the Circuit Court by way of an indictment. DIST. CT. MD., CASE MANAGEMENT PLAN—CRIMINAL CASES 4, https://perma.cc/6LRC-LNWU (last visited Dec. 18, 2023) ("The District Court has a goal of resolving most misdemeanor criminal cases (Tracks 1, 2 & 3) within 180 days. Felony cases are forwarded to the Circuit Court typically within 60 days."). During this time, no judicial review of the evidence takes place if no preliminary hearing is held.

382. Typically, if the case is not dismissed until it is indicted, arraigned, and scheduled in Circuit Court, it could take up to six months from the time of arrest. *See supra* note 381.

383. *See supra* notes 378–380 and accompanying text.

384. *See supra* note 325 and accompanying text.

385. *See* UBalt Law, *supra* note 325; JOHNSON ET AL., *supra* note 326. The public forum that took place discussing the Report was used as an opportunity to campaign for the upcoming election, rather than as a real discussion about the findings and how they could be addressed going forward.

386. *See supra* note 302 and accompanying text.

to hold the defendant de facto without bail until their trial date. In those cases, almost 80 percent of the defendants were Black and more than 90 percent were represented by a public defender.[387] There are a multitude of ways to attempt to address these disparate findings. The first would be to stop requesting monetary bail, as continuously promised by Krasner's campaign.[388] There could also be implementation of a more comprehensive bail policy akin to Bell's policy in St. Louis County, disallowing monetary bail for any misdemeanor offenses and requiring review of those held on bail for felony charges.[389] Prosecutors could be required to critically examine the charges in a given case and reject the highest penalty that could be charged as the basis for a bail recommendation. This would result in a more concrete policy to address the disparate treatment of Black defendants and those represented by the public defender.

Unfortunately, there is no method to force change when a policy is not being enacted as intended. Krasner has been confronted with the data from The Philadelphia Bail Fund's analysis multiple times.[390] He has implemented no changes based on the results. Instead, he stated he did not agree with the results, while at the same time insisting he had not reviewed them.[391] Krasner put his head in the sand and doubled down on

387. PHILA. BAIL FUND, RHETORIC VS. REALITY, *supra* note 301, at 13; *see also* PHILA. BAIL FUND, OBSERVATIONS OF 125 RECENT BAIL REQUESTS 4 (2019) [hereinafter PHILA. BAIL FUND, OBSERVATIONS], https://perma.cc/RHW6-AHM5 (PDF).

388. *See* Gonnerman, *supra* note 29 (describing Krasner's promise to eliminate cash bail for most nonviolent crimes as the foundation for his campaign).

389. *See supra* notes 201–207 and accompanying text. Although, to make the policy successful as a decarceral tool, there would need to be acceptance that overcharging can skew the measure used to make the bail determination. The charge alone could not be the determinative factor in the analysis.

390. *See* Deconstructed, *Philly's Reform Prosecutor Reacts to His Impeachment*, INTERCEPT (Nov. 29, 2022), https://perma.cc/TQK9-NYC8 (asking Krasner explicitly to respond to the Philadelphia Bail Fund report).

391. *See id.* (explaining that Krasner did not agree with the Philadelphia Bail Fund's assertion but quoting him as saying "if they would like to send us a report that supports the notion that only 5 percent of these cases where we are seeking high bail are serious cases, we're happy to look at it"). The Philadelphia Bail Fund has been publishing data on Krasner's bail policies since 2019; this quote is from an interview in November of 2022. *Id.*; *see also*

his theory that his policy was fine and working as intended, despite having publicly available data for his review for years.

When there is no accountability to force change, progressive prosecutors can continue to claim deniability, refuse to accept when policies fail, and fail to change when results are not achieved. The progressive label does nothing to build additional accountability into the role. This is particularly harmful given what happened with the attempts to eliminate monetary bail, as advocates relied on progressive prosecutors to enact the changes they promised.[392] What occurred instead was a refocused incarceration effort, the opposite of an anti-carceral approach, and an attempt to target a specific group of "violent offenders" and hold those individuals without bail.[393] There are many problems with this tactic. There are often no attempts to define "violent offenders," and many people charged with misdemeanors or crimes devoid of violence are lumped into the mix. More pertinent to advocates of the movement who are relying on progressive prosecutors to address racial disparities is that the group targeted in the "violent offender" exception will be made up of men from communities of color, perpetuating the systemic racism that progressive prosecutors vowed to address.[394]

Rather than hoping that individual progressive prosecutors will begin to police themselves, accountability must be built into the role of the prosecutor. National organizations that support progressive prosecutors should show their true commitment to criminal legal reform by joining advocates in a push for

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PHILA. BAIL FUND, OBSERVATIONS, *supra* note 387; PHILA. BAIL FUND, RHETORIC VS. REALITY, *supra* note 301.

392. *See, e.g.*, Gonnerman, *supra* note 29 (describing Krasner's promise to eliminate cash bail for most nonviolent crimes as the foundation for his campaign); Fenton, *supra* note 216 (discussing Mosby's promises to no longer request cash bails).

393. *See, e.g.*, *A Conversation with Larry Krasner*, *supra* note 328 (stating Krasner's policy as shifting to eliminate cash bail only for nonviolent crimes, while keeping very high bails for a small, targeted group of defendants); JOHNSON ET AL., *supra* note 326, at iii (discussing "War Room" charges, used to designate violent repeat offenders, most likely to involve young Black male defendants).

394. *See* Godsoe, *supra* note 25, at 199 ("The focus on prosecuting 'the right people' perpetuates many of the same pathologies found in the current approach to prosecution, such as racial disproportionality and erasure of structural causes of harm.").

increased accountability. Progressive prosecutors should welcome external, independent experts who could assist them to achieve their stated goals of reducing pretrial incarceration and systemic racism. Consent decrees can provide guidance on how external accountability has been mandated by courts—independent monitors have been critical in evaluating whether policies or procedures are achieving the goals intended[395]—but monitors must be combined with agreements to make changes and implement different plans in response to data showing failure in an initial approach. Otherwise, no real change will have been implemented, and the harms enacted by prosecutors in the criminal legal system will continue unabated.

3. The Political Impact

In Philadelphia, St. Louis, and Baltimore, attempts to reform the bail system by reducing or eliminating monetary bail often resulted in an increase of defendants held without bail.[396] In each city, there continued to be a large population held in pretrial incarceration and racial disparities were not reduced.[397] The attempts to reform the bail system did not reduce mass incarceration or address systemic racism, they perpetuated it.[398] Instead of responding to these results by acknowledging how reductions in monetary bail did not reduce levels of pretrial incarceration and committing to further bail reforms,

395. *See, e.g.*, Tracy Hester, *Consent Decrees as Emergent Environmental Law*, 85 MO. L. REV. 687, 690 (2020) (explaining that consent decrees "serve as a primary vehicle for judicial implementation and oversight of some of the largest and most significant disputes in civil rights, antitrust, labor, immigration, class actions, bankruptcy, and environmental law").

396. *See supra* notes 271, 301 and accompanying text; HUEBNER ET AL., *supra* note 157, at 5. Given that there was no appreciable reduction in monetary bail in Houston, it has not been included.

397. *See* PHILA. BAIL FUND, OBSERVATIONS, *supra* note 387, at 4 (discussing that in Philadelphia most of the defendants who were subject to bail requests were Black and most of those people were appointed a public defender); *supra* note 301 and accompanying text; BALT. ACTION LEGAL TEAM, *supra* note 157, at 8 (finding that in Baltimore almost 80% of the defendants incarcerated without bail during the time leading up to their trial had all charges dropped or were acquitted); HUEBNER ET AL., *supra* note 157, at 8 ("In 2019, Black persons represented 25% of the general population in St. Louis County but represented 55% of the jail population.").

398. *See supra* note 397.

prosecutors in Philadelphia and Baltimore shifted their rhetoric to focus on addressing violent crimes.[399]

The political nature of the role of the prosecutor played a large part in why this occurred. Facing high crime rates in their respective cities, both Krasner and Mosby responded to criticism from the public by proclaiming a target on those charged with gun violence and other "violent offenders."[400] Rather than a reduction in incarceration, they merely offered a shift in focus from less controversial, low-level offenses, such as property crimes and drug possession.[401] This was not a reform of the system; it was a refocused incarceration effort. It is not confusing why refocusing incarceration efforts did not reduce the pretrial population of the jails or address racial disparity in the criminal systems in Philadelphia or Baltimore. What is confusing is why this approach gained traction with self-identified progressive prosecutors given that it shares attributes with the law-and-order focus of the past that was largely rejected by both the progressive movement and the activists who support it.[402]

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399. *See A Conversation with Larry Krasner*, *supra* note 328 (explaining Krasner's policy as shifting to not eliminate all cash bails, but to insist on keeping very high bails or recommend incarceration without bail for a small, targeted group of defendants); *Baltimore Police Set Up "War Room" to Combat Homicides*, *supra* note 378 (discussing Mosby's declaration of war through requesting incarceration without bail, on a group of targeted, violent, repeat offenders). Interestingly, not only did the coverage of Bell's policies and rhetoric surrounding bail reform become harder to find and analyze over time, but his recent run for Senate appears to have coincided with his office stripping their website of content. *See* Jason Rosenbaum, *St. Louis County Prosecutor Wesley Bell Announces U.S. Senate Run*, ST. LOUIS PUB. RADIO (June 7, 2023), https://perma.cc/56VE-TJLK; *Press Releases*, SAINT LOUIS CNTY. PROSECUTING ATT'Y, https://perma.cc/P8RX-VMGE (last visited July 28, 2023) ("We couldn't find the page you were looking for.").

400. *See A Conversation with Larry Krasner on Criminal Justice Reform*, *supra* note 328 (detailing Krasner's policy, which focuses on recommending very high bail or incarceration without bail for those accused of certain violent crimes); *Baltimore Police Set Up "War Room" to Combat Homicides*, *supra* note 378.

401. *See, e.g.*, Garcia-Navarro, *supra* note 197 (discussing Mosby's announcement to cease prosecuting marijuana possession cases because it is a non-violent crime, disproportionately effects people of color, and wastes valuable time and resources that her office could be using to face violent crimes and gun violence).

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

One answer revolves around the political attributes encompassed in the role of the head prosecutor. The top prosecutor of an office is not merely a line attorney representing the government in court; they are also a politician, constantly running for office and being evaluated by those that can take away their job.[403] This leads them to alter their positions or rhetoric to appease public outrage.[404] This occurred when Ogg shifted away from progressive policies after Republican judges' and commissioners' pushback in Houston[405] and when Krasner's messaging became much more law-and-order in response to outcry over the increasing gun violence in Philadelphia.[406] The end result of heeding these electoral pressures occurred at the expense of defendants, as prosecutors doubled down on efforts to punish a particular type of charge or embrace a punitive law-and-order policy.[407]

While prosecutors have always been politicians, those that self-identify as progressive are now collectively part of a larger movement that is attempting to redefine what role prosecutors can play in reforming the criminal legal system.[408] At the same time, head prosecutors have social media presence, intensifying their engagements in the political process and capacity to be swayed by negative reactions and larger push-back.[409] The question becomes whether we can remove the political pressures

721 (2020) (describing progressive prosecutors' elections as marking a "significant break from the law-and-order approach to prosecution that dominated for decades").

403. *See id.* at 727 (discussing the responsibilities of the top prosecutor as not only "professional, possessing skill and training, but also the capacity and inclination to resist public influence").

404. While that was the case with Ogg, Krasner, and Mosby, there are exceptions to be found if you look outside the realm of bail reform. *See* Tom Jackman, *Arlington Prosecutor Goes to Va. Supreme Court Against Judges Who Challenge Her New Policies*, WASH. POST (Aug. 28, 2020), https://perma.cc/6NUG-K5SW (explaining the push-back against a newly elected prosecutor in northern Virginia received from a circuit judge, and her own appeal to the state supreme court to vindicate her exercise of her own prosecutorial discretion).

405. *See supra* notes 332–333 and accompanying text.

406. *See generally* Mensah & Palmer, *supra* note 308.

407. *See supra* note 330 and accompanying text.

408. *See supra* notes 64, 403 and accompanying text.

409. See *supra* notes 403–406 for a discussion of head prosecutors' reactions to public opinion.

of the role for progressive prosecutors, and if the answer is no, can a progressive prosecutor ever be successful in efforts to decarcerate a system that is carceral?[410] When viewed through the lens of bail reform, the answer is no. The carceral nature of the prosecutor's role (requesting defendants are held pretrial and thereby contributing to mass incarceration and systemic racism) will not change unless and until the system itself does not incarcerate.[411]

4. The Adversarial System

The adversarial nature of the prosecutor's role causes pressure and concerns that can infect good policy decisions with irrelevant and irrational factors.[412] The drive to win that accompanies the adversarial nature of the role can cause prosecutors to try to beat the other side, rather than achieve the best result considering all the circumstances.[413] In a contest between two sides, it is natural to believe there is a winner and a loser. Traditionally, the government wins when they convince a judge, or jury, to hold, convict, or sentence a defendant.[414] When a prosecutor argues for a defendant to be held without bail, they will win if they keep the defendant incarcerated, even if justice dictates otherwise in the circumstances.[415] Over time,

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410. *See, e.g.*, Todd May & George Yancey, Opinion, *Policing Is Doing What It Was Meant to Do. That's the Problem*, N.Y. TIMES (June 21, 2020), https://perma.cc/E7LG-JG9S (arguing that police departments' function in broader society leads inevitably to suppression, because the practical role the police play, not individually, but as a collective whole, is itself one of suppression and sustaining the economic social order).

411. *See* Godsoe, *supra* note 25, at 164 (concluding prosecutors cannot transform the system since their function in the system is to convict and punish); *see also* Foran et al., *supra* note 25, at 499 ("[P]rosecutors are law enforcement and prosecution is a systemic component of the criminal punishment system . . . .").

412. *See* BARKOW, *supra* note 23, at 9 (arguing that criminal justice policy is driven by factors beyond studies and rational assessments, and that prosecutors are not well suited to make policies for issues they have a significant stake in).

413. *See* Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419, 1420–21 (2018) (highlighting a prosecutor's strong structural incentives to strategically maximize the likelihood of conviction and punishment rather than advance a broader aspiration of administering justice).

414. *See id.* at 1421.

415. *See supra* note 413 and accompanying text.

this allows prosecutors to forget the humanity of the defendants that they prosecute, leading them to subtly change their larger policy decisions and ultimately leading them away from their promised positions.[416] Moreover, the line attorneys who represent the State in courtrooms day-to-day are heavily impacted by these adversarial pressures, creating a potential division between progressive prosecutors' goals and their line attorneys' actions.[417]

Despite the legal mandate of the prosecutor as a minister of justice, prosecutors have still historically been adversarial by nature, trying, above all, to win convictions and keep those convictions intact, and have allowed political pressure to shift policy.[418] Prosecutors have historically fought against upending or reforming the system, often to the extent of objecting to advances in sciences and the reality of developing forensic evidence.[419] This is true even though they have always been tasked with seeking justice, not with winning a particular case or election.[420]

416. *See* PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 107 (2009) (describing the decision of whether to charge someone as one of his favorite parts of the job, where he considered if the case had "jury appeal" and if they could get the evidence into court). There is also history of dehumanizing criminal defendants, particularly Black defendants, that starts when they are children. *See generally* KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH (2021) (explaining that the failure to view Black children as children has led to the criminalization of normal adolescent behaviors and Black youth). *But see* Smith, *supra* note 71, at 419 ("Progressive prosecutors recognize the humanity in criminal defendants, no matter the crime, and understand that the lowest moment in a person's life is just that, a low point.").

417. *See supra* note 233 and accompanying text.

418. *See* John Pfaff, Opinion, *Why Do Prosecutors Go After Innocent People?*, WASH. POST (Jan. 21, 2016), https://perma.cc/C2TR-HPPL (illustrating the numerous incentives, including electoral pressures, that cause prosecutors to continually prosecute innocent defendants)*; see also* Bruce A. Green, *Gideon's Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336, 2352–56 (2013) (noting the numerous factors, sometimes countervailing, that inform prosecutorial discretion in bringing charges).

419. *See* Maneka Sinha, *Radically Reimagining Forensic Evidence*, 73 ALA. L. REV. 879, 916 (2022) ("As organized bodies seeking to influence policy, prosecutors have played a major role in halting forensic reform in order to retain forensics as a tool, under their control, that can be used to secure criminal convictions.").

420. *See supra* notes 61–65 and accompanying text.

Scholars have attempted to address the adversarial nature of the role and suggested ways to alter its directives. Instead of acting as a supreme juror, some argue prosecutors should have an agnostic view of a defendant's guilt.[421] Taking inspiration from less partisan legal systems, others suggest prosecutors ought to act more as truth seeking judges do in inquisitorial models such as France and Germany.[422] Rather than do justice, they say the prosecutor should instead serve the law.[423] But these scholars' astute suggestions have not yet swayed the reality of today's criminal legal system, even with the rise of the progressive prosecutor.

The adversarial nature of the role does not disappear when prosecutors label themselves progressive. Acknowledging the racial disparities in the system does not make a prosecutor immune from public criticism and the urge to respond in a way that will equate to a win. The combination of the adversarial system and fear-infected politics can counteract even the most dedicated prosecutor's progressive mandate, resulting in a shift of policy that goes against the goals of the progressive prosecutor movement.[424] Further, having a progressive prosecutor in charge of an office does not remove the daily pressures the line attorneys face when showing up to court. Without accepting this and attempting to alter the dynamics, it is entirely predictable that a line attorney will shift their position and be punitive in their requests to a judge, regardless of who is in power at the top.

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421. *See* Alafair S. Burke, *Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. 79, 79–82 (2010) (arguing that ethical prosecutors should indifferently pursue charges rather than pursuing charges only if they are personally convinced the defendant is guilty).

422. *See* Fish, *supra* note 413, at 1451 (arguing that prosecutors should reject adversarial advocacy and instead administer the law with professional indifference where the law constrains them and engage in moral deliberation when given discretion).

423. *See* Jeffrey Bellin, *Theories of Prosecution*, 108 CAL. L. REV. 1203, 1236–48 (2020) (recognizing the murkiness of the advocate for justice model and arguing for a normative "servant-of-the-law" theory of prosecution).

424. *See supra* Part III.A.3.

5. Lack of Power

Progressive prosecutors' attempts to eliminate monetary bail show that, when acting alone, they do not hold enough power to reduce mass incarceration or address systemic racism.[425] Even in St. Louis County, where multiple actors in the system were working concurrently to reform the bail system and a rule change had been adopted by the Missouri Supreme Court instructing release on recognizance, the reforms did not result in a largescale reduction of those held pretrial.[426] In fact, while there was some decline in the average length that a defendant was held in pretrial incarceration, a majority of those incarcerated were still held on monetary bail.[427] Black defendants were statistically overrepresented in admissions to the jail when compared to rates of residency in St. Louis County,[428] and Black defendants were held for twelve days longer than white defendants.[429] Bell's clear-cut instructions to his line attorneys to request alternative methods of incarceration if a defendant was held on bail proved unsuccessful.[430] While we do not know whether this was due to an unwillingness by the judiciary to implement the new rule change, or line attorneys that would not abide by the internal guidelines, the lack of power held by Bell to enact his policy is the same. Draconian sentencing and mass incarceration are now features of our system that will take much more than one actor, or even multiple players acting in concert, to correct.[431]

Bell's experience in St. Louis County also showcases internal factors that push back against a progressive

425. *See supra* notes 219–233 and accompanying text.

426. *See supra* Part II.A.1; *see also* HUEBNER ET AL., *supra* note 157, at 5 ("In 2010, 259,751 bed days were occupied by individuals with bond amounts over $5,000, which is 49% of all bed days used in that year. In 2019, this number rose to 361,175, or 70% of all bed days.").

427. *See supra* notes 240–241 and accompanying text.

428. *See* HUEBNER ET AL., *supra* note 157, at 16 ("Though the population of St. Louis County is 25% Black, more than half (55%) of the jail admissions in the year 2019 were made up by Black people . . . .").

429. *See supra* notes 246–247 and accompanying text.

430. *See supra* Part II.A.1.

431. *See* Butler, *supra* note 42, at 1990 (arguing reform is not the main work of any prosecutor); Godsoe, *supra* note 25, at 237 ("[S]ocial change mostly comes from beyond the narrow confines of the legal system . . . .").

prosecutor's attempts at reform, ultimately removing their ability to exert power through policy. An elected prosecutor's policies can only be implemented if they are followed by their line attorneys, hundreds of whom represent their office every day in countless prosecutions.[432] Wesley Bell faced immense internal pressures when his line attorneys would not fall in line with his new priorities.[433] Similar to the leak with Ogg, the internal memorandum detailing his new policies was leaked by attorneys within his own office.[434] This internal backlash began even before Bell took office. Before he was sworn in, the prosecutors in his office voted in secret to join a police union[435] to avoid the firings that had become commonplace with other progressive prosecutors.[436] It is those line prosecutors who then made the daily determinations of what charges to bring against a defendant and whether to ask that they be incarcerated pretrial.[437] They could easily inflate charges against defendants to circumvent those policies, enabling themselves to recommend incarceration for the defendants they charged while still following Bell's policies on paper.[438]

432. *See supra* note 233 and accompanying text.

433. *See supra* note 233 and accompanying text.

434. *See* Jordan, *supra* note 230 (highlighting Mr. Bell's tumultuous first week in the office after implementing significant policy changes in who and what will be prosecuted).

435. *See supra* notes 234–235 and accompanying text.

436. *See* Lacy, *supra* note 234 ("McColloch said the move came out of concern among his staff that Bell would either clean house or keep them from moving up."). Ogg informed thirty-seven prosecutors shortly before taking office that they would not continue to work for the District Attorney's office when she was sworn in. *See* Ed Mayberry, *Incoming DA Accuses Harris County Prosecutors of Misuse of Information,* HOUS. PUB. MEDIA (Dec. 21, 2016), https://perma.cc/45YB-RBPP (noting that Ogg intended to prosecute those who shared internal information). Krasner asked thirty-one employees to resign or be fired on his fourth day in office. *See* Gonnerman, *supra* note 29. Mosby, who fired approximately six attorneys and prompted dozens to resign, was unsuccessfully sued for her firing of a line attorney who supported her rival during the election. *See* Justin Fenton, *Judge Tosses Mosby Lawsuit, Says Prosecutors Can Be Fired for Political Reasons*, BALT. SUN (June 3, 2016), https://perma.cc/EP6N-3YES.

437. *See supra* notes 231–236 and accompanying text.

438. As scholars have long noted, prosecutors have multiple tools in their toolbox that can be utilized to enact punitive policies. *See, e.g.*, BARKOW, *supra* note 23, at 8 ("[K]eeping sentences long and mandatory makes prosecutors'

Further compounding these struggles with the ability to enact policy is the immense pushback by forces outside of a prosecutor's office, when the judiciary or executive believes that a progressive prosecutor has gone too far.[439] Of the four prosecutors reviewed in this Article, Marilyn Mosby faced perhaps the most intense backlash by external forces.[440] Mosby was repeatedly targeted by Governor Larry Hogan, who threatened to reduce her funding because of her policy decisions,[441] and by the Attorney General for her policies and rhetoric.[442] She was blamed for the crime rates of Baltimore, as though her policies were the determinative factor causing the

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jobs easier because it gives them the leverage they need to get guilty pleas and avoid trials . . . .").

439. *See, e.g.*, Chris Geidner, *Florida Governor Suspends Tampa Prosecutor in Latest Attack on Abortion and Trans Rights*, BOLTS (Aug. 4, 2022), https://perma.cc/Y4LG-KSQL (detailing efforts of Governor Ron DeSantis to suspend local prosecutor Andrew Warren because his office would not prosecute abortion-related cases or cases involving anti-transgender laws); Tom Jackman, *Loudoun Judge Throws Progressive Prosecutor's Office Off Case*, WASH. POST (June 26, 2022), https://perma.cc/AJ9N-R45G (detailing the unprecedented actions of a local state court judge who removed progressive prosecutor Buta Biberaj and her entire office from a criminal case in Virginia when he was unsatisfied with the information presented during plea negotiations). While Biberaj was ultimately reinstated by the Virginia Supreme Court, the reinstatement had to do with issues to the process, not the outcome, and merely provided a roadmap for future judges to disqualify the prosecutor on a case in Virginia. *See* Matthew Barakat, *Virginia's Top Court Reinstates Prosecutor Removed by Judge*, ASSOCIATED PRESS (Dec. 8, 2022), https://perma.cc/PY65-QD75 (recounting the Virginia Supreme Court's potentially problematic holding in reinstating Biberaj).

440. Scholar India Thusi has done a comprehensive analysis on the vitriol of the online attacks waged against Black female prosecutors, including Mosby. *See generally* Thusi, *supra* note 42.

441. *See, e.g.*, Bryn Stole & Tim Prudente, *Larry Hogan Criticizes Marilyn Mosby's Handling of Criminal Cases; Baltimore State's Attorney Accuses Governor of 'Political Theater'*, BALT. SUN (Nov. 23, 2021), https://perma.cc/8UNY-DYTN (illustrating Govenor Hogan's frustration and tacit criticisms of Mosby); Danielle E. Gains, *Miller, Mosby Spar over Proposal for AG to Prosecute City Crime*, MD. MATTERS (Feb. 27, 2020), https://perma.cc/5VAY-XRSN (detailing the debate over Hogan's 2021 budget proposal directing $2.5 million to the Office of the Attorney General to fight violent crime in Baltimore).

442. *See, e.g.*, Press Release, Brian E. Frosh, Md. Att'y Gen., Statement by Attorney General Frosh Following Press Conference by State's Attorney Marilyn Mosby (Sept. 19, 2022), https://perma.cc/Q6P5-3XEP (PDF) (alleging serious problems with a motion to vacate and legal action taken by Mosby in the Adnan Syed case).

murder rate.[443] There were public proclamations that the police department would not follow suit with her priorities.[444] These efforts to curtail the power of progressive prosecutors highlight how fragile their power becomes when it is used to disrupt the carceral nature of the system or challenge the systemic racism embedded within it. There is continued evidence of this across the United States: thirty-seven preemption bills have been introduced in seventeen different states attempting to strip progressive prosecutors of their power. [445]

While these efforts to take prosecutors' power appear more pronounced and are filled with more vitriol when the elected prosecutor's identity challenges the status quo, those that fit the traditional mold are not immune from official backlash either. On November 16, 2022, the Pennsylvania House of Representatives approved articles of impeachment against Krasner in an attempt to remove him from office for his progressive policies.[446] The House Resolution alleged misbehavior in office for various policies and procedures, including his exercise of discretion in firing attorneys, withdrawing from the Pennsylvania District Attorneys Association, failing to prosecute minor crimes, and failing to notify crime victims about certain matters.[447] While Krasner

443. *See* Dan Rodricks, Commentary, *Marilyn Mosby Claim as an Effective Prosecutor a Hard Case to Make as Baltimore Violence Continues*, BALT. SUN (Mar. 10, 2022), https://perma.cc/23FL-JK9V (excoriating Mosby's prosecution record compared to past prosecutors in the same role).

444. *See, e.g.*, Garcia-Navarro, *supra* note 197 (noting that interim police Commissioner Tuggle would not order officers to stop making marijuana arrests following Mosby's announcement that her office would no longer prosecute the cases).

445. *See* Akela Lacy, *17 States Have Now Tried to Pass Bills That Strip Powers from Reform-Minded Prosecutors*, INTERCEPT (Mar. 3, 2023), https://perma.cc/WYB7-54PS (highlighting the litany of attempts by state legislatures and police-unions since the mid-2010s to undermine reformist prosecutors' agendas).

446. The Resolution further blamed Krasner's lack of leadership for causing a "crisis" in the City of Philadelphia, alleging the policies had prevented the District Attorney's office from enforcing the laws. *See* GEN. ASEEMB. PA., A RESOLUTION IMPEACHING LAWRENCE SAMUEL KRASNER, DISTRICT ATTORNEY OF PHILADELPHIA, FOR MISBEHAVIOR IN OFFICE; AND PROVIDING FOR THE APPOINTMENT OF TRIAL MANAGERS, H.R. Res. 240, Reg. Sess., at 24 (Pa. 2022), https://perma.cc/KUK5-NTUR (PDF) (impeaching Krasner for his progressive policies as the Philadelphia District Attorney).

447. *See id.* at 1–3, 15.

eventually prevailed,[448] removing a prosecutor from their elected position has emerged as a tactic by those looking to affirm the status quo of the criminal legal system.[449]

This is not to say that all progressive prosecutors will be removed from office. But it does indicate that prosecutors' vast discretion, authority and power is not limitless. Rather, it has historically been given to enact and uphold the carceral state and systemic racism.[450] It does not simply follow that they hold the power to decarcerate as well. Given that progressive prosecutors are consistently obstructed when they attempt progressive reforms, they cannot be the ones that advocates place their faith in to correct the criminal legal system.

CONCLUSION

Progressive prosecutors are not the actors that activists or the criminal legal system should rely on to reduce incarceration or address racism through the elimination of monetary bail. Their role is too plagued with politics and the deeply ingrained adversarial nature of the system. While it may be so for all progressive reform efforts, it is particularly evident in the bail reform movement. The four progressive prosecutors reviewed in this Article were unable to follow through on their promises to address systemic racism or reduce pretrial incarceration. The actors that lack transparency and have no accountability cannot be the ones we rely on to rectify the carceral nature of, or systemic racism inherent in, the criminal legal system. The result of placing our faith in prosecutors simply because they identify as progressive, when their purpose and goals remain the same, will only result in the repackaging and reframing of

448. Krasner filed a Petition for Review, asking the Commonwealth Court of Pennsylvania for a judicial declaration that the impeachment was unlawful and unconstitutional. A majority of the Court found there was no constitutional basis for impeaching Krasner and took note that "the House simply appears not to approve of the way District Attorney has chosen to run his office." Krasner v. Ward, No. 563 M.D. 2022, 2023 WL 164777, at *20 (Pa. Commw. Ct. Jan. 12, 2023).

449. *See supra* note 445 and accompanying text; Alexandra Berzon & Ken Bensinger, *Inside Ron DeSantis's Politicized Removal of an Elected Prosecutor*, N.Y. TIMES (Mar. 11, 2023), https://perma.cc/DYF5-YN28 (illustrating the governor's highly partisan decision to remove Warren from his elected office).

450. *See supra* note 418 and accompanying text.

their efforts to incarcerate in a system ripe with bias. Advocates should focus instead on pushing back against the prosecutorial role itself by advocating for legislation that mandates accountability, funds methods of transparency, and challenges the carceral state.