

# REIMAGINING PROSECUTION: A Growing Progressive Movement

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## ABOUT THE AUTHOR

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## ABSTRACT

Prosecutors are the most powerful officials in the criminal justice system. At least ninety percent of all criminal cases are prosecuted on the state level, and in all but five jurisdictions, the chief prosecutor (also known as the district attorney) is an elected official. Most district attorneys run unopposed and serve for decades. However, in recent years, a number of incumbent district attorneys have been challenged and defeated by individuals who pledged to use their power and discretion to reduce the incarceration rate and eliminate unwarranted racial disparities in the criminal justice system. These so-called “progressive prosecutors” have enjoyed some modest successes, but many have faced challenges—from within and outside of their offices. This Article discusses some of these successes and challenges and proposes guidelines to assist newly-elected district attorneys who are committed to criminal justice reform.

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“If you are really concerned about how the criminal justice system treats African-Americans, the best way to protest is to vote. Do what they just did in Philadelphia and Boston and elect state attorneys and district attorneys who are looking at issues in a new light.”<sup>1</sup>

—Former President Barack Obama at the University of Illinois at Urbana-Champaign, September 7, 2018

### Introduction

In *Berger v. United States*,<sup>2</sup> the Supreme Court noted that the prosecutor’s “interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.” Nonetheless, most prosecutors have focused on seeking convictions in criminal cases. This perspective has greatly contributed to the phenomenon of mass incarceration and its many unjust collateral consequences.<sup>3</sup>

In recent years, some elected prosecutors have sought to change this narrative by using their power and discretion with the goals of not only enforcing the law, but also reducing mass incarceration, eliminating racial disparities, and seeking justice for all, including the accused. This small but growing movement of so-called “progressive” prosecutors has achieved varying levels of success. Some of these prosecutors report

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1. *Read Obama’s Full Speech from the University of Illinois*, NBC NEWS CHICAGO (Sept. 7, 2018), <https://www.nbcchicago.com/blogs/ward-room/obama-university-of-illinois-full-speech-492719531.html> [<https://perma.cc/CNS6-65ED>].

2. *Berger v. U.S.*, 295 U.S. 78 (1935).

3. *See generally* Angela J. Davis, *The Prosecutor’s Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063 (2016).

modest improvements, but many have faced serious challenges from within and outside of their offices.

In this Article, I explore this new vision of prosecution, including its successes and challenges. Can progressive prosecutors make significant progress towards the goals of eliminating mass incarceration and unwarranted racial disparities? What are the factors that impact their ability to affect change and how can those factors be managed?

Part I briefly describes and discusses how prosecutors contribute to mass incarceration and racial disparities in the criminal justice system. Part II discusses the recent movement of elected progressive prosecutors with a focus on three prosecutor offices that have implemented policies to reduce the jail and prison population. Part III examines some of the internal and external challenges faced by prosecutors who have implemented progressive policies. Part IV discusses factors that affect a prosecutor's ability to implement reforms and proposes guidelines for elected prosecutors who are committed to transforming the existing model of prosecution.

## **I. Mass Incarceration, Racial Disparities, and the Role of the Prosecutor**

The United States has the highest incarceration rate in the world with over 2.1 million people in its prisons and jails.<sup>4</sup> Additionally, there are unwarranted racial disparities at every step of the criminal process, from arrest to sentencing. People of color are 37 percent of the general population, yet they make up 67 percent of the prison population.<sup>5</sup> Black men are six times as likely to be incarcerated as white men, and Latino men are twice as likely to be incarcerated as white men.<sup>6</sup>

The phenomenon of mass incarceration in the United States is largely the result of policy decisions made during the past forty years. The War on Drugs and the passage of harsh sentencing laws are among the causes of a 500 percent increase in the number of people in the nation's prisons and jails.<sup>7</sup> The collateral consequences of mass incarceration include disenfranchisement, the loss of public housing and public benefits, difficulty finding employment, separation of families, and fiscal burdens on state and federal budgets.

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4. Roy Walmsley, Inst. for Crim. Pol'y Res., *World Prison Population List*, WORLD PRISON BRIEF 2, 6 (12th ed. 2018), [http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl\\_12.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf) [<https://perma.cc/748K-WRXH>].

5. *Criminal Justice Facts*, SENT'G PROJECT, <https://www.sentencingproject.org/criminal-justice-facts> (last visited Mar. 6, 2019) [<https://perma.cc/VJK4-F848>].

6. *Id.*

7. *Id.* See also Lauren Carroll, *How the War on Drugs Affected Incarceration Rates*, POLITIFACT (Jul. 10, 2016), <https://www.politifact.com/truth-o-meter/statements/2016/jul/10/cory-booker/how-war-drugs-affected-incarceration-rates> [<http://perma.cc/X6H8-RKM3>] (discussing the validity of claims that the war on drugs led to an incarceration increase that disproportionately affected poor people and minorities).

Many factors contribute to the racial disparities in the criminal justice system. There are the socioeconomic factors such as poverty, lack of education, and high unemployment in communities of color—all of which are impacted by race discrimination in society as a whole. There is also disproportionate offending among people of color for certain types of offenses. Research by renowned criminologist Alfred Blumstein demonstrated that 76 percent of the racial disparities in the prison population may be explained by disproportionate offending.<sup>8</sup> Blumstein concluded that the remaining 24 percent may be the result of criminal justice variables such as a prior criminal record or the discretionary decisions of criminal justice officials, especially police officers and prosecutors.<sup>9</sup> The unexplained percentage of disparities in drug cases is even higher, as much as 50 percent.<sup>10</sup>

People of color in the criminal justice system are treated worse than their similarly-situated white counterparts at every step of the process, whether they are the victims of crime or the accused. Although the precise percentage of racial disparity caused by discretionary decision-making cannot be precisely determined, this disparate treatment cannot be justified at any level—50 percent, 24 percent or even 1 percent. When police officers take race into account in making the decision to stop, frisk, search, and/or arrest an individual, they engage in racial profiling. Judges sometimes impose higher cash bail or longer sentences on people of color. Both practices have been well documented,<sup>11</sup> and greatly contribute to the racial disparities in the criminal justice system. However, prosecutors deserve heightened scrutiny, primarily because of their tremendous power and discretion.

Prosecutors are the most powerful officials in the criminal justice system. Thus, their discretionary decisions—especially their charging and plea-bargaining decisions—play a very significant role in contributing to mass incarceration and unwarranted racial disparities.<sup>12</sup> Police officers have a tremendous amount of discretion on the street but ultimately only have the power to bring an individual to the courthouse door. It is the

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8. Nazgol Ghandnoosh, Ph.D., *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, SENT'G PROJECT (Sept. 3, 2014), <https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies> (citing Patrick A. Langan, *Racism on Trial: New Evidence to Explain the Racial Composition of Prisons in the United States*, 76 J. CRIM. L. & CRIMINOLOGY 666–683 (1986)) [<https://perma.cc/B39V-NFLX>].

9. *Id.*

10. *Id.*

11. Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170, 181–83 (2005); *See generally* Cynthia E. Jones, “Give Us Free”: *Addressing Racial Disparities in Bail Determinations*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 919 (2013).

12. *See* John Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1266–67, 69 (2012). *See generally* JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017).

prosecutor who decides whether and to what extent that individual will become a part of the criminal justice system.

Prosecutors decide whether an individual will be charged with a crime, and the standard for charging—probable cause—is very easily met, allowing prosecutors to “pile on” charges that they may not be able to prove at trial. This phenomenon, known as “overcharging,” gives the prosecutor an advantage at the plea-bargaining stage of the process. An individual facing a long list of charges will be highly motivated to accept a plea bargain that requires him to plead guilty to one or more charges—even if he is not guilty or has a valid defense—just to avoid the possibility of a jury convicting him of all of the charges.

The charging and plea-bargaining decisions are entirely controlled by prosecutors. Just as a prosecutor may decide to “pile on” unmeritorious charges, he may decide to forego charges altogether even if there is evidence to support a conviction. A prosecutor may offer a plea bargain but is not required to do so. He may decide to give one individual a break while prosecuting another similarly situated individual arrested for the same offense. Likewise, prosecutors may offer a better deal to one individual than to another who is similarly situated. This vast discretion in the charging and plea bargaining process often results in unwarranted racial disparities.<sup>13</sup> The disparities may be the result of implicit bias or the result of race neutral factors that have a racial impact.<sup>14</sup> Regardless of the cause, the result is the same: unfair treatment of black and brown people in the criminal justice system.

However, just as the power and discretion of prosecutors have contributed to mass incarceration and racial disparities in the criminal justice system, that same power and discretion may be used to institute reforms to correct these injustices.<sup>15</sup> Many prosecutors aggressively pursue charges in as many cases as possible, seek high cash bail, and advocate for lengthy prison sentences. But a prosecutor instead could use her power and discretion to institute policies and practices that would reduce the incarceration rate and unwarranted racial disparities. Such policies and practices would be in *accord* with the Supreme Court’s edict in *Berger* that prosecutors should seek justice, not convictions. In recent years, a growing number of elected prosecutors have chosen this path, attempting to balance the pursuit of public safety with the reduction of the prison and jail population.

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13. See generally ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007).

14. *Id.*

15. See generally Angela Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 *FORDHAM L. REV.* 3 (2018); But see generally Abbe Smith, *Good Person, Good Prosecutor in 2018*, 87 *FORDHAM L. REV. ONLINE* 3 (2018).

## II. The Election of Progressive Prosecutors

Most criminal cases—around 90 percent—are prosecuted on the state and local level, and most state prosecutors are elected officials.<sup>16</sup> Most states elect a statewide prosecutor called the Attorney General. Attorneys General serve as legal advisors for the state’s agencies and legislature. They also focus on issues like consumer protection, antitrust, and related matters. Rarely do Attorneys General get involved in the prosecution of criminal cases, although there are some exceptions.<sup>17</sup>

There are thousands of chief state and local prosecutors who are elected to handle criminal cases, usually on the county level. Most of them are called District Attorneys or State’s Attorneys, and the prosecutors who work beneath them are called Assistant District Attorneys (ADAs) or Assistant State’s Attorneys (ASAs). Currently only Delaware, Rhode Island, New Jersey, Connecticut and the District of Columbia appoint the chief prosecutors who handle criminal cases.

Although the electoral process is meant to serve as the mechanism of accountability for prosecutors, it has been largely ineffective for a variety of reasons. First, there is very little transparency in the prosecutorial function. Prosecutors’ most important and consequential duties, charging and plea-bargaining, are performed behind closed doors. It is impossible to hold prosecutors accountable without knowing how they carry out these important functions. Second, most people pay very little attention to prosecutor races. Finally, most prosecutors run unopposed and serve for decades.<sup>18</sup> We live in a democracy where we attest to hold accountable those to whom we grant power, yet the most powerful officials in the criminal justice system are rarely held accountable because of these flaws in the electoral process.

Recent years have seen modest progress in improving the effectiveness of prosecutor elections. Organizations like Color of Change and the ACLU have mounted campaigns to educate the public about the importance of District Attorney races.<sup>19</sup> Also, ironically, some of the

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16. Federal prosecutors are appointed by the President and confirmed by the Senate. This Article focuses on state prosecutors because the vast majority of criminal cases are prosecuted in state courts.

17. See e.g., Jon Anderson, *Alabama Attorney General Takes Over Prosecution of Galleria Mall Shootings*, HOOVER SUN (Dec. 13, 2018), <https://hooversun.com/news/alabama-attorney-general-takes-over-prosecution-of-galleria1213> [<https://perma.cc/5ELF-HHXF>] (detailing how Alabama State Attorney General Steve Marshall took over a criminal prosecution of an Alabama mall shooting.); Leonard M. Fleming & Beth LeBlanc, *Attorney General Adds Worthy to Flint Prosecution Team*, THE DETROIT NEWS (Feb. 21, 2019), <https://www.detroitnews.com/story/news/politics/2019/02/21/nessel-ag-flint-probe-todd-flood/2882947002> [<https://perma.cc/JESS-RSKR>] (detailing Michigan State Attorney General Dana Nessel’s oversight of the “Flint Water” prosecution).

18. See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 593 (2009).

19. See e.g., MEET YOUR DA. <https://meetyourda.org>, (last visited Feb. 26, 2019) (website of ACLU Project which aims to educate voters about the importance

police killings of unarmed black men in recent years served to educate the public about the power of prosecutors and their central role in the criminal process. The fact that very few prosecutors charged the police officers involved in these killings resulted in community members confronting prosecutors and demanding accountability.<sup>20</sup> Consequently, these community members learned about the prosecutorial function in other contexts and began to pay attention to prosecutor elections.

As the prosecutor education campaigns evolved, several individuals began to run against incumbent prosecutors, offering a radically different vision of what it means to be a prosecutor. These challengers promised not only to pursue public safety but to use their power and discretion to reduce the prison and jail population and make the system fairer for all involved, including the accused. Some challenged incumbents who declined to prosecute police officers involved in the killings of unarmed black men and boys, campaigning in part on this issue. All promised to implement a progressive prosecutorial agenda in pursuit of criminal justice reform, including and especially alternatives to incarceration in appropriate cases. This part explores the paths of three progressive prosecutors—one who unseated an unpopular incumbent, one who never served as a prosecutor prior to his election, and one who is serving his fourth term as the chief prosecuting attorney.

#### A. *Kim Foxx*

Kim Foxx was elected State's Attorney for Cook County, Illinois in 2016. Cook County includes Chicago and has the second largest population of any county in the nation. When Foxx was elected, the violent crime rate, especially the homicide rate, was the highest it had been in decades and higher than most U.S. cities, including New York, Philadelphia, Houston, and Los Angeles.<sup>21</sup> The homicide clearance rate was low, and most of the homicide victims were African American.

Foxx defeated the incumbent, Anita Alvarez—the first woman and first Latina State's Attorney for Cook County. Alvarez was a traditional “law and order” prosecutor who aggressively prosecuted most

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of their local District Attorney elections); COLOR OF CHANGE, <https://colorof-change.org>, (last visited Feb. 26, 2019) (website for similar organization which aims to mobilize voters of color to vote in local D.A. elections).

20. See e.g., Kashmira Gander, *Michael Brown Shooting: What Happened in Ferguson?*, INDEPENDENT (Aug. 11, 2015), <https://www.independent.co.uk/news/world/americas/michael-brown-shooting-what-happened-in-ferguson-10450257.html> [<https://perma.cc/J634-TT9Y>] (detailing political aftermath of the Michael Brown shooting); Jacey Fortin & Jonah Engel Bromwich, *Cleveland Police Officer Who Shot Tamir Rice is Fired*, N.Y. TIMES (May. 30, 2017), <https://www.nytimes.com/2017/05/30/us/cleveland-police-tamir-rice.html> (detailing firing of police officer who was responsible for Tamir Rice's death) [<https://perma.cc/UFT4-33C9>].
21. John Sanburn & David Johnson, *See Chicago's Deadly Year in 3 Charts*, TIME (Jan. 17, 2017), <http://time.com/4635049/chicago-murder-rate-homicides> [<https://perma.cc/UXN6-FNER>].

crimes. She was accused repeatedly of abusing her power and engaging in misconduct. Alvarez defended the misconduct of police officers who extracted false confessions that resulted in wrongful convictions even after a court issued certificates of innocence to the defendants. She repeatedly charged citizens with felony eavesdropping for recording their encounters with police officers. There were numerous additional allegations of misconduct against Alvarez, but she is probably best known for delaying the prosecution of Jason Van Dyke, the police officer who killed an unarmed black youth named Laquan McDonald. In fact, Alvarez only prosecuted Van Dyke after a judge ordered the release of a videotape that showed Van Dyke shooting McDonald in the back while he was lying prone on the ground. Her failure to prosecute Van Dyke was a big issue in Foxx's campaign and undoubtedly contributed to her defeat.<sup>22</sup>

When Kim Foxx ran against Alvarez, she was the Chief of Staff for Cook County Board President Toni Preckwinkle. In that position, she worked on criminal justice reform with the goal of addressing racial disparities in the criminal and juvenile justice systems. Prior to working for Preckwinkle, Foxx had served as an ASA in Cook County for twelve years. When she ran against Alvarez, Foxx pledged to use her power and discretion to implement criminal justice reforms.

Foxx is Cook County's first African American woman State's Attorney. She speaks often of her background and upbringing. Foxx spent part of her childhood in the Cabrini-Green public housing projects. Her father left her mother shortly before Foxx was born. Foxx's mother suffered from mental illness and drug addiction, and Foxx bounced between living in shelters and with her grandmother. She was sexually assaulted twice when she was a young child—once by a relative when she was four and once by two boys she did not know when she was seven. She has cousins who have done time in prison and cousins who have been shot.<sup>23</sup> All of these experiences heavily influenced her philosophy of prosecution and helped shape her views about criminal justice reform.

Shortly after taking office in 2017, Foxx began to fulfill her campaign promises. During her second week as State's Attorney, she announced that her office would not charge retail thefts as felonies unless the value of the property was at least \$1,000 or the defendant had ten or more prior felonies. Illinois law permits felony retail theft charges if the property is worth \$300 or more, so this change in charging policy reduced the number of felony convictions and shifted resources to more serious offenses. Some officials, including Chicago's police superintendent, welcomed the

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22. Carol Felsenthal, *Kim Foxx Wants to Tell You A Story*, CHICAGO MAG. (Dec. 10, 2018), <http://www.chicagomag.com/Chicago-Magazine/January-2019/Kim-Foxx-Wants-to-Tell-You-a-Story> [https://perma.cc/36VN-T4B7].

23. Steve Bogira, *The Hustle of Kim Foxx*, MARSHAL PROJ. (Oct. 29, 2018), <https://www.themarshallproject.org/2018/10/29/the-hustle-of-kim-foxx> [https://perma.cc/55FE-7LBK].



change in policy. Suburban merchants and police chiefs, however, were not happy with Foxx's decision.<sup>24</sup>

In March of 2017, Foxx started working on bail reform. She announced that her office would support the release of individuals charged with nonviolent offenses who were detained pretrial because of their inability to post bonds of \$1,000 or less.<sup>25</sup> Foxx later issued guidelines to the prosecutors in her office, ordering them to proactively ask for pretrial release in appropriate cases. She continued to publicly speak out in support of bail reform and supported the Cook County Public Defender's call for an Illinois Supreme Court ruling requiring that all money bonds be affordable. By the end of 2017, the Cook County jail population had decreased by more than 1,000 people.<sup>26</sup> Unsurprisingly, Foxx's bail reform policies were praised by some<sup>27</sup> and criticized by others.<sup>28</sup>

In June of 2017, Foxx announced that her office would no longer prosecute individuals for driving with licenses suspended for financial reasons (such as failure to pay traffic tickets or child support). For this and other modest reforms, Riverside police chief Thomas Weitzel accused Foxx of trying to dismantle the criminal justice system.<sup>29</sup> Kevin Graham, the president of the Chicago Fraternal Order of Police (FOP) criticized the bail and theft policies, accusing Foxx of endangering the community.<sup>30</sup> Foxx explained that, with cash bail, defendants felt pressured to plead guilty just to get out of jail even if they were innocent of the offense. She met with Graham in an effort to find common ground and moved forward with her new policies.

Foxx made history in her second year in office when she released over six years of data in felony criminal cases documenting outcomes at four critical stages of each case: intake, initiation, disposition, and sentencing.<sup>31</sup> The data is included in four tables accessible to the public and does not include names or any other personal identifying information. The data may be used to identify patterns of constitutional violations and disparate treatment of defendants and/or victims. No other chief

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24. *Id.*

25. See e.g., The People's Lobby, *In Pursuit Of Justice For All: An Evaluation of Kim Foxx's First Year in Office*, <https://www.thepeopleslobbyusa.org/wp-content/uploads/2017/12/Equal-Justice-for-All-A-Report-on-Kim-Foxxs-First-Year-ForPrint.pdf> (last visited Mar. 6, 2019) [hereinafter Evaluation]; *State's Attorney Foxx Announces New Bond Reform Initiative*, COOK COUNTY STATE'S ATT'Y (Mar. 1, 2017), <https://www.cookcountystatesattorney.org/news/states-attorney-foxx-announces-new-bond-reform-initiative> [<https://perma.cc/9RNR-94S2>].

26. *Evaluation*, *supra* note 25.

27. *Id.*

28. Bogira, *supra* note 23.

29. *Id.*

30. *Id.*

31. *State's Att'y Foxx Announces Unprecedented Open Data Release*, COOK COUNTY STATE'S ATT'Y (Mar. 2, 2018), <https://www.cookcountystatesattorney.org/news/states-attorney-foxx-announces-unprecedented-open-data-release> [<https://perma.cc/CM4N-CTA4>].

prosecutor has demonstrated this level of transparency. In fact, most resist efforts of others attempting to obtain information about their policies and practices.<sup>32</sup> When Foxx released the data, she announced, “I sought this office committed to building the most open and transparent prosecutor’s office in the country. I am proud to be taking the lead on open data, and hope that many of my fellow prosecutors around the country will join me in this effort to be truly transparent and accountable to our constituents. The public deserves nothing less.”<sup>33</sup>

In addition to these broad policy changes, Foxx demonstrated her commitment to fundamental change in many individual cases. She worked out a deal to secure the release of a man who was sentenced to life without the possibility of parole at the age of fourteen after her predecessor vehemently opposed his release.<sup>34</sup> Foxx brought criminal charges against two police officers involved in fatal shootings. Her Conviction Integrity Unit dropped charges against some defendants who claimed they had been wrongfully convicted, including dismissing charges against eighteen individuals on November 16, 2017—Chicago’s first mass exoneration. When one of the exonerees noted that no one had ever apologized for what happened to them, Foxx apologized, privately and publicly. Joshua Tepfer, an attorney from the Exoneration Project at the University of Chicago Law School, found the gesture remarkable, especially given that Foxx was not personally responsible for the wrongful convictions. He noted that she “referred to the exonerated as ‘victims,’ and wished them healing and justice,” and called it “a deliberate and important choice of language.”<sup>35</sup> Despite some detractors, Foxx continues to enjoy support among most of her constituents.

## **B. Larry Krasner**

Larry Krasner never prosecuted a case in his life before he was elected the District Attorney for Philadelphia, Pennsylvania in 2017. He started his career as a public defender in Philadelphia and later opened his own practice, specializing in criminal defense and civil rights. Krasner filed more than seventy-five lawsuits against the police department, primarily for corruption and police brutality. He also frequently represented protestors pro bono, including members of the Black Lives Matter movement.

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32. See, e.g., Emily Lane, *Orleans DA Won't Release 'Fake Subpoena' Info Because He Doesn't Want To, ACLU Lawyer Says*, NOLA.COM (Nov. 7, 2017), [https://www.nola.com/crime/index.ssf/2017/11/da\\_wont\\_release\\_fake\\_subpoena.html](https://www.nola.com/crime/index.ssf/2017/11/da_wont_release_fake_subpoena.html) [<https://perma.cc/7AA4-QSF3>].

33. See *State's Attorney*, *supra* note 25.

34. See Bogira, *supra* note 23 (detailing how Chicago State’s Attorney Kim Foxx instructed her appellate division to restructure a defendant’s offer to secure his release from life in prison to three years).

35. Carol Felsenthal, *Kim Foxx Wants to Tell You A Story*, CHI. MAG. (Dec. 10, 2018), <http://www.chicagomag.com/Chicago-Magazine/January-2019/Kim-Foxx-Wants-to-Tell-You-a-Story> [<https://perma.cc/C3TD-E5GH>]

When Krasner decided to run for District Attorney of Philadelphia in 2017, the District Attorney's office was embroiled in scandal. The incumbent, Seth Williams, was the first African American District Attorney of Philadelphia and of the entire state of Pennsylvania. During Williams's second term, he was indicted on numerous bribery and extortion charges and was ultimately sentenced to five years in prison.

Krasner joined a field of six candidates in the Democratic primary and ran on a promise to change the culture of the District Attorney's office "from a culture of seeking victory for prosecutors to a culture of seeking justice for victims."<sup>36</sup> He promised to work towards ending mass incarceration by seeking alternatives to incarceration, opposing cash bail, and treating drug addiction as a medical problem instead of a crime. Krasner also vowed never to seek the death penalty. He won the primary by an overwhelming margin and soundly defeated the Republican candidate in the general election.

Shortly after taking office in January of 2018, Krasner began to fulfill his campaign promises. During his first week on the job, he fired 31 of the office's prosecutors and immediately began recruiting and filling the open positions with lawyers who share his vision of criminal justice reform. Krasner hired several former public defenders and personally visited 25 law schools to recruit law students during his first year in office, including all historically black law schools. He often targeted students who wanted to be public defenders, noting that they were "'probably the right kind of people' for 'a truly progressive prosecutor's office.'"<sup>37</sup>

In his second month in office, Krasner made national news by issuing a memo to the prosecutors in his office directing them to follow new charging and sentencing policies.<sup>38</sup> The memo directed the prosecutors to no longer charge marijuana possession, possession of marijuana paraphernalia, or prostitution (if the defendant has fewer than three prostitution convictions). They were also ordered to divert more cases and to offer plea deals that would result in lower sentences. Perhaps the most controversial part of the memo informed prosecutors of a new sentencing policy. This section included data on the incarceration rate of the United States, Pennsylvania, and Philadelphia and explained the harms caused by mass incarceration. It directed prosecutors to state on the record at sentencing hearings the costs and benefits of the sentence they asked the judge to impose, including the actual cost of incarcerating the defendant for the

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36. *On the Issues*, KRASNERFORDA, <https://krasnerforda.com/platform> [<https://perma.cc/5VM4-FLK3>].

37. Chris Palmer, *Larry Krasner's First Year as Philly DA: Staff Turnover, Fewer Cases, Plenty of Controversy*, PHILA. INQUIRER (Jan. 6, 2019), <https://www.philly.com/news/larry-krasner-philadelphia-district-attorney-staff-reform-cases-first-year-20190106.html> [<https://perma.cc/R5NV-PNL2>].

38. Krasner Internal Memo, <https://www.documentcloud.org/documents/4415817-Philadelphia-DA-Larry-Krasner-s-Revolutionary-Memo.html> (Last visited Feb. 26, 2019).

number of years requested. The memo also directed prosecutors to seek shorter probationary periods.

Krasner has instituted other policies to reduce the number of people in Pennsylvania's prisons and jails. His office no longer seeks cash bail for defendants charged with twenty-five different crimes, including prostitution, retail theft, and trespassing and no longer brings charges in cases that only involve marijuana possession, effectively decriminalizing marijuana use in Philadelphia. Krasner hired a special immigration counsel to train his prosecutors on how to minimize the risk of deportation for defendants charged with all offenses except violent and sex offenses. The policy will also protect victims and witnesses who face possible deportation.<sup>39</sup>

Krasner's most radical change in charging policy involves homicide cases. Instead of charging the highest possible level of homicide, he requires his prosecutors to charge only the level of homicide that can be proven beyond a reasonable doubt. This decision rejects the common prosecutorial practice of overcharging to gain an advantage at the plea-bargaining stage. According to Krasner, "We are not going to overcharge . . . We are not going to try to coerce defendants. We are going to proceed on charges that are supported by the facts in the case, period. The era of trying to get away with the highest charge regardless of the facts is over."<sup>40</sup> Prosecutors are required to get his approval on any plea offer that exceeds fifteen to thirty years in prison.

At the end of Krasner's first year, his office filed 18 percent fewer cases than in 2017, including 25 percent fewer misdemeanors.<sup>41</sup> According to data collected by his office at the end of his first year, prosecutors opened 6,500 fewer cases than the previous year, and half as many as the office filed in 2013.<sup>42</sup>

### C. *Dan Satterberg*

Dan Satterberg has been a prosecutor for his entire legal career. He joined the King County Prosecuting Attorney's Office upon graduation from law school and served as a trial attorney for four years before becoming Chief of Staff for then-Prosecuting Attorney Norm Maleng. In 2007, Norm Maleng died suddenly from a heart attack, and Satterberg was appointed to serve as interim Prosecuting Attorney until a special

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39. Alicia Victoria Lozano, *Philadelphia District Attorney's Office Trains 300 Attorneys to Protect Immigrant Rights*, NBC PHILADELPHIA (Jan. 24, 2019), <https://www.nbcphiladelphia.com/news/local/Philadelphia-District-Attorneys-Office-Trains-300-Attorneys-to-Protect-Immigrant-Rights-504826141.html> [<https://perma.cc/3D3P-65Y4>]

40. Maura Ewing, *America's Leading Reform-Minded District Attorney Has Taken His Most Radical Step Yet*, SLATE (Dec. 4, 2018), <https://slate.com/news-and-politics/2018/12/philadelphia-district-attorney-larry-krasner-criminal-justice-reform.html> [<https://perma.cc/XSM2-5P5E>].

41. See Palmer, *supra* note 37.

42. *Id.*

election was held later that year. Satterberg won the special election and served the remainder of Maleng's term. He has since won reelection three times.<sup>43</sup>

Satterberg is one of a very few longstanding chief prosecutors who has been engaged in criminal justice reform long before it became popular.<sup>44</sup> He was a cofounder of the Law Enforcement Assisted Diversion (LEAD) program in 2011. In the LEAD program, police officers immediately divert individuals in possession of less than a gram of illegal drugs or engaged in prostitution activity to needed services. LEAD differs from other diversion programs because individuals in the program are never booked, charged, or brought to court. The program was originally limited to Seattle, but in September 2018, Satterberg announced that it would be expanded to the rest of King County.

Satterberg views drug addiction as a medical problem that should be addressed with treatment instead of incarceration. He supports safe injection sites<sup>45</sup> and has publicly opposed the Trump administration's decision to prosecute individuals who maintain them.<sup>46</sup> Satterberg has written about the experience of his sister who suffered from drug addiction for decades.<sup>47</sup> He learned a lot about addiction and its effects when he helped her achieve sobriety before her tragic death in 2018. Like Kim

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43. Satterberg ran as a Republican in all but the 2018 race. He switched to the Democratic party in May of 2018, stating, "I don't want anybody to think for a second that my views are in line with this president." Josh Kelety, *The Political Invulnerability of King County Prosecutor Dan Satterberg*, SEATTLEWEEKLY (Jun. 21, 2018), <https://www.seattleweekly.com/news/the-political-invulnerability-of-king-county-prosecutor-dan-satterberg> [<https://perma.cc/7KT5-868T>].
44. See Seattle Times Editorial Board, *The Times Recommends: Dan Satterberg for King County Prosecuting Attorney*, SEATTLE TIMES (Sept. 7, 2018), <https://www.seattletimes.com/opinion/editorials/the-times-recommends-dan-satterberg-for-king-county-prosecuting-attorney> [<https://perma.cc/L2SC-DTNJ>] (detailing Dan Satterberg's longstanding commitment to criminal justice reform at the prosecutorial level); See also Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER (May. 11, 2015), <https://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment> [<https://perma.cc/5ZDK-F6VC>] (detailing Milwaukee DA John Chisholm's efforts to enact criminal justice reform as early as 2007).
45. Miriam Aroni Krinsky & Dan Satterberg, *Don't Jail Addicts. Overdose Prevention Sites Work, and the US Needs to Get on Board*, USA TODAY (Nov. 1, 2018), <https://www.usatoday.com/story/opinion/policing/2018/11/01/drugs-opioids-policing-usa/1821797002> [<https://perma.cc/6M7Y-ZURZ>].
46. *King County Prosecutor: Trump, Sessions Wrong About Safe Injection Sites*, MYNORTHWEST (Feb. 16, 2018), <http://mynorthwest.com/901976/satterberg-safe-injection-sites-trump> [<https://perma.cc/5263-LDP9>]; Rod J. Rosenstein, *Fight Drug Abuse, Don't Subsidize It* (Aug. 27, 2018), <https://www.nytimes.com/2018/08/27/opinion/opioids-heroin-injection-sites.html> [<https://perma.cc/YE3T-98L3>].
47. Dan Satterberg, *My Sister's Drug Addiction—And What it Taught Me*, CROSSCUT (May. 17, 2018), <https://crosscut.com/2018/05/my-sisters-drug-addiction-and-what-it-taught-me> [<https://perma.cc/K23R-6VXZ>].

Foxx, Satterberg's life experiences undoubtedly influenced his philosophy of prosecution.

In addition to LEAD, Satterberg has established other programs that divert youth and adults out of the juvenile and criminal justice systems. The Choose 180 Youth Workshop is a pre-charge diversion program that gives young people an opportunity to avoid prosecution by participating in half-day workshops and getting needed services that include employment opportunities, academic support, and mentorship. The program diverts about 400 youths from the criminal justice system each year.<sup>48</sup>

Satterberg has established restorative justice programs for juveniles that involve the offender, the victim, and members of the community. One such program is the Family Intervention and Restorative Services program which diverts juveniles who engage in violent behavior against family members. The program involves the victims and provides services for the entire family with the goal of keeping families together and promoting nonviolence and respect among family members. The program has diverted over 400 juveniles from the criminal justice system without charges being filed.

Satterberg's office runs a felony diversion program in the Juvenile Court called CEDAR (Community Engagement Diversion Alternative Resolution) that emphasizes building a connection between young people and a number of nonprofit organizations. The youth in CEDAR enter a guilty plea to a felony and the sentencing hearing is continued for six months while the youth and community group work on developing pro-social skills. Satterberg's office contracts with these organizations and pays them for the value they add in attempting to transform the youth's aspirations. The programs include Peacemaking Circles and employ formerly incarcerated individuals. If the youth engages with the community group during the six-month period, they may earn a dismissal of the felony charge at the sentencing hearing. This program is consistent with Satterberg's philosophy that the community should play a crucial role in the justice system, and that the prosecutor should share power with nonprofit providers.

Since Satterberg has been in office, the daily population of juveniles in detention has been reduced from one hundred to fifty.<sup>49</sup> During the past 20 years, the juvenile offender caseload has declined from 8000 to 1500.<sup>50</sup> Satterberg recommended clemency for twenty-one prisoners serving life without the possibility of parole,<sup>51</sup> and he is a staunch opponent

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48. *Choose 180 Youth Program*, KING COUNTY, <https://www.kingcounty.gov/depts/prosecutor/youth-programs/choose-180.aspx>.

49. Seattle Times Editorial Board, *supra* note 44.

50. Email from Dan Satterberg, King County Prosecuting Attorney, to author (Apr. 22, 2019 6:05 PM PST) (on file with author); *Voices of Reform—Dan Satterberg*, THE COALITION FOR PUBLIC SAFETY, <https://www.coalitionforpublicsafety.org/justice-champions/dan-satterberg> (last visited Feb. 26, 2019).

51. Dan Satterberg, *King County's Prosecuting Attorney: 'We Don't Need the Death*

of the death penalty.<sup>52</sup> He also supported Initiative 940, a ballot initiative that makes it easier to prosecute police officers who use unlawful deadly force.<sup>53</sup> Satterberg has won four elections, running unopposed in all but the last race. Lisa Daugaard, director of the Public Defender Association and a cofounder of the LEAD program, praised Satterberg's record, as did King County's former chief public defender, Lorinda Youngcourt, who called Satterberg one of the most progressive prosecutors she has ever worked with.<sup>54</sup> Although many factors contribute to the success or failure of a candidate for the chief prosecutor job, Satterberg's political success should provide reassurance to progressive candidates concerned about the popularity of a progressive platform.

### III. The Challenges of Progressive Prosecution

Chief prosecutors who have attempted to change the policies, practices, and goals of their offices have faced numerous challenges from within and outside of their offices. The challenges have varied in scope, depending on the nature and extent of the change. Some of the challenges have come from the chief prosecutors' own employees who are resistant to change, and others have come from other institutions in the criminal justice system.

Several factors bring about and contribute to the resistance and challenges progressive prosecutors face. One such factor is whether the prosecutor has prior prosecutorial experience. Someone who has been prosecuting cases for years may have difficulty taking direction from a newly elected District Attorney who has never prosecuted a case, especially if she was previously a criminal defense attorney. Another factor is whether the new policies and practices conflict with the interests and/or values of other criminal justice officials or institutions. For example, a prosecutor's decision to decline prosecution of all marijuana possession cases has a direct impact on the police departments making arrests in these cases. For these and many other reasons, a progressive prosecutor must think carefully about the ramifications of her decisions, communicate her goals and plans with all interested parties, and address all predictable consequences.

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*Penalty*, SEATTLE TIMES (Jan. 19, 2018), <https://www.seattletimes.com/opinion/king-countys-prosecuting-attorney-we-dont-need-the-death-penalty> [<https://perma.cc/PZV3-T2NM>].

52. Elections Board, *2018 Endorsement Questionnaire: Dan Satterberg*, URBANIST (Oct. 10, 2018), <https://www.theurbanist.org/2018/10/10/2018-endorsement-questionnaire-dan-satterberg> [<https://perma.cc/P6KF-ASH9>].
53. Josh Keley, *The Political Invulnerability of Dan Satterberg*, SEATTLE WKLY. (Jun. 21, 2018, 3:00 PM), <https://www.seattleweekly.com/news/the-political-invulnerability-of-king-county-prosecutor-dan-satterberg> [<https://perma.cc/ME98-5526>].
54. Ryan Briggs & Max Martin, *Leaked List Shows Krasner Firings Targeted Top Staff, "Porngate" Prosecutors*, PHILA. WKLY. (Jan. 5, 2018), [http://www.philadelphiaweekly.com/news/leaked-list-shows-krasner-firings-targeted-top-staff-porngate-prosecutors/article\\_960fda64-f271-11e7-b901-2f37b4f5508e.html](http://www.philadelphiaweekly.com/news/leaked-list-shows-krasner-firings-targeted-top-staff-porngate-prosecutors/article_960fda64-f271-11e7-b901-2f37b4f5508e.html) [<https://perma.cc/EC5T-5FES>].

### A. *Larry Krasner*

Larry Krasner's policies are among the most radical in the progressive prosecution movement. It was very predictable that there would be a huge backlash—from within and outside of the District Attorney's office. During the campaign, many ADAs supported one or more of his opponents in the primary. His background as a criminal defense and civil rights attorney who regularly sued the police department automatically put him at odds with many of the ADAs and the police department.

Krasner fired 31 ADAs during his first week in office. Krasner gave no reasons for the firings, but it seemed clear that these attorneys were not in agreement with his philosophy of prosecution and proposed policies. Some were seasoned homicide prosecutors who had aggressively pursued the death penalty. Krasner's decision to dismiss these prosecutors was praised by some and criticized by others. One critic was Beth Grossman, Krasner's opponent in the general election and the former chief of the office's civil asset forfeiture unit.<sup>55</sup> A group of former prosecutors hosted an event at the FOP Lodge to honor the thirty-one prosecutors who were fired. A total of 139 employees left after Krasner was elected. Although he hired 150 new employees, the atmosphere in the office has been described as "tense" at times.<sup>56</sup> Two people claiming to be ADAs in Krasner's office opened anonymous twitter accounts and attacked Krasner and his policies.<sup>57</sup>

Krasner's policies and practices have drawn the ire of the Philadelphia Police Department, the U.S. Attorney, and other criminal justice officials. Krasner decided to release a list of sixty-six police officers who had engaged in misconduct, including lying, racial bias, and brutality. The list was drawn up by Krasner's predecessor, Seth Williams, who did not intend for it to be released, but rather to be used as an internal guide to determine which officers' testimony could be used at trial. Krasner not only released the list but turned it over to the Philadelphia Defender Association. The Philadelphia FOP filed a lawsuit against the District Attorney's office, the mayor, and the police commissioner, claiming they harmed the officers' reputations and failed to create due process protections for them.<sup>58</sup>

John McNesby, the President of the FOP, has vehemently criticized Krasner since Krasner took office, accusing him of being anti-law enforcement. On March 1, 2018, McNesby sent a letter to the police cadets after

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55. *Id.*

56. Bobby Allyn, *Philly DA Larry Krasner Earns Praise from Reformers, Scorn from Victim Advocates*, WHY? (Feb. 5, 2019), <https://why.org/articles/after-his-first-year-philly-d-a-larry-krasner-earns-praise-from-reformers-scorn-from-victim-advocates> [<https://perma.cc/F776-5AS4>].

57. Ben Austen, *In Philadelphia, a Progressive D.A. Tests Power and Learns Limits of Office*, N.Y. TIMES MAG. (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> [<https://perma.cc/833J-4N6M>].

58. *Id.*



Krasner spoke to them at the invitation of the Guardian Civic League, an organization of African American police officers. During his speech to the cadets, Krasner talked about the appropriate use of force during police encounters. In his letter to the cadets, McNesby called Krasner's remarks "ridiculous and dangerous" and accused him of intentionally trying to endanger their lives. McNesby urged the cadets to "completely disregard his dangerous and despicable remarks."<sup>59</sup>

Krasner has charged a number of police officers with various criminal offenses, including murder, for engaging in acts of brutality. His decision to charge two officers with criminal offenses for engaging in unlawful stop-and-frisks and falsifying official paperwork is unprecedented.<sup>60</sup> Investigators discovered video evidence that contradicted the officers' stated reason for stopping and frisking a citizen. Krasner charged each of them with a felony (obstructing the administration of law) and three misdemeanors (false imprisonment, tampering with records, and official oppression).<sup>61</sup> The ACLU previously sued the Philadelphia Police Department for engaging in racial profiling, and citizens frequently file civilian complaints against officers, but this case may be the first time officers have been criminally charged for an illegal stop-and-frisk.

William McSwain, the U.S. Attorney for the Eastern District of Pennsylvania, has also been highly critical of Krasner. Local District Attorneys often cooperate with the federal prosecutor for their districts in the investigation and prosecution of certain crimes. Such cooperation between McSwain and Krasner seems unlikely after McSwain publicly questioned Krasner's commitment to crime victims. Speaking about Krasner, McSwain stated, "He unfortunately seems wholly unconcerned about providing justice to victims. He seems preoccupied with advocating for defendants."

Although Krasner has been criticized by members of the law enforcement community, he has earned high praise from criminal justice reformers across the nation.<sup>62</sup> He has been featured in profiles in the *New York Times Magazine*, the *New Yorker*, and *Newsweek*. Krasner

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59. Joe Trinacria, *Philly FOP President Blasts DA Krasner in Letter to Police Cadets*, PHILA. MAG. (Mar. 2, 2018, 2:07 PM), <https://www.phillymag.com/news/2018/03/02/mcnesby-krasner-police-cadets> [<https://perma.cc/LACE-ZN3S>].

60. PoliceOne Staff, *Pa. DA Charges 2 Cops for 'Illegal' Stop-and-Frisks in Landmark Case*, POLICEONE (Oct. 9, 2018), <https://www.policeone.com/stop-and-frisk/articles/481681006-Pa-DA-charges-2-cops-for-illegal-stop-and-frisks-in-landmark-case> [<https://perma.cc/MS3-FXS8>].

61. Jared Piper, *Philly DA Larry Krasner is Going After Police Officers for Illegal Stop-and-Frisks*, BILLY PENN (Oct. 4, 2018), <https://billypenn.com/2018/10/04/philly-da-larry-krasner-is-going-after-police-officers-for-illegal-stop-and-frisks> [<https://perma.cc/AM6Y-MCDR>].

62. See, e.g., Shaun King, *Philadelphia DA Larry Krasner Promised A Criminal Justice Revolution. He's Exceeding Expectations*, INTERCEPT (Mar. 20, 2018), <https://theintercept.com/2018/03/20/larry-krasner-philadelphia-da> [<https://perma.cc/YLM9-9H8R>] (article by criminal justice reform activist Shaun King praising Krasner's reforms).

speaks to standing-room-only crowds at law schools where students often wait in line to see him.<sup>63</sup> The organizations in Philadelphia who worked hard to secure his election continue to support him.

## B. *Aramis Ayala*

Aramis Ayala was elected State Attorney for the Ninth Judicial Circuit of Florida in 2016, becoming the first African American State Attorney in Florida's history. She started her legal career as a prosecutor in the same office that she was eventually elected to run. After two years, she became disillusioned with the unfairness of the criminal justice system and joined the public defender office. Ayala decided to challenge her old boss, Jeff Ashton, in the 2016 State Attorney race. She ran on a progressive platform, promising more transparency, fair treatment of people of color, and engagement with the black communities of Orange and Osceola counties. Ayala won the Democratic primary and was unopposed in the general election.

Ayala did not discuss the death penalty during her campaign, but it became the defining issue of her tenure as State Attorney. On March 16, 2017, just two months after she took office, Ayala announced that her office would no longer seek the death penalty. She explained that the death penalty is costly, ineffective as a deterrent, and takes too long to implement and pledged to seek life sentences in appropriate cases.

The backlash to her decision was swift and severe. Within hours of her announcement, Florida governor Rick Scott issued an executive order removing her from a capital case involving the death of an Orlando police officer. The law enforcement community attacked her, and weeks later, state legislative committees proposed cutting her budget by one million dollars.<sup>64</sup> On April 3, 2017, the governor reassigned all the first degree murder cases that were eligible for the death penalty from Ayala to Brad King, the State Attorney for the fifth Judicial Circuit.<sup>65</sup>

On April 11, Ayala filed a federal lawsuit against Scott, arguing that he violated her constitutional rights when he reassigned the murder cases to a state attorney who had not been elected by her constituents. The case ultimately made its way to the Florida Supreme Court, and on August 31, the court ruled against Ayala with two justices dissenting.<sup>66</sup> Soon

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63. Ben Austen, *Progressive Phila. D.A. Tests Power and Learns Limits of Office*, N.Y. TIMES MAG. (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> [https://perma.cc/63H4-WEBT].

64. Frances Robles, *Lock 'Em Up? Prosecutors Who Say 'Not So Fast' Face a Backlash*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/us/aramis-ayala-prosecutors-death-penalty.html> [http://perma.cc/3JYY-DBWN].

65. Monivette Cordeiro, *Rick Scott Reassigns Murder Cases Away from State Attorney Aramis Ayala*, ORLANDO WEEKLY (Apr. 3, 2017), <https://www.orlandoweekly.com/Blogs/archives/2017/04/03/rick-scott-reassigns-21-murder-cases-away-from-state-attorney-aramis-ayala> [https://perma.cc/C84J-C3LU].

66. Monivette Cordeiro & Colin Wolf, *Florida Supreme Court Rules Against Ayala on Death Penalty Cases*, ORLANDO WKLY. (Aug. 31, 2017), <https://www.>

after the court's ruling, Ayala announced that she had appointed a death penalty review panel consisting of seven ASAs from her office to review all first degree murder cases to decide whether the death penalty should be sought. The panel consists of seven prosecutors—six ASAs who have previously handled death penalty cases plus the attorney assigned to the murder case. A decision to seek the death penalty requires the unanimous agreement of the seven-member panel. Ayala also announced that she would not seek the return of the cases Scott reassigned to Brad King, noting that she did not want to put the victims' families through the trauma of going back and forth between prosecutors.<sup>67</sup>

Ayala has attempted to implement additional reforms since she lost her fight to abandon the death penalty. In May 2018, she announced that her office would no longer seek cash bail in many cases involving nonviolent offenses.<sup>68</sup> On September 7, 2018, she announced the establishment of a Conviction Integrity Unit to “prevent, identify, and remedy false convictions.”<sup>69</sup> Ayala's bail announcement has been criticized, and she has not announced any additional reform initiatives since. The death penalty litigation continues to detract from her agenda.<sup>70</sup> Ryan Williams, an ASA who left Ayala's office after she announced she would not pursue the death penalty, has announced that he will run against her for State Attorney in 2020.<sup>71</sup>

### C. *Rachael Rollins*

Like Aramis Ayala, Rachael Rollins made history when she was elected District Attorney for Suffolk County, Massachusetts. When Rollins was sworn in on January 2, 2019, she became Suffolk County's first

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orlandoweekly.com/Blogs/archives/2017/08/31/florida-supreme-court-rules-against-ayala-on-death-penalty-cases [https://perma.cc/AA62-SZFB].

67. Gal Tziperman Lotan, *State Attorney Ayala Rescinds her Death-Penalty Ban*, ORLANDO SENTINEL (Sept. 1, 2017), <https://www.orlandosentinel.com/news/breaking-news/os-aramis-ayala-death-penalty-press-conference-20170831-story.html> [https://perma.cc/96AF-R2GJ].
68. Scott Powers, *Aramis Ayala Will Seek Non-Monetary Bail in Non-Violent, Low-Risk Crime Cases*, ORLANDO RISING (May 16, 2018), <https://orlando-rising.com/aramis-ayala-will-seek-non-monetary-bail-non-violent-low-risk-crime-cases> [https://perma.cc/37TN-W2ZJ].
69. See CONVICTION INTEGRITY & ACCOUNTABILITY, <https://www.sao9.net/conviction-integrity-accountability.html> (last visited Feb. 26, 2019) [https://perma.cc/SC2U-7RXN].
70. Monivette Cordeiro, *Central Florida Lawmaker Wants Rick Scott to Remove Aramis Ayala from a Botched Murder-for-Hire Case*, ORLANDO WEEKLY (Jan. 17, 2018), [https://www.orlandoweekly.com/Blogs/archives/2018/01/17/central-florida-lawmaker-wants-rick-scott-to-remove-aramis-ayala-from-a-botched-murder-for-hire-case?utm\\_source=widget&utm\\_medium=articleblog&utm\\_campaign=-endofarticle&utm\\_content=RelatedStories](https://www.orlandoweekly.com/Blogs/archives/2018/01/17/central-florida-lawmaker-wants-rick-scott-to-remove-aramis-ayala-from-a-botched-murder-for-hire-case?utm_source=widget&utm_medium=articleblog&utm_campaign=-endofarticle&utm_content=RelatedStories) [https://perma.cc/Q8L7-X4CM].
71. Elizabeth Gondar, *Aramis Ayala's Former Assistant is Running Against Her for State Attorney*, ORLANDO WEEKLY (Feb. 5, 2019), <https://www.orlandoweekly.com/Blogs/archives/2019/02/05/aramis-ayalas-former-assistant-is-running-against-her-for-state-attorney> [https://perma.cc/Z86B-XVH6].

African American and first woman District Attorney. Rollins ran on a progressive platform in a crowded field to replace Daniel Conley, who announced that he would not seek reelection after serving in the position for sixteen years.

Rollins started her legal career at the National Labor Relations Board and held a variety of positions before running for District Attorney. She was an associate at a prestigious Boston law firm, General Counsel for the Massachusetts Department of Transportation and the Massachusetts Bay Transportation Authority, and Chief Legal Counsel for the Massachusetts Port Authority. Rollins' prior experience also included a stint as a federal prosecutor from 2007 until 2011.

Rollins began thinking about running for District Attorney in 2017 when she was angry and distraught over the spate of killings of unarmed black men by police officers across the country. She spoke about her decision to run during a speech a month after she was elected, saying, "It really makes me sad as a leader to know that the system is not set up to help the people that need it the most, and it is exactly why I said after raging in my home one evening . . . that I was no longer going to sit at home and cry or scream or swear."<sup>72</sup> Rollins' life experiences also influenced her decision to run. Like Foxx and Satterberg, she has a family member who suffered from drug addiction. Rollins also has brothers who have been in and out of prison. Her firsthand observation of their struggles helped shape her views on the criminal justice system.

During Rollins' campaign, she promised to work towards ending mass incarceration and racial disparities in the criminal justice system and to decriminalize poverty, drug addiction, and mental illness. She announced her opposition to cash bail and mandatory minimum sentences and pledged not to prosecute a list of fifteen nonviolent offenses unless there were exceptional circumstances warranting prosecution. ADAs in her office would be required to demonstrate exceptional circumstances and seek approval from a supervisor to charge any of the offenses on the list. The list included minor misdemeanor offenses like trespassing and disorderly conduct, as well as more serious offenses like threats and possession with intent to distribute drugs.<sup>73</sup>

Rollins' pledge to forego prosecution of these nonviolent offenses sparked opposition even before she took office. The president of the Boston Police Patrolman's Association claimed that the policy would endanger the lives of police officers, stating, "I'm afraid if there are no consequences offenders will figure, why not resist? Our job is already

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72. Maria Cramer, *How Much Will Incoming Suffolk DA Rachael Rollins Shake Things Up?*, BOSTON GLOBE (Dec. 28, 2018), <https://www.bostonglobe.com/metro/2018/12/27/after-fiery-campaign-rachael-rollins-about-how-much-will-she-shake-things/EMCMGMXILRyp73jXIPo2vI/story.html> [<https://perma.cc/XX2R-4JX7>].

73. *Charges to Be Declined*, ROLLINSRDA.COM, <https://rollins4da.com/policy/charges-to-be-declined> (last visited Feb. 26, 2019) [<https://perma.cc/7E6X-ZTZ6>].

dangerous. It's unbelievable to think people are willing to make it more dangerous for us."<sup>74</sup> The most extreme opposition came from an Indiana-based national police organization; the organization filed a complaint against Rollins with the Office of Bar Counsel claiming her pledge to forego charges for the offenses on her list constituted attorney misconduct.<sup>75</sup> The complaint was filed on December 23, 2018, before she even had the power to implement the policy.

On March 25, 2019, Rollins issued a 65-page memo to her staff establishing policies and practices on a wide range of issues, including cash bail, charging, and diversion.<sup>76</sup> The memo establishes a presumptive recommendation of pretrial release unless there is clear evidence that the defendant is a flight risk. It also includes the list of 15 nonviolent offenses that will not be prosecuted, as promised during her campaign. Rollins further directs ADAs to divert other nonviolent offenses and seek alternatives to incarceration. The memo includes extensive data in support of the new policies.

Soon after Rollins issued the memo, Massachusetts Public Safety and Security Secretary Thomas A. Turco III sharply criticized the policies, claiming that they will interfere with the state's efforts to curb the opioid crisis and put some crime victims at risk.<sup>77</sup> Rollins strongly defended the memo and has received support from a former federal judge<sup>78</sup> and from many of her constituents.<sup>79</sup>

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74. Kristina Rex, *DA Hopeful's 'Do Not Prosecute' List Has Critics Saying She's Soft On Crime*, CBS BOSTON (Sept. 7, 2018), <https://boston.cbslocal.com/2018/09/07/rachael-rollins-do-not-prosecute-list-crimes-boston-suffolk-county> [https://perma.cc/4JBH-PAEJ].
  75. Kaitlin Flanagan, *Police Group Accuses Suffolk DA-Elect of 'Reckless Disregard' for Massachusetts Laws*, NBC BOSTON (Dec. 28, 2018), <https://www.nbcboston.com/news/local/Rachael-Rollins-Suffolk-District-Attorney-Elect-National-Police-Association-Bar-Complaint-503616441.html> [https://perma.cc/V73N-P9XZ].
  76. *The Rachel Rollins Policy Memo*, SUFFOLK CTY. DISTRICT ATTORNEY (March 2019) <http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf> [https://perma.cc/RU5J-A6CV].
  77. Danny McDonald, *Mass. Public Safety Secretary has Concerns with Suffolk DA's Policy Memo*, BOSTON GLOBE (Apr. 4, 2019), <https://www.bostonglobe.com/metro/2019/04/04/mass-public-safety-secretary-has-concerns-with-rollins-policy-memo/omWk5a5jYVftct9qJyfr4I/story.html> [https://perma.cc/23NJ-ETYR].
  78. Nancy Gertner, *DA Rollins is on the Right Path in Criminal Justice Reform*, BOSTON GLOBE (Apr. 8, 2019) <https://www.bostonglobe.com/opinion/2019/04/08/rollins-right-path-criminal-justice-reform/rba5oplGordySac4ws3lOM/story.html> [https://perma.cc/3VKG-SL53].
  79. Taylor Pettaway, *Hundreds Rally in Support of Rachel Rollins*, BOSTON HERALD (Apr. 7, 2019), <https://www.bostonherald.com/2019/04/07/hundreds-rally-in-support-of-suffolk-da-rachael-rollins> [https://perma.cc/DVY4-7WF5].

## IV. Implementing a Progressive Agenda

### A. *Defining the Progressive Prosecutor*

Progressive prosecutors are committed to reducing mass incarceration and racial disparities in the criminal justice system. There are several ways prosecutors can achieve these goals. Opposing cash bail can reduce the jail population. Foregoing charges in certain categories of cases and implementing diversion programs may reduce the incarceration rate. Diversion programs that do not require guilty pleas (and hence convictions) make it easier for participants to find employment and housing. Likewise, diversion programs that do not require the payment of fees and fines or impose other difficult conditions are more likely to reduce the number of people in prisons and jails. Prosecutors who commit never to charge juveniles as adults, even when the law permits them to do so, keep juveniles out of the criminal justice system and help to reduce the disproportionate number of black and brown youths tried in adult court.<sup>80</sup> Prosecutors who refuse to seek the death penalty take an important step towards ending the well-documented racial disparities in the implementation of the death penalty.<sup>81</sup> However, not every District Attorney will be able to successfully implement every goal. Many factors play a role, including the political climate of the jurisdiction, the prior experience of the District Attorney, and even the race and gender of the District Attorney.

### B. *Politics*

In theory, progressive prosecutors duly elected by their constituents may argue that they were given a mandate to implement reform. After all, they ran on a progressive platform and won a majority of the votes. In practice, the political climate of their jurisdictions has an impact on their ability to affect change. For example, powerful groups like the FOP and the bail bond industry may confront and attack progressive prosecutors. The experiences of Larry Krasner in Philadelphia and Kim Foxx in Chicago provide cautionary examples. Krasner faces constant attacks

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80. See Christopher Huffaker, *In Many States, Black Juveniles End Up in Adult Court in High Numbers*, MIAMI HERALD (June 22, 2017) <https://www.miamiherald.com/news/nation-world/national/article157648774.html> [<https://perma.cc/YBP5-L2Y5>].

81. See, e.g., David C. Baldus, et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. LAW. & CRIMINOLOGY 663 (1983) (famous study that found that the odds of defendants receiving the death penalty were 4.3 times greater if they were accused of killing white victims than if they were accused of killing black victims); D. Baldus, et al., *Race Discrimination and the Death Penalty in the Post Furman Era: An Empirical and Legal Overview, with Preliminary Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998) (finding that, in Philadelphia from the years 1983 and 1993, the odds of receiving the death penalty in Philadelphia increased by 38 percent when the accused was a black person); Richard C. Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*, REPORT, DEATH PENALTY INFO. CTR., June, 1998.

by law enforcement organizations. Foxx had the support of the Chicago police commissioner but does not have backing from all the police chiefs in the surrounding suburbs in her county. Aramis Ayala's attempt to stop implementing the death penalty in her district demonstrates the extent of the potential power of political foes.

A District Attorney attempting to implement criminal justice reform in Columbus, Mississippi, cannot run on the same platform as a District Attorney in Philadelphia, Pennsylvania, because Mississippi is much more conservative and the electorate would likely not be as receptive to radical changes. Yet when Scott Colom defeated incumbent Forrest Allgood in northeast Mississippi, advocates for criminal justice reform in Mississippi recognized the significance of his victory.<sup>82</sup> Colom's proposed reforms included diversion for drug addicts, more rehabilitative services, and alternatives to incarceration in appropriate cases. These proposals may not sound very progressive in Philadelphia, Pennsylvania, but in Columbus, Mississippi, they represented a new vision for the District Attorney's office. Colom's predecessor, Allgood, had pushed for harsh sentences and the Mississippi Supreme Court found that he had engaged in egregious misconduct. This highlighted the significance of Colom's promised reforms. Colom has followed through on his promises and is currently working with Tucker Carrington, the head of the Innocence Project at the University of Mississippi Law School, to establish a conviction review unit.

### C. *Prior Experience*

The progressive prosecutors elected in recent years come from a variety of backgrounds, which plays a role in their ability to implement reforms, especially as they attempt to change the culture of their offices. Some, like Larry Krasner, had no prior prosecutorial experience when they took office. Others, like Kim Foxx and Dan Satterberg, had prior prosecutorial experience in the offices they now run. Aramis Ayala had experience as both a prosecutor and a defense attorney. Krasner's prior role as one of his office's fiercest adversaries made it impossible for him to implement change without replacing many of the career prosecutors in his office with lawyers who share his vision. Foxx had prior experience in her office, but worked under the incumbent whom she ultimately defeated, so she faced similar challenges. Satterberg faced fewer internal challenges because of his many years of experience in the office he now runs and the circumstances under which he became the chief prosecuting attorney.

District Attorneys with little or no experience practicing criminal law may struggle to gain credibility with the ADAs in their offices and thus may have a difficult time implementing reforms. District Attorneys

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82. Nick Tabor, *What If Prosecutors Wanted to Keep People Out of Prison?*, NY. MAG. (Mar. 27, 2018), <http://nymag.com/intelligencer/2018/03/what-if-prosecutors-wanted-to-keep-people-out-of-prison.html> [https://perma.cc/S8Z4-HBES].

with no prosecutorial experience similarly have credibility issues. Thus, it is important that newly elected District Attorneys without prosecutorial experience hire experienced prosecutors who share their vision for leadership and supervisory positions.

#### **D. Race and Gender**

It is difficult to determine the extent to which race and gender play a role in a District Attorney's ability to implement a progressive agenda. Progressive organizations have praised Krasner for his ability to implement radical reforms in Philadelphia, but it would be unfair and simplistic to conclude that he is more progressive than Foxx, Rollins, or Ayala. Not only do the latter three serve in more conservative jurisdictions where the political climate makes it difficult for them to implement radical reforms, but also their status as black women forces them to endure gender and racial biases that Krasner does not face. It is impossible to measure the extent to which these biases (implicit and otherwise) affect their ability to implement reforms.<sup>83</sup>

#### **V. Guidelines for the Progressive Prosecutor**

Because the experiences of progressive prosecutors vary and because they face different challenges, there are no set recommendations for success that would work for all. However, all progressive prosecutors should follow a few basic guidelines.

##### **A. Communication**

Progressive prosecutors must communicate early and often with other criminal justice officials, government officials, and community groups as they attempt to implement reforms. Meetings with police chiefs, judges, councilmembers, mayors, and other officials are essential. Progressive prosecutors should share their vision for reform and the specific policies and practices they plan to implement. The prosecutor should inform the police chief ahead of time that she no longer plans to charge certain offenses. Not only would this communication possibly save resources, but it may result in the police chief working with the prosecutor on implementing a solution that would address the concerns of both parties. King County's LEAD program is one such example.

Prosecutors should not simply inform other criminal justice and government officials of their plans. They should also attempt to persuade them to support the new policies by sharing data and success stories from other jurisdictions. Evidence that the policies will save money without resulting in increased crime may persuade the skeptics. Prosecutors should also listen and respond to concerns of other officials. Sometimes they

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83. See Jeff Barnes, Ehsan Tabesh & Fisher Phillips, *Combating Implicit Bias in the Workplace*, LAW360 (Jan. 5, 2017), <https://www.law360.com/articles/873708/combating-implicit-bias-in-the-workplace> [<https://perma.cc/6AEW-K92H>] (explaining concept of implicit bias in workplace settings and methods employers can undertake to combat its' effects).



may need to compromise and other times they may agree to disagree. In any event, communication and transparency are essential components of a successful implementation of a progressive agenda.

Progressive prosecutors should also communicate regularly with their constituents. They should have regular community meetings to address the concerns of their constituents and inform them of their new policies and practices. Prosecutors who ran on a progressive platform should be held accountable—not just at every election but also throughout their tenures. Transparency and communication should be key pillars of every prosecutor’s office. Prosecutors should also communicate with the public on their websites, through social media, and at public events. Although communication is key, the newly elected District Attorney should think carefully about when and how to communicate about certain issues. The experience of Aramis Ayala should serve as a lesson to all District Attorneys attempting to implement a policy that may be particularly controversial in their jurisdictions.

## **B. *Education and Training***

Most newly elected District Attorneys will find themselves in charge of offices that have long functioned under a prosecutorial model that perpetuated the problems progressive prosecutors are seeking to end. They will face not only the daunting challenge of implementing new policies and practices, but also of changing the entire culture of their offices. Extensive education and training are essential to transforming the prosecutor’s office. Progressive prosecutors should start by communicating with their offices in much the same way they communicate to other government officials and community members. However, in addition to informing their staff of success stories and data from other jurisdictions, they must invest in intensive training and education of their prosecutors.

Prosecutors should implement required education and training programs that cover a wide range of topics, including mass incarceration, racial disparities in the criminal justice system, the criminalization of poverty, and related topics. Ordering prosecutors to implement new policies without explaining why the reforms are necessary will cause resentment and ensure failure. All members of prosecution offices should also undergo implicit bias training.<sup>84</sup>

There are a growing number of organizations devoted to supporting and providing technical assistance and training for newly elected progressive prosecutors and their offices. Fair and Just Prosecution (FJP) “brings together newly elected local prosecutors as part of a network of leaders committed to promoting a justice system grounded in fairness,

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84. N.C. COMM’N ON RACIAL AND ETHNIC DISPARITIES IN THE CRIM. JUST. SYS., *THE BRAIN SCI. THAT IS REVOLUTIONIZING THE WAY WE THINK ABOUT RACIAL DISPARITIES AND RACISM*, <http://ncracialjustice.org/projects/implicit-bias-trainings> (last visited Mar. 8, 2019) (explaining concept of implicit bias in the criminal justice system) [<https://perma.cc/7KU8-7YVY>].

equity, compassion, and fiscal responsibility. These recently elected leaders . . . are supported by FJP's network through ongoing information sharing, research and resource materials, opportunities for on the ground learning, in-person convenings, technical assistance, and access to national experts."<sup>85</sup> Reshaping Prosecution is an initiative of the Vera Institute of Justice. This project helps "reform-minded prosecutors rethink their role in delivering justice and pursuing public safety . . . [by] partnering with prosecutors to put their campaign promises into action as concrete, data-informed policies and practices. The goal of these partnerships is to develop strategies for prosecutors to reduce incarceration and promote racial equity in their work, and increase the public's confidence in their office."<sup>86</sup> Prosecutor Impact provides "prosecutors new to the job with the tools, data and training to make compassionate, fair, and informed decisions that demonstrate a commitment to the safety of the public, the well-being of the victim, as well as the betterment of the person charged with the crime."<sup>87</sup> The Institute for Innovation in Prosecution (IIP) at John Jay College "provides a collaborative national platform that brings together prosecutors, policy experts, and the communities they serve to promote data-driven strategies, cutting-edge scholarship, and innovative thinking. The IIP is dedicated to criminal justice that promotes community-centered standards of safety, fairness, and dignity."<sup>88</sup>

### C. *New Leadership and Hiring Policies*

Progressive District Attorneys should attempt to educate and train their staff, but they should not hesitate to replace prosecutors who are not receptive to change. Although there may be circumstances in which the District Attorney finds it necessary to fire some ADAs immediately, in most instances, the new District Attorney should attempt to inform, educate, and train their ADAs and give them an opportunity to keep their jobs. Those who are unable or unwilling to follow the new leadership and vision should be fired. Of course, reality dictates that there will be trials and other hearings scheduled, so cleaning house entirely and all at once may not be possible.

Hiring progressive prosecutors in supervisory positions should be one of the highest priorities as the District Attorney will not be able to monitor the daily decisions of ADAs, especially in large offices. Close

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85. Fair and Just Prosecution, *About FJP / Our Work and Vision*, <https://fairandjustprosecution.org/about-fjp/our-work-and-vision> (last visited Mar. 8, 2019) [<https://perma.cc/PP3P-M48U>].

86. Jamila Hodge, *Reshaping Prosecution*, VERA INSTIT. OF JUST., <https://www.vera.org/projects/reshaping-prosecution-program>, (last visited Mar. 8, 2019) [<https://perma.cc/974A-LGZB>].

87. Prosecutor Impact, *Prosecutor Impact's Approach*, <https://prosecutorimpact.com/the-pi-vision>, (last visited Mar. 8, 2019) [<https://perma.cc/CUV4-WW4V>].

88. Inst. for Innovation in Prosecution, *Our Mission: Innovation in Crim. Just.*, <https://www.prosecution.org/our-mission>, (last visited Mar. 8, 2019) [<https://perma.cc/Y2PU-R76B>].

supervision is essential to ensure that ADAs are properly implementing new office practices.

The District Attorney should also implement new hiring policies. It will take time and hard work to transform the culture of a District Attorney's office. That transformation cannot happen unless all the attorneys are committed to criminal justice reform. In addition to training and educating existing attorneys, the new District Attorney should hire new entry-level and experienced prosecutors with a progressive vision of prosecution. She will, of course, want to hire smart, hardworking attorneys with great work ethic and excellent trial skills. However, the interviews should include questions about the applicants' views on mass incarceration, racial disparities, cash bail, and other issues relevant to criminal justice reform.<sup>89</sup>

### Conclusion

District Attorneys committed to reforming the criminal justice system should plan carefully to confront the many internal and external challenges they will inevitably face. These challenges will vary by jurisdiction, experience, and background, and thus so will the strategies for addressing them. No single approach can achieve success in all jurisdictions, nor can every reform be implemented in every jurisdiction.

For all these reasons, there should not be a litmus test or list of requirements for progressive prosecutors. Any attempt to reduce the incarceration rate and unwarranted racial disparities in the criminal justice system should be supported. An "all or nothing" approach will achieve nothing. In a country plagued by mass incarceration, racial inequities, and other injustices, the goal should be a fair and just criminal justice system with a much lower incarceration rate. Although radical change is desirable, it may not always be possible. Progress toward this goal should be the hallmark of the progressive prosecutor.

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89. See Austen, *supra* note 57 (detailing Krasner's visits to law schools in an effort to recruit progressive-minded law students to become prosecutors).

