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From the Legal Literature Is Progressive Prosecution Possible?

Francesca Laguardia*

I. INTRODUCTION

Progressive cities across the country have taken a new tact to control criminal justice in their districts by electing state prosecutors who run on a progressive platform and promise to use the discretion of the office to change criminal prosecution.¹ As prosecutorial discretion and its influence on criminal justice has received increasing attention over the last decade, reformers have seized on this elected position as an opportunity to make substantial changes in the system.²

But the wisdom and potential of this tactic are under debate.³ Scholars routinely run through the list of prosecutors who have been elected on progressive platforms,⁴ yet some who ran on these

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¹Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707, 707–08 (2020); Emily Bazelon & Miriam Krinsky, Opinion, *There's a Wave of New Prosecutors. And They Mean Justice*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html>.

²Bellin, *supra* note 1, at 707–09; Chad Flanders & Stephen Galoob, *Progressive Prosecution in a Pandemic*, 110 J. CRIM. L. & CRIMINOLOGY 685, 689–93 (2020).

³*E.g.*, PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 106, 120 (2009); Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y.L.S. L. REV. 70 (2020); Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 806, 813 (2020); Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. L. 411 (2019); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 396 (2001); Ronald Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 591 (2009); see also Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748 (2018).

⁴*E.g.*, Gajwani & Lesser, *supra* note 3, at 1206, 1218 (discussing Aramis Ayala in Orlando, Marilyn Mosby in Baltimore, Larry Krasner in Philadelphia, Cyrus Vance in Manhattan, Kim Foxx in Chicago, Leon Cannizzaro in New Orleans, and Jackie Lacey in Los Angeles).

platforms have disappointed progressive observers.⁵ This failure supports scholars' broader skepticism of progressive prosecutors.⁶

There is a wealth of literature on progressive prosecution, so much that researchers beginning to look at the topic may be overwhelmed by the options.⁷ In 2020, the *Journal of Criminal Law & Criminology* held a symposium on the phenomenon.⁸ The papers included in the fall 2020 volume—including articles by Chad Flanders and Stephen Galoob; Jeffrey Bellin; Bruce Green and Rebecca Roiphe; Daniel Fryer; and Maybell Romero—offer a useful overview and introduction to the history and hurdles of progressive prosecution across the United States.⁹

II. WHAT IS PROGRESSIVE PROSECUTION?

The first issue these authors address is that of progressive prosecution itself. What is progressive prosecution? How can it be defined and by what practices is it characterized? These authors seem to largely agree that progressive prosecution is characterized by use of decriminalization, alternatives to incarceration, use of prosecutorial discretion to move cases out of the criminal legal system, and reducing overall incarceration.¹⁰ Additionally, progressive prosecutors should be attentive to racial disparities in the system, including in charging, sentencing recommendations, jury

⁵See, e.g., Smith, *The Prosecutors I Like*, *supra* note 3, at 416 (discussing Cyrus Vance in Manhattan, Leon Cannizzaro in New Orleans, and Jackie Lacey in Los Angeles).

⁶Romero, *supra* note 3, at 817.

⁷See, e.g., Bellin, *supra* note 3; Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171 (2019); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018); Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. ONLINE 8 (2018); Gajwani & Lesser, *supra* note 3; Heather Pickerell, *Critical Race Theory & Power: The Case for Progressive Prosecution*, 36 HARV. BLACKLETTER L.J. 73 (2020); Wright, *supra* note 3.

⁸Symposium, *Progressive Prosecution: Legal, Empirical, and Theoretical Perspectives*, 110 J. CRIM. L. & CRIMINOLOGY 685 (2020).

⁹Bellin, *supra* note 1, at 707; Flanders & Galoob, *supra* note 2, at 685; Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769 (2020); Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. CRIM. L. & CRIMINOLOGY 719 (2020); Romero, *supra* note 3, at 803. A sixth article in the symposium examines prosecutorial policies and practices regarding declinations to prosecute, rather than an examination of progressive prosecution more generally, and is omitted from this review accordingly. See Ronald F. Wright, *Prosecutors and their State and Local Politics*, 110 J. CRIM. L. & CRIMINOLOGY 823 (2020).

¹⁰Bellin, *supra* note 1, at 716; Flanders & Galoob, *supra* note 2, at 690–91; Green & Roiphe, *supra* note 9, at 742; Romero, *supra* note 3, at 804.

selection, and office culture.¹¹ The progressive prosecutor is focused on these areas specifically in response to modern critiques of mass incarceration and the criminal justice system in general.¹² This is because the progressive prosecutor is a product of those critiques, a tool or participant in reformers' efforts to correct the most striking failures of the criminal justice system.¹³ In *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, Professors Bruce Green and Rebecca Roiphe also note that the identities of progressive prosecutors are distinct from traditional prosecutors.¹⁴ They assert that progressive prosecutors are more often female, of color, political activists, and yet political outsiders.¹⁵

It should be noted, however, that not all commenters accept this label of "progressive prosecutor." Jeffrey Bellin cites Kim Foxx (Cook County prosecutor), who asserted she was not a progressive prosecutor, simply a prosecutor who prosecutes "the right way."¹⁶ Bellin, too, argues that a more appropriate question would be the norms that should guide prosecutions, outside of particular political preferences, and that focus on a dichotomy between progressive and traditional prosecutors evades important analysis of the proper role of prosecutors more generally.¹⁷

What, then, is the right way to prosecute? Flanders and Galoob suggest prosecutors focus on "doing justice," but this aim must be not only for victims, but also for the accused and the community.¹⁸ In contrast, Professor Romero argues that prosecution is inherently and irreparably flawed, and Daniel Fryer (a beginning state prosecutor himself, recently hired in Philadelphia),¹⁹ reminds us that prosecutorial power to do good may be severely limited by other actors in the criminal legal system, and that the focus on decarceration may become counterproductive (for reasons discussed below).²⁰ Professor Bellin, a critical of the progressive prosecutorial stance and a proponent of a more general development of prosecutorial duties), argues that rather than acting for social justice, prosecutors

¹¹Fryer, *supra* note 9, at 800.

¹²Bellin, *supra* note 1, at 710–11; Flanders & Galoob, *supra* note 2, at 686–87, 688–91; Green & Roiphe, *supra* note 9, at 741; Romero, *supra* note 3, at 813.

¹³Bellin, *supra* note 1, at 707–08; Flanders & Galoob, *supra* note 2, at 688–91; Fryer, *supra* note 9, at 776; Romero, *supra* note 3, at 813.

¹⁴Green & Roiphe, *supra* note 9, at 742.

¹⁵Green & Roiphe, *supra* note 9, at 741–43.

¹⁶Bellin, *supra* note 1, at 711.

¹⁷Bellin, *supra* note 1, at 711–13.

¹⁸Flanders & Galoob, *supra* note 2, at 688–89.

¹⁹Fryer, *supra* note 9, at 722.

²⁰Fryer, *supra* note 9, at 790, 798; Romero, *supra* note 3, at 813.

should be “servant[s] of the law,” preoccupying themselves with issues of fairness and legal demands, rather than questions of justice.²¹ Professors Green and Roiphe, similarly suggest that “contemporary progressive prosecutors ought to take care not to sacrifice professionalism to broader social justice policy goals.”²² Green and Roiphe remind us that the role of the prosecutor involves “complicated questions of fact and law” which requires independence; the professional expertise required to answer these questions may be threatened by interference from populists.²³

In sum, progressive prosecution is an attempt to use prosecutorial power to refocus the criminal justice system towards progressive goals, but these goals may vary.²⁴ Moreover, observers have criticized many supposedly progressive prosecutors for failing to maintain truly progressive policies.²⁵ The instrumentalist origin of the progressive prosecutor also explains their increasing presence, as prosecutor’s offices offered an opportunity for reformers to make some headway in the criminal justice system—but prosecutors’ offices present also present barriers to reform, some potentially fatal.

III. REFORMERS’ FOCUS ON PROGRESSIVE PROSECUTION: THE SYSTEM AS AN OPPORTUNITY, AND ITS LIMITS

Progressive prosecutors appeared in response to popular and academic criticism of mass incarceration and the criminal justice system,²⁶ but why was did prosecution become such a focus for change? One reason is that the powers of the prosecutor have been a particular complaint.²⁷ The standard argument is that the power of the prosecutor is virtually limitless, and singularly responsible for mass incarceration in the United States.²⁸ Changing behaviors of

²¹Bellin, *supra* note 1, at 714.

²²Green & Roiphe, *supra* note 9, at 722.

²³Green & Roiphe, *supra* note 9, at 766–67.

²⁴Green & Roiphe, *supra* note 9, at 740, 746.

²⁵Green & Roiphe, *supra* note 9, at 743; Romero, *supra* note 3, at 816.

²⁶Bellin, *supra* note 1, at 707–08; Flanders & Galoob, *supra* note 2, at 688–91; Romero, *supra* note 3, at 813.

²⁷Bellin, *supra* note 1, at 709; Flanders & Galoob, *supra* note 2, at 691; Fryer, *supra* note 9, at 770–71; Green & Roiphe, *supra* note 9, at 737–38.

²⁸Bellin, *supra* note 1, at 709; Fryer, *supra* note 9, at 771, 773, 774 (citing Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 5 (2019); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 480–81 (2016)); see also ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 17 (2007); JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (2017); Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1076 (2017); Erik Luna & Marianne Wade, *Introduction to*

prosecutors would, therefore, have a substantial effect on criminal justice more generally.²⁹

At the same time, state prosecutors are most often elected, offering an opportunity for quick change through mobilization of popular will.³⁰ Prosecutorial discretion offers the opportunity to have an effect on defendants more quickly and effectively than through criminal defense.³¹ Prosecutors' offices make an attractive target, as well, because their elections appear to be low hanging fruit for reformers. Professor Bellin offers that: "District attorney elections are characterized by low voter interest" and "Candidates regularly run unopposed. In some jurisdictions it is difficult to find anyone willing to take the job."³²

This image of low hanging fruit may overstate the case, however. Professor Romero suggests that, rather than running unopposed, "[o]ften these contests pit a new, progressive prosecutor against an incumbent from the same party."³³ She notes that while more progressive challengers sometimes win these contested elections, other times, victory is seen in simply creating a more difficult run for an incumbent or party insider than might have been expected. Such was the case of the Queens District Attorney's race in New York in 2019, when a public defender challenged and lost to the Queens Borough President in New York City.³⁴ Moreover, Professor Romero reminds us that scholars and commentators who assert that there is a wave of progressive prosecutors waging successful elections tend to ignore rural areas in the country, focusing only on urban areas, and ignoring that change in legal practice and players is far slower in rural areas.³⁵

Along with the debate over the possibility of successfully electing prosecutors, however, there are important questions to be answered as to the level of change prosecutors can make in the system, and if they are even sufficiently motivated to do so.

IV. CAN PROSECUTORS BE PROGRESSIVE?

In *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, Professor Romero offers an argument that, in fact,

Prosecutorial Powers: A Transnational Symposium, 67 WASH. & LEE L. REV. 1285, 1285 (2010).

²⁹Davis, *supra* note 28, at 5; Fryer, *supra* note 9, at 771.

³⁰Bellin, *supra* note 1, at 709; Fryer, *supra* note 9, at 771 (citing Davis, *supra* note 28, at 5); Fryer, *supra* note 9, at 785, 792.

³¹Bellin, *supra* note 1, at 709; Fryer, *supra* note 9, at 771, 785, 792.

³²Bellin, *supra* note 1, at 708.

³³Romero, *supra* note 3, at 804.

³⁴Romero, *supra* note 3, at 804.

³⁵Romero, *supra* note 3, at 805, 817.

progressive prosecution is a mirage. She focuses on the ABA's Criminal Justice Standards for the Prosecution Function.³⁶ In particular, she turns to Standard 3-1.2(f), which emphasizes that the prosecutor is "a problem-solver responsible for considering broad goals of the criminal justice system."³⁷ In this she seems to echo Professor Bellin's argument that the prosecutor is a "servant of the law," maintaining the processes and functions of the criminal justice system, which may, at times, require undermining one's own case in order to support criminal procedure requirements and the norms of fairness and accuracy that they are meant to support.³⁸ Professors Bellin and Romero are diametrically opposed, however, in their analyses of the potential for the criminal justice system, or the criminal law, to act in a manner to serve communities.

Professor Romero offers a critique of the very nature of the criminal justice system.³⁹ She reminds us of the inglorious history of the legal system in the United States, "formed around deeply embedded systems of class and racial subordination The criminal law may aptly be characterized as both White and racist."⁴⁰ Having insufficiently rid itself of racial and class bias, she argues, enforcement of the criminal law is necessarily "enforcing the rules of a legal system which is inherently racist and sexist."⁴¹

This is only aggravated by the fact that prosecutors themselves are disproportionately White ("Three percent of elected prosecutors are men of color, and only two percent are women of color"),⁴² which enhances the threat of implicit bias and unconscious racism influencing prosecutorial decisions.⁴³ Implicit bias may affect charging decisions, bail, plea bargaining, jury selection, and recommended sentences,⁴⁴ as well as disparate treatment in diversionary (alternative to incarceration) programs.⁴⁵

Adding to these concerns, in *Race, Reform, and Progressive Prosecution*, Assistant District Attorney (ADA) Fryer points out that even race neutral policies in progressive prosecutors' offices are likely to reinforce racial disparities in the criminal justice system by

³⁶Romero, *supra* note 3, at 814.

³⁷Romero, *supra* note 3, at 814 (citing CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION std. 3-1.2(f) (AM. BAR ASS'N 2017)).

³⁸Bellin, *supra* note 1, at 714.

³⁹Romero, *supra* note 3, at 816–21.

⁴⁰Romero, *supra* note 3, at 816.

⁴¹Romero, *supra* note 3, at 817.

⁴²Romero, *supra* note 3, at 818.

⁴³Romero, *supra* note 3, at 818–19.

⁴⁴Romero, *supra* note 3, at 819.

⁴⁵Fryer, *supra* note 9, at 794.

ignoring the fact that those disparities already exist.⁴⁶ For instance, leniency given to first time offenders will fail to account for “offenders who have prior offenses because of racially-charged policing and prosecution from a prior administration.”⁴⁷ Diversionary programs may be accompanied by fees that create disparate outcomes for poor offenders, many of whom are people of color.⁴⁸

Even if a prosecutor were able to avoid these insidious influences, Professor Romero also reminds us of more traditional influences that may hamper aspiring progressive prosecutors.⁴⁹ Micromanagement of line prosecutors by more traditional supervisors can render impotent any progressive impulses they may have.⁵⁰ Additionally, in smaller jurisdictions, prosecutors maintain “closer interpersonal relationships with police officers and political actors [that] may hamper policy change.”⁵¹ Between non-progressive prosecutors, police officers, judges, and political actors, Professor Romero argues, “progressive-minded” prosecutors “face vast amounts of resistance;” so vast, in fact, that it may be insurmountable.⁵² For these reasons, she asserts, “a truly progressive prosecutor should actively work to ensure the obsolescence of their own position and office,” rather than dreaming that prosecution can be a progressive tool of its own.⁵³

To these criticisms, ADA Fryer adds concerns about the power of the prosecutor in the criminal justice system.⁵⁴ Fryer offers a frighteningly easy to imagine scenario. He states: “A progressive prosecutor disagrees with the ways in which police officers stop and harass young Black men in an effort to detect public gun carrying. As a result, the prosecutor dismisses various cases to deter the police actions.”⁵⁵ Far from resulting in an actual change for young Black men in the jurisdiction, Fryer suggests that a police commissioner who opposed the prosecutor’s philosophy likely would not “defer to prosecutors. Instead, what we would likely see is continued harassment of these individuals on the streets, even if they are not

⁴⁶Fryer, *supra* note 9, at 795.

⁴⁷Fryer, *supra* note 9, at 795.

⁴⁸Fryer, *supra* note 9, at 795.

⁴⁹Romero, *supra* note 3, at 815–16.

⁵⁰Romero, *supra* note 3, at 815.

⁵¹Romero, *supra* note 3, at 817.

⁵²Romero, *supra* note 3, at 816.

⁵³Romero, *supra* note 3, at 816, 815.

⁵⁴Fryer, *supra* note 9, at 789.

⁵⁵Fryer, *supra* note 9, at 786.

ultimately convicted of a crime.”⁵⁶ This hypothetical (borrowed from an earlier article by Bellin) offers a clear view into the limitations of the power of the prosecutor. But Fryer is not done.

He next points to the possible interference of legislators, who have opportunities to “reduce prosecutor offices’ budgets, reduce the discretion that prosecutors have in cases, or even—following what is done in several jurisdictions—permit police officers to litigate cases themselves.”⁵⁷ Legislators can also move jurisdiction over cases, governors may reassign cases, and the Department of Justice offers an alternative route to prosecution.⁵⁸ Each of these options undermines the ability of any individual prosecutor to change the system in a significant way.

Fryer also reminds us that the complete abolition of criminal prosecution, or uncritical use of declinations to prosecute, may not result in positive outcomes for those most damaged by the criminal justice system.⁵⁹ Fryer acknowledges that mass incarceration, over policing, and over prosecution are the central concerns regarding our criminal justice system today.⁶⁰ But Fryer also highlights the risk of ignoring the needs of African American communities, which is likely to occur if prosecutions are generally diminished without specific attention and effort to avoid asymmetrical harm to vulnerable populations.⁶¹ Prioritizing leniency for leniency’s sake, without attention to these risks, opens the door wide to bias and neglect of Black victims in vulnerable communities.⁶² Moreover, it may counterproductively vent progressive energy, reducing pressure on prosecutors’ offices to protect these communities, thereby further entrenching prosecutorial neglect.⁶³ In highlighting these concerns, Fryer places himself in direct conflict with Professor Romero, who would argue against prosecution in general. In some ways, this distills the crucial conflict inherent in the notion of progressive prosecution.

V. CONCLUSION

Criticism of the criminal justice system and mass incarceration

⁵⁶Fryer, *supra* note 9, at 786.

⁵⁷Fryer, *supra* note 9, at 787 (citing Bellin, *The Power of Prosecutors*, *supra* note 7, at 199); Alexandra Natapoff, Opinion, *When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26, 2018), <https://www.nytimes.com/2018/12/26/opinion/polic-e-prosecutorsmisdemeanors.html>).

⁵⁸Fryer, *supra* note 9, at 787.

⁵⁹Fryer, *supra* note 9, at 797–800.

⁶⁰Fryer, *supra* note 9, at 798.

⁶¹Fryer, *supra* note 9, at 798–99.

⁶²Fryer, *supra* note 9, at 798–99.

⁶³Fryer, *supra* note 9, at 800.

have led to the appearance of progressive prosecutors in cities across the country. But it is early to draw conclusions about the extent or implications of this trend. The power and effect of progressive prosecutors is still uncertain. Moreover, the tension between critics such as Professor Romero and ADA Fryer is emblematic of the difficult position in which progressive prosecutors find themselves. There is momentum towards changing the system of and through prosecution, but what changes should be made, and whether that change is possible, is still a matter of debate.