

3-11-2020

## Taking a Deeper Dive into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography: Part Two: External Constraints

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### Recommended Citation

Madison McWithey, *Taking a Deeper Dive into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography: Part Two: External Constraints*, 61 B.C.L. Rev. E.Supp. I.-49 (2020), <https://lawdigitalcommons.bc.edu/bclr/vol61/iss9/9>

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# TAKING A DEEPER DIVE INTO PROGRESSIVE PROSECUTION: EVALUATING THE TREND THROUGH THE LENS OF GEOGRAPHY

## PART TWO: EXTERNAL CONSTRAINTS

MADISON MCWITHEY\*

**Abstract:** “Progressive prosecution” has injected new life into criminal justice reform. This trend, which calls for less punishment, less prosecution of many lower-level crimes, and more diversion programs, has taken hold in large cities like Philadelphia, Chicago, Boston, and Houston, as well as in smaller rural districts. Despite the hype, however, progressive prosecution has its limitations. This article discusses four of those limitations and analyzes their effect on progressive prosecution’s likelihood of success in both urban and rural districts. Although many factors constrain progressive prosecution, this article addresses two types: internal and external. Part One discusses internal constraints, including the traditional motivations of individual prosecutors and prosecutors’ reliance upon “line” or assistant prosecutors. Part Two addresses external constraints such as the police and availability of resources. Taken together, Parts One and Two emphasize that an evaluation of progressive prosecution’s merits must take a nuanced, contextual perspective.

### INTRODUCTION

Across the country, newly-elected progressive prosecutors are striving to introduce compassion and nuance into our criminal justice system. But despite proponents’ excitement over the movement’s potential, some observers are skeptical of the progressive prosecutor’s ability to reach actual results. This two-part article analyzes typical prosecutorial constraints through the lens of geography to arrive at a more granular assessment of progressive prosecution’s likelihood of success. Part One of this article addressed the internal constraints a progressive prosecutor faces in her role, including individual prosecutor motivations and reliance upon line prosecutors. Part Two will analyze two external constraints on progressive prosecution: police accountability and availability of resources.

First, a prosecutor’s attempts to hold police accountable for misconduct can constrain her ability to carry out progressive policies. All prosecutors rely on police officers to arrest suspects, gather evidence, and to serve as key wit-

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nesses in their trials; in short, they cannot do their jobs without the police. But many progressive prosecutors have run on platforms that include holding police accountable for misconduct, which can severely strain the relationship between the two parties.

Unlike progressives, traditional prosecutors usually are reluctant to criticize the police, who offer essential endorsements to prosecutors' electoral campaigns.<sup>1</sup> When investigating police misconduct, these traditional prosecutors may hide behind the guise of a grand jury to give themselves "political cover," allowing these prosecutors to say they followed through with their constituency's demands while remaining in favor with the police.<sup>2</sup>

In contrast, progressive prosecutors insist on standing up to law enforcement officials by handling these controversial types of cases in a manner that ensures greater justice and, at a minimum, impartiality.<sup>3</sup> In doing so, however, they will likely fail to please both their constituents and the police.<sup>4</sup> Without votes from the former and cooperation from the latter, progressive prosecutors cannot carry out their policies.

Apart from police misconduct, chief prosecutors simply have limited control over police officers outside of the courtroom.<sup>5</sup> Police officers' freedom of action gives them the power to derail a progressive prosecutor's agenda. For example, a police officer's decision whether to arrest someone involves a high level of discretion.<sup>6</sup> If a progressive prosecutor hopes to decriminalize low-level marijuana possession, he needs police officers to stop arresting individuals for that crime. But if a strong police commissioner or the local police union

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<sup>1</sup> See *Ties That Bind: How the Bond Between Police and Prosecutors Leads to a Conflict of Interest*, THE GUARDIAN (Dec. 31, 2015), <https://www.theguardian.com/us-news/2015/dec/31/ties-that-bind-conflicts-of-interest-police-killings> [<https://perma.cc/92ZW-VXNE>] [hereinafter *Ties That Bind*] (noting that police disapproval of a DA candidate can be "electorally toxic" because police unions endorse 95% of elected DAs).

<sup>2</sup> *Id.*

<sup>3</sup> See David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. 25, 38–39 (2017) (explaining how progressive prosecutors aim to "balance[] three different and often-conflicting objectives" in police misconduct cases: "independence, accountability, and professional competence").

<sup>4</sup> See *id.* ("Protecting all three values simultaneously is difficult.").

<sup>5</sup> *It's a Complicated Relationship Between Prosecutors, Police*, NPR: ALL THINGS CONSIDERED (Dec. 4, 2014), <https://www.npr.org/2014/12/04/368529402/its-a-complicated-relationship-between-prosecutors-police> [<https://perma.cc/AMZ7-R2AA>].

<sup>6</sup> See generally Vida B. Johnson, *Prosecutors Who Police the Police Are Good People*, 87 FORDHAM L. REV. ONLINE 13, 16 (2018), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1019&context=flo> [<https://perma.cc/N298-8GFK>] (asserting that "the only institution in our criminal justice system with more power than police is the prosecutor's office"); George C. Thomas, III, *Discretion and Criminal Law: The Good, the Bad, and the Mundane*, 109 PENN ST. L. REV. 1043, 1043 (2005) (noting that "any system that permits an almost limitless set of decision points for police and prosecutors will be filled with almost limitless discretion").

does not agree with that policy, police officers may continue to arrest individuals for possession, thus undermining the progressive prosecutor’s legitimacy.<sup>7</sup>

In addition to prosecutors’ relations with police, access to resources such as diversion programs and specialty courts can also constrain progressive prosecutorial policies.<sup>8</sup> As the pace of criminal justice reform continues to accelerate, progressives have reconceptualized and expanded the role of prosecutors. Progressive prosecutors do more than simply churn through cases; they also often consider whether an alternative to incarceration is best for a particular defendant.<sup>9</sup> Resources like diversion programs and specialty courts can give offenders a second chance. Yet, implementation of these programs requires significant time and money and many districts do not adequately utilize them once implemented.<sup>10</sup>

## I. POLICE ACCOUNTABILITY

### A. *The Urban Environment*

Police misconduct in the urban setting has led to the election of many progressive prosecutors. For example, Chicago constituents elected Kim Foxx after police officers murdered seventeen-year-old Laquan McDonald, shooting him in the back sixteen times.<sup>11</sup> DA Anita Alvarez, Kim Foxx’s predecessor, waited to bring charges against the responsible officer until a journalist made the tape of the shooting public.<sup>12</sup> Foxx defeated Alvarez running on a platform of police accountability and justice for those like Laquan McDonald.<sup>13</sup> And in St. Louis County, Missouri, Wesley Bell challenged incumbent Bob McCulloch after a white police officer killed eighteen-year-old Michael Brown in the

<sup>7</sup> See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1317 (2012) (describing how “police are effectively empowered to decide not only who will be arrested but who will be convicted”); see also Thomas *supra* note 6, at 1044–45 (discussing the discretionary actions by police officers that are “essentially un-reviewable,” such as deciding “whether to set up radar on one highway versus another” to catch drivers speeding).

<sup>8</sup> See Elena Schwartz, *Do Diversion Programs Really Work?*, CRIME REP. (July 3, 2018), <https://thecrimereport.org/2018/07/03/do-jail-diversion-programs-really-work/> [<https://perma.cc/ZNF8-7APC>] (noting that “[a] widespread lack of data about fees, success rates, recidivism, and who is accepted or rejected from diversion programs, precludes accountability and improvement almost nationwide”).

<sup>9</sup> See *id.* Regrettably, many prosecutors do not take advantage of available programs. *Id.* For example, the ACLU sued Kansas prosecutors for “failing to disclose diversion opportunities to defendants.” *Id.* The ACLU determined that elected prosecutors in Kansas use these programs in felony cases only about 5% of the time. *Id.*

<sup>10</sup> *Id.* (observing that prosecutors currently use diversion programs in just 9% of cases).

<sup>11</sup> Josie Duffy Rice & Clint Smith, *Justice in American Episode 7: The New Progressive Prosecutors?*, APPEAL (Sept. 5, 2018), <https://theappeal.org/justice-in-america-episode-7-the-new-progressive-prosecutors/> [<https://perma.cc/H6VM-DNJ7>].

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* (noting that Foxx has been described as “one of the most progressive prosecutors in the nation”).

city of Ferguson.<sup>14</sup> McCulloch, who had served as the chief prosecutor for almost thirty years, lost his bid for reelection to Bell, who decisively won the election after promising to pass all future cases of police misconduct to an outside, independent prosecutor.<sup>15</sup>

Kim Foxx, Wesley Bell, and others like them have pledged to keep the police accountable. But their efforts are fraught with difficulties. First, such pledges typically annoy police unions.<sup>16</sup> Lack of support from the local police union can be a difficult hurdle to overcome in an election, as voters typically value an endorsement by the police.<sup>17</sup> Should a progressive candidate manage to overcome lack of police support to win an election, actually delivering on their pledge to crack down on police misconduct presents its own set of challenges.<sup>18</sup>

Some cities, for example, have promised to investigate cases involving police misconduct using special prosecutors from outside the community.<sup>19</sup>

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<sup>14</sup> Jacob Rosenbert, *Can a Prosecutor Ever Truly Be Progressive? Ferguson May Be the Ultimate Test Case*, MOTHER JONES (Apr. 17, 2019), <https://www.motherjones.com/crime-justice/2019/04/progressive-prosecutors-ferguson-wesley-bell-kamala-harris-kim-gardener/> [<https://perma.cc/LX6S-A7EX>].

<sup>15</sup> Samantha Michaels, *An Underdog Reformer Just Unseated the Prosecutor Who Handled the Ferguson Police Shooting*, MOTHER JONES (Aug. 8, 2018), <https://www.motherjones.com/crime-justice/2018/08/wesley-bell-prosecutor-ferguson-robert-mcculloch/> [<https://perma.cc/7PUG-MUH5>]. Under McCulloch, the grand jury refused to charge the police officer responsible for the Ferguson shooting. Astead W. Herndon, *Can a Criminal Justice Advocate Unseat Ferguson's Lead Prosecutor? Wesley Bell Will Try*, N.Y. TIMES (Aug. 7, 2018), <https://www.nytimes.com/2018/08/07/us/politics/ferguson-bill-mcculloch-wesley-bell.html> [<https://perma.cc/QCT5-SLTV>].

<sup>16</sup> See Phillip Martin, *Rachael Rollins Rises to National Stage with Country's Progressive DAs*, WGBH NEWS (Jan. 9, 2019), <https://www.wgbh.org/news/local-news/2019/01/09/rachael-rollins-rises-to-national-stage-with-countrys-progressive-das> [<https://perma.cc/3FCP-Z9AA>]. Rachael Rollins did not have the support of the police during her campaign, largely due to the list of fifteen crimes she promised she would “be reluctant to prosecute.” *Id.* The Boston Police Patrolman's Association critiqued the list during the campaign, stating its enforcement would be “dangerous to police.” *Id.* Before Rollins was officially sworn into office, the National Police Association filed an ethics complaint against her, citing the list. Radley Balko, *Boston's First Black Woman Prosecutor Has Yet to Take Office, but She's Already Facing an Ethics Complaint*, WASH. POST (Dec. 28, 2018), <https://www.washingtonpost-com.proxy.bc.edu/opinions/2018/12/28/bostons-first-black-prosecutor-has-yet-take-office-shes-already-facing-an-ethics-complaint/> [<https://perma.cc/L6VQ-K6H5>].

<sup>17</sup> See *Ties That Bind*, *supra* note 1 (discussing the importance of police union support to candidates running for DA).

<sup>18</sup> The exclusionary rule is a “sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation.” *Davis v. United States*, 564 U.S. 229, 232 (2011). Traditionally, measures such as the exclusionary rule were created to serve as a remedy where police break protocols and violate citizens' rights. See Rachel A. Harmon, *Promoting Civil Rights Through Proactive Police Reform*, 62 STAN. L. REV. 1, 9 (2009). Although the rule's purpose is to deter police officers from committing constitutional violations, it has not been able to “promote wholesale institutional change.” *Id.*

<sup>19</sup> See generally Sabrina G. Singer, *Embracing Federalism in Special Prosecution Models: An Analysis of Experimentation in the States*, 51 COLUM. J.L. & SOC. PROBS. 431, 433–36, 448–51 (2018) (defining a special prosecutor as “a lawyer appointed to investigate, and, if justified, seek indictments in a particular case”) (citing *Special Prosecutor*, BLACK'S LAW DICTIONARY (11th ed. 2019)); *Law Signed to Require Independent Investigations of Deaths from Police Force*, ACLUN.J. (Jan.

Special prosecutors can promote a sense of legitimacy and impartiality that local prosecutors may not provide.<sup>20</sup>

But not everyone agrees that appointing a special prosecutor is the most “progressive” course of action. Some critics believe that progressive prosecutors ought to hold police to the same standards as others that come through their courtroom.<sup>21</sup> Even though DA’s offices rely on police, the two are independent entities. Moreover, police have limited options for retaliation against a crusading prosecutor—police, after all, want to keep their jobs. Urban progressive prosecutors, therefore, have the power to stand against the police and prosecute misconduct cases on their own turf.<sup>22</sup>

Progressive prosecutors’ constituencies may also disapprove of the special prosecutor approach.<sup>23</sup> Urban populations often have more generalized, detached feelings towards the police, as a police department in a large city can employ thousands of officers.<sup>24</sup> Additionally, studies show that non-white minorities are becoming the majority in urban environments.<sup>25</sup> As members of minority groups are forced to endure an unequal share of police misconduct, urban constituents may feel personally offended if their elected official does not stand up to the police herself. These sentiments can lead to overwhelming

30, 2019), <https://www.aclu-nj.org/news/2019/01/30/law-signed-require-independent-investigations-deaths-police> [<https://perma.cc/R2ET-QSBZ>] (discussing legislation signed in New Jersey that requires a special prosecutor in cases involving police brutality).

<sup>20</sup> Yet critics of the special prosecutor model cite this level of independence as a major shortcoming. See Singer, *supra* note 19, at 442, 444. Some critics argue that the discretion given to special prosecutors provides ample space for “abuse of unchecked power.” *Id.* at 445.

<sup>21</sup> See Johnson, *supra* note 6, at 17–19 (emphasizing that “to truly be a good person and a good prosecutor, a prosecutor must hold police officers accountable”).

<sup>22</sup> See *id.* at 16–18 (warning that “at this moment in time prosecutors are the only institutional players with the power to check the power of police”).

<sup>23</sup> See Singer, *supra* note 19, at 445–47 (discussing that critics of special prosecutors are concerned that their use might “exacerbate[] mistrust” in local authorities).

<sup>24</sup> See Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP (June 19, 2015), <https://news.gallup.com/poll/183704/confidence-police-lowest-years.aspx> [<https://perma.cc/VLY9-KVM9>] (reporting that just 30% of black Americans feel “quite a lot” of confidence in the police, compared with 52% among the general population); Charlie Sorrel, *People Living in High-Crime Areas Respect the Law, but Distrust the Police*, FAST COMPANY (Mar. 15, 2017), <https://www.fastcompany.com/3068921/people-living-in-high-crime-areas-respect-the-law-but-distrust-the-police> [<https://perma.cc/RLH6-6ZVT>] (citing the results of a study in which just 23.8% of participants “thought the police are honest”); see also William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1973, 1997–98 (2008) (describing how the “decline of local democratic control over criminal justice” in high-crime, urban cities led to professionalized police forces that are “detached from the neighborhoods they serve”).

<sup>25</sup> Kim Parker et al., *Demographic and Economic Trends in Urban, Suburban and Rural Communities*, PEW RES. CTR. (May 22, 2018), <https://www.pewsocialtrends.org/2018/05/22/demographic-and-economic-trends-in-urban-suburban-and-rural-communities/> [<https://perma.cc/K259-9A36>]. The study reveals that although “the [United States] population remains majority white,” just 44% are white in urban areas. *Id.* The authors note that since 2000, non-Hispanic whites “have become the minority in most urban areas.” *Id.*

distrust of a police department and outrage towards a prosecutor who fails to adequately handle the misconduct.<sup>26</sup>

Aside from difficulties in handling police misconduct, urban progressive prosecutors face potential resistance from strong police commissioners and unions.<sup>27</sup> Police commissioners may not be willing to follow prosecutors' progressive policies if they believe that those policies undermine their department's crime-fighting priorities.<sup>28</sup> Or if a newly elected DA begins her term by pointing out police officers' inadequate performance, the local union might defend its officers' abilities and present a unified front against the prosecutor.<sup>29</sup>

Further, urban police commissioners and other police officials often comment on the public safety consequences of the district attorney's office policies. For example, the National Police Association complained about Boston DA Rachael Rollins to the Massachusetts Bar Association after she released a list of non-violent crimes that her office has pledged not to prosecute.<sup>30</sup> Police support can sway the public's reception of such drastic policy

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<sup>26</sup> See Elias R. Feldman, *Strict Tort Liability for Police Misconduct*, 53 COLUM. J.L. & SOC. PROBS. 89, 98–100, 102 (2019). The author notes that many scholars attribute the unequal burden minority groups face to the “policies and practices of law enforcement” and “unconscious racial biases.” *Id.* She also discusses the “dignitary injur[ies]” that arise when police officers act on these biases. *Id.* Police brutality towards members of minority groups does not just cause physical injury; there is a “separate dignitary injury sustained by all racial minorities” that “stems from the inequity itself.” *Id.*

<sup>27</sup> See generally ‘Help Wanted’: Philadelphia Police Union Calling for New District Attorney in I-95 Billboard, CBSN PHILLY (June 27, 2019, 5:25 PM), <https://philadelphia.cbslocal.com/2019/06/27/help-wanted-philadelphia-police-union-calling-for-new-district-attorney-in-i-95-billboards/> [<https://perma.cc/6PZT-V8XD>]. The Philadelphia Fraternal Order of Police made their dissatisfaction for DA Krasner explicit by paying for two billboards that read, “Help Wanted: New Philadelphia District Attorney. Please Contact FOP Lodge #5.” *Id.*

<sup>28</sup> Barbara Bean-Mellinger, *What Is a Police Commissioner's Job?*, HOUS. CHRON. (Aug. 20, 2018), <https://work.chron.com/police-commissioners-job-25236.html> [<https://perma.cc/5MG5-LSBC>] (discussing how police commissioners can be elected or appointed, and that commissioners often “set the overall mission and focus” for the department).

<sup>29</sup> See Dana Branham & Sarah Sarder, *Texas Police Union Calls for DA's Removal Over His Plan Not to Prosecute Certain Crimes*, DALL. MORNING NEWS (Apr. 18, 2019, 4:30 PM), <https://www.dallasnews.com/news/2019/04/18/texas-police-union-calls-for-dallas-da-s-removal-over-his-plan-not-to-prosecute-certain-crimes/> [<https://perma.cc/9UEU-UCUD>] (reporting on Texas police union's dissatisfaction with Dallas DA John Creuzot's policy to “not prosecute certain low-level crimes”); Elyssa Cherney, *Chicago Police Union President Renews Criticism of Kim Foxx, Says She 'Needs to Step Down' if She Can't Do Her Job*, CHI. TRIB. (Apr. 30, 2019), <https://www.chicagotribune.com/news/breaking/ct-met-chicago-union-president-fop-comments-kim-foxx-20190430-story.html> [<https://perma.cc/89ES-57XD>] (explaining the tumultuous relationship between Chicago DA Kim Foxx and the local police union stemming from Foxx's decision not to prosecute certain crimes); Alicia V. Lozano, *Philadelphia District Attorney's Office Wins Court Battle Against Police Union Over 'Do Not Call List'*, NBC PHILA. (Nov. 22, 2019, 12:02 PM), <https://www.nbcphiladelphia.com/news/local/philadelphia-district-attorneys-office-wins-court-battle-with-police-union/2222588/> [<https://perma.cc/3M3C-ABDJ>] (describing the “fraught” relationship between Philadelphia DA Larry Krasner and the local police union that included conflict even before Krasner was elected).

<sup>30</sup> Kaitlin Flanigan, *Police Group Accuses Suffolk DA-Elect of 'Reckless Disregard' for Massachusetts Laws*, NBC BOS. (Dec. 28, 2018), <https://www.nbcboston.com/news/local/rachael-rollins>

changes—a commissioner’s support, especially concerning crimes no longer being prosecuted, could be crucial to the policy’s ultimate success.<sup>31</sup> On the whole, then, progressive prosecutors must strike the delicate balance of holding the police accountable while not completely alienating them in the process.

### B. The Rural Environment

Rural progressive prosecutors face different challenges in keeping police accountable, such as prosecutors’ personal relationships with police officers. A smaller county has fewer officers, so a prosecutor will likely interact with the same officer on more than one occasion.<sup>32</sup> In fact, a prosecutor in a small community might socialize with officers outside of the law enforcement context. An ADA who will likely work with an officer again in the future might be reluctant to call them out for conducting an inadequate investigation and risk damaging a personal relationship.<sup>33</sup>

Although close relationships can provide police with a cloak of protection, they can also result in personal conflicts that work in a progressive prosecutor’s favor. For example, a rural prosecutor faced with a case of police misconduct might feel betrayed or frustrated on a personal level. After all, the prosecutor is a member of the community too. That prosecutor may take a

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suffolk-district-attorney-elect-national-police-association-bar-complaint/129098/ [https://perma.cc/BB67-HNG5]; Eoin Higgins, *Progressive DA Rachael Rollins Hasn’t Stopped Prosecuting Petty Crimes Despite Pledge*, INTERCEPT (Mar. 24, 2019), https://theintercept.com/2019/03/24/rachael-rollins-da-petty-crime/ [https://perma.cc/UF94-4XFX].

<sup>31</sup> Julie Shaw, *Report: DA Krasner “Very Close” to Rolling Out Policy Decriminalizing Drug Possession*, PHILA. INQUIRER (May 8, 2019), https://www.philly.com/news/philadelphia-district-attorney-larry-krasner-drug-possession-20190508.html [https://perma.cc/R5TS-5CY4]. For example, DA Larry Krasner has been working on a new policy that would “decriminaliz[e] drug-possession cases.” *Id.* In response to this report, Richard Ross, Philadelphia’s Police Commissioner, commented on the potential policy. *Id.* He warned against “blanket policies” but admitted that law enforcement has “no interest in seeing people incarcerated who are addicted to substances that are illegal.” *Id.* As of December 2019, the program has started to show results: “drug-possession convictions excluding diversion programs are down 45%.” Samantha Melamed, *Inside Philly DA Larry Krasner’s New Plan to Drop Low-Level Drug Charges in Favor of Addiction Treatment*, PHILA. INQUIRER (Dec. 3, 2019), https://www.inquirer.com/news/philadelphia-district-attorney-larry-krasner-drug-diversion-decriminalization-criminal-justice-reform-20191203.html [https://perma.cc/8TBY-MTN9].

<sup>32</sup> *Police Employment, Officers Per Capita Rates for U.S. Cities*, GOVERNING.COM, https://www.governing.com/gov-data/safety-justice/police-officers-per-capita-rates-employment-for-city-departments.html [https://perma.cc/L9ZR-8Y36]. As of 2016, there were over three thousand total police officers in Dallas, Texas. *Id.* Corpus Christi, the largest city in Nueces County, Texas, has only 445 total officers. *Id.*

<sup>33</sup> Michelle Liu, *Why One North Mississippi DA Thinks Special Prosecutors Hold the Key in Police Shootings*, MISS. TODAY (Aug. 20, 2018), https://mississippitoday.org/2018/08/20/why-one-north-mississippi-d-a-thinks-special-prosecutors-hold-the-key-in-police-shootings/ [https://perma.cc/F4ST-XRQW]. Mississippi DA Scott Colom has made it a point to create a policy in which all cases where “law enforcement officers shoot civilians,” an independent prosecutor takes the case. *Id.* Colom notes that his “five-prosecutor team can’t help but work with law enforcement officials.” *Id.*



more active role in the investigation to make certain the case is not mishandled. Thus, in a close-knit, rural environment, police misconduct has the potential to hit home in a way that is less common in large, urban environments.

A rural prosecutor's constituents can likewise feel a personal connection with their police department. Members of a tight-knit rural community may be less likely to criticize their police officers, with whom they are likely to have personal relationships. A progressive prosecutor can combat this by encouraging increased police accountability on behalf of the entire community.<sup>34</sup> But unlike prosecutors in the urban environment, rural prosecutors have added incentives to pass misconduct cases off to separate entities like special prosecutors; close relationships between prosecutors and the police may be difficult to overcome in these situations.<sup>35</sup>

Finally, like their urban counterparts, rural prosecutors must work with police officers to prosecute crimes effectively. Therefore, the same institutional concerns apply in each setting. A strong, powerful police commissioner who opposes progressive ideas can threaten a rural progressive prosecutor's agenda. In that scenario, rural prosecutors must find a level of cooperation with police. Otherwise, a resentful police force may work to undermine the prosecutor's office.

## II. AVAILABILITY OF RESOURCES

### A. *The Urban Environment*

Progressive prosecutors have expanded the role of the prosecutor. In addition to their primary duty of prosecuting cases, prosecutors engage with their communities, help offenders get their lives on track, and even help prevent crime from happening in the first place.<sup>36</sup> But establishing programs to tackle these new responsibilities requires significant resources.

Such programs are on the rise, particularly in urban areas, which are more likely to have resources available to fund them.<sup>37</sup> Since 2007, for example,

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*; Nick Tabor, *What if Prosecutors Wanted to Keep People Out of Prison?*, N.Y. MAG. (Mar. 27, 2018), <http://nymag.com/intelligencer/2018/03/what-if-prosecutors-wanted-to-keep-people-out-of-prison.html> [<https://perma.cc/VLA4-E259>]. Scott Colom commented that prosecutors "have to work too closely for there to be independence" in police misconduct cases, "[e]specially in rural communities." *Id.* He previously asked the State Attorney General's office to get involved in a police misconduct case out of his concern for impartiality. *Id.*

<sup>36</sup> See Kristine Hamann & Laura Greenberg-Chao, *The Prosecutor's Evolving Role*, PROSECUTOR, Jan. 2018, at 14, 30 (discussing recent initiatives including "juvenile diversion programs," "community engagement," and "neighborhood courts").

<sup>37</sup> See Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587, 1605 (2012) (citing the existence of "approximately 3,000 specialized criminal courts in the United States"); *Texas Specialty Courts*, OFF. TEX. GOVERNOR (July 16, 2019), [gov.texas.gov/uploads/files/organization/criminal-justice/Specialty-Courts-By-County.pdf](http://gov.texas.gov/uploads/files/organization/criminal-justice/Specialty-Courts-By-County.pdf) [<https://perma.cc/M8PY-P4BU>] (contrasting the number of specialty courts in urban and rural Texas). Most

Texas has increased the number of specialty courts from nine to 177.<sup>38</sup> In Dallas County, there are twenty-two.<sup>39</sup> In contrast, rural Nueces County has only four.<sup>40</sup> The number of alternatives to incarceration available can increase an individual defendant's chance of receiving some type of aid from one of these programs.<sup>41</sup>

Progressive prosecutors who seek to expand the use of these programs may face resistance from line prosecutors. An ADA usually has discretion when deciding whether to give a defendant the option of entering into a diversion program rather than serving time in jail.<sup>42</sup> This is a heavy burden for line prosecutors, who often have little background or experience in social work or psychology. Because busy chief prosecutors are unlikely to review all of their ADA's activities, line prosecutors' decision making can affect the success of these programs.<sup>43</sup>

Urban offices have sought to maximize the effectiveness of diversion programs by acknowledging the burden on line prosecutors. For example, in Maricopa County, Arizona, County Attorney Bill Montgomery created the Diversion Program Bureau to improve the county's diversion programs.<sup>44</sup> To en-

specialized courts focus on crimes involving drugs and usually offer treatment as an alternative to prison. *Id.* In Texas, there has been an effort to introduce a new type of specialty court exclusive to "law enforcement officers, firefighters, prison guards, and paramedics charged with any misdemeanor or felony . . . who suffer from a brain injury, mental illness or a mental disorder . . . that they got from their job." Jolie McCullough, *Some Counties Question Need of Special Courts for Law Enforcement*, TEX. TRIB. (July 3, 2017, 12:00 AM), <https://www.texastribune.org/2017/07/03/texas-specialty-courts-police/> [<https://perma.cc/58ZQ-22EB>]. Critics believe that these courts might "further divide the community from police officers." *Id.*

<sup>38</sup> Rick Perry, *Follow the Texas Model*, BRENNAN CTR. FOR JUST. (Apr. 28, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/follow-texas-model> [<https://perma.cc/487Q-ZRAH>]; *Texas Specialty Courts*, *supra* note 37. These specialty courts range in their focus area, but the most common are drug and mental health courts. *Texas Specialty Courts*, *supra* note 37. The 177 courts also include veterans court, family court, commercially sexually exploited persons court, and juvenile court. *Id.*

<sup>39</sup> *Texas Specialty Courts*, *supra* note 37.

<sup>40</sup> *Id.*

<sup>41</sup> But leaders advocating for these types of programs believe that they are currently "vastly underutilized" and "inaccessible to low-income defendants." Schwartz, *supra* note 8. Prosecutors across the United States divert only 9% of felony cases. *Id.*

<sup>42</sup> Mary Fan, *Street Diversion and Decarceration*, 50 AM. CRIM. L. REV. 165, 181 (2013) (stating that "prosecutors are the central gatekeepers, wielding broad discretion over whether defendants get pretrial diversion"); Rick Jones, *From the President: See No Evil: Prosecution and Unchecked Discretion*, NAT'L ASS'N CRIM. DEF. LAW., <https://www.nacdl.org/Article/January-February2018-FromthePresidentSeeNoEvilPros> [<https://perma.cc/Q9VG-YMNS>] (discussing the "wide discretion" that "the criminal justice systems extends [to] prosecutors").

<sup>43</sup> And even more so for "absolutist" prosecutors who demonstrate a "commitment to rules, structure, and hardened categories of right and wrong." Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1668, 1681 (2018).

<sup>44</sup> Amanda Jacinto, *Redefining Wins and Losses: Further Enhancing the Prosecutor Playbook*, PROSECUTOR, Apr. 2018, at 10. Jacinto states that this program is an "investment in crime reduction," which is exactly what progressive prosecution is all about. *Id.* at 11. Maricopa County, Arizona has a

act his vision, Montgomery asked Patricia Cordova, a former human services professional with no prosecutorial experience, to be the Bureau's chief.<sup>45</sup> Cordova works alongside the county's line prosecutors to influence and become a part of the pre-trial decision-making process.<sup>46</sup> In Philadelphia, DA Larry Krasner has launched a police-assisted program that allows for police officers to participate in the diversion effort early on in the criminal justice process.<sup>47</sup> Instead of arresting someone struggling with a drug addiction, for example, officers have the option to place the individual in a community-based treatment facility.<sup>48</sup> The city of Philadelphia has budgeted \$750,000 for this program annually, as part of a larger six-million dollar initiative to decrease the city's jail population over the course of three years.<sup>49</sup>

These programs aid prosecutors by delegating decision-making power to others. In Maricopa County, for example, prosecutors considering diversion programs can consult with a professional who specializes in working with the prison population.<sup>50</sup> And by recruiting police officers to take part in pretrial diversion, fewer offenders may come through the system, which lightens a prosecutor's caseload and permits more individuals to receive the type of help that they need.<sup>51</sup> Urban progressive prosecutors have the luxury of leading

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population of over 4.4 million. *Quick Facts, Maricopa County, Arizona*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/maricopacountyarizona/PST045218> [<https://perma.cc/2WYU-9DSF>]. The county includes Arizona's capital, Phoenix, the fifth most populous city in the United States. *US City Populations 2019*, WORLD POPULATION REV., <http://worldpopulationreview.com/us-cities/> [<https://perma.cc/N949-FW68>].

<sup>45</sup> Jacinto, *supra* note 44, at 10.

<sup>46</sup> *Id.* at 11. Cordova serves as an invaluable resource to line prosecutors by offering trainings and helping them understand "when and how" to advocate for a diversion program. *Id.*

<sup>47</sup> Kelly Cofrancisco, *City Announces Police-Assisted Diversion (PAD) to Fight Opioid Epidemic*, CITY OF PHILA. (Mar. 16, 2018), <https://www.phila.gov/2018-03-16-city-announces-police-assisted-diversion-pad-to-fight-opioid-epidemic/> [<https://perma.cc/B3V6-CEWD>]; see also Tom MacDonald, *Philadelphia Going "Outside the Box" with Diversion Program*, WHYY (Mar. 16, 2018), <https://whyy.org/articles/philadelphia-going-outside-box-diversion-program/> [<https://perma.cc/LYA9-8Z29>] (reporting that under the police-assisted diversion program, an individual could be given up to two chances to be rehabilitated, but that a third offense would result in prosecution).

<sup>48</sup> Cofrancisco, *supra* note 47.

<sup>49</sup> *Id.*; Katie Colaneri, *\$3.5 Million Grant to Help Philly Cut Inmate Population, Launch Other Prison Reforms*, WHYY (Apr. 13, 2016), <https://whyy.org/articles/35-million-grant-to-help-philly-cut-inmate-population-launch-other-reforms/> [<https://perma.cc/3LYK-79WN>]. Compare this figure to the \$4 million budget of the Nueces County, Texas prosecutor's office led by DA Mark Gonzalez. Justin Jouvenal, *From Defendant to Top Prosecutor, This Tattooed Texas DA Represents a New Wave in Criminal Justice Reform*, WASH. POST (Nov. 19, 2018), [https://www.washingtonpost.com/local/public-safety/from-defendant-to-top-prosecutor-this-tattooed-texas-da-represents-a-new-wave-in-criminal-justice-reform/2018/11/19/e1dca7cc-d300-11e8-83d6-291fceed2ab1\\_story.html/e1dca7cc-d300-11e8-83d6-291fceed2ab1\\_story.html](https://www.washingtonpost.com/local/public-safety/from-defendant-to-top-prosecutor-this-tattooed-texas-da-represents-a-new-wave-in-criminal-justice-reform/2018/11/19/e1dca7cc-d300-11e8-83d6-291fceed2ab1_story.html/e1dca7cc-d300-11e8-83d6-291fceed2ab1_story.html) [<https://perma.cc/22JC-YK7W>].

<sup>50</sup> Jacinto, *supra* note 44, at 10.

<sup>51</sup> See generally Cofrancisco, *supra* note 47.

large-scale, collaborative efforts with big budgets to fund them.<sup>52</sup> As long as individual prosecutors are given the proper tools to assist with diversion, these types of programs can put a lot of defendants through proper treatment rather than sending them to prison.

### B. The Rural Environment

Despite the limited resources of rural district attorney's offices, progressive prosecutors have still managed to implement successful diversion programs. Because fewer individuals come through the system in these smaller offices, a large variety of programs is not necessary. Progressive prosecutors can make an impact with a smaller number of diversion programs by focusing on certain low-level offenses and working with specific offenders on a more individualized basis.

Rural progressive prosecutors across the country are expanding these programs. For example, Scott Colom, Mississippi's Sixteenth Circuit Court DA, doubled the defendants participating in a pre-trial diversion program to 218 in his first year in office.<sup>53</sup> As long as a defendant secures employment or attends school while remaining sober, the office will consider dropping the charges.<sup>54</sup> The program is led by a former social worker who has the professional background to assist defendants in finding the type of rehabilitation services or schooling they need to succeed.<sup>55</sup> Colom funded the treatment for individuals in the program using a combination of court fees, fines and Medicaid.<sup>56</sup>

In his past two years in office, Nueces County, Texas DA Mark Gonzalez has funneled nearly 2,600 defendants away from jails and into similar programs.<sup>57</sup> Gonzalez's diversion programs sought to target defendants dealing with substance abuse or those who could benefit from domestic violence training.<sup>58</sup> Defendants that participate in the Nueces County marijuana possession

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<sup>52</sup> See Colaneri, *supra* note 49 (discussing Philadelphia's diversion efforts); Lucas Manfield, *Dallas's New Deflection Center Enjoys Widespread Support. But Funding It? That's Another Matter*, DALL. OBSERVER (Jan. 2, 2020, 4:00 AM), <https://www.dallasobserver.com/news/new-deflection-center-enjoys-widespread-support-but-funding-it-thats-another-matter-11830057> [https://perma.cc/328U-QHKE] (describing Dallas DA Creuzot's new \$1 million jail diversion center for people with mental illness). Perry, *supra* note 38 (explaining how Texas's \$241 million investment into treatment and rehabilitation programs still saved the state over \$2 billion in its incarceration budget).

<sup>53</sup> Tabor, *supra* note 35.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* Because of the area's lack of a public transportation system, the administrator will coordinate rides to ensure members of the program make their treatment appointments or classes. *Id.*

<sup>56</sup> Steve Rogers, *Achieving Some of Goals, DA Says*, DAILY TIMES LEADER (May 18, 2018), <https://www.dailytimesleader.com/content/achieving-some-goals-da-says> [https://perma.cc/UY8N-W3RR].

<sup>57</sup> Jouvenal, *supra* note 49.

<sup>58</sup> Eleanor Dearman, *Nueces County District Attorney Makes Mark After Year in Office*, CORPUS CHRISTI CALLER TIMES (Feb. 15, 2018, 1:10 AM), <https://www.caller.com/story/news/local/2018/02/09/nueces-county-district-attorney-makes-mark-after-year-office/1079849001/> [https://perma.cc/M94F-

program, for example, must pay a \$250 fine and complete a mandatory drug class.<sup>59</sup> The programs have generated over \$700,000 in revenue, which is then invested back into diversion and also used to fund county employees' salaries.<sup>60</sup>

The success of these programs demonstrates that progressive prosecution does not require endless resources to improve the criminal justice system. Smaller programs that offer individualized attention to defendants can quickly increase a county's rehabilitation rate. Also, progressive prosecutors can take advantage of the *ad hoc* nature of rural courthouses, which may be more willing to treat defendants as individuals than large, overburdened urban courts.<sup>61</sup> In this setting, one or two carefully tailored programs may be just as effective as the wide array offered in large cities.

As in the urban environment, though, line prosecutors may pose a threat to the success of diversion programs in rural counties. Prosecutors in the rural environment do not necessarily have the skill set of a social worker, which would help them know when a particular defendant may be a good fit for a certain program. Due to the nature of the rural area, however, prosecutors in these offices are more likely to work on finding collaborative solutions and ask for help from other players in the system.<sup>62</sup> Progressive chief prosecutors are more available to their staff in these areas and can assure that their line prosecutors gain some of the knowledge needed to be successful in pursuing diversion programs for defendants.

## CONCLUSION

This two-part article analyzes the obstacles to successful progressive prosecution in a fresh light. Admittedly, progressive prosecutors face many restraints beyond the four discussed in this article. Instead of providing a com-

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L8A5] (“[Gonzalez implemented] programs for [charges stemming from] marijuana possession, driving with an invalid license, driving while intoxicated and first-time offender domestic violence cases.”). The program for first-time offenders of domestic violence has been controversial. Jouvenal, *supra* note 49. During Gonzalez’s first year in office, only two men were enrolled in the program, and prosecutors dismissed a majority of domestic violence cases. *Id.* In April 2018, Gonzalez acknowledged that his office had “failed” at handling these domestic-violence cases. *Id.*

<sup>59</sup> Carimah Townes, *Is Mark Gonzalez the Reformer He Promised to Be?*, APPEAL (Nov. 21, 2017), <https://theappeal.org/is-mark-gonzalez-the-reformer-he-promised-to-be-462f199a60c/> [<https://perma.cc/254M-C826>]. If a defendant is unable to pay the \$250 fine, he can “pay off” the fine by completing twenty-five hours of community service. *Id.* Previously, if arrested for low-level possession of marijuana, the offender would be punished by up to 180 days imprisonment and a fine that could reach \$2,000. *Cannabis Laws & Penalties in Texas*, TEX. NORML, <https://www.texasnorml.org/activism/marijuana-laws-and-penalties-in-texas/> [<https://perma.cc/6GJN-AP3K>].

<sup>60</sup> Dearman, *supra* note 58; Jouvenal, *supra* note 49.

<sup>61</sup> See Elizabeth R. Gebert, *Challenges Facing Rural Prosecutors*, PROSECUTOR, Sept. 2018, at 11 (describing how the limited resources in rural areas require stakeholders to pursue “unorthodox” solutions to meet “mutual goals”).

<sup>62</sup> See *id.*

prehensive overview of all such issues, however, this article demonstrates the need for nuanced, context-dependent treatment of these limitations.

Part One demonstrated that rural progressive prosecutors are in a better position than their urban counterparts to surmount internal constraints. Part Two's analysis of external constraints does not allow for such a neat conclusion. The innately dependent relationship prosecutors have with the police is a hindrance to progressive prosecution regardless of where it takes place. Urban progressive prosecutors in large offices face potential backlash from their constituents for appointing special prosecutors to handle police misconduct cases. Progressives who instead personally handle such cases risk alienating police, without whom prosecutors cannot do their jobs effectively. In the rural environment, the personal relationships between prosecutors and police create their own set of difficulties. And in both the urban and rural settings, tough-on-crime police commissioners may simply refuse to cooperate with progressive policies.

On the other hand, both the urban and rural environments provide great opportunities for progressive prosecution through alternatives to incarceration. Although urban offices have bigger budgets, thus permitting implementation of more diversion programs, prosecutors in the rural environment can focus on defendants at an individual level, and help get them the treatment they need to be successfully rehabilitated. The *ad hoc* nature of rural courthouses also gives these prosecutors greater opportunities to divert offenders and create a more balanced approach in handling cases.

These conclusions suggest that progressive prosecution cannot always produce successful and just results, and that is not good enough. Even though these new players entering the criminal justice scene have created high hopes for change, it is unlikely that the innate, institutional failures can be fixed without a complete revamp of the system. The injustice that occurs every day to criminal defendants in courtrooms across the nation cannot be tolerated.

But the spirit of progressive prosecution means fitting within the established confines and to 'do better.' Prosecutors are supposed to serve as leaders in promoting justice, but until that becomes a reality, the amount of discretion prosecutors wield should be diverted among a greater group of individuals. One change that could easily be implemented in DA's offices, particularly in the urban environment, is to hire social workers to serve on cases alongside line prosecutors. Social workers have the necessary background to evaluate defendants in a more nuanced light and could help ensure that a progressive touch is added in tough cases. Big cities already have hefty, million-dollar budgets and the resources to hire a social worker for each division. Social workers will likely align with progressive prosecution values and provide helpful insight into diversion efforts while lightening the load for overworked line prosecutors.

District attorneys have the highest privilege of representing the constituents that elected them into office. The burden progressive prosecution places on traditional DAs offices is heavy, and it may seem unfair to make prosecutors adapt and fit into an influx system. Unfortunately, however, their ‘crime-fighting’ attitudes are largely the reason why such a change is necessary in the first place. At the very least, the charge led by progressive prosecutors can challenge the traditional mindset and achieve greater justice for criminal defendants.

**Preferred citation:** Madison McWithey, *Taking a Deeper Dive into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography, Part II*, 61 B.C. L. REV. E. SUPP. I.-49 (2020), <http://lawdigitalcommons.bc.edu/bclr/vol61/iss9/9/>.