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Legal and Ethical Principles for the 21st Century Prosecutor

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INTRODUCTION

Should prosecutors use their position and power to take criminal justice reform into their own hands?[1] Prosecutors have been thrust into a new space where they are forced to make blanket decisions about certain atypical phases in the criminal justice system. These phases are atypical in that guilt is not the factual issue before the court, and although bargaining may be present, the process is not wholly centered around adjudication. Decisions relating to charging, bail, and expungement fall into this category of atypical phases. Traditionally, all phases of the prosecutor's role have been adversarial.[2] Now, the 21st century prosecutor is being put in a role where default adversarial posture may not make sense. So called progressive prosecuting has created uncharted territory for prosecutors to take a more cooperative approach in these atypical phases of the criminal justice system.[3] Today's prosecutors may even be in an environment of office-wide mandates to deny charging of certain crimes, promote bail reform, and represent class actions of expungement. Office culture that pursues these goals was unheard of in the time of the traditional prosecutor but is increasingly becoming normative throughout this reform movement.

Put simply, there is a new era of prosecutors in the 21st century. These 21st century prosecutors have brought about a rise in prosecutors as primary actors for positive change in the face of systemic issues in the criminal justice system. There are several reasons why prosecutorial reform matters for the overall reform of the criminal justice system. Prosecutors are in fact the frontrunners in many phases of the system, including being the prime players in determining who to charge, who to release, and who has their record expunged, which have become broad points of

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[1] *See, e.g.*, Emily Bazelon and Miriam Krinsky, *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.

[2] *See generally*, Earl J. Shilbert, *The Role of the Prosecutor in the Process of Criminal Justice*, 63 A.B.A. J. 1717, 1717-20 (1977) (detailing the role of traditional role of a prosecutor and proposing expansion).

[3] *See, e.g.*, Jeffrey Bellin, *The Limits of Prosecutorial Power*, THE MARSHALL PROJECT, May 2, 2017, https://www.themarshallproject.org/2017/05/02/the-limits-of-prosecutorial-power.

focus in decriminalization. The issue of prosecutorial discretion during these phases that are not per se adversarial as pure adjudication of guilt exists within a larger backdrop of trends in criminal justice relating to an expansion of the system generally, and specifically incarceration. Our nation is confronted with this issue that other constitutional actors have yet to overcome. The United States of America traditionally continued to increase incarceration rates even as we had the largest percentages of imprisoned people in the world.[4] With continual climb in convictions comes an increase in the disparate ratio of minorities in the system, a prevalent issue in the criminal justice system that is already displayed as a drastic misrepresentation of population statistics.[5] Beyond the mere numbers of persons locked up in United States prisons or involved in the criminal justice system, the most shocking statistic is this disparate impact upon people of color.[6] For example, in Wisconsin where African Americans represent six percent of the population, they make up thirty-seven percent of the state prison population.[7]

The new approach to prosecution is arguably quasi-legislative and may be viewed to undermine certain priorities of other constitutional actors. Forces both outside and inside prosecutor offices, including judges, elected officials, the police, and other prosecutors, are resisting this new era of prosecution.[8] However, this prosecutorial approach can also bring prosecutors to the forefront of positive change in the criminal justice system to combat the plague of high incarceration rates. There is little governing law for the prosecutorial role in the atypical

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[4] *See generally*, Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate Than Any Other Country*, WASHINGTON POST, July 7, 2015, https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/.

[5] *See generally*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (detailing the disparate impact of the criminal justice system on people of color).

[6] *Id*.

[7] *See, e.g.*, Jeffrey Toobin, *The Milwaukee Experiment: What Can One Prosecutor Do About the Mass Incarceration of African Americans*, N.Y. TIMES, May. 4, 2015, https://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment.

[8] Barkow, Rachel E., *Can Prosecutors Help To End Mass Incarceration?* MICHIGAN L. REV., Forthcoming, https://ssrn.com/abstract=3758006.

phases of charging, bail, and expungement, but other criminal justice actors and academics have made separation of powers arguments against sweeping progressive reform. Still, these arguments beg the question of whether prosecutors becoming *de facto* policy makers is justified, and if so, on what grounds. Some argue the answer to this question rests on ethical considerations, such as the goal of decriminalization and reduction of disparate impact on minorities, which should override any contradictory approach by the legislature.

The ultimate question of whether prosecutors should use their position and power to take criminal justice reform into their own hands includes a follow up question to determine what legal and ethical principles should provide guidance. There are different theories, including guidance from the Supreme Court and the separation of powers doctrine, to the Model Rules, to line prosecution norms and internal office culture. Whether the criminal justice system should value uniformity and clarity or diversity and creativity, and whether the answer should be in a neighborhood-by-neighborhood, office-by-office, state-by-state or nationwide form, has been debated by many legal scholars and criminal justice actors.

This paper contributes to the above-mentioned discussions. First, this paper identifies both the power prosecutors have in exercising discretion in the atypical phases of charging, bail, and expungement and the need and opportunity for positive change at such phases. Second, this paper explores how this new era of progressive prosecuting has restructured the prosecutorial role in these atypical phases. Third, this paper compiles potential theories of guidance for prosecutors based in legal and ethical principles by canvasing the possible paths for guiding the new era prosecutor.

To accomplish the above three goals, this paper is broken into four parts. Part I is a current event depiction of progressive prosecution through news articles on the tactics of certain local

prosecutor's offices. The 21st century prosecutor examples are juxtaposed against the traditional role prosecutors were encouraged to take prior to the reform movement. These illustrations depict the significance of prosecutorial discretion for pursuing criminal justice reform. Next, Part II analyzes the specific atypical phases of charging, bail, and expungement. First, it identifies the traditional role of prosecutors at each phase. Second, it explores various reform movements of each stage and the impact each reform may have on the criminal justice issues of mass incarceration and disparate impact. Part III then moves the discussion to different theories of guidance for how prosecutors should navigate this new space. This discussion includes arguments against prosecutor's acting in a quasi-legislative role based on separation of powers principles and limited governing law for these phases. But it argues that there are many potential legal and ethical principles that could provide guidance for the 21st century prosecutor. Potentially, such nuances in ethical arguments may lean towards progressive prosecutors using their power for positive change, even in the face of backlash from other constitutional actors. Part III is divided into two subparts – law and ethics, analyzing seminal cases in the legal realm, the model rules, and office culture and norms for an ethical backdrop. Part IV concludes this paper with a canvasing of how prosecution, and even progressive prosecution with similar goals, can look different based on which theory an office may rely. Theories may work differently for different phases and in different areas of the country, thus, the purpose of this paper is not necessarily to select a solution to over-criminalization through prioritizing theories for what the prosecutorial role should look like. Instead, the purpose of this paper is to provide a descriptive contribution of potential prosecutorial roles in the atypical phases of charging, bail, and expungement and the impact different approaches to the prosecutorial role at these phases may have on criminal justice reform.

I. RISE OF THE NEW PROSECUTOR AS A PRIMARY ACTOR FOR CHANGE

This part addresses the phenomenon known as "the rise of the new prosecutors" within the broader backdrop of movements towards criminal justice reform. Namely, how progressive prosecuting can reduce mass incarceration and disparate impact on minorities. It begins with the idea of what the traditional prosecutorial role consists of and how such a tough on crime traditional mold may have played the largest role in over-criminalization. It next continues to discuss the rise of progressive prosecuting and goes on to juxtapose a new movement among progressive prosecutors against the traditionally adversarial model. Further, it discusses how prosecutors have the power to use their position for positive change through this new movement.

A. Traditional Prosecutors: Adversarial and Adjudicative

Prosecutors have traditionally played an adversarial role with a narrow sphere of responsibility in the criminal justice system.[9] This role was typically composed of receiving cases, filing charges, adjudicating a plea or trial and moving on to the next case.[10] Until the 21st century, this idea of the prosecutorial role perpetuated systemic issues in the criminal justice system due to culture and resource limitations.[11] Resource scarcity today means a rationing of criminal justice away from over-criminalization and over-incarceration, but before the push for reform, it did not necessarily generate accordance with the public's sense of justice.[12] It largely meant that prosecutor offices lacked the capacity or the support to address crime problems holistically.[13] Instead prosecutors were more a part of a binary system, where the aim was to be adversarial and representation of the State may not have necessarily reflected representation of the people. In

[9] Shilbert, *supra* note 2.
[10] *Id.*
[11] *Id.*
[12] Bibas, Stephanos, *The Need for Prosecutorial Discretion*, FACULTY SCHOLARSHIP AT PENN LAW, 1427, (2010), https://scholarship.law.upenn.edu/faculty_scholarship/1427.
[13] Shilbert, *supra* note 2 at 1717.

adversarial postures, the legal profession often painted prosecutors as conservative, severe, and unforgiving.[14] The overall aim of this hard-nosed traditional prosecutor boiled down to one concept: enforcing the law.[15]

Execution of the law used to mean being tough on crime, which in turn, meant locking people up to protect the public.[16] Legal scholars have argued that such tough on crime prosecution bears a majority of the responsibility for the mass incarceration issue of the United States.[17] This argument blames mass incarceration on prosecutorial dominance,[18] and that previous deference to prosecutorial discretion meant severe punishment and severe consequences.[19] But the rationale behind the power of a traditional prosecutor can be used to support the rationale behind the power of a progressive one. It is a two headed coin. If prosecutors make decisions to charge, request bail conditions, essentially keep a person in jail or with a criminal record hanging over them, prosecutors can also decide not to; that is exactly what progressive prosecutors are doing. Progressive prosecutors are breaking the traditional law-and-order mold of their role in the criminal justice system.

B. The Power of the Local Prosecutor in a New Wave of Reform

Analyzing the criminal justice system involves analyzing power and analyzing the consequences of prosecutors' decisions shows the brunt of that power.[20] Some scholars argue

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[14] *See, e.g.*, Jennifer Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*, N.Y. TIMES, Oct. 22, 2018, https://www.newyorker.com/magazine/2018/10/29/larry-krasners-campaign-to-end-mass-incarceration.

[15] *See generally* JOHN L. WORRALL & M. ELAINE NUGENT-BORAKOVE, THE CHANGING ROLE OF THE AMERICAN PROSECUTOR at 4 (2017).

[16] *See, e.g.*, David Lat, *How Tough-on-Crime Prosecutors Contribute to Mass Incarceration*, N.Y. TIMES, April 8, 2019, https://www.nytimes.com/2019/04/08/books/review/emily-bazelon-charged.html.

[17] *Id.*

[18] *See generally* JOHN PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017) (assessing prosecutor's role in exploding incarceration rates).

[19] Barkow, *supra* note 8.

[20] *See, e.g.*, David Lat, *How Tough-on-Crime Prosecutors Contribute to Mass Incarceration*, N.Y. TIMES, April 8, 2019, https://www.nytimes.com/2019/04/08/books/review/emily-bazelon-charged.html.

whether prosecutors should have the power to impact change on the criminal justice system, but almost all scholars opine that prosecutors wield this power. Many legal scholars consider prosecutors as the most powerful actor in the criminal justice system.[21] Local district attorneys straddle a line between the judiciary and the legislature, in between the court system and the world of politics.[22] Despite the traditional method of prosecution prior to the 21st century, it is plausible that prosecutors can use their role to respond to crime problems and overall systemic issues in criminal justice.[23] Beyond executing the law, prosecutors hold the potential to influence law enforcement through various phases in administering justice.[24] Prosecutors have evolved into powerful political figures, often in response to democratic input from their communities encouraging progressive movements.[25] Prosecutors can use such power to pursue positive change in the criminal justice system.

Local prosecutors are the most highly involved constitutional actors in the criminal justice system at the ground level and have enough discretion to create change.[26] Local prosecutors handle ninety-five percent of the criminal cases brought in the United States,[27] fourteen times as many felonies and several hundred times as many misdemeanors as federal prosecutors.[28] Thus, local prosecutors are positioned to handle reform through their broad discretion on whether and how to prosecute.[29] Prosecutors can generate decriminalization and dismantle mass incarceration through reforms starting at the outset of a case through declining to charge certain low-level offenses[30] and

[21] *See, e.g.*, Bellin, *The Limits of Prosecutorial Power*,
[22] *See generally*, WORRALL & NUGENT-BORAKOVE, THE CHANGING ROLE OF THE AMERICAN PROSECUTOR at 4.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *See, e.g.*, Bazelon and Krinsky, *There's a Wave of New Prosecutors. And They Mean Justice*.
[27] *Id.*
[28] *See generally* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011).
[29] *See, e.g.*, Bazelon and Krinsky, *There's a Wave of New Prosecutors. And They Mean Justice*.
[30] *Id.*

continue after release through expungement efforts.[31] For example, in Brooklyn, New York, District Attorney Eric Gonzalez advances the principle of routing low-level offenders out of the criminal justice system.[32] Likewise, the Manhattan District Attorney's Office declines to prosecute cases involving marijuana possession and smoking in public.[33] Further, under the direction of some prosecutors advocating criminal justice reform, New York state has moved to clear records of marijuana convictions based on disproportionate effects on New Yorkers of color.[34] The efforts were led by both district attorneys and defense providers that are traditionally adversaries.[35] Manhattan District Attorney Cy Vance Jr. spoke to the new cooperative posture, describing feeling of honor to work with defense attorneys in order to help ex-offenders by removing unnecessary obstacles to necessary rights like employment, housing, and education.[36]

Reform to combat over-criminalization and its impact on people of color has swept the country and created a visible contrast from the traditional tough on crime prosecutor persona to the form of progressive prosecutor making promises.[37] These promises can be summarized to include less incarceration and more fairness and have increasingly become bi-partisan issues.[38] This prosecutorial approach to justice has been dubbed more lenient than the prior traditional adversarial posture.[39] Prosecutors are rethinking whether and how to bring about charges and what ensuring a fair process really means for the prosecutorial role.[40] These progressive prosecutors

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[31] *See, e.g.*, Azi Paybarah, *About 160,000 People in New York to See Their Marijuana Convictions Disappear*, N.Y. TIMES, Aug. 29, 2019, https://www.nytimes.com/2019/08/28/nyregion/marijuana-records-new-york-city.html.
[32] *See, e.g.*, Bazelon and Krinsky, *There's a Wave of New Prosecutors. And They Mean Justice*.
[33] *See, e.g.*, Paybarah, *About 160,000 People in New York to See Their Marijuana Convictions Disappear*.
[34] *Id.*
[35] Press Release, Manhattan DA, Through Groundbreaking Class Action, Hundreds of New Yorkers Have Old Marijuana Convictions Sealed (Aug. 12, 2019), https://www.manhattanda.org/through-groundbreaking-class-action-hundreds-of-new-yorkers-have-old-marijuana-convictions-sealed/.
[36] *Id.*
[37] *See, e.g.*, Bazelon and Krinsky, *There's a Wave of New Prosecutors. And They Mean Justice*.
[38] *Id.*
[39] *See, e.g.*, Bellin, *The Limits of Prosecutorial Power*,
[40] *See, e.g.*, Bazelon and Krinsky, *There's a Wave of New Prosecutors. And They Mean Justice*.
[40] *Id.*

have not only declined to charge certain low-level offenses, but also declined to ask for bail in many misdemeanor cases.[41]

However, reform can be state by state and even office by office specific. Proponents for community-based prosecution reform propose that reform to reimagine the prosecutorial role could even be neighborhood by neighborhood based to reflect the fundamental democratic process.[42] Neighborhood by neighborhood-based offices would be accountable and transparent to the community they serve with a checks and balances system rooted in democracy.[43]

No matter the form, progressive prosecutors are popping up all over the country as agents of change. It is worth mentioning that although prosecutors are displaying power to create positive change on a case-by-case basis, without the support of other criminal justice actors, this reform may not last.[44] Prosecutors are not the only constitutional actors in the criminal justice system; the legislature writes the laws and judges have the ultimate say over decisions such as bail.[45] When assessing the terrain of reform, it is important to realize that prosecutors operate within the boundaries set by these other actors and therefore have restricted and not absolute power.[46] Prosecutors still play an important part in criminal justice reform, but often on a case-by case basis.[47]

Due to these limitations on the prosecutorial role and opponents against policy change initiated by prosecutors, it is important to analyze the atypical phases where prosecutors have the most power to step out of their traditional roles. Understanding the traditional prosecutorial role in the light of the new era of prosecuting during charging, bail, and expungement will exemplify

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[41] *Id.*
[42] *Id.*
[43] *See generally* STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE.
[44] *See, e.g.*, Bellin, *The Limits of Prosecutorial Power*,
[45] *Id.*
[46] *Id.*
[47] *Id.*

how prosecutors can effect positive change. Further, conceptualizing the theories of guidance for effecting positive change at each of these phases can help show potential outcomes of what the 21st century prosecutor looks like and what the next century's criminal justice system could look like.

II. AYTPICAL PHASES IN PROSECUTION AS BROAD POINTS OF FOCUS

This part narrows in on how prosecutors have become policy makers in addition to traditional role of receiving evidence, bringing charges, bargaining, or going to trial in phases of the criminal justice system that are not wholly adjudicative. These phases were traditionally all adverse to the defense even though the purpose of such phases were not to determine the guilt or innocence of the defendant. There has been a renewed examination of the prosecutorial role in promoting cooperation in the atypical phases of pre-trial hearings, bail, and post-conviction reentry, based on reform movements for decriminalization and prosecutorial enforcement. This part will describe in turn the juxtaposition of the prosecutorial role during the atypical phases of charging, bail, and expungement. The new movement has shined a light on these phases that were typically not given much attention. The consequence of illuminating prosecutorial discretion in these atypical phases is that the role of a prosecutor is in the legal and academic spotlight more than ever. This part will show how progressive prosecutors are becoming both pseudo-adversarial and quasi-legislative through displaying the potential influence prosecutors have in each phase and in the criminal justice system, including reducing incarceration rates and disparate impact on minorities.

A. Deciding to Use the Full Power of Discretion

Many legal scholars argue that prosecutorial discretion in making decisions to charge is the greatest extent of a prosecutor's power.[48] This great power may be heightened by the vast number of laws passed by the legislature, but the prosecutor's politics may hold the most weight to place an individual behind bars.[49] Some legal scholars have even argued that the power of prosecutors to decide who to charge is almost entirely unrestrained and the most important link in the chain of the criminal system process.[50] In the past, prosecutors who were tough on crime may have leaned towards a modern tendency of overcharging.[51] Especially during the 1980's and 1990's, some prosecutors used their power of discretion to increase incarceration rates, but in the current movement, prosecutorial power may cut the other way – decreasing incarceration.[52]

Jumping forward to the 21st century, incarceration rates are still high, but in cities like Philadelphia who held the highest incarceration rate of the ten largest cities in America, diversity and progressivism within the city's residents combat tough on crime policies.[53] At this local level, progressive prosecutors are winning elections.[54] Even former President Barack Obama promoted effecting change on the disparate impact of the criminal justice system through voting for prosecutors who are viewing prosecution in a new light.[55] Many legal scholars and criminal justice actors have expressed concerns about the impact of selective prosecuting on race and

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[48] Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 103, (2013), http://www.columbialawreview.org/ham-sandwich-nation_Reynolds.
[49] *Id.*
[50] *Id.* at 104.
[51] *Id.* at 105.
[52] *Can and Should Judges Demand Prosecutors Provide Written Explanations for Dismissals and Plea Deals?* Sentencing Law and Policy Blog (Aug. 17, 2020), https://sentencing.typepad.com/sentencing_law_and_policy/2020/08/can-and-should-judges-demand-prosecutors-provide-a-written-explanations-for-dismissals-and-plea-deal.html.
[53] *See, e.g.*, Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*.
[54] *Id.*
[55] *Id.*

overcriminalization,[56] but this overwhelming prosecutorial power can be used for progressive efforts as well.

Prosecutors are employing progressive efforts by making macro-legislative style decisions. For District Attorney Larry Krasner in Philadelphia, District Attorney Rachel Rollins in Boston, and other newly elected prosecutors, this means delivering change through decisions to stop prosecuting certain crimes, including driving with a suspended license, drug possession and shoplifting.[57] Internal efforts such as these may deliver more of an impact on systemic issues in the criminal justice system than other external efforts.[58] Further, such internal efforts to use the power of discretion to combat mass incarceration can operate like law.[59] Local prosecutors can announce general policies about charging that create a norm of declining to charge entire categories of cases.[60]

Although the discretion wielded by prosecutors of the '80's and '90's was met with little interference, now reformers who are flipping the coin of discretion are sometimes met with pushback.[61] For example, in Arlington County, Virginia, county judges are questioning prosecutorial discretion wielded in this oppositive way.[62] Progressive prosecutors in areas like Arlington face opposition from not-so-progressive judges who have recently become enthusiastic to review and regulate decisions to charge.[63] Some proponents of the reform movement rally for a transparent review process as well, but typically seek explanations only for decisions to use

[56] Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 127-128 (2008).
[57] *See, e.g.*, Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*.
[58] Miller & Wright, *supra* note 56.
[59] *Id.*
[60] Ronald F. Wright, *Prosecutors and their State and Local Polities*, 110 J. CRIM. L. & CRIMINOLOGY 823 (2020), https://scholarlycommons.law.northwestern.edu/jclc/vol110/iss4/6.
[61] *Can and Should Judges Demand Prosecutors Provide Written Explanations for Dismissals and Plea Deals, supra* note 52.
[62] *Id.*
[63] *Id.*

governmental power to charge and not forgoing such power in deciding not to charge.[64] On either side of the debate, this leads to follow up questions about whether prosecutors were elected to exercise this power and both whether and how prosecutors can reform the criminal justice system if met with such resistance.

Resistance can also come from prosecutors who have fit the traditional mold throughout their career.[65] District Attorney's like Larry Krasner in Philadelphia often turn to promotion of progressive office culture and training, but sometimes the only option is restructuring.[66] Beyond buy-in from justice system actors, support must also come from funding partners in the community to support any discretionary decisions that led to alternative paths of prosecution. Prosecutorial discretion comes with the power to divert defendants from the criminal justice system to treatment, rehabilitation, or community service programs, but financial resources may still hinder the possibility of change.[67]

B. Bailing Out the Bail System

Financial resources are also at the crux of another restructuring effort – bail reform. The traditional use of setting bail essentially equated itself to purchasing pre-trial release.[68] The purpose of bail was, and still is, to assure court appearance for those who were assumed not to be a threat to public safety, but de facto detention occurred too often of those with the inability to afford to post.[69] Historically, bail was set high for most offences for the purpose of flight

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[64] *Id.*
[65] *See, e.g.*, Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*.
[66] *Id.*
[67] *See Generally*, Beth McCann, Courtney Oliva & Ronald Wright, *Prosecution Office Culture and Diversion Programs*, 21 WASH. CRIM. L. REP. 33 (2020), https://e1e6cfc6-b1d4-4e45-b03c 22d8c290e050.filesusr.com/ugd/e009e5_b2b1f668d03449dbada3b1a0538b5a35.
[68] Carol Trilling Linker & Stephen F. Sloan, NEW YORK SENATE RESEARCH SERVICE TASK FORCE ON CRITICAL PROBLEMS, *Accused and Unconvinced: A Brief on Bail Practices* at 4 (1978), https://www.ojp.gov/pdffiles1/Digitization/46590NCJRS.
[69] *Id.*

prevention, community safety and, some would argue, punishment.[70] It is this later traditional component that receives the most attack today. For decades, reformers have criticized the traditional bail system for its inevitable disparate effect on indigent defendants in the face of constitutional guarantees to not be excessive.[71] These guarantees were only supported by a limited range of options for pretrial conditions, with judges often choosing cash bail.[72] Some studies show that failure to post amounts for forty percent of jail populations.[73] However, many bail statutes, like the one in New York, proclaim that the bail system is not unconstitutional under either the equal protection or the due processes clauses of both the United States Constitution and their respective state constitutions.[74] The bail system was traditionally, and in some states still is, governed under the assumption that a right to bail was discretionary as long as it was not excessive, but bail statutes in reforming states like New York, have written in a right to bail in the absence of a sufficient reason for denial.[75] The applicable New York statute has created bail as a matter of right for misdemeanor cases and as a matter of discretion for greater offenses. [76]

The Bail Reform Act has undergone various construction, but reform today essentially exaggerates the 'shall not be excessive' boundary on setting bail. The basic framework is that people should be released under the least restrictive conditions that still assure court appearance and public safety.[77] Even at the height of the tough on crime prosecutorial philosophy, the

[70] *Id.*
[71] *Id.* at 9.
[72] *See, e.g.*, Taryn A. Merkl, *New York's Latest Bail Law Changes Explained*, BRENNAN CENTER FOR JUSTICE, April 16, 2020, https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained.
[73] *Id.*
[74] N.Y. CONST. ART I, § 5.
[75] *Id.*
[76] *Id.*
[77] *See, e.g.*, Merkl, *supra* note 72.

Supreme Court, advocated that detention should be a carefully considered exception to society's norm of liberty.[78]

But until progressive prosecutors have contributed to these least restrictive measures to mean not letting one's wallet be the difference in the likelihood of dentition, detention was not a carefully considered exception. Current bail reform recognizes this systemic issue and includes making more crimes eligible for cash bail, but more important to the movement, expanding pretrial release conditions beyond cash.[79] The movement seeks to attack the depredation of the presumption of innocence of people jailed for failure to pay and the contribution to already staggering and disproportionate prison populations.[80] Research shows that detainment can have drastic consequences, including likelihood of fostering a plea deal even if innocent.[81] Prosecutors' contributions of avoiding asking for bail and taking into account more factors, including a person's legal history and status, are considered high-impact policies against such dramatic results.[82]

Like the charging phase, local prosecutors are taking the wheel to be the policy impactors.[83] Local prosecutors have discretion at the bail setting phase for any case.[84] Progressive offices, like the Philadelphia District Attorney's Office, have erected office wide mandates to not seek bail for an array of charges.[85]

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[78] *United States v. Salerno*, 481 U.S. 739 (1987).
[79] *See, e.g.*, Taryn A. Merkl, *supra* note 72.
[80] *Id.*
[81] *See, e.g.*, Diana Dabruzzo, *New Jersey Set Out to Reform Its Cash Bail System. Now, the Results Are In*, ARNOLD VENTURES, Nov. 14, 2019, https://www.arnoldventures.org/stories/new-jersey-set-out-to-reform-its-cash-bail-system-now-the-results-are-in/.
[82] *See, e.g.*, Stephanie Wykstra, *Bail Reform, Which Could Save Millions of Unconvicted People From Jail, Explained*, VOX, Oct. 27, 2028, https://www.vox.com/future-perfect/2018/10/17/17955306/bail-reform-criminal-justice-inequality.
[83] *Id.*
[84] *Id.*
[85] *Id.*

However, some criminal justice actors find bail reform at odds with the traditional role of the prosecutor to promote public safety. A study done in Cook County, Illinois[86] and the New York Police Department[87] argue that such reform increases crime. Further, court systems worry lack of funding will stop reform before it can even get on its feet.[88] Some judges, like a few in Bronx County, New York, even work around reform by setting a bail amount too high for indigent defendants to pay, appearing to have the goal of defeating the intent of the new legislature and returning to the old ways.[89] In fact, it is ultimately the judge who sets bail with the discretion to override a prosecutor's recommendation.[90]

Despite the opposition, reformers push for change in this pretrial phase due to the vast negative penalties that detention can have on a person.[91] Even detainment for a short period of time pretrial can dramatically impact a person's ability to retain their job, housing, children, and driver's license.[92]

C. Forgiving and Forgetting Past Crimes for Future Rights

If pretrial detention can have such a damaging and lasting impact on a person's rights, being incarcerated because of conviction or taking a plea, can destroy someone's future. Having a criminal record generates collateral consequences that will continue to regulate the lives of ex-offenders long after they have left prison.[93] Being in the system traditionally meant being

[86] *See, e.g.*, Merkl, *supra* note 72.
[87] *See, e.g.*, Tina Moore & Jorge Fitz-Gibbon, *Bail Reform a Significant Reason for Crime Spike, NYPD says*, N.Y. POST, March 5, 2020, https://nypost.com/2020/03/05/bail-reform-a-significant-reason-for-crime-spike-nypd-says/.
[88] *See generally*, Glenn A. Grant, J.A.D., Acting Administrative Director of the Courts, New Jersey Courts, Report to the Governor and the Legislature (2018).
[89] *See, e.g.*, Akash Mehta, *A Broken Bond: How New York Judges Are Getting Around Bail Reform*, THE CITY, Oct. 12, 2020, https://www.thecity.nyc/2020/10/12/21512018/new-york-judges-getting-around-bail-reform-bond.
[90] *See, e.g.*, Bellin, *The Limits of Prosecutorial Power*,
[91] *See, e.g.*, Dabruzzo, *New Jersey Set Out to Reform Its Cash Bail System. Now, the Results Are In*.
[92] *Id.*
[93] *See, e.g.*, Reuben Jonathan Miller, *How Thousands of American Laws Keep People 'Imprisoned' Long After They're Released*, POLITICO, Dec. 30, 2020, https://www.politico.com/news/magazine/2020/12/30/post-prison-laws-reentry-451445.

imprisoned after release by means of restrictions in where a person could work and live, and even how they could receive an education or participate in democracy.[94] Reformers have dubbed ex-offenders as stuck in a state of quasi-citizenship materialized by legislative agendas.[95] After being held on the inside, ex-offenders enter the outside world to face a similar alienation, and with disparate proportions in prison populations, people of color inevitably face disparate impact when re-entering society as well.[96] However, expungement rests on the policy of allowing an ex-offender to move on from such identity and create a new future without grave restrictions on their rights.[97]

There are similarities in the motivations behind the law of expungement and the goals of reformers, such that both have roots in sympathetic policymakers,[98] but expungement as a remedy was welcomed on a smaller and more boundary-filled scale than reformers hope for today. In addition, expungement and sealing efforts were traditionally paid little attention in terms of actual results[99] unlike the goal of reformers who now wish to evaluate its benefits. States have always had varied available expungement remedies and continue to have different expungement and sealing laws with remaining procedural hurdles.[100] In the legal world, expungement is characterized as a forgetting form of relief and sealing a record is characterized a forgiving form of relief.[101] Jurisdictions make separate choices about which route to utilize. Traditionally,

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[94] *Id.*
[95] *Id.*
[96] *See generally*, ALEXANDER, *supra* ntoe 5.
[97] *State v. N.W.*, 747 A.2d 819, 832 (N.J. Super. Ct. App. Div. 2000) (discussing the purpose of expungement is to create a second chance for an ex-offender).
[98] *See* Bernard Kogon & Donald L. Loughery Jr., *Sealing and Expungement of Criminal Records — The Big Lie*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 378, 378 (1970).
[99] *Id.*
[100] *See generally*, Brain M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 FORDHAM L. R. J. 6, 2821-2871, 2842 (2018) (detailing the historical and current layout of expungement laws).
[101] *See, e.g.*, CAL. PENAL CODE §4852.01 (West 2018).

petitioners for expunging or sealing their records needed to overcome a presumption of retaining criminal records available for public record and often boundless paperwork.[102]

Reformers are pushing back against the hurdles before ex-offenders, both upon reentry and in efforts to petition for expungement. The movement, and even the so-called progressive prosecutor, encourages measures to expand the number and type of convictions eligible for expungement,[103] reduce waiting time to be able to petition for expungement,[104] and lowering the number of procedural requirements that need to be met to satisfy the burden for petitioning.[105] So-called clean slate states have even considered automatic expungement or sealing of certain types of lessor offenses.[106] Michigan was recently the sixth state to offer this automatic relief and also expanded petition-based relief for most misdemeanors and some felonies.[107] But even clean slate states, the remaining procedural hurdles continue to grant prosecutors mechanisms by which to either stall or hasten the process.[108]

Prosecutors are often the first point of review of a petition for expungement, and in some states, are the final point of objection.[109] In most states, although judges are typically the final authority, prosecutors are themselves judges on the merits of a petition.[110] Further, state statutes like New York's § 216 leave room for prosecutors to act in this quasi-judicial way, including that a good cause showing can be considered under the interests of the public and the parties, which

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[102] *See e.g.*, Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota* –State v. Schultz, 31 WM. MITCHELL L. REV. 1331, 1344 (2005).
[103] *See generally*, Restoration of Rights Project, NAT'L ASS,N' CRIM. DEF. LAW., https://perma.cc/K85S-PGLD.
[104] *See generally*, RAM SUBRAMANIAN ET. AL., VER INST. FOR JUSTICE, RELIEF IN SIGHT?: STATES RETHINK THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, 2009-2014 (2014), https://www.vera.org/publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014.
[105] *Id.* at 17, 21
[106] *See generally*, Murray, *supra* note 100.
[107] *See e.g.*, *Michigan to Be Sixth State with Automatic Conviction Relief*, COLLATERAL CONSEQUENCES RESOURCE CENTER (2020).
[108] *Id.*
[109] *Id.* at 2846.
[110] *Id.* at 2847.

impliedly includes the State.[111] The movement today is against using these considerations and procedural hurdles to stall the process. Instead, progressive prosecutors go further than simply not objecting to petitions for expungement but promote affirmative actions to help hasten the process for certain categories of crime. These affirmative actions can take the form of meeting with employers to encourage hiring of people with past criminal records, like District Attorney Ben David in Wilmington, North Carolina. DA David explained these active steps as a method to stop prosecuting ex-offenders to help with reentry.[112]

III. GUIDING PRINCIPLES FOR THE NEW PROSECUTORIAL ROLE

Part I established the rise of a new era of prosecution. Part II explained how prosecutors are in positions that may demand more scrutiny in their role. With these concepts discussed in the above parts, now it is important to explore the ways to conceive of a prosecutor's role in atypical phases. This part is an exploration of the theories of prosecution among legal scholars and the potential guiding legal and ethical principles for prosecutors in the face of progressive reform in phases that were mainly governed by tradition.

A. Theories of Prosecution: Justice Doers or Legal Servants

There is no generally accepted theory of the prosecutorial role,[113] but some legal scholars conceive prosecutors as agents of the populace. Naturally, the lack of normative theory for the prosecutorial role has implications in how prosecutors may act during charging, bail, and expungement decisions. Two leading theories include the "do justice" model and the "servant of the law" theory of prosecutorial behavior.[114] Yet, there is disconcertion among constitutional

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[111] N.Y. UNIF RULES, SEALING CT RECORDS § 216.1.
[112] *See, e.g.*, Eli Hager, *Forgiving vs. Forgetting: For Offenders Seeking a New Life, a New Redemption Tool*, THE MARSHALL PROJECT, March 17, 2015, https://www.themarshallproject.org/2015/03/17/forgiving-vs-forgetting.
[113] Jeffrey Bellin, *Theories of Prosecution*, 108 CALIFORNIA L. REV. 1203 (2019), https://ssrn.com/abstract=3347939.
[114] *Id*.

actors about what each of these theories mean.[115] Judges may use the "do justice" slogan to criticize prosecutorial failure, while legislatures may point to the idea as prosecutorial duty, and prosecutors themselves may practice the concept as a rationale for power wielding.[116]

The "do justice" model is malleable to how prosecutors wish to wield their power irrespective of whether their goal is to be traditionally tough on crime or progressively reform. In the traditional sense, prosecutors can claim they are doing justice by being more severe in the phases of charging, bail, and expungement. On the other hand, prosecutors like those in Philadelphia seek justice for society by being more lenient in those phases.[117] Prosecutors on either side of the reform movement embrace the "do justice" model, but the lack of uniformity in conceptualizing the prosecutorial role undermines any uniformity in what justice means for this model.[118] Conceptualizing prosecutors as justice doers only undermines any clear guidance for the prosecutorial role and generates further ambiguity on how prosecutors should act in any phase.[119] Even when the "do justice" model is embraced, it does not legally govern the prosecutorial role. Prosecutors are only legally bound to comply with applicable rules of procedure and case precedent.[120]

Legal scholar Jeffery Bellin argues that shifting from this "do justice" model to the "servant of the law" paradigm would keep justice related concerns at the forefront but with a more consistency to promote clear guidance.[121] Prosecutors would no longer mechanically enforce criminal statutes but weigh constitutional significances such as due process and procedural

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[115] *Id.* at 1217.
[116] *Id.*
[117] PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, NEW POLICIES ANNOUNCED FEBRUARY, (2018) https://assets.documentcloud.org/documents/4412996/Krasner-Memo-March-13-2018.
[118] Bellin, *supra* note 113.
[119] Id. at 1242.
[120] See, e.g., *Carter v. State*, 738 N.E.2d 665, 672 (Ind. 2000) (discussing prosecutor's obligation to follow local discovery rules).
[121] Bellin, *supra* note 113.

protections like discovery requirements.[122] Bellin argues this shift would lesson tension between the prosecutorial role and the progressive prosecutor movement.[123] His argument focuses on how an orientation from this paradigm should highlight the underlying mission of the criminal justice system rather than appearing to override the actions of other constitutional actors.[124] Progressive prosecutors could subvert backlash as zealous servants to the law and current existing legal rules, finding a particular shield in defendant-protective rules that support cooperation.[125] By following the lead of the applicable background law, prosecutors can be less adversarial and more lenient when the law allows in the phases of charging, bail and expungement.[126] When the law provides for prosecutorial choices without guidance, the default would be leniency, but when deviation from the default is necessary, there is likely to be transparency and consistency.[127]

However, the "servant of the law" theory narrows the role of a prosecutor, may still receive opposition as a different means to the same end, and has limited legal guidance to draw from.[128] There are still issues with potential criticism no matter being grounded in such limited background law and opposers can still argue that certain laws may run counter to such progressive reform. At the heart of this debate is the narrowing of the prosecutorial function such that other actors in the criminal justice system hold similar responsibility to ensure justice.[129] Arguably, a narrowing of the scope of a prosecutor's role may take some of their power away necessary to effect positive change in a way counter to the objective of the reform movement. Further, with limited legal guidance, deviation from default would likely be the norm and not the exception.

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[122] *Id.* at 1214.
[123] *Id.* at 1248.
[124] *Id.* at 1251.
[125] *Id.* at 1252-1253.
[126] *Id.* at 1213.
[127] *Id.* at 1215.
[128] *Id.* at 1252-1253.
[129] *Id.* at 1213.

B. Limited Legal Principles and the Separation of Powers Limitation

There is little governing law for a prosecutor's role particularly in the phases of charging, bail, and expungement. Opposers to the reform movement expect prosecutors to always have their role fully grounded in the enforcement and not in the creation of the law. But the new era prosecutors rest their decisions to decarcerate on legal policy grounds about their role in enforcing justice.[130] At the center of the legal argument against reform stands the separation of powers doctrine. Critics against prosecutorial discretion used in this way say prosecutors are responsible for upholding the law, but progressive prosecution is undermining it.[131] For instance, in opposition to prosecutors' decisions not to charge, critics argue for a prosecutor's traditional role and against crossing the line between executive and legislative powers.[132] Further, in making blanket decisions against charging, for other bail conditions, or for expungement, prosecutors are exercising a refusal of enforcement that effectively rewrites law.[133]

Some cases, like *Ayala v. Scott*, show how perceived prosecutorial overstepping into another constitutional actor's realm have reached state court.[134] Aramis Ayala, an elected Florida prosecutor met criticism for her decisions to not pursue the death penalty for any charge.[135] In Florida, Governor Rick Scott attempted to take back his power by using his constitutional authority to reassign criminal cases from Ayala's office under the legal requirement of good reason – that reason was rooted in the separation of powers.[136] Governor Scott claimed that separation of powers

[130] *See e.g.*, Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 3. 603 (2020), https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=1393&context=olr.
[131] *Id.*
[132] Wright, *supra* note 60.
[133] *See e.g.*, Sawyer, *supra* note 130.
[134] 224 So. 3d 755 (Fla. 2017).
[135] Frances Robles, *Lock 'Em Up? Prosecutors Who Say 'Not So Fast' Face a Backlash*, N.Y. TIMES, March 30, 2017, https://www.nytimes.com/2017/03/30/us/aramis-ayala-prosecutors-death-penalty.html.
[136] *Ayala*, 224 So. 3d at 757 (referencing relevant state statutes).

meant that he had a good reason to reassign cases from Ayala's office is Ayala was exercising legislative rather than executive power.[137]

Some Supreme Court rulings have touched on prosecutorial law and has made some pronouncements of how they conceive a prosecutor's role as a matter of law. The Supreme Court holds prosecutors as representatives of the sovereign with an obligation to govern impartially and an interest in justice above winning at all costs.[138] Further, the Court found prosecutors "may strike hard blows, [but are] not at liberty to strike foul ones.[139] The problem is that different constitutional actors of different jurisdictions have different ideas of what foul blows means. However, there are some cases that can lead to inferences that prosecutors must not always be adversarial. For example, prosecutors must not suppress evidence favorable to a defendant, and instead must turn such evidence over to presumedly help the defense.[140]

C. Model Rules Against Mass Incarceration

Beyond legal principles, ethical guidance begs to outweigh any quasi-legislative concerns of a prosecutor's action with systemic issues in the criminal justice system. However, the Model Rules and their adaptions by the states are lacking as a balancing mechanism of what a prosecutor should do. In the face of this reform, there is a concern of whether Model Rule 3.8 needs to be updated. Currently, Model Rule 3.8 only uniformly provides guidance on the phase of charging such that prosecutors shall refrain from charging without being supporting by probable cause.[141] This leaves a vast amount of room for discretion in charging. Further, without any mention of bail or expungement in Model Rule 3.8, prosecutors have almost complete ethical discretion on their

[137] *Id*.
[138] *Berger v. United States*, 295 U.S. 78, 79 (1935).
[139] *Id*.
[140] *Brady v. Maryland*, 373 U.S. 83, 84 (1963).
[141] MODEL RULES OF PROF'L CONDUCT R. 3.8 (2020).

role in those phases. Thus, an update to the model rules about the prosecutorial role in non-adjudicative phases could alleviate concerns about limited uniform guidance in local prosecutor reform. Some legal scholars argue for consistency of process in guiding prosecutor's case management decisions at the charging, bail, and expungement phases to achieve reformist goals against racial injustice and mass incarceration.[142]

On the other hand, the lack of binding principles leaves room for creativity, but there is still little ethical clarity on how a prosecutor can use their roles in non-adjudicative phases. Office culture with policy driven motives is used to challenge the lack of legal guidance with a movement from within. But these movements within local prosecutor offices lack uniformity as well. Still, there are arguments of whether diversity and creativity should triumph over uniformity and overall clarity because what makes sense in one jurisdiction may not make sense in another. Further, some legal scholars argue that reform should be based on a democratic process of community or neighborhood input.[143] For example, in exploring declinations to charge through use of prosecutorial discretion, legal scholars have argued that loyalties to local votes should influence such office-wide mandates.[144] This duty to local polities can be supported under justifications of limited resources as well.[145]

In every jurisdiction and for each atypical phase, moral principles have justified progressive reform against systemic issues both underlying and created by mass incarceration. First, there are concerns of whether prison has the desired effect on an individual or a negative cyclical effect.[146] Second, even if prison may have desired effects on some, every offender may

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[142] Kay Levine, *Should Consistency Be Part of the Reform Prosecutor's Playbook?* 1 HASTINGS J. CRIME & PUNISH. 169 (2020), Emory Legal Studies Research Paper 20-9, https://ssrn.com/abstract=3601928.
[143] *See generally* STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE.
[144] Wright, *supra* note 60.
[145] *Id*.
[146] *See, e.g.*, Stephanos Bibas, *The Truth about Mass Incarceration*, NAT. REV. (Sept. 16, 2015). https://www.nationalreview.com/2015/09/mass-incarceration-prison-reform/

not deserve or rehabilitate from the full extent of the criminal justice process.[147] Third, beyond arguments of desert, prison will almost certainly have a negative impact on ex-inmates. Being incarcerated not only cuts prisoners off from their loved ones and their place in society, upon release ex-offenders have a hard reentering society, with limited rights in terms of jobs, housing, education, and voting.[148]

IV. PRESCRIPTION FOR PROSECUTOR ACTION IN ATYPICAL PHASES

After an exploration of the potential guiding legal and ethical principles for prosecutors choosing progressive reform in phases that were mainly governed by tradition, it is necessary to canvas the application of these different theories behind conceiving a prosecutor's role today. There was traditionally a way a prosecutor should act, but now there is a menu of options for how a prosecutor can act in the atypical phases of charging, bail, and expungement. This part is not necessarily creating a solution to the problem faced by the movement, but instead presents all facets of the problem. Prosecutors as democratic representatives may mean different things in different jurisdictions and for different phases. Therefore, this part will create a map of the effects of various theories and the lack of formal legal or ethical guidance on the different atypical phases.

A. Wielding Discretion under Discretionary Theories

Prosecutors hold some of the greatest power in the criminal justice system through discretion in making decisions to charge.[149] This great power may be almost unrestrained,[150] and one of the key phases prosecutors can use to either be traditionally tough on crime by overcharging,[151] or progressively combat over criminalization through decreasing incarceration.[152]

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[147] *Id.*
[148] *Id.*
[149] Reynolds, *supra* note 48 at 103.
[150] *Id.* at 104.
[151] *Id.* at 105.
[152] *Can and Should Judges Demand Prosecutors Provide Written Explanations for Dismissals and Plea Deals?*, *supra* note 52.

Progressive prosecutors argue overcriminalization continues to be a major problem in the United States which has retrospective concerns about selective prosecuting on mass incarceration and disparate impact on race,[153] but prosecutors can also use this power to combat these criminal justice issues.

The "do justice" model offers a means for prosecutors to wield their power with the goal of progressive form. Prosecutors can support their blanket decisions not to charge on the grounds of doing justice for society. However, there are few legal factors binding prosecutors, and only one ethical suggestion in Model Rule 3.8, which only requires prosecutors to refrain from charging without being supporting by probable cause.[154] This leaves room for backlash by way of separation of powers augments. In opposition to prosecutors' decisions not to charge, critics argue the line between executive and legislative powers is crossed.[155]

The "servant of the law" theory is equally as unclear in terms of guidance. Prosecutors can use this theory to support decisions not to charge, or to charge more leniently, [156] by weighing the constitutional significances as due process and defendant-protective procedural protections.[157] Scholars suggest that when there is no background law on how to act, prosecutors should act with leniency as a default,[158] but in decisions to charge, the background legal guidance is sparse. Like the "do justice" model, the ambiguity in the "servant of the law" theory leaves open room for separation of powers critiques. Prosecutors only have limited case precedent to combat such opposers. [159]

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[153] Miller & Wright, *supra* note 56.
[154] MODEL RULES OF PROF'L CONDUCT R. 3.8 (2020).
[155] Wright, *supra* note 60.
[156] Bellin, *supra* note 113.
[157] *Id.* at 1214.
[158] Bellin, *supra* note 113.
[159] See, e.g., *Carter*, 738 N.E.2d at 672.

Prosecutors like those in Philadelphia[160] and Boston[161] seem to apply the justice doers of society concept through stopping the prosecution of crimes that tend to do more harm when punishing the individual than to society when committed. These crimes include driving with a suspended license, drug possession and shoplifting.[162] Such prosecutors employ a progressive "do justice" model to impact systemic issues in the criminal justice system by way of internal efforts and office culture.[163] But these internal efforts can operate like law,[164] because local prosecutors can mandate office-wide policies.[165]

Prosecutors acting in this quasi-legislative way face an uphill battle against not-so-progressive judges who have recently become enthusiastic to review and regulate decisions to charge.[166] Legislatures may also move for such discretion to have a transparent review process.[167] Beyond outside constitutional actors, resistance can also come from within.[168] In Philadelphia, being a progressive justice doer office looks like an office restructuring.[169] Progressive reformists who remain after restructuring may fight against opposition with community support and the idea that doing justice does not necessarily mean being severe in charging or bringing charges at all. It is possible that data on community impact from leniency in charging may provide further support. For now, neither side of the argument seems to have an outright winning argument in terms of legal and ethical theory.

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[160] *See supra* note 117.
[161] *See, e.g.*, Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*.
[162] *Id.*
[163] Miller & Wright, *supra* note 56.
[164] *Id.*
[165] Wright, *supra* note 60.
[166] *See supra* note 52.
[167] *Id.*
[168] *See, e.g.*, Gonnerman, *Larry Krasner's Campaign to End Mass Incarceration*.
[169] *Id.*

B. Out Theories on Bail Reform

Traditionally, bail was another phase where prosecutors could wield power to increase detention since posting bail was essentially the same as purchasing pre-trial release.[170] The purpose of bail was always to assure court appearances and public safety, but this indirectly meant detention simply due to inability to pay.[171] Historically, bail was sometimes set high as a means of punishment, but no matter the rationale, only led to the detention to indigent defendants.[172] Further, although constitutional guarantees against excessiveness exist, [173] traditionally the bail system meant disparate effects on these indigent defendants with only a limited range pretrial condition options.[174]

Under a "servant of the law theory," prosecutors can rely on such constitutional guarantees in making decisions surrounding bail. Unlike the phase of charging, each state has the background law of a bail statute. However, many bail statutes, including New York's, find the system not unconstitutional under either the equal protection or the due processes clauses of both the United States Constitution and their respective state constitutions.[175] The right to bail is governed by a discretionary standard when not excessive, but progressive bail reformists like those in New York, have written in a right to bail when lacking sufficient reason for denial.[176] The New York statute created the right to bail for misdemeanor cases and promotes discretion for greater offenses.[177]

Progressive reformists who consider themselves either justice doers or servants of the law, exaggerate the anti-excessive boundary to rework bail. Arguably, prosecutors promoting bail

[170] Linker & Sloan, *Accused and Unconvinced: A Brief on Bail Practices* at 4.
[171] *Id.*
[172] *Id.*
[173] *Id.* at 9.
[174] *See, e.g.*, Merkl, *New York's Latest Bail Law Changes Explained*.
[175] N.Y. CONST. ART I, § 5.
[176] *Id.*
[177] *Id.*

reform could consider themselves doing justice for society or being supported under a "servant of the law" theory in the anti-excessive legal background to push for defendants to be released under the least restrictive conditions that assure court appearance and public safety.[178]

In making these blanket decisions for least restrictive bail conditions, prosecutors are exercising a refusal of enforcement that effectively rewrites law. [179] Like making blanket decisions for charging, progressive prosecutors are essentially policy impactors,[180] and progressive offices like Philadelphia's and New York's, are using office wide mandates to not seek bail for lower-level offenses.[181] Although there is potential for similar separation of powers arguments to that of office wide mandates in decisions to charge, bail reformists face backlash that they are not necessarily doing justice. The New York Police Department argues that such reform increases crime. [182] Even if later studies undermine this opposing argument, prosecutors who are basing their bail reform power in the legal guidance provided in bail statutes can still be undermined by other constitutional actors. Some judges, like a few in the Bronx, New York use their power as the ultimate decisionmaker in bail setting[183] to override the prosecutor's discretion and combat bail reform by reverting to high monetary amounts.[184] For now, the success of bail reform may depend more on how judges wield their power than how prosecutors are conceived.

C. Theories to Forgive and Forget

Having a criminal record regulates the lives of ex-offenders long after they have left prison.[185] Traditionally, being imprisoned for any portion of time meant facing imprisonment

[178] Merkl, *New York's Latest Bail Law Changes Explained*.
[179] *See e.g.*, Sawyer, *supra* note 130.
[180] *Id.*
[181] *Id.*
[182] *See, e.g.*, Moore & Fitz-Gibbon, *Bail Reform a Significant Reason for Crime Spike, NYPD says.*
[183] *See, e.g.*, Bellin, *The Limits of Prosecutorial Power*,
[184] *See, e.g.*, Mehta, *A Broken Bond: How New York Judges Are Getting Around Bail Reform*.
[185] *See, e.g.*, Miller, *How Thousands of American Laws Keep People 'Imprisoned' Long After They're Released*.

upon reentry due to restrictions of rights relevant to housing, work, and education.[186] Ex-offenders face further alienation, and with disparate proportions inside prison , people of color inevitably face disparate impact on the outside well.[187] Expungement's goal is to allow ex-offenders to move past prison and have a new future.[188]

Expungement reformists have the benefit under a "do justice" model that motivations behind the idea of expungement and the recent progressive goals have roots in sympathetic policymakers.[189] States are varied in expungement remedies, procedural hurdles, and restrictions governing reentry.[190] Under either a "do justice" model of not continuing to imprison those who have been released or a "servant of the law" theory rooted in the law of expungement itself, reformers desire to reduce such procedural hurdles and restrictions upon reentry. Their efforts include expanding the number and type of convictions eligible for expungement,[191] reducing waiting time to be able to petition for expungement,[192] and lowering the number of procedural requirements that need to be met to satisfy the burden for petitioning.[193] Some states go as far as a clean slate through automatic expungement of lessor offenses.[194] States also vary on whether prosecutors are the first or final point of review of a petition for expungement.[195] In states where prosecutors are judges on the merits of a petition, they bypass judicial authority to override them unlike in the bail context.[196]

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[186] *Id.*
[187] *See generally*, ALEXANDER, *supra* note 5.
[188] *N.W.*, 747 A.2d at 832.
[189] *See* Kogon & Loughery Jr., *supra* note 98.
[190] *See generally*, Murray, *supra* note 100.
[191] *See generally*, Restoration of Rights Project, *supra* note 103.
[192] *See generally*, SUBRAMANIAN, *supra* note 104.
[193] *Id.* at 17, 21
[194] *See generally*, Murray, *supra* note 100 at 2845.
[195] *Id.* at 2846.
[196] *Id.* at 2847.

New York is an example where prosecutors have support to act in this quasi-judicial way under a "servant of the law" theory due to the law on expungement. Specifically, prosecutors can produce a good cause showing under the interests of the public and the parties.[197] Arguably, this good cause showing itself may resemble the "do justice" model on behalf of society. To progressive prosecutors, doing justice at the expungement phase means more than simply not objecting to petitions, but taking affirmative actions as agents of change. Such actions include meeting with employers to encourage hiring of people with past criminal records.[198] Prosecutors who are acting as agents of change reference support beyond the limited legal guidance and theories that conceive their role, but in the ethical considerations of fostering a better criminal justice system.

CONCLUSION

Twenty-first century prosecutors are forced to make blanket decisions in phases of the criminal justice system where guilt is not the factual issue before the court. Although bargaining may be present, the phases of charging, bail, and expungement do not focus on adjudication. Traditionally, a prosecutor's role was to be tough on crime and adversarial.[199] Today, that tradition may not make sense. The progressive prosecuting reform movement pushes for a more cooperative approach in the atypical phases of the criminal justice system.[200] Some offices promote this culture in office-wide mandates to deny charging of certain crimes, promote bail reform, and represent class actions of expungement. Offices like these have brought about a rise in prosecutors as primary actors for positive change in the face of systemic issues in the criminal justice system.

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[197] N.Y. UNIF RULES, SEALING CT. RECORDS § 216.1.
[198] *See, e.g.*, Hager, *Forgiving vs. Forgetting: For Offenders Seeking a New Life, a New Redemption Tool*.
[199] *See generally*, Shilbert, *supra* note 2.
[200] *See, e.g.*, Bellin, *The Limits of Prosecutorial Power*.

Prosecutors are prime players in determining who to charge, who to release, and who has their record expunged. Such phases have become broad points of focus in decriminalization. Our nation traditionally continued to increase incarceration rates even as the leader in percentage of imprisoned people in the world,[201] which directly continued to increase the disparate ratio of minorities in the system.[202] This new prosecutorial approach can bring prosecutors to the forefront of combating the issues of mass incarceration and criminalization. However, this new approach is arguably quasi-legislative and has been viewed as undermining priorities of other constitutional actors.

There is little governing law for the prosecutorial role in the atypical phases of charging, bail and expungement, but constitutional actors who oppose the movement have made separation of powers arguments against sweeping progressive reform. Thus, beyond whether prosecutors should use their power to generate criminal justice reform, this paper asks the question of what legal and ethical principles should provide guidance. Academics argue over guidance based on Supreme Court precedent, the separation of powers doctrine, the Model Rules, line prosecution norms and internal office culture. Arguments extend to the concepts of uniformity versus diversity and whether communities should have more say over the actions of their elected prosecutors.

Comparing the traditional prosecutorial role against progressive prosecution in the phases of charging, bail, and expungement, makes clear that prosecutors have power to effect change in a criminal justice system faced with mass incarceration and disparate impact. What is unclear is what legal and ethical principles should govern prosecutors as they wield this power. Theories of prosecution may work differently for different phases and in different locations. Ultimately, it will likely continue fall to the individual offices to determine their own conception of the prosecutor's

[201] *See generally*, Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate Than Any Other Country*.
[202] *See generally*, ALEXANDER, *supra* note 5.

role during the atypical phases of charging, bail, and expungement and the impact different conceptions at these phases may have on criminal justice reform.