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Progressive Prosecution

Sherry Boston
Stone Mountain Judicial Circuit

Rachel Foran
Community Justice Exchange

Deborah Gonzalez
District Attorney, Western Judicial Circuit

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Fourth Panel – Progressive Prosecution

Sherry Boston | District Attorney, Stone Mountain Judicial Circuit
Rachel Foran | Organizing Director, Community Justice Exchange
Deborah Gonzalez | District Attorney, Western Judicial Circuit

Of all the stakeholders in the criminal justice system, the judge, the defense attorney, jury and prosecutors, prosecutors are often seen as the most powerful stakeholder in the room because they decide which charges are pursued, or whether to pursue charges at all.¹ In recent years, we have seen the election of prosecutors who have taken a different approach and didn't fit into the traditional view of the prosecutorial function. These prosecutors are sometimes labeled a “progressive prosecutor.”² To start our discussion:

Q: How would you define a progressive prosecutor, what do you think of that label?

DA Boston:³ I really don't like the term progressive prosecutor, and I always start off by saying that, because I think it automatically labels and places someone in a specific box because the question that naturally follows is then what does it mean to be progressive. And I think everyone has a different definition because what does it mean to be conservative? I think we have really done a disservice to the work we are trying to do by labeling it with this idea of *progressive* because that label immediately catches people off guard. Then the discussion that follows is not about the underlying issues with our criminal justice system. I think it is more important to focus on what issues a prosecutor that is interested in reforming the criminal justice system should have on their checklist. Basically, that's how I look at it as a prosecutor that's interested in understanding how the criminal justice system has impacted, perhaps negatively, parts of our community. Then are you interested in being a part of transforming that? And are you interested in looking at your role as being bigger than just processing the cases that come across?

Q: Can you tell us a little bit about your work in that space and how you've approached those things differently in your journey in Georgia?

DA Boston: I pulled out my laptop because I always like to start with a mission. We have a mission statement and a vision and that really is the backbone of all the work that we do.⁴ And so every time I speak not only externally, but internally, it's important for us to share the mission. The mission of the DA's office is to safeguard our community, to vigorously and fairly prosecute felony offenses occurring within the Stone Mountain Judicial Circuit.⁵ We seek to accomplish this goal by preserving the dignity and best interest of our victims while using smart prosecution strategies that balance offender accountability with

¹ ANGELA J. DAVIS, *THE AMERICAN PROSECUTOR POWER, DISCRETION AND MISCONDUCT* 25-26, (reprt., Oxford Univ. Press 2009).

² See, e.g., Avinindar Singh & Sajid A. Kahn, *A Public Defender Definition of Progressive Prosecution*, 16 STAN. J. OF CIV. RTS. & CIV. LIBERTIES 475 (2021) (elaborating on what the term progressive prosecutor means); Allison Young, *The Facts on Progressive Prosecutors*, CENTER FOR AMERICAN PROGRESS, <https://www.americanprogress.org/article/progressive-prosecutors-reforming-criminal-justice/> (last visited Dec. 29, 2022).

³ *Sherry Boston's Bio*, OFF. OF THE DEKALB CNTY. DIST. ATT'Y, https://www.dekalbda.org/about_us/sherry_boston_s_bio/index.php (last visited Dec. 29, 2022).

⁴ Sherry Boston, *Our Mission*, DEKALB CNTY. DIST. ATT'Y'S OFF., https://www.dekalbda.org/about_us/our_mission/index.php (last visited Dec. 30, 2022).

⁵ *Id.*

prevention intervention and restorative justice. We believe in the power of engagement and building relationships with community partners for the betterment of everyone. And our vision is that we endeavor to restore faith in the criminal justice system and disrupt cycles of violence, trauma, and recidivism in our pursuit of public safety and justice and every kind of reform. Everything that we do in our office is through the lens of our vision, and we look to see if we are meeting those goals and objectives for our victims, for our community and for the people that we are prosecuting.

Q: You also ran on a platform of changing the way prosecution looked in the Western Judicial Circuit, so could you tell us about some of those goals?⁶

DA Gonzales⁷: Well, first of all, let me say I do believe that there are progressive prosecutors, and I proudly identify as a progressive prosecutor. And a progressive prosecutor is someone who will step out there and say “this is how I will run my office.” And I will run it because the power of discretion is one of the main causes for the mass incarceration and the systemic racism that we have in our system.⁸ And to me, a progressive prosecutor goes with intentionality and consciousness, with every decision that they may have, how that decision and its consequences, serve justice. I was very transparent when I ran my campaign, and I was transparent on day one when I entered into service with my day one memo.⁹ And I continue to be, as we even revised our Year Two memo.¹⁰ To me, progressive means that we acknowledge the harm that we in this profession created for our community, and that we make a commitment to make things better and to heal our atmosphere.

Q: First, can you give us a little bit of background about the abolitionist movement for those who may not be familiar and then, from an abolitionist perspective, can you tell us whether or not prosecutors can actually contribute to change within the criminal justice system?

Rachel Foran:¹¹ Well, as you know I’m an organizer, not a lawyer, but I work with a lot of lawyers. I think it is a good idea to start with defining some terms, not that folks here don't know what prison industrial complex abolition is but just so that we're starting from similar places. So prison industrial complex abolition is a political vision.¹² It’s a restructured society without prisons, policing, prosecution or any form of surveillance or supervision,

⁶ Deborah Gonzalez, ATHENS CLARKE CNTY. DIST. ATTY’S OFF., <https://deborahforda.com/>.

⁷ Interview with Deborah Gonzalez, District Attorney, ATHENS CLARKE CNTY., (Feb. 18, 2022).

⁸ See, e.g., *The Power of Prosecutors*, AM. C.L. UNION, <https://www.aclu.org/issues/smart-justice/prosecutorial-reform/power-prosecutors> (last visited Nov. 10, 2022) (“Prosecutors have the power to flood jails and prisons, ruin lives, and deepen racial disparities with the stroke of a pen.”).

⁹ District Attorney Deborah Gonzalez, *Memorandum* (Jan. 1, 2021), https://drive.google.com/file/d/1SHwcNeKMZmsCMJkddUvC7nu6ycS_GG9l/view?usp=sharing.

¹⁰ See Institute for Innovation in Prosecution at John Jay College of Criminal Justice, *District Attorney Deborah Gonzalez on Progressive Prosecution*, YOUTUBE, <https://www.youtube.com/watch?v=17o65Ptmsnw> (last visited Dec. 28, 2022) (discussing how she has upheld the label of progressive prosecutor since her first year in office and the importance in doing so in order to “get things done the way that we need them done”).

¹¹ Rachel Foran, Organizing Director, Community Justice Exchange. Masters in Theological Studies, Religion/Religious Studies, Religion, Ethics and Politics, Harvard Divinity School.

¹² *What is the PIC? What is Abolition?*, CRITICAL RESISTANCE, <https://criticalresistance.org/mission-vision/not-so-common-language/> (last visited Dec. 29, 2022).

where people have what they need to be safe and live well.¹³ And so, in this way, you know abolition is both about dismantling oppressive structures and it's about building a new world.¹⁴ There's this quote I love from Fred Moten [and Stefano Harney] who say that the object of abolition is “not so much the abolition of prisons, but the abolition of a society that could have prisons, that could have slavery, that could have the wage. . . .”¹⁵ So it's not really about the elimination of anything and more about the founding of a new society, and that's the vision that guides abolitionists work. But within that vision it's also a very practical organizing strategy, because if you understand the criminal legal system, not as broken but as designed to be a tool of white supremacy, racial capitalism, settler colonialism, if, and if you understand that, it is possible to live in a world where there [are] no prisons. Then it changes the way that you think about how to make change right now. You think about how do you shrink the size scope resources of the criminal punishment system? How do you make it smaller on the road to making it obsolete and so that's how abolition also differentiates itself from reform?

Reformist strategies think about the criminal legal system as broken but fixable, and this is where I think of the progressive prosecutor.¹⁶ I also do not love that term, but maybe for different reasons. But people electing prosecutors who are committed to reforms is a reformer strategy in the sense that it wants to change the person who's in power with the hope that they use their power towards reformist ends, but it doesn't want to upend the power structure.¹⁷ Whereas, an abolitionist perspective on prosecution sees prosecution as a systemic component of the criminal punishment system and therefore as something that we need to work to make obsolete through systemic and structural changes.¹⁸ New York City elected a so called progressive prosecutor, and he said he would not prosecute survivors of domestic violence, and I really hope that that's what happens.¹⁹ These are changes on an individual level that are important for people's lives, and I don't want to deny that. But I think when we think about an abolitionist perspective, to change the current system, that's

¹³ See *Abolitionist Principles & Campaign Strategies for Prosecutor Organizing*, COMMUNITY JUSTICE EXCHANGE, (Jan. 22, 2020), <https://www.communityjusticeexchange.org/en/abolitionist-principles>. See also *What is the PIC? What is Abolition?* CRITICAL RESISTANCE <https://criticalresistance.org/mission-vision/not-so-common-language/> (defining the prison industrial complex and abolition) (last visited Dec. 29, 2022).

¹⁴ See *What is the PIC? What is Abolition?*, *supra* note 14.

¹⁵ STEFANO HARNEY & FRED MOTEN, *THE UNDERCOMMONS: FUGITIVE PLANNING & BLACK STUDY* 42 (Erik Empson ed., Minor Compositions 2013) (Moten is a scholar and a poet who explores black studies, performance studies, poetry, and critical theory in his work); see also *Fred Moten*, POETS.ORG, <https://poets.org/poet/fred-moten> (last visited Nov. 7, 2022) (“A scholar whose work explores Black studies, performance studies, poetry, and critical theory”).

¹⁶ See Skyler Rich, *Reform vs Abolition: An Introduction*, FOR EVERYONE (Mar. 3, 2022), <https://foreveryonecollective.com/blogs/news/reform-vs-abolition-an-introduction> (providing a working distinction between criminal reformists and abolitionists).

¹⁷ See Darcy Covert, *Transforming the Progressive Prosecutor Movement*, WIS. L. REV. 187, 188 (2021) (stating that proponents of electing “progressive” prosecutors believe that these prosecutors can help foster change without having to change any laws).

¹⁸ See Rachel Foran, Mariame Kaba & Katy Naples-Mitchell, *Abolitionist Principles for Prosecutor Organizing: Origins and Next Steps*, 16 STAN. J. CIV. RIGHTS & CIV. LIBERTIES 496, 499 (2021) (providing that “abolitionists believe that prosecution—as an integral element of the criminal punishment system— cannot be progressive”).

¹⁹ See Tamar Sai, *Pressure Mounts for Manhattan District Attorney to Drop Charges of Criminalized Survivor Tracy McCarter*, PRISM (Mar. 29, 2022), <https://prismreports.org/2022/03/29/pressure-mounts-for-manhattan-district-attorney-to-drop-charges-of-criminalized-survivor-tracy-mccarter/> (stating that the NY Manhattan DA, during his campaign, had vowed not to prosecute domestic violence victims).

not what's going to get us closer to abolition, we need to work at delegitimizing the office and shrinking the power size resources.²⁰

Q: What does an abolitionist perspective say about the prosecutors helping individuals who've been victims of crime?

Rachel Foran: When I think about folks who have been victims of crime, so often people who have experienced harm are also folks who have been prosecuted.²¹ These categories aren't often as distinct as many people think, especially those who do not work in the criminal justice system.²² I think I just start from a different place, which is what would it mean for policing, prisons, prosecution to not be the solutions for any of the social problems that lead to harm happening? What would it look like for people to have what they need to be safe and when harm does happen, as it would even in an abolitionist future, what are some ways we could address those problems without punishment? Within the current system, when people are harmed, a lot of people don't necessarily turn to the criminal legal system as their way to get help.²³ That is partially because prosecutors act on behalf of the state, they do not act on behalf of the person who was harmed.²⁴ That's not to say that some prosecutors don't care deeply about victims and care deeply about getting justice for those victims, but their role is to act on behalf of the state. So, in cases where someone is victimized and doesn't want to go forward, the prosecution can still go forward.²⁵ I just think that there are not really clear answers to these questions when we think about the prosecutors role to act on behalf of the state.

Q: What are your thoughts on critics who feel like a prosecutor's sole function is to enforce the laws on the books, and that is an abuse of their discretion when they choose not to enforce certain laws?

DA Boston: We do represent the state, and I don't represent individual victims per se, but in our office, we feel like we want to represent what is in the best interest of the victim, understanding that not every victim wants to prosecute, but perhaps public safety mandates that that prosecution happen.²⁶ We see that, especially in domestic violence cases where we know that the cycle of violence may prevent a victim from being in a position to vocalize his

²⁰ See e.g., Zohra Ahmed, *Bargaining for Abolition*, 90 *FORDHAM L. REV.* 1953, 1955 (2022) (“...as advocates devise reforms to dismantle mass criminalization, shrinking prosecutors’ offices may be the key to true transformation.”)

²¹ See W.G. Jennings, et al., *On the Overlap Between Victimization and Offending: A Review of the Literature*, 17 *AGGRESSION AND VIOLENT BEHAV.* 17 (2012); cf. David Collins, *BPD Analysis Uncovers Revealing Information About Murder Victims, Suspects*, *WBALTV* (Jan. 2, 2020, 9:19 AM), <https://www.wbaltv.com/article/bpd-2019-murder-victim-suspect-analysis/30374201> (reporting a police survey that 81.9 % of murder victims had a criminal record).

²² Jennings, *supra* note 22.

²³ *The Criminal Justice System: Statistics*, RAINN <https://www.rainn.org/statistics/criminal-justice-system> (showing large percentage of crime go unreported to police) (last visited Dec. 29, 2022).

²⁴ PROSECUTION FUNCTION in *CRIM. JUST. STANDARDS* § 3-1.3 (AM. BAR ASS’N 2017) (explaining that the prosecutor generally serves the public interest, not necessarily victims).

²⁵ A MODEL PROSECUTORIAL PROTOCOL FOR FAMILY VIOLENCE INCIDENTS III.A-B (GA. COMM’N OF FAM. VIOLENCE) (indicating that, specifically in family violence cases, “the decision whether or not to proceed with prosecution of the case is made solely by the prosecutor.”).

²⁶ See generally Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 *UCLA WOMEN’S L. J.* 173 (1996) (arguing that, specifically in the case of crimes like domestic violence, aggressive prosecution may be necessary for public safety because the crime affects not only the victim, but society at large).

or her situation.²⁷ But do I have an obligation to prosecute every law on the books or is that my role? This is probably the biggest question that people ask when they talk about prosecutors, and I firmly believe that, as a prosecutor, I have the discretion.²⁸ And by the way, discretion is nothing new. It didn't just get invented yesterday. Prosecutors have been using their discretion since the beginning of time, but now that there are prosecutors that are declining to prosecute certain crimes because they believe it's more harmful for the communities they serve, it becomes a question of if prosecutors are allowed to use discretion.²⁹

There are a number of crimes on our books, adultery being one of them, and one of my fellow DA's might find it necessary to prosecute.³⁰ The law is still on the books, but most offices don't use their discretion to prosecute it,³¹ so we've got legislators that feel like they're writing the laws of what they think are societal norms. Then you have the community which may disagree, so prosecutors have to decide where they fall. For me, I say that my community elected me, they understood what I stand for, and I'm transparent about what I do. And if they don't like the decisions I'm making, then I expect them to get someone else in this office. But what I do and how I serve my community is perhaps not the same as some of my other DA friends, but I respect the work that they do, their decisions, because we should not just be rubber stamping. Allowing the legislature to dictate the law that we *should enforce* takes away from the idea that we are duly elected officials who have been asked to use our discretion in the way that we see best serves the people that asked us to serve.

Q: What's been your experience and how have you chosen in your office to exercise prosecutorial discretion?

DA Gonzales: It is unlike the other days when I actually served in the General Assembly for a couple of years and saw that part of them making laws.³² And, unfortunately, in our General Assembly, we have less than 32 of representatives who are actually attorneys, and so there are a lot of laws that are actually poorly written.³³ So, that creates a situation where one year they pass a law, and along the next five years, they're passing other laws to fix the law that they initially passed, five years ago. And I think it's really important that

²⁷ See Thomas L. Kirsch II, *Problems in Domestic Violence: Should Victims Be Forced to Participate in the Prosecution of their Abusers?*, 7 WM. & MARY J. OF WOMEN & L. 383, 392-398 (2001) (discussing the reasons victims of domestic violence may be reluctant to cooperate with prosecution).

²⁸ See K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. OF LEGAL ETHICS 285, 305-306 (2014) (summarizing the prosecutor's ability to use prosecutorial discretion).

²⁹ See Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW360 (April 27, 2019), <https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor> (analyzing the reasoning behind the rise in progressive prosecution and the resulting obstacles and criticism).

³⁰ See Ethan Bronner, *Adultery, an Ancient Crime That Remains on Many Books*, N.Y. TIMES (Nov. 14, 2012), nytimes.com/2012/11/15/us/adultery-an-ancient-crime-still-on-many-books.html (discussing the origins and status of adultery laws in the United States); see also Joanne Sweeny, *Adultery and Fornication: Why Are States Rushing to Get These Outdated Laws off the Books?*, SALON (May 6, 2019), <https://www.salon.com/2019/05/06/adultery-and-fornication-why-are-states-rushing-to-get-these-outdated-laws-off-the-books/> (examining the changes being made to adultery laws in the United States).

³¹ See *Infidelity and Adultery (Cheating) Laws in Georgia*, THE CLAIBORNE FIRM, <https://www.claibornefirm.com/infidelity-adultery-laws-in-georgia/>.

³² Deborah Gonzalez, GA. HOUSE OF REPRESENTATIVES, <https://www.house.ga.gov/Representatives/en-US/member.aspx?Member=4914> (last visited Dec. 29, 2022).

³³ See David Ralston, *House Member Directory*, GA. HOUSE OF REPRESENTATIVES (2022), https://www.legis.ga.gov/api/document/docs/default-source/house-document-library/house-member-directory.pdf?sfvrsn=1f476975_52.

when the DA's get these laws that we're looking at all of the ramifications of that law, and even the unintended consequences of those laws that are put in place. We should also look at some of the intentions of why certain laws are written and put forward. There is a lot of politics that go into why certain laws are written that don't just deal with the aspects of what we want to do. We want to look at what will pursue justice because this is what the people in my circuit elected me to do, and I think a good example of that is campus carry.³⁴ That affected UGA, and there are plenty of people in Athens who did not want that bill to pass.³⁵ But it did, and we are living with that, and my husband works here at UGA. When the law first passed, I was very concerned about him coming into buildings where anybody can pull out a gun. If I can, I want us to understand that there is a larger system in place here when we talk about the laws that we have to follow and that goes back into why those laws are passed to begin with. We want to look at what are the intentions of those legislators when they pass those laws. What is it that they're trying to do?

When I served, there was one legislator who got one bad question from a reporter, and all of a sudden, he had a bill saying that they were going to basically censor all reporters and put them in jail.³⁶ Because he got one bad press, he took that action, so we need to take a look also at the reasoning behind some of these laws. A lot of them were written by people who are not lawyers and who do not understand the way that the legal language will get interpreted once it's passed. The other thing I want people to understand is, I don't care what DA there is, you got to be superhuman if you think that you can in fact prosecute every single case that happens. In your circuit, nobody has those resources. When I came into office after an emergency judicial closure that closed the courts for months, I came in with a backlog of cases.³⁷ Then there was an addition of brand new cases every week, and it has not stopped since I walked in in January. Nobody has the money, nobody has the people, nobody has the time with a courtroom to take care and prosecute every single case that comes in.³⁸ We have to make decisions as to how we are going to use the resources that we have so that we can have the maximum impact to keep our community safe.³⁹ And if that means I'm not going to prosecute a simple possession of marijuana because I want to go after the person who committed an aggravated assault or a murder, then that's what I'm going to do. The people in this circuit elected me to make those kinds of decisions as to how to use the resources that they give me to keep this community safe.

³⁴ H.B. 280, 2017 Gen. Assemb., Reg. Sess. (Ga. 2017) (amending the Georgia Code “so as to authorize the carrying and possession of handguns . . . by weapons carry license holders in certain buildings or on real property owned by or leased to public institutions of postsecondary education”).

³⁵ Michelle Baruchman & Lauren McDonald, *Backpackin' Heat: University Community Takes Stand Against Campus Carry*, THE RED & BLACK, https://www.redandblack.com/athensnews/backpackin-heat-university-community-takes-stand-against-campus-carry/article_5f8a14ba-ebdd-11e5-bee9-d7a407f1a0fc.html (last updated Aug. 17, 2016).

³⁶ I COULD NOT FIND SUPPORT FOR THIS STATEMENT.

³⁷ Order Declaring Statewide Judicial Emergency (Ga. Mar. 14, 2020), <https://www.gasupreme.us/wp-content/uploads/2020/03/CJ-Melton-amended-Statewide-Jud-Emergency-order.pdf>; see Blake Aued, *Athens Judges Make Pandemic Plans to Restart Jury Trials*, FLAGPOLE (Jan. 6, 2021), <https://flagpole.com/news/city-dope/2021/01/06/athens-judges-make-pandemic-plans-to-restart-jury-trials/> (reporting that “new District Attorney[] Deborah Gonzalez . . . ‘[would] need[] time to build her team up’” before jury trials could resume and address “the backlog of cases” that followed statewide judicial closures).

³⁸ See *FY 2023 Annual Operating & Capital Budget*, THE UNIFIED GOV'T OF ATHENS-CLARKE CNTY. (July 1, 2022), <https://www.accgov.com/DocumentCenter/View/86690/FY23-Approved-Operating--Capital-Budget?bidId=> (looking at the goals of DA offices to prioritize crimes that will harm the community within their budget).

³⁹ *Id.* (prioritizing crimes that the community needs to prevent to keep people safe).

Q: I want to go back to the beginning remarks about prosecutors acknowledging our roles in problems in the criminal justice system, specifically mass incarceration. How can prosecutors use their discretion to correct those issues or to contribute to a change in those issues, like re-entry efforts. There has been some talk about record restriction efforts, but what has been your experience?

DA Gonzales: I think it begins with reading the police reports that come in and making sure that the evidence that we're given fit the charges that are alleged on the police reports. We need to make sure it is not people just throwing in every charge that they can on someone, but that the charges are supported by the facts and the evidence as we go forward. I think that's the first thing, being really careful and intentional of what we get in and taking the time to look at those things. One of the things I'm trying to do, and hope to do, is to create an intake where we can triage and look at these cases and get through this backlog. That way, we can see what is valid and what is not. Nobody ever says that we're not going to hold people accountable, that is not the point of this at all. The point is that you hold them accountable, but you've got different options. We can review whether it is a case that is appropriate for an accountability court, a different pretrial diversion, or incarceration. In restorative justice,⁴⁰ we have choices now that we've never had before, and it is a disservice to everybody in our community if we don't look at those as well because we need to make sure we're not doing knee jerk reactions. We need to make sure we aren't just putting somebody in a cage and turning away the key. That's not the only way that we're going to keep our community safe, because 95% of people who are incarcerated are returning citizens who are going to come back home.⁴¹ So we need to look at how are we preparing them and how are we preparing our communities for when they get back here?

Q: Do you believe that this is an adequate solution, or does it aid in making any progress towards reforming the justice system?

Rachel Foran: I'll start with discretion, which I think is really interesting because in a lot of ways it's a good thing if prosecutors use their discretion to do less charging, less prosecutions, less convictions, less incarceration - those are good things. But if we trust, which I think we do, prosecutors to use discretion in these ways to lessen incarceration, that's great. But your successors could be people who are the exact opposite, and that's the risk we would run with discretion. The risk is that it depends on the individual. And I think how it ties to the abolitionist approach is that prosecutorial judicial discretion is sort of a red herring because it obscures what the problem is and therefore what the answers are.⁴² The answers are structural and systemic, so we have to still do what we can to reduce the size, scope,

⁴⁰ Debra Heath-Thornton, *Restorative Justice*, ENCYCLOPEDIA BRITANNICA (Aug. 26, 2018), <https://www.britannica.com/topic/restorative-justice> (defining restorative justice as “response to criminal behaviour that focuses on lawbreaker restitution and the resolution of the issues arising from a crime in which victims, offenders, and the community are brought together to restore the harmony between the parties”).

⁴¹ See GA. DEP'T OF CORR., *Inmate Statistical Profile: Active Life Without Parole*, 9–12, 19 (Nov. 1, 2022), https://gdc.ga.gov/sites/default/files/pdf/Profile_life_wo_parole_2022_10.pdf (looking at inmate county of origin and type of sentence to show 95% are in custody for new sentences and only .55% for life without parole).

⁴² See CMTY. JUST. EXCH. ET AL., *Abolitionist Principles & Campaign Strategies for Prosecutor Organizing*, <https://www.communityjusticeexchange.org/en/abolitionist-principles> (Jan. 22, 2020) (providing a better understanding of how abolitionist view prosecutors and their discretionary abilities).

resources, and legitimacy of the system.⁴³ That is where my abolitionists organizing energies are put.⁴⁴

Although they've been around for a while, another intervention that's been introduced to reform over the last decade or so, not just from prosecutors, but also the judiciary as a way to say incarceration is bad, is alternative courts.⁴⁵ These parties say we want to do less of incarceration, so let's think about other ways that people can get diverted from the system through different kinds of treatment courts, accountability courts, status courts, or problem solving courts. And from an abolitionist perspective, incarceration is bad, but so is increasing the scope of the carceral control of the system, even if it looks different, even if it looks more humane as a treatment program.⁴⁶ Participation in these programs is still increasing the control of the system and the reach of the system on people's lives because it's what it's not doing and the message it sends.⁴⁷ People should have access to treatment resources in their community outside of the criminal legal system, and not have the criminal legal system saying we're going to arrest you and the way that you're going to get the access to these services is through us. It says whatever problems in society, if it's mental health, homelessness, whatever the issue is, it is going to be through the criminal legal system that it gets addressed. Solutions are not based in the community and therefore you're still ensnared in the corporate control of the system.⁴⁸

Similarly, I think there's ways that these things can potentially do less harm, but from an abolitionist perspective, where we're trying to shrink the system and not expand it into our communities or homes even farther, I think these programs have been problematic. Because when we talk about shrinking the system, how have legislators responded to your idea? It was funded, which is optimal, but are you making any progress? I think there are some really great legislative avenues to take, but it's a similar viewpoint, as I think I have around prosecutors, where we just want the legislator to do less, like write less laws. We want them to engage in decriminalization, whether it's sex work or drugs or loitering. We

⁴³ See Shima Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 S. CAL. L. REV. 1123, 1135–36 (2021) (noting that the scope of prosecutorial discretion is quite large by the sheer abundance of allotting statutes and stating “[t]he prosecutor may have more discretion than any government official.”).

⁴⁴ See generally, Rachel Foran et al., *Abolitionist Principles for Prosecutor Organizing: Origins and Next Steps*, 16 STAN. J. CIV. RIGHTS & CIV. LIBERTIES 496, 529 (2021) (advocating for reducing the size, scope and power of prosecutor’s offices).

⁴⁵ See generally, Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055 (2003) (giving an overview of the implementation and purpose of such alternative courts.); but see Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U. CAL. DAVIS L. REV. 1573 (2021) (explaining the various shortcomings of problem solving courts in achieving an alternative to prosecution).

⁴⁶ See Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1210 (2015) (“[A]bolition makes a bolder critical demand, which requires more thoroughgoing transformation, recognizing the importance of a substitutive regulatory logic, rather than a shift from imprisonment to prison-backed noncarceral alternatives.”).

⁴⁷ *Id.*; see also Bill Keller, *What Do Abolitionists Really Want?*, THE MARSHALL PROJECT (June 13, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/06/13/what-do-abolitionists-really-want> (“When we talk about abolishing prisons and abolishing law enforcement, it’s actually reducing the power and the reach of those entities.”).

⁴⁸ See *Accountability Courts*, NORTHEASTERN JUDICIAL CIRCUIT HALL AND DAWSON GEORGIA, <https://www.nejc.org/accountability> (last visited Dec. 27, 2022) (describing the goal of accountability court programs as an “alternative to incarceration” and identifying programs related to drug use, alcohol use, mental health issues, veterans, and parent and family services thereby displaying the wide array of societal problems that are expected to be addressed through the criminal justice system); see also Alex Soderstrom, *Georgia’s Accountability Courts: A National Example for Treating Crime*, GEORGIA POL. REV. (Feb. 6, 2017), <http://georgiapoliticalreview.com/georgias-accountability-courts-a-national-example-for-treating-crime/> (explaining that in Georgia, accountability courts work to target societal issues such as addiction and mental illness but does so as part of the criminal justice system).

want less laws because repealing laws that criminalize behavior means that people will get arrested less. Sentencing reforms around mandatory minimums or excessive sentencing, those are steps in a great direction not fighting for new laws or enhanced penalties.⁴⁹ But, especially over the last couple years in Georgia with hate crime legislation, it has been seen as a very progressive approach in trying to protect marginalized communities.⁵⁰ But, in reality, how hate crime laws are typically deployed, it is not in that way at all, and in fact, it is often used against folks because of who they are and who it is supposed to protect. It doesn't do anything to address the violence towards marginalized groups at the root causes of it. Again, it uses policing, incarceration, and law enforcement as the response to those imbalances so my answer is to endorse ways that take more laws away or reduce the harms of sentencing through legislation.

If people are interested in how abolitionist engage around legislative reforms that are proposed, I look to mentors and abolitionists that have come before me. They have provided questions of ways to evaluate reforms that ask questions like: Does this reform expand the legitimacy of the system? Does this reform divide people into deserving or undeserving? Does it expand protections for everyone, or does it create carve outs that say this group of people will get the benefit of the reform, but these won't? Does it provide profits for certain people that benefit from the prison industrial complex? These are questions that you can ask yourself when you're looking at legislative reforms or any kind of policy reforms to help you gauge if it is getting us closer to a future without the system, or is it actually further entrenching the system.

Q: We heard from our panel this morning about the difference between Governor Deal's criminal justice reform and what we're seeing now in the current legislature, so I like to ask our district attorneys, do the legislators ever consult you when thinking about how crimes or criminalization of certain offenses, changes in sentencing, more mandatory minimums, or reducing sentences for certain offenses. Q: Do you have input? Do they seek your advice or counsel, or is it more of "this is what we want to do," and then you're left to deal with it on the back end?

DA Boston: During legislative session, I had to keep my phone on the table next to me because it would be ringing all the time. My delegation have been largely concerned with my opinion about any and all bills that come across through the legislature that they feel are going to touch on an area of prosecution. And I know that many of my colleagues have those relationships with their individual legislators. They really care about our opinion but may not always follow what we say to most of them, but you have to remember most aren't lawyers. I feel really blessed to have legislators that do call on me to ask my opinion before they make a vote. And if I have legislation that I want to see put forth, I have found that

⁴⁹ See Máximo Langer, *Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then*, 134 HARV. L. REV. F. 42, 44 (2020) ("[F]or criminal law minimalism, the penal system still has a role to play in society, but a radically reduced, reimagined, and redesigned role . . ."); see also Allison Siegler, *End Mandatory Minimums*, BRENNAN CTR. FOR JUST. (Oct. 18, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/end-mandatory-minimums> ("To dismantle America's dehumanizing and racially skewed human caging system, we must eliminate mandatory minimums.").

⁵⁰ See H.B. 426, 155th Gen. Assemb., Reg. Sess. (Ga. 2020); see also Daniel Victor, *Georgia Added a Hate Crimes Law Last Year After the Death of Ahmaud Arbery*, N.Y. TIMES (Mar. 18, 2021), <https://www.nytimes.com/2021/03/18/us/georgia-hate-crime-law.html>, ("The law allows for extra penalties to be applied for crimes motivated by a victim's race, color, religion, national origin, sex, sexual orientation, gender or disability.").

there are folks, particularly the lawyers, that tend to carry our torch. That's because they understand our position, and they're super interested in helping us now. I've seen the difference in the legislature under Governor Deal versus under Governor Kemp is that Governor Deal made it a part of his governing platform. Criminal justice reform was a big part of that, and it wasn't just talk. Governor Deal put money behind his reforms, and he created a task force to implement recommendations. And, his decisions allowed us to really take some necessary steps forward in criminal justice reform. When I go across the country, and they're talking about governors that have engaged in meaningful reform, Governor Deal is at the top of everyone's list. It doesn't matter if you go into a blue state or red state, they do talk about what Governor Deal accomplished in Georgia.⁵¹ It was transformative, and I hope that we can continue some of those necessary reforms. But now, every day, whether the legislature listens just depends on the day of the week.

Q: What's been your experience in providing input, as an elected versus your conversations with prosecutors, when you were in the Assembly?

DA Gonzales: I think this is a perfect example of where politics intersects with the judiciary in our office. So, unlike DA Boston, who legislators seek out, here in Athens, if I said I was for something, they would be against it. And if I said I'm against something, they would be for it. I have been told a couple times "don't go there, just let them do what they have to do on it," but I think it's an example of where politics does interfere sometimes. I was a State legislator when we passed the last part of Governor Deal's criminal justice reform. He had eight parts that he had created, and he was able to pass seven of them.⁵² And it was great that they did the reforms, but they did not go far enough. But, it was honestly because of those reforms that one of the consequences that occurred was that we lowered mass incarceration in Georgia.⁵³ Instead, we became the number one state for Community supervision.⁵⁴ One in eighteen people in Georgia are under Community supervision.⁵⁵ That was a direct result of those reforms, and we have to acknowledge that when we look at what is happening and those consequences that occurred.⁵⁶ So while Governor Deal did wonderful stuff, like what he did in juvenile justice, we must not forget those unintended consequences that occurred and that our community is paying for right now with that many people under Community supervision.

⁵¹ See, e.g., Naomi Shavin, *A Republican Governor Is Leading the Country's Most Successful Prison Reform*, THE NEW REPUBLIC (Mar. 31, 2015) <https://newrepublic.com/article/121425/gop-governor-nathan-deal-leading-us-prison-reform> ("[O]ne could reasonably argue that Georgia is doing more to reform its criminal justice system than any other state in the country.").

⁵² See, e.g., Nick Watson, *Nathan Deal's Legacy of Criminal Justice Reform Is Now Enshrined on a Building*, THE GAINESVILLE TIMES (Feb. 8, 2020, 10:28 PM) <https://www.gainesvilletimes.com/news/public-safety/nathan-deals-legacy-of-criminal-justice-reform-is-now-enshrined-on-a-building/> (giving an overview of the Deal administration's criminal justice reform policies).

⁵³ See, e.g., Hannah Riley, *Governor Deal's Final Criminal Justice Reform Push*, S. CTR. FOR HUM. RTS. (Feb. 22, 2018) <https://www.schr.org/governor-deals-final-criminal-justice-reform-push/>; see also Nick Watson, *supra* note 52.

⁵⁴ See, e.g., Ray Khalfani, *Georgia Criminal Legal Systems Budget Primer for State Fiscal Year 2023*, GA. BUDGET AND POLY INST. (July 27, 2022) <https://gbpi.org/georgia-criminal-legal-systems-budget-primer-for-state-fiscal-year-2023/>.

⁵⁵ See *Probation Reform Bill SB 105 Introduced*, GA. JUST. PROJECT (Feb. 9, 2021) <https://gjp.org/probation-reform-bill-sb-105-introduced/>.

⁵⁶ See Bill Rankin, *Nathan Deal's Criminal Justice Reforms Leave Lasting Legacy*, ATLANTA J. CONST. (Dec. 21 2018) <https://www.ajc.com/news/local/deal-criminal-justice-reforms-leaves-lasting-legacy/ZMwb2vG7C4LurWoFESw46O/> (describing the reforms placed forth by Nathan Deal and the effects they continue to have on the criminal justice system today).

Q: What has been your experience with the legislators when they come to you for your input? What's been the primary concern with the way prosecutors have been exercising their discretion in relationship to not prosecuting certain offenses, accountability courts, diversion that is not traditionally viewed as the prosecutors function?

DA Boston: So, I won't answer that question about my delegation, but I have a delegation that generally is in support of legislation that allows prosecutors to have that discretion and make those decisions. I have however been seated at a table like this, testifying in front of committee members who did not share that same philosophy and question me very specifically about discretion. There was a legislator that specifically said, "No offense, DA Boston, but we are the legislators and we make the laws. It's your job to just enforce the laws that we pass." That is a statement with which I fundamentally disagree. If that were the case, then again, I would not need to be elected. They could just put a body in the chair with a heartbeat and a bar card, so they could tell them just to stamp every file that goes along. That's not what we do, and that's not what our system is about. So the moment we elect someone to sit in a chair and make decisions for which they will be held accountable, by both sides, the victims, the communities, the advocates, the defenders, then they have to be given discretion if the whole community is open to the decisions you make. One example I want to bring up that there's a lot of interest in how prosecutors are investigating and charging in cases of police excessive force misconduct.⁵⁷ Those cases are 100% built on discretion because, generally speaking, those cases aren't coming to your office because someone's gotten a warrant and already made it a criminal case.⁵⁸ They're bringing you a file and telling you to make the decision of whether this is a case where a law enforcement officer exceeded his authority and harmed someone in the community, or if this a case where the officer was justified in his or her actions in defending the public. There is no greater example of prosecutorial discretion than that. So you can't ask me on one hand, to use my knowledge, common sense, and experience to look at the facts and make a decision about that case then on the other hand, have other issues in the public where we are supposed to rubber stamp and move on.

Q: Wrapping up, I want to talk about future outlook and some final thoughts on the subject. What does the future of the abolitionist movement look like in the context of the work or opposition to prosecutors? Is there anything that prosecutors can do within the movement to kind of facilitate that change?

Rachel Foran: No, not really. I have yet to see it based on the reasons that make total sense to me, namely that a prosecutor is elected. It would only work if one fired all their staff, got rid of their budget, didn't do what their what they've, like, taken an oath to do. For all

⁵⁷ Compare The Associated Press, *Atlanta Police Officers Won't Face Any Charges in Rayshard Brooks Shooting*, NPR, <https://www.npr.org/2022/08/23/1119098497/rayshard-brooks-police-no-charges-atlanta> (2022) (showing that a *special prosecutor* determined that the force used by the officers in question was objectively reasonable), with *Former Atlanta Police Sergeant Sentenced to Prison for Using Excessive Force and Obstructing Investigation*, The United States Attorney's Office, Northern District of Georgia, <https://www.justice.gov/usao-ndga/pr/former-atlanta-police-sergeant-sentenced-prison-using-excessive-force-and-obstructing> (2018) (showing where a police officer was imprisoned for 5 years for clear violation of police code and the Georgia constitution).

⁵⁸ See Nicole Gonzalez Van Cleve & Somil Trivedi, *Why Prosecutors Keep Letting Police Get Away With Murder*, SLATE (Jun. 5, 2020, 5:50AM), <https://slate.com/news-and-politics/2020/06/why-prosecutors-keep-letting-police-get-away-with-murder.html> (explaining the complex relationship between police and prosecutors and how this relationship created the current conditions where police conduct may thrive.).

the obvious reasons, it's career suicide and it's not the job they were elected to do. The job of prosecution is to charge people, prosecute them on behalf of the state, and punish them.⁵⁹ Fundamentally, that is what the role is in its structural function. So, individual prosecutors can do less of those things, which is good, but until we really shrink the system as much as possible, until there is no system, that's just where we're trying to go. I love this poem by Rubem Alves and there's a line in it that says, "Let us plant dates, even though those that plant them may never eat them"⁶⁰ because for me, that's sort of what being a part of the abolitionist movement is like. It is definitely a long game.

I don't think I'm going to live to see a world where we don't have the criminal punishment system, but that doesn't mean that there aren't things that we can do now to make that future more possible. And that looks like organizing around campaigns that work on this shrinking of the system. It looks like just building movements, building people power, and that's what I'm concerned with as an organizer is bringing people into the movement. I want to involve people who believe in the notion that the world we want is possible and that are, you know, willing to work for it. It also looks like working within your communities and in your relationships to imagine a different way of doing things, of how to handle harm outside of the criminal punishment system, of how to meet people's needs that would make a lot of the stuff that you will probably see in courts irrelevant. Things like housing, health care, food, water, basic stuff that results in what people get criminalized for. So I can't tell you our five year plan because it's much longer, and there's a lot of us that are different.

I don't speak for all abolitionists, but in general, those are the broad contours. It's a long game, so let me just say this is one of those areas where I like to say that I have a shared vision because the truth of the matter is, if we got to a point in our society where effectively I was no longer needed because I had eradicated all crime and my community was thriving, I would gladly turn out the lights, walk out the door, peace out, write a book, collect my money, put it in a bottle and go around the country and tell people how they can achieve it right. My point being that I absolutely agree that we are at the point and have been at the point for some time in the United States where the criminal justice system has been an unlawful use to solve all the world's problems, be it food, insecurity, lack of education, access to health care, all of those things, and we have somehow managed.

DA Boston: To push the resolution of those into the criminal justice system, I don't believe it should be there, which is why I do advocate and work with community groups to talk about putting those resources outside. And for me, it does mean accountability courts, diversion programs. It does mean me pushing for mental health services outside of jails being our number one provider of mental health services so ultimately, I agree and there's so many things that are out of my control. Having had the opportunity to travel over to Europe on criminal justice trips to see what can be done in other countries and the fundamental backbone of that is universal health care and all these things that we don't have that allow them to provide the services that don't push people in the criminal justice system. But I sell it to say, because I do think it's important for anyone watching to hear about the abolition movement and to understand that we do share a commonality which is that the criminal legal

⁵⁹ See generally BEN W. STUDDARD, GA. CRIM. TRIAL PRAC. § 18:7 (2022-2023 ed.) ("Prosecutors serve as a link between law enforcement officers and the trial of cases. They have the duty to see that the law is enforced . . . to seek justice and not merely convict.")

⁶⁰ RUBEM A. ALVES, TOMORROW'S CHILD: IMAGINATION, CREATIVITY AND THE REBIRTH OF CULTURE, 204 (1972).

system is not the place to fix the world's problems. A decarceration system is one that I 100% would love to see because, for me, as a black woman doing this work and seeing the number of people that look like me and my family behind bars is sickening. Absolutely so. So I work through that goal and in the role that I'm in right now. I appreciate the work that you do in the role that you're in.

Q: DA Gonzales, as someone who owns that label as a progressive prosecutor, what does the future look like from your perspective?

DA Gonzales: Change. That's what I believe the future looks like. It started in 2016 and into the big movement in 2020, and I think it's just going to continue with more and more resulting in prosecutors like me.⁶¹ What has happened before has to be fixed, and we were part of the problem so we have a responsibility to be part of the solution. And we will work in partnerships with other organizations. For too long, the offices were silos, they were black boxes, and we did what we had to do. We didn't work with the community, and nobody knew what was happening in there. We sort of stayed in, and it was almost like a cult. All prosecutors went to the same summer conference, and they did the same things, and then they went over to this conference, and they did the same things, but they never engaged. For the first time, we're having groups of prosecutors talking to people with lived experiences and bringing those people into their offices to understand those stories and, more importantly, to understand the very real consequences and impact of every decision that we make as a prosecutor. For too long, I think prosecutors were able to make decisions and not see what the consequences were. And when you don't know what those consequences are, it's very easy to think they don't exist. And so, to make sure that stories like Patrick's come into the office of a DA so that they can hear them and understand and see the person beyond just that piece of paper they have to deal with. Having a progressive prosecutor as a boss means I ask of them even more than other offices ask of them because I'm asking them to stop, question things, brainstorm other options that maybe you wouldn't have done before, and that takes even more time and even more resources than just looking at a list and dishing out expected punishments. I want them to question who's that person, what were the circumstances, what does it mean not just for them, but their family and the community, and that is a lot more work on them. They've never had to really be held accountable for it, and so, yes, I have discretion, I give them a certain amount of discretion, but there are things they have to come to me and get approval for.

I have made it a big commitment that I do not believe in the death penalty. I do not believe in it, and if we're going to go life without parole, you come to my office and you lay out your argument for it, that justifies why this individual is never ever going to be redeemable. If you can do that in my office, then I will back you up because at the end of the

⁶¹ See Melissa Segura, *Progressive Prosecutors Won in Midterm Elections Across the US in Spite of Tough-On-Crime Rhetoric from Republicans*, YAHOO NEWS (Nov. 10, 2022, 6:14 PM), https://www.yahoo.com/news/repUBLICan-rhetoric-crime-didn-t-231440673.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xILmNvbS8&guce_referrer_sig=AQAAALmnl0jVgOTlo4Me5Wnds7ljJUVXrv3qwxG8Y9QMBG7WtXCtX4qrcJp-lM7KsQi-bJmi7uAQ6-OhQt0SbWFg_gT4hcqk6uLze4ZspEv97ZTGwiaPsVctmAOIBZL4pBogZU5TEtXdEhRIZfaEjXV8OT70zyiRw3azJxzLa_8NjR3P (“[P]rogressives won races in major metros with diverse populations signifies [sic] strength within the movement.”); see also Zusha Elinson & Jacob Gershman, *Progressive Prosecutor Movement Tested by Rising Crime and Angry Voters*, WALL STREET JOURNAL (June 5, 2022, 3:55 PM), <https://www.wsj.com/articles/progressive-prosecutor-movement-tested-by-rising-crime-and-angry-voters-boudin-11654443234>.

day, as the elected DA, I am the face that's out there. I am the person that the public comes to and says "Hey, this is happening, answer for it." I am accountable, and my people work, really, really hard, and I make them work harder, because I believe that what this position can do can really help restore and heal our community, because it is not just about crime. And I think when we focus only on crime, we lose the sense of the bigger picture, and that is trauma. We have to reckon with trauma, and until we do that, we will not get through the crime statistics that we want.