

Fall 2023

Prosecutorial Mutiny

Cynthia Godsoe

Brooklyn Law School, cynthia.godsoe@brooklaw.edu

Maybell Romero

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

60 Am. Crim. L. Rev. 1403 (2023)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

PROSECUTORIAL MUTINY

Cynthia Godsoe and Maybell Romero*

ABSTRACT

Elected progressive prosecutors face resistance on many fronts to their reforms of the overly harsh and racist criminal legal system. One of these forms of resistance is particularly corrosive—internal dissension by line prosecutors. This resistance flummoxes criminal legal system reform and undemocratically interferes with the will of the electorate. This resistance, which we term “prosecutorial mutiny,” is also unethical under the American Bar Association’s Model Rules. Given the pervasiveness of such mutiny alongside other sources of backlash to criminal system change, we argue that progressive prosecutors are not the panacea to all the criminal legal system’s ills as many have hoped, and that resources should be focused on supporting other sources of change to the system.

INTRODUCTION	1404
I. PROSECUTORIAL MUTINY	1406
A. <i>Typology</i>	1406
1. <i>Suing</i>	1406
2. <i>Filing Ethics Complaints</i>	1410
3. <i>Opposing Publicly in Other Ways</i>	1412
4. <i>Undermining Internally</i>	1414
5. <i>Participating in Mass Resignations</i>	1414
B. <i>Some Commonalities Among These ‘Mutineers’</i>	1415
II. ETHICAL AND DEMOCRATIC PROBLEMS WITH PROSECUTORIAL MUTINY . . .	1419
A. <i>Historical Context of Prosecutors and Their Ethical Duties</i> . . .	1419
B. <i>Prosecutorial Mutiny’s Relationship to the Violation of Ethical Rules</i>	1421
C. <i>Prosecutorial Mutiny Undermines Democracy and the Rule of Law</i>	1424
III. IS MUTINY DESIRABLE WHEN FROM THE LEFT?	1426
A. <i>Historical Examples</i>	1426
B. <i>“Progressive” Line ADAs in “Traditional” Offices</i>	1427
1. <i>Recent Examples</i>	1427

* Professor of Law, Brooklyn Law School and Felder-Fayard Associate Professor of Law, Tulane Law School. For thoughtful comments, we owe thanks to the participants at the 2022 Criminal Justice Ethics Schmooze and ACLR symposium on Reform-Minded Prosecution. We are grateful for excellent research assistance from Nicholas Connolly, Caroline Golub, and Eliza Reinhardt, and also to the editors of the *American Criminal Law Review*, for organizing such an engaging symposium and for their thoughtful editing. © 2023, Cynthia Godsoe & Maybell Romero.

CONCLUSION 1429

INTRODUCTION

A growing movement of progressive prosecutors is working to undo, or at least remediate, decades of racist, costly, and harmful criminal legal policies that have subjected communities of color and poor people to overcriminalization and overincarceration.¹ Progressive prosecutors have run and won on mandates to change the way the public and policymakers think about justice and safety, such as declining to move forward with certain categories of crimes, reforming bail, and making other changes to the criminal legal system to make it more data-driven, equitable, and effective in improving public safety and recidivism.²

Nationwide, district attorneys (“DAs”) who have attempted to make even moderate reforms have faced tremendous pushback from police, judges, and even other prosecutors.³ The battle is still raging but continues despite some high-profile setbacks, such as the June 2022 recall of San Francisco DA Chesa Boudin. The movement continues to grow, with progressive prosecutors elected in numerous jurisdictions in the 2022 midterm elections.⁴

While police unions and associations opposed reformist candidates in the past, for police to be joined by their district attorney counterparts like the Los Angeles Association of Deputy District Attorneys (“ADDA”) and the National District Attorneys Association (“NDAA”), is a recent and alarming phenomenon.⁵ Why

1. See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1424 (2021) (describing the “progressive prosecutor” movement).

2. See Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 178–82 (2022) (providing examples of such elected prosecutors); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 6–15 (2019) (same).

3. Somewhat ironically, many changes these prosecutors are making are not radical at all, more just meeting a low bar of ethical and empirically based policy. See, e.g., Brooks Holland & Steven Zeidman, *Progressive Prosecutors or Zealous Defenders, from Coast-to-Coast*, 60 AM. CRIM. L. REV. 1467, 1471–73 (2023) (discussing L. A. District Attorney George Gascón’s career and criticism of him from the left). See also Maybell Romero, *Moving Past “Progressive” Prosecution in the Wake of the Trump Administration*, 69 WASH. U. J. L. & POL’Y 275, 284 (2022).

4. See Matthew Impelli, *Progressive Prosecutors Win in Midterms Despite GOP’s Attacks on Crime*, NEWSWEEK (Nov. 9, 2022), <https://www.newsweek.com/progressive-prosecutors-election-outcomes-nationwide-wins-175765>; see also Camille Squires & Daniel Nichanian, *Minneapolis Elects a Career Public Defender as Its New Prosecutor*, BOLTS (Nov. 9, 2022), <https://boltsmag.org/minneapolis-public-defender-turned-prosecutor/>.

5. For the ADDA, see Jeremy B. White, *Los Angeles prosecutors overwhelmingly want to oust their progressive boss*, POLITICO, (Feb. 22, 2022), <https://www.politico.com/news/2022/02/22/los-angeles-prosecutors-progressive-da-gascon-00010798>. On the other hand, the NDAA has attempted to dilute the meaning of “progressive” when referencing progressive prosecutors. In his inaugural address, board president of the NDAA Duffie Stone explained that, in his view, all prosecutors are progressive:

If you’re asking me about somebody being progressive, the way I define that is someone who wants to innovate, somebody who wants to make the system better. Reform? Absolutely. I don’t know a single prosecutor that didn’t take the helm of their office with the thought “I’m gonna make it better than it was.” Every prosecutor in this room, every prosecutor I know has taken over their office and said “I want to make it better. I want to make it more efficient. I want to make it fairer.” Every one. So if, Mr. Washington Post, you’re asking me what do I think about progressive prosecutors, I say “Thank you. Prosecutors are absolutely progressive.”

have these attorneys joined the opposition? Attorneys are “public citizens having special responsibility for the quality of justice,” who not only zealously advocate for their clients but also “seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.”⁶ This rebellion against elected progressive prosecutors is also undemocratic, akin to an attempt to undo elections and subvert the public’s voice.⁷ Accordingly, it is an essential topic to address in this Symposium on *Reform-Minded Prosecution*.

In this Article, we will describe the phenomenon we term “prosecutorial mutiny”: internal resistance to progressive changes. What terminology is even correct? Does rebellion give it too much credibility? Aren’t these perhaps just self-interested lawyers trying to gain publicity or funding for their own political ambitions?⁸ Although mutiny at sea was historically a crime equivalent to treason, it seems to have typically been used against “bad leaders” and led to better outcomes.⁹ For instance, the Law of Seamen—a treatise that serves as a sort of restatement of maritime law—explains that mutiny is justified only in emergencies: “gross incompetency of the master to properly fulfill the duties” as a result of skill, “grossly bad habits,” or “profligate or cruel behavior” might warrant an excuse for refusal to remain by the ship if clearly proven beyond all reasonable doubt.¹⁰ In contrast, as we elaborate further in this Article, we do not consider these progressive prosecutors “bad,” nor the mutineers ethically justified.

Part I provides examples and develops a typology of this phenomenon, and identifies some commonalities in these prosecutorial mutineers. Part II elaborates on the professional and democratic problems with this means of resisting change, especially for prosecutors, who have special ethical obligations. Part III addresses a frequent argument justifying mutiny against progressive prosecutors—that attorneys should be encouraged to resist “bad” regimes from within, as for instance, during the Trump administration. Finally, the Article concludes by elaborating on the challenges—or perhaps impossibility—of rapid institutional change and of separating out politics from role ethics.¹¹

14th Circuit Solicitor’s Office, *Progressive Wave?: Prosecutors Force for Criminal Justice Reform for Decades, Stone Argues*, YOUTUBE (Aug. 16, 2019), <https://www.youtube.com/watch?v=qCvDbQw7T8U> (speaking at 6:00-6:40).

6. MODEL RULES OF PRO. CONDUCT preamble & scope (AM. BAR ASS’N 1983).

7. See further discussion *infra* Part II.C.

8. See *infra* notes 12, 41–42 (describing these patterns as to Jenkins and Hatami).

9. Patrick J. Murphy, *Is It Time for Mutiny?*, HARV. BUS. REV. (Apr. 9, 2013), <https://hbr.org/2013/04/is-it-time-to-stage-a-mutiny>.

10. 1 THE LAW OF SEAMEN § 10:23 (5th ed. 2021).

11. Philadelphia District Attorney Larry Krasner addressed this challenge during an interview with Ben Austen from the New York Times Magazine: “Every single day, we are trying to write policy, and also have policy carried out . . . That’s the real struggle. It’s not flicking a light switch on or off. Culture eats policy.” Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, N.Y. TIMES

I. PROSECUTORIAL MUTINY

Progressive prosecutors facing internal subversion recognize how critical it is but are often powerless to address the phenomenon of prosecutorial mutiny within their offices, spending countless hours and much energy combatting it rather than implementing the change platforms for which they were elected. In this Part, we develop a typology of internal attorney mutiny, using recent examples from within progressive prosecutors' offices. The typology roughly proceeds from most to least extreme deviations from ordinary professionalism and office norms, and relatedly from most to least risky for the participants. To be clear, however, none of these strategies have been very risky for individual attorneys given the immense political and financial backing for revolting against progressive prosecutors.¹² We conclude this Part by examining some commonalities in the motivations—or purported motivations—of these mutineers, and their framing of the appropriate role of elected chief prosecutors and line prosecutors (at least when the chief is progressive).

A. Typology

1. Suing

Suing your own boss as a means of expressing disagreement is both public and flagrantly undermining. Quite unusually, however, some line DAs in Los Angeles—where as part of a union and protected by strong civil service laws, they cannot be dismissed easily—have used this (very blunt) tool to express their disagreement with the elected DA's reforms.¹³ Los Angeles District Attorney George Gascón¹⁴ won by a significant margin—seven percent¹⁵—in a hotly contested election in Los Angeles in 2020. He was transparent about his reform platform, including ending the use of sentencing enhancements, which have been used to disproportionately prosecute minorities and low-income people,¹⁶ and abandoning the use of the death penalty.¹⁷

MAG. (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> (quoting Krasner).

12. See, e.g., Susie Neilson, *Brooke Jenkins' \$100K Came to Light with this Document. Here's what else It Shows*, S.F. CHRON. (Aug. 11, 2022), <https://www.sfchronicle.com/projects/2022/brooke-jenkins-payment/>.

13. Editorial, *George Gascón Can't Fire Prosecutors for Opposing His Visions. Can He Win Them over?*, L.A. TIMES (Nov. 30, 2020), <https://www.latimes.com/opinion/story/2020-11-30/los-angeles-county-district-attorney-george-gascon-civil-service> (reporting that L.A. ADAs “can’t be fired, demoted or disciplined without just cause. And even then, any finding of just cause would be subject to multiple layers of review”).

14. *Id.*

15. George Gascón, BALLOTEDIA, https://ballotpedia.org/George_Gasc%C3%B3n (last visited Feb. 17, 2023).

16. News Release: *District Attorney George Gascón Issues Amended Directive on Sentencing Enhancements*, L.A. CNTY. DIST. ATT’Y’S OFF. (Dec. 18, 2020), <https://da.lacounty.gov/media/news/district-attorney-george-gascon-issues-amended-directive-sentencing-enhancements>.

17. *LA County DA-elect Gascon Promises Big Changes, Says He Won't Back Down from Protestors*, ABC 7 (Dec. 4, 2020), <https://abc7.com/george-gascon-jackie-lacey-lada-interview/8507097/>.

In the context of prosecutorial mutiny, there have been two types of lawsuits: first, a largescale union lawsuit alleging the elected prosecutor's new policies violate state law and require Assistant District Attorneys ("ADAs") to violate their (largely unstated) ethical obligations, and, second, individual lawsuits combining claims of ethical violations and retaliation from "disgruntled" or former employees.¹⁸ Both kinds of lawsuits have been filed against Gascón. Immediately after the election, assistant prosecutors in Gascón's office attempted to accomplish what was narrowly averted on the federal level in January 2021—to circumvent election results by filing lawsuits, ignoring the popular will, and replacing it with their self-serving judgment, while undermining the separation of powers. To this end, the LA prosecutor union sought an injunction to prevent the elected DA's new directives from being implemented, mostly arguing (somewhat ironically) against the exercise of prosecutorial discretion.¹⁹ The union president explained the association's position, stating that "[w]hile an elected District Attorney has wide discretion in determining what charges to pursue in an individual case, that discretion does not authorize him or her to violate the law or to direct attorneys representing the district attorney's office to violate the law."²⁰

The primary lawsuit against Gascón, brought by the union, superficially uses the language of the rule of law, democracy, and attorney ethics, but its allegations do not correspond. For instance, it alleges that "George Gascón, on the first day of his investiture as Los Angeles County's District Attorney, issued multiple Special Directives that commanded the deputy district attorneys (the 'DDAs') of the Los Angeles County District Attorney's Office to violate California's criminal laws, their oath as prosecutors, and their professional ethical obligations."²¹ Yet the complaint fails to cite any specific ethics rules beyond general ones to uphold the law²² and, significantly, does not acknowledge the special ethics rules for prosecutors. As discussed further below, prosecutors are the only attorneys to have a unique ethical rule and role. The role is as "a minister of justice and not simply that of an

18. Ian Spiegelman, *Top L.A. Prosecutors Claim Retaliation by D.A. Gascon in New Lawsuit*, L.A. MAG. (Mar. 9, 2022), <https://www.lamag.com/citythinkblog/top-l-a-prosecutors-claim-retaliation-by-d-a-gascon-in-new-lawsuit>.

19. *Id.*

20. Katy Grimes, *LA Prosecutors File Lawsuit to Stop District Attorney Gascón from Breaking California Law*, CAL. GLOBE (Dec. 30, 2020, 3:34 PM), <https://californiaglobe.com/articles/la-prosecutors-file-lawsuit-to-stop-district-attorney-gascon-from-breaking-california-law>.

21. Respondent's Answering Brief at 1, *Ass'n of Deputy Dist. Att'ys for L.A. Cnty. v. Gascón*, 295 Cal. Rptr. 3d 1 (Ct. App. 2022) (No. B310845).

22. Verified Petition for Writ of Mandate and/or Prohibition and Complaint for Declaratory and Injunctive Relief at 12, *Ass'n of Deputy Dist. Att'ys for L.A. Cty. v. Gascón*, No. 20STCP04250 (Cal. Super. Ct. Dec. 30, 2020) ("This command not only violates the law, but also requires the County prosecutors to violate their ethical duties. . . . '[A] lawyer shall not violate the lawyer's duty under Business and Professions Code section 6808, subdivision (a) to uphold the Constitution and laws of the United States and California A lawyer shall not . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.'") (quoting CAL. RULES PROF. CONDUCT §§ 1.2.1, 3.3 (West 2018)).

advocate.”²³ The Criminal Justice Standards for the Prosecution Function further elaborate upon this mandate: “The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court. The prosecutor’s office should exercise sound discretion and independent judgment in the performance of the prosecution function.”²⁴ While there is a rich literature exploring the meaning and contours of Model Rule 3.8 and other rules that bear upon how a prosecutor fulfills their duties, none of this has been explored in the lawsuits in question. Nor does the union lawsuit acknowledge that it is ethical—maybe even required to do “justice” under the Model Rules—for Gascón to advocate for his interpretation of, or a change in, California law.²⁵

As to notions of democracy and the rule of law, the lawsuit also does not live up to its rhetoric. Indeed, the real center of the union’s disagreement with Gascón appears to be that they disagree with the policies he was elected to implement—and thus disagree with the Los Angeles electorate—and think he is too overbearing in implementing this mandate. For instance, the union critiques the DA for “attempt[ing] to impose his vision of criminal justice through sweeping assertions of executive power,”²⁶ something that seems exactly what chief prosecutors in the United States are supposed to do as part of the tri-branch government checks and balances. The union then argues that Gascón was wrong to exercise his right to appeal to implement his electoral platform, using insulting and inflammatory rhetoric:

[Gascón] is convinced that the rule of law doesn’t apply to him He believes his election is a mandate from the voters that vests him with unlimited power to impose his personal ideology, even when doing so means

23. MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR. ASS’N 1983).

24. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(a) (AM. BAR ASS’N 2017).

25. For the same reasons, the Superior Court’s conclusion that the District Attorney’s Special Directives would force ADDA’s members to violate supposed ethical obligations fails. The Superior Court concluded that “*Kilborn* [which held that the requirement that a prosecutor plead and prove prior serious and violent felony convictions does not violate separation of powers in Three Strikes cases] and other appellate cases must be cited to the court if the constitutionality of the plead[] and prove requirement” is at issue. Ass’n of Deputy Dist. Att’ys for L.A. Cty. v. Gascón, No. 20STCP04250 (Cal. Super. Ct. Dec. 30, 2020). But the Court of Appeal cases on this issue deal with a separate question. In any event, even if the Superior Court had the right reading of those cases (and it does not), the Rules of Professional Conduct also permit a Deputy District Attorney to advance a position contrary to current law, as long as it is supported by “a good faith argument for an extension, modification, or reversal of the existing law.” CAL. RULES PROF. CONDUCT, § 3.1 (West 2018). Thus, even if a Deputy District Attorney believed that the Directive’s statement about the constitutionality of the Three Strikes Law did not comport with Court of Appeal decisions, he may nonetheless repeat the Directive’s statement—and do so ethically—because there is a reasonable (in fact, correct) argument that there should be a change in the existing law. See Ass’n of Deputy Dist. Att’ys for L.A. County v. Gascón, 295 Cal. Rptr. 3d 1, 41 (Ct. App. 2022).

26. Respondent’s Answering Brief, *supra* note 21.

disregarding the will of the voters, the legislators, and the governor who enacted the three strikes laws.²⁷

They deride Gascón, winner of one of, if not the, highest budget²⁸ and most contested prosecutorial elections to date, as a dictator—terming him “King George”—while not addressing their own unelected status and not explaining why their vision of criminal “justice” should supersede the elected DA.

Nonetheless, so far, the ADAs appear to be prevailing in this politically-charged lawsuit. A panel of the California Court of Appeal ruled that Gascón cannot order prosecutors to refrain from filing three strikes sentencing enhancements.²⁹ Though the opinion gives credence to both the union’s and Gascón’s conceptions of prosecutorial discretion,³⁰ the panel ultimately found for the union, stating that changes to the Three Strikes Law must come through the voters or the legislature, and “it is neither for [courts] nor the district attorney to rewrite it.”³¹

The second type of mutinous lawsuit—individual suits—similarly deploys vague terms about “violating the law” but also does not seem to cite specific ethics rules. One such suit, brought by two former high-ranking ADAs in the Los Angeles DA’s office, claims they were demoted and reassigned as “retaliation” for refusing to follow unlawful policies.³² Yet the policies they cite do not seem to be “unlawful”—instead they are the kind of change that Gascón was elected for. For instance, ADA Maria Ramirez claims she was demoted because she would not follow Gascón’s policy restricting the charging of juveniles as adults, a policy she claims would put prosecutors in a corner where they were “forced to randomly select only one victim and charge one crime pertaining to that chosen victim,” and lead some cases to be dismissed.³³ Although her complaint alleges that “these

27. City News Service, *Prosecutors Union Blasts Gascón for Appeal of Ruling on Prior Strikes*, NBC L.A. (July 15, 2022, 9:02 PM), <https://www.nbctlosangeles.com/news/local/prosecutors-union-blasts-gascon-for-appeal-of-ruling-on-prior-strikes/2939243> (quoting ADDA’s statment).

28. James Queally & Maloy Moore, *Police Unions, Justice Reformers Battle for Dollars in Bitter L.A. County D.A. Race*, L.A. TIMES (Feb. 24, 2020, 5:00 PM), <https://www.latimes.com/california/story/2020-02-24/political-donations-jackie-lacey-george-gascon-los-angeles-district-attorney>.

29. Eric Leonard, *Appeals Court Orders LA County DA Gascón to Enforce Three-Strikes, Special Circumstances*, NBC L.A. (June 2, 2022, 5:06 PM), <https://www.nbctlosangeles.com/investigations/appeals-court-orders-la-county-district-attorney-george-gascon-three-strikes-special-circumstances/2908106>; see also Matthew Ormseth, *Gascón Appeals Order that Knocked Down Prior Strikes Directive to California Supreme Court*, L.A. TIMES (July 15, 2022, 5:54 PM), <https://www.latimes.com/california/story/2022-07-15/gascon-appeals-order-that-knocked-down-prior-strikes-directive-to-california-supreme-court-to> (stating that Gascón’s lawyers argue that this incursion onto the DA’s discretion is a dangerous precedent and violates the separation of powers, creating a potential “constitutional crisis”). Gascón is appealing to the full appeals court, the Supreme Court of California, and the appeal is still pending as of May 2, 2023. Ass’n of Deputy Dist. Att’ys for Los Angeles Cnty. v. Gascon, 515 P.3d 657 (Cal. 2022) (granting petition for review).

30. See Ass’n of Deputy Dist. Att’ys for L.A. County v. Gascón, 295 Cal. Rptr. 3d 1, 25–45 (Ct. App. 2022).

31. *Id.* at 37.

32. Scott Schwebke, *High-Ranking Prosecutors Allege DA Gascón Demoted Them for Complaining About Policies*, L.A. DAILY TIMES (Mar. 9, 2022, 7:01 AM), <https://www.nbctlosangeles.com/investigations/appeals-court-orders-la-county-district-attorney-george-gascon-three-strikes-special-circumstances/2908106>.

33. *Id.*

filings would constitute fraud on the court and, among other things, violate plaintiff's ethical and prosecutorial obligations under the law," there are no citations to ethical authority, and charging fewer juveniles as adults certainly does not constitute anything akin to "fraud."³⁴ Moreover, picking among and only bringing some cases is something all prosecutors do and have always done—they cannot possibly prosecute all alleged crimes in their jurisdictions. In short, the complaint is drafted as an employment action but reads more like a personal attack on Gascón for carrying out his campaign platform and for prosecuting police for assaults and murders, hiring new ADAs in his office who formerly worked for the public defender, and other such changes for which he was elected.³⁵

In a different individual lawsuit, ADA Jon Hatami—the “star” of a recent Netflix documentary series³⁶—makes even more tenuous claims; he alleges defamation and that his criticism of Gascón's policies led Gascón to not provide him the high profile assignments which “impact[ed his] work and ability to prove himself for desired promotions.”³⁷ Additionally, shortly after Gascón's election, Hatami appeared on Fox and other news channels to criticize Gascón as “pro-criminal, anti-victim, and [someone] who refuses to follow the law.”³⁸ Given this public undermining of Gascón—indeed, accusing him of illegal activity!—not promoting Hatami seems understandable.

2. Filing Ethics Complaints

In addition to lawsuits being filed against them, numerous progressive prosecutors have also faced ethics complaints filed against them. Although it is unclear whether line ADAs participated directly in these, it is possible that some influenced or at least supported them. To cite just a few of the numerous examples: a national law enforcement group, the National Police Association, filed an ethics complaint against then-Boston DA Rachael Rollins before she was even inaugurated, arguing that her campaign platform to reduce the prison population by not charging people for some minor crimes constituted a “reckless disregard for the laws.”³⁹ St. Louis

34. *Id.*

35. “Instead we have a dangerous combination of willful ignorance and vindictiveness—and the citizens of Los Angeles County are paying the price.” *Id.* Victor Rodriguez, meanwhile, alleges that, although Gascón wanted to offer extreme leniency to violent young suspects, cops who found themselves accused would be given no leniency and no quarter regardless of the evidence—or lack of evidence—in the filing claim. *Id.*

36. *Prosecutor on Gabriel Fernandez's Case, Jon Hatami, Says He Thinks of Him Every Day*, INSIDE EDITION (Mar. 6, 2020, 8:54 PM), <https://www.insideedition.com/prosecutor-on-gabriel-fernandezs-case-jon-hatami-says-he-thinks-of-him-every-day-5858/>.

37. Julie Drake, *Hatami files suit against Gascón*, ANTELOPE VALLEY PRESS (Sept. 9, 2021), https://www.avpress.com/news/hatami-files-suit-against-gasc-n/article_a5412a70-1116-11ec-b236-6b6c6348f030.htm; see also Jason McGahan, *A Media Savvy Deputy DA is Leading a Noisy Crusade Against George Gascón*, L.A. MAG. (Apr. 15, 2021), <https://www.lamag.com/citythinkblog/gascon-jon-hatami-district-attorney/> (describing Hatami as “used to playing to the camera”).

38. McGahan, *supra* note 37.

39. Sean Philip Cotter, *National Police Group Knocks Incoming DA Rachael Rollins*, BOS. HERALD (Dec. 28, 2018, 3:09 PM), <https://www.bostonherald.com/2018/12/28/national-police-group-knocks-incoming-da-rollins>; Kristin LaFratta, *In Memo, Suffolk DA Rachael Rollins Tells Staff ‘Immediately Notify Me’ of ICE Activity at*

DA Kim Gardner was cited for discovery violations in her office's recent high-profile prosecution of former Missouri governor Eric Grietens.⁴⁰ San Luis Valley, Colorado DA Alonzo Payne was accused of not communicating with judges, victims, and defense attorneys, as well as not complying with the state Crime Victim Rights Act, and was disbarred⁴¹—an extremely rare sanction, especially for a government attorney such as a prosecutor.

These complaints certainly appear politically motivated, especially in light of the significant amount of serious prosecutorial misconduct that goes unaddressed, even enabled, across the country.⁴² The Rollins complaint was baseless and, similar to the mutinous lawsuits, did not cite ethical rules that purportedly formed the basis for the complaint. Gardner's case became high-profile because of her and Grietens's political positions and opposition. (Indeed, Grietens weaponized the case in his failed 2022 U.S. Senate campaign.⁴³) Yet the allegations of misconduct—evidence of which was discovered during a very unusual mass police raid of Gardner's office⁴⁴—are no different than many cases where prosecutors receive no disciplinary action, or even no criticism at all, and much less serious than many cases where that is also true. To take just one example: three men in Queens were exonerated in spring 2021 after spending twenty-four years in prison after a trial where prosecutors failed to turn over crucial evidence and made numerous false statements to the court, yet the

Boston Courthouses, MASS. LIVE (March 26, 2019, 11:03 AM), <https://www.masslive.com/boston/2019/03/in-memo-suffolk-da-rachael-rollins-tells-staff-immediately-notify-me-of-ice-activity-at-boston-courthouses.html>.

40. Debra Cassens Weiss, *Top St. Louis Prosecutor is Reprimanded for Discovery Missteps, Misstatements in Then-Governor's Prosecution*, A.B.A. J. (Sept. 1, 2022, 8:44 AM), <https://www.abajournal.com/web/article/top-st-louis-prosecutor-is-reprimanded-for-discovery-missteps-misstatements-in-then-governors-prosecution>.

41. See Carol McKinley, *Former San Luis Valley District Attorney Disbarred*, COLO. POL. (Oct. 14, 2022), https://www.coloradopolitics.com/courts/former-san-luis-valley-district-attorney-disbarred/article_92f5ad42-314c-5d01-95d1-507819e96bc6.html; see also Karin Brulliard, *A Rural Prosecutor Pledged Reform. Critics Say He Delivered Disaster*, WASH. POST (Apr. 21, 2022, 6:00 AM), <https://www.washingtonpost.com/nation/2022/04/21/rural-colorado-prosecutor-recall/> (describing Payne's platform as "radical," especially for rural Colorado, and including reforms such as ending cash bail and no more "criminalization of poverty").

42. See, e.g., Jonah E. Bromwich, *They Publicized Prosecutors' Misconduct. The Blowback Was Swift*, N.Y. TIMES (Nov. 10, 2021), <https://www.nytimes.com/2021/11/10/nyregion/queens-prosecutors-misconduct.html> (describing egregious prosecutorial misconduct that has gone unaddressed and quoting Georgetown University Law Center professor Paul Butler's comment that "[p]rosecutors are notorious for escaping being investigated when there are concerns that they violated legal ethics [and for escaping consequences]").

43. *Gardner Admits Wrongdoing in Ethics Investigation*, KMOV (Apr. 11, 2022), <https://www.kmov.com/2022/04/11/gardner-faces-disciplinary-hearing-stemming-grietens-invasion-privacy-case/>. Gardner ultimately accepted a reprimand and fine. Rebecca Rivas, *Missouri Supreme Court Fines Kim Gardner \$750 for Professional Misconduct*, MO. INDEP. (Aug. 30, 2022, 3:56 PM), <https://missouriindependent.com/2022/08/30/missouri-supreme-court-fines-kim-gardner-750-for-professional-misconduct/>.

44. Rivas, *supra* note 43. More broadly, Gardner has become the focus of a special prosecutor who was appointed to investigate a former F.B.I. agent. The prosecutor has had her Gardner's office's email server seized by the police, giving them access, her lawyers say, to active criminal investigations of the department itself. He has allegedly been fishing for incriminating information on her administration, and her aides have been called before a grand jury. See Richard A. Oppel Jr., *The St. Louis Prosecutor Went After the Establishment. Now the Tables Are Turned*, N.Y. TIMES (June 14, 2019), <https://www.nytimes.com/2019/06/14/us/st-louis-prosecutor-kim-gardner.html>.

prosecutors have faced no discipline.⁴⁵ It is no wonder that the New York Times editorial board termed one state bar “a prosecutor-protection racket.”⁴⁶

In contrast, the highly partisan nature of complaints against progressive prosecutors for much less egregious violations is striking. Unlike the other accused prosecutors, Payne does seem to have had some serious challenges running the office, and perhaps was even of questionable competence as chief prosecutor. Nonetheless, it is still apparent that his disciplinary action—following a recall campaign funded by the local city council—was in large part motivated by his perceived progressive or even “radical” views on criminal system reform; for instance, local media sources noted that he was endorsed by Bernie Sanders.⁴⁷ Opponents stated they support some reform but that Payne, the first Latino District Attorney in the forty percent Latinx district, took it “too far” and, accordingly, sought not only to remove him from elected office but also to disbar him.⁴⁸

3. Opposing Publicly in Other Ways

In addition to lawsuits and ethics complaints, other forms of public opposition have also been deployed against progressive prosecutors, including openly joining with vocal enemies of the elected prosecutor, such as the police; speaking out publicly—even outright insulting—the DA; propagating misinformation about the DA and their policies and purported impact on public safety; supporting recalls, impeachments, and other measures designed to undo the election and oust the DA before the next election (Boudin) or in spite of reelection (Krasner).

Numerous examples exist of the first category, including ADAs in St. Louis County, Missouri chief prosecutor Wesley Bell’s office taking the highly unusual move of joining the police union as soon as he was elected, even before he took office.⁴⁹ Additionally, there are many instances of prosecutors criticizing the elected DA to the press and making personal attacks via social media and other platforms. These range from outright criticism and personal attacks, to leaking information about decisions they disagree with—such as the case with Manhattan DA Alvin Bragg during his prosecution of former President Trump—and even

45. George Joseph, *Prosecutors Wrongfully Convicted Three Men Who Spent 24 Years Behind Bars. Will They Be Disbarred?*, GOTHAMIST (May 6, 2021), <https://gothamist.com/news/prosecutors-wrongfully-convicted-three-men-who-spent-24-years-behind-bars-will-they-be-disbarred>.

46. Editorial, *How Can You Destroy a Person’s Life and Only Get a Slap on the Wrist?*, N.Y. TIMES (Dec. 4, 2021), <https://www.nytimes.com/2021/12/04/opinion/prosecutor-misconduct-new-york-doj.html>.

47. See Matt Connelly, “Let ‘em Go Alonzo” – Bernie Sanders Styled District Attorney Facing Recall, CAMPFIRE COLORADO (Mar. 17, 2022), <https://campfirecolorado.com/featured/featured-slot-1/let-em-go-alonzo-bernie-sanders-styled-district-attorney-facing-recall/>.

48. Brulliard, *supra* note 41.

49. Maybell Romero, *Prosecutors and Police: An Unholy Union*, 54 U. RICH. L. REV. 1097, 1099 (2020).

misinformation.⁵⁰ For instance, consider the long-time Chicago line prosecutor in Kim Foxx's office who wrote in a leaked email upon resigning in July 2022, that he had "zero confidence in [Foxx's] leadership," and that "[t]his Administration is more concerned with political narratives and agenda than with victims and prosecuting violent crime. That is why I can't stay any longer."⁵¹ Similarly, Richard Sax, a Philadelphia line prosecutor who retired when Philadelphia DA Larry Krasner was elected—and who the office credibly accused of misconduct in a high-profile exoneration⁵²—spoke with multiple media sources to portray Krasner as both a bad prosecutor for the community and a bad person, calling him "mean-spirited," "spitting fire," and taking "personal and vindictive" actions against career prosecutors.⁵³ Sax also publicly disparaged Krasner on Sax's Facebook page, berating Krasner for his "nasty outburst" and stating that he was "ruining the DA's office." Another person on Sax's Facebook page replied that Krasner should be put down, as in killed "like a rabid dog."⁵⁴ Other Philadelphia prosecutors wrote on anonymous Twitter accounts "to bombard Krasner with broadsides."⁵⁵

Some of this public criticism of top prosecutors is false information and/or attempts to use specific high profile cases in "dog whistle" fashion to obscure the data and actual facts about crime, often coupled with efforts to undermine elections. For instance, in the San Francisco recall effort, line ADA Brooke Jenkins not only lied about volunteering for the recall effort, covering up her significant payments from opposition forces,⁵⁶ but also ignored the facts about decreased crime in San Francisco or about research on causes related not to Boudin's policies but rather to the pandemic and other factors. Jenkins focused instead on a "Willie Horton" narrative of a few high-profile cases.⁵⁷ Even more recently, a former Republican District Attorney in Pennsylvania authored a report claiming that Krasner's policies are connected to increased crime—claims that scholars virtually unanimously criticize

50. Andrew Weissmann, *The Curious Case of Alvin Bragg – Reconsidering the DA's Trump Investigation*, JUST SECURITY (Aug. 25, 2022), <https://www.justsecurity.org/82833/the-curious-case-of-alvin-bragg-reconsidering-the-das-trump-investigation/>.

51. Craig Wall, *Resigning Prosecutor Says He Has 'Zero Confidence' in Cook County State's Attorney Kim Foxx*, ABC 7 (Aug. 3, 2022), <https://abc7chicago.com/cook-county-states-attorney-kim-foxx-james-murphy-resignation/12096537/>.

52. *Philly DA's Office: Ex-Prosecutors Committed 'Egregious' Misconduct in 2007 Murder Case*, YAHOO NEWS (May 15, 2018), <https://news.yahoo.com/philly-da-apos-office-ex-105537490.htm> (reporting that the Philadelphia DA filed a court motion "against onetime members of its own office" in a conviction review proceeding to free Dontia Patterson, citing "egregious police and prosecutorial misconduct" including Richard Sax who did not turn over exculpatory evidence, i.e. committed *Brady* violations, and that the prosecution was "illogical" and "completely lacking in integrity").

53. Ralph Cipriano, *Progressive D.A. Larry K. Loses it With Former Prosecutor*, BIG TRIAL (May 10, 2018), <https://www.bigtrial.net/2018/05/progressive-da-larry-krasner-loses-it.htm>. Krasner countered that these "old regime" prosecutors like Sax had a "win at all costs" mentality and targeted people of color. *Id.*

54. *Id.*; see also Austen, *supra* note 11.

55. Austen, *supra* note 11.

56. See *infra* note 87.

57. Benjamin Schneider, *Chesa Boudin Recall: Both Sides Make Their Case*, S.F. EXAM'R (May 23, 2022), https://www.sfxaminer.com/news/chesa-boudin-recall-both-sides-make-their-case/article_95cdd158-1d59-50ca-f792-5f0c8ae9c032.htm.

as not empirically supported. Experts also point out that the report itself is rife with methodological and factual errors.⁵⁸ Indeed, no scholars or experts appear to support Hogan's report, although numerous conservative politicians do.⁵⁹

4. Undermining Internally

This catch-all category includes numerous tactics such as destroying documents and tanking cases deliberately. To take one example, Kim Ogg, Houston's first openly gay top prosecutor and the first Democrat to hold the office in nearly forty years, reported that "line prosecutors had worked actively against her when she was taking over last year, even deleting electronic files on a controversial case."⁶⁰ Similarly, some line attorneys in LA are purportedly withholding key case information from DA Gascón and other supervisors.⁶¹ A little less aggressive but still impeding the DA's reforms, mutiny can include ignoring or flouting the new policy *sub silentio*. The extent of this is likely very widespread, and virtually impossible to capture.

5. Participating in Mass Resignations

There are many examples of big waves of resignations from progressive prosecutorial offices: for example, over fifty ADAs in Krasner's office resigned when he was first elected. This is currently happening in New York City, where about twelve percent of the ADAs in Manhattan had resigned by June 2022, and thirteen percent in Brooklyn, with a large number of resignations also happening in Chicago.⁶² Some claim this is due to disagreements with the elected DA over what is best for the public and what is "justice." For instance, a former senior Chicago line prosecutor Dan Kirk, who resigned following Foxx's election, claims "people just can't tolerate working there anymore if it doesn't match their vision of justice."⁶³ While

58. Samantha Michaels, *Blaming Larry Krasner for Gun Violence Does Not Make Statistical Sense*, MOTHER JONES (Oct. 31, 2022), <https://www.motherjones.com/politics/2022/10/larry-krasner-impeachment-republicans-prime-data-progressive-prosecutors>; see also Matt Keyser, *Researchers Concerned with Findings of 'De-Prosecution' Article Published in Peer-Reviewed Journal*, NAT'L P'SHIP FOR PRETRIAL JUST. (Jan. 9, 2023), <http://www.pretrialpartnership.org/news/researchers-concerned-with-findings-of-de-prosecution-article-published-in-peer-reviewed-journal/> (quoting multiple social scientists as studying the data and concluding that there was "no effect of de-prosecution on homicide").

59. Akela Lacy, *Larry Krasner Impeachment Committee Relies on Widely Panned Journal Study*, THE INTERCEPT (Oct. 24, 2022), <https://theintercept.com/2022/10/24/larry-krasner-impeachment-debunked-study/>. Republicans pursued a midterm strategy of feeding fears of crime, and tried to "cherry-pick" data with the specific goal of using it to impeach Krasner. See Michaels, *supra* note 58.

60. Austen, *supra* note 11.

61. James Queally, *L.A. County D.A.'s Office Under Gascon Is at War with Itself*, L.A. TIMES (May 3, 2022), <https://www.latimes.com/california/story/2022-05-03/la-da-internal-strife>.

62. Melissa Klein, *Hundreds of NYC Prosecutors Quitting Woke Bosses and Onerous Reforms*, N.Y. POST (June 25, 2022), <https://nypost.com/2022/06/25/more-nyc-prosecutors-quit-because-of-reform-laws/>; Amanda Vinicky, *Cook County State's Attorney Kim Foxx Faces Mounting Criticism over Prosecutor Resignations*, WTTW NEWS (Aug. 2, 2022), <https://news.wttw.com/2022/08/02/cook-county-state-s-attorney-kim-foxx-faces-mounting-criticism-over-prosecutor>.

63. Vinicky, *supra* note 62.

some of these resignations do seem ideologically motivated, many are likely due to other factors such as the pandemic, or just self-interest and desire to undermine the elected DA.⁶⁴

B. Some Commonalities Among These ‘Mutineers’

Numerous patterns emerge among these current or former line prosecutors mutinying against their elected bosses, despite their variation in jurisdiction and local history. While the typology presented above categorizes several forms of resistance against progressive prosecutors in neat and separate fashion, they often overlap and are very much related to each other. Similarly, mutineers, no matter what form of resistance they engage in, have some commonalities with each other.

First, these mutineers across various jurisdictions frequently criticize the elected DA or attribute events to them that are not related to the DA’s policies or performance. For instance, many of the resignations, especially during the COVID-19 pandemic, are dubiously linked to the election of a progressive prosecutor. Far more likely, looking at nationwide employment patterns, is that large-scale resignations are a combination of pandemic employment changes, salaries, work-life balance, and the like.⁶⁵ Tellingly, in New York City many public defenders are also leaving in large numbers for these reasons.⁶⁶ Similarly, in Chicago, what may be pandemic related turnover is being framed by Foxx’s political opponents as about her bad policies.⁶⁷ Dan Kirk, the former senior line prosecutor in Foxx’s office who resigned, reasoned

[Q]uite frankly, exposing the population of Cook County to dangerous criminals who every reasonable person agrees should not be allowed to walk the streets, should not comport with anybody’s sense of integrity and morals and ethics, and that’s why I’m not surprised that all these people are leaving in the numbers that they are.⁶⁸

64. Examples of the latter phenomenon are Ayala’s former deputy who took over death penalty prosecutions for the Florida Governor, see Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 18 (2019) (describing the “swift and severe” backlash to the prosecutor), or Brooke Jenkins in San Francisco, see Neilson, *supra* note 12.

65. See, e.g., Jonah E. Bromwich, *Why Hundreds of New York City Prosecutors Are Leaving Their Jobs*, N.Y. TIMES (Apr. 4, 2022), <https://www.nytimes.com/2022/04/03/nyregion/nyc-prosecutors-jobs.html>; see also Brady Knox, *Mass Exodus from Prosecutor Kim Foxx’s Office Amid Chicago Crime Wave*, WASH. EXAM’R (Oct. 12, 2022), <https://www.washingtonexaminer.com/news/justice/mass-exodus-states-attorney-kim-foxx-continues-frustrations-mount-chicago-crime-wave>; see also Lisa Rozner, ‘Great Resignation’ Extends to New York City’s District Attorney Offices, CBS N.Y. (Apr. 4, 2022), <https://www.cbsnews.com/newyork/news/great-resignation-extends-to-new-york-citys-district-attorney-offices/>.

66. Bromwich, *supra* note 65.

67. Vinicky, *supra* note 62. See also Christopher Smith, *Black Women Prosecutors Under Fire*, VERA, <https://www.vera.org/state-of-justice-reform/2019/prosecution> (last visited Jan. 12, 2022).

68. Vinicky, *supra* note 62.

Second, and even more problematic, mutineers attack elected DAs for core aspects of their job, such as being “political” or using prosecutorial discretion.⁶⁹ For instance, numerous former and current line prosecutors in Chicago have loudly berated DA Kim Foxx for supporting bail reform and the Illinois SAFE-T Act.⁷⁰ One even argued that Foxx should make decisions “based upon the facts and the law and not based on the *whims of her political supporters*”—that is, the constituents who elected her twice over.⁷¹ Similarly, LA ADAs deride DA George Gascón as behaving like the most un-American of political figures—a hereditary monarch named “King George”—for exercising his discretion against their own preferences.⁷² These lines of criticism are particularly hypocritical because these same line prosecutors and their colleagues did not criticize elected leaders during the decades in which those DAs exercised their discretion and lobbied against any criminal system reform.⁷³

Relatedly, these line prosecutors weaponize the language of democracy and ethics to resist policy changes, despite the fact that these DAs were voted into office on these platforms for change. As noted above, although the mutineers use the language of “ethics” and democracy, they actually cite little to no ethical authority and actively undermine democratically elected prosecutors.⁷⁴ Third, the tactics of prosecutorial mutiny reveal a deep institutional resistance to change—even publicly demanded change by prosecutors’ groups, unions, and line prosecutors en masse—as well as narrow and rigid conceptions of system actor roles. Accordingly, mutineers complain that progressive prosecutors are asking line DAs to “essentially be tantamount to the second defense attorney,”⁷⁵ given that these newly-elected prosecutors ask them to not prosecute minor crimes as aggressively as in the past. This exemplifies how mutinous prosecutors are resistant to the role of the prosecutor evolving.

Fourth, their revolts are also accompanied by a hubris and hero mentality that has long characterized many prosecutors.⁷⁶ Although some prosecutors have acknowledged the need for “humility,” most do not seem to embrace its use in

69. See, e.g., *Veteran Prosecutor Abruptly Quits, Ripping Foxx in Goodbye Email: ‘Zero Confidence,’* CWBCHICAGO (July 29, 2022), <https://cwbchicago.com/2022/07/veteran-prosecutor-abruptly-quits-ripping-foxx-in-goodbye-email-zero-confidence.html> (reprinting the body of Murphy’s resignation email). Not to mention that activists and critical scholars have long critiqued the false binary between law and politics and the myth of law’s neutrality. See Cynthia Godsoe, Abbe Smith & Ellen Yaroshesky, *Can You Be A Legal Ethics Scholar and Have Guts?*, 35 GEO. J. LEGAL ETHICS 429, 452–53 (2022).

70. Vinicky, *supra* note 62.

71. *Id.* (emphasis added).

72. Ormseth, *supra* note 29 (quoting a lawyer for the ADA union mocking the “reign of King George Gascón”).

73. Godsoe, *supra* note 2, at 170–71.

74. See *supra* Part I.A.2.

75. Vinicky, *supra* note 62 (citing Kirk of Chicago complaining about Kim Foxx).

76. See, e.g., Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001); Wendy Kaminer, *Games Prosecutors Play*, AM. PROSPECT (Dec. 19, 2001), <https://prospect.org/justice/games-prosecutors-play/>; MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS 134 (1999). We believe that the hero complex is one of the most significant barriers to criminal system reform. See Godsoe, *supra* note 2, at 205–07.

practice.⁷⁷ Indeed, in a profession often characterized by hubris, prosecutors are arguably at the top.⁷⁸ Some of this is self-selection; while some of the rationales for going into prosecution are neutral, others are more “savior-esque.” For instance, in *Career Motivations of State Prosecutors*, Professors Ronald Wright and Kay Levine examine four specific rationales for becoming a prosecutor, with two having been popularly accepted to some extent in “the prosecutorial memoir literature” and another two arising from their own data and analysis.⁷⁹ The first rationale is about “express[ing] and validat[ing] a person’s intrinsic commitment to rules, structure, and hardened categories of right and wrong.”⁸⁰ Some of the prosecutors surveyed in Wright and Levine’s study expressed a “desire to perform public service for the local community.”⁸¹ For instance, one prosecutor explained that the job meant “represent[ing] the good tax-paying, law-abiding citizens of the county.”⁸²

Some prosecutors who mutiny, especially those who do so openly and as publicly as possible, seem to be doing their jobs for very different reasons than those explored by Wright and Levine (apart from being motivated by very hardened categories of right and wrong, perhaps). Oftentimes, rather than accepting the will of the electorate, they take any limitation on how they do their jobs—be they

77. See, e.g., Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC’Y 18 (1940). U.S. Supreme Court Justice Jackson famously stated:

A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen’s safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.

Id.

78. Progressive prosecutors continue to struggle with this image. Seattle DA Dan Satterberg recently noted his “humility” in thinking the criminal legal system could solve societal problems—a positive development—but simultaneously lamented his office’s difficulty in hiring local law graduates since prosecutors are no longer seen by many as the “good guys.” See Dan Satterberg, Dist. Att’y, King Cnty., Virtual Presentation at UNLV Law School Prosecution Symposium (Apr. 8, 2022). Even more telling, and less astute to audience, former Boston progressive DA Rachael Rollins created a public flap when she critiqued public defenders for claiming to be “heroes” despite failing to adequately represent “[her] people,” that is, communities of color, implying prosecutors were the real protectors and saviors. See Andrea Estes, *District Attorney Rollins Calls Public Defenders too White and Privileged, Setting off a Storm of Protest*, BOS. GLOBE (May 5, 2020), <https://www.bostonglobe.com/2020/05/05/metro/district-attorney-rollins-calls-public-defenders-too-white-privileged-setting-off-firestorm-among-defense-lawyers/>.

79. Ronald F. Wright & Kay L. Levine, *Career Motivations of State Prosecutors*, 86 GEO. WASH. L. REV. 1667, 1681 (2018).

80. *Id.* Some prosecutors might even believe that they “are doing God’s work by enforcing the law.” *Id.* at 1682. More neutral reasons include gaining trial skills; state prosecutors view themselves as trial attorneys even though most of their cases are resolved by way of plea bargain “because they are in court regularly for adversarial proceedings,” even when those proceedings are not trials. Another rationale focused on very practical concerns—work/life balance and not having to maintain the grueling hours that can come from working at a large, prestigious law firm or keeping a solo practice afloat. *Id.* at 1681–82, 1685–86.

81. *Id.* at 1688.

82. *Id.* at 1689.

proposed categorical declinations to prosecute, office-wide policies on sentencing recommendations, or the like—very personally, while hiding behind the rationale of “public safety” to justify their actions. Tellingly, some mutineers describe themselves as knowing better than their elected bosses how things should be, what is right, and what is justice. For instance, ADA Dan Kirk of Chicago claims that his derisive comments about Kim Foxx are not based on his dismissal from her office but rather because “he knows how things are supposed to go.”⁸³ Similarly, ADA Richard Sax, who openly criticized and threatened DA Larry Krasner on his social media page, as well as undermined the new conviction integrity unit in the DA’s office, claimed he was “trying to do the right thing.”⁸⁴

Finally, virtually all of the mutineer prosecutors have a personal gripe or something to gain through the critique—despite their rhetoric of acting for the people. In other words, it is not about protecting community members but rather about these prosecutors’ own ambition and political views.⁸⁵ Consider a few examples. The Los Angeles DA organization’s “past actions suggests that [their suit against Gascón] is part of a longstanding pattern of ideologically motivated advocacy and commitment to tough-on-crime policies, rather than a show of blind allegiance to the law.”⁸⁶ San Francisco’s new DA Brooke Jenkins claimed that she was speaking out publicly and volunteering for the recall campaign against her boss—former DA Chesa Boudin—out of her own ethics, but, in fact, she was being paid a significant amount by his opponents. A political action committee,⁸⁷ which provided two-thirds of the funds used in the campaign to recall Chesa Boudin and is not even headquartered in San Francisco, paid Jenkins over \$100,000.⁸⁸ Other vocal critics, such as Hatami in LA, similarly seem to have political ambitions of their own.⁸⁹

More broadly, this resistance to change often appears to be about ego and sense of self. DA Larry Krasner distinguishes between two different groups of

83. Vinicky, *supra* note 62.

84. Cipriano, *supra* note 53.

85. See, e.g., McGahan, *supra* note 37 (describing revolt by Hatami and others in the L.A. office as “politically opportunistic”).

86. Piper French, *The Prosecutors’ Union That’s Suing George Gascón has a History of Zealous Opposition to Reform*, THE APPEAL (Jan. 27, 2021), <https://theappeal.org/george-gascon-lawsuit-prosecutors-union/>; see also Carissa Byrne Hessick, Ronald F. Wright & Jessica Pishko, *The Prosecutor Lobby*, 79 WASH. & LEE L. REV. (forthcoming 2023) (recent empirical study that finds that prosecutor lobbying is widespread and most commonly used to prevent funding decreases to prosecutorial offices and block other criminal system reforms).

87. Eric Ting, *Payments Received by New SF DA Brooke Jenkins During Chesa Boudin Recall Draw Scrutiny*, SFGATE (Aug. 10, 2022), <https://www.sfgate.com/politics/article/brooke-jenkins-received-payments-17364686.php>.

88. See Joe Kukura, *SF Recalls Largely Funded by ‘Neighbors for a Better San Francisco’ PAC, Which Is Based in San Rafael*, SFIST (Feb. 10, 2022), <https://sfist.com/2022/02/10/sf-recalls-largely-funded-neighbors-for-a-better-san-francisco-pac-which-is-based-in-san-rafael/>.

89. See McGahan, *supra* note 37.

prosecutors, ones who cut corners and commit misconduct,⁹⁰ and those who more sincerely attempt to follow the prosecutorial mandate to do justice. Krasner concludes it is harder to speak to the second, more well-intentioned group, “and say, ‘Thank you for your life’s work, the report card is F because from the very beginning you were approaching this the wrong way.’”⁹¹ Black Lives Matter founder Patrisse Cullors agrees that the realization of some prosecutors that what they thought was “heroic” might have just been punitive, and the concomitant damage to their self-image is driving a significant amount of the near-rabid backlash against California progressive prosecutors; as she puts it, “yesterday’s heroes may fear they are today’s villains. Accepting or adopting criminal justice reform could undermine their very sense of self.”⁹² In short, acknowledging that a new approach to the criminal system might be safer and better entails some prosecutors admitting that their years of practice and daily judgments were not necessarily helpful, were maybe even harmful—a reckoning that is very difficult for people to do, especially for those used to being feted as professionals and “good guys.”⁹³

II. ETHICAL AND DEMOCRATIC PROBLEMS WITH PROSECUTORIAL MUTINY

This Part takes on the big question: can lawyers ethically participate in mutiny? Especially against a democratically elected boss? The answer is sometimes, but many of the examples in this piece cross a line. This Part begins by providing some historical context about prosecutorial power and the unique prosecutorial roles before turning to some specific ethical rules mutineers’ actions may violate, and concludes by arguing that prosecutorial mutiny can also threaten democracy.

A. Historical Context of Prosecutors and Their Ethical Duties

The history of the American prosecutor is unique with the norm that prosecutors should not be motivated by anything apart from the public interest arising in the

90. See Austen, *supra* note 11. Notably, research suggests that prosecutors who consider themselves as “heroes” are more likely to take ethical shortcuts, or even commit misconduct. See Kay L. Levine & Ronald F. Wright, *Images and Allusions in Prosecutors’ Morality Tales*, 5 VA. J. CRIM. L. 38, 44–50, 56–58 (2017) (concluding from qualitative research that those who describe themselves as “the savior[s] and protector[s] of the community” are more likely to engage in discovery malfeasance, vilify the defense, “have ‘blindlers’ on,” and lack an objective view of the strength of evidence and proportionate punishment).

91. See Austen, *supra* note 11.

92. See Patrisse Cullors, Opinion, *What Two California Recall Efforts Say About Criminal Justice Reform*, L.A. TIMES (Feb. 4, 2021, 3:05 AM), <https://www.latimes.com/opinion/story/2021-02-04/gascon-boudin-recall-criminal-justice-reform>.

93. Longtime federal district court judge Nancy Gertner, now a Professor of Practice at Harvard Law School, makes a related point about judges, and notes that this focus on “legal formalism” instead of the parties involved or legal systems on the ground has caused judges to contribute to mass incarceration and to be resistant to necessary reforms in the criminal legal system. NANCY GERTNER, THE SQUARE ONE PROJECT, REIMAGINING JUDGING: EXECUTIVE SUMMARY (2022), <https://squareonejustice.org/wp-content/uploads/2021/12/CJLJ9284-Reimagining-Judging-summary-211215-WEB.pdf> [<https://perma.cc/SSR8-MY8Q>].

relatively early days of the republic.⁹⁴ The role of the prosecutor was professionalized throughout the 1800s, initially beginning largely as a part-time job taken on by lawyers with private practices to a full-time public service career with its own particular cultural norms.⁹⁵ Prosecutors grew to positions of “trust and authority” in their offices and of great discretion and power, as well.⁹⁶

While the federalist system renders it impossible to say that there is one unified criminal law of the country—counting each state and the federal government, there are at least fifty-one criminal legal systems in the United States—each of the fifty states has adopted the American Bar Association’s (“ABA”) Model Rules of Professional Conduct (“Model Rules”).⁹⁷ And prosecutors are the only type of lawyer with their own ethical rule devoted to their function.⁹⁸ In further recognition that the prosecutorial role comes with many unique norms and responsibilities, the ABA has also released its own Criminal Justice Standards for the Prosecution Function (“Prosecution Standards”).⁹⁹

In addition to a distinctive ethical rule, prosecutors also have a singular ethical mandate: to be “ministers of justice.”¹⁰⁰ The mandate has multiple sources, including prosecutors’ lack of a concrete client, immense power, and claim to represent the community or “the people”—the latter of course relating to their being elected.¹⁰¹ Although the Model Rules and other ethical guidelines make clear that the job extends well beyond maximizing convictions,¹⁰² prosecutors, judges, and the mainstream public have long interpreted the mandate as virtually synonymous with a narrow, tough-on-crime perspective.¹⁰³ In contrast, progressive prosecutors have recently begun expanding ideas about justice—and about the public and whose voice, and definitions of safety, matter—a big part of what these mutineers most vociferously object to. To take just one example, New Orleans DA Jason Roger Williams stated that “[prosecutors] are ethically required to consider broader

94. Maybell Romero, *Profit-Driven Prosecution and the Competitive Bidding Process*, 107 J. CRIM. L. & CRIMINOLOGY 161, 172 (2017) (citing *Commonwealth v. Knapp*, 27 Mass. (10 Pick) 477 (1830)).

95. *Id.* at 173–76.

96. *Id.* at 176.

97. See *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS’N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ (last visited Nov. 31, 2022).

98. MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR. ASS’N 1983).

99. See CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2 (AM. BAR ASS’N 2017).

100. NAT’L PROSECUTION STANDARDS 1-1.1 (NAT’L DIST. ATT’YS ASS’N 2009); MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR. ASS’N 1983). As the U.S. Supreme Court has expressed it, a prosecutor is a “representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Berger v. United States*, 295 U.S. 78, 88 (1935).

101. Godsoe, *supra* note 2 at 190.

102. See, e.g., CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2 (AM. BAR ASS’N 2017).

103. See Jeffrey Bellin, *The Changing Role of the American Prosecutor*, 18 OHIO ST. J. CRIM. L., 329, 331–32 (2020) (describing how prosecutors contribute to “increasing severity . . . [and] big picture . . . skyrocketing incarceration”).

notions of the right results, the rights of defendants and the public good . . . [including] understand[ing] the complicated ways that race, and the overlapping issue of poverty, impacts the lives of defendants.”¹⁰⁴

B. Prosecutorial Mutiny's Relationship to the Violation of Ethical Rules

In addition to following a hard-line, arguably unjust concept of justice, some of the mutineers' actions violate other attorney ethics rules. Here we discuss three overlapping categories of rules: rules around prosecutorial publicity as well as truth and misstatements more broadly; rules around racial, gender, and other biases; and rules about upholding the rule of law more broadly.

Some mutineers attempt to mischaracterize the state of the law, both to courts and to the public. This tactic has certainly been employed by the ADDA in Los Angeles in its mischaracterizations of the nature of prosecutorial discretion. The ADDA's rendition of such discretion's development presented a drastically inaccurate statement of the history of the law and categorical choices to decline, as well as prosecute, certain types of cases.¹⁰⁵ Recall also Brooke Jenkins' misstatements—or outright lies by omission?—about her involvement as a paid consultant with the Boudin recall.¹⁰⁶ While attorneys are constrained from speaking about pending matters to a large extent by Model Rule 3.6, perhaps a broader understanding of what constitutes misconduct, including misleading the public regarding how the law functions, should be understood as a violation of Rule 8.4(c). Rule 8.4(c) specifies that it is professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]”¹⁰⁷ Model Rule 4.1 also addresses the truthfulness of statements made by attorneys when interacting with people other than clients, and does so rather broadly, stating that lawyers shall not knowingly “make a false statement of material fact or law to a third person[.]”¹⁰⁸ Comments to Rule 4.1 support a wide reading of the rule, explaining that “[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.”¹⁰⁹

This includes mischaracterizing the role of prosecutors themselves. Turning to the Los Angeles ADDA again, the association has critiqued Gascón for behaving

104. TANIA TETLOW & FLOZELL DANIELS, FOR THE SAKE OF JUSTICE: FINAL REPORT OF THE TRANSITION TEAM TO JASON ROGERS WILLIAMS, DISTRICT ATTORNEY OF NEW ORLEANS 38 (2021) (calling for prosecutors to “understand a host of issues around sexuality, gender identity, national origin and immigration status”). See also Angela J. Davis, *The Prosecutor's Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063, 1079 (2016) (persuasively arguing that this mandate encompasses a prosecutor's duty to work toward ending mass incarceration, both by “exercis[ing] their discretion and not pursu[ing] criminal charges in appropriate cases . . . [and by] consider[ing] the broader goals of the criminal justice system [and] seek[ing] reform”).

105. For a history of prosecutorial nonenforcement, see Justin Murray, *Prosecutorial Nonenforcement and Residual Criminalization*, 19 OHIO ST. J. CRIM. L. 390 (2023).

106. See discussion *supra* notes 87–88.

107. MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS'N 1983).

108. MODEL RULES OF PRO. CONDUCT r. 4.1(a) (AM. BAR ASS'N 1983).

109. MODEL RULES OF PRO. CONDUCT r. 4.1 cmt. 1 (AM. BAR ASS'N 1983).

“like a defense attorney” by trying to institute reforms and cultural change in his office.¹¹⁰ This is in direct contrast to the American Bar Association’s statement that prosecutors should be creative problem solvers who should work with their communities to ward doing more than just incarcerating people.¹¹¹ With regressive prosecutors and police shoring each other up against reforms¹¹² and those prosecutors seeing and calling themselves heroes,¹¹³ perhaps it is not surprising that this type of misconduct has started to arise.

Second are rules prohibiting bias in a lawyer’s conduct, in some states including conduct beyond court. Rule 8.4(g) talks about bias and states clearly that it is misconduct to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status[.]”¹¹⁴ This rule, adopted in August 2016, is meant to prevent and address harms done to the administration of justice when attorneys engage in discrimination and harassment.¹¹⁵ The recent wave of progressive prosecutors are different from most DAs historically not just in their policies, but also in their demographics; the vast majority of DAs are white male career prosecutors¹¹⁶ and “[t]hree fifths of the states that elect prosecutors have never elected a Black prosecutor, as of 2014.”¹¹⁷ In contrast, a large group of these reformers are women, people of color, or both.¹¹⁸ Too little attention is usually paid to how unrepresentative elected prosecutors are of the communities they serve. As Bryan Stevenson has observed, “[in contrast to police diversity], we haven’t paid much attention to prosecutors. And that role . . . has largely been occupied by white men and [] has changed almost not at all in the last 30 years.”¹¹⁹

110. *The Monday Morning Memo*, L.A. ASS’N DEPUTY DIST. ATT’YS (Feb. 28, 2022), <https://myemail.constantcontact.com/Monday-Morning-Memo-for-February-28-2022.html?soid=1120011172453&aid=C5B-DigeShM>.

111. CRIM. JUST. STANDARDS: PROSECUTION FUNCTION 3-1.2(f) (AM. BAR ASS’N 2017).

112. *Romero*, *supra* note 49, at 1098.

113. *Godsoe*, *supra* note 2, at 205–07.

114. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N, amended 2016).

115. ABA Comm. on Ethics & Pro. Resp., Formal Op. 20-493 (2020) (discussing purpose, scope, and application of Model Rule 8.4(g)).

116. “Ninety-five percent of elected chief prosecutors are white, and [seventy-nine] percent are white men, per a recent study; in contrast, those identifying as progressives are much more likely to be female or people of color.” *Godsoe*, *supra* note 2, at 167 n.8 (citing Joe Watson, *Study: 95 Percent of Elected Prosecutors Are White*, PRISON LEGAL NEWS (Feb. 8, 2017), <https://www.prisonlegalnews.org/news/2017/feb/8/study-95-percent-elected-prosecutors-are-white>; REFLECTIVE DEMOCRACY CAMPAIGN, JUSTICE FOR ALL: WHO PROSECUTES IN AMERICA? (2015), https://wholeads.us/wp-content/uploads/2019/03/Justice-For-All-Report_31319.pdf).

117. *Id.* at 179.

118. *Id.* at 178–79 (explaining the demographic breakdown and also pointing out that some of these prosecutors “have familial experience with the criminal system or prior professional experience as defense and civil rights attorneys,” in contrast to most DAs).

119. *Id.* at 179 (alterations in original) (quoting All Things Considered, *Report Highlights Lack of Racial Diversity Among U.S. Prosecutors*, NAT’L PUB. RADIO, at 00:59 (July 7, 2015), <https://www.npr.org/2015/07/07/420913863/report-highlights-lack-of-racial-diversity-among-u-s-prosecutors>).

However, those who have paid attention are not just voters, but mutineers—who sometimes engage in racialized and gendered narratives of incompetence, or worse, in impeding change.¹²⁰ This is particularly true of the Black women elected DAs such as Kim Foxx, Rachael Rollins, and Kim Gardner. As Professor India Thusi has noted, these Black, female prosecutors have faced “an inordinate amount of resistance to their reforms. . . . Black women prosecutors in particular have faced unprecedented challenges to their authority as prosecutors,” leaving them unable to “reap all the privileges available to White prosecutors.”¹²¹

The third category of ethical obligations is the overarching obligation to uphold the rule of law and access to justice in a democracy. This mandate is expressed in particular rules, such as Rule 8.4 which prohibits broadly-defined obstruction of justice, and in the preamble of the rules itself.¹²² The Preamble requires lawyers to take a “special responsibility for the quality of justice” as well as a duty to further the public’s “confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.”¹²³ Relatedly, lawyers should “demonstrate respect for the legal system and . . . the administration of justice”¹²⁴ Most state oaths of office and bar admission proceedings also center on these mandates.¹²⁵

These provisions, among others, have been cited recently in disciplinary actions against lawyers working for President Trump to contest and undermine the 2020 Presidential election. For instance, disciplinary proceedings in New York and Washington D.C. against the most famous—or infamous—of these attorneys, Rudy Giuliani, cited similar state provisions, as well as the attorney oath of office to support

120. One of the authors dealt with such treatment firsthand as a young line prosecutor attempting to work from a more progressive ethos—when arguing with other prosecutors around the state about the need to rethink policies, some prosecutors would tell her that she was “a dumb bitch” who “should go back to Mexico.” The author was born in the United States and her family is from Costa Rica . . . though she does love Mexico very much.

121. *Id.*

122. See MODEL RULES OF PRO. CONDUCT preamble (AM. BAR ASS’N 1983):

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . . A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process. . . . In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

Id.

123. *Id.*

124. *Id.*

125. See, e.g., Letter from Lawyers Defending Am. Democracy to the State Bar of Cal., Request for Investigation of John C. Eastman (Dec. 16, 2021), <https://ldad.org/wp-content/uploads/2021/12/211208-Eastman-Final.pdf> (noting that “[l]awyers are licensed to practice in California and elsewhere in this country only after they have demonstrated their knowledge of and respect for the rule of law, the essential but fragile ingredient of a healthy democracy”) [hereinafter Disciplinary Complaint].

the suspension of his law license in both states.¹²⁶ Finding that the special status of attorneys gives their words extra weight in the public eye, the D.C. bar disciplinary counsel also emphasized the importance of attorneys respecting the results of democratic elections as part of their obligation to uphold the rule of law: “A constitutional democracy like ours does not work unless the loser honors the decision of the voters.”¹²⁷

To be clear, we are not stating that the actions of prosecutorial mutineers are equivalent to the actions of attorneys seeking to overturn the 2020 election. Nonetheless, some of the misstatements around progressive prosecutors’ policies and even about crime levels, especially when coupled with efforts to undo an election immediately after it happens—think of, for instance, the recalls filed right after the elections of Gascón and Boudin—also arguably threaten the rule of law and bring some of the other harms expressed in these overarching ethical provisions.

C. Prosecutorial Mutiny Undermines Democracy and the Rule of Law

In addition to potentially violating ethical mandates, mutinous prosecutors also undermine democratic processes. Prosecutor elections have been regarded in legal scholarship with a jaundiced eye, and with good reason. “It is a widely shared view among law professors that prosecutor elections are rarely more than empty exercises” as “incumbents virtually always win.”¹²⁸ Prosecutor elections have also, historically, provided a rather ineffective mechanism for enforcement over a role that has few supervisory controls over it otherwise.¹²⁹

The progressive prosecutor movement, however, has upended this longtime understanding by showing that at least some change to the “surface politics of criminal law” can be secured through the ballot box.¹³⁰ The number of progressive prosecutors continues to rise mostly in, but not limited to, urban areas.¹³¹ Two of the first—Kim Foxx of Chicago and Larry Krasner of Philadelphia—were reelected in 2020 and 2021 respectively, despite massive and very well-funded

126. See, e.g., Liz Dye, *DC Bar Panel Finds Giuliani Violated One or Two Rules of Ethics. And That’s No Big Lie*, ABOVE THE LAW (Dec. 16, 2022), <https://abovethelaw.com/2022/12/dc-bar-panel-finds-giuliani-violated-one-or-two-rules-of-ethics-and-thats-no-big-lie/>.

127. Adam Klasfeld, *Rudy Giuliani ‘Weaponized His Law License’ to Attack Constitution He Swore to Uphold, D.C. Bar Says as Attorney Misconduct Hearing Begins*, LAW & CRIME (Dec. 5, 2022), <https://lawandcrime.com/2020-election/rudy-giuliani-weaponized-his-law-license-to-attack-constitution-he-swore-to-uphold-d-c-bar-says-as-attorney-misconduct-hearing-begins/> (quoting Washington D.C. bar counsel Hamilton Fox); see also Disciplinary Complaint, *supra* note 125, at 6 (alleging that attorney and former professor John Eastman violated California Rule 8.4(c) in making misstatements related to the election because “[t]here was absolutely no legitimate basis for any outcome-relevant challenge to the results of the popular vote in the 2020 Presidential election”).

128. Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1543 (2020).

129. Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 595, 598–605 (2014).

130. Hessick & Morse, *supra* note 128, at 1542 (citing William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH L. REV. 505, 510 (2001)).

131. See *supra* note 4.

opposition.¹³² Significantly, the highest support for these and other progressive prosecutors was in neighborhoods most impacted by crime, largely communities of color.¹³³ In short, despite the mutineers' rhetoric, those voters most in need of real safety are making it clear that they believe these new prosecutors and system reform are the best way to achieve that.

This is not to say that elected leaders should completely ignore the views and history of the line attorneys in their offices. Professor Lauren Ouziel has encouraged caution “before demanding full responsiveness from” what she terms “the enforcement, bureaucracy,” while also observing that there are “significant drawbacks to ceding too much power to entrenched institutional interests to set the enforcement agenda.”¹³⁴ Ouziel posits that what she terms “bureaucratic resistance” creates a sort of “push and pull” that serves an important democratic function by making members of the community take “a more active role in evaluating the extent of progress on promised reforms.”¹³⁵ This framing of resistance, however, is contingent on everyone who participates in the “push and pull” acting in good faith and committing to candor and truthfulness. When line prosecutors mischaracterize the role of a prosecutor and lie about the tools available to elected prosecutors to institute the kinds of reforms that voters want, that positive push and pull breaks down, and that resistance undermines democratic ideals and the rule of law. While historically the goals of elected prosecutors and those they supervise have been “generally aligned,”¹³⁶ the progressive prosecution movement presents a unique moment with correspondingly unique challenges where those who oppose reform efforts might not necessarily be motivated at all by concerns of public safety but rather by some other pernicious incentive. This sort of rupture can be observed when examining how some opponents of progressive reforms will lie and

132. See Katie Meyer, *Philly DA Larry Krasner Cruises to Reelection Victory*, WHYY, (Nov. 2, 2021, 11:32 pm), <https://whyy.org/articles/philly-da-larry-krasner-cruises-to-reelection-victory/>; Kumar Ramanathan, *Breaking Down Kim Foxx's Win in the 2020 Primary*, CHICAGO DEMOCRACY (Mar. 25, 2020), <https://sites.northwestern.edu/chicagodemocracy/2020/03/25/kim-foxx-2020-primary-win/>.

133. Law professor and economist John Pfaff demonstrates this very strong correlation in a series of maps constructed from election data. See John Pfaff (@JohnFPfaff), TWITTER, (Oct. 24, 2022, 8:36 AM), https://twitter.com/JohnFPfaff/status/1584524265352675329?s=20&t=6P_KUVkuNM2-AOai2kp/aA; see also Ramanathan, *supra* note 132 (analyzing precinct-level data to show that Foxx's support remained high in urban largely Latinx and Black communities—in Black communities consistently very high, over seventy-five percent—while her support dropped in suburban white communities).

134. Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 576 (2020).

135. *Id.* at 577. Rebecca Roiphe makes an analogous argument from an ethics perspective: “[T]here is always some room around the edges for [government] lawyers to exercise influence: through counseling, protest, mitigation or even stepping down in the face of unjust power. However, the desire to stay in the room—to be relevant and powerful—should never supplant lawyers’ professional judgment and obligation [to] the rule of law.” Rebecca Roiphe, *Is Obedience Always Support? Government Lawyers in Evil Regimes*, JOTWELL (Aug. 5, 2022), <https://legalpro.jotwell.com/is-obedience-always-support-government-lawyers-in-evil-regimes/> (reviewing David Luban, *Complicity and Lesser Evils: A Tale of Two Lawyers*, 34 GEO. J. LEGAL ETHICS 613 (2021)).

136. Ouziel, *supra* note 134, at 555.

distort data in an attempt to gain the upperhand, with a blatant example being the efforts to recall Larry Krasner discussed above.¹³⁷

Two significant harms arise from this type of mutiny: 1) flummoxing electoral processes, and 2) misleading the public as to what a prosecutor can and should do, as well as how prosecutorial discretion functions. To the latter point, misleading the public is particularly harmful when done by an attorney, as well as when it concerns legal processes; these misleading statements can “erode[] the public’s confidence in the integrity of attorneys admitted to our bar and damage[] the profession’s role as a crucial source of reliable information. It tarnishes the reputation of the entire legal profession and its mandate to act as a trusted and essential part of the machinery of justice.”¹³⁸

III. IS MUTINY DESIRABLE WHEN FROM THE LEFT?

This Part addresses the common argument supporting mutineers that this kind of revolt is sometimes desirable, especially in the recent Trump administration. In other words, when a harmful—or perhaps merely conservative?—politician is in office, attorney mutiny may actually be beneficial, even essential. We outline some historical examples, then address those in the Trump administration. We conclude, however, by distinguishing those actions from the revolts within progressive prosecutors’ offices in several ways, particularly in their nexus to democracy. In short, the rebels in the Trump administration resisted primarily in support of the rule of law and democracy—in stark contrast to the line prosecutors who are actively trying to undermine, even overturn, legitimate elections. Hence, their pushback against an elected leader is more akin to acceptable, even beneficial, resistance rather than undemocratic mutiny.

A. Historical Examples

Lawyers and other professionals have often resisted from within government systems.¹³⁹ For instance, social workers, lawyers, and trial judges ignored state bans on adoption by gay and lesbian couples during the 1980s and 1990s.¹⁴⁰ Other scholars have explored more recent examples of lawyers dedicated to disability, LGBTQ, and other civil rights areas working within the Department of Justice (“DOJ”), as well as government lawyers in the Department of Homeland Security employing prosecutorial discretion to soften the harshness of Obama administration

137. See *supra* Part I.A.

138. See *In re Giuliani*, 146 N.Y.S.3d 266, 283 (N.Y. App. Div. 2021) (citations omitted).

139. Based on historical research into anti-slavery lawyers during the 1850s, Dan Farberman outlines a model of a resistance lawyer in an unjust regime: “A resistance lawyer engages in a regular, direct service practice within a procedural and substantive legal regime that she considers unjust and illegitimate. Through that practice, she seeks both to mitigate the worst injustices of that system and to resist, obstruct, and dismantle the system itself.” Daniel Farberman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1880 (2019).

140. Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311, 334 (2015) (describing this history).

immigration policy.¹⁴¹ These lawyers resisting—in contrast to those revolting against progressive prosecutors—have primarily worked to render government agencies *less* punitive and *more* democratic.¹⁴²

B. “Progressive” Line ADAs in “Traditional” Offices

One form of resistance which seems rare historically—and definitely was not called for or praised—is the reverse of today’s prosecutorial mutineers. Less aggressive or less carceral prosecutors did not resist—and were not encouraged to rebel against—their carceral bosses. The lack of examples is deafening.¹⁴³ Instead, these line ADAs were likely pushed out, not promoted, or even converted to the predominant carceral approach.¹⁴⁴ What little scholarly treatment there is of this inverse situation seems to agree that line prosecutors who are less carceral than their elected bosses have no “right” to mutiny; in contrast, they will not be promoted and should leave that line of work.¹⁴⁵ The contrast to today’s mutineers who, instead of leaving or converting to their elected bosses’ reformist position, sue, try to oust them from office, and publicly and *sub silentio* undermine their bosses’ goals.

1. Recent Examples

In addition to historical examples of prosecutorial mutiny deployed against conservative reforms, there are recent examples especially in the context of the Trump Administration. In defending mutiny against progressive prosecutors, numerous commentators raise the desirability, or actual fact, of resistance against the Trump administration. Indeed, we—along with others critiquing this mutiny—have been faced directly with this argument countless times: a sort of “whatifism” that is difficult to answer in the abstract.¹⁴⁶ Accordingly, we decided to play out this reasoning and examine recent mutiny from the left.

141. See Stephen Lee & Sameer M. Ashar, *DACA, Government Lawyers, and the Public Interest*, 87 FORDHAM L. REV. 1879 (2019); see also Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649 (2012) (identifying “key impacts” that cause lawyers within the state may have in terms of reform and moving the state towards social movement goals).

142. As we reference more in the conclusion, lawyers of all types—even resistance lawyers—are usually more conservative than other reformers and activists, and often conservatize otherwise radical or groundbreaking social movements. See *infra* Conclusion.

143. Of course, it is always impossible to fully prove a negative. But multiple searches of legal scholarship and media have turned up no real examples of this phenomenon over the last decades—in stark contrast to the many examples of rebellion against progressive prosecutors in the last few years alone.

144. This potential of conversion to the prosecutorial role—which she argues is inherently problematic—has led Abbe Smith to question whether “good people” can be prosecutors. See Abbe Smith, *supra* note 76; Abbe Smith, *Good Person, Good Prosecutor in 2018*, 87 FORDHAM L. REV. ONLINE 3 (2018).

145. See, e.g., Kate Levine, *Who Shouldn’t Prosecute the Police*, 101 IOWA L. REV. 1447, 1472 (2016) (“As Angela J. Davis writes, to be promoted, a prosecutor must ‘stay in favor with [her] boss,’ who is usually elected based on ‘tough on crime’ promises. Thus an assistant prosecutor who did not secure convictions ‘would not be promoted or otherwise advance in that office.’”).

146. This question came from other academics, practicing lawyers, and “regular” non-law folks.

Numerous accounts relate how officials in the Department of Homeland Security, DOJ, and others, worked to mitigate, delay, or outright thwart some of former President Trump's most extreme immigration and other policies. For instance, one high-level official described himself and colleagues as "working diligently from within to frustrate parts of [Trump's] agenda and his worst inclinations."¹⁴⁷ Perhaps an even more striking example is the unanimous position among assistant Attorneys General in the Justice Department that they would resign if Trump fired Deputy AG Jeffrey Rosen to replace him with Assistant AG Jeffrey Clark, who was trying to overturn the Georgia election results to delegitimize Biden as the winner.¹⁴⁸ This tactic worked to help persuade Trump to keep Rosen in his position.¹⁴⁹

Beyond these examples, there are also reports of less prominent DOJ attorneys working "under the radar" to mitigate the harshest policies.¹⁵⁰ One example, similar to the mutineers' action described in *supra* Part I.A.2. above, is the filing of ethics complaints against lawyers representing Trump or working in his administration. These complaints allege violations of the rule of law, as well as violations of numerous rules mandating truthfulness and candor from attorneys.¹⁵¹

Some parallels to the mutinous line prosecutors are evident in these cases, such as the use of democratic and ethical justifications, at least rhetorically.¹⁵² For instance, senior Trump administration official Miles Taylor described his

147. Miles Taylor, *Opinion, I am Part of the Resistance Inside the Trump Administration*, N.Y. TIMES (Sept. 5, 2018), <https://www.nytimes.com/2018/09/05/opinion/trump-white-house-anonymous-resistance.html> (noting "Americans should know that there are adults in the room" who will keep the country "steady"). Originally published anonymously, the article's author Miles Taylor later identified himself, having left his position as chief of staff in the Department of Homeland Security. Taylor left the Republican party, campaigned against Trump and endorsed Biden, and is a co-founder of the Forward Party with Andrew Yang and David Jolly. Tim Reid, *Former Republicans and Democrats Form New Third U.S. Political Party*, REUTERS (July 27, 2022, 8:32 PM), <https://www.reuters.com/world/us/exclusive-former-republicans-democrats-form-new-third-us-political-party-2022-07-27/>.

148. Katie Benner, *Trump and Justice Dept. Lawyer Said to Have Plotted to Ousting Acting Attorney General*, N.Y. TIMES (Jan. 22, 2021), <https://www.nytimes.com/2021/01/22/us/politics/jeffrey-clark-trump-justice-department-election.html> (reporting that the DOJ staff feared that Trump's plan "would seriously harm the department, the government, and the rule of law").

149. *Id.*

150. See Christy Lopez, *The Civil Rights Division: The Crown Jewel of the Justice Department*, 130 YALE L.J. F. 462, 471–72 (2021) (also noting that "career [attorney]s dedicated to civil-rights enforcement have fled in droves").

151. See *supra* Part II.C; see also Myah Ward, *D.C. Bar Files Ethics Charges Against Rudy Giuliani*, POLITICO (June 10, 2022), <https://www.politico.com/news/2022/06/10/dc-bar-launches-ethics-charges-against-rudy-giuliani-00038977>; N.Y.C. BAR, STATEMENT OF NEW YORK CITY BAR ASSOCIATION CONCERNING GRIEVANCE COMPLAINTS FILED AGAINST RUDOLPH GIULIANI (2021), <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/grievance-complaints-filed-against-rudolph-giuliani> (discussing two complaints filed with the New York bar alleging rules "that prohibit an attorney from knowingly making a false statement, filing frivolous litigation, or otherwise engaging in conduct that is prejudicial to the administration of justice or that adversely reflects on the lawyer's fitness as a lawyer" (footnotes omitted)).

152. See *supra* notes 26–41 and accompanying text (describing mutineers using vague ethical language in their lawsuits against progressive prosecutors, and claiming that they are rebelling in the public's interest). One clarification: some of those most prominently resisting Trump, such as Miles Taylor, are not attorneys, and others

motivations as essential to his overarching duty to the country and democracy, above his duty to the President who appointed him.¹⁵³ Also similar is a certain hubris or “hero” mentality in these unelected state actors asserting that they know better than their elected boss what is “right” for the polity,¹⁵⁴ and being described as “upstanding Americans” saving the nation.¹⁵⁵

Yet there are also notable differences. First, while these tactics fit into some of the lower-down categories of the typology—ethics complaints, speaking to the media (albeit mostly anonymously), resisting from within, and mass resignations or threatened resignations—none of these lawyers approached the level of line DAs filing lawsuits or openly allying with known political adversaries of Trump’s. Second, they did not go public with their opposition until after they resigned or left the government.¹⁵⁶ Third, a considerable part of some of the motivation in resistance beyond the substantive policies seems to have been Trump’s personality and leadership style; for instance one resisting official described it as “impetuous, adversarial, petty and ineffective,” also noting that Trump “engages in repetitive rants,” “flip-flops” and “half-baked, ill-informed and occasionally reckless decisions that have to be walked back.”¹⁵⁷ Fourth, and most significantly, these revolts—especially the most celebrated ones—supported democracy. The ethics complaints and the threatened mass resignation of assistant attorneys general centered on preventing Trump’s efforts to overturn the 2020 election and other related “rule of law” violations.¹⁵⁸

CONCLUSION

Government agencies, including progressive prosecutors, can never be “radical,” or even much more than slightly less status quo.¹⁵⁹ While many of the reforms progressive prosecutors have worked to institute are critical, they are also long overdue and demonstrate how low the bar really is for ethical prosecutors. When they do try to do so, they face attacks not only from political opponents external to their offices, but also resistance from their subordinates. This reality means that “progressive” prosecutors will not be able to “save the day” every place they are

were political appointees rather than line attorneys or civil service; for instance Taylor was a high-level Trump appointee and had also worked in the George W. Bush administration.

153. See Taylor, *supra* note 147.

154. See *id.* (also noting that “Americans should know that there are adults in the room” who will keep the country “steady”).

155. Rebecca Beitsch & Jordan Williams, *Report Details DOJ Officials’ Resistance to Trump Push to Probe Election*, THE HILL (Oct. 7, 2021, 8:22 AM), <https://thehill.com/homenews/senate/575694-senate-report-details-how-doj-officials-fought-off-trump-push-to-investigate/>

156. Taylor, for instance, described it as a “private resistance” and not openly opposing Trump until he resigned. See Taylor, *supra* note 147.

157. *Id.*

158. See *supra* notes 151–57 and accompanying text.

159. See Godsoe, *supra* note 2 at 237 (“All lawyers and scholars . . . should allow the true change agents, those in the system and those touched by it, to exercise their autonomy from the bottom up.”).

elected, even if those who support the movement overall want to keep pretending that they will.

Until all prosecutors, including the “progressive” or “reform-minded” ones begin to give away their own resources and their own power, they will never be progressive, and are only barely reform-minded. Accordingly, we should be cautious about lionizing them as radical change agents. Even the most reform-minded prosecutor will run into both internal and external dissension, and perhaps even mutiny from their subordinates. More broadly, lawyers and the law itself are often not the most effective way to change the status quo, since they—we—are part of the power structures and hierarchy.¹⁶⁰ So we should be hesitant to rely solely on lawyers for meaningful change, and instead listen to and work with impacted communities to support bottom-up change.

160. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324, 349 (1987) (arguing that legal scholars “should listen” to the voices of marginalized people, and “build coalitions with others,” since legal scholars “will never be [at] the center of any successful [change] movement”).