

THE WAY WE DO THINGS AROUND HERE: WHAT PROGRESSIVE PROSECUTORS CAN LEARN FROM CORPORATE COMPLIANCE

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Recent years have witnessed the election of “progressive prosecutors”—individuals who have pledged to use their power and discretion to reform local prosecutors’ offices from the top down. While it remains too early to say whether their efforts will bring permanent change, it is evident that reform is not easy. This is because reform must take place within complex organizations, governed by pre-existing and entrenched norms. The challenges here are not unique to district attorneys’ offices. Corporations have long been aware of the fundamental structural challenges to reforming ailing organizational cultures and have expended considerable resources studying how best to create “cultures of compliance.” This note argues that prosecutorial reformers would be well-served to study the corporate movement’s successes and failures, and to implement these hard-learned best practices in their own pursuit of change.

The note begins by defining and exploring the causes of prosecutorial misconduct. It then surveys the rise of the “progressive prosecutor,” and posits that reform efforts have been complicated and sometimes stymied by internal organizational realities. It introduces the practices and methodologies of corporate compliance and explains their applicability in reforming prosecutorial cultures. The note then runs several case studies through the lens of corporate compliance. Each case study suggests that the absence of effective compliance practices and procedures risks undermining reform efforts. Finally, the Note discusses and responds to a number of hurdles to progressive prosecutors’ successful adoption of the corporate compliance model.

INTRODUCTION

In cities and counties across the country, avowed progressive reformers have increasingly won local prosecutors' races. This cohort of "progressive prosecutors" promised across-the-board changes: they committed to combating mass incarceration and racial disparities, righting past wrongs, and rehabilitating their offices from the top down.¹

Kim Foxx, the State's Attorney in Cook County, Illinois, pledged "transformative" change.² Larry Krasner, Philadelphia's District Attorney (DA), set himself on a "radical path to remake the criminal justice system."³ Eric Gonzalez, Brooklyn's DA, "promis[ed] to make [his office] a national model of what a progressive prosecutor's office can be."⁴

It remains too early to say whether their efforts will succeed. Prosecutorial policies have undoubtedly changed in many of these offices. But the on-the-ground reality of reform is messier—the outcomes at times inconsistent and its hard-fought changes unsteady. Through the first year of Krasner's tenure, it remained unclear whether his "guidelines [on charging decisions] . . . were being followed consistently in court . . . by the prosecutors who were supposed to be making them."⁵ Likewise, "[d]espite [Foxx's] rhetoric to the contrary . . . [her] line prosecutors have taken no action to prevent the use of cash bail in the vast majority of felony cases"⁶ and her office "has not reduced the volume of petty drug cases."⁷ In Brooklyn, the rate of marijuana possession prosecutions undoubtedly dropped in the years after the DA's office committed to re-

1. See *infra* Part II.

2. Micah Uetricht, *The Criminal-Justice Crusade of Kim Foxx*, CHI. READER (Mar. 9, 2016), <https://www.chicagoreader.com/chicago/kim-foxx-bid-unseat-anita-alvarez-cook-county/Content?oid=21359641> [<https://perma.cc/6XQV-3V38>].

3. Steve Volke, *Philadelphia DA Larry Krasner on Radical Path to Remake Criminal Justice System*, NEWSWEEK (Nov. 9, 2018), <https://www.newsweek.com/philadelphia-da-larry-krasner-radical-path-remake-criminal-justice-system-1194093> [<https://perma.cc/6RB4-9MVD>].

4. ERIC GONZALEZ, JUSTICE 2020: AN ACTION PLAN FOR BROOKLYN 5 (Mar. 2019), <http://www.brooklynda.org/wp-content/uploads/2019/03/Justice2020-Report.pdf> [<https://perma.cc/2LZW-L7KT>].

5. Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power — and Learns the Limits — of His Office*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> [<https://perma.cc/6QBW-BZFU>].

6. Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform"*, 128 YALE L.J. F. 848, 926 (2019).

7. Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. L. 411, 417 (2019).

fraining from such prosecutions, yet court observers continued to see possession cases “whenever they [were] in court.”⁸

The gap between the reform rhetoric espoused by these new leaders and the sometimes incongruent actions taken by line prosecutors speaks to the difficulty of the undertaking. The task of a progressive prosecutor is an arduous one. Not because, as some commentators have reasoned, progressive prosecution is a hopeless “*paradox*” that “fail[s] to deliver on the transformative demands of a fundamentally rotten system.”⁹ But rather because this reform must take place *within* complex organizations, governed by pre-existing and entrenched norms.¹⁰ The largest prosecutors’ offices “employ hundreds of lawyers, investigators, and support staff, and even the smallest have cultures that are difficult to change.”¹¹

These are all serious impediments to institutional reform, but they are not unique. Corporate leaders have been facing similar hurdles for decades. They have learned that reforming ailing corporate cultures requires sincere “buy-in” to the organization’s ethical ideals from employees at all levels.

Progressive prosecutors typically present their commitment to these ideals in their policy pronouncements—pledges to not pursue possession of marijuana charges, to increase diversion efforts, and to investigate police officer shootings of unarmed individuals.¹²

8. John Pfaff, *Why Public Defenders Matter More than Ever in a Time of Reform*, THE APPEAL (Apr. 18, 2018), <https://theappeal.org/why-public-defenders-matter-more-than-ever-in-a-time-of-reform-9b018e2184fe/> [<https://perma.cc/G3WC-3G7U>]; See also Mary Frost, *Brooklyn DA: Prosecution of Low-Level Marijuana Cases Down 98 Percent*, BROOKLYN EAGLE (Feb. 20, 2019), <https://brooklyneagle.com/articles/2019/02/20/brooklyn-da-prosecution-of-low-level-marijuana-cases-down-98-percent/> [<https://perma.cc/YH8E-DHCV>] (reporting that the number of low level drug possession cases dropped in 2018, by approximately 10 percent).

9. Note, *The Paradox of “Progressive Prosecution”*, 132 HARV. L. REV. 748, 750 (2018); See also David E. Patton, *A Defender’s Take On “Good” Prosecutors*, 87 FORDHAM L. REV. ONLINE 20, 24 (2018) (“A generation from now, when people fairly ask who did what to fight against and change [this “extraordinarily harsh and punitive” system], will the young prosecutors of today come to mind? Time will tell. Count me a skeptic.”); Karakatsanis, *supra* note 6, at 925 (arguing that, despite a change of rhetoric, “it is largely business as usual so far” inside progressive prosecutors’ offices).

10. David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 27 (2017) (noting that prosecutors’ offices are “complicated organizations”).

11. *Id.*

12. See, e.g., Maura Ewing, *A ‘Completely Unelectable’ Progressive Will Probably Win Philadelphia’s DA Race*, ATLANTIC (Nov. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/11/larry-krasner-philadelphia-da/544937/> [<https://perma.cc/6XQV-3V38>] (describing Larry Krasner as a progressive, reform-minded

But if the modern compliance movement has anything to teach, it is that impassioned policy statements are not sufficient to stimulate real cultural change.¹³

Corporations—long aware of the fundamental structural challenges to compliance and increasingly wary of the public condemnation and costly criminal and regulatory litigation that follows corporate misconduct—expend considerable resources studying how best to create a “culture of compliance” within their organizations and then implementing these “best practices.”¹⁴ For progressive prosecutors, this modern corporate compliance movement presents a wellspring of guidance. Prosecutorial reformers would be well-served to study the corporate movement’s successes and failures, and to implement these hard-learned best practices in their own pursuit of change.

This note proceeds in five parts. Part I begins by identifying the problem and causes of prosecutorial misconduct. Part II then surveys the rise of the “progressive prosecutor.” After detailing the history of prosecutorial misbehavior in each of the three jurisdictions highlighted throughout this note—Cook County, Illinois; Philadelphia, Pennsylvania; and Brooklyn, New York—the note discusses the pernicious consequences of misconduct and reviews calls for reform. This section then introduces the three progressive prosecutors prominently featured in this note—Kim Foxx, Larry Krasner, and Eric Gonzalez, as well as the progressive prosecution movement writ large. Finally, the section posits that reform efforts have been challenged as much by internal factors as by external pressures. Part III introduces the practices and methodologies of corporate compliance and explains their applicability in reforming prosecutorial cultures. Part IV runs several recent case studies in the aforementioned cities through the lens of corporate compliance. Foxx’s handling of the Jussie Smollett case, Krasner’s prosecution of Jovaun Patterson, and the exoneration of Bladimil Arroyo by Gonzalez’s Conviction Review Unit are all discussed. Each of the case studies presents unique compliance lessons, ultimately suggesting that the absence of effective compliance practices and procedures risks undermining progressive reform. Finally, in Part V,

prosecutor because he “says he will prioritize keeping people out of prison and improving access to services for low-income residents and those with drug addiction and mental illness,”); Uetrict, *supra* note 2 (noting that Kim Foxx would describe her progressive policies as bringing “transformative” change to the Cook County prosecutor’s office).

13. *See infra* Part II, B.

14. *Id.*

the note discusses and responds to a number of hurdles to progressive prosecutors' successful adoption of the corporate compliance model.

I. IDENTIFYING AND DEFINING PROSECUTORIAL MISCONDUCT

A. *Defining Misconduct*

Misconduct, as conceptualized in this Note, encompasses behavior that violates both legal precepts *and* an organization's policies and ethical values. Academic literature has historically focused on the former.¹⁵ However, growing public concern with the role of prosecutors in perpetuating mass incarceration and facilitating police misconduct has stimulated a renewed interest in what ethical prosecution looks like.¹⁶ Progressive reformers aim for more than simply following the law: they seek to transform the practices and mindsets of the offices they lead. As such, the latter definition of misconduct will become increasingly salient.

15. See, e.g., Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833 (1997); Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51 (2016).

16. See, e.g., Terry Gross, *'Charged' Explains How Prosecutors and Plea Bargains Drive Mass Incarceration*, NAT'L PUB. RADIO (Apr. 10, 2019), <https://www.npr.org/2019/04/10/711654831/charged-explains-how-prosecutors-and-plea-bargains-drive-mass-incarceration> [<https://perma.cc/DV2G-785Q>] (discussing Emily Bazelon's book, *Charged*, and how plea bargains and prosecutorial focus on convictions have contributed to mass incarceration); *Prosecutors Can Help End Mass Incarceration*, FORBES (Mar. 12, 2020), <https://www.forbes.com/sites/ashoka/2020/03/12/prosecutors-can-help-end-mass-incarceration/#fb5c8a55d574> [<https://perma.cc/G9KR-KCJT>] (discussing the power that prosecutors wield in the context of mass incarceration and what humane prosecution looks like); *The Power Of Prosecutors*, ACLU, <https://www.aclu.org/issues/smart-justice/prosecutorial-reform/power-prosecutors?redirectsues/mass-incarceration/smart-justice/power-prosecutors> [<https://perma.cc/9BBK-S24L>] (last visited Sept. 21, 2020) ("Prosecutors have the power to flood jails and prisons, ruin lives, and deepen racial disparities with the stroke of a pen. But they also have the discretion to do the opposite. This video explores the power of prosecutors to continue to drive mass incarceration — or end it.").

1. Legally-Defined Misconduct

Prosecutors' ethical obligations spring from a number of sources, including legal precedent, statutory guidelines, court rules, and dictates of professional responsibility.¹⁷

The U.S. Supreme Court has been instrumental in defining the obligations of prosecutors. According to the Court, prosecutors must (among other duties) disclose materials that pertain to the credibility of government witnesses (*Giglio v. United States*) or that could exculpate the defendant (*Brady v. Maryland*),¹⁸ make only appropriate arguments to the judge or jury (*Caldwell v. Mississippi*),¹⁹ and refrain from knowingly using perjured testimony (*Pyle v. Kansas*).²⁰

Local prosecutors are likewise bound to obey the commands of legal codes and state common law, which may circumscribe behavior in a variety of ways. For instance, prosecutors may be obligated to inform victims of various case developments.²¹

State prosecutors are also beholden to ethics guidelines encoded in the American Bar Association's Model Rules of Profes-

17. As an aside, some of the transgressions identified above—Hynes's campaign finance violations, Williams's bribery charges—have nothing to do with conduct undertaken in the courtroom. As such, they fall outside of the scope of this note's primary focus: misconduct occurring *during* the course of criminal prosecution. Nonetheless, it bears noting that these transgressions still qualify as ethical transgressions and, as such, raise concerns about how prosecutors guilty of such misconduct manage the everyday business of the office.

18. See *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Examples of *Giglio* materials might include information that the witness was previously dishonest in legal proceedings or on a job application, was previously convicted of a crime, or has made inconsistent statements about the case. See Memorandum from Donald A. Davis, U.S. Attorney, on Criminal Discovery 15-18 (2010), https://www.justice.gov/sites/default/files/usao/pages/attachments/2015/04/01/miw_discovery_policy.pdf [<https://perma.cc/NL84-DDJ7>] (providing examples of *Giglio* materials). Examples of *Brady* materials include evidence tending to show "that someone else committed the criminal act," or "that the defendant did not have the requisite knowledge or intent," or the existence of an affirmative defense. *Id.* at 12.

19. 472 U.S. 320, 332-34 (1985).

20. 317 U.S. 213, 215-16 (1942).

21. See, e.g., GA. CODE ANN. § 17-17-11 (2020) (stating that "[t]he prosecuting attorney shall offer the victim the opportunity to express the victim's opinion on the disposition of an accused's case"); HAW. REV. STAT. § 801D-4(a)(1) (2020); NEB. REV. STAT. 29-120 (2020); N.Y. EXEC. LAW § 642(1) (McKinney 2019); DEL. CODE ANN. tit. 11, § 9405 (2019) (stating that "the prosecutor shall confer with a victim before amending or dismissing a charge or agreeing to a negotiated plea or pretrial diversion").

sional Conduct.²² The ABA's Model Rules contain only one rule specifically devoted to prosecutorial conduct: Model Rule 3.8.²³ Most prominently, Rule 3.8 requires that prosecutors refrain from bringing charges unsupported by probable cause, reaffirms a prosecutor's *Brady* obligations, and expands this ethical responsibility to the post-conviction period.²⁴ Of course, prosecutors—as licensed attorneys—are not otherwise immune from adhering to the rest of the Rules. Mandates to provide competent representation and to avoid conflicts of interest may be particularly pertinent to local criminal law practitioners.²⁵

Court-made rules further restrain prosecutors from, among other things, making improper comments during opening statements and closing arguments, misstating the law, eliciting improper testimony, disparaging the accused, or vouching for the victim or a government witness.²⁶

2. Violations of Office Norms

In addition to this traditional understanding, this paper conceptualizes misconduct as encompassing a different sort of misbehavior—activities that violate norms of conduct established by a head prosecutor.

22. See *Alphabetical List of Jurisdictions Adopting Model Rules*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ [https://perma.cc/72X4-2E99] (last visited Sept. 21, 2020) (indicating that, with the exception of California, all states have adopted the ABA's Model Rules of Professional Conduct).

23. MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR. ASS'N 2018).

24. MODEL RULES OF PRO. CONDUCT r. 3.8(A)-(H) (AM. BAR. ASS'N 2018).

25. See generally MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR. ASS'N 2018) (detailing a duty to provide competent representation); Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment In The Regulation Of Prosecutors*, 89 B.U. L. REV. 1, 30 (2009) (arguing that Rule 1.1 of the Model Code could be applied to a prosecutor's duty to avoid wrongful convictions); See also MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR. ASS'N 2018) (detailing conflicts-duties to current client); MODEL RULES OF PRO. CONDUCT r. 1.8 (AM. BAR. ASS'N 2018) (detailing conflicts-related duties to current clients in specific situations); MODEL RULES OF PRO. CONDUCT r. 1.11 (AM. BAR. ASS'N 2018) (detailing conflicts-related duties for current and former government officials). Conflicts of interest might arise, for instance, in police-involved shootings, where a victim is also a defendant within the same jurisdiction.

26. See Harry Mitchell Caldwell, *Everybody Talks About Prosecutorial Conduct but Nobody Does Anything About It: A 25-Year Survey of Prosecutorial Misconduct and a Viable Solution*, 2017 U. ILL. L. REV. 1455 (2017) (detailing thirteen different types of prosecutorial misconduct).

The norms established by progressive reformers generally reflect the public's mounting concern with discretionary prosecutorial decision-making. In particular, reformers are responding to a growing public sense "that prosecutors' decisions about whom to charge, what plea bargains to offer, or what sentences to pursue may be not simply unwise, but abusive, reflecting wrongdoing in an ordinary, if not legal, sense."²⁷ Failures to indict unscrupulous police officers and resolutions to pursue severe sentences for low-level drug crimes both fall into this category.²⁸ Even though these decisions are well within a prosecutor's discretion, they are precisely the kinds of decisions progressive prosecutors have committed to re-orienting.²⁹

Norms should not be thought of as bright line rules, but rather as ethical guideposts delineating preferred standards of behavior. As such, there can be healthy disagreement on what justice requires in an individual case. For instance, line prosecutors may reasonably disagree about whether diversion is appropriate in a particular case, even as office norms urge prosecutors to make "jail the 'alternative'" (i.e. to seek non-jail resolutions whenever possible).³⁰

27. Green & Yaroshefsky, *supra* note 15, at 71.

28. *See, e.g.*, Green & Yaroshefsky, *supra* note 15, at 72 ("The [public] sentiment was that prosecutors abused their investigative and charging discretion by treating the police officers [involved in the killings of Eric Garner and Michael Brown] more leniently than similarly situated low-income people, presumably because of racial bias or sympathy to the police."); David Baumwoll, *INSIGHT: Prosecutors Using Charging Discretion Can Reform the Criminal Justice System*, BLOOMBERG L. (Dec. 6, 2019), <https://news.bloomberglaw.com/white-collar-and-criminal-law/insight-prosecutors-using-charging-discretion-can-reform-the-criminal-justice-system> [<https://perma.cc/NS4R-KGFF>] (discussing how prosecutors can use discretion to reform the criminal justice system and mentioning Seattle DA Daniel Satterburg's decision "not to charge crimes involving possession of 1 gram or less of drugs, including heroin").

29. *See, e.g.*, Sheryl Gay Stolberg & Jess Bidgood, *Baltimore Wrestles with the Way Forward After a Mistrial*, N.Y. TIMES (Dec. 17, 2015), <https://www.nytimes.com/2015/12/18/us/freddie-gray-baltimore-william-porter-jury-deadlock.html> [<https://perma.cc/UU56-2HST>] (discussing the commitment of Marilyn Mosby—Baltimore's progressive State's Attorney—to indicting officers involved in the arrest and subsequent death of Freddie Grey); Maura Ewing, *America's Leading Reform-Minded District Attorney Has Taken His Most Radical Step Yet*, SLATE (Dec. 4, 2018), <https://slate.com/news-and-politics/2018/12/philadelphia-district-attorney-larry-krasner-criminal-justice-reform.html> [<https://perma.cc/LEE7-8VGK>] (explaining that Larry Krasner characterized the practice of overcharging as "coercive" and committed his office to only "proceed[ing] on charges that are supported by the facts in the case, period").

30. *See* Gonzalez, *supra* note 4, at 12 (committing to making "jail the 'alternative'" and to "[c]hanging the office culture so that ADAs *consider* non-jail resolutions at every juncture of a case") (emphasis added).

The emphasis here is not on some generalized understanding of what constitutes ethical prosecutorial decision-making, but rather on each head prosecutor's espoused values for their office. Once a lead prosecutor has asserted that some behavior contravenes office norms, this behavior constitutes a cognizable kind of "misconduct"—one that can be tracked and prevented. This usage of the word "misconduct" is admittedly more expansive than traditional prosecutorial understandings of the concept. However, broadening the term's meaning to include deviations from office norms allows this note to position prosecutorial reforms alongside corporate compliance models, which embrace this more expansive meaning.³¹ As such, activities that violate norms of conduct instituted by the head prosecutor will also be considered "misconduct" for the purposes of this note.

B. *The Causes of Misconduct*

Understanding why prosecutors engage in misconduct—whether deliberate or inadvertent—is essential to preventing misconduct in the first instance.

1. Deliberate Misconduct

For decades, "the media and judiciaries focused primarily on *intentional* violations of law."³² Deliberately committed misconduct might be explained by a number of conditions common to prosecutors' offices. First, some academic commentators postulate that deliberate unethical conduct is the inevitable result of the adversarial system.³³ In this view, prosecutors are consumed by the first rule of lawyering: "zealous advocacy" for the "client."³⁴ To be sure, a prosecutor's client is "the People."³⁵ However, such abstract representation is difficult to operationalize. As such, the very nature of the

31. See *infra* Part III.

32. Green & Yaroshefsky, *supra* note 15, at 52 (emphasis added).

33. See, e.g., H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1702 (2000) (observing that "even the best of the prosecutors—young, idealistic, energetic, dedicated to the interests of justice—are easily caught up in the hunt mentality of an aggressive office").

34. See generally Eric S. Fish, *Against Adversary Prosecution*, 103 IOWA L. REV. 1419 (2018) (discussing a prosecutor's dual roles as "partisan advocate" and "minister of justice" and arguing that the former has a corruptive force).

35. See ABA STANDARDS FOR CRIMINAL JUSTICE § 3-1.3 (4th ed. 2017) ("The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim."); Carol A. Corrigan, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L. Q. 537, 537 (1986) ("The prosecutor

adversarial system drives prosecutors to zealously fight for the *government's* position. In their drive to win cases, prosecutors might intentionally fail to disclose *Brady* or *Giglio* information or deliberately ignore troubling inconsistencies in a defendant's confession.

This “win at all costs” mentality is exacerbated by a second condition that begets intentional misconduct: the conviction-focused imperatives of most prosecutors' offices. Historically, convictions have been “the lodestar by which prosecutors [are] judged.”³⁶ A low conviction rate might lose a prosecutor their promotion, jeopardize their annual bonus, or ruin their chance at election to the highest post in the office.³⁷

Even offices that have moved away from conviction-focused measures of success must contend with a third condition that motivates deliberate misbehavior: the moral certainty that often drives prosecutorial decision-making.³⁸ Prosecutors “believe that it is their responsibility to exercise discretion in cases, to be the razor of morality in our society, to discern between the acceptable and unacceptable.”³⁹ Undoubtedly, this “trait is essential to doing the job well.”⁴⁰ After all, achieving justice means making moral—not just

does not represent the victim of a crime, the police, or any individual. Instead, the prosecutor represents society as a whole.”)

36. Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2091 (2010).

37. See, e.g., DAVID A. HARRIS, FAILED EVIDENCE: WHY LAW ENFORCEMENT RESISTS SCIENCE 104 (2012) (“[P]rosecutors' careers advance according to their conviction rates. The higher the rate, the better they do.”); MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS 24 (1999) (“It soon seems clear to the new guy that the only way he's ever going to move on to the more challenging cases—and the only way he's going to squeeze the maximum amount of money out of the state to feed his family and his psyche—is to win as many cases as he can”); Jessica Fender, *DA Chambers offers bonuses for prosecutors who hit conviction targets*, DENVER POST (Mar. 23, 2011), <https://www.denverpost.com/2011/03/23/da-chambers-offers-bonuses-for-prosecutors-who-hit-conviction-targets/> [https://perma.cc/7SX2-8FE6] (reporting that District Attorney Carol Chambers “created an unusual incentive for her felony prosecutors, paying them bonuses if they achieve a predetermined standard for conviction rates at trial”); Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 442 n.164 (1992) (“Elected state prosecutors often face bitter contests in which their win-loss record becomes a campaign issue.”).

38. See Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 WM. & MARY L. REV. 387, 398 (2017) (noting that prosecutors “often share a sense of moral certainty in what they do”).

39. *Id.*

40. *Id.* (explaining why DOJ prosecutors may find it difficult to “admit mistakes or critique the power structure” they operate within).

legal—decisions. However, this same attribute may drive some prosecutors to eschew the dictates of a new behavioral regime. Habituated to determining what justice requires, some practitioners may intentionally reject calls to fall into a new progressive line.⁴¹

Then there is the low likelihood that any given indiscretion will be exposed.⁴² A number of factors make discovery unlikely. First, “prosecutors who engage in willful misconduct presumably do not want to be discovered and therefore take steps to conceal their misdeeds.”⁴³ Second, “the vast majority of known instances of prosecutorial misconduct come to light only during the course of a drawn-out trial or appellate proceeding[,]” and most criminal cases never make it to that stage.⁴⁴ Third, misconduct is most often reported to professional associations by disgruntled clients—that is, individuals who are intimately familiar with an attorney’s conduct vis-à-vis a given case.⁴⁵ “[S]ince prosecutors don’t have clients in the traditional sense—they represent ‘the people’—this backstop fails.”⁴⁶ Fourth, even if the misconduct is uncovered by *someone*, that someone is unlikely to report the infraction. Other attorneys, such as judges, fellow prosecutors, or defense counsel—who may well be best positioned to identify misconduct for what it is—may fail to report “out of a fear of retribution.”⁴⁷ Finally, randomized case audits—which could spot misconduct—are unknown to the profession.⁴⁸

41. See, e.g., Austen, *supra* note 5 (discussing experiences of progressive reformer Kim Ogg, who stated that “line prosecutors had worked actively against her when she was taking over . . . even deleting electronic files on a controversial case” and reporting on anonymous Twitter accounts started by ADAs purportedly working under Krasner, which “blamed Krasner’s reforms for abetting crime and defended the work of the city’s past district attorneys”); *The Paradox of “Progressive Prosecution”*, *supra* note 9, at 761 (discussing the “subtle acts of defiance” available to line prosecutors opposed to reform). R

42. See Barkow, *supra* note 36, at 2094 (observing the low chances of getting caught and the important role the likelihood of detection plays on deterrence). R

43. David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 209 (2011). R

44. *Id.* at 210.

45. See Parker Yesko, *Why Don’t Prosecutors Get Disciplined?*, AM. PUB. MEDIA REP. (Sept. 18, 2018), <https://www.apmreports.org/story/2018/09/18/why-dont-prosecutors-get-disciplined> [<https://perma.cc/B6KG-9GS3>] (noting that because “lawyers usually don’t file complaints [against prosecutors], it’s mostly their perturbed clients who do”).

46. *Id.*

47. *Id.*

48. See generally Christina Parajon, Comment, *Discovery Audits: Model Rule 3.8(d) and the Prosecutor’s Duty To Disclose*, 119 YALE L.J. 1339, 1348 (2010) (recom-

The fact that, historically, prosecutors have not faced serious disciplinary consequences for their actions—whether from judges or from supervisors—further facilitates deliberate wrongdoing.⁴⁹ For instance, a 2003 study found that in 2,012 cases in which a conviction was reversed or a sentence reduced because of prosecutorial misconduct, only 44 prosecutors faced state disciplinary proceedings.⁵⁰

Likewise, prosecutorial immunity, which effectively insulates individual prosecutors and their offices from civil liability for decisions made in the course of executing their duties, also facilitates deliberate misconduct.⁵¹

2. Negligent Misconduct

However, misconduct is not always, and perhaps not even mostly, the result of deliberate wrongdoing. Instead, misconduct can often be attributed to negligence. Local prosecutors' offices "have large caseloads and are often poorly funded and understaffed."⁵² This can lead to "overlooked evidence or insufficient documentation about promises made to witnesses or their prior records

mending prosecutors' offices begin to conduct case audits in order to improve internal compliance with discovery requirements).

49. See, e.g., Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 *FORDHAM L. REV.* 537, 569 (2011) (noting that discovery materials obtained in *Zahrey v. City of New York*, No. 98 Civ. 4546 (S.D.N.Y. filed June 26, 1998), revealed that the Brooklyn District Attorney's Office had "no formal disciplinary rules and procedures, and no history of disciplining prosecutors found to have engaged in misconduct, including the withholding of *Brady* material"); Brief for National Ass'n of Criminal Defense Lawyers et al. as Amici Curiae Supporting Respondents at 31, *Pottawattamie County v. McGhee*, 547 F.3d 922 (8th Cir. 2008) (No. 08-1065) (noting that discovery from a civil rights lawsuit in Queens, New York found that not a single prosecutor was disciplined in the eighty-four cases that involved prosecutorial misconduct resulting in the reversal of a conviction).

50. See Neil Gordon, *Misconduct and Punishment*, *CTR. FOR PUB. INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS* (June 26, 2003), <https://publicintegrity.org/politics/state-politics/harmful-error/misconduct-and-punishment/> [<https://perma.cc/EUV3-25PP>] (reporting also that seven of these disciplinary cases were eventually dismissed); Steve Weinberg, *Breaking the Rules*, *CTR. FOR PUB. INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS* (June 26, 2003), <https://publicintegrity.org/politics/state-politics/harmful-error/breaking-the-rules/> [<https://perma.cc/79ER-CGN8>].

51. See, e.g., *Connick v. Thompson*, 563 U.S. 51 (2011) (holding that prosecutor's office could not be held liable for the illegal conduct of one of its prosecutors, even if that violation resulted from deficient training); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (holding that prosecutors have full immunity from civil suits resulting from their government duties).

52. Barkow, *supra* note 36, at 2092.

or statements.”⁵³ Prosecutors buckling under the strain of hundreds of individual cases may inadvertently miss the presence of *Brady* evidence or lack the time to follow up on every lead in a relatively minor misdemeanor. Complicated power dynamics with police officers—on whose investigatory work ADAs depend—and inadequate information sharing, both within the office and between law enforcement agencies, exacerbate the risks.⁵⁴ Unconscious biases, most notably confirmation bias, also help to explain negligent misbehavior.⁵⁵ Confirmation bias can make assessments of whether a piece of information satisfies *Brady* unclear and may cause prosecutors who earnestly believe in a defendant’s guilt to keep certain evidence back or to fail to sufficiently question law enforcement’s narrative.⁵⁶

53. *Id.* at 2093.

54. See, e.g., Wil S. Hylton, *Baltimore vs. Marilyn Mosby*, N.Y. TIMES MAG. (Sept. 28, 2016), <https://www.nytimes.com/2016/10/02/magazine/marilyn-mosby-fred-die-gray-baltimore.html> [<https://perma.cc/C9BZ-C3HQ>] (discussing the Baltimore State’s Attorney’s reliance on the city police department to investigate cases, even when those cases involve police misconduct); Jon Swaine et al., *Ties that Bind*, THE GUARDIAN (Dec. 31, 2015, 8:00 AM), <https://www.theguardian.com/us-news/2015/dec/31/ties-that-bind-conflicts-of-interest-police-killings> [<https://perma.cc/4JYL-QA6Z>] (discussing prosecutors’ reliance on police work).

55. An actor succumbing to confirmation bias will, after “examining the information available, . . . tend to see a confirmation of his previous expectations, even if the evidence is more consistent with a different state of affairs.” Geoffrey P. Miller & Gerald Rosenfeld, *Intellectual Hazard: How Conceptual Biases in Complex Organizations Contributed to the Crisis of 2008*, 33 HARV. J.L. & PUB. POL’Y 807, 814 (2010). See generally BROOKLYN DISTRICT ATTORNEY ET AL., 426 YEARS: AN EXAMINATION OF 25 WRONGFUL CONVICTIONS IN BROOKLYN, NEW YORK (July 9, 2020), http://www.brooklynda.org/wp-content/uploads/2020/07/KCDA_CRUReport_v4r3-FINAL.pdf [<https://perma.cc/9LFT-ZFKN>] [hereinafter 426 YEARS] (discussing role of confirmation bias in wrongful convictions throughout the report, including as it pertains to false confessions and eyewitness identifications).

56. “[Confirmation] bias is defined as the ‘inclination to retain, or a disinclination to abandon, a currently favored hypothesis.’” DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 23 (2012) (quoting Joshua Klayman, *Varieties of Confirmation Bias*, 32 PSYCH. LEARNING AND MOTIVATION 385, 386 (1995)). See also Bruce A. Green & Ellen Yaroshesky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 488 (2009) (noting that prosecutors may have a difficult time accurately assessing the value of exculpatory evidence because “tunnel vision” may make them prone to view such evidence “through the lens of one’s preexisting expectations and conclusions”); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1611 (2006) (citing Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 396 (1984)) (“The prosecutor’s application of *Brady* is biased not merely because she is a zealous advocate engaged in a ‘competitive enterprise,’ but because the theory she has developed from that enterprise might

3. Culture's Role in Enabling Misconduct

Ultimately, whether misconduct is deliberate or inadvertent, its root cause can often be attributed to the office culture in which it occurred. The insight that bad culture breeds bad behavior is not a recent one.⁵⁷ For years, legal academics (and more recently the public) have “push[ed] blame up the ladder in the prosecutors’ office, perceiving low-level prosecutorial wrongdoing as symptomatic of bad culture.”⁵⁸ Relevant literature most frequently invokes two inveterate facets of that “bad culture”: a lack of back-end “accountability” (i.e. punishment) and a myopic focus on securing convictions.⁵⁹ But while punishment and thoughtful goal-setting may mold an office culture, they are only two attributes of an invariably complex office environment.

For reformers, the crucial question is not whether culture plays a role in enabling misconduct, but rather how to effectively transform that culture. Recommendations to increase ex-post punishment (usually through external misconduct review boards or increased judicial oversight) or to reconsider conviction-based success measures, while commendable, are unlikely to transform prosecutorial cultures. A brief perusal of corporate wrongdoing, which occurs in highly regulated environments, often in the face of nominally aligned employee incentives, confirms this.⁶⁰ Something more is necessary: a deeper and more granular understanding of why misconduct occurs and what features of a given cultural environment facilitate deviation from legal rules *and* office policies and

trigger cognitive biases, such as confirmation bias and selective information processing.”).

57. See, e.g., Alafair S. Burke, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?: Talking About Prosecutors*, 31 *CARDOZO L. REV.* 2119, 2127 (2010) (attributing legally-defined misconduct to a “deeply flawed prosecutorial culture”).

58. Green & Yaroshefsky, *supra* note 15, at 70.

59. See, e.g., Green & Yaroshefsky, *supra* note 15 (supporting efforts to increase accountability via judicial oversight); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 *U. PA. L. REV.* 959, 962 (2009) (noting that “most [scholars] favor external regulation of prosecutors by other institutions” as a means of curtailing abuse of discretion); Fish, *supra* note 34, at 1479 (urging prosecutors to move away from using conviction rates as a metric of success).

60. See, e.g., Todd Haugh, *The Power Few of Corporate Compliance*, 53 *GA. L. REV.* 127, 175 (2018) (stressing that Wells Fargo “senior managers’ bonuses were not tied to cross selling or products-per-household, so there were no direct compensation incentives for encouraging fake accounts” and yet, even in the highly regulated banking industry, and with seemingly correctly aligned incentives, fraud was perpetuated on a massive scale).

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norms. And, conversely and concomitantly, what features promote ethical decision-making.

II.

A RENAISSANCE OF PROGRESSIVE PROSECUTION

A. *Misconduct and Prosecutorial Practice Prior to Reform*

The exact occurrence rate of prosecutorial misconduct is unknown, and legal misconduct is undoubtedly of greater concern in some offices than in others.⁶¹ That said, prosecutors' violations of legal rules and ethical precepts is a troubling reality.⁶² Consider the history of prosecutorial misconduct in the three cities discussed in this note.

In Chicago, an investigation by the *Chicago Tribunal* at the turn of this century “found that prosecutor misconduct [was] commonplace in felony cases brought in Cook County.”⁶³ The newspaper cited chronic prosecutorial misconduct by county assistant prosecutor Scott Arthur, who “broke” the “rules of engagement,” but “continued to move up the office’s rank,” as indicative of a larger cultural problem in the State’s Attorney’s Office.⁶⁴ More recently, Anita Alvarez, the State’s Attorney from 2008 to 2016, was accused of endorsing a variety of unethical behaviors, primarily relating to poor use of discretion—from undercharging police officers accused of civilian shootings to charging a recanting witness with per-

61. See, e.g., Keenan et al., *supra* note 43, at 209 (noting that a number of “empirical problems hamper efforts to provide an accurate assessment” of the incidence of prosecutorial misconduct); Fish, *supra* note 34, at 1479 (“Different prosecution offices also have different cultural norms, which can vary from aggressive and adversarial to moderate and managerial.”) (citing Pamela J. Utz, *Two Models of Prosecutorial Professionalism*, in *THE PROSECUTOR* 99, 103-14 (William F. McDonald ed., 1979) (contrasting the adversarial culture of San Diego County’s DAO with the managerial culture of Alameda County’s DAO)).

62. For instance, “[a] 2003 study by the Center for Public Integrity . . . found over two thousand appellate cases since 1970 in which prosecutorial misconduct led to dismissals, sentence reductions, or reversals.” Keenan et al., *supra* note 43, at 211. This presents over sixty distinct cases of misconduct a year. And that is only the misconduct that was egregious enough to be contested in an appellate case.

63. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 *IOWA L. REV.* 393, 465 (2001) (citing Ken Armstrong & Maurice Possley, *Trial and Error: How Prosecutors Sacrifice Justice to Win* (pts. 1-5), *CHI. TRIB.* (Jan. 10-14, 1999), <https://www.chicagotribune.com/chi-020103trial-gallery-story-gallery.html> [<https://perma.cc/JFV6-3XL2>]).

64. Ken Armstrong & Maurice Possley, *Reversal of Fortune*, *CHI. TRIB.* (Jan. 13, 1999), <https://www.chicagotribune.com/investigations/chi-020103trial4-story.html#nt=storygallery> [<https://perma.cc/X2UZ-4LM8>].

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jury.⁶⁵ The latter case prompted a host of prominent attorneys, judges, and the Governor of Illinois to pen a letter requesting that Alvarez drop the perjury charge as it would dissuade future witnesses from recanting false testimony.⁶⁶

Misconduct was common in Philadelphia as well. In the mid-1990s, during Jack McMahon's campaign for DA, a training tape for Philadelphia prosecutors on which McMahon encouraged racial discrimination in jury selection came to public attention.⁶⁷ In 2013, the Assistant Chief of the Homicide Unit resigned and surrendered to state prosecutors after she was accused of ethical and criminal misconduct.⁶⁸ In 2015, media outlets reported that Philadelphia prosecutors were protecting police officers accused of misconduct.⁶⁹ Finally, on June 29, 2017, the sitting District Attorney, Rufus Seth Williams, pled guilty to federal bribery charges.⁷⁰

In Brooklyn, the 23-year long tenure of Charles Joseph Hynes, who left office in 2013, was marred by a number of misconduct allegations. Perhaps most prominent was the case of Jabbar Collins, who spent 16 years in prison for the 1994 murder of a rabbi.⁷¹ In

65. See Josie Duffy Rice, *The Horrifying Behavior of Anita Alvarez*, *Chicago's Head Prosecutor*, DAILY KOS (Nov. 24, 2015), <https://www.dailykos.com/stories/2015/11/24/1453982/-The-horrifying-behavior-of-Anita-Alvarez-Chicago-s-head-prosecutor> [https://perma.cc/VJ2P-YASW].

66. Frank Main, *Former Judges, Ex-prosecutors Urge Alvarez: Drop Perjury Case*, CHI. SUN TIMES (May 5, 2014), <https://chicago.cbslocal.com/2014/05/05/former-judges-ex-prosecutors-urge-alvarez-to-drop-perjury-case/> [https://perma.cc/U9A9-44WZ].

67. See *Prosecutor's Tape on Juries Results in Mistrial*, N.Y. TIMES (Apr. 4, 1997), <https://www.nytimes.com/1997/04/04/us/prosecutor-s-tape-on-juries-results-in-mistrial.html> [https://perma.cc/L7GS-YY5C].

68. See Karen Araiza, *Prosecutor Accused of "Revenge" Crime Resigns, Charged*, NBC PHILA. (Oct. 4, 2013), <https://www.nbcphiladelphia.com/news/local/Prosecutor-Lynn-Nichols-Surrenders-Resigns-Charged-Philadelphia-226473041.html> [https://perma.cc/PUH2-GWQ8] (adding that though this prosecutor left the DA's office, the DA's office noted that "none of her cases or casework have been called into question or review," suggesting that the charges against her did not prompt an internal review).

69. See Daniel Denvir, *How Philadelphia Prosecutors Protect Police Misconduct: Cops Get Caught Lying—and Then Get off the Hook*, SALON (Dec. 28, 2015), https://www.salon.com/2015/12/28/how_philadelphia_prosecutors_protect_police_misconduct_cops_get_caught_lying_and_then_get_off_the_hook/ [https://perma.cc/Z8WK-2VLC].

70. Press Release, U.S. Attorney William E. Fitzpatrick, Philadelphia District Attorney Rufus Seth Williams Pleads Guilty To Federal Bribery Charge (June 29, 2017), <https://www.justice.gov/usao-nj/pr/philadelphia-district-attorney-rufus-seth-williams-pleads-guilty-federal-bribery-charge> [https://perma.cc/3A9M-LEKJ].

71. Anthony C. Thompson, *Retooling and Coordinating the Approach to Prosecutorial Misconduct*, 69 RUTGERS L. REV. 623, 633 (2017).

2010, a federal judge granted Collins's petition for habeas corpus relief after he was presented with evidence that the lead prosecutor in the case, Michael Vecchione, withheld *Brady* materials and coerced witnesses into testifying against Collins.⁷² Despite the judge castigating Vecchione for his "shameful" conduct,⁷³ as well as Vecchione's role in several other high-profile office scandals,⁷⁴ District Attorney Hynes remained steadfast in his support of the prosecutor, who rose to head of the Homicide Bureau, the Trial Division, and the Rackets Bureau.⁷⁵ Additional allegations of prosecutorial misconduct on the part of other borough prosecutors surfaced in 2012 and 2013.⁷⁶ Eventually, Hynes himself was judged to have engaged in unethical conduct in relation to a reelection campaign.⁷⁷

72. One witness reported that he had agreed to supply false testimony in exchange for prosecutors dropping a probation violation; another alleged that detectives threatened to charge him as an accessory to a robbery if he didn't testify for the government; a third reported that the prosecutor handling the case had threatened to hit him with a coffee table or to jail him for perjury and then did jail him before the witness finally agreed to testify. *Id.* at 632–39.

73. A. G. Sulzberger, *Facing Misconduct Claims, Brooklyn Prosecutor Agrees to Free Man Held 15 Years*, N.Y. TIMES (June 9, 2010), <https://www.nytimes.com/2010/06/09/nyregion/09vecchione.html> [<https://perma.cc/CBC2-SMH4>].

74. See Joaquin Sapien, *A Prosecutor, a Wrongful Conviction and a Question of Justice*, PRO PUBLICA (May 23, 2013), <https://www.propublica.org/article/a-prosecutor-a-wrongful-conviction-and-a-question-of-justice> [<https://perma.cc/ZE6P-SZRU>] (chronicling Vecchione's participation in a number of problematic prosecutions).

75. Vivian Yee, *Under Fire, Brooklyn Deputy Prosecutor Will Retire*, N.Y. TIMES (Nov. 14, 2013), <https://www.nytimes.com/2013/11/15/nyregion/under-fire-brooklyn-deputy-prosecutor-will-retire.html> [<https://perma.cc/C4JL-PTEW>].

76. See Brad Hamilton, *Lawyer Accuses Brooklyn DA Charles Hynes' Office of Manipulating Witnesses, Evidence*, N.Y. POST (Dec. 3, 2012), <https://nypost.com/2012/12/03/lawyer-accuses-brooklyn-da-charles-hynes-office-of-manipulating-witnesses-evidence/> [<https://perma.cc/QF47-K25B>] (alleging that prosecutors under Hynes "knowingly elicited contradictory identification testimony from the same two key witnesses before two separate grand juries"); Michael Powell, *A Prosecutor Loath to Say 'Not Guilty,'* N.Y. TIMES (Jan. 28, 2013), <https://www.nytimes.com/2013/01/29/nyregion/brooklyn-district-attorney-clings-to-discredited-cases.html> [<https://perma.cc/4SCV-JQYT>] (detailing the case of William Lopez, which involved disclosure violations and "flimsy" evidence).

77. See Julianne Cuba, *Ethics Board Deals Record Fine to Former DA for Abusing Office During Campaign*, BROOKLYN PAPER (Mar. 30, 2018), <https://www.brooklynpaper.com/stories/41/14/all-hynes-pays-largest-campaign-fine-in-history-2018-03-30-bk.html> [<https://perma.cc/Q7VT-CMX7>] ("Ethics watchdogs slapped Brooklyn's embattled former top prosecutor with the highest fine ever dealt by the city for illegal campaign-related activities.").

B. *The Pernicious Consequences of Misconduct and Calls for Reform*

The consequences of legally-defined prosecutorial misconduct can be tragic for defendants.⁷⁸ Those unlucky enough to be on the other side of an unscrupulous or negligent prosecutor may be denied a chance at a fair trial, convicted of a crime they did not commit, and condemned to suffer the million indignities and torments of prison, sometimes for decades.⁷⁹

The pernicious consequences of violations of office norms may be more subtle. For progressive prosecutors, undertaken reforms reflect a growing public concern about the direct and collateral consequences of discretionary prosecutorial decisions. More and more, prosecutors face public condemnation for their perceived overcharging of certain defendants,⁸⁰ such as MIT fellow Aaron

78. See 426 YEARS, *supra* note 55 (examining 26 wrongful convictions in Brooklyn, some of which were attributable to prosecutorial misconduct, and quoting Eric Gonzalez in report's introductory letter as follows: "[t]he magnitude of years lost to wrongful imprisonment in these cases is almost unbearable—together, they add up to 426 years spent in prison. And each case described in these pages is itself a complete tragedy, for the person who was wrongfully convicted and incarcerated, for his or her community, for the victims and survivors of these cases, and indeed for all of us").

79. See, e.g., *id.* at 60–68 (discussing role of prosecutorial misconduct in several wrongful convictions occurring in Brooklyn, some of which resulted in defendants serving decades long prison sentences); Samantha Melamed, *A 'Perfect Storm' of Injustice*, PHILA. INQUIRER (Jan. 21, 2020), <https://www.inquirer.com/news/philadelphia-da-larry-krasner-conviction-integrity-unit-exoneration-theophalis-wilson-christopher-williams-20200121.html> [https://perma.cc/GZK8-PDFY] (reporting that the Philadelphia DA's office had exonerated Theophalis "Bilal" Wilson—who spent 28 years behind bars—after discovering that the prosecutors pursuing his case had committed various kinds of misconduct); Joaquin Sapien, *He Went to Prison After a Prosecutor Hid Evidence. Seven Years After Our Story, He Walked Free.*, PROPUBLICA (Feb. 20, 2020), <https://www.propublica.org/article/he-went-to-prison-after-a-prosecutor-hid-evidence-seven-years-after-our-story-he-walked-free> [https://perma.cc/GBM2-FQD5] (reporting on parole release of Tyronne Johnson, who spent 20 years in prison after the prosecutor in his case hid evidence and noting the same prosecutor had his license suspended by a disciplinary committee for committing other misconduct); Laurel Wamsely, *After 36 Years in Prison for 'Georgetown Jacket' Murder, 3 Men Are Exonerated at Last*, NAT'L PUB. RADIO (Nov. 26, 2019), <https://www.npr.org/2019/11/26/782941770/after-36-years-in-prison-for-georgetown-jacket-murder-3-men-are-exonerated-at-la> [https://perma.cc/YE9X-DAV4] (reporting on the 36-year-after-the-fact exoneration of three men erroneously convicted of murder after the prosecutor in their case failed to hand over potentially exculpatory evidence).

80. It should be noted that the professional responsibility rules do not appear to address the problem of overcharging or undercharging. Rule 3.8's admonition that prosecutors bring only those charges that are supported by probable cause is "inadequate to address overcharging because probable cause is a minimal threshold that is well below what is required to convict" and inadequate to address under-

Swartz—who committed suicide after federal prosecutors charged him with 13 counts for downloading academic articles en masse from JSTOR⁸¹—and the perpetual undercharging of others, such as police officers accused of killing unarmed persons and wealthy perpetrators of sexual assault.⁸² Progressive reformers strive to establish policies and norms that address these public concerns. As such, stark deviations from new office norms may undermine public trust in these reforms and in prosecutors in general.

Ultimately, both kinds of prosecutorial misconduct thus present a threat to the health of civil society, most obviously by depressing public confidence in our criminal justice system.⁸³ Generally speaking, “the more confident people are that . . . members [of a

charging because there is no mandate that individuals be charged for every criminal act. H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 63 (2013).

81. See Superseding Indictment of Aaron Swartz, *United States v. Swartz*, No. 1:11-CR-10260-NMG (D. Mass. Sept. 12, 2012); Alex Stamos, *The Truth About Aaron Swartz’s “Crime,”* UNHANDLED EXCEPTION (Jan. 12, 2013), <http://unhandled.com/2013/01/12/the-truth-about-aaron-swartzs-crime/> [https://perma.cc/UH7K-Q89A] (asserting that Aaron Swartz was “massively overcharged,” since his downloading of journal articles was from an open university network that provided access to a website offering unlimited free downloads); Stephen L. Carter, *The Overzealous Prosecution of Aaron Swartz*, BLOOMBERG VIEW (Jan. 17, 2013), <https://www.bloomberg.com/opinion/articles/2013-01-17/the-overzealous-prosecution-of-aaron-swartz> [https://perma.cc/7S3A-XEJF].

82. See, e.g., Nadia Prupis, *Ferguson Prosecutor Hit with Ethics Complaint*, COMMON DREAMS (Jan. 6, 2015), <http://www.commondreams.org/news/2015/01/06/ferguson-prosecutorhit-ethics-complaint> [https://perma.cc/6GCE-YE8L] (reporting that the Ethics Project had filed a complaint with a state disciplinary body against the Ferguson Prosecuting Attorney and some of his staff, after the police shooting death of Michael Brown); Jonathon Sizemore, *Eric Garner’s Death: No Justice No Peace*, CITYLAND (Mar. 16, 2017), <https://www.citylandnyc.org/eric-garner-death-no-justice-no-peace/> [https://perma.cc/3ZWG-YPL7] (reporting that the NAACP petitioned Kings County Supreme Court to compel the State Grievance Committee to bring ethics charges against Staten Island District Attorney Daniel Donovan following his alleged misconduct in the investigation of the police killing of Eric Garner); Erin Durkin, *Sexual Assault Survivors Call on Cy Vance Jr. to Resign*, POLITICO (Jan. 23, 2020), <https://www.politico.com/states/new-york/albany/story/2020/01/23/sexual-assault-survivors-call-on-cy-vance-jr-to-resign-1253915> [https://perma.cc/W9ZC-XMNL] (reporting on calls for Manhattan District Attorney Cy Vance to resign following allegations that he had mismanaged the prosecution of wealthy and well-connected sexual predators, such as Harvey Weinstein and Robert Hadden).

83. See, e.g., John Hollway, Opinion, *Reining in Prosecutorial Misconduct*, WALL ST. J. (July 4, 2016), <https://www.wsj.com/articles/reining-in-prosecutorial-misconduct-1467673202> [https://perma.cc/4AVX-D7F6] (“These cases are not the norm. But they persist, and they make the job of good-faith prosecutors harder by undermining the legitimacy of the criminal-justice system.”).

particular government group] behave unethically, the less likely they are to have confidence in other aspects of that group's performance."⁸⁴ With prosecutors, the relationship between ethical conduct and job performance is clear. After all, "[t]he primary duty of the prosecutor is to seek justice within the bounds of the law."⁸⁵ How can a prosecutor who has acted unethically be trusted to exercise their discretion in pursuit of that duty?

In the wake of increased public scrutiny, academics, legislatures, and even conservative news outlets have all issued calls to hold prosecutors to account.⁸⁶ This heightened awareness of the prevalence and harmful consequences of prosecutorial misconduct has engendered an interest in reforming District Attorneys' offices across the United States.

C. *Progressive Prosecutors Respond*

A wave of "progressive prosecutors" has emerged in the wake of these calls for reform⁸⁷: Marilyn Mosby in Baltimore, Scott Colom in Mississippi, James Stewart in Louisiana, Mark Gonzalez—a former defense attorney with "not guilty" tattooed across his chest—in Texas, Marco Serna in New Mexico, and others, including the three prosecutors highlighted in this note: Kim Foxx in Chi-

84. Claire Gecewicz & Lee Rainie, *Americans' Perceptions About Unethical Behavior Shape How They Think About People in Powerful Roles*, PEW RESEARCH CTR.: FACT-TANK (Sept. 19, 2019), <https://www.pewresearch.org/fact-tank/2019/09/19/americans-perceptions-about-unethical-behavior-shape-how-they-think-about-people-in-powerful-roles/> [<https://perma.cc/Q2HT-AMVD>]. Though public confidence polls typically ask about faith in the police, Congress, or the courts, rather than local prosecutors' offices, the logical inferences made by survey participants likely translates to trust in district attorneys.

85. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.2 (Am. Bar Ass'n, 4th ed. 2017).

86. See, e.g., Caldwell, *supra* note 26 (detailing 13 different types of prosecutorial misconduct); Keenan et al., *supra* note 43, at 203; Jillian Jorgensen, *Settlement Squashes NY State Panel Probing Prosecutorial Misconduct*, N.Y. DAILY NEWS (Dec. 10, 2018), <https://www.nydailynews.com/news/politics/ny-pol-prosecutorial-conduct-commission-hold-lawsuit-20181210-story.html> [<https://perma.cc/E8G6-A7Z9>] (detailing failed efforts of New York legislature to assemble a new body charged with investigating prosecutorial misconduct); Kevin D. Williamson, *When District Attorneys Attack*, NAT'L REV. (May 31, 2015), <http://www.nationalreview.com/article/419110/when-district-attorneys-attack-kevin-d-williamson> [<https://perma.cc/Q654-Y7QM>]. See also *Prosecutors Burn Down the Law: How Fire Investigators Distorted Evidence to Loot a Company*, WALL ST. J. (Jan. 2, 2015), <http://www.wsj.com/articles/prosecutors-burn-down-the-law-1420242330> [<https://perma.cc/4URZ-2PQE>].

87. *The Paradox of "Progressive Prosecution"*, *supra* note 9, at 750.

cago, Larry Krasner in Philadelphia, and Eric Gonzalez in Brooklyn.⁸⁸

Foxx was the earliest of this group to win a local election and assumed her post in December 2016.⁸⁹ Prior to her election, she had served as the “Chief of Staff for the Cook County Board President, where she was the lead architect of the county’s criminal justice reform agenda to address racial disparities in the criminal and juvenile justice systems.”⁹⁰ Krasner, who likes to describe himself as “a prosecutor with *com-passion*. Or a public defender with *pow-er*,”⁹¹ worked as a criminal defense and civil rights attorney for thirty years before being elected to Philadelphia’s top prosecutorial post in 2017. Since becoming district attorney, Krasner “ha[s] become a model for other progressives seeking office—for outsiders with grass-roots support and uncompromising platforms for change, for D.A. candidates proclaiming themselves the next Larry Krasner.”⁹² In contrast, Gonzalez devoted his professional career to the Brooklyn District Attorney’s Office.⁹³ It was the untimely death of his immediate predecessor, Kenneth Thompson—whose election was arguably the “turning point” for the progressive prosecution movement in the first place⁹⁴—that spurred Gonzalez to seek office.⁹⁵ After the election, Gonzalez named Jill Harris, a former public defender, the Chief of Policy and Strategy and tapped a cohort of 70 individuals—including “community members, criminal justice re-

88. See David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 648 (2017) (identifying the first six of these individuals as progressive prosecutors); Austen, *supra* note 5 (identifying Larry Krasner as a “progressive DA”); Press Release, Office of Kings Cty. Dist. Att’y, Brooklyn District Attorney Eric Gonzalez Unveils Sweeping Reforms His Office is Implementing as Part of the Justice 2020 Initiative, Establishing a National Model of a Progressive Prosecutor’s Office (Mar. 11, 2019), <http://www.brooklynda.org/2019/03/11/brooklyn-district-attorney-eric-gonzalez-unveils-sweeping-reforms-his-office-is-implementing-as-part-of-the-justice-2020-initiative-establishing-a-national-model-of-a-progressive-prosecutors> [https://perma.cc/NLV6-79DX] (identifying the office as providing a “national model” for progressive prosecutors).

89. *Kimberly M. Foxx*, COOK COUNTY ST’S ATT’Y, <https://www.cookcountystatesattorney.org/about/kimberly-foxx> [https://perma.cc/FB6M-UDSU].

90. *Id.*

91. Austen, *supra* note 5.

92. *Id.*

93. See *Eric Gonzalez*, BROOKLYN DISTRICT ATT’Y’S OFF., <http://www.brooklynda.org/eric-gonzalez/> [https://perma.cc/C7J3-YCZV] (last visited Nov. 2, 2020) (stating that Gonzalez “began his legal career in the Brooklyn District Attorney’s Office upon his graduation from law school in 1995”).

94. Sklansky, *supra* note 88, at 651.

95. See *Eric Gonzalez*, *supra* note 93 (stating that Gonzalez was appointed as Acting DA after Ken Thompson’s death).

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form experts and advocates, faith leaders, [and] formerly incarcerated people”—to draft an “action plan” for reform.⁹⁶

These three reformers and their larger, contemporaneous cohort collectively represent the “first major shift in the politics and incentives of American prosecution in decades.”⁹⁷ For the three progressive prosecutors highlighted in this note—Kim Foxx, Larry Krasner, and Eric Gonzalez—this shift reflects a dual concern with countering both “legal misconduct” and the sort of “violations of office norms” outlined in *Part I*.⁹⁸ Their efforts to combat the former are evident, for instance, in their support of robust “Conviction Review Units” and commitments to increasing ethics training for line prosecutors.⁹⁹ Their efforts to forestall the latter can be seen in

96. See Gonzalez, *supra* note 4, at 11.

97. EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION, at xxvii (2019).

98. See, e.g., Frederic Block, *Let's Put an End to Prosecutorial Immunity*, THE MARSHALL PROJECT (Mar. 13, 2018), <https://www.themarshallproject.org/2018/03/13/let-s-put-an-end-to-prosecutorial-immunity> [<https://perma.cc/9PN4-GNPR>] (stating that the Jabbar Collins case “animated a crusading civil rights lawyer named Ken Thompson to campaign against and defeat [incumbent District Attorney Charles Hynes]”); Sklansky, *supra* note 88, at 652 nn.33–38 (citing a number of articles in support of the assertion that “Thompson’s campaign focused on allegations of prosecutorial misconduct under Hynes’s watch”); Holly Otterbein, *Meet the D.A. Candidate Who’s Defended Black Lives Matter and Occupy in Court*, PHILA. MAG. (Feb. 22, 2017), <https://www.phillymag.com/news/2017/02/22/larry-krasner-district-attorney-race/> [<https://perma.cc/9L62-7RC2>] (reporting that Krasner’s experiences combatting prosecutorial overcharging and apparent *Giglio* violations were the high points of his legal career and stating that he believed it was time for the DA’s Office to head in a “different direction”); Kim Foxx for Cook County State’s Attorney, FACEBOOK (Feb. 4, 2016), <https://www.facebook.com/watch/?v=1561430014184994> [<https://perma.cc/P3FM-UVZX>] (depicting advertisement in which Kim Foxx criticizes Anita Alvarez for taking over 400 days to indict the police officer responsible for shooting Laquan McDonald—an unarmed, Black teenager).

99. Conviction Review Units are internal divisions dedicated to investigating erroneous convictions. In his campaign to permanently assume the DA’s position, Eric Gonzalez identified the Conviction Review Unit started by his progressive predecessor Ken Thompson as one of his priorities. See Jon Schuppe, *Brooklyn District Attorney Ken Thompson’s Death Leaves Exoneration Movement Mourning*, NBC (Oct. 11, 2016), <https://www.nbcnews.com/news/us-news/brooklyn-district-attorney-ken-thompson-s-death-leaves-exoneration-movement-n663966> [<https://perma.cc/TX9R-TEEX>]. A key feature of Gonzalez’s comprehensive reform plan—named Justice 2020—was the creation of an Office of Professional Responsibility and Ethics. See Gonzalez, *supra* note 4, at 8. Kimm Foxx likewise promised to “beef[] up the division that investigates wrongful prosecution,” and to hire an “ethics officer to train attorneys and investigate ethical lapses.” See Steve Schmadeke, *Kim Foxx Promises “New Path” of Transparency as Cook County State’s Attorney*, CHI. TRIB. (Dec. 1, 2016), [R](https://www.chicagotribune.com/news/local/breaking/ct-kim-foxx-states-</p></div><div data-bbox=)

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commitments to re-orienting office norms pertaining to low-level offenses, overcharging, and police misconduct.¹⁰⁰

D. *The Rough Road to Reform*

All three reformers—Foxy, Krasner, and Gonzalez—have eschewed conviction-based metrics and understood from the beginning of their tenures that the culture of their offices needed to change.¹⁰¹ Avowals to effect change are, of course, not commensu-

attorney-met-20161201-story.html [https://perma.cc/U85Z-SBSH]; Steve Schmadeke, *Newly Elected Kim Foxx Details Plans to Reshape State's Attorney's Office*, CHI. TRIB. (Dec. 6, 2016), <https://www.chicagotribune.com/news/local/breaking/ct-kimm-foxx-interview-met-20161205-story.html> [https://perma.cc/Z9DU-MWEF]. See also Chris Palmer & Samantha Melamed, *Philly DA Larry Krasner Promised an Aggressive Conviction Integrity Unit. Judges Have Pushed Back*, PHILA. INQUIRER (Jan. 29, 2019), <https://www.philly.com/news/larry-krasner-conviction-integrity-unit-philadelphia-district-attorney-judges-20190129.html> [https://perma.cc/2Q63-ZCU2] (reporting Larry Krasner promised to form an “aggressive” Conviction Integrity Unit).

100. See, e.g., Gonzalez, *supra* note 4, at 19, 29 (Mar. 2019) (noting that the “DA may decline to prosecute certain charges through diversion programs, or even with no intervention at all” and recommending “the DA develop protocols to ensure independent investigations with no special treatment for police officers suspected of misconduct”); RECLAIM CHICAGO ET AL., IN PURSUIT OF JUSTICE FOR ALL: AN EVALUATION OF KIM FOXX’S FIRST YEAR IN OFFICE 11 (2017), <https://www.thepeopleslobbyusa.org/wp-content/uploads/2017/12/Equal-Justice-for-All-A-Report-on-Kim-Foxxs-First-Year-ForPrint.pdf> [https://perma.cc/4LTJ-BKQD] (describing Kim Foxx’s efforts to combat overcharging); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 U.C.L.A. CRIM. JUSTICE L. REV. 1, 8–9 (2019) (noting that Foxx announced “her office would not charge retail thefts as felonies unless the value of the property was at least \$1,000 or the defendant had ten or more prior felonies” and “would no longer prosecute individuals for driving with licenses suspended for financial reasons”); Philadelphia DAO, *DA Larry Krasner Slaps Down Hundreds of Marijuana-Buying Cases*, MEDIUM (Aug. 9, 2018), <https://medium.com/philadelphia-justice/da-larry-krasner-slaps-down-hundreds-of-marijuana-buying-cases-d1e12306bf4e> [https://perma.cc/5VZ8-YDYU] (“Since DA Larry Krasner issued a groundbreaking policy in March, our office has declined to prosecute over 293 marijuana purchase cases.”). See Samantha Melamed & Chris Palmer, *Rethinking Murder Charges; DA Krasner Shifts Focus from “Wins” in Homicide Prosecutions*, PHILA. INQUIRER (Nov. 14, 2018), <https://www.philly.com/philly/news/larry-krasner-murder-cases-philadelphia-district-attorney-20181114.html> [https://perma.cc/2AGC-65DX] (identifying an office-wide policy to either seek lesser charges from the start or reduce charges in homicide cases. “The new strategy aligns with Krasner’s oft-expressed belief that former prosecutors were out for wins - in the form of excessive prison sentences - rather than for justice.”).

101. See Sarah Schulte, *Kim Foxx Plans Big Changes in Cook County State's Attorney's Office*, ABC 7 CHI. (Dec. 5, 2016), <https://abc7chicago.com/kim-foxx-sworn-in-states-attorney-election/1641062/> [https://perma.cc/DN79-G8W2] (quoting Foxx as follows: “We really want to change the culture of the office, change busi-

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rate with change-in-fact. And for these progressive prosecutors, the road to reform has, at times, been difficult.¹⁰² The reasons that particular reforms fail to yield their anticipated results are idiosyncratic. Outside forces, including interference from legislatures, hostile judges, and recalcitrant police forces, play an indelible role.¹⁰³ But, as this note’s case studies will illustrate, *internal* failures to bring about promised cultural change are instrumental in explaining why misconduct continues to occur and reform efforts stumble.¹⁰⁴

ness within the office.”); Adeshina Emmanuel, *Electing Progressive Prosecutors Isn’t Enough. Now, Activists Are Holding Them Accountable*, IN THESE TIMES (Mar. 26, 2018), https://inthesetimes.com/article/21014/kim_foxx_larry_krasner_chicago_philadelphia_prosecutors_progressive [https://perma.cc/Z9Q7-JVGY] (reporting that Foxx has had difficulty getting prosecutors to “shift away from the idea that a high conviction rate is the marker of success”); Otterbein, *supra* note 98 (quoting Krasner as follows: “The culture of the District Attorney’s office has brought us to this situation of having drastic injustice, especially focused on poor people and black and brown people. That culture needs to change. That culture can change.”); Gonzalez, *supra* note 4, at 9 (“The recommendations of Justice 2020, taken together, represent an enormous culture shift for the Brooklyn DA’s office, one that DA Gonzalez is eager to undertake.”); *id.* at 19 (stating that convictions should no longer be the “main measure of success” for ADAs).

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102. See Smith, *The Prosecutors I Like: A Very Short Essay*, *supra* note 7, at 417–18 (discussing the difficulties Krasner and Foxx have faced in actualizing their reform vision); Ali Watkins, *As Shootings Spike in Northern Brooklyn, N.Y.P.D. and Prosecutors Collide*, N.Y. TIMES (Aug. 8, 2019), <https://www.nytimes.com/2019/08/08/nyregion/brooklyn-shootings-da-nypd.html> [https://perma.cc/FAM5-FPJF] (discussing “feud” between NYPD and Gonzalez in the face of Gonzalez’s commitment to diverting certain gun possession cases); BAZELON, *supra* note 97, at 273 (discussing intransigence of some Brooklyn line prosecutors to change and stating that “[t]he everyday machinery of prosecution ground on, impervious to change at the top. It would take serious patience and stamina to change the system on a large scale”); Davis, *Reimagining Prosecution: A Growing Progressive Movement*, *supra* note 100, at 3 (stating that while some progressive prosecutors have made “modest improvements, . . . many have faced serious challenges from within and outside of their offices”).

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103. See, e.g., Smith, *supra* note 7, at 417 (noting that Kim Foxx has faced “county budget cuts, hostility from some judges, and hostility from the Fraternal Order of Police”); Davis, *supra* note 100, at 16–17 (discussing conflicts between Larry Krasner and the Philadelphia police); Tina Moore et al., *Brooklyn DA Coddling Gun-Toters: NYPD Chief*, N.Y. POST (July 8, 2019), <https://nypost.com/2019/07/08/brooklyn-da-coddling-gun-toters-nypd-chief/> [https://perma.cc/PW4F-GC66] (reporting NYPD Commissioner was “grous[ing] that the Brooklyn DA is going too easy on gun-possession cases” and that the DA’s diversion policy was responsible for an uptick in crime).

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104. See also Davis, *supra* note 100, at 15–21 (discussing some of the pushback progressive prosecutors have received from within their offices); Heather L. Pick-errell, *Critical Race Theory & Power: The Case For Progressive Prosecution*, 36 HARV. BLACKLETTER L.J. 73, 83 (2020) (“Some of the most obstinate actors who are re-

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Academics and corporations, through the study and implementation of ethics and compliance programs, have devoted considerable resources to understanding similar problems: namely how to stimulate compliance with ethical rules and standards. As such, corporate compliance best practices and innovations may prove useful for head prosecutors aiming to change their own office culture.

III.

LESSONS FROM CORPORATE COMPLIANCE

For corporations, expensive teaching moments—the collapse of Enron, the more recent Wells Fargo fraudulent accounts scandal, and many others, as well as a prodigious expenditure of resources—have spurred a wealth of academic research and practical experimentation with what it takes to create a culture of compliance.¹⁰⁵ A comparable expenditure of resources and experimentation with compliance initiatives has not been made in prosecutors' offices. As such, progressive prosecutors could well benefit from corporate experience.

A. *An Introduction to Corporate Compliance*

Corporate compliance can generally be conceptualized as “a system of policies and controls that organizations adopt to deter violations of law and to assure external authorities that they are taking steps to deter [such] violations.”¹⁰⁶ Compliance programs have two aims: (1) to deter law and rule breaking and (2) to generate and enforce norms.¹⁰⁷ The latter objective is embodied in compa-

sponsible for stymieing progressive prosecutors' agendas are subordinate, line prosecutors who subvert their boss's agenda.”)

105. See, e.g., Ronald R. Sims & Johannes Brinkmann, *Enron Ethics (Or: Culture Matters More Than Codes)*, 45 J. BUS. ETHICS 243 (2003) (arguing Enron's misdeeds demonstrate that corporate culture has a greater impact on compliance than codes of conduct); Haugh, *supra* note 60, at 129 (utilizing the Wells Fargo fake accounts scandal “as a backdrop” to explain a theory of compliance); Stan Silverman, *5 Lessons from the Report Analyzing Wells Fargo's Fake Account Scandal*, BIZ JS. (Apr. 25, 2017), <https://www.bizjournals.com/bizjournals/how-to/growth-strategies/2017/04/5-lessons-from-the-report-analyzing-wells-fargos.html> [https://perma.cc/LF56-TZTZ] (pulling out key compliance lessons for banks in the wake of the Wells Fargo scandal). See also *infra* Section III.A and sources cited therein.

106. See Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 958 (2009).

107. See Haugh, *supra* note 60, at 139–40 (identifying two areas of focus for compliance programs: deterring violations of law and “norm generation”); ETHICS & COMPLIANCE CERTIFICATION INST., PRINCIPLES AND PRACTICES OF HIGH-QUALITY ETHICS & COMPLIANCE PROGRAMS 12 (2016) [hereinafter ETHICS & COMPLIANCE

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nies' commitment to creating an "ethical culture"—now viewed by the majority of corporations as the "supreme goal" of their compliance program.¹⁰⁸

There is no "rigid formula" for achieving these aims.¹⁰⁹ Rather, effective compliance programs are built around a company's particular risk profile.¹¹⁰ As such, "risk assessments are the foundation upon which [high quality compliance programs] are built."¹¹¹ An organization's history, maturity, size, the industry in which it operates, and the attendant regulatory environment "drive the design and function" of its compliance program. Specifically, the identified risks inform company decisions about the best way to use the wide set of "tools" commonly employed across compliance programs.¹¹²

At minimum, every compliance program is devoted to employee education and training.¹¹³ Here, the "main instrument is the company code of conduct . . . that memorializes for employees what they can and cannot do."¹¹⁴ A "code of conduct" or manual typically includes a clear mission statement as well as more granular directives geared toward addressing the diverse risks faced by various sub-groups of workers.¹¹⁵ The mechanisms for training are also

CERTIFICATION INSTITUTE] ("Ethics and Compliance" programs achieve their aims by "[c]ontinuously assess[ing] and abat[ing] the organization's legal, ethics and other compliance risks . . . [and by e]stablish[ing] and perpetuat[ing] an organizational culture that prizes ethical decision-making and the raising of concerns without fear of retaliation").

108. Haugh, *supra* note 60, at 140 (internal citations omitted).

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109. Criminal Div., *Evaluation of Corporate Compliance Programs*, U.S. DEP'T OF JUST. 1 (Apr. 2019, updated June 2020), <https://www.justice.gov/criminal-fraud/page/file/937501/download> [<https://perma.cc/F9VK-YWA5>] [hereinafter *Evaluation of Corporate Compliance Programs*] (stating that the effectiveness of a program is not assessed according to any "rigid formula").

110. *Evaluation of Corporate Compliance Programs*, *supra* note 109, at 1 ("[R]ecogniz[ing] that each company's risk profile and solutions to reduce its risks" must drive determinations about programmatic effectiveness).

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111. ETHICS & COMPLIANCE CERTIFICATION INST., *supra* note 107, at 21.

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112. Haugh, *supra* note 60, at 141 (noting that these tools "are almost uniformly applied and adopted within and across firms").

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113. *See, e.g.*, Haugh, *supra* note 60, at 141 ("The main instrument is the company code of conduct (alternatively called an employee manual or handbook) that memorializes for employees what they can and cannot do."); Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 939 (2017) ("The common structural framework for compliance includes . . . firm-wide education and training about both the substance and process of compliance . . .").

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114. Haugh, *supra* note 60, at 141.

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115. Pamela H. Bucy, *Corporate Criminal Liability: When Does It Make Sense?*, 46 AM. CRIM. L. REV. 1437, 1448–49 (2009) ("[E]ach business should have multiple,

varied in their turn and can include “group sessions, one-on-one meetings, and web-based tutorials.”¹¹⁶ Significantly, employees’ training is not limited to admonitions to “‘do the right thing.’ [Rather, m]odern compliance programs gear their training to the areas where the employees are most likely to face compliance issues.”¹¹⁷ That is, those in accounting departments receive training on the Generally Accepted Accounting Principles, while those whose job it is to identify overseas business opportunities learn about the limits set by the Foreign Corrupt Practices Act.¹¹⁸

Next, no robust compliance program would be complete without a monitoring function, which can include “certifications, sign-off procedures, and supervisory review,” as well as ethics hotlines, employee surveys, and audits.¹¹⁹ Vitally, compliance programs require an enforcement function, for no program will be “fully living and breathing unless it has teeth.”¹²⁰ Enforcement can take many forms, from private or public reprimand to additional training to demotion, but the “most likely punishment for a significant compliance violation is termination.”¹²¹ Finally, industry experts have increasingly understood that creating a culture of compliance requires an understanding of behavioral ethics and a more thoughtful use of measurement tools.¹²²

short, specific, codes of conduct tailored to particular employment duties” which should each be “specific” as exactly what conduct is prohibited).

116. Haugh, *supra* note 60, at 142.

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117. John T. Boese, *Do Corporate Compliance Programs Really Prevent Corporate Wrongdoing? Of Course They Do!*, 4 EMORY CORP. GOVERNANCE & ACCOUNTABILITY REV. 9, 13 (2016).

118. Langevoort, *supra* note 113, at 939–40 (“[Compliance programs are customized in] recogni[tion of] the great range of motives, opportunities, and types of violations most likely to be a problem at a given firm.”).

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119. Haugh, *supra* note 60, at 142–43.

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120. Gretchen A. Winter & David J. Simon, *Code Blue, Code Blue: Breathing Life into Your Company’s Code of Conduct*, 20 ACCA DOCKET, Nov.-Dec. 2002, at 85. It bears noting that compliance programs must maintain a capacity to *investigate* misconduct allegations—an undeniable prerequisite to imposing sanctions.

121. Haugh, *supra* note 60, at 143.

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122. See Donald C. Langevoort, *Behavioral Ethics, Behavioral Compliance*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 263, 263 (Jennifer Arlen ed., 2018); Hui Chen & Eugene Soltes, *Why Compliance Programs Fail—and How to Fix Them*, HARV. BUS. REV., Mar.-Apr. 2018, <https://hbr.org/2018/03/why-compliance-programs-fail> [<https://perma.cc/W6BP-JVQ2>]. See also Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J.L. & BUS. 965, 971 (2018) (critiquing widespread corporate failure to measure compliance program success and noting that “[a]mong firms who try to measure their programs’ effectiveness, only

As mentioned above, compliance professionals recognize that there is no single template for a successful compliance program.¹²³ That said, industry studies and, importantly, the Department of Justice—the body primarily responsible for prosecuting white collar crime—have sought to clarify the qualities distinguishing a robust program from an inadequate one.¹²⁴ DOJ issued guidance—collected in a 2019 document entitled *Evaluation of Corporate Compliance Programs* and updated in June 2020—is comprehensive in its scope, delineating the markers of good programs in areas as diverse as “Risk Assessment” and “Commitment by Senior and Middle Management.”¹²⁵ The document is a reflection of an understanding long held by federal prosecutors: that a “paper program”—that is one “that exists on paper but is not supported by the corporate culture and therefore does not meaningfully influence employee behavior”¹²⁶—is an inadequate substitute for a “real program ‘designed, implemented, reviewed, and revised . . . in an effective manner.’”¹²⁷

The best compliance programs are those that move beyond “check the box” exercises to foster a “strong ethical *culture*.”¹²⁸ Culture may seem like an elusive concept, but can be understood simply as “the way we do things around here.”¹²⁹ It encompasses the “values and behaviors” that define an organization’s activities and is “built over time, the sum of behaviors that are initiated and rein-

half are reasonably confident that they are measuring it appropriately” and suggesting possible reforms).

123. See, e.g., ETHICS & COMPLIANCE CERTIFICATION INST., *supra* note 107, at 15 (noting that all programs must be tailored to account for the idiosyncrasies of a given company and the environment it operates in); Geoffrey P. Miller, *An Economic Analysis of Effective Compliance Programs*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 247 (Jennifer Arlen ed., 2018) (summarizing the disparate guidance provided by various government regulators). R

124. See generally *Evaluation of Corporate Compliance Programs*, *supra* note 109; ETHICS & COMPLIANCE CERTIFICATION INST., *supra* note 107 (reporting on the findings of a “blue ribbon panel” dedicated to identifying the common characteristics of successful compliance programs). R

125. See generally U.S. DEP’T OF JUST., *supra* note 109. R

126. David Hess, *Ethical Infrastructures and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence*, 12 N.Y.U. J.L. & BUS. 317, 320–21 (2016).

127. U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-28.800, PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS (2015), <https://www.justice.gov/archives/usam/archives/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.010> [<https://perma.cc/4M6N-ZRB2>].

128. ETHICS & COMPLIANCE CERTIFICATION INST., *supra* note 107, at 13, 24. R

129. *Id.* at 25.

forced on a daily basis.”¹³⁰ Exemplary compliance programs are those that not only aim to stave off rule breaking, but also endeavor to “[e]stablish[] and perpetuat[e] a high standard of integrity that becomes part of the DNA of the organization.”¹³¹

Effective compliance programs are steered by “senior leaders . . . [who] personally demonstrat[e] an organization-wide commitment to ethics and compliance.”¹³² But while proper “tone at the top” is necessary, it is not sufficient alone to stimulate effective compliance. The most effective compliance programs recognize that because “[e]mployees are keenly attuned to the actions of their direct supervisors and to the extent to which they walk their talk,” managers and supervisors play an integral role in creating cultures of compliance.¹³³ Effective programs accordingly equip and support “managers and supervisors . . . to help them connect the [company’s core] values to priorities and decisions in *daily operations*.”¹³⁴ The ultimate aim is to create an organization where even the lowest-rung employee feels empowered to raise ethics “concerns without fear of retaliation.”¹³⁵

B. *Parallels to Prosecutorial Reform*

It may not be obvious, at first blush, that lessons learned from corporate compliance can be readily applied to local prosecutors’ offices. After all, corporate compliance is the brainchild of a world defined by bottom-lines and profit margins, while prosecutors’ offices are, at least ostensibly, staffed by public interest-oriented attorneys motivated by a mandate to seek “justice.”

And yet, in the most important ways, corporations and state prosecutors’ offices are remarkably alike. Broadly speaking, the dual aims of compliance—(1) to deter law and rule breaking and (2) to generate and enforce norms—apply to both corporate and prosecutorial reformers. Like corporate compliance leaders, progressive reformers seek to curtail not only illegal conduct, but also “violations of office norms,” as defined earlier in this note.¹³⁶ Put

130. *Id.*

131. *Id.* at 17.

132. *Id.* at 25.

133. *Id.*

134. ETHICS & COMPLIANCE CERTIFICATION INST., *supra* note 107, at 25 (emphasis added).

135. *Id.* at 12.

136. *See infra* Section I, A.

simply, in both arenas, leaders nurse comparable ambitions: cultural change.¹³⁷

Moreover, like business leaders, head prosecutors must grapple with the “principal-agent” problem.¹³⁸ CEOs rely on agents (i.e. employees) to accomplish office tasks and goals, just as head prosecutors rely on assistant district attorneys (ADAs) to handle individual prosecutions. The “problem” manifests when the agent’s interests diverge from those held by the principal. In the absence of adequate controls or “buy in” on the part of the agent, the principal’s interests—in corporate compliance or prosecutorial justice—will inevitably lose out.¹³⁹ At its core, it is this problem that the corporate compliance model seeks to combat.

Furthermore, the compliance model aims to forestall violations that are the product of both intentional and negligent conduct, which, as explained above, are both endemic to prosecutors’ offices.

Finally, one of the chief goals of compliance programs is to improve the detection of wrongdoing—an objective shared with lead prosecutors.¹⁴⁰

IV.

CASE STUDIES: MISCONDUCT IN THE OFFICES OF THREE PROGRESSIVE PROSECUTORS

The following case studies demonstrate how and where the newest cohort of progressive prosecutors could benefit from the lessons offered by corporate compliance.

A. *Kimberly Foxx and the Charging and Pleading of Jussie Smollett*

1. The Case of Jussie Smollett

On January 29, 2019, Jussie Smollett, a star of the television show *Empire*, reported that he had been attacked on the streets of

137. See Barkow, *supra* note 36, at 2105–06 (arguing that corporate compliance can be useful for reforming *federal* prosecutor’s offices). R

138. *The Paradox of “Progressive Prosecution”*, *supra* note 9, at 760 (“[H]ead prosecutors cannot run every case (if they could, line prosecutors would not be necessary). Given this reality, there is significant potential for noncompliance from those on the lower rungs of the hierarchy due to a lack of buy-in to the goals of the head prosecutor.”). R

139. See generally Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through The Principal-Agent Model*, 40 PUB. CONT. L.J. 63, 64-66 (2010) (explaining agency theory).

140. See Barkow, *supra* note 36, at 2105–06. R

Chicago.¹⁴¹ Smollett, who is gay and Black, told police officers that he was walking home after a late-night meal when two unidentified assailants began yelling “racial and homophobic slurs” at him.¹⁴² The attackers allegedly physically battered Smollett, covered him in an unknown chemical substance, and threw a noose around his neck, all while shouting “MAGA Country”—a reference to Donald Trump’s presidential campaign slogan.¹⁴³

The alleged assault sparked national interest and the Chicago police expended considerable resources to identify the perpetrators of the apparent hate crime.¹⁴⁴ In the weeks following the attack, however, leads generated by the police “shifted the trajectory of the investigation.”¹⁴⁵ On February 20, 2019, the Cook County State’s

141. See Sopan Deb, *Jussie Smollett, Star of ‘Empire,’ Attacked in What Police Call a Possible Hate Crime*, N.Y. TIMES (Jan. 29, 2019), <https://www.nytimes.com/2019/01/29/arts/television/empire-jussie-smollett-attacked.html> [https://perma.cc/NR4V-LFMM].

142. See Colin Dwyer & Laurel Wansley, *Police Say ‘Empire’ Actor Jussie Smollett Attacked In Possible Hate Crime*, NPR (Jan. 29, 2019), <https://www.npr.org/2019/01/29/689758253/police-say-empire-actor-jussie-smollett-attacked-in-possible-hate-crime> [https://perma.cc/EVF7-DQNN].

143. See Nader Issa & Luke Wilusz, *‘Empire’ Star Victim of Racist, Homophobic Attack in Streeterville, Police Say*, CHI. SUN-TIMES (Jan. 29, 2019), <https://chicago.suntimes.com/news/jussie-smollett-rope-tied-around-neck-empire-star-rationally-charged-homophobic-slurs-streeterville-attack/> [https://perma.cc/3LT2-PE9N]. MAGA is an abbreviation of Donald Trump’s campaign slogan: Make American Great Again—a sentiment characterized as inherently racist by some. See Issac Bailey, *Why Trump’s MAGA Hats Have Become a Potent Symbol of Racism*, CNN (Mar. 12, 2019), <https://www.cnn.com/2019/01/21/opinions/maga-hat-has-become-a-potent-racist-symbol-bailey/index.html> [https://perma.cc/2TNT-989B].

144. See, e.g., Deb, *supra* note 141 (citing “tweets” of support from presidential candidates Cory Booker and Kamala Harris); Laura Bradley, *Ellen Page Tearfully Condemns Jussie Smollett Attack—And the Trump Administration*, VANITY FAIR (Feb. 1, 2019), <https://www.vanityfair.com/hollywood/2019/02/ellen-page-jussie-smollett-colbert-late-show> [https://perma.cc/34Q2-C2QM]; Katie Galioto, *Trump Condemns ‘Horrible’ Attack on Actor Jussie Smollett*, POLITICO (Jan. 31, 2019), <https://www.politico.com/story/2019/01/31/trump-condemns-attack-jussie-smollett-1140398> [https://perma.cc/J9AD-3E3H]. \$130,106.15 in overtime was paid to police investigators. Michael Tram, *Chicago to Sue Jussie Smollett for Costs of Investigation*, ASSOCIATED PRESS (Apr. 4, 2019), <https://www.apnews.com/03bfce3e4ecf44b1bdc5849970da79bc> [https://perma.cc/2FYQ-KZA8].

145. Sopan Deb, *Chicago Police Seeking to Interview Jussie Smollett Again After Questioning Two Brothers*, N.Y. TIMES (Feb. 16, 2019), <https://www.nytimes.com/2019/02/16/arts/television/jussie-smollett-police-interview.html?rref=collection%2Fbyline%2Fsopandeb&action=click&contentCollection=undefined®ion=stream&module=inline&version=latest&contentPlacement=1&pgtype=collection> [https://perma.cc/2X3L-BHJV]. Concurrently, the FBI was investigating whether Smollett had also sent himself a threatening, white powder filled letter, a week prior to the alleged assault. See BET Staff, *FBI And USPS Reportedly Still Investigating*

Attorney's Office (CCSAO) charged Smollett with disorderly conduct for filing a false police report.¹⁴⁶ On March 8, Smollett was charged with 16 counts of disorderly conduct for staging the hate crime hoax.¹⁴⁷

But then, on March 26, in what the *New York Times* characterized as a “startling about-face,” Joe Magats, the prosecutor heading the case, dropped every one of those 16 charges.¹⁴⁸ Magats asserted that this disposition was warranted in light of Smollett's community service and his agreement to relinquish his \$10,000 bond.¹⁴⁹ Magats justified the decision by pointing to the office's prioritization of “violent crime and the drivers of violent crime.”¹⁵⁰ Highlighting Smollett's lack of felony or violent criminal history, Magats stated that he “[didn't] see Jussie Smollett as a threat to public safety.”¹⁵¹

Some, including the city's police chief and mayor, saw the decision to drop the charges as a miscarriage of justice.¹⁵² Some saw it as a triumph.¹⁵³ Most were simply perplexed.¹⁵⁴

The troubling tale *behind* the Smollett prosecution revealed itself at a much slower pace—dribbled out in media articles, FOIA

Who Sent the Letter to Jussie Smollett, BET (Feb. 22, 2019), <https://www.bet.com/news/national/2019/02/22/fbi-and-usps-reportedly-still-investigating-who-sent-the-threate.html> [<https://perma.cc/7BVC-S8MH>].

146. Andy Grimm & Sam Charles, *Jussie Smollett Charged with Felony Disorderly Conduct, Prosecutors Say*, CHI. SUN-TIMES (Feb. 20, 2019), <https://chicago.suntimes.com/entertainment/empire-actor-jussie-smollett-suspect-criminal-investigation-chicago-police-department/> [<https://perma.cc/6BMD-TPD6>].

147. Andy Grimm, *'Empire' Actor Jussie Smollett Indicted on 16 Counts of Disorderly Conduct*, CHI. SUN-TIMES (Mar. 8, 2019), <https://chicago.suntimes.com/news/empire-actor-jussie-smollett-indicted-on-16-counts-disorderly-conduct/> [<https://perma.cc/6BMD-TPD6>].

148. Julie Bosman & Sapan Deb, *Jussie Smollett's Charges are Dropped, Angering Mayor and Police*, N.Y. TIMES (Mar. 26, 2019), <https://www.nytimes.com/2019/03/26/arts/television/jussie-smollett-charges-dropped.html?rref=collection%2Fby-line%2Fsapan-deb&module=inline> [<https://perma.cc/XBM6-QXB4>].

149. *Id.*

150. Bosman & Deb, *supra* note 148.

151. *Id.*

152. See Chicago Tribune Staff, *Read Mayor Emanuel, Chicago Top Cop's Comments About Jussie Smollett Charges Being Dropped*, CHI. TRIB. (Mar. 26, 2019), <https://www.chicagotribune.com/news/local/breaking/ct-met-jussie-smollett-emanuel-johnson-transcript-20190326-story.html> [<https://perma.cc/8D2H-ZXK6>] (noting that the Mayor and Police Chief called the dropped charges a “whitewash of justice”).

153. See *Twitter Reacts to Prosecutor's Decision to Drop All Charges Against Jussie Smollett*, REVOLT TV (Mar. 26, 2019), <https://revolt.tv/stories/2019/03/26/twitter-reacts-jussie-smollett-charges-dropped-0700ad9ef0> [<https://perma.cc/96AG-AKK5>] (aggregating Twitter comments on the case, including statements characterizing the dismissal as vindication of Smollett's innocence).

requests, and public statements made by departing employees. Records obtained by the *Chicago Sun Times* revealed that, in the days after the alleged attack, Kim Foxx, the State's Attorney, was put in touch with one of Smollett's family members, who expressed concerns that "police sources" were leaking information about the investigation and expressed hope that the "FBI would have a tighter lid on the information."¹⁵⁵ Though the Chicago Police Department disputes the account, Foxx allegedly endeavored to persuade Police Superintendent Eddie Johnson to turn the case over to the FBI.¹⁵⁶ The State's Attorney then informed Smollett's relative that she had spoken with the superintendent and that he was "going to make the ask [of the FBI]."¹⁵⁷ On February 19, 2019, the day before Smollett was charged with disorderly conduct, a CCSAO spokesperson announced that "Foxx had recused herself from the investigation."¹⁵⁸ The announcement was oblique, noting only that the recusal was intended to "address potential questions of impartiality based upon familiarity with potential witnesses in the case."¹⁵⁹ But on March 28, two days after the office dropped all of the charges against Smollett, the CCSAO walked back the recusal, asserting that: "[t]he State's Attorney did not *formally* recuse herself or the Office based on any actual conflict of interest."¹⁶⁰ According to an office spokeswoman, the term "recusal" was used in its "colloquial" rather than legal sense.¹⁶¹ Finally, on April 16, it was revealed that Foxx had continued to communicate with the prosecutor overseeing Smollett's case even after the recusal had been made public, which included con-

154. See, e.g., *id.* (aggregating Twitter comments on the case, including tweet by a Senior Writer for Rolling Stone, who stated "I just want to know what actually happened").

155. Andy Grimm, *Records: Former Michelle Obama Aide, Smollett Relative Reached out to Kim Foxx*, CHI. SUN-TIMES (Mar. 13, 2019), <https://chicago.suntimes.com/2019/3/13/18404894/records-former-michelle-obama-aide-smollett-relative-reached-out-to-kim-foxx> [<https://perma.cc/HFS7-T8AL>].

156. See *id.*

157. *Id.*

158. Sam Charles, *CPD: Brothers Previously Suspected in Smollett Case Meet with Cops, Prosecutors*, CHI. SUN-TIMES (Feb. 19, 2019), <https://chicago.suntimes.com/entertainment/jussie-smollett-empire-actor-attacked-hate-crime-streeterville/> [<https://perma.cc/SQV4-LTLG>].

159. *Id.*

160. Katelyn Caralle, *Embattled Chicago Prosecutor Kimberly Foxx Never Legally Recused Herself from Jussie Smollett Case*, WASH. EXAM'R (Mar. 28, 2019) (emphasis added), <https://www.washingtonexaminer.com/news/embattled-chicago-prosecutor-kimberly-foxx-never-legally-recused-herself-from-jussie-smollett-case> [<https://perma.cc/5V2S-BV8U>].

161. *Id.*

veying her concerns about the charging decision to Magats shortly after the 16-count indictment was announced.¹⁶²

These behind-the-scenes revelations would prompt condemnation of a different kind, as public figures and private citizens questioned Foxx's integrity. Local police chiefs and law enforcement union leaders called for Foxx's resignation,¹⁶³ and two separate private citizens, a former appellate judge and a former prosecutor,¹⁶⁴ filed petitions requesting that a special prosecutor reconsider the case.¹⁶⁵ A state court judge eventually acquiesced and the appointed special prosecutor, Dan K. Webb, re-indicted Smollett in February 2020.¹⁶⁶

162. Shannon Heffernan & Miles Bryan, *State's Attorney Closely Followed Smollett Case After Recusal, Text Messages Show*, NAT'L PUB. RADIO (Apr. 17, 2019), <https://www.npr.org/2019/04/17/714187032/states-attorney-closely-followed-smollett-case-after-recusal-text-messages-show> [<https://perma.cc/D6W5-FVXR>]. It was also revealed that Foxx was involved in other aspects of the case. *Newly released texts, emails show behind-the-scenes of Smollett fallout*, FOX5 (Apr. 17, 2019), <https://www.fox5ny.com/news/newly-released-texts-emails-show-behind-the-scenes-of-smollett-fallout> [<https://perma.cc/AU5A-GKV5>] (noting that, after the recusal, Magats informed Foxx that he had given her number to Michael Avenatti, a celebrity lawyer coming to the office in his capacity as a representative of the brothers who had allegedly helped Smollett stage the attack).

163. Zachary Halaschak, *Police Chiefs Call on Chicago Prosecutor to Resign Amid Smollett Controversy*, WASH. EXAM'R (Apr. 4, 2019), <https://www.washingtonexaminer.com/news/police-chiefs-call-on-prosecutor-kim-foxx-to-resign-amid-jussie-smollett-controversy> [perma.cc/3G4B-7H2L] (quoting Chicago FOP president as follows: "Ms. Foxx needs to resign and she should do it quickly . . . This is not just about Jussie Smollett. This is about many cases in the Cook County system that have gone unprosecuted or having charges reduced").

164. Eric Zorn, *Citizen Sheila O'Brien Shows That You, Too, Can Demand a Special Prosecutor*, CHI. TRIB. (May 3, 2019), <https://www.chicagotribune.com/columns/eric-zorn/ct-perspec-zorn-jussie-smollett-kim-foxx-sheila-obrien-trump-impeachment-20190502-story.html> [<https://perma.cc/RC5Y-EQ3Z>] (explaining that O'Brien was acting as a private citizen and that any private citizen in Chicago can petition for a special prosecutor).

165. See Megan Crepeau, *Second Call for Special Prosecutor to Investigate Kim Foxx's Handling of Jussie Smollett Investigation*, CHI. TRIB. (Apr. 5, 2019), <https://www.chicagotribune.com/news/local/breaking/ct-met-kim-foxx-jussie-smollett-special-prosecutor-20190405-story.html> [<https://perma.cc/XFQ2-FP6Y>]; Megan Crepeau, *One of Two Petitions Withdrawn to Appoint Special Prosecutor to Look Into Dismissal of Jussie Smollett Charges*, CHI. TRIB. (Apr. 29, 2019), <https://www.chicagotribune.com/news/local/breaking/ct-met-jussie-smollett-kim-foxx-special-prosecutor-20190429-story.html> [<https://perma.cc/4EX9-6NG2>].

166. See Gabrielle Fonrouge, *Jussie Smollett Could Be Charged Again, Says Chicago Judge*, PAGE SIX (June 21, 2019), https://pagesix.com/2019/06/21/jussie-smollett-could-be-charged-again-says-chicago-judge/?_ga=2.228429397.970304192.1561030512-80825762.1554746509 [<https://perma.cc/W9W8-D6LC>] (reporting on the appointment of a special prosecutor in

The scandal eventually impelled two official investigations into the CCSAO's handling of the case, one by the Cook County Inspector General, requested by Foxx herself,¹⁶⁷ and the second by the aforementioned special prosecutor.¹⁶⁸

2. Scrutinizing the Actions of State's Attorney Foxx: A Compliance-Based Perspective

The Smollett saga suggests that the CCSAO failed to institute effective compliance measures to govern decisions about (1) if and when to recuse the head prosecutor or the office writ large, (2) how to charge non-violent offenders, and (3) when and how to offer plea agreements and outright dismissals.

a. The Decision to Recuse

First, there is the matter of Foxx's recusal. Once Smollett became a suspect, the communications between Foxx and a member of Smollett's family seem like valid grounds for recusal.¹⁶⁹ It was also procedurally feasible. Under Illinois law, a state's attorney can "file a petition to recuse himself or herself from a cause or proceeding for any . . . reason he or she deems appropriate."¹⁷⁰ If the peti-

the case); Julia Jacobs, *Jussie Smollett Indicted Again in Attack That Police Called a Hoax*, N.Y. TIMES (Feb. 11, 2020), <https://www.nytimes.com/2020/02/11/arts/television/jussie-smollett-indicted-chicago.html> [<https://perma.cc/PN4L-TSVC>] (reporting that a grand jury had indicted Smollett for disorderly conduct and filing false police reports).

167. Gregory Pratt, *Cook County Inspector General to Review Prosecutors' Handling of Jussie Smollett Case*, CHI. TRIB. (Apr. 13, 2019), <https://www.chicagotribune.com/news/local/politics/ct-met-kim-foxx-jussie-smollett-20190412-story.html> [<https://perma.cc/29TH-D4JY>] (announcing inspector general's plan to investigate).

168. The Inspector General's investigation was ongoing as of August 1, 2020. The Special Prosecutor's report was released on August 17, 2020. See Information Release, Special Prosecutor Dan K. Webb of Winston & Strawn LLP Concludes Investigation into Cook County State's Attorney's Office and Chicago Police Department's Handling of the Jussie Smollett Case (Aug. 17, 2020), <https://news.wttw.com/sites/default/files/article/file-attachments/Winston%20and%20Strawn%208.17.2020%20Information%20Release%20re%20Special%20Prosecution.pdf> [<https://perma.cc/3AML-Q8D6>] [hereinafter Webb Announcement].

169. See Grimm, *supra* note 155 (opinion of defense lawyer and Chicago-Kent College of Law professor Richard Kling as follows: "I don't think it is odd or rare for prosecutors to talk to police, or for (Foxx) herself to ask what is going on in a particular case And, once she realized she had talked to a family member who may have given her information about a pending case, recusing herself was exactly the right thing to do").

170. Megan Crepeau & Jason Meisner, *Kim Foxx Defends Jussie Smollett Decision as Office Says she 'did not Formally Recuse Herself'*, CHI. TRIB. (Mar. 28, 2019), <https://www.chicagotribune.com/news/local/breaking/ct-met-jussie-smollett-kim-foxx-interview-20190327-story.html> [<https://perma.cc/3JMM-AZAU>].

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tion is granted, the law calls for the judge to appoint a special prosecutor either through the attorney general's office, another county prosecutor's office, or a private attorney.¹⁷¹ But Foxx never filed such a petition.¹⁷²

When it was made, Foxx's walk-back of her recusal appeared to be a response to calls for a special prosecutor to take over the case. If Foxx had never actually recused herself, she didn't "have to seek the appointment of a special prosecutor."¹⁷³ But after her continued involvement with the case was revealed, another explanation seemed just as probable: the walk-back might have been a preemptive effort to deflect criticism for Foxx's patent failure to honor the recusal.¹⁷⁴ In light of these revelations, the March 28, 2019 announcement of non-recusal begins to look like a preemptive justification for Foxx's failure to adhere to her public commitment to recuse herself.

The entire affair reveals an office without a formal, written recusal policy.¹⁷⁵ The CCSAO, lacking a game plan for real or perceived conflicts of interest, was reduced to public waffling on the meaning of the word "recusal."

Written policies form the keystone of any robust corporate compliance program.¹⁷⁶ Formally outlining rules forces drafters to more carefully consider what the rules should be and makes it far

171. *Id.*

172. *Id.*

173. Caralle, *supra* note 160 (emphasis added).

174. Foxx's failure to honor the recusal was manifest in her post-recusal interactions with Magats and continued interactions with counsel for involved parties. *See* Heffernan & Bryan, *supra* note 162 (reporting that shortly after the recusal, Foxx conveyed her concerns about the charging decision to Magats); Crepeau, *supra* note 162 (noting that, after the recusal, Magats informed Foxx that he had given her number to Michael Avenatti, a celebrity lawyer coming to the office in his capacity as a representative of the brothers who had allegedly helped Smollett stage the attack).

175. The fact that Alan Spellberg conducted a review of applicable laws in mid-February 2019 strongly suggests the office lacked a formal policy before that time. *See* Ben Bradley, *Top Foxx Official Said Recusal Wasn't Right*, WGN TV (Apr. 17, 2019), <https://wgntv.com/2019/04/17/top-foxx-official-said-recusal-wasnt-right/> [<https://perma.cc/P8AS-JLP4>]. After all, a written, pre-existing policy would have obviated the need for research on the mechanics of recusal.

176. *See Evaluation of Corporate Compliance Programs*, *supra* note 109, at 4 (stating that "as a threshold matter, prosecutors should examine whether the company has a code of conduct"). Written codes of conduct have long been seen as the foundation on which corporate compliance programs are built. *See generally* Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559 (1990) (describing the prevalence and usefulness of written codes of conduct).

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more likely that the rules will be followed in the face of on-the-job pressure.¹⁷⁷ In the corporate space, written *conflict-of-interest* policies are—“as one might expect—critically important.”¹⁷⁸ A robust corporate policy “detail[s] how employees can disclose potential conflicts of interest, explain[s] the process for reviewing and ruling on reported relationships, and set[s] clear ramifications for employees who fail to report a conflict.”¹⁷⁹ That is, the best policies explain the mechanisms for reporting and “recusal,” rather than merely defining what constitutes a conflict. Admittedly, that policies and procedures should be made manifest in writing may seem like a facile or banal point. And yet, this case illustrates what results in the absence of written guidance: namely unseemly and arguably unethical decision-making.¹⁸⁰

However, even the best outlined compliance program will fail in the face of C-suite contempt, and, worryingly, Foxx appears to have been repeatedly contemptuous of recommendations offered by her Chief Ethics Officer, April Perry.

Foxx’s text messages reveal that she first decided to recuse herself only at Perry’s urging.¹⁸¹ Perry may have recommended recusal in the wake of Foxx’s communications with Smollett’s family or because of (false) rumors that Foxx was related to Smollett.¹⁸² Whatever the case, Foxx—who privately characterized the recusal

177. Heather G. White, *A Little Help From Our Friends: Moving Beyond Enforcement To Improve State And Local Government Compliance With Federal Securities Laws*, 22 N.Y.U. J. LEGIS. & PUB. POL’Y 129, 187 (2019) (“Formalized, written rules tend to be more effective than informal, unwritten practices because the rules are more carefully considered during the process of writing them, and because they are more likely to be followed.”).

178. Jeff Kaplan & Rebecca Walker, *Assessing Conflict of Interest Compliance Programs*, CORP. COMPLIANCE INSIGHTS (June 3, 2020), <https://www.corporatecomplianceinsights.com/assessing-conflict-interest-compliance-programs/> [<https://perma.cc/KL63-LFSH>].

179. ROOTING OUT CONFLICTS OF INTEREST, COMPLIANCE WEEK 7, <https://www.complianceweek.com/download?ac=6005> [<https://perma.cc/5LVY-4JNU>].

180. See Webb Announcement, *supra* note 168, at 5 (determining that “[t]he CCSAO engaged in a substantial abuse of discretion and breached its obligations of honesty and transparency by making false and/or misleading statements to the public regarding State’s Attorney Foxx’s recusal”).

181. Madeline Holcombe & Ray Sanchez, *Smollett Case Prosecutor Called Pressure to Recuse Herself ‘Racist,’ Documents Show*, CNN (June 1, 2019), <https://www.cnn.com/2019/06/01/us/kim-foxx-smollett-recusal-texts/index.html> [<https://perma.cc/932F-HRYC>] (quoting a text message in which Foxx stated that “April told me I had to do it” [i.e. to recuse herself]).

182. See *id.* (quoting text message in which Foxx asserts that this was the reason for Perry’s recusal recommendation). See also *supra* Section IV.A.1 (discussing communications between Foxx and Tchen).

recommendation as “dumb”¹⁸³—seems to have discounted a fundamental tenant of compliance best practice: one should avoid not only actual impropriety, but also the *appearance* of impropriety.¹⁸⁴

Foxx’s low regard for Perry’s recommendation is evident in her decision not to seek formal recusal or the appointment of a special prosecutor. Email correspondence records reveal that Alan Spellberg, the supervisor of the CCSAO Criminal Appeals Division, conducted a review of the applicable case law and concluded that “[w]hile the State’s Attorney has complete discretion to recuse herself from any matter, she cannot simply direct someone (even the First Assistant) to act in her stead.”¹⁸⁵ That is, Magats could not simply step in to handle the case.¹⁸⁶ Shortly thereafter, Perry sent Magats a draft motion and order requesting court approval of the recusal and the appointment of a special prosecutor.¹⁸⁷ According to Perry, Foxx, apparently without consulting Perry, “determined that the motion and order should not be filed.”¹⁸⁸ Perry allegedly learned of Foxx’s decision from Magats, rather than from Foxx her-

183. Holcombe & Sanchez, *supra* note 181 (quoting text messages sent by Foxx to a colleague as follows: “I told [Perry] that wasn’t true. She said it was pervasive among CPD and that I should recuse. I thought it was dumb but acquiesced. It’s actually just racist.”) R

184. See, e.g., Michael W. Peregrine & Bernadette M. Broccolo, “*Independence and the Nonprofit Board: A General Counsel’s Guide*,” 39 J. HEALTH L. 497, 498 (2006) (discussing the importance of maintaining the independence of a governing board in “both fact and appearance”); Philip A. Wellner, Note, *Effective Compliance Programs and Corporate Criminal Prosecutions*, 27 CARDOZO L. REV. 497, 502 (2005) (stating that, “in the wake of several ethical missteps,” Boeing issued new compliance guidance that recommended “prohibiting new employees who had recently worked for Boeing’s competitors from working in positions that give the *appearance* of impropriety”) (emphasis added).

185. Bradley, *supra* note 175. R

186. Foxx later asserted that she never received this email from Alan Spellberg. See *id.* However, Perry asserted that she was following Spellberg’s advice when she recommended a formal court recusal and the appointment of a special prosecutor. See Robert Chiarito & Julia Jacobs, *Jussie Smollett Case to Be Investigated by Special Prosecutor*, N.Y. TIMES (June 21, 2019), <https://www.nytimes.com/2019/06/21/arts/television/jussie-smollett-special-prosecutor.html> [<https://perma.cc/G5R3-TDXC>] (discussing the actions in question).

187. Ben Bradley, *Mysterious ‘Special Prosecutor Order’ Email in Smollett Case, Records Show*, WGN TV (Apr. 19, 2019), <https://wgntv.com/2019/04/19/mysterious-special-prosecutor-order-email-in-smollett-case-records-show/> [<https://perma.cc/H6TZ-Q4GS>] (“The subject line of one email sent February 20 at 4:04pm read: ‘Magats recusal petition.’ A second email was sent from Perry to Magats six minutes later labeled: ‘Magats special prosecutor order.’”).

188. Gabrielle Fonrouge, *Ex-ethics Officer Puts Kim Foxx on Blast Over Smollett Case*, PAGE SIX (June 21, 2019), <https://pagesix.com/2019/06/21/ex-ethics-officer-puts-kim-foxx-on-blast-over-smollett-case/> [<https://perma.cc/2W6M-6YFS>].

self.¹⁸⁹ Soon after, Foxx's Chief Ethics Officer submitted a letter of resignation.¹⁹⁰ While the reasons for Perry's departure were never made public, Foxx's attempts to blame Perry for the botched recusal and Perry's public refutation of the accusation suggest this conflict played a role.¹⁹¹

All of this was avoidable. Corporations are increasingly cognizant of the risks posed by recalcitrant CEOs.¹⁹² Recent business scandals, such as the Wells Fargo fraudulent accounts scandal, during which bank employees opened thousands of fraudulent accounts to meet sales targets, have reemphasized the specific dangers posed by leaders who cloister themselves from compliance warnings.¹⁹³ The DOJ, for its part, has stressed that the compliance function should have "sufficient autonomy from management."¹⁹⁴ Chief Compliance Officers (CCOs) have responded to the threat by, among other things, regularly scheduling "alone time" with in-

189. *Id.* (quoting Perry, who asserted that "the First Assistant advised [her] that State's Attorney Foxx determined that the motion and order should not be filed").

190. See Gabrielle Fonrouge, *Kim Foxx Deputies Resigning After Jussie Smollett Scandal*, PAGE SIX (Apr. 18, 2019), https://pagesix.com/2019/04/18/kim-foxx-deputies-resigning-after-jussie-smollett-scandal/?_ga=2.30788215.970304192.1561030512-80825762.1554746509 [https://perma.cc/69JF-PWAD] (reporting that Perry handed in her resignation letter on April 15, 2019).

191. Chiarito & Jacobs, *supra* note 186 ("Ms. Foxx said in a statement on Friday that she disagreed with the judge's conclusion that a special prosecutor was required. She said that she had followed the advice of her chief ethics officer, April Perry, when deciding to recuse herself. That prompted a rebuke from Ms. Perry, who left the office soon after the charges were dropped.").

192. See, e.g., Michael Volkov, *When Your CEO Just Does Not Get It*, VOLKOV: CORRUPTION, CRIME & COMPLIANCE (June 21, 2018), <https://blog.volkovlaw.com/2018/06/when-your-ceo-just-does-not-get-it/> [https://perma.cc/NU88-CQKR] (discussing a CCO's responsibility to educate the CEO on compliance matters); Kimberly Boatwright, *5 Ways to Convince Management that Compliance is Important*, TRUPOINT PARTNERS (Nov. 15, 2017), <https://www.trupointpartners.com/blog/how-to-communicate-with-management-about-compliance> [https://perma.cc/AH47-BZEW] (suggesting strategies for securing "buy in" from company CEOs and senior management).

193. Carrie Tolstedt, the head of Wells Fargo's community banking division, habitually "maintain[ed] 'an "inner circle" of staff that supported her, reinforced her views, and protected her.'" Brian Tayan, *The Wells Fargo Cross-Selling Scandal*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 6, 2019), <https://corpgov.law.harvard.edu/2019/02/06/the-wells-fargo-cross-selling-scandal-2/> [https://perma.cc/ZZJ8-23WY]. Perhaps relatedly, she also refused to escalate sales practices concerns to the board of directors. See *id.*

194. U.S. DEP'T OF JUST., *supra* note 109, at 11.

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dependent members of a company's audit committee or board of directors.¹⁹⁵

But at present, district attorneys' offices lack independent boards that could serve a similar backstop function. The risks presented by unidirectional reporting to a district attorney with ultimate final authority may be mitigated in other ways, however. For instance, progressive prosecutors might consent to multi-directional reporting lines for their ethics officers. In the event the DA ignores important recommendations, office policy might give the officer an opportunity to discuss the matter with a specific executive staff member or require an "all executives" meeting—thereby giving the ethics officer a clear way to escalate careful review of important ethics issues. Another way to ensure that ethics officers operate with "adequate authority and stature" in the office is to ensure that important decisions—like Foxx's recusal—are decided after an in-person meeting.¹⁹⁶ Face-to-face meetings facilitate discussion, allowing compliance officers to more clearly stress the severity of foreseeable consequences and avoid miscommunications that could otherwise result. Such meetings could head off what happened in Chicago—namely, Perry's learning of Foxx's recusal decision only second hand.

Above all, "leaders must not transmit the idea that compliance is a 'necessary evil.'"¹⁹⁷ Characterizations of compliance recommendations as "dumb" increases the odds that employees will view compliance obligations as merely perfunctory and "for show."¹⁹⁸ If

195. GEOFFREY PARSONS MILLER, *THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE* 148 (3d ed. 2020). *See also* ETHICS & COMPLIANCE CERTIFICATION INST., *supra* note 107, at 19 (finding that high quality compliance programs ensure ethics and compliance officers have "regular access to the board and/or the audit committee").

196. U.S. DEP'T OF JUST., *supra* note 109, at 11.

197. Thomas Sehested, *Creating a Culture of Compliance: Why All Successful Businesses Must Do This and Where to Begin*, FORBES (Sept. 17, 2018), <https://www.forbes.com/sites/forbestechcouncil/2018/09/17/creating-a-culture-of-compliance-why-all-successful-businesses-must-do-this-and-where-to-begin/#4860a8035050> [<https://perma.cc/XE9V-U6TJ>].

198. Stephen M. Culter, Speech by SEC Staff: Second Annual General Counsel Roundtable: Tone at the Top: Getting it Right (Dec. 3, 2004), <https://www.sec.gov/news/speech/spch120304smc.htm> [<https://perma.cc/5SJF-HEVY>] (admonishing corporate leader to refrain from "double talk": "You can't say to the broad audience that ethics, integrity and honesty are important, but ignore them (or worse yet, joke about them or dismiss them) when you're in a social setting, or 'off line,' or off the record, or when you're talking to smaller groups. At Enron, we know that senior managers conducted a skit in which one of the themes was deceiving the SEC. That probably didn't help create a culture of respect for the law.").

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compliance efforts are to be successful, the CEO, “as the corporation’s chief compliance officer in effect if not in title,” must “personally lead compliance.”¹⁹⁹ That leadership was absent on the issue of recusal.²⁰⁰

b. The Decision to Charge

Separate and distinct from the subject of recusal, there is the matter of how exactly Magats charged Smollett. A 16-count indictment for what amounts to the filing of a false police report—essentially a victimless non-violent crime—suggests that Smollett was “overcharged.” As such, the indictment is out of step with the progressive prosecution movement, which views overcharging as a form of “coercion” intended to pressure defendants into a plea deal.²⁰¹ Vitaly, it was also out of step with Foxx’s own preferred charging practices.

Indeed, this apprehension was at the crux of the post-recusal message Foxx sent to Magats: “Sooo. . . I am recused, but when people accuse us of overcharging cases. . . 16 counts on a class 4 [felony] becomes exhibit A.”²⁰² Magats replied that he could “see where that can be seen as excessive.”²⁰³ Foxx then compared Smollett’s case to that of R. Kelly, the musician facing sex abuse charges: “Pedophile with 4 victims 10 counts. Washed up celeb who lied to cops, 16. On a case eligible for deferred prosecution I think it’s indicative of something we should be looking at generally.”²⁰⁴ In his response, Magats wrote that he would meet with other office attor-

199. Ben W. Heineman, Jr., *The Chief Compliance Officer Debate: Focus on Function Not Form*, AM. BAR ASS’N (July 20, 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/07/06_heineman/ [<https://perma.cc/2XGQ-YRLD>].

200. Without adopting the language of compliance, Cook County judge Michael Toomin—who assigned a special prosecutor to review the Smollett matter—recognized the absence of effective leadership here, opining that “the ship of the State ventured from its protected harbor without the guiding hand of its captain. There was no master on the bridge to guide the ship as it floundered through uncharted waters. And it ultimately lost its bearings.” Fonrouge, *supra* note 166.

201. See, e.g., Ewing, *supra* note 29 (explaining Larry Krasner characterized the practice of overcharging as “coercive”); Jason Rosenberg, *Can a Prosecutor Ever Truly Be Progressive? Ferguson May Be the Ultimate Test Case*, MOTHER JONES (Apr. 17, 2019), <https://www.motherjones.com/crime-justice/2019/04/progressive-prosecutors-ferguson-wesley-bell-kamala-harris-kim-gardener/> [<https://perma.cc/U2TF-P6KS>] (reporting that on his first day in office, progressive prosecutor Wesley Bill instructed his staff to stop “overcharging” defendants).

202. Heffernan & Bryan, *supra* note 162.

203. *Id.*

204. *Id.*

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neys and “take a hard look at how we charge the cases and get it to something that covers what needs to be covered without being excessive and ultimately pointless.”²⁰⁵

As a very public deviation from Foxx’s preferred progressive policy, the indictment falls into the “discretionary” bucket of misconduct defined in Part I of this note. If progressive prosecutors are to succeed in their mission, they must combat departures from the spirit, as well as the letter, of their reform. It is no surprise then, that Foxx felt compelled to reach out to Magats to “discuss reviewing office policies to assure consistencies in our charging and our use of appropriate charging authority”²⁰⁶ However, the very fact that Magats, when left to his own devices, included 16 counts in Smollett’s indictment indicates that Foxx’s progressive mission is not deeply ingrained in office practice.

Here again, the office appears to lack sufficient formalized guidance on how to charge cases. The pertinent legal industry ethics rule—namely Rule 3.8 from the Model Rules of Professional Conduct and its admonition that prosecutors bring only those charges that are supported by probable cause—is “inadequate to address overcharging because probable cause is a minimal threshold that is well below what is required to convict.”²⁰⁷ Something more refined is required.

Compliance experts warn that employees need granular guidance because nobody can be expected to remember every office initiative or law at every given moment.²⁰⁸ Guidance need not take the form of brow beating. In the corporate space, guidance increasingly looks like “behavioral ethics nudging.”²⁰⁹ Nudges, or “small design elements that structure the context in which choice is made,” may take the form of “reminders, warnings, prompts, anchors, frames, and default rules.”²¹⁰ One particular sort of framing device could have worked well in Foxx’s case: a form that prompts line prosecutors to justify each charge, both with a higher evidentiary bar (beyond a reasonable doubt) and vis-à-vis the office’s progressive vision.

205. *Id.*

206. *Id.*

207. Caldwell, *supra* note 80, at 63.

208. See Haugh, *supra* note 60, at 192–93 (discussing the usefulness of a simple checklist to promote compliance when “temptation is highest”).

209. Todd Haugh, *Nudging Corporate Compliance*, 54 AM. BUS. L.J. 683, 710 (2017) (“Companies with cutting edge corporate compliance programs are currently, and increasingly, instituting behavioral ethics nudging in an attempt to prevent employee wrongdoing.”).

210. Haugh, *supra* note 209, at 683, 690.

Formal guidance can also take shape through training exercises. Compliance officers know that “[t]o ensure unethical employee decision-making is properly targeted, companies ‘need to frame [their] training around . . . specific, risky job tasks’”²¹¹—here, the ubiquitous and perpetually tricky task of charging out an indictment. Moreover, *all* staff—even and indeed especially senior staff such as Magats—should be required to attend relevant trainings because the absence of top tier leadership from compliance trainings is a “sure way to trivialize the workshops.”²¹² Ultimately, a properly instituted compliance program is one designed to produce “acceptance and identification” among staff members, such that “people act in role-appropriate ways simply because they experience such roles as consistent with their own identities.”²¹³ If the program is successful, the CEO, CCO, or district attorney will not need to send the kinds of text messages that Foxx sent to Magats.

The indictment is even more concerning in light of the fact that Magats is the chief of CCSAO’s Criminal Prosecutions Bureau²¹⁴—that is, the man with final say over most of the charging decisions made by the office.²¹⁵ This implies that Foxx failed to generate genuine adoption of her progressive policies among the executive-level staff. Behavioral ethics—“the study of how individuals make ethical decisions and judge the ethical decisions of others”—suggests that “[c]ompliance efforts should target those individuals within the company whose unethical decision-making pose the greatest risk” of influencing others.²¹⁶ Magats, as a

211. Haugh, *supra* note 60, at 192.

212. J.D. Wallace, *Ethics in Training Methods*, in *BUSINESS AND CORPORATE INTEGRITY: SUSTAINING ORGANIZATIONAL COMPLIANCE, ETHICS, AND TRUST* 118, 130 (Robert C. Chandler ed., 2014) (quoting an Executive Leadership Coach).

213. MILLER, *supra* note 195, at 197.

214. See David Thomas, *Foxx’s Team Takes Shape with Hires*, CHI. DAILY L. BULL. (Jan. 24, 2017), <https://www.chicagolawbulletin.com/archives/2017/01/24/kim-foxx-civil-bureau-1-24-17> [<https://perma.cc/8JC7-8TNF>] (reporting that Foxx had promoted Magats to the head of the Criminal Prosecutions Bureau).

215. See Criminal Prosecutions Bureau, Cook County State’s Attorney, <https://www.cookcountystatesattorney.org/criminal-prosecutions-bureau> [<https://perma.cc/H9ZX-7FLV>] (last visited Sept. 24, 2020) (stating that the bureau is the CCSAO’s largest and that its prosecutors handle over 30,000 felonies and several hundred thousand misdemeanors every year).

216. Haugh, *supra* note 60, at 137. Haugh argues that, rather than merely focusing on promoting ethical culture generally, companies should identify employees who, by dint of their “job task, leadership role, propensity to rationalize wrongdoing, and social and organizational networks” disproportionately impact that culture. See *id.* at 137. For instance, Haugh argues that regional managers were the key players in creating conditions conducive to fraudulent accounts generation at Wells Fargo. See *id.* at 176–79.

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respected, career professional with direct managerial oversight of a significant swath of CCSAO’s operations, is exactly such a person.²¹⁷

c. The Decision to Dismiss

Finally, there is a concern with the disposition of Smollett’s case. The office had apparently agreed to drop all of the charges in exchange for “community service” and an agreement that the television star forfeit his \$10,000 bond payment.²¹⁸

Foxx and her staff may well have thought that the office would be hailed for “not wasting the time of judges, jurors and prosecutors on a minor, nearly pathetic offense allegedly committed by a B-list star desperate for attention”²¹⁹ After all, diversion—i.e. the pursuit of alternatives to conviction and incarceration—is a mainstay of the progressive prosecution movement,²²⁰ and “[v]ery few people thought Smollett should serve time for [the alleged offense of hiring acquaintances to rough him up and then lying about it]. Cutting a deal to let him walk would illustrate how measured and fair [Foxx was].”²²¹

Unfortunately, the mechanics of disposition here—the particulars of Smollett’s “diversion” deal and how it came about—are cause for concern. As former appellate judge Sheila O’Brien stated, the case resolution created “an appearance of impropriety, a perception that justice was not served here, that Mr. Smollett received special treatment.”²²² Foxx blamed the public confusion on the fact that most people “don’t understand the intricacies of the justice

217. Following Haugh’s insights, *see* Haugh, *supra* note 60, at 137, it was not Magats position in the highest levels of the office that made his adherence to office positions essential to cultural reform at CCSAO. That is, this wasn’t simply a matter of “tone at the top.” *Id.* Instead, it was his years of experience *in* the office—and the status in the organization’s social network this tenure conferred—as well as his role in directly overseeing office prosecutions, that mattered.

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218. *See* Bosman & Deb, *supra* note 148.

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219. Eric Zorn, *Since Kim Foxx Won’t Tell You What Really Happened in the Jussie Smollett Case, Let Me Try*, CHI. TRIB. (Feb. 12, 2020), <https://www.chicagotribune.com/columns/eric-zorn/ct-column-jussie-smollett-dan-webb-kim-foxx-james-comey-zorn-20200212-d4zak6p4urgwnelbdcdauhto5m-story.html> [<https://perma.cc/7MHB-ZH6W>].

220. *See The Paradox of “Progressive Prosecution”*, *supra* note 9, at 753–54 (describing diversion as an essential tenant of the movement). *See also* Gonzalez, *supra* note 4, at 14–17 (aiming to “make jail the ‘alternative’” in Brooklyn).

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221. Zorn, *supra* note 219.

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222. Megan Crepeau, *Kim Foxx Subpoenaed to Appear at Hearing on Appointment of Special Prosecutor in Jussie Smollett Case*, CHI. TRIB. (Apr. 27, 2019), <https://www.chicagotribune.com/news/local/breaking/ct-met-jussie-smollett-kim-foxx-special-prosecutor-20190426-story.html> [<https://perma.cc/KJ44-ZYH7>].

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system . . . don't understand alternative prosecution or diversion or alternate outcomes outside of prison or lengthy probation . . .”²²³ She asserted that the disposition here was not so different from other class 4 felonies the office had handled.²²⁴

But while it may be true that the public is not well versed in the finer mechanics of diversion, the trouble is that Smollett's case does not look like other diversions or dismissals handled by the office. Smollett was not formally required to participate in a court-ordered program, his progress in any community service would not be tracked, and no conditions for dropping the charges were set.²²⁵

The special prosecutor Dan K. Webb agreed that Smollett's case disposition did not conform with typical CCSAO case outcomes. In a statement accompanying his decision to indict Smollett, Webb asserted that further prosecution of Smollett was “in the interests of justice” precisely because Smollett's case disposition was out of sync with the general practices of the office.²²⁶ Vitally, Webb found that Smollett was not required to participate in the “CCSAO Deferred Prosecution Program [DPP],” even though he was eligible.²²⁷ The special prosecutor eventually concluded that “[t]he terms of Mr. Smollett's resolution do not track the requirements of the DPP.”²²⁸

Moreover, according to Webb's statement, the CCSAO was unable to provide “documentary evidence” that the office had resolved similar cases in a like manner.²²⁹ Webb found this lack of

223. *WBEZ News: Prosecutor Kim Foxx Defends Jussie Smollett Decision In WBEZ Interview*, WBEZ (Mar. 27, 2019), <https://www.wbez.org/shows/wbez-news/prosecutor-kim-foxx-defends-jussie-smollett-decision-in-wbez-interview/ddc80843-d6ee-4c25-a635-02ad49c325e6> [<https://perma.cc/KR9J-9Y7U>].

224. *Id.*

225. Janell Ross, *Other Cases are Dismissed in Chicago, But Not Like Jussie Smollett's Was*, NBC (Mar. 29, 2019), <https://www.nbcnews.com/news/nbcblk/other-cases-are-dismissed-chicago-not-jussie-smollett-s-was-n988591> [<https://perma.cc/ZD22-VVTH>].

226. Press Release, Winston & Strawn LLP, Special Prosecutor Dan K. Webb of Winston & Strawn LLP Announces New Criminal Charges Against Jussie Smollett (Feb. 11, 2020), <https://www.prnewswire.com/news-releases/special-prosecutor-dan-k-webb-of-winston-strawn-llp-announces-new-criminal-charges-against-jussie-smollett-301003303.html> [<https://perma.cc/BD8Y-9HZN>] [hereinafter Webb Statement].

227. Webb Statement, *supra* note 226. This latter point was not well publicized at the time of the case disposition, but was eventually revealed by the special prosecutor appointed to review the case. R

228. Webb Announcement, *supra* note 168, at 4. R

229. *See* Webb Statement, *supra* note 226 (noting that the special prosecutor sought to obtain pertinent evidence, but received none). *See also* Webb Announce- R

evidence particularly troubling because the CCSAO had publicly justified the Smollett disposition by asserting that the case was resolved “under the same criteria that would be available for any defendant with similar circumstances.”²³⁰ In the end, the issue was not one of the public’s misunderstanding, but of internal inconsistency. Indeed, Webb ultimately found that “CCSAO decision-makers on the Initial Smollett Case have significantly and meaningfully divergent explanations for how the resolution was reached.”²³¹ If the office had formalized mechanisms for deciding who qualifies for diversion and processes for ensuring compliance with existing diversion policies, much of Foxx’s scandal could have been avoided.

Ultimately, if the “progressive” outcome here was diversion for Smollett, then Foxx’s compliance failures had the perverse effect of making it more likely that Smollett would face jail time for his non-violent crime. The lack of firmly established compliance-based procedures drove staff to leapfrog to the intended result (diversion for a non-violent offender), thereby creating an appearance of impropriety and assuring that outside—and likely less progressive—forces would step in to pursue charges against Smollett.

* * *

In the wake of the Smollett scandal, Foxx asserted that she “was elected to bring criminal justice reform and that includes intentionality, consistency, and discretion” and that she would “continue to uphold these guiding principles.”²³² However, the prosecution of Jussie Smollett suggests that a lack of formalized compliance-based procedures could continue to hamper her efforts to transform the office. To be sure, the media spectacle surrounding the case was atypical and may partially explain the office’s chaotic decision-making. But this is precisely the point of compliance programs: they provide guidance amidst the chaos of the unexpected.

ment, *supra* note 168, at 4 (“CCSAO did not rely upon any specific similar CCSAO cases when resolving the Initial Smollett Case.”). R

230. Webb Statement, *supra* note 226. Webb would go on to call the CCSAO’s statement’s so “misleading” as to constitute a breach of the office’s obligations of “honesty and transparency.” Webb Announcement, *supra* note 168, at 4–5. R

231. Webb Announcement, *supra* note 168, at 4. R

232. Heffernan & Bryan, *supra* note 162. R

B. Larry Krasner and A Plea Deal for Jovaun Patterson

1. The Case of Jovaun Patterson

On May 5, 2018, Jovaun Patterson, a 29-year-old Black man, attempted to rob a Philadelphia deli store owner.²³³ Patterson found Mike Poeng, the 50-year-old deli owner, washing his car on the street.²³⁴ Brandishing an AK-47, Patterson ordered the man inside, telling him: “This is a robbery.”²³⁵ Poeng did not go inside.²³⁶ Instead, presumably fearing for his wife and child, who were in the store, Poeng resisted.²³⁷ In the ensuing altercation, Patterson shot Poeng.²³⁸ As Patterson fled, Poeng bled out from a severed femoral artery before being rushed to the emergency room, where he died and was subsequently resuscitated.²³⁹ The rifle round fired by Patterson rendered Poeng unable to walk without assistance.²⁴⁰ As a consequence of his injuries, Poeng lost his store and livelihood.²⁴¹

The Philadelphia District Attorney’s Office initially charged Patterson, who surrendered two months after the incident,²⁴² with attempted murder, aggravated assault, robbery–threat of immediate serious injury, possession of a firearm by a prohibited person, possession of a firearm on a street in Philadelphia, possession of an instrument of crime, simple assault, and recklessly endangering another person.²⁴³

233. Julie Shaw, *Man, 29, Surrenders in AK-47 Shooting of West Philly Beer Deli Owner*, PHILA. INQUIRER (July 2, 2018), <https://www.philly.com/philly/news/crime/jovaun-patterson-arrested-west-philadelphia-beer-deli-owner-shooting-ak47-20180702.html> [<https://perma.cc/B95Q-XXJG>].

234. *Id.*

235. George Parry, Opinion, *Whose Side is Philly District Attorney Larry Krasner Really On?*, PHILA. INQUIRER (Dec. 13, 2018), <https://www.philly.com/opinion/commentary/larry-krasner-district-attorney-philadelphia-crime-victims-20181213.html> [<https://perma.cc/6DH3-969J>].

236. Shaw, *supra* note 233.

237. See Parry, *supra* note 235 (noting that Poeng sprayed Patterson with a water hose).

238. *Id.*

239. *Id.*

240. *Id.*

241. See *Feds: Philadelphia DA Too Easy on Man Convicted in Shooting*, FOX NEWS (Feb. 28, 2019), <https://www.foxnews.com/us/feds-philadelphia-da-too-easy-on-man-convicted-in-shooting> [<https://perma.cc/HU6A-WMJP>].

242. See Shaw, *supra* note 233.

243. See Press Release, U.S. Att’y William M. McSwain, U.S. Attorney’s Office Brings Federal Charges After the Philadelphia District Attorney’s Office Agrees to a Lenient Plea Deal in a Violent Robbery (Feb. 28, 2019), <https://www.justice.gov/usao-edpa/pr/us-attorney-s-office-brings-federal-charges-after-philadelphia-district-attorney-s> [<https://perma.cc/K8T4-GA2F>] [hereinafter McSwain Press Release].

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An unidentified witness reportedly told police that, the night before the attempted robbery, Patterson took his AK-47 to a neighbor's house and stated that "he was tired of [Poeng's] mouth and something had to be done about him."²⁴⁴ Despite the suggestion that the violence may have been premeditated, Patterson's substantial criminal history,²⁴⁵ and video evidence of Patterson's actions,²⁴⁶ the line prosecutor dropped the attempted-murder charge and allowed Patterson to plead guilty to aggravated assault, robbery, and possession of an instrument of crime.²⁴⁷ Consequently, Patterson faced a prison sentence of 3.5 to 10 years in prison.²⁴⁸

News of the plea deal was met with shock and derision.²⁴⁹ Media outlets reported that Poeng was "stunned" by the news. The former deli-owner told reporters that "[Patterson] changed my life forever . . . I can't do anything. I can't take care of myself anymore. I have three kids. Who is going to support them? He's going to be

244. Parry, *supra* note 235.

245. As a juvenile, Patterson was arrested four times on charges of vandalism, assault, and drug possession. As an adult, Patterson had been arrested ten times. Including the most recent plea deal, four of these arrests resulted in convictions. While all of these convictions were for misdemeanor offenses, he "had faced felony charges including attempted murder, gun charges, and robbery. In some cases, the more serious charges were dismissed after key witnesses failed to appear in court to testify." Julie Shaw, *Krasner Now Seeks to Vacate Plea Deal for AK-47 Gunman Who Critically Wounded West Philly Beer Deli Owner*, PHILA. INQUIRER (Dec. 7, 2018), <https://www.inquirer.com/news/district-attorney-larry-krasner-seeks-reversal-plea-deal-ak-gunman-west-philly-20181208.html#:~:text=district%20Attorney%20Larry%20Krasner's%20office,administration%20of%20the%20former%20defense> [<https://perma.cc/55HR-S7Q9>].

246. Julie Shaw, *Video Shows Man with AK-47 Attacking West Philly Beer Deli Owner*, PHILA. INQUIRER (May 8, 2019), <https://www.philly.com/philly/news/crime/police-video-ak47-assault-rifle-beer-deli-owner-shooting-west-philly-20180508.html> [<https://perma.cc/8CGR-4ZUA>] (providing footage of the attack as captured by surveillance cameras).

247. *See id.*

248. *See id.*; Parry, *supra* note 235.

249. *See The District Attorney Who Doesn't Take Gun Violence Seriously*, PHILADELPHINQUENCY (Nov. 16, 2018), <https://www.philadelinquency.com/2018/11/16/the-district-attorney-who-doesnt-take-gun-violence-seriously/> [<https://web.archive.org/web/20190331220614/https://www.philadelinquency.com/2018/11/16/the-district-attorney-who-doesnt-take-gun-violence-seriously/>]; Julie Shaw, *West Philly Beer Deli Owner Stunned by Plea Deal for Gunman Who Shot Him*, PHILA. INQUIRER (Nov. 15, 2018), <https://www.philly.com/philly/news/crime/philly-beer-deli-owner-shooting-gunman-krasner-plea-sentence-20181115.html> [<https://perma.cc/KX6M-W8X5>] (noting that the victim's nephew characterized the plea as "pretty outrageous").

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in jail three to 10 years—that’s it? I’ll be handicapped the rest of my life.”²⁵⁰

Though the District Attorney’s Office initially stood by the plea deal,²⁵¹ less than three weeks later the office reversed course, filing a motion to vacate the plea.²⁵² The motion was parried by Patterson’s defense attorney and criticized by retired State Supreme Court Chief Justice Ronald D. Castille, who served as the city’s DA from 1986 to 1991, as a “public relations response” to public criticism.²⁵³ In a final ruling issued in April 2019, Judge Rayford Means refused to vacate the plea deal or to hear a victim impact statement, citing concerns about the precedent it would set.²⁵⁴

In a penultimate twist, William M. McSwain, the U.S. Attorney for the Eastern District of Pennsylvania, announced on February 28, 2019 that he would bring federal charges against Patterson.²⁵⁵ McSwain’s indictment included two charges: (1) one count of attempted robbery and (2) one count of using, carrying and discharging a firearm during and in relation to a crime of violence.²⁵⁶ McSwain announced the charges in a press conference in which he issued a blistering critique of Krasner’s handling of the case and embrace of progressive policies, even blaming the DA for a rise in the city’s homicide rate.²⁵⁷

The federal indictment prompted Patterson’s defense counsel to file a motion to vacate the plea deal and sentence.²⁵⁸ This time,

250. *Id.*

251. *See id.*

252. Max Marin, *Philly DA Moves to Reverse Controversial Plea Deal for Gunman in AK-47 Shooting*, BILLY PENN (Dec. 7, 2018), <https://billypenn.com/2018/12/07/da-krasner-to-reverse-controversial-plea-deal-for-gunman-in-ak-47-shooting/> [<https://perma.cc/64MS-RNR2>].

253. Julie Shaw & Jeremy Roebuck, *DA’s Move to Rescind Plea Deal is Fought*, PHILA. INQUIRER, Dec. 12, 2018, at B01.

254. Julie Shaw, *Judge to Shooter: A Deal’s a Deal, but Meddling Feds Are a Concern*, PHILA. DAILY NEWS, Apr. 30, 2019, at 2.

255. *See* McSwain Press Release, *supra* note 243.

256. Indictment of Jovaun Patterson, *United States v. Patterson*, No. 2:19-cr-00125-MSG (E.D. Pa. Feb. 28, 2019).

257. *See* McSwain Press Release, *supra* note 243 (“The Philadelphia District Attorney’s Office isn’t putting fear into the hearts of anybody who is contemplating a life of violent crime. Instead, what’s even worse, is that the District Attorney’s Office is putting fear into the hearts of law-abiding citizens who have to deal with the terror of homicide and other violent crime in their neighborhoods.”).

258. *See* Julie Shaw, *Philly Judge Lets AK-47 Gunman Withdraw Guilty Plea in Shooting of Beer Deli Owner*, PHILA. INQUIRER (Aug. 19, 2019), <https://www.inquirer.com/news/philadelphia-judge-rayford-means-district-attorney-larry-krasner-jovaun-patterson-ak47-gunman-plea-withdrawal-20190819.html> [[HTTPS://PERMA.CC/AZ7R-QHGQ](https://perma.cc/AZ7R-QHGQ)].

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Judge Means acquiesced and vacated the deal.²⁵⁹ Ironically, the District Attorney's Office not only opposed the motion²⁶⁰—a mere four months after seeking their own vacate order—but also appealed the decision.²⁶¹

As of August 13, 2020, the appellate court has not issued a decision on the matter.²⁶² Patterson eventually pled guilty to the federal charges.²⁶³ Following the terms of his federal agreement, Patterson was sentenced to 14 years and three months in federal prison—significantly more than he faced under his state-level plea deal.²⁶⁴

2. Scrutinizing the Actions of District Attorney Krasner: A Compliance-Based Perspective

The initial decision to drop some of the charges against Patterson, as well as to recommend a relatively short sentence,²⁶⁵ was very much in line with Krasner's progressive goals.²⁶⁶ Indeed, Krasner's

259. *Id.* In both April and August, Judge Means was concerned with the finality of adjudication. In April, Judge Means was concerned with the double jeopardy implications of vacating the plea. In August, his concern was with the implications of federal prosecution for the very same acts at issue in the state prosecution. *Id.* (quoting Judge Means as follows: "It derails our whole system of plea bargaining if there is no finality").

260. See Shaw, *supra* note 258.

261. ADA Orem asserted that the judge lacked jurisdiction over the case and a spokesman from the office reported that the DA's Office would be appealing. See *id.*

262. See Julie Shaw, *After 'Sweetheart' Deal from Philly DA, Gunman Gets 14 Years in Federal Prison for Shooting a Store Owner with an AK-47*, PHILA. INQUIRER (Aug. 13, 2020), <https://www.inquirer.com/news/jovaun-patterson-ak-47-shooting-sentencing-william-mcswain-larry-krasner-20200813.html> [<https://perma.cc/MW8H-KJX9>] (noting that the DA's office appealed the decision to the state Superior Court, which has yet to rule).

263. See Julie Shaw, *AK-47 Gunman Pleads Guilty in Federal Court in 2018 Shooting of West Philly Beer Deli Owner*, PHILA. INQUIRER (Dec. 17, 2019), <https://www.inquirer.com/news/ak-47-gunman-jovaun-patterson-guilty-plea-federal-court-us-attorney-william-mcswain-district-attorney-larry-krasner-20191217.html> [<https://perma.cc/7VKV-AQ85>].

264. See Shaw, *supra* note 262; Shaw, *supra* note 263.

265. Whether 3½ to 10 years for attempted murder constitutes a "short" prison sentence is a matter of perspective. Certainly, as noted above and below, some politicians and victims' advocacy groups believed the sentence should have been longer.

266. See Melamed & Palmer, *supra* note 100 (identifying an office-wide policy to either seek lesser charges from the start or reduce charges in homicide cases. "The new strategy aligns with Krasner's oft-expressed belief that former prosecutors were out for wins - in the form of excessive prison sentences - rather than for justice. The way Krasner sees it, what looks like a radical shift is merely restoring balance - moving away from overcharging, which he called a 'gutless' abdication of responsibility.").

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desire to alter the criminal justice system's response to violent criminals is part of what places him at the forefront of progressive reformers.²⁶⁷ Moreover, the decision not only reflected the *spirit* of Krasner's reforms, but also harmonized with Krasner's stated office policy, which stressed that line prosecutors should refrain from reflexively seeking the highest charge possible.²⁶⁸ Instead, prosecutors were instructed to "utilize the spectrum of possible homicide charges, and proceed [only] on what [they] think[] the evidence supports."²⁶⁹ This likely explains why, in response to initial media inquiries, Ben Waxman, a spokesperson for Krasner, asserted that both the withdrawal of the attempted-murder charge and the sentence were "wholly appropriate."²⁷⁰

The trouble, from a professional responsibility perspective, was the fact that Poeng had not been informed of the plea prior to its announcement.²⁷¹ Under the Pennsylvania Crime Victims Act, prosecutors must notify victims in personal-injury crimes of a plea deal in order to provide the victim with an opportunity to comment.²⁷² This failure, and the public scrutiny it engendered—rather than the substance of the (relatively) short sentence itself—was likely the reason that the office attempted to vacate the plea. From the get-go, Waxman apologized that Poeng had not been notified of the plea hearing, noting that "[w]e strongly believe that every victim has a right to be heard."²⁷³

Krasner had already faced significant criticism from victims' family members and victims' rights groups.²⁷⁴ Part of the criticism

267. See, e.g., JAMES FORMAN JR., *LOCKING UP OUR OWN* 221 (2017) (criticizing reformers, including President Barack Obama, for their endorsement of the "non-violent offenders only" approach to criminal justice reform).

268. See Melamed & Palmer, *supra* note 100 (describing Krasner policy initiatives with respect to individuals who kill). R

269. *Id.*

270. Shaw, *supra* note 249. R

271. See *id.*

272. See Crime Victims Act, 18 Pa. Cons. Stat. § 11.213(b) (1997). See also Office for Victims of Crime, Victim Notification, <https://ovc.ojp.gov/topics/victim-notification> [<https://perma.cc/9PR7-KBC9>] (stating that victims' right to notification is supported by both federal law and the law of each state).

273. Shaw, *supra* note 249. R

274. See, e.g., Helen Ubiñas, *Hey, DA Krasner, Remember the Crime Victims*, PHILA. INQUIRER (Jan. 12, 2018), https://www.philly.com/philly/columnists/helen_ubinas/larry-krasner-homicide-victims-movita-johnson-harrel-20180111.html [<https://perma.cc/8FLE-LVB7>]; Chris Palmer, *Parents of Rittenhouse Square Stabbing Victim Assail DA Larry Krasner*, PHILA. INQUIRER (Aug. 2, 2018), <https://www.philly.com/philly/news/breaking/linda-schellenger-mother-sean-schellenger-michael-white-rittenhouse-square-stabbing-larry-krasner-20180802.html> [<https://perma.cc/7J3J-LNLE>].

was rooted in fundamental disagreements about what charges were appropriate for particular crimes, but family members repeatedly expressed dissatisfaction with how office and case developments were communicated to victims and their loved ones.²⁷⁵

In response, Krasner assembled a Crime Victims' Advisory Committee in April of 2018.²⁷⁶ In addition to providing support and grief services,²⁷⁷ the Committee was tasked with helping the DA's Office communicate with victims and their families.²⁷⁸

From a compliance perspective, this effort was inadequate as evidenced by the failures of communication that continued to occur in homicide cases *after* the April 2018 creation of the Committee. Consider, for example, the exoneration of Dontia Patterson, who had been convicted of stabbing Antwine Jackson in 2007.²⁷⁹ Though Waxman stated that the office had tried repeatedly to reach the victim's family (by phone, email, and in-person), the victim's sister alleged that, other than a vaguely worded letter requesting that she contact the DA's Office for "updates about the case," Krasner's staff made no efforts to reach her.²⁸⁰ Neither had Krasner's office notified Steven Bernstein, the brother of a different murder victim, when it reduced the death sentence of his brother's killer to life in prison.²⁸¹ Similarly, in the matter of Philadelphia Police Sgt. Robert Wilson's murder, the DA's Office had failed to inform the family of a plea deal "until it was too late for any meaningful discussion."²⁸² The office's repeated failures suggest that,

275. See Ubiñas, *supra* note 274 (detailing the hurt and anxiety felt by individuals who were not contacted before or soon after the firing of prosecutors handling the homicides of their loved ones); Palmer, *supra* note 274 (detailing Linda Schellenger's criticism of Krasner's communication methods and decision to charge her son's killer with only second, rather than first, degree murder).

276. Chris Palmer, *Philly DA Larry Krasner Unveils Victims' Advisory Panel*, PHILA. INQUIRER (Apr. 6, 2018), <https://www.philly.com/philly/news/crime/philadelphia-district-attorney-larry-krasner-victims-committee-movita-johnson-harrell-20180406.html> [https://perma.cc/2D9Z-XE9F].

277. See Julie Shaw, *Murder Victims' Kin to Get Support*, PHILA. INQUIRER, Aug. 2, 2018, at B02.

278. See Palmer, *supra* note 276.

279. See Chris Palmer, *After Philly DA's Office Clears Man of Murder, Victim's Family Feels Disrespected*, PHILA. INQUIRER (May 21, 2018), <https://www.philly.com/philly/news/crime/dontia-patterson-antwine-jackson-larry-krasner-philadelphia-murder-conviction-overtured-20180521.html> [https://perma.cc/GNM8-6RQU] (providing some background on the murder).

280. See *id.*

281. Volke, *supra* note 3.

282. *Id.*

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contrary to compliance best practices,²⁸³ Krasner's office was not monitoring the success of the Crime Victims' Advisory Committee initiative. Perhaps if it had been watching more closely, the errors in Patterson's case could have been avoided.

In response to media inquiries, Waxman stated that an office review of the matter found that the prosecuting assistant district attorney, Lori Edelman Orem, "made two mistakes. First, she did not contact the victim prior to the plea, which is against DAO policy as well as state law. Second, she did not get authorization from her supervisor to convey the plea offer."²⁸⁴ While Orem's actions might well be conceptualized as "mistakes," they should also be recognized as products of specific compliance failures.

Waxman asserted that contacting victims is "DAO policy."²⁸⁵ But, as the DOJ has explained to corporations, "paper program" alone will not create a culture of compliance.²⁸⁶ Regular training and granular guidance on obligations are also required.²⁸⁷

Checklists are one way to prompt employee compliance. For instance, Texas Instruments provides employees with a checklist that asks employees to answer a series of ethically more expansive questions: "(1) is the action legal, (2) does it comply with our values, (3) if you do it, will you feel bad, (4) how will it look in the newspapers?"²⁸⁸ If Orem had been aware of the state law, then a checklist may have prompted her to hold off on charging or to see a supervisor at step 1; if she was not aware of the law, she may nevertheless have reconsidered her actions at step 4—how would it look to proceed without contacting an attempted homicide victim?

Moreover, checklists do not have to take a 1000-foot approach to ethics, they may instead function as task-specific nudges. In this way, they are particularly helpful as bulwarks against "ethical fading"—the reality that "psychological factors can cause ethical (and

283. See *Evaluation of Corporate Compliance Programs*, *supra* note 109, at 4-5 (recommending that training address lessons learned from prior compliance incidents and asking prosecutors to consider "[w]hat efforts has the company made to monitor and implement policies and procedures that reflect and deal with the spectrum of risks it faces").

284. Shaw, *supra* note 245.

285. *Id.*

286. *Evaluation of Corporate Compliance Programs*, *supra* note 109, at 9.

287. A review of publicly available records on January 1, 2020 do not reveal what, if any, training Philadelphia's prosecutors received on their obligations under the Pennsylvania Crime Victims Act.

288. See Gillian Flynn, *TI Gives Employees a Quick Test*, WORKFORCE (June 1, 1995), <https://www.workforce.com/news/ti-gives-employees-a-quick-test> [https://perma.cc/Q6XY-8FTE] (citing checklist and its contents).

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legal) considerations to fade from view, leading people to almost unconsciously engage in . . . misconduct.”²⁸⁹ Here, for instance, a plea-bargaining checklist might ask prosecutors to confirm that they have spoken with the victim or their family. Because it is not always feasible to reach victims, the checklist might serve as a reminder to formally memorialize attempts to contact the family—precisely because failures to do so may become a point of contention. They might also prompt line prosecutors to obtain authorization from a supervisor before charging out cases with unreachable victims.

Though not obvious from the public record, it is possible that prosecutors in Philadelphia receive some kind of training on their obligations under the Pennsylvania Crime Victims Act.²⁹⁰ But even assuming that Orem was sufficiently cognizant of her obligations under the Act, the situation likely presented her with a set of competing pressures: (1) awareness that she had a responsibility to contact the victim and (2) consciousness of the office’s new homicide charging priorities.

Krasner made his commitment to reforming homicide-related charging decisions manifest from his first days in office, when he spearheaded “reducing charges to third-degree murder or manslaughter in at least six cases initially filed as ‘murder generally’—an umbrella that encompasses first-, second-, and third-degree.”²⁹¹ This commitment was reinforced in the aforementioned office policy and in media interviews conducted throughout 2018.²⁹²

He does not appear to have made a similar push for adherence to the Pennsylvania Crime Victims Act. The law is not explicitly mentioned in coverage of the Committee. Neither is there any press coverage of Krasner discussing the law in 2018.²⁹³ This is not to say that Krasner *should have* been talking about the law. Rather, the discrepancy in the relative attention given to each topic—presumably both inside and outside of the office—frame, and may explain, Orem’s actions.

289. Robert A. Prentice, Comment, *Beyond Temporal Explanations of Corporate Crime*, 1 VA. J. CRIM. L. 397, 415 (2013).

290. A review of publicly available records on January 1, 2020 did not reveal any mentions of internal use of a checklist.

291. Melamed & Palmer, *supra* note 100.

292. See, e.g., Melamed & Palmer, *supra* note 100; Bobby Allyn, *Philly DA Says He’s Striving for Justice Not Harshes Sentence in Homicide Cases*, WHY? (Nov. 19, 2018), <https://why.org/articles/philly-da-says-hes-striving-for-justice-not-harshes-sentence-in-homicide-cases/> [<https://perma.cc/6QQJ-FWHH>].

293. Based on a Google and LexisNexis review of archived news stories.

Orem had a responsibility to contact the victim, but encountered a situation well-examined in the field of corporate compliance—one in which “the pressure of the moment” causes “definitions of responsibility [to be] renegotiated downward to accommodate those pressures.”²⁹⁴ The Wells Fargo “fake accounts” crisis provides the most recent example of how a deeply ingrained cultural objective—generating sales—can “drown[] out any explicit compliance measures,” such as trainings and explicit employee handbook guidance.²⁹⁵

In the Patterson case, the pressure to charge according to the new policy may well have prompted Orem to “downgrade” her obligation to contact the victim. This is why behavioral ethicists urge the display of ethical reminders (which may take the form of a checklist or other “nudge”) as close to the time of temptation as possible.²⁹⁶ It is also why leaders must not neglect to foster a “culture of compliance,” even as they encourage a realignment of the organization’s end goals.²⁹⁷

Ideas common to compliance also have something to say about the second “mistake.” Namely, compliance officers and programs

294. John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in *CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS* 13, 19 (David M. Messick & Anne E. Tenbrunsel eds., 1996).

295. See Todd Haugh, *The Trouble With Corporate Compliance Programs*, MASS. INST. TECH. SLOAN MGMT. REV. (Sept. 6, 2017), <https://sloanreview.mit.edu/article/the-trouble-with-corporate-compliance-programs/> [<https://perma.cc/XW97-97RC>]. The bank maintained an industry-typical compliance program prior to the scandal. See Janine Yancey, *What We Learned from Wells Fargo About Checks and Balances*, EMTRAIN (Sept. 28, 2016), <https://emtrain.com/blog/code-of-conduct/wells-fargo-checks-balances/> [<https://perma.cc/MD8J-SV4Q>] (“Like any other bank, Wells Fargo has a robust compliance training program and compliance team.”). The company’s employee handbooks “explicitly stated that ‘splitting a customer deposit and opening multiple accounts for the purpose of increasing potential incentive compensation is considered a sales integrity violation.’” Moreover, this “paper” code was supplemented with training and monitoring. See Haugh, *supra* note 60, at 173–74. Nonetheless, a company culture that emphasized sales drove employees to value results over ethical means. See Tayan, *supra* note 193 (noting that the board of director’s report on the scandal found that “employees who engaged in misconduct most frequently associated their behavior with sales pressure”). The comparison is particularly salient because, in so far as Wells Fargo employees did not personally reap financial rewards for meeting their sales targets, the scandal was “more about managing employee ethicality than incentivized law breaking” and therefore closer in kind to prosecutorial misconduct. Haugh, *supra* note 60, at 176.

296. See Langevoort, *supra* note 122, at 277.

297. Haugh, *supra* note 60, at 171 (noting that experts, including the author of the article, agreed that a defective compliance *culture* was the ultimate cause of the Wells Fargo scandal).

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must account for the reality that “[i]n a corporation, to wait to do something until one is ordered to do so can be thought of as a failure of initiative Many subordinates, in those circumstances, can be expected to intuit what orders they would be given and ‘follow them in advance.’”²⁹⁸ The situation cannot be so different in a fast paced, inevitably understaffed prosecutor’s office. Compliance programs must account for such realities. The best programs “consider the behavioral implications of the compliance program at every turn, particularly how company policies might foster or defeat employee rationalizations.”²⁹⁹

McSwain eventually castigated Krasner for failing to take responsibility for the plea deal and heaping the blame on his ADA:

It tells us that nobody in leadership at the District Attorney’s Office even knows what’s going on in plea negotiations or in the courtroom in significant violent crime matters. In the absence of supervision, however, the assistant district attorneys certainly know that they are to pursue deals that will please the District Attorney or they risk losing their jobs, and there is no doubt that the assistant district attorney in the Patterson case did exactly that³⁰⁰

This may be unduly harsh, but it is not wholly inaccurate. If Orem was the “experienced and dedicated prosecutor”³⁰¹ she was described as, then Patterson’s case suggests that the office has failed—on a structural level—to institute sufficient controls to ensure that homicide plea deals are run by supervisors or only finalized after discussions with victims.

In the end, as in the case of Smollett, there is a bitter irony here. Once again, the absence of sufficient compliance measures drove line prosecutors to hasty action and resulted in a sentence arguably out of sync with the DA’s progressive vision.

C. *Eric Gonzalez and the Exoneration of Bladimil Arroyo*

1. The Case of Bladimil Arroyo

On February 22, 2019, prosecutors in Kings County, New York moved to vacate Bladimil Arroyo’s 18-year old murder conviction.³⁰² Arroyo’s exoneration was not an endorsement of his inno-

298. Darley, *supra* note 294, at 24–25.

299. Haugh, *supra* note 295.

300. See McSwain Press Release, *supra* note 243.

301. Shaw, *supra* note 245.

302. See Jennifer Vasquez, *NYC Man in Prison Since 2001 in Connection with Botched Robbery Killing Has Murder Conviction Vacated*, NBC N.Y. (Feb. 22, 2019),

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cence. Indeed, District Attorney Gonzalez explained that “we cannot say that Mr. Arroyo was not involved in this crime.”³⁰³ Instead, Arroyo’s release resulted from the Conviction Review Unit’s conclusion that Arroyo had been “deprived of a fair trial.”³⁰⁴ The procedural errors in the case included disclosure violations and the prosecutor’s knowing introduction of a confession built on a “false fact.”³⁰⁵

The murder at the heart of this matter occurred in the early morning hours of September 16, 2001.³⁰⁶ The murder victim, Gabor Muronyi, and his friend were walking away from Sweet Cherry strip club in Sunset Park, Brooklyn when they were attacked.³⁰⁷ His friend, Cary Greene, engaged one of the assailants in combat and managed to stab his attacker before escaping.³⁰⁸ He then flagged down two police officers, telling them that he had heard gun shots as he ran away.³⁰⁹ The officers returned to the scene of the crime to find Muronyi lying in a pool of his own blood.³¹⁰ Arroyo was apprehended by police officers who followed a vehicle fleeing the scene and then a trail of blood to Arroyo’s mother’s apartment.³¹¹ At the precinct after his arrest, Arroyo stated that he’d been at Sweet Cherry with Eddie Lorenzo and that Lorenzo had been stabbed.³¹²

The details of the attack, including the race and number of the attackers, were a matter of dispute. Greene initially reported that three Black men had attempted to rob the two friends, even going

<https://www.nbcnewyork.com/news/local/New-York-City-Man-Prison-Connection-Botched-Robbery-Killing-Murder-Conviction-Vacated-Set-Free-506221141.html> [https://perma.cc/5VV8-FQSY].

303. Press Release, Office of Kings Cty. Dist. Att’y, Brooklyn DA Moves to Vacate Murder Conviction, in Connection with 2001 Killing Outside Sunset Park Strip Club (Feb. 22, 2019), <http://www.brooklynnda.org/2019/02/22/brooklyn-da-moves-to-vacate-murder-conviction-in-connection-with-2001-killing-outside-sunset-park-strip-club/> [https://perma.cc/9E7X-SYVV].

304. *Id.*

305. See Vasquez, *supra* note 302.

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306. See CONVICTION REVIEW UNIT, KINGS CTY. DIST. ATTY’S OFFICE, REPORT ON THE CONVICTION OF BLADIMIL ARROYO 1 (Feb. 2019), <http://www.brooklynnda.org/wp-content/uploads/2019/02/bladimil-arroyo-conviction-report-2.20.pdf> [https://perma.cc/4CRL-H3L3].

307. Vasquez, *supra* note 302.

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308. See CONVICTION REVIEW UNIT, *supra* note 306, at 1.

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309. See *id.*

310. See THE NATIONAL REGISTRY OF EXONERATIONS: BLADIMIL ARROYO, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5518> [https://perma.cc/M7CV-58BV].

311. See CONVICTION REVIEW UNIT, *supra* note 306, at 4.

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312. See *id.* at 5.

so far as to positively identify Nicolas Johnson, a Black man, as his attacker.³¹³ After Johnson was arrested, Greene reneged, saying that “if the guy did not have a stab wound then this would not be the guy.”³¹⁴ In a later police line-up, Greene positively identified Eddie Lorenzo but was never able to identify Arroyo as one of the attackers.³¹⁵ Moreover, at trial, Greene testified that there had been only two assailants.³¹⁶

The case against Arroyo also relied on the testimony of police officer Michael Monteverde. Monteverde had been near the strip club when he heard gunshots and saw a car speeding from the direction of the shots.³¹⁷ Though Monteverde initially reported seeing three individuals flee from the car, he later testified that there were only two, identifying Lorenzo as the driver and Arroyo as a passenger.³¹⁸

Arroyo’s confession—secured during his second interview—was integral to his eventual conviction. In his first interview, Arroyo did not confess to the murder. Instead, he admitted only that Lorenzo had become angry at the two victims after they bumped into him at the strip club.³¹⁹ When the pair noticed the victims walking outside the club, Lorenzo and Arroyo both exited their vehicle to confront Greene and Muronyi.³²⁰ Arroyo initially stated that by the time Lorenzo had fired his gun Arroyo was already back inside the vehicle.³²¹ In the hours after this initial statement, Detective David Gilbert, who had been at the hospital when Muronyi was pronounced dead, returned to the precinct and reported that a physician told him that Muronyi had died of a stab wound to the chest.³²² Vitaly, Detective Robert Keating—who would conduct Arroyo’s second interview—learned of the physician’s pronouncement.³²³

Approximately five to six hours after Arroyo’s initial statement, and after Detective Gilbert’s report on the cause of death, Detective Keating asserted that Arroyo spontaneously “asked to speak with [me] and then stated, ‘I did not tell you the whole story

313. *See id.* at 3.

314. *See id.*

315. *See id.* at 8.

316. *See id.* at 1.

317. *See* CONVICTION REVIEW UNIT, *supra* note 306, at 1.

318. *See id.*

319. *See id.* at 6.

320. *See id.*

321. *See id.*

322. *See id.* at 18, 31.

323. *See* CONVICTION REVIEW UNIT, *supra* note 306, at 17.

before”³²⁴ During this second interrogation, Arroyo confessed that he had stabbed Muronyi in the “upper body area.”³²⁵

It was only the following day that the official autopsy report revealed that Muronyi had died from a single gunshot wound. What the emergency room physician had identified as a stab wound was in fact the slit out of which the fatal bullet had exited the victim’s body.³²⁶

Finally, police officers apprehended another individual near the scene of the crime: James Ortiz.³²⁷ Ortiz, who approached officers to ask what had happened, had cuts on his hand and was “clutching a bloody napkin.”³²⁸ Greene also identified Ortiz during a lineup “as possibly one of the persons that attacked [the deceased].”³²⁹ Ortiz’s arrest appears to have been voided at the precinct; he was never charged in relation to the crime and police do not appear to have investigated him as a suspect after Greene’s initial identification.³³⁰

Instead of probing the various inconsistencies evident in the police report, the lead prosecutor proceeded on the theory that Arroyo had shot the victim. The ADA introduced Arroyo’s confession at trial and suggested to the jury that the defendant’s confession to a stabbing was an attempt to minimize his culpability by “putting a knife in his hand where there was a gun.”³³¹

Brooklyn’s Conviction Review Unit (CRU) eventually determined that “[w]ithout defendant’s confession, the circumstantial evidence . . . was insufficient to establish guilt beyond a reasonable doubt.”³³² In addition, the CRU determined that the prosecutor had failed to turn over exculpatory materials, in violation of *Brady* and *Giglio*.³³³ These materials included detectives’ notes about Greene’s identification of Ortiz and about Monteverde’s initial beliefs concerning the number and race of passengers in the fleeing

324. *See id.* at 7, 17.

325. *See id.* at 9.

326. *See id.* at 15, 27.

327. *See id.* at 3–4.

328. *See id.* at 3.

329. *See* CONVICTION REVIEW UNIT, *supra* note 306, at 20 n.46.

330. *See id.* at 3 n.10.

331. *See id.* at 22.

332. *See id.* at 1 n.1.

333. *See id.* at 40. The CRU also determined that the ADA had violated his *Rosario* obligations. *People v. Rosario*, 9 N.Y.2d 286 (1961), *cert. denied*, 368 U.S. 866 (1961) mandates that the government disclose all of a prosecution witness’ prior recorded statements, so long as they are material to that witness’ testimony. N.Y. CODE CRIM. PROC. §§ 240.44(1), 240.45(1)(a).

car, as well as evidence about Greene's past conviction for hindering prosecution.³³⁴

2. Scrutinizing the Actions of District Attorney Gonzalez: A Compliance-Based Perspective

Arroyo's release marked the 25th exoneration out of Brooklyn's CRU.³³⁵ Unlike the previous exonerations, this one was paired with a 43-page report detailing the CRU's findings.³³⁶ The last 2.5 pages of this report present a barebones "root cause analysis," identifying three primary bases for the miscarriage of justice that occurred: (1) not all of Arroyo's interrogations had been recorded, (2) the prosecutorial team appeared to suffer from confirmation bias, and (3) the office lacked a uniform discovery practice.³³⁷

Though subtitled "Recommendation," this section of the report is markedly light on actionable steps for the future. The first and last issues identified by the CRU were effectively deemed to be no longer of concern, given changes in applicable law and in office-wide discovery practices implemented after Arroyo's conviction.³³⁸ Meanwhile, the appeal for confirmation bias training was limited to just that: eight words calling for instruction on the matter.³³⁹ Moreover, nowhere in the report was there a recommendation that the lead prosecutor be disciplined. Perhaps such a report is not the best venue for disciplinary recommendations. However, it bears noting that while the report pointedly refrained from identifying the prosecuting ADA by name,³⁴⁰ the ADA in question was not only still employed by the office, but, in fact, headed the office division re-

334. See CONVICTION REVIEW UNIT, *supra* note 306, at 2. The latter of these constitutes *Giglio* matter as it pertains to the credibility of a witness.

335. See POST CONVICTION JUSTICE BUREAU, <http://www.brooklynda.org/the-post-conviction-justice-bureau/#conviction> [<https://perma.cc/QGB4-RCSE>].

336. See Christina Carrega, *New York Man's Conviction Overturned After Discovery of 'False Confession' for Murder in Botched Robbery*, ABC NEWS (Feb. 23, 2019), <https://abcnews.go.com/US/york-mans-conviction-overturned-discovery-false-confession-murder/story?id=61246612> [<https://perma.cc/NFH7-NR2V>].

337. See CONVICTION REVIEW UNIT, *supra* note 306, at 40–42.

338. See *id.* (stating that the interrogation recording issue was "largely mooted by the statutory requirement to record by video interrogations of persons accused of . . . certain serious crimes . . ." "and that, in the years since Arroyo's conviction, the office had instituted an "open file" system and was moving to electronic discovery).

339. See *id.* at 41 ("The CRU recommends training prosecutors on this issue.").

340. See *generally id.* (referring to the prosecuting attorney as either "the prosecutor" or the "trial ADA" throughout).

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sponsible for prosecuting homicides.³⁴¹ Timothy Gough, who had been a practicing line attorney for over a decade when he prosecuted Arroyo’s case, was now Chief of Brooklyn’s Homicide Bureau.³⁴²

In the press release announcing the exoneration, Gonzalez stated the he was “confident that policy changes that have been made over the ensuing years and additional recommendations by the CRU will ensure that these mistakes are not repeated.”³⁴³ As explained below, it is less likely that a corporate compliance officer or a DOJ prosecutor would have considered this an adequate response to serious ethical violations.

a. Failure to Propose Specific Recommendations

First, a marker of a compliance program’s effectiveness is whether its policies and procedures have been updated “in light of lessons learned.”³⁴⁴ In this, the CRU report presents a missed opportunity.

The CRU did not recommend seizing the moment as a chance to refresh line prosecutors’ training on their *Brady* and *Giglio* obligations. Instead the report focused on explaining how the office’s institution of “Open File Discovery Policy for most cases” and the recent commitment to electronic discovery “surely reduce the chances that paper is lost or mismanaged.”³⁴⁵ While as a practical matter that is likely true, this assessment does little to mitigate the risks of disclosure-related misconduct *now*. The DA’s Office “should be looking for *any* opportunity to influence ethical decision-making through education and training.”³⁴⁶

The CRU report did suggest renewed training on confirmation bias. However, it failed to outline what this training should look

341. See Theodore Hamm, Opinion, *More Transparency Needed on Brooklyn’s Tainted Convictions*, CITYLIMITS (Mar. 1, 2019), <https://citylimits.org/2019/03/01/opinion-more-transparency-needed-on-brooklyns-tainted-convictions/> [https://perma.cc/Z7CB-2HLX] (noting that Timothy Gough was identified as the trial ADA in an Appeals Court opinion (citing *Arroyo v. Conway*, 2010 U.S. Dist. LEXIS 107337, at *11 (E.D.N.Y. Oct. 7, 2010))).

342. See *Brooklyn DA Gonzalez Names New Homicide Chief and Three New Heads Of Trial Bureaus*, BKLYNER (Feb. 3, 2017), <https://bklyner.com/brooklyn-ada-gonzalez-names-new-homicide-chief-three-new-heads-trial-bureaus/> [https://perma.cc/UGY2-6KZW].

343. Press Release, Off. of Kings Cty. Dist. Att’y, Brooklyn DA Moves to Vacate Murder Conviction, *supra* note 303.

344. See *Evaluation of Corporate Compliance Programs*, *supra* note 109, at 3.

345. CONVICTION REVIEW UNIT, *supra* note 306, at 42.

346. Haugh, *supra* note 60, at 192.

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like. This is disappointing because *how* confirmation bias training is carried out determines whether or not it is effective. Behavioral science research suggests, for instance, that reminding individuals to be “fair and impartial” does next to nothing in counteracting naturally held biases—something more is required.³⁴⁷ Admittedly, it is not the job of the CRU to develop training programs. Nevertheless, in the field of compliance, a robust root cause analysis is one that suggests “*specific* changes” to reduce risks.³⁴⁸ Here, the absence of specific guidance on the issue of confirmation bias presents a lost chance to advance office trainings on the matter.

Moreover, the CRU could have recommended that the report or a summarized version of the report be used in future trainings. Compliance industry experts have long advocated for the use of real case studies in education efforts,³⁴⁹ and corporations have increasingly used “sanitized” case studies—i.e. “anonymized stori[es] that really happened in the organization”—in compliance trainings.³⁵⁰ Indeed, mining “failures, near misses, and all investigations” for “lessons learned to protect or prevent future issues” is a key feature of high quality compliance programs.³⁵¹ Buttressing this focus on intra-organizational wrongdoing is the sense that staff find grappling with the realities of actual misconduct more engaging than watching PowerPoints or answering hypotheticals.³⁵²

347. See Tom Stafford, *How to Get People to Overcome Their Bias*, BBC NEWS (Jan. 31, 2017), <https://www.bbc.com/future/article/20170131-why-wont-some-people-listen-to-reason> [<https://perma.cc/G763-QQTT>] (discussing study conducted by Charles Lord, which found that asking study participants to be “as objective and unbiased as possible,” and to consider themselves “as a judge or juror asked to weigh all of the evidence in a fair and impartial manner” had no effect on biased outcomes).

348. *Evaluation of Corporate Compliance Programs*, *supra* note 109, at 18 (emphasis added). R

349. See, e.g., Bruce Zagaris, *A Brave New World: Recent Developments in Anti-Money Laundering and Related Litigation Traps for the Unwary in International Trust Matters*, 32 VAND. J. TRANSNAT'L L. 1023, 1040 (1999) (urging regulators to make sanitized case studies available to reporting institutions for education purposes).

350. Mary Bennett, *That Really Happened? Using Sanitized Cases to Make Ethics & Compliance Concepts Real*, NAVEX GLOBAL (June 17, 2015), <https://www.navexglobal.com/blog/article/really-happened-using-sanitized-cases-make-ethics-compliance-concepts-real/> [<https://perma.cc/3EYH-UC9Q>].

351. ETHICS & COMPLIANCE CERTIFICATION INST., *supra* note 107, at 20. R

352. See Bennett, *supra* note 350 (outlining the likely benefits of using sanitized cases in training). R

b. Failure to Discipline

Of course, one of the reasons that sanitized case studies are effective is that they allow employees to see “organizational justice in action.”³⁵³ Here, the responsible ADA was never penalized for the misconduct in question.³⁵⁴

Reasonable minds may differ as to what kind of discipline Gough should have faced for the misconduct. The corporate compliance standard of “zero tolerance” may be inappropriate for a number of reasons.³⁵⁵ First, a spokesman for the office stressed that officials were not able to determine “when or even if [Gough] received the missing documents.”³⁵⁶ Second, and vitally, Gough did not make the decision to prosecute unilaterally, but only after extensive discussions with supervisors, who approved of the prosecution plan.³⁵⁷ Gough’s apparent “long track record of professional and highly ethical conduct” may also weigh against dismissal.³⁵⁸ Finally, the confirmation bias and arguably the disclosure failures here fall into the *inadvertent* misconduct bucket. The CRU explicitly stated that it did not believe “that any of the errors recounted . . . were deliberate.”³⁵⁹ Furthermore, the investigation and prosecution of Gabor Muronyi’s alleged murderer occurred in the fall of 2001—that is, in the weeks and months after the chaos of 9/11 and at a time when the city’s homicide rate was approximately twice what it was in 2019.³⁶⁰ While an overwhelming caseload does not excuse

353. *Id.* (quoting Bruce Anderson, Chief Compliance Officer of Health Net Inc.).

354. Gough was the Chief of the Homicide Bureau as of the date of this note. See also Hamm, *supra* note 341 (discussing the Brooklyn DA’s apparent decision not to publicly name or discipline Gough).

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355. Haugh, *supra* note 60, at 143 (noting that many compliance consultants advocate for “zero tolerance” as the “standard in every organization”).

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356. Hamm, *supra* note 341.

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357. CONVICTION REVIEW UNIT, *supra* note 306, at 41 (describing Gough’s conversations with colleagues and supervisors and noting that none of these individuals appear to have raised vital, pertinent questions, and noting that they may have all been suffering from confirmation bias). The degree to which a line prosecutor should be punished may depend, at least in part, on the prosecutor’s good faith effort to seek guidance and approval from supervisors.

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358. Hamm, *supra* note 341.

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359. CONVICTION REVIEW UNIT, *supra* note 306, at 39.

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360. See N.Y. POLICE DEP’T, *Seven Major Felony Offenses 2000-2019*, at https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/historical-crime-data/seven-major-felony-offenses-2000-2019.pdf [<https://perma.cc/2GEN-7NAD>] (reporting 649 cases of murder and non-negligent manslaughter in 2001, compared with 319 cases in 2019); *New York City Population by Borough, 1950 – 2040*, NYC OPEN DATA, <https://data.cityofnewyork.us/City-Government/New-York-City-Population-by-Borough-1950-2040/xywu-7bv9> [<https://perma.cc/4XZJ-W34V>]

misconduct, the unreasonable working conditions of the time might mitigate an individual ADA's culpability.

DOJ guidance provides that disciplinary procedures should be "commensurate with the violations."³⁶¹ It is entirely possible that a "commensurate" punishment in this case would not include traditionally punitive measures (such as firing or demotion). Perhaps individual ADAs should not be fired for conduct that was not deliberate or resulted from an unrealistic caseload and other structural errors, particularly as discovery standards and office culture was markedly different 20 years ago. However, "discipline" can take many forms, including re-training for the wrongdoer or the limited-duration onboarding of a compliance-focused supervisor to the offender's bureau.

Regardless, it is important that *some* kind of discipline be meted out for misconduct resulting in such a profound miscarriage of justice. Punishment can serve many purposes and here one of its aims must be to demonstrate to ADAs that "unethical conduct will not be tolerated and will bring swift consequences, regardless of the position or title of the employee who engages in the conduct."³⁶² If line prosecutors are to "buy in" to a compliance program, they must believe that the program is legitimate. Impartial treatment of every employee—regardless of their standing in the office hierarchy—is essential to generating faith in the legitimacy of management's compliance goals.³⁶³

Effective compliance programs are defined by "clear disciplinary procedures" that are "enforce[ed] . . . consistently across the organization."³⁶⁴ Well-defined and consistently applied disciplinary standards are urgently needed in this particular area because of the relatively high risk that a similar situation surfaces in the future. Brooklyn's CRU has a full docket of old cases to review, many of which may well have been handled by prosecutors still employed by

(last visited Sept. 24, 2020) (reporting NYC's population grew by approximately half a million people between 2000 and 2020). *See also* CONVICTION REVIEW UNIT, *supra* note 306, at 41 (noting that "discovery in this case may have been complicated by the events of September 11, 2001, and the ensuing strains on the New York Police Department").

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361. *Evaluation of Corporate Compliance Programs*, *supra* note 109, at 13.

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362. *Id.*

363. *See, e.g.*, Tom Tyler et al., *The Ethical Commitment to Compliance: Building Values based Cultures*, 50 CAL. MGMT. REV., 31–51 (2008) (demonstrating that procedural fairness, a primary aspect of organizational legitimacy, is critical in promoting employee commitment and compliance).

364. U.S. DEP'T OF JUST., *supra* note 109, at 13.

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the office.³⁶⁵ As long as veteran prosecutors staff the office's middle and executive rungs, the office will need clear procedures for handling comparable accusations and CRU results.

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The Brooklyn CRU is widely recognized as one of the country's foremost conviction integrity review units.³⁶⁶ And the unit's report places Brooklyn on the vanguard of classically progressive reform initiatives in so far as the decision to vacate was based on a commitment to procedural justice rather than actual innocence and in so much as the decision-making behind this conclusion was made available to the public.³⁶⁷ However, the case study also presents a

365. Consider, for instance, the assessment of an appellate judge, in 2014, that the "Brooklyn district attorney's office was responsible for 'burying' evidence" that contradicted police testimony in the 25-year old murder conviction of Everton Wagstaffe. Jim Dwyer, *Cleared After Nearly 23 Years in Prison, but Not Free*, N.Y. TIMES (Sept. 23, 2014), <https://www.nytimes.com/2014/09/24/nyregion/cleared-after-nearly-23-years-in-prison-but-not-free.html> [https://perma.cc/35SX-AR76]. The lead prosecutor in that case, Anne M. Gutmann, is now an "Executive Assistant District Attorney" with the office. See Joaquin Sapien, *Watching the Detectives: Will Probe of Cop's Cases Extend to Prosecutors?*, PROPUBLICA (June 21, 2013), <https://www.propublica.org/article/watching-the-detectives-will-probe-of-cops-cases-extend-to-prosecutors> [https://perma.cc/PRS7-76H5]. This note takes no position on the validity of Guttman's decades-old conduct. Rather, the point is that Gough's position is not unique.

366. See, e.g., Barry Scheck, *Conviction Integrity Units Revisited*, 14 OHIO ST. J. CRIM. L. 705, 714 (2017) (identifying Brooklyn as one of the two offices whose procedures most closely track the "best practices" of conviction review and that has "generated the greatest number of exonerations"); Ronald S. Sullivan, Jr., Op-Ed, *How Brooklyn's Conviction Review Unit Became a National Model*, KINGS CTY. POLITICS (Aug. 25, 2017), <https://www.kingscountypolitics.com/op-ed-brooklyns-conviction-review-unit-became-national-model/> [https://perma.cc/Z5CA-MJDM] (arguing that Brooklyn's CRU has become a "national model").

367. Exonerations based on procedural injustices, rather than DNA evidence, are rare. Conviction review units across the country have largely focused on correcting injustices through DNA review. See, e.g., Leslie Minora, *Beyond DNA, Difficult Tests for the Justice System*, DALL. OBSERVER (Dec. 29, 2011), <https://www.dallasobserver.com/news/beyond-dna-difficult-tests-for-the-justice-system-6424258> [https://perma.cc/A5UV-SJ6H] (reporting that the Dallas, TX conviction integrity unit took the DNA cases first, because they were "easiest," and has exonerated only four individuals without the aid of DNA evidence). Transparency is not a defining characteristic of many conviction review units. See, e.g., Eleanor Mueller & Christopher Huffaker, *Prosecutors Look to Free the Innocent – but Won't Release Findings*, McCLATCHY DC (Aug. 18, 2016), <https://www.mcclatchydc.com/news/crime/article96424972.html> [https://perma.cc/NC79-WBH3] (criticizing conviction review units across the country for failing to publish even basic information about the units and their findings).

missed compliance opportunity and suggests to staff that the office may not apply its disciplinary policies uniformly. While correcting the injustices of the past is commendable, preventing future misconduct is equally important. Embracing the lessons of corporate compliance is essential to creating a culture where even negligent misconduct is less likely to occur.

V.

HURDLES TO THE SUCCESSFUL IMPLEMENTATION OF COMPLIANCE SYSTEMS IN PROSECUTORS' OFFICES

Several obstacles stand in the way of implementing compliance programs and reforms, even in offices where progressive prosecutors have committed to implementing them.

A. *The Expense*

To begin with, there is the cost. Given public discussions about exorbitant corporate expenditures on compliance programs, reformers might well be wary of the perceived expense of starting a compliance program.³⁶⁸

Corporations spend millions of dollars on compliance every year,³⁶⁹ but even public bodies find compliance expensive. For instance, the California Commission on Judicial Performance—an independent state agency with the responsibility of investigating complaints of judicial misconduct and disciplining judges who engage in such misconduct—cost \$4,085,406 to administer in 2014.³⁷⁰

Even the largest district attorneys' offices would be stymied by such significant expenses. A \$4 million expenditure could eat up approximately 2, 4, and 7.5 percent of the annual budgets of each

368. See, e.g., David Trainer, *Morgan Stanley's \$28 Billion Opportunity in the Future of Wealth Management*, FORBES (July 26, 2017), <https://www.forbes.com/sites/greatspeculations/2016/07/26/morgan-stanleys-28-billion-opportunity-in-the-future-of-wealth-management/#26ed77bb722a> [<https://perma.cc/YZG3-QAVW>] (“The six biggest U.S. banks—J.P. Morgan (JPM), Bank of America (BAC), Citigroup (C), Wells Fargo (WFC), Goldman Sachs (GS), and Morgan Stanley—spent over \$70 billion on regulatory compliance in 2013.”).

369. See PONEMON INST., *THE TRUE COST OF COMPLIANCE: A BENCHMARK STUDY OF MULTINATIONAL ORGANIZATIONS* 5 (2011), https://www.ponemon.org/local/upload/file/True_Cost_of_Compliance_Report_copy.pdf [<https://perma.cc/EYU4-N4YJ>] (finding that multinational corporations spent an average of \$3.5 million on compliance efforts every year).

370. Caldwell, *supra* note 26, at 1485 (noting that the annual cost of the California Commission on Judicial Performance was \$4,085,406).

of the CCSAO, Brooklyn District Attorney's Office, and Philadelphia DAO respectively.³⁷¹

Fortunately for progressive reformers, there is good reason to think that a robust compliance program could be established at a substantially lower cost point. As a preliminary matter, the price tag of independent ethics organizations—like the California Commission on Judicial Performance—include overhead (rental fees, office supplies etc.) and employee costs (support staff salaries) that DA offices already provide.³⁷²

Likewise, as a practical matter, corporate compliance expenditures offer a poor point of comparison. Large corporations typically operate in highly regulated industries, often across national lines. As such, they are obligated to maintain sophisticated control environments, both to satisfy regulatory requirements and to monitor work forces numbering in the thousands.

Prosecutors' offices do not operate in comparably complex regulatory environments. Neither are they responsible for monitoring and educating thousands or tens of thousands of employees across national boundaries. The sort of sophisticated technologies and data professionals that are essential to corporate compliance programs—and that make up close to a third of a multinational's average compliance outlay—are not necessary in the prosecution space.³⁷³

371. These percentages are based on the following assumed annual budgets. OFF. OF THE PRESIDENT, BD. OF COMM'RS OF COOK CNTY., COOK COUNTY FISCAL YEAR 2020 76 (2020), <https://www.cookcountyil.gov/sites/default/files/service/volume-1-web-adopted-2020.pdf> [<https://perma.cc/MM8C-V7HJ>] (reporting a proposed budget of \$161.3 million for CCSAO in 2020); COUNCIL OF THE CITY OF N.Y., REPORT OF THE FINANCE DIVISION ON THE FISCAL 2019 PRELIMINARY BUDGET FOR THE DISTRICT ATTORNEYS AND OFFICE OF SPECIAL NARCOTICS PROSECUTOR 2 (Mar. 12, 2018) (reporting a preliminary budget of \$97.4 million for the Brooklyn District Attorney's Office in 2019); OFF. OF THE DIR. OF FIN., MAYOR'S FISCAL YEAR 2020: BOOK I 1176 (2020), <https://www.phila.gov/finance/pdfs/budgetdetail/Mayor's%20FY%202020%20Operating%20Budget%20Detail%20-%20Book%20I.pdf> [<https://perma.cc/C8TN-9SHZ>] (reporting a proposed budget of approximately 53 million for the Philadelphia District Attorney's Office in 2020).

372. See, e.g., OFF. OF THE PRESIDENT, BD. OF COMM'RS OF COOK CNTY., *supra* note 371, at 19 (including operations and rental and leasing costs in the annual budget); OFF. OF THE DIR. OF FIN., *supra* note 371, at 1178–82 (including rents, repair and maintenance, and support staff charges in DA's budget).

373. See PONEMON INST., *supra* note 369, at 7 (examining compliance budgets of 46 multinational corporations and finding that “Corporate IT” costs account for over \$1 million of the average outlay of \$3.5 million); Tom Groenfeldt, *Taming The High Costs Of Compliance With Tech*, FORBES (May 22, 2018), <https://www.forbes.com/sites/tomgroenfeldt/2018/03/22/taming-the-high-costs-of-compliance-with->

At their core, many of the essential tasks performed by effective compliance departments require sustained effort on the part of committed individuals, but are not in and of themselves that expensive to administer. Creating policy guidebooks, crafting checklists, holding training sessions, facilitating group ethics discussions—none of this necessarily involves expensive technology or resorting to the services of expensive outside consultants.

All told, there is ample reason to think exorbitant price tags need not strangle the compliance efforts of progressive reformers.

B. Hiring a Chief Ethics Officer

Local prosecutors will also have to face another problem that is less of a challenge for corporate leaders: a dearth of professional expertise. In the corporate world, an entire industry—with its own trade publications, professional associations, and international conferences³⁷⁴—alerts would-be CCOs to the possibility of a career in compliance, educates those individuals, and clarifies what companies should be looking for in their hires: a professional degree—often, though not necessarily, a juris doctor—followed by years of experience as an audit professional or white collar federal prosecutor.³⁷⁵ There is nothing comparable for district attorneys looking to identify worthy candidates to fill chief ethics officer positions.

tech/#39730dccc5d3f [https://perma.cc/4LR4-LTEU] (discussing technological upgrades that must be made in light of new and complex financial regulations).

374. See, e.g., COMPLIANCE WEEK, <https://www.complianceweek.com/> [https://perma.cc/SXQ8-T5GC]; INT'L ASS'N OF RISK & COMPLIANCE PROFESSIONALS, <https://risk-compliance-association.com/> [https://perma.cc/T3GV-SNFL] (certifying Certified Risk and Compliance Manager Professionals and Certified Information Systems Risk and Compliance Professionals); UNITED BANKERS ASS'N, <https://www.aba.com/training-events/certifications/certified-regulatory-compliance-manager> [https://perma.cc/7UZZ-SS9S] (providing professional certification as a Certified Regulatory Compliance Manager); *The Ultimate List of Compliance Conferences and Events*, ASCENT (Feb. 19, 2020), <https://www.ascentregtech.com/blog/the-ultimate-list-of-compliance-conferences-and-events/> [https://perma.cc/6KYZ-PPQ7] (aggregating list of corporate compliance conferences held in 2020).

375. See, e.g., MILLER, *supra* note 195, at 147 (noting that, in general, for the CCO position: a “Bachelor’s Degree [is] required; Masters Degree desired. [And] JD [is] preferred”); Michael Volkov, *Do Compliance Professionals Have to Be Lawyers?*, VOLKOV BLOG (Apr. 6, 2014) [hereinafter Volkov, *Compliance Professionals*], <https://blog.volkovlaw.com/2014/04/do-compliance-professionals-have-to-be-lawyers/> [https://perma.cc/EW6Z-ZP8H] (arguing that though some “companies are requiring compliance professionals to be trained attorneys,” a law degree is not essential to the position); Michael Volkov, *Do Former Prosecutors Make Good CCOs?*, VOLKOV BLOG (May 30, 2019) [hereinafter Volkov, *Former Prosecutors*], <https://blog.volkovlaw.com/2016/05/prosecutors-make-good-ccos/> [https://perma.cc/

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This, coupled with the relative dearth of financial incentives common to public service, may explain why a post seeking a “Chief Professional Responsibility and Ethics Officer” for the Brooklyn DA’s Office remained up for months.³⁷⁶

But the task is not hopeless. CCSAO filled its chief ethics officer position first with a federal prosecutor and later with a 19-year veteran of a professional disciplinary body.³⁷⁷

Even in the corporate world, it is a matter of debate whether litigators with experience in prosecution are best suited to head office-wide ethics efforts.³⁷⁸ What is clear is that, in seeking to fill these positions, prosecutors’ offices must first clarify the duties and expectations of the position. They may find that the position requires more in the way of managerial know-how and creativity than disciplinary experience.

Ultimately, if compliance programs are to be effective, the chief ethics officer at a progressive district attorney’s office should fulfill duties similar to those carried by the most dedicated CCOs.

DEY7-3S7F] (noting that several companies have made experience as a federal prosecutor a prerequisite to the CCO position).

376. The position appears to have been originally posted sometime in early 2019. KCDA’s official hiring website listed the position as of May 17, 2019. However, the position was no longer on the website as of October 1, 2020. See LEGAL RECRUITING, BROOKLYN DISTRICT ATTORNEY’S OFF., <http://apply.brooklynda.org/videktop/virecruitsselfapply/ReDefault.aspx?Tag=1f699100-8b5e-4fcc-a9ea-c8f647d30ff66> [<https://perma.cc/K4QC-GJD7>]. The position was advertised on other hiring websites as recently as January 2020. As of August 1, 2020, the office does not have a Chief Compliance Officer. See *Executive Leadership*, BROOKLYN DIST. ATTY’S OFF., <http://www.brooklynda.org/executive-leadership/> [<https://perma.cc/V8N3-366W>] (listing all executive level staff, but not a “Chief Compliance Officer”).

377. See Andy Grimm, *2 Top Deputies of State’s Attorney Foxx, One Tied to Smollett Case, to Resign*, CHI. SUN TIMES (Apr. 18, 2018), <https://chicago.suntimes.com/2019/4/18/18619800/2-top-deputies-of-state-s-attorney-foxx-one-tied-to-smollett-case-to-resign> [<https://perma.cc/Q5M9-5DV7>] (describing Perry as a former federal prosecutor); Meriel Coleman, LINKEDIN, <https://www.linkedin.com/in/meriel-coleman-7a5b0413/> (last visited Feb. 20, 2020) (stating that Meriel Coleman assumed the CEO position in June 2019 and that she had previously spent 19 years as an “attorney” for the Attorney Registration and Disciplinary Commission (‘ARDC’) of the Illinois Supreme Court). Publicly available information suggests that Coleman worked as a litigator representing the ARDC in proceedings against attorneys. See, e.g., *Attorney Registration And Disciplinary Commission Of Supreme Court Of Illinois Issues Complaint Filed Regarding Raymond Henehan*, TARGETED NEWS SERV. (July 16, 2007) (identifying Coleman as counsel for the ARDC); *Attorney Registration Commission of Illinois Issues Complaint Filed Regarding O’Malley*, TARGETED NEWS SERV. (Aug. 12, 2016) (identifying Coleman as counsel for the ARDC).

378. See, e.g., Volkov, *Former Prosecutors*, *supra* note 375 (discussing the merits and demerits attendant to installing federal prosecutors as CCOs).

Ethics officers, as conceptualized in this note, should be more than mere purveyors of ethics opinions. Like modern CCOs, their “core job [should be] to operationalize formal rules.”³⁷⁹ Their task is to formulate a “uniform set of policy guidelines”; to institute education and training for employees; to “map out” the key processes of the organization, assess where the risk of misconduct lies in each, and then determine how best to mitigate those risks; and finally to audit the entire program, “to ensure that it is operated fairly, promptly, and without retaliation.”³⁸⁰ While they should serve as a resource for whistleblowers and line prosecutors seeking ethics guidance, these activities should not define the sum total of their duties. Their days should be filled with granular considerations: how best to effectuate the policies and reform efforts of the district attorney, what specific procedures must be in place to increase the odds of compliance, and what programs, check-ins, and incentives should be instituted to ensure that line prosecutors “buy in” to the larger reform effort.

As a final point on this issue, it bears noting that only the largest prosecutors’ offices are likely able to devote a salaried position entirely to compliance. Smaller offices might consider hiring a part-time chief ethics officer, assigning specific compliance duties to one or several executive staff members, convening periodic compliance audit committees, or looking for other creative ways to adopt compliance best practices.³⁸¹

C. Change Takes Time

Finally, compliance research suggests that corporate reform takes time—from four years at medium-sized firms to ten years at large ones.³⁸² Unfortunately for progressive prosecutors, elected

379. Heineman, *supra* note 199. *See also* Volkov, *Compliance Professionals*, *supra* note 375 (arguing that while a company’s attorneys are responsible for defining the boundaries of legal and illegal conduct, CCOs are “dedicated to defining processes to ensure that the company stays within the defined lanes and legal boundaries”).

380. Heineman, *supra* note 199.

381. Prosecutors heading smaller offices must work even harder to ensure that part-time compliance officers or periodic audit committees retain the “authority and stature” necessary for effective compliance oversight to occur. *See* U.S. DEP’T OF JUST., *supra* note 109, at 11 (discussing importance of compliance function autonomy).

382. *See* JOHN P. KOTTER & JAMES L. HESKETT, *CORPORATE CULTURE AND PERFORMANCE* 104–05, 110 (1992).

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terms are typically just four years long.³⁸³ As such, progressive prosecutors face a real risk of losing reelection before their reforms can take hold.

As a preliminary point, singular scandals—such as the Smollett case—can dominate re-election campaigns, to the detriment of all the other good the prosecutor has accomplished.³⁸⁴ To some degree, however, such scandals are the least of a progressive prosecutor's problems. As Rachel Barkow deftly explained in a recent symposium paper, prosecutorial elections are unlike other local elections in that they “focus on criminal justice alone.”³⁸⁵ This means that an increase in violence, or a surge in media coverage of a “new” threat—for instance a novel drug epidemic—could spell disaster for a reform candidate's campaign. “People concerned with violence want immediate action, and there is no sign that there is enough voter support to invest in communities to get at the structural decay that causes so much criminal activity and drug use in the first place.”³⁸⁶

On the other hand, and as a last hopeful point, the hiring of an ethics officer and public commitment to compliance best practices may play well with an electorate tired of political corruption and vague promises for reform.

383. See, e.g., N.Y. County Law, Art. 24 § 927 (delineating four year-terms for New York City DAs); District Attorney, Office of the City of Philadelphia, <https://www.phila.gov/phils/Docs/Inventor/graphics/agencies/A006.htm> [<https://perma.cc/4PA6-ZXXZ>] (reporting that the DA's “term was extended to four years under the State Constitution of 1874”); *What is a Prosecutor?*, CAL. DIST. ATTYS' ASS'N, <https://www.lakecountyca.gov/Assets/Departments/DistrictAttorney/docs/What%20is%20a%20Prosecutor.pdf?method=1> [<https://perma.cc/4F9Z-WWWN>] (stating that “[e]lections for the office of district attorney are held every four years at the same time as elections for the Governor, with the exception of Los Angeles and San Francisco counties”).

384. For instance, Kim Foxx's reelection campaign has been largely defined by her handling of the Smollett case. See, e.g., Ray Sanchez, *Jussie Smollett Case Overshadows Reelection bid of Chicago's Top Prosecutor*, CNN (Mar. 17, 2020), <https://www.cnn.com/2020/03/17/us/chicago-kim-foxx-cook-county-states-attorney/index.html> [<https://perma.cc/Z33T-XVZF>]; Rachel Hinton, *Webb Report Ensures Kim Foxx has Re-election Running Mate — Jussie Smollett*, CHI. SUN TIMES (Aug. 17, 2020), <https://chicago.suntimes.com/politics/2020/8/17/21372810/webb-report-kim-foxx-re-election-obrien-republican-jussie-smollett> [<https://perma.cc/UWT6-WDAA>].

385. Rachel E. Barkow, *Three Lessons for Criminal Law Reformers from Locking Up Our Own*, 107 CALIF. L. REV. 1967, 1970 (2019).

386. *Id.* at 1971.

CONCLUSION

The corporate compliance movement does not have all the answers. Its programs have been known to fail in spectacular fashion,³⁸⁷ and surveys reveal that, despite largescale investment in compliance efforts, disturbingly high percentages of executives “could justify unethical behavior to meet financial targets.”³⁸⁸ But, this does not mean that corporate compliance has nothing to teach. At minimum, corporate compliance studies and industry guides provide a wealth of data on what does not work and what, with sufficient effort, just might.

The cases outlined here cry out for increased and careful consideration of how to engender cultural change. Academics have noted that “[t]here are no generally agreed-upon ‘best practices’ for prosecutors’ offices”³⁸⁹ In the face of that void, progressive prosecutors should look to the corporate compliance space for guidance. Without the support of a robust ethical culture made manifest in comprehensive codes of conduct, trainings, monitoring, and consistently meted discipline and rewards, reform efforts in individual offices may fail. Ultimately, even the most charismatic and innovative progressive prosecutors need compliance from their agents in order to succeed. In the worst case, misconduct in the offices of the vanguard class of progressive prosecutors—misconduct that could have been prevented by a well-crafted compliance program—could jeopardize the public’s faith in the progressive movement overall. Good intentions alone never saved a corporation. Neither will they save the promise of progressive prosecution.

387. See, e.g., Haugh, *supra* note 60 (discussing the failures of Wells Fargo’s compliance program); Jaclyn Jaeger, *Five Compliance Lessons from Walmart’s FCPA Settlement*, COMPLIANCE WEEK (July 22, 2019), <https://www.complianceweek.com/anti-corruption/five-compliance-lessons-from-walmarts-fcpa-settlement/27438.article> [<https://perma.cc/2AGV-23CF>] (discussing compliance failures related to Walmart’s FCPA-related scandal in Mexico). R

388. Chen & Soltes, *supra* note 122 (citing a 2016 Ernst & Young Global Fraud Survey, which found that 42 percent of surveyed executives could so justify unethical behavior). R

389. Sklansky, *supra* note 10, at 27. R

