

AS THE PENDULUM SWINGS? THE POLITICS OF CRIME POLICY IN SAN FRANCISCO

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ABSTRACT

This article will review recent oscillations in crime policy in the City and County of San Francisco, California, particularly as represented in the 2019 election of Chesa Boudin as District Attorney, followed in 2022 by his recall and removal from office. Boudin had run as a “progressive prosecutor”, promising fundamental reforms to local crime policy, so the question arises: what, if anything, does his recall just over halfway through his 4-year term of office indicate for the future of progressive prosecution in San Francisco, but equally importantly, throughout the United States? We believe the recall does not signify a broad public retreat from progressive prosecution, which still enjoys wide support in many locales throughout the country, but instead reflects mostly singular characteristics of the San Francisco political system coupled with unique impacts of the Covid pandemic. Still, it represents one variant of the fierce organized opposition that progressive prosecution has engendered everywhere it has been implemented, and therefore, may offer lessons for how to forge ahead with reform measures against determined political resistance.

KEYWORDS: Chesa Boudin; progressive prosecution; crime policy; San Francisco.

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1. INTRODUCTION

In November 2019, voters in the City and County of San Francisco California elected Democrat Chesa Boudin as their chief prosecuting officer or District Attorney (DA). Boudin, who had been practicing as a deputy public defender for the four prior years and was 39 at the time of his election, ran on a progressive reformist platform, defeating moderate Democrat and interim District Attorney Suzanne Loftus by a margin of 51% to 49%. Loftus had been endorsed by major local, state, and national figures within the Democratic Party, including Mayor London Breed of San Francisco, Governor Gavin Newsom of the State of California, then-U.S. Senator Kamala Harris (who, herself, had served as San Francisco's DA from 2004 to 2010), and others. Immediately following Boudin's election and before he took office, efforts were launched to recall him (Sharpe, 2022).²

Boudin was sworn into office on January 8, 2020, by San Francisco Mayor Breed. Just over two months later, on March 16, 2020, six Bay Area counties, including San Francisco, were placed under a mandatory stay-at-home order due to Covid-19. This order remained in effect until May 2020. Over time, Covid-related restrictions were gradually eased, with the last of indoor mask mandates ending only in June 2022. It is impossible to understate the disruptive impacts of Covid and the public health responses to it to all spheres of life in the Bay Area – just as virtually every other metropolitan area in the entire globe – including to the criminal justice system and public safety.

After an initial recall effort sponsored by a former Republican candidate for mayor failed, a second effort by a group called San Franciscans for Public Safety, alleging that Boudin's policies had contributed to soaring crime rates in the city, succeeded in gaining more than the roughly 50,000 citizen signatures necessary

² Under San Francisco municipal law, elected public officials may be removed from office before the expiration of their term in office via a recall election, in which voters choose to remove or not remove the official in question. No other candidates are presented in the recall election. If an official is removed, an interim replacement may be appointed by the mayor until a special election is held to install a temporary office holder, who serves until the next regularly scheduled election for that office. As distinct from impeachment from office, which requires a showing of wrongdoing, a recall may be launched for any reason, including simple voter dissatisfaction with the office holder. Retrieved on September 18, 2022 from https://sfelections.sfgov.org/sites/default/files/Documents/candidates/20200427_RecallGuide.pdf

to qualify a recall for the ballot. The election was held on June 7, 2022, resulting in Boudin's recall by a 55% to 45% margin.

Right wing media outlets and Republican politicians nationally were quick to celebrate Boudin's defeat as the public's repudiation of the goals and methods of progressive prosecution. If famously liberal San Francisco voters rejected Boudin, was this not a sign that progressive prosecution was doomed to failure everywhere else? This, of course, was playing out against a national backdrop in which the right wing was attempting to mobilize fear of crime to drum up support going into the mid-term elections in November 2022.³

This article disputes that inference, suggesting, instead, that Boudin's recall stemmed from factors other than voter dissatisfaction with progressive criminal justice reforms in the broad sense. Instead, specific characteristics of San Francisco, including shifts in local crime patterns due to the pandemic shutdown left him particularly vulnerable to the well-funded political attack organized by powerful actors hostile to his reformist ambitions. Still, while the confluence of circumstances that contributed to Boudin's recall are not likely to be reproduced in exact form elsewhere, the San Francisco example is a variant on a theme. Progressive prosecutors have faced extremely stiff political opposition in virtually all jurisdictions in which they have held office both from other political office holders and from organized forces in civil society. It behooves supporters of progressive prosecution to examine the San Francisco record to determine whether and how similar results can be avoided elsewhere.

Section 2 below will examine the setting: the City and County of San Francisco, focusing on characteristics relevant to the politics of crime policy. Section 3 will explain the concept of prosecutorial discretion in the U.S. legal system and its relationship to the emergence of progressive prosecution. Section 4 will briefly review the history of progressive prosecution in San Francisco. Section 5 will explore the tenure of Chesa Boudin as District Attorney, reviewing actions he took and policies he implemented. Section 6 will examine the impact of the Covid-19 pandemic on crime and crime policies in the city. Section 7 will focus on the

³ The elections are "mid-term" because they are occurring at the mid-point of the 4-year U.S. presidential election cycle. The right-wing mobilization of crime as an electoral wedge issue is not confined to the United States, but is common to Sweden, Italy, the Philippines, and, of course, Brazil, as well as many other nations across the globe. Nor is it new; in the United States, fear of crime has been mobilized by right wing Republicans for electoral gain at least since Richard Nixon if not before.

ultimately successful recall attempt against DA Boudin and the reasons for its success. Implications of the Boudin recall for the future of progressive prosecutions in San Francisco and beyond, including four possible principles to consider moving forward, will constitute our conclusions.

2. SETTING THE STAGE: THE CITY AND COUNTY OF SAN FRANCISCO

San Francisco occupies the tip of a peninsula bounded by the Pacific Ocean to the west and the San Francisco Bay to the east, joined by the Golden Gate, with its iconic orange-red bridge leading from the city to Marin County to the north. With approximately 815,000 current residents it is the 17th most populous city in the United States and considering its relatively small land mass – just under 47 square miles (or 122 square kilometers) – is second only to New York City in population density. It is unique in California as the only of 58 counties in which municipal and county governments are consolidated, thus the “City and County of San Francisco”.

Historically, San Francisco has served as an important West Coast port and financial center. Much of its initial wealth was built by “mining the miners”, that is, supplying food, clothing, and equipment to those who joined the California Gold Rush that began in 1849, and offering banking services to those who were successful. During World War II it was the port of embarkation for many troops sent to the Pacific Theater. More recently it has become a center for high technology, and particularly biotechnology, along with the legal, educational, and other ancillary services on which the tech industry relies. San Francisco is also the informal social, cultural, and political capital of the wider Bay Area. For decades it has been one of the most popular destinations in the world for both recreational and business tourism.

Beginning with the Beat Generation in the 1950s followed by the 1967 Summer of Love, San Francisco emerged as a bastion of social and political liberalism. In the 1970s it hosted a thriving gay scene, electing Harvey Milk, the first openly gay official in the United States, in 1977 – sadly, Milk was assassinated in 1978 along with Mayor George Moscone after less than a year in office. In 2004, then-Mayor Gavin Newsom was the first public official to move his administration to recognize same-sex marriage. The city has also led the way statewide in decriminalizing use of narcotics. For example, its Board of Supervisors recently passed a resolution urging law enforcement to de-prioritize crimes involving use of

psychedelics (Jaeger, 2022). Many residents of the region take pride in the belief that San Francisco, and the wider Bay Area, often serve as the cutting edge of social and political innovation for the entire country, and trends that are set here soon radiate outward to the rest of the nation. Similarly, politicians who have first established themselves locally have commonly gone on to higher state or national office.⁴ San Francisco voters registered as Democrats outnumber Republicans nearly 10 to 1, and President Biden outpolled Donald Trump by 86% to 12% in 2020 in the city.

Just as San Franciscans regard their trend-setting role with pride, elsewhere and within right wing circles, San Francisco is regarded with scorn and held up as a negative example of what American city life should be in the 21st century.⁵ And indeed, life in “the City”, as many residents of the Bay Area call it, is not idyllic. In recent years San Francisco has experienced many of the ills of other U.S. cities, some, perhaps, in acute form. Homelessness, an outgrowth of both income inequality and policies inhibiting new residential construction, is a stubborn reality that seems to resist solution (Fagan & Moench, 2022). Associated problems including drug addiction, acute mental illness, and crime have negatively impacted the quality of life in the city. Gentrification and urban development have driven many poorer residents to outlying areas; the Black population of the city has dropped from around 13% in 1970 to just over 5% today. Still, San Francisco is a “minority majority city” with a long-standing Asian community of about 34% (World Population Review, n.d.).⁶

Crime rates nationally, including in San Francisco, have been in a historic decline since their peak in the 1970s (Neilson, 2021). Nonetheless, like all major American cities, San Francisco continues to struggle with crime and public security. As compared to other cities within the state, San Francisco ranks approximately in

⁴ For example, current U.S. Senator from California Dianne Feinstein served as mayor of San Francisco; current Governor of the State of California Gavin Newsom also served as mayor of the city; Speaker of the House of Representatives Nancy Pelosi represents a San Francisco district; and current U.S. Vice-President Kamala Harris was DA of San Francisco before being elected as California State Attorney General, then U.S. Senator from California, and finally (for now) Vice President.

⁵ As an example, see Tucker Carlson on Fox News. Retrieved on June 29, 2023, from <https://www.youtube.com/watch?v=HJUMoN68yx8>

⁶ White residents constitute 46%; persons of Chinese origin are about two thirds of the Asian population, followed by Filipinos, Vietnamese, Japanese and others. The Hispanic population, mainly of Mexican and Central American origins, is about 11% (World Population Review, n.d.).

the middle in most crime categories, including violent crime. One notable exception in recent years has been larceny, in which San Francisco ranks first by a considerable margin. This is largely explained by the ubiquity of car break-ins, often focused in areas frequented by tourists; the piles of glass crystals throughout city streets and sidewalks are derisively called “San Francisco snow”. Violent crimes, on the other hand, tend to be concentrated in two neighborhoods, the Tenderloin and Bayview-Hunter’s Point, while other neighborhoods experience relatively little of it. San Francisco suffers relatively little criminal gang activity, as compared, for example, to Los Angeles, Fresno, or Sacramento.

The San Francisco Police Department is headed by a chief appointed by the mayor, and who currently commands a force of just over 2,000 officers (Neilson, 2022a). While reasonably diverse in terms of its ethnic composition, the force nonetheless wrestles with manifestations of racism.⁷ In 2015, for example, it was revealed that a ring of officers had been exchanging explicitly racist and homophobic text messages (Van Derbeken, 2015). More recently, analysis of data collected by the State of California revealed that despite nearly a decade of efforts to raise consciousness statewide about racial biases through reporting of detention, arrest, and search rates, Black people in San Francisco were 6 times more likely than white people to be stopped by police. This was so even though Blacks were statistically less likely to be found with contraband when searched – and were still more likely than whites to have force used against them by police (Gardiner & Neilson, 2022).

3. DISCRETION AND PROGRESSIVE PROSECUTION

Criminal prosecutions in the State of California are carried out primarily in relation to crimes defined in the California Penal Code and following procedures and rules of evidence similarly laid out in state-level codes.⁸ However, the actual

⁷ Per the San Francisco Police Department (n.d.) website, the force is 46.62% white, 8.70% black, 18.78% Hispanic, and 17.71% Asian, with Filipino, Native American, and others each under 10%.

⁸ Under the Constitution of the United States, the individual states are sovereign and retain all powers not specifically yielded to the federal government. Police power – the power to ensure public safety through the definition and enforcement of criminal law – is one such power retained by the states. The federal government also has the power to define and prosecute crimes, and has, over time, increased its exercise of this power. Nonetheless, most of the crime in the United States is prosecuted at the state level. There is a functional division of labor between the federal criminal justice system, which prosecutes higher-level drug

deployment of prosecutorial resources is carried out in each of the state's 58 counties, which derive their powers from the state, by an official called the "District Attorney", elected by the voters of that county.⁹ This, of course, is true of the City and County of San Francisco.¹⁰ California counties vary tremendously in size and population – Los Angeles County being the most populous in the entire nation with ten million residents – but in most counties, the actual prosecution of cases is carried out by deputies or assistants to the DA, not by the DA him- or herself.

A fundamental concept in understanding the role of a prosecuting attorney in the entire U.S. legal system, not just in California, is that of prosecutorial discretion. Prosecutors are vested with the unique and almost unbounded decision-making authority in determining whether to initiate a criminal case, what crimes to charge, when to do so, against whom, by what procedural mechanism, and with what, if any, associated sentencing enhancements. Prosecutorial discretion, of course, also entails the power to decide not to charge a crime or to allege a sentencing enhancement, or to dismiss a case that has been filed.¹¹ This awesome authority, which mobilizes the vast resources of the state against an individual, also vests in the prosecutor tremendous leverage in plea bargaining – the mode of resolution of more than 90% of all criminal cases in the United States. This is because the prosecutor determines from the filing the gravity of the offense and associated sentence, and can agree or decline to agree with requests from a defendant to plead to lesser charges (Bisharat, 2014). As one commentator has

trafficking, terrorism, fraud, embezzlement, public corruption, and other "white collar" offenses which often cross state boundaries, and the criminal justice systems of the states, which tend to prosecute street crime and other offenses that generally are confined within the boundaries of a single state.

⁹ Each county also constitutes a judicial district, with its own system of courts; judges are elected for six-year terms, but replacements may be appointed by the Governor of the State when judicial vacancies occur due to retirements or deaths. As a practical matter, most judges are first appointed by the Governor, then stand for election at the next regularly scheduled general election.

¹⁰ It is also true for all but 5 states and the federal system, in which prosecutors are appointed. Their titles vary slightly, although "district attorney" or "state attorney" are both common.

¹¹ Sentencing enhancements are allegations that are formally pleaded in a charging document that are not independent criminal offenses, but, if proven in association with a criminal charge, empower and in some cases require that a court impose a heightened sentence on the defendant if convicted. For example, in California any felony that results in great bodily injury can be sentenced to an additional 3 to 6 years in state prison. However, a case currently before the California Supreme Court will determine whether a prosecutor has discretion not to allege certain kinds of sentencing enhancements. This issue arose via a lawsuit against the current DA of Los Angeles County, George Gascón, about whom more will follow below.

proclaimed: “Prosecutors are the most powerful officials in the criminal justice system” (Harris, 2019, p. 4).

Prosecutorial discretion is rationalized as a means of conserving limited government resources, as the prosecutor is in a unique position to evaluate the relative evidentiary strengths of cases, the likely reactions of jurors to that evidence and thus the likelihood of conviction at jury trial, the quantum of investigatory and other administrative resources necessary to a successful prosecution, and the gravity of the charged offenses in the eyes of the community. Courts are generally deferential to prosecutors’ exercises of discretion, as the remedy for poor prosecutorial performance is thought to rest at the ballot box. There is a second feedback mechanism for prosecutors from the community they represent, which is in the votes of jurors in criminal trials to convict defendants or to acquit them. If jurors disagree with a prosecutor’s exercise of discretion in bringing charges against a particular defendant, they may find that defendant not guilty.

Candidates for prosecutorial offices run in part on promises about how they will exercise their discretion. When Kamala Harris, for example, ran for San Francisco DA in 2003, she campaigned on a promise never to charge a defendant with the death penalty.

Prosecutorial discretion has been pivotal in the emergence of the movement for progressive prosecution that has sprung up in the last decade or less across the United States. The movement has emerged in response to increasing concern over the phenomenon of mass incarceration – the United States, with 2.1 million in prisons has the greatest absolute number and the highest rate of incarceration in the world today – and the undeniable reality of persistent racial inequalities in the criminal justice system (Bisharat, 2018; Alexander, 2010). If prosecutors, in exercising their discretionary powers over recent decades, have contributed materially to the problem of racially discriminatory mass incarceration, then one way to begin to cure that problem is through the exercise of that very same power by individuals committed to non-carceral responses to crime and to racial equity.

Since 2016, voters in cities as diverse as Orlando, Los Angeles, St. Louis, Philadelphia, Chicago, Austin, Seattle, Oakland, and San Francisco have elected – and in some cases re-elected – prosecutors campaigning on progressive reformist platforms. While each has pursued priorities specific to his/her jurisdiction, common aims have included shifting away from punishment, especially by incarceration, to rehabilitation and treatment, diminishing racial and class bias

through measures such as bail reform, and firm prosecutions of police brutality and other forms of misconduct. It is fair to call this a movement not only because of its breadth – tens of millions of U.S. citizens now live in jurisdictions headed by progressive prosecutors – but because progressive prosecutors communicate with each other, both informally and through state-wide and national organizations, and draw on similar sources of intellectual inspiration and support.¹²

4. PROGRESSIVE PROSECUTION IN SAN FRANCISCO

San Francisco's broadly liberal-to-progressive polity has brought relatively moderate leaders to the Office of the District Attorney for decades, at least as compared to surrounding jurisdictions. But explicitly reformist tendencies began to surface as early as 1995 with the election of Terrance Hallinan, who opposed the death penalty, declined to prosecute prostitution cases and supported medical uses of marijuana. After winning re-election once, Hallinan was defeated in 2003 by Kamala Harris.

While Harris did not openly campaign as a progressive — rather, she attacked the incumbent Hallinan as a poor manager, running a technologically primitive office with among the lowest conviction rates in the state (52% as compared to the state average of 83%) – Harris was the first woman and person of color to serve as San Francisco DA. She had, as previously noted, promised never to seek the death penalty, and had also vocally opposed a voter initiative that would have empowered prosecutors to try juveniles in adult courts in serious cases. Harris won re-election as DA in 2007, but in 2011 ran for and succeeded in being elected as Attorney General for the State of California.

Then-Mayor Gavin Newsom appointed George Gascón to succeed Harris as San Francisco DA. Gascón, who had a distinguished career in law enforcement, had been serving directly prior as Chief of Police in San Francisco. At the time, he certainly lacked the public markers of a progressive reformer. Indeed, he has openly

¹² For example, the Prosecutors' Alliance of California describes its mission as "reforming California's criminal justice system through smart, safe, modern solutions that advance, not just public safety, but human dignity and community well-being". Retrieved on June 29, 2023, from <https://prosecutorsalliance.org>. Fair and Just Prosecution, meanwhile, is a national organization that "brings together elected local prosecutors as part of a network of leaders committed to promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility". Retrieved on June 29, 2023, from <https://fairandjustprosecution.org/about-fjp/our-work-and-vision/>

described his migration toward progressive prosecution as a personal journey that occurred while he was in office and over a period of years.¹³ But from his initial appointment until he resigned in 2019, Gascón took increasingly bold positions, perhaps the most impactful of which was his authoring and shepherding to passage of Proposition 47, which reclassified many felony crimes in the California Penal Code to misdemeanors.¹⁴ Gascón also championed “DA Stat”, an online site open to the public and designed to introduce transparency and thus public accountability into the work of his office (Sernoffsky, 2019).

All of this is to say that, while Chesa Boudin defied the odds in 2019 by overcoming the opposition of much of the city’s and state’s Democratic establishments to win election, it was not a complete shock. On the contrary, the San Francisco electorate had been trending toward support of progressive reformers for more than two decades. In that sense, Boudin’s election represented continuity more than it did a dramatic break from the past. But without doubt, Boudin had run on a platform of radical criminal justice reform considerably more ambitious than that of any other DA candidate in the city’s history. While, as previously noted, his margin of victory was slim, his opponent clearly stood for a more conventional law and order approach, and voters had little reason for confusion in choosing between the two.

5. THE BOUDIN ADMINISTRATION

Chesa Boudin brought an unusual pedigree to the Office of the District Attorney for San Francisco. His parents had been members of the leftist Weather Underground and were convicted of felony murder for their roles in an armed robbery in which two police officers and a Brinks armored car guard were killed in 1981. Chesa, 14 months old at the time, was raised by two other prominent former members of the group and grew up visiting his birth parents behind bars. He achieved an elite education, graduating from Yale Law School, and clerked for two esteemed federal court judges before joining the Office of the Public Defender in

¹³ Gascón stated so in a webinar held by the Prosecutors Alliance of California on September 7, 2022, and attended by this author.

¹⁴ Under California law, legislation, including amendments to the state constitution, may be passed by propositions placed on the ballot and voted on directly by the voters of the state. Indeed, many important changes to criminal law and procedure over the last 40 years have been made by propositions, not by acts of the legislature.

San Francisco in 2015. While a deputy public defender, he litigated a case challenging the cash bail system as a violation of the rights of the defendant's due process and equal protection under the California and U.S. Constitutions, winning a ruling that required judges to consider the ability of a defendant to pay while setting bail.¹⁵

In assuming office as District Attorney in 2019, then, Boudin was suddenly in charge of the very attorneys he had been facing as adversaries in court for the previous four years. This surely uncomfortable circumstance was doubtless aggravated when, two days into his term, Boudin fired seven subordinates, including five managing attorneys, some of them highly respected within the office, and soon after proceeded to build his management team that included additional former public defenders from his old office.

Yet this kind of house cleaning was not out of line with tradition: Terrance Hallinan had fired 14 staff members on taking office in 1996. In other cities where progressive prosecutors have been elected and where civil service laws have not barred them, similar purges have occurred. Larry Krasner fired 31 prosecutors upon taking office in Philadelphia in 2018 (Harris, 2019). Indeed, Brooke Jenkins, who was appointed by Mayor Breed to succeed Boudin following the recall, as of this writing had already fired 16 of Boudin's hires.

Churn, however, continued, and in Boudin's first 18 months in office 51 prosecutors, representing about a third of the office total, either resigned or were fired by Boudin. Few organizations can withstand that degree of turnover without disruption. Indeed, in September 2021, Boudin's office was publicly chastised in open court by a sitting judge for purportedly prioritizing broad reform goals for

¹⁵ Bail is an amount, usually in the form of cash, that is deposited with the court after a defendant has been charged but before trial as a guarantee that he or she will continue to appear at future court dates. While release without bail on the defendant's own recognizance or promise to return to court is required in most misdemeanor cases, bail had been typical in virtually all felonies until Humphrey. If the defendant willfully failed to appear, bail could be forfeited. Few defendants could post the entire bail amount, but instead employed private businesses known as "bail bondsmen", who, for a non-refundable fee of 10% from the defendant, guaranteed the full bail amount to the court. Those who could not afford bail were held in custody until trial. Poor people tended to stay in custody pre-trial, creating strong pressures on them to enter guilty pleas to avoid lengthy time in jail, while wealthier defendants made bail and were able to assist in the investigation and defense of their cases, and to make choices in plea bargaining free of the immediate pressures of custody. These dynamics were explored by this author further in Bishart (2014). The case was *In re Humphrey*. Retrieved on June 29, 2023, from <https://casetext.com/case/in-re-humphrey-43>

state or national audiences instead of “the unglamorous yet necessary work of public prosecution” (Barba, 2021).¹⁶

Boudin had been directly preceded in office by another progressive prosecutor, George Gascón.¹⁷ But there is little question that the array of policies Boudin began to implement – while perfectly consistent with his campaign promises, and also with fundamental commitments of the progressive prosecution movement – represented a palpable advance over those of his predecessor.¹⁸ Perhaps the most far-reaching were the concrete steps that Boudin and his deputies took to implement a broad policy of “decarceration”. Incarceration, of course, is the use of custody as a tool of criminal justice whether before or following a criminal conviction, whereas decarceration is its opposite: minimizing or reducing imprisonment at all stages of criminal prosecutions. A second animating principle of Boudin’s administration was a drive for racial equity, intertwined with the first because mass incarceration has had vastly disproportionate impacts on communities of color in the United States (Alexander, 2010).

Decarceration was the animating principle behind many specific policies pursued under Boudin’s administration implicating virtually all phases of criminal prosecution from charging to sentencing and beyond. Soon after taking office, Boudin directed his deputies not to allege “three strikes” sentencing nor gang enhancements, both of which have been demonstrated to have disproportionate impact on Black and Hispanic defendants (Johnson, 2020).¹⁹ He also announced

¹⁶ Superior Court Judge Bruce Chan was responding to the failure of the DA’s office to have turned over evidence to the defense in a timely manner in accordance with its legal duty. The case had been handled by four different deputies. The same judge later praised Boudin and two deputies for having met their ethical obligation in negotiating a disposition in an older case in which had arisen before Boudin took office, and in which evidence had been wrongfully withheld by the deputies handling the case (Redmond, 2021). He also privately apologized to Boudin for his public criticisms, which were unusual for a sitting judge, as judges are ethically required to maintain political impartiality. Judge Chan’s criticisms were instantly exploited by recall supporters.

¹⁷ Gascón resigned citing family needs; after moving to Los Angeles, he ran successfully for District Attorney of Los Angeles County, where he continues to serve as of this writing. Suzanne Loftus was appointed by the mayor of San Francisco to replace Gascón on an interim basis; it was she who Boudin defeated in 2019 to gain office.

¹⁸ Boudin laid out many of his policy priorities in a speech delivered at his swearing in ceremony, a transcript of which is available online. Retrieved on June 30, 2023, from https://sanfrancisco.granicus.com/TranscriptViewer.php?view_id=90&clip_id=34863

¹⁹ Under the California Penal Code, a defendant convicted of a felony crime who has been proved to have suffered two previous serious felony convictions can be sentenced to 25 years to life imprisonment. Similarly, the sentence of a defendant who is proved to have committed an offense on behalf of a criminal gang can be enhanced from 2 years to life, depending on the severity of the underlying crime. Both types of enhancements have been

that his office would no longer charge cases stemming from pretextual stops – those in which police are suspected to have detained a person, whether driving or on foot, for petty violations as an excuse or pretext to search the detainee for contraband. Pretextual stops, while explicitly permissible under state and federal law, have been widely shown to be employed by police in racially discriminatory fashion.²⁰

Decarceration was likewise the rationale for Boudin’s direction to his deputies not to seek cash bail in most cases. As noted above, Boudin had already litigated against the system of cash bail as a public defender; now he was in a position, as DA, to nearly extinguish the practice as a whole in San Francisco.²¹ Pre-trial custody status – whether a defendant is in jail or not while awaiting trial – has manifold implications for how a case plays out, but suffice it to say that an out-of-custody defendant has greater leverage and more options in how to manage his/her case as compared to an in-custody defendant. Eliminating cash bail as a practice is therefore a major step toward leveling the legal playing field for indigent defendants, who are, not surprisingly, disproportionately Black and Hispanic.

In addition to declining to charge individuals who might have been charged under previous guidelines, Boudin also promoted non-carceral dispositions for charged defendants. Under authorizing legislation from the state, Boudin quickly introduced primary caregiver diversion, under which charges against defendants caring for minor children were suspended for 24 months while the parent-defendant underwent counseling or training, following successful completion of

mitigated or narrowed in application by recent legislation.

²⁰ The most infamous example was the use of “stop and frisk” by the New York City Police Department, which gave rise to the class action suit *Floyd v. City of New York*. In 2013 a federal district court found that the New York Police Department policy had been applied unconstitutionally and required that changes be implemented. Retrieved on June 29, 2023, from

https://scholar.google.com/scholar_case?case=390056199313197546&q=related:Uc8BjfdBH7AJ:scholar.google.com/&hl=en&as_sdt=0.5&scioq=UNITED+STATES+DISTRICT+COURT+SOUTHERN+DISTRICT+OF+NEW+YORK++DAVID+FLOYD,+LALIT+CLARKSON,+DEON+DENNIS,+and+DAVID+OURLICHT++vs+THE+CITY+OF+NEW+YORK,+et+al

²¹ In *re* Humphreys destabilized the status of cash bail in California, triggering a series of interventions by the California state legislature, the California Supreme Court, and the voting public through a referendum supported, paradoxically, by both the bail bond industry and by reformers. While the industry was clearly motivated to preserve its livelihood, reformers were troubled by vagueness in the systems of “risk assessment” that were designed to help courts decide on pre-trial release of defendants (McCrum, 2022). The legislature continues to grapple with the problem as of this writing, following the failure in September 2022 of yet another reform bill (Thompson, 2022).

which charges were dismissed.²² In a few cases, Boudin or his deputies permitted diversion to defendants accused of violent crimes, a significant departure from prior practice, and requiring amendments to charging documents to add divertible offenses. Plea bargains offered under Boudin to charged defendants involved no or considerably less jail or prison time as compared to previous administrations, and his deputies typically demanded shorter jail or prison terms following convictions at trial. Boudin also pledged not to cooperate with the U.S. Customs and Border Patrol in cases involving non-citizens and tried to craft dispositions that minimized immigration consequences of their criminal convictions.²³

The decarceration theme so central to Boudin's policies also carried through to his establishment of both a Post-Conviction Unit and an Innocence Commission. The former was created to review cases in which the sentences imposed may be excessive or in which the convictions may otherwise be legally questionable while the latter was tasked with evaluating cases where an incarcerated person asserts that they were wrongfully convicted. In other words, decarceration was also being extended to cases in which convictions had already been achieved under prior administrations and some in which convicts were already serving sentences.

Racial equity seemed the more relevant goal in Boudin's campaign promises, and subsequent actions, in relation to police misconduct. Since the 2014 police killing of Michael Brown in Ferguson, Missouri, and continuing through the murder of George Floyd in Minneapolis in May 2020 – and truthfully, both before and since – police violence against Black men is a salient concern of both progressive criminal justice reformers and wide swaths of the U.S. public. Prosecuting police who employ unjustifiable or excessive force against persons of color was a promise made by Chesa Boudin on the campaign trail just as it has been for virtually every progressive prosecutor in running for office during the last decade.

²² There are a number of different kinds of diversion that are authorized under the California Penal Code. Speaking broadly, diversion may be sought in cases involving first-time offenders in non-violent cases; eligibility standards are often established for each county by the local DA, while the court determines whether an individual defendant meets those standards. The DA, however, can, in effect, permit an individual defendant who would be ineligible based on the charged offense to become eligible by amending the charging document with addition of a divertible charge.

²³ Many crimes can subject non-citizens to deportation, exclusion from admission, or denial of naturalization under U.S. law.

Within weeks of the Floyd murder, Boudin took several actions to strengthen police accountability and to respond to instances of police violence. These included support for a resolution brought to the San Francisco Board of Supervisors to bar the hiring of police officers with prior records of misconduct, adoption of a policy not to charge cases relying solely on the testimony of officers with histories of misconduct and issuing a policy directive to provide compensation to victims of police violence (San Francisco District Attorney, 2020). He also initiated prosecutions against several police officers, including the first two instances in which on duty San Francisco police officers were charged with homicide (Cabanatuan & Swan, 2021); the victims in both cases were Black.

All the above-described policies and actions taken by Boudin were, as noted, consistent both with his campaign promises and with one might call the playbook of the movement for progressive prosecution. Somewhat more of an outlier was his establishment of an Economic Crimes Against Workers Unit within four months of taking office, one of the first of its kind in the nation. In 2021 the unit brought pathbreaking civil suits against food delivery service DoorDash and another corporation for misclassifying gig workers – on which the business models of both corporations were built – as independent contractors rather than employees, thus denying them employment benefits (DiFeliciantonio, 2021). Gig workers in San Francisco are overwhelmingly people of color and immigrants (Dickey, 2020). These suits could not have comforted other major gig worker-dependent corporate giants such as Instacart, Lyft and Uber, all headquartered in San Francisco. Boudin also filed suit against several in-state manufacturers of parts for home-assembled “ghost guns,” which are unregulated and untraceable, and are increasingly being used in violent crimes nation-wide.²⁴

5. THE PANDEMIC WILDCARD

When Chesa Boudin took office in January 2020, no one could have predicted how rapidly, and radically, life in San Francisco would shift just nine weeks later. But it did, with the institution of a regional stay-at-home order on March 16 of that year due to the onset of the Covid-19 pandemic. Residents of the

²⁴ The manufacturers were Blackhawk Manufacturing Group, Inc.; GS Performance, LLC; MDX Corporation.

six-county Bay Area were required to stay indoors, to venture out only for essential purposes, and not to travel more than five miles from their residences.

This was simply the local version of the pandemic response that was, in every way – economic, social, political, and more – a shock unrivaled in recent U.S. history, perhaps going back to World War II or the Great Depression of the 1930s. Other nations, of course, experienced the pandemic in their own ways, all of them trying to one degree and in one form or another.

Hundreds of thousands of commuters who had spent every day of their working lives in San Francisco for years or decades, were suddenly absent from the city. The downtown financial district, almost entirely commercial with very few residents, was instantly a ghost town. Hotels and restaurants were closed, and tourism ground to a complete halt. Many employees of businesses large and small could not work. Educational institutions were shut down as families sheltered together. Homeless shelters closed, pouring even more unhoused into the streets each night. Jails populations were also deliberately reduced out of health concerns, accelerating Boudin's decarceration strategy still further.

As weeks of confinement stretched into months, it became increasingly apparent that the pandemic was exacting a heavy toll on people in social and psychological terms, both locally and nationally. Isolation, fear of Covid, and loss of income were causing stress that was manifested in a variety of ways in social behavior. When restrictions on driving were loosened, average traffic speed increased significantly, and traffic deaths soared, notwithstanding lighter traffic (National Transportation Research Nonprofit, 2022). Four in ten adults complained of anxiety or depressive disorder, up from 1 in 10 prior to the pandemic, and substance and alcohol abuse increased substantially (Panchal *et al.*, 2021). Drug overdose deaths in San Francisco jumped by 50%, especially among the homeless, exacerbated by the increase in availability of the highly potent synthetic opioid fentanyl and the closure of substance abuse services (Appa, Rodda, & Cawley, 2021). Many homeless overdose deaths occurred on sidewalks and in doorways, places readily visible to the public. As the pandemic wore on, and the possibilities of remote work increased, more than 50,000 residents, disproportionately younger ones, moved out of San Francisco in a single year, causing an unprecedented population drop of more than 6.3%, greater than that of any major U.S. city (Li & Neilson, 2022).

The pandemic also impacted crime patterns and the criminal justice system in unpredictable ways in San Francisco and in many other cities in the United States. With most people spending time at home, and remote workers not commuting into the city, perhaps not surprisingly, the overall crime rate plummeted, as did crimes in almost all categories, including violent crime. There were several exceptions, including home burglaries which skyrocketed by nearly 50%; auto thefts, which increased by just over 20%; and murders, up 17%. The latter figure, however, represented in absolute terms 8 more homicides over the 41 that were registered in 2019, while nationwide increases in murder rates were estimated measured at 26% and by some as high as 35% (Neilson, 2021).

Where crimes were occurring also shifted: car break-ins, previously concentrated in shopping and tourist districts, spread to residential neighborhoods that had suffered fewer of them before the pandemic. Indeed, the increase in home burglaries was almost certainly due to the abrupt halt in tourist and commute traffic. Tourists, especially from foreign countries, have long been favored targets of thefts in San Francisco – and probably other cities – both for the cash, cameras, and other expensive goods they bear with them, and for the fact that they typically have returned home long before any legal process can commence against an arrestee, and thus cannot serve as witnesses in a case. This, in turn, often leads prosecutors not to file cases against arrestees in with foreign crime victims. Fewer commuter cars and shoppers from around the region probably also diminished the opportunities for car break-ins. The resulting home burglaries, however, also meant that a greater proportion of the burdens of property crimes was shifted from non-voting tourists and commuters to San Francisco homeowners and renters, who voted in the city. And, of course, the intrusiveness and threat associated with home burglaries is considerably greater than was so of car burglaries.²⁵

San Francisco also witnessed an uptick in what have been widely perceived to have been anti-Asian hate crimes, a high proportion of them committed against elders (Associated Press, 2022). This was in keeping, sadly, with national trends, which saw a 77% increase in reports of crimes against Asian Americans from 2019 to 2020. The phenomenon has been widely explained as Covid-driven, fueled by

²⁵ Many of the home burglaries were entries of garages, not the living areas of homes. Many San Francisco homes have street-level garages while living space is situated above in second and third floors. In California law, however, an attached garage is considered part of the home, legally indistinguishable from the home's living space.

President Trump's repeated references to "kung flu" and the "China virus" (Findling *et al.*, 2022). It pays to recall here that San Francisco's 34% Asian population, while not monolithic ethnically or politically, is established, organized, and the largest Asian minority of any city over 500,000 residents in the United States (South China Morning Post, n.d.)²⁶ and thus forms an unusually influential voting bloc.

Empty streets in the downtown shopping and financial districts also meant that stores were extraordinarily vulnerable to burglaries. Most of these occurred at night, as groups of burglars, undeterred by surveillance cameras, shattered glass doors and display windows with hammers, scooped up luxury goods by the armful, then fled long before police could arrive at the scene. Business and store owners were deeply angered and frustrated by the seeming impotence of law enforcement and the criminal justice system to protect them. Their sense of outrage doubtless peaked, along with that of the public, on a Friday night in November 2021 when dozens of mostly young adults rampaged through Louis Vuitton and other high-end retailers in Union Square during store hours, making off with thousands of dollars of goods while security guards watched helplessly (Echeverria, Said, & Hernandez, 2021). Surely, it seemed to many, crime in the city was spiraling out of control, an impression endlessly amplified by both legacy and social media.

The San Francisco criminal justice system was not spared the disruption of the pandemic. Judges, court staff, attorneys for both prosecution and defense and jurors were all subject to the stay-at-home order just like other citizens. It was weeks if not months before the courts could gear back up, adapting awkwardly to virtual proceedings, and causing lengthy delays in trials. Virtual tools provided an imperfect stopgap to trials and other ancillary services, such as Alcoholics or Narcotics Anonymous meetings – better than nothing, to be sure – but far less effective than in-person encounters.²⁷

6. UNPACKING THE RECALL

²⁶ This was true as of the 2010 U.S. census data, and likely remains generally accurate. Honolulu, with 68.2% Asian Americans of its roughly 347,000 residents have the highest percentage of any American city. The other top ten cities are all in California, 8 of them in the San Francisco Bay Area.

²⁷ This was the assessment of an anonymous San Francisco Superior Court judge interviewed by the author on September 23, 2022.

Recalls – the removals of officials from their offices before the completion of their prescribed lawful terms – were among the tools introduced into California state law during the early 20th century Progressive Era to bolster direct democracy and diminish the power of monied elites and corrupt politicians.²⁸ Many California counties and municipalities followed suit, although local rules vary somewhat from jurisdiction to jurisdiction. Generally, however, a recall begins when a small number of citizens file a notice of intent. That filing opens a window of time within which proponents of the recall must gather a larger number of certified signatures, ranging from 10-20% of registered voters, depending on the size of the jurisdiction and the office in question. If the threshold is reached, the recall is placed on the ballot in a special election. If the threshold is not met within the prescribed time window, the recall petition fails.

For many years both recalls and their close cousins, referenda, were rare in California. But they have greatly increased in frequency in recent years. Ironically, because of the logistical challenges and the expense of signature gathering (signature gatherers are typically paid), coupled with the costs of political advertising, recalls and referenda have morphed from their populist origins into instruments for special interests – those with the both the deep pockets and the motivation to see the cumbersome process through.²⁹ Nonetheless, most recalls, and referenda fail.

Why did the 2022 recall of Chesa Boudin succeed? There is no single factor, but rather a multitude of factors, that produced this exceptional result.

To begin, San Francisco's scale and population density made recall more logistically and financially feasible than it would have been in a larger jurisdiction. It is one thing to gather 50,000+ signatures in a geographically small space with under a million residents, and another entirely to have to seek more than half a million signatures across a land area 100 times that of San Francisco, as that of Los

²⁸ 18 other U.S. states adopted recall laws, mostly in that same period. Voter initiatives (sometimes called "referenda" or "propositions") were another Progressive Era innovation in California and elsewhere that permitted legislation, including state constitutional amendments, to be brought directly to the electorate for approval and adoption.

²⁹ Two competing propositions were on the California state ballot for November 2022 addressing online sports betting. Combined spending by the two camps on political advertising had already reached \$357 million not quite two months before the election. It is also fair to see recalls and referenda as part of a growing portfolio of procedures currently being wielded by right wing forces in the United States to disrupt and foil democratic elections, along with gerrymandering, restrictions on voting rights, lawfare, refusals to certify election results, and more.

Angeles County, where two recall efforts against a progressive prosecutor have failed since 2020 (Karlman, 2022). This rendered Boudin vulnerable to a well-financed recall effort funded by a relative handful of wealthy opponents. 80% of the \$7 million spent in support of the recall effort came in donations of \$50,000 or greater, and three individuals donated more than \$500,000 each. Meanwhile, fewer than 10% of the recall campaign donations were under \$10,000. The roster of donors, both individual and institutional, came primarily from the real estate and high-tech industries (McCarty, 2022). Recall opponents raised approximately \$3 million from a higher proportion of smaller donors.

As we have seen, Chesa Boudin was elected in 2019 by a relatively narrow margin of 51% to 49% and a recall effort against him was initiated even before he took office. It was a far more tenuous starting foundation than those of some other progressive prosecutors, such as Larry Krasner in Philadelphia, elected by a nearly 50-point margin in 2017 and re-elected on a nearly 40-point margin in 2021. Strong mandates have been given to progressive prosecutors in cities with much larger Black populations than San Francisco's 5% – Philadelphia, for example, is greater than 41% Black – and a not coincidental older infrastructure of civil society organizations working toward criminal justice reform – as in Los Angeles.³⁰ Moreover, San Francisco uses ranked choice voting, and Boudin was the first choice of 36% of the voters in a low turnout year, which may have contributed to the sense among his critics both that he lacked a broad mandate for aggressive reforms and that he was politically vulnerable.

His critics may not have been far off the mark. San Francisco is a very progressive city when it comes to LGBTQ issues and drug policies. But support for progressive prosecution may have been thinner in San Francisco than it was wide – in other words, many San Franciscan voters may have supported criminal justice reform in the general and abstract, while harboring reservations about concrete reformist measures – especially a robust commitment to decarceration.³¹ Moreover, historically, San Francisco's progressive principles have sometimes faltered in the city's treatment of its Black residents, who, as the prime victims of mass

³⁰ Personal interview with former DA Chesa Boudin in San Francisco, 6 September 2022.

³¹ If so, that would be consistent with national sentiments. Sutton (2022) cites a poll showing that while 52% of voters nationally wanted to reduce numbers in prisons, only a third or so would reduce sentences for violent offenders – the majority of people in prison – and fewer than a quarter would reduce sentences for “crime in general”.

incarceration locally and nationally, also have the most to gain from the progressive prosecution movement.³²

That certainly seemed evident in the public reaction to the case of Troy McAlister, who, while on parole from prison had committed a rash of crimes, including several non-violent offenses in December 2019 in San Francisco. These culminated on New Year's Eve of 2020 crash that killed two pedestrians in San Francisco. The car McAlister was driving had been stolen in adjacent San Mateo County; an illegal handgun and methamphetamines were found in the car; McAlister fled the scene on foot but when apprehended nearby was found to be under the influence of alcohol.

This was a horribly tragic crime for which Boudin arguably suffered unjustifiable blame. Following McAlister's arrests in December, from which he had been released from custody, Boudin's office had elected to refer him to the California Department of Corrections (CDC) on a parole violation. McAlister had previously suffered serious felony convictions that Boudin's deputies could have charged as "strikes" but did not. Still, the decision to refer McAlister to the CDC was in line with prior practice in San Francisco as well as in adjacent jurisdictions.³³ The media uproar still took nationwide scope, and especially enflamed local supporters of a recall.

Pandemic-related anti-Asian hate crime without doubt undermined Boudin's standing with a large and crucial voting bloc in the city. The palpable sense of vulnerability felt by Asian Americans in San Francisco was not assuaged when Boudin was reported to have described the killer of an elderly Thai American as having had a "temper tantrum". Boudin later clarified that he had been referring to the killer's behavior before encountering the victim, but the family, and surely parts of the Asian community, received Boudin's comment as trivializing and insensitive. A civil suit was filed against Boudin by another Asian victim of crime, Anh Lê, alleging that Boudin improperly declined to file a hate crime in his case and failed to inform him, per a DA's statutory duty, of the plea bargain reached with the

³² We have already noted above the statistics demonstrating San Francisco's disproportionate stops, arrests, searches, and uses of force against Black people (Gardiner & Neilson, 2022). Deliberate post-World War II policies of urban development and processes of gentrification have also forced the exodus of many Black residents from the city, destroying, for example, the Fillmore District, which was a thriving cultural center for the black community termed "the Harlem of the West" for its numerous jazz venues.

³³This common policy stems from judicial efficiency and resource concerns: CDC parole violation hearings, as compared to new filings, are streamlined and low-cost proceedings.

defendant. The plaintiff later withdrew the suit, as evidence emerged contradicting several of its key claims, but by that time the public relations damage had been done (Kukura, 2022).

Boudin, as other progressive prosecutors, insisted that his approach to prosecution was “data-driven,” and reportedly referred commonly to academic studies to support his policies.³⁴ Falling crime rates during his term clearly supported him and controverted claims that his administration had led to a rash of crimes. As we are seeing in retrospect, however, statistics and academic studies are unpersuasive in the face of personal experiences and anecdotal evidence, the latter, especially, as magnified by social media. As one liberal white woman and resident of the wealthy Pacific Heights neighborhood remarked to this author, “We had lived in San Francisco for twelve years and never felt unsafe; we always parked our car on the street. But then our car was broken into 4 times in the last year! What are we supposed to think?”³⁵

San Francisco in the 21st century is a tech-oriented community. Virtually all businesses and many homes now sport surveillance cameras, and social media engagement is high. Thus, many home burglaries were captured on video and immediately uploaded to social media. The website of NextDoor.com, popular in San Francisco and which empowers neighbors to communicate with each other over a wide variety of matters of community interest – public safety being a prominent one – created the sense that crime had become, in the words of a San Francisco Superior Court judge, “proximate and personal” for many city residents.³⁶ This was all at a time when many people had been forced into idleness by the pandemic, and, without the distractions of work, commuting, school, and the other myriad activities that had previously consumed their hours and days, had little better to do than scroll through social media for news and entertainment.

Legacy media – television and major newspapers such as the San Francisco Chronicle – were not different. “If it bleeds it leads”, is a longtime principle in American journalism, and some reporters and columnists appeared to see it as

³⁴ Interview of Chesa Boudin in San Francisco by the author 6 September 2022. Both Boudin and Los Angeles County DA George Gascón characterized progressive prosecution as “data driven” in a virtual webinar held 7 September 2022 by the Prosecutors’ Alliance of California and attended by the author. According to a veteran SF prosecutor interviewed by the author on 16 September 2022, Boudin cited a “Stanford University study” showing that sentencing enhancements disproportionately impacted people of color.

³⁵ Interview of anonymous San Francisco resident by the author on 24 September 2022.

³⁶ Interview of anonymous Superior Court judge by author on 23 September 2022.

their duty to echo the heightening public concerns over what felt like a rising tide of crime. Here, for example, is just one lurid headline from the local CBS television affiliate on the Anh Lê case: “Victim in ‘Brutal’ Chinatown Attack Sues San Francisco DA Chesa Boudin Amid Shocking Jump in Anti-Asian Hate Crimes” (CBS San Francisco, 2022). As we have seen, substantial parts of the Lê case were later revealed to be untrue.

By no means was the resulting ire of San Francisco voters directed exclusively at their DA. In fact, 3 members of San Francisco’s Board of Education were recalled in February 2022 over a series of actions culminating in the elimination of merit requirements for entry into the district’s highly rated Lowell High School.³⁷ Extensive polling done by the San Francisco Chronicle newspaper just weeks after the successful recall of DA Boudin showed deep despair over the condition of the city, and both anger and frustration over the performance of all city officials, including the mayor (Moench, 2022b), the Board of Supervisors (Morris, 2022), and the School Board (Tucker, 2022). Perhaps it is not an exaggeration to say that, had other city officials’ heads been offered on the chopping block instead of Boudin’s, voters might have swung the axe just as lustily as they did against their DA. It did not help Boudin that this was an up-down vote on his tenure alone, not a contest against other candidates who may have split the vote or seemed even less desirable than Boudin himself.

It was not an accident, of course, that Boudin was selected by monied interests for sacrifice over, for example, Mayor London Breed, a centrist Democrat generally perceived to be friendly to business interests. To city residents, however, Boudin may have simply served as a symbol of a failing and dysfunctional city government writ large, made accessible to their retaliation courtesy of the proponents of his recall. As our previously quoted Pacific Heights resident told this author: “The most fundamental duty of city government is to provide its citizens with a sense of safety. They [meaning San Francisco city officials] failed in that basic duty. The recall was our direct democratic way of telling the city: we’ve had enough!”

³⁷ As one observer points out (Sutton, 2022), the school board recall triggered a major mobilization of the Asian American community, which saw the board’s move as a threat to admissions for high-achieving Asian students. As such it provided the organizational readiness and sense of empowerment among Asian Americans that was channeled into the later recall drive against DA Boudin.

DA Boudin certainly faced internal resistance from deputies within his office with the afore-mentioned churn of employees and administrative disorder, and this resistance eventually was made public. Interestingly, neither the internal criticism nor the attacks launched by the recall effort were phrased as repudiations of the goals of criminal justice reform. Instead, critics mostly focused on Boudin's alleged mismanagement of his office. For example, he was chided by several veteran prosecutors for engaging in dispositions of individual cases, sometimes undercutting his deputies' positions in plea bargaining via direct communications with defense attorneys. This practice, it was alleged, was dispiriting to line deputies, who generally are afforded discretion (within office guidelines) in case disposition. As one prosecutor-critic pointed out, Boudin could not possibly engage in all the 20,000 odd cases prosecuted by his office on an annual basis, creating the prospect of unequal justice as between cases in which he did and didn't directly intervene.³⁸

If these seem like valid criticisms, one might also wonder to what extent Boudin's intervention in individual cases was a result, not a cause of internal resistance. The strong impression left with this author, through several interviews with either former or current San Francisco prosecutors, is that senior members of the office, while comfortable and even enthusiastically supportive of some reforms pursued either by Boudin or his predecessor, balked at two aspects of the new regime's approach. The first was blanket bans on sentencing enhancements, as opposed to the exercise of discretion in each individual case. The second was the application of decarceration principles, whether in respect of bail or in plea dispositions or sentencing, to cases involving violence or other very serious charges. Prosecutors raised in an earlier more carceral era, firmly believing in protection of public safety as a paramount prosecutorial duty, drew the line at cases of violence. Chesa Boudin simply did not. This is not because Boudin undervalued public safety, but because he did not see incarceration as ultimately serving it in the same way as some of his senior deputies. The philosophical rift between Boudin and some of his staff was underscored in their minds by his status as a son of incarcerated parents.

³⁸ Former San Francisco deputy public defender and now private criminal defense attorney Martin Sabelli also suggests that Boudin's relatively "thin" trial experience of about 5 years also weakened him internally (Sabelli, 2022). Extended Interview: Former Prosecutor Don Du Bain. Retrieved on June 29, 2023, from <https://www.nbcbayarea.com/investigations/extended-interview-former-prosecutor-don-du-bain/2697872/>

But internal dissent against incoming progressive prosecutors, occasionally bordering on revolt, is typical, not exceptional, and has not proved fatal to their administrations. George Gascón, who, after resigning as San Francisco DA in 2019 and being elected Los Angeles County DA in 2020, was sued within a month of taking office by the union representing his own deputies for attempting reforms the union claimed controverted state laws (Solis, 2020). Gascón has, nonetheless, survived two recall efforts. Even in Los Angeles County, with the largest staff of prosecutors in the world, in terms of votes they are but a handful. What internal dispute creates, however, is an opening for outside forces to exploit. Boudin's public standing can only have suffered when two senior deputies, Don Du Bain and Brooke Jenkins, resigned and became public spokespeople for the ultimately successful recall effort.

The San Francisco Police Officers Association (SFPOA) that had spent heavily to defeat Boudin in 2019 remained a relentless critic of the DA throughout his abbreviated term. While Boudin claimed to have a collegial and cooperative relationship with Chief of Police Bill Scott, anecdotal evidence supports claims that police officers also engaged in on-the-job resistance to Boudin policies, declining to arrest suspects even of crimes witnessed and called in by civilians, while telling them that arrests were pointless when the DA would decline to charge or otherwise fail to keep criminals off the streets.³⁹ This may have been a factor in declining San Francisco police clearance rates during the pandemic (Neilson, 2022b).

San Francisco Mayor London Breed, as previously noted, supported Boudin's main opponent in the 2019 DA election. Her policies toward crime were clearly at odds with the DA's at some junctures. This was most evident in her December 2021 declaration of a 90-day emergency regarding the Tenderloin neighborhood, where drug overdose deaths and street drug use and dealing were rampant, leading to a jump in drug-related arrests (Moench, 2022a). In sum, it was clear that San Francisco city government was presiding over a restive voting population without a coordinated strategy to deal with public safety, which, whether true or not, was widely perceived as being in crisis.

³⁹ Interview with anonymous former San Francisco deputy public defender and city resident by the author on 9 September 2022. A recent study has suggested that San Francisco police have increased arrest rates following the recall of Chesa Boudin and the appointment of Brooke Jenkins as interim DA (Neilson, 2022b).

The final 10-point margin by which the recall succeeded was narrower than anticipated; polling going into the election suggested that Boudin would suffer a resounding defeat. The second and successful recall effort had been headed by two Democrats, Mary Jung and Andrea Shorter. While several local political clubs, former and sitting Supervisors, State Assembly members, unions, and newspapers lined up in support of Boudin and against the recall, two SF Supervisors, key local Asian American political clubs, the SF Chamber of Commerce, and other business groups supported the recall. Preliminary precinct analysis suggested that Boudin was defeated by a coalition of Asian American and affluent white voters (Tong & Crane, 2022).

7. CONCLUSION

We began by disputing the claim that Boudin's recall signified broad discontent with the goals of progressive prosecution, and by asserting, instead, that a unique confluence of circumstances specific to San Francisco and the unprecedented impact of Covid combined to produce this unusual development. Certainly, progressive prosecutors or candidates for office like Diana Becton in Contra Costa County, or Pamela Price in Alameda, both across the bay from San Francisco to the east, have achieved recent electoral success, as did Rob Bonta, elected as California State Attorney General.⁴⁰ Hopefully our discussion to this point has sufficiently elaborated what we believe to be the primary factors contributing to the successful recall of Boudin.

If, as we argue, the cause of the recall was multifactorial and the combination of them not likely to be produced elsewhere or even in San Francisco in the future, it follows that teasing out lessons to be learned will be challenging, and any conclusions must be tentative. With that caveat, and acknowledging that hindsight is 20-20, let us do our humble best.

The first lesson, one is tempted to argue is: don't try to introduce aggressive criminal justice reform at the beginning of a pandemic! This may seem facetious, but it is not. All things considered, it seems clear to this author that absent the pandemic and its sequelae, this recall would not have succeeded.

⁴⁰ Others, such as Sajid Khan, a progressive candidate for DA in Santa Clara County, to the south of San Francisco, have fallen short.

“So what?” a reader may be justified in asking; such an event is not likely to recur. But, as experts increasingly maintain, pandemics may become the norm in the future. Other social and political disruptions associated with climate change are virtually guaranteed in our future – they are, indeed, part of our present – and bear the capacity to deliver similar shocks to the world of crime and criminal justice. Hence, it is perhaps not simply fanciful to suggest that reformers tread lightly and cautiously during the major social disruptions that may become our new normal.

Second, what might be termed the “heroic model” of criminal justice reform is not likely to succeed, and instead is likely to face political opposition and higher odds of defeat or reversal. True, prosecutors may be, “the most powerful actors in the criminal justice system” (Harris, 2019), but as to crime they remain downstream actors, lacking command of the kinds of resources – mental health and addiction services, housing, education, jobs and more – that are necessary to address the root causes of crime. For this reason, it may be advisable to approach reform not only with comprehensive plans (which already exist), but, where feasible, also to seek to advance them through electoral slates – candidates, in other words, for local level offices who campaign together on the bases of promises to collaborate in implementing comprehensive plans.

Third, while the urge to fulfill campaign promises is doubtless strong,⁴¹ progressive prosecutors must balance that urge against the possible virtues of incrementalism. Two of the longer tenured and therefore successful progressive prosecutors, Dan Satterberg of Seattle and George Gascón, first of San Francisco, then of Los Angeles, evolved both in their personal politics and in their progressive office policies. Satterberg, first appointed to succeed his deceased boss in 2007, ran in his first of several elections as a Republican, only switching his party affiliation to Democrat in 2018 to disavow any association with President Trump (Harris, 2019). Gascón, during his San Francisco tenure, introduced several policies, such as permitting non-life and sometimes more lenient pleas in charged three strikes cases, that were not implemented as blanket policies but allowed similar outcomes. In the cases of Satterberg and Gascón, their incrementalism naturally paralleled the evolution of their views. But had Boudin deliberately adopted a phased plan, with first-, second-, third-, and fourth-year goals, he might not have evoked the same degree of internal resistance that gave outside forces the

⁴¹ This is exactly what Chesa Boudin cited in our interview.

ammunition to bring him down.⁴² Moreover, he might have had interim successes on which to further extend his initially narrow electoral mandate.

Fourth and finally, as much as progressive prosecutors may desire to work above the political fray, that does not seem possible today. Every act will be scrutinized, broadcast on social media, and manipulated for political ends by enemies of reform. Rather, progressive prosecutors must be as attentive to messaging and counter messaging as they are to forming actual policy. The challenge here should not be underestimated: it is very hard to overcome anecdotal evidence gleaned from the internet and supported by eerie images uploaded from home surveillance cameras, with cold statistics. It is a lamentable reality, however, that the challenge must be faced and overcome.

For those sympathetic to progressive prosecution, or even simply fascinated though skeptical of its promise, this is still a hopeful time, even in San Francisco. Mayor London Breed's interim appointee Brooke Jenkins (the same former Boudin employee who left to join the recall effort) has proceeded cautiously, rolling back some Boudin policies incrementally, and meeting publicly with representatives of the Asian American community to recognize their fears and concerns (Neilson, 2022c). On November 8, 2022, Jenkins overcame several allegations of ethical lapses to prevail comfortably over several challengers (not including Boudin) in a special election, and thus won the right to serve out the remaining year of Boudin's term (Hao, 2022).

Boudin has not indicated whether he will run again for his old seat in the next general election, scheduled in November 2023. Nor is it clear who would prevail, in that race, were Jenkins and Boudin both to contest for the seat. It is entirely possible that Jenkins will suffer the same wrath of the voters after more than a year of incumbency, as the city's seemingly intractable problems persist under a dysfunctional city government and with a deeply despairing public. Chesa Boudin may still have the last word.

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