DEFENSE LAWYERING IN THE PROGRESSIVE PROSECUTION ERA

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The movement to elect so-called "progressive prosecutors" is relatively new, but there is a robust literature analyzing it from a number of angles. Scholars consider how to define "progressive prosecution," look at the movement through a racial justice lens, and examine it in the context of rural spaces, deportation, and the pandemic. One essay even offers a "progressive prosecutor's handbook." But what of the defense lawyer representing clients in a progressive prosecution jurisdiction? With the election of the new prosecutor, things may have shifted from a highly-charged, adversarial relationship with a harsh law-and-order office to something quite different. Defenders in such jurisdictions face a number of complex decisions in both individual case representation and systemic reform efforts in this relatively new environment. Yet there is no defense lawyer's handbook for practicing in the progressive prosecution era.

The core role of the defender—zealously seeking the best outcome to meet the client's goals—does not change when a progressive prosecutor enters the picture. But the fact that the new prosecutor's goals and policies are different shifts defender goalposts in significant ways. These shifts must be accounted for in assessing the opportunities and challenges for defenders, as well as their performance, in these new situations. After examining criminal defense lawyering theory and regulation in practice, this Article discusses an existing typology of "progressive prosecutors"—from the "progressive who prosecutes" to the "anti-carceral prosecutor"—and then sketches out a potential typology of defense attorneys. Next,

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it examines a major concern for defenders that cuts across all other issues, which is the progressive prosecutor who posits themself as the main reformer of the criminal legal system, and sometimes even as a transformer or hero. This is a narrative that some progressive prosecutors seek to advance, and others do not disclaim. Defenders should not fight to claim this narrative as theirs, as they do not own it. But they cannot simply ignore prosecutors who claim the reform mantle—since doing so might negatively affect their relationships with clients, their families, and the communities they serve.

Consideration of the defender's role in individual advocacy in a progressive prosecution jurisdiction raises a number of questions, the most fundamental being: what changes might defenders make to get even better outcomes for clients? Although such changes could touch upon every phase of a criminal case, this Article focuses on opportunities and challenges for defense advocacy at the pre-charging and plea-bargaining stages. Finally, the Article turns to the defender's role in advocating for systemic change in the potentially (although not necessarily) receptive environment of a progressive prosecution jurisdiction. There are any number of reforms or roads to transformation that defenders might advocate for in the mass criminalization era, with an eye on changes that survive the ephemeral and precarious position of the progressive prosecutor. The focus here is on defenders pushing progressive prosecutors to give up some of their own funding and support parity of funding for public defense, and challenging prosecutors to move beyond low-hanging fruit—like declining to prosecute minor misdemeanor cases—and take on reform in the realm of serious and violent offenses.

INTRODUCTION

The so-called "progressive prosecution" movement, at first quietly funded by George Soros and then much less quietly supported by a broader coalition,[1] has resulted in the election of a number of prosecutors in major cities and suburbs who pledge to reform and sometimes to shrink the criminal legal system. One news article described these prosecutors as "[s]ounding more like liberal activists and civil rights lawyers than traditional hard-nosed DAs."[2] In 2019, one U.S. Attorney

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[1] *See, e.g.*, Matt Ferner, *George Soros, Progressive Groups to Spend Millions to Elect Reformist Prosecutors*, HUFFINGTON POST (May 12, 2018), https://www.huffpost.com/entry/george-soros-prosecutors-reform_n_5af2100ae4b0a0d601e76f06 [https://perma.cc/NPC2-JK76] ("Soros, the ACLU, the two PACs and a constellation of allied state-level groups hope that by organizing activists, educating voters and dumping money into district attorney races across the country, they can slowly start to replace more of the country's 2,400 top prosecutors with reformers . . . ."); Scott Bland, *George Soros' Quiet Overhaul of the U.S. Justice System*, POLITICO (Aug. 30, 2016), https://www.politico.com/story/2016/08/george-soros-criminal-justice-reform-227519 [https://perma.cc/VX2G-X28V]; *see also* ACLU Found. Cal., *Hey, Meet Your DA*, MEET YOUR DA, https://meetyourda.org/ [https://perma.cc/DPS9-HAJ8] (last visited Aug. 29, 2023) (featuring video of John Legend, on ACLU of Northern California website, explaining that "[t]he District Attorney is an elected position which represents your interests in the criminal justice system. It's up to you to hold them accountable."); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 2 (2019).

[2] Del Quentin Wilber, *Once Tough-On-Crime Prosecutors Now Push Progressive Reforms*, L.A. TIMES (Aug. 5, 2019), https://www.latimes.com/politics/story/2019-08-02/once-tough-on-crime-prosecutors-now-push-progressive-reforms [https://perma.cc/636G-UHXQ].

characterized the situation in his jurisdiction, with the then-recent election of Larry Krasner as the District Attorney, as a complete role-shift: "'Philadelphia doesn't have a prosecutor . . . [t]he city has a public defender with power.'"[3] Similar critiques (and far worse, particularly for prosecutors of color[4]) have been leveled against former St. Louis, Missouri top prosecutor Kim Gardner; Manhattan District Attorney Alvin Bragg; Cook County State's Attorney Kim Foxx; and others who claim the progressive mantle.[5]

It is certainly not the case that jurisdictions with progressive prosecutors have actually elected a public defender with power. After all, these prosecutors are still securing convictions and locking up plenty of people.[6] And the jury is still out on whether some of these recently elected prosecutors are truly "progressive," if there is even consensus about the meaning of that term.[7] However, significant change has already happened in some jurisdictions. This includes newly elected prosecutors announcing that they will decline to bring charges in entire categories of low-level misdemeanors,[8] and a small number of prosecutors who joined defense counsel on motions for release due to the COVID-19 pandemic.[9] In a few jurisdictions, progressive prosecutors have even dismissed or declined to

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3 *Id.* (discussing then-recently elected DA Larry Krasner). The U.S. Attorney was likely aware of Krasner's earlier statement, made to a group of law students, that "'[a] progressive D.A. is not the same thing as a traditional D.A.' . . . 'You might call me a prosecutor with *com-passion*. Or a public defender with *pow-er*.'" 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/PCT4-XWDF].

4 *See* discussion *infra* notes 61–63.

5 *See, e.g.*, David Jackson, Todd Lighty, Gary Marx & Alex Richards, *Kim Foxx Drops More Felony Cases as Cook County State's Attorney than Her Predecessor, Tribune Analysis Shows*, CHI. TRIB. (Aug. 10, 2020), https://www.chicagotribune.com/investigations/ct-kim-foxx-felony-charges-cook-county-20200810-ldvrmqv-v6bd3hpsuqha4duehmu-story.html [https://perma.cc/HZE7-W8B8].

6 Joshua Vaughn, *The Successes and Shortcomings of Larry Krasner's Trailblazing First Term*, THE APPEAL (Mar. 22, 2021), https://theappeal.org/the-successes-and-shortcomings-of-larry-krasners-trailblazing-first-term/ [https://perma.cc/HLJ2-BNXJ] ("'I am not an abolitionist,' Krasner said. 'I do not think there should be no jails whatsoever. I do not believe there should be no cops whatsoever.'"); *see also* Kate Levine, *The Progressive Love Affair with the Carceral State*, 120 MICH. L. REV. 1225 (2022) (reviewing AYA GRUER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION (2020)).

7 *See infra* notes 48–60 and accompanying text.

8 *See infra* note 172 and accompanying text.

9 *See* Eda Katharine Tinto & Jenny Roberts, *Expanding Compassion Beyond the COVID-19 Pandemic*, 18 OHIO ST. J. CRIM. L. 575, 580 (2021).

prosecute certain types of felony offenses.[10] A few progressive prosecutors have supported reform of harsh sentencing laws, while others have put resources into wrongful conviction and re-sentencing units.[11]

There is also a growing body of policy papers and legal academic scholarship devoted to the topic of progressive prosecution, including one article entitled "The Progressive Prosecutor's Handbook."[12] An emerging body of empirical work studies these prosecutors, often using data those very offices provide.[13] There is an organization run by progressive prosecutors, and its director recently published a book based on interviews of progressive prosecutors.[14] There is another organization focused

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10 *See, e.g.*, Jackson, *supra* note 5 (describing how Chicago top prosecutor Kim Foxx dropped a much higher percentage of felony drug cases than her predecessor, although she dropped lower percentages of homicides, sex offenses, and aggravated assaults).

11 *See, e.g.*, Kevin Ring & Stephanie Morales, *Broad Support Exists for Ending Mandatory Minimums in Virginia*, VIRGINIAN-PILOT (Jan. 31, 2021), https://www.pilotonline.com/2021/01/30/opinion-broad-support-exists-for-ending-mandatory-minimums-in-virginia/ [https://perma.cc/3JSJ-WBP8]; Rebecca Davis O'Brien & Troy Closson, *Brooklyn Prosecutors Seek to Throw Out Scores of Convictions*, N.Y. TIMES (Sept. 7, 2022), https://www.nytimes.com/2022/09/07/nyregion/brooklyn-prosecutors-convictions.html [https://perma.cc/JY78-AWLY].

12 David Alan Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. Davis L. REV. ONLINE 25, 27–28 (2017) (noting how "[t]here is no roadmap for progressive district attorneys" and encouraging readers to "[t]hink of this as the skeletal first edition of a progressive prosecutor's handbook").

13 *See, e.g.*, Vera Inst. of Just., *Reshaping Prosecution Initiative*, VERA, https://www.vera.org/projects/reshaping-prosecution-program [https://perma.cc/XH9U-KWT2] (last visited Aug. 29, 2023) ("Vera's team of experts works directly with prosecutors to transform campaign platforms into data-informed policies and practices . . . ."); *Commons Monroe County, NY*, MEASURES FOR JUST., https://app.measuresforjustice.org/commons/monroe-county-da?utm_source=newsletter&utm_medium=email&utm_campaign=mcda-commons [https://perma.cc/8KQ3-DJET] (last visited Sept. 3, 2023) ("The Commons dashboard publishes complex data in a user-friendly format for the public to access. . . . Commons provides a comprehensive overview of criminal cases and dispositions within the Monroe County District Attorney's Office."). *Cf.* Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 805 (2020) ("Studies of and reflections on progressive prosecutors, while informative, often completely discount [the] . . . acute political divide between urban and rural areas and ignore the state of prosecution, progressive or not, in rural jurisdictions. Ignoring rural jurisdictions erases a number of communities of color throughout the United States.") (footnote omitted).

14 *Fair and Just Prosecution*, FAIR AND JUST PROSECUTION, https://fairandjustprosecution.org/ [https://perma.cc/M29B-H68G] (last visited Aug. 29, 2023) (describing how the organization "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"); MIRIAM ARONI KRINSKY, CHANGE FROM WITHIN: REIMAGINING THE 21ST-CENTURY PROSECUTOR xiv-xv (2022) (stating that the term "*progressive prosecutors . . .* is a misnomer that suggests a political label of *progressive* instead of the more apt focus on *progress*: the essence of reform").

on electing them.[15] In short, there is a lot of attention on just about all facets of the progressive prosecution movement.

But what of the defense lawyer representing clients in a so-called progressive prosecution jurisdiction? For some public defenders and private counsel, there were quick and significant shifts—from a highly charged adversarial relationship with a harsh law-and-order prosecutor to something quite different. For example, things defenders had to fight hard to achieve for clients—release without bail on misdemeanor cases, diversion for low-level cases, dismissal of marijuana charges—might suddenly be a given.[16] The cases that newer defenders typically handle might change, particularly in jurisdictions where the progressive prosecutor has announced a policy of declining to bring minor drug possession and other charges that might have previously made up a significant portion of the misdemeanor docket. The new prosecutor's potential responsiveness to wrongful conviction claims might mean the public defender devotes significant new resources to an area that previously offered little to no promise.[17]

These are just a few examples of how the defender landscape might change when a more progressive prosecutor replaces a less progressive one. In some jurisdictions, at least some members of the defense bar could now be seen as less progressive (or less protective of defendants' rights) than the newly elected head prosecutor. Other defenders may have supported the progressive prosecutor during the election. Now what? As one public defender in a progressive prosecution jurisdiction so aptly put it, defenders in progressive prosecution jurisdictions face "the risk of standing on the flight deck proclaiming 'mission accomplished.'"[18]

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15 *Real Justice*, REAL JUST., https://realjusticepac.org/ [https://perma.cc/ZD5Z-TXUQ] (last visited Aug. 29, 2023) ("Real Justice elects civil rights-minded prosecutors who use the powers of their office to reduce mass incarceration, police violence, and injustice.").

16 *See* discussion *infra* Part III.A.1.a.

17 *See, e.g.*, *Conviction Integrity Unit*, OFF. OF THE STATE'S ATT'Y FOR BALT. CITY, https://www.stattorney.org/divisions/conviction-integrity-unit [https://perma.cc/QQK3-9JAX] (last visited Aug. 29, 2023); *Innocence Project*, MD. OFF. OF THE PUB. DEF., https://www.opd.state.md.us/innocence-project [https://perma.cc/NR7C-42B5] (last visited June 2, 2023) ("The Innocence Project screens over 200 [claims] annually to assess whether an inmate claiming innocence may have a viable wrongful conviction claim. The project utilizes contemporary forensic testing on old evidence retained by police. The project litigates viable innocence claims through all stages of the proceedings.").

18 Brad Haywood, *Busting the Myth*, INQUEST (June 10, 2022), https://inquest.org/busting-the-myth-progressive-prosecutors/ [https://perma.cc/HGC4-XU5G].

There is no handbook for the defender in a progressive prosecution jurisdiction.[19] The core role of the criminal defense attorney—zealous advocacy to meet the client's goals, within the bounds of the ethical rules—does not change when the prosecutor changes.[20] Yet even if the theoretical underpinnings of the defender role do not shift, that role in reality certainly does. Indeed, the defender in a progressive prosecution jurisdiction faces a number of complex decisions with respect to both individual case representation and systemic reform efforts in this relatively new environment. For example, defenders must grapple with the possibility that their clients and clients' families may view them as complicit with prosecutors because both sides appear to be on the same page—at least in certain circumstances. This happens against the backdrop of public defenders already struggling to gain their clients' trust.[21]

Relatedly, what does zealous advocacy and a defender office committed to fighting an unjust system look like in a place where the prosecutor is touted—or even touts herself—as the change agent for reform?[22] What complications arise when the progressive prosecutor calls for collaboration with defenders, for example in post-conviction litigation handled by the prosecutor's conviction and sentencing integrity units?[23] What are the pros and cons of cooperative endeavors, and do they differ if it is cooperation for systemic reform rather than within the context of an individual case? A microcosm of these questions can be found in debates over the role of defense counsel in problem-solving courts, which are held out as collaborative and cooperative rather than adversarial (and are problematic for that same reason).[24]

When it comes to resources, chronic public defender underfunding and heavy workloads are well-documented and calls to remedy this imbalance are often intertwined with critiques

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19 Note that I am not writing here about defense lawyers who fail to zealously represent their clients. That is another issue, a problem with much commentary in the ample literature on underfunded defense, defender systems, and ineffective assistance of counsel. *See infra* note 273 and accompanying text. Although these are all significant problems, this Article focuses on the zealous, committed defender who now faces new choices after the election of a progressive prosecutor.

20 *See infra* Part I.A.

21 *See infra* notes 115–20 and accompanying text.

22 *See infra* Part I.

23 *See, e.g.*, *Conviction Integrity Unit*, *supra* note 17 ("[The Conviction Integrity Unit] . . . works in partnership with the Mid-Atlantic Innocence Project" and the University of Baltimore's Innocence Project Clinic).

24 *See infra* note 283.

of overly aggressive prosecutorial approaches. How should the need for well-funded, robust defense service be articulated in a progressive prosecution jurisdiction (or how can defenders avoid losing funding, since there is—some will argue—less for them to do)?[25] Perhaps most obviously, how might defenders best use the time and resources they would otherwise have spent on advocating for things that the progressive prosecutor might already support (e.g., broader discovery, no cash bail, and the declination[26] and diversion of more cases)?[27]

Part I examines a question that this Article's title alone might lead readers to pose: isn't the core role of the defense lawyer the same in all jurisdictions, regardless of the type, goals, and policies of the prosecutor? To put it another way, why is defense lawyering different just because the prosecutor is progressive? As Part I.A. concludes, while the theoretical foundations of the defense role might remain constant, the practical reality of how things play out on the ground leads to unique considerations for defending in such jurisdictions.

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25 *See infra* Part III.B.1. Brooks Holland and Steven Zeidman call for full funding for defender offices, to replace the misguided reliance on progressive prosecutors to reform the criminal legal system. *See* Brooks Holland & Steven Zeidman, *Progressive Prosecutors or Zealous Defenders, from Coast-to-Coast*, 60 AM. CRIM. L. REV. 1467 (2023). As they recognize, there are significant obstacles to such funding, *see id.* at 1486 n.141, and perhaps stemming the loss of any further funding is more realistic. But the current, long-standing crisis in defense services is of constitutional dimension and it should not be simply aspirational to change that situation.

26 "Declination" is a general term encompassing a variety of names across jurisdictions. *See, e.g.*, *What Does "No Paper" Mean?*, D.C. CTS., https://www.dccourts.gov/node/1290 [https://perma.cc/PKX9-5QJ9] (last visited Aug. 29, 2023) (explaining term of "no papering" in the District of Columbia); MODEL PENAL CODE: SENT'G, § 6.03(1) (Am. L. Inst., 2023) (defining "deferred prosecution" as "the practice of declining to pursue charges against an individual believed to have committed a crime in exchange for completion of specified conditions"); Kay L. Levine, Joshua C. Hinkle & Elizabeth Griffiths, *Making Deflection the New Diversion for Drug Offenders*, 19 OHIO ST. J. CRIM. L. 75, 75, 78 (2021) (calling for more prosecutorial involvement in pre-arrest "deflection programs," that use "police as first responders [who] can be integral to facilitating entry into treatment"). Law enforcement can also decline to arrest even when there is probable cause, instead issuing a warning. *Cf.* Tracey Meares, *Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation*, 111 NW. U. L. REV. 1525, 1529–30 (2017) (describing how mere contact with the police can cause harm, particularly if such interactions are persistent—such as in neighborhoods where young Black men are consistently stopped and frisked).

27 Matt Watkins, *Prosecutor Power #2: A Public Defender on the Urgency of Reform*, CTR. FOR JUST. INNOVATION (May 2018), https://www.courtinnovation.org/publications/public-defender-power-prosecutors [https://perma.cc/7LKF-WEKH] (providing transcription of interview with public defender who describes the three most important changes progressive prosecutors can make: charging decisions, bail, discovery).

To complicate the picture further, since all lawyering is highly context specific, defenders face different challenges and opportunities depending on the type of progressive prosecutor they encounter. Part I.B. thus discusses an existing typology of "progressive prosecutors" before sketching out a potential typology of defense attorneys in progressive prosecution jurisdictions.

Part II offers preliminary thoughts to frame the later discussion of individual and systemic approaches a defender might take in such a progressive prosecution jurisdiction. This frame is the narrative of prosecutor-as-criminal-legal-system-reformer, -transformer, or even -hero that some progressive prosecutors seek to advance, and others do not disclaim. The answer is not that defenders should claim this reform narrative as theirs, as they are not change agents who own it. However, defenders should not simply ignore prosecutorial claims to this narrative, as doing so might negatively affect their relationships with clients, their families, and the communities that defenders serve.

Part III puts a concrete lens on all of this. Part III.A. addresses an immediate concern for defense lawyers in a jurisdiction with a newly elected (or, increasingly, re-elected) progressive prosecutor: what will change in the day-to-day prosecution of their individual clients, given new policies and perhaps new prosecution personnel? What changes should defenders make in their individual representations to get even better outcomes for clients? Although such changes could touch upon every phase of a criminal case—from charging, to sentencing, and through any post-conviction litigation—this section considers defense advocacy at two important moments in the adversarial system: the pre-charging and plea-bargaining stages.

Finally, Part III.B. turns to the defender's role in advocating for systemic change in the potentially (although not necessarily) receptive environment of a progressive prosecution jurisdiction. While there are any number of reforms or roads to transformation that defenders might advocate for in the mass criminalization era, this section discusses two ways defenders might push progressive prosecutors to shrink their carceral footprints. First, defenders can urge progressive prosecutors to divert some of their own funding into non-law-enforcement-based social services and into achieving parity of resources between prosecutors and defenders. Second, defenders can challenge prosecutors to move beyond low-hanging fruit like declinations in minor misdemeanor cases and take on more difficult issues relating to more serious and violent charges.

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Criminal Defense Lawyering Theory, In Practice

One response to the topic of this article could be: why even consider the role of the defender in progressive prosecution jurisdictions when defenders all have the same role and responsibilities? The needle does not move, the response might continue, because defense counsel must fight hard for every individual client in every individual case. But the needle does move when the defense role in theory meets practice. If at least some of the defender's clients have a "better" environment due to a progressive prosecutor, then both individual and systemic advocacy approaches shift, even if they remain grounded in the same role definition.

A. The Core Role of the Defense Lawyer

Criminal defense lawyers practice in many varying environments and contexts. There are defenders in holistic offices with resources for noncriminal matters related to the criminal case, those defending clients in multiple courts in large rural areas with very few resources, overburdened big city defender offices, lawyers practicing in federal courts, and those focused on municipal court representation.[28] Context matters, and that is a premise of this Article. However, before turning to the particular context of defense lawyering in a

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[28] James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 Harv. L. Rev. 819, 821 (2019) (explaining that holistic defense recognizes the need for a team of professionals to address a range of a client's needs, including collateral consequences and nonlegal issues that lead clients to the criminal legal system); Jessica Pishko, *The Shocking Lack of Lawyers in Rural America*, The Atlantic (July 18, 2019), https://www.theatlantic.com/politics/archive/2019/07/man-who-had-no-lawyer/593470/ [https://perma.cc/XG7R-SBTG] (describing some of the challenges of defense lawyering in far-flung rural jurisdictions); *Defender Services*, U.S. Cts., https://www.uscourts.gov/services-forms/defender-services [https://perma.cc/Y5WZ-558X] (last visited Aug. 29, 2023) ("Today, there are 82 authorized federal defender organizations. They employ more than 3,700 lawyers, investigators, paralegals, and support personnel and serve 91 of the 94 federal judicial districts. There are two types of federal defender organizations: federal public defender organizations and community defender organizations."); Alexandra Natapoff, *Criminal Municipal Courts*, 134 Harv. L. Rev. 964, 986 (2021). Further, some lawyers take a "traditional" approach to criminal-defense representation, while many others have moved to a more client-centered approach. *See, e.g.*, Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. Kan. L. Rev. 1, 7–9 (1998). *See generally* Katherine R. Kruse, *Engaged Client-Centered Representation and the Moral Foundations of the Lawyer-Client Relationship*, 39 Hofstra L. Rev. 577 (2011).

progressive prosecution jurisdiction, this section briefly reviews the core role of the criminal defense attorney as set out in ethical rules, professional standards, and court decisions. It also recognizes some of the myriad roadblocks to realization of that role.

Codes of professional conduct or responsibility set out binding ethical rules for lawyers.[29] Most jurisdictions' ethical codes closely follow the principles set forth in the American Bar Association's Model Rules of Professional Conduct—some of them specific and many of them relevant to criminal case representation. From this source comes the core general lawyering tenet of zealous advocacy within the bounds of the other ethical rules.[30] Although ethical rules "do not specify all the tasks that a lawyer must perform and how much time to devote to them, [they] do describe in general terms how a representation must be conducted."[31] As the late ethics scholar Monroe Freedman explored, criminal defense lawyers face particular challenges from conflicts between interpretations of ethical various rules, especially those involving client confidentiality and candor to the court.[32] Longtime criminal defense lawyer and scholar, Abbe Smith, captures the way many defenders define their work: "Good defenders fight for our clients, enable them to have a voice, and hold the government's feet to the fire—all

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29 *See, e.g.*, MD. R. ATTORNEYS 19-300.1 para. 7 ("Many of an attorney's professional responsibilities are prescribed in the Maryland Attorneys' Rules of Professional Conduct, as well as substantive and procedural law.").

30 MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2020) ("A lawyer should . . . take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with . . . zeal in advocacy upon the client's behalf."). There is voluminous commentary on the meaning of zealous advocacy. *See, e.g.*, Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771 (2006).

31 Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1176 (2003) (describing how the ethics rules' requirement of competent representation encompasses the "thoroughness and preparation reasonably necessary for the representation," including "analysis of the factual and legal elements of the problem," and also "require[s] lawyers to communicate with their clients, keeping them current, answering their questions, and helping them make informed decisions") (first quoting MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR. ASS'N 2002)) (and then quoting *id.* r 1.1 cmt. 5).

32 Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); *see also* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 118–22 (6th ed. 2023) (taking the position that the duty of zealous representation can justify breaking other ethical requirements, especially given inconsistencies and tensions in ethical rules).

of which is important in a system bent on crushing those we have a duty to defend."[33]

Professional standards, including the American Bar Association's (ABA) Criminal Justice Standards and the National Legal Aid and Defender Association's (NLADA) Defender Standards, offer nonbinding guidelines that range from abstract to concrete.[34] For example, one NLADA Guideline details defense counsel's responsibilities relating to the presentence investigation report,[35] while an ABA Standard on Functions and Duties of Defense Counsel includes the duty to "advocate with courage and devotion."[36]

Constitutional doctrine weighs in by establishing a floor for competency below which defenders cannot perform without violating the right to effective assistance of counsel, assuming their former client can clear the often-insurmountable

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33 Abbe Smith, *Defending Gideon*, 26 U.C. DAVIS SOC. JUST. L. REV. 235, 269 (2022); *see also* Samuel Dash, *The Emerging Role and Function of the Criminal Defense Lawyer*, 47 N.C. L. REV. 598, 626 (1969) (describing defense counsel as "challenger of the government in an adversary system"); *id.* at 626 n.82 ("The function of the defense lawyer . . . serves a broader purpose than his duty to fully and vigorously represent his client within the law. It serves society's interest in maintaining a system of justice which deters the prosecution from carelessly proceeding against an accused without sufficient evidence, creating the danger of convicting an innocent person.").

34 *See* CRIM. JUST. STANDARDS: DEF. FUNCTION (AM. BAR ASS'N 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ [https://perma.cc/E8H5-R993]; PERFORMANCE GUIDELINES FOR CRIM. DEF. REPRESENTATION (NAT'L LEGAL AID & DEF. ORG. 2006). Writing in the late 1960s, one scholar described how the first iteration of the ABA Defense Function Standards "did not, for the most part, create new professional standards for the defense function. It attempted to determine what standards were followed and agreed upon by a representative sample of the most competent and experienced criminal defense lawyers in this country, Canada, and England." Dash, *supra* note 33, at 623. The standards came about post-*Gideon*, as the need to define the basic role of defense counsel became apparent. The initial advisory committee essentially did a listening tour—with confidentiality for the experienced defenders who agreed to speak with them—and then distilled what they heard into standards. *Id.* at 624–25.

35 PERFORMANCE GUIDELINES FOR CRIM. DEF. REPRESENTATION § 8.4 (NAT'L LEGAL AID & DEF. ORG. 2006).

36 CRIM. JUS. STANDARDS: DEF. FUNCTION § 4-1.2(b) (AM. BAR ASS'N 2017); *cf.* Susan D. Carle & Scott L. Cummings, *A Reflection on the Ethics of Movement Lawyering*, 31 GEO. J. LEGAL ETHICS 447, 472 (2018) (noting, in their discussion of general lawyering ethics, the "core values of respect for others, empathy, self-reflection, and 'other-regarding' behavior—values at the heart of professionalism" (footnote omitted)). The ABA Standards also repeat and incorporate concepts from the ethical rules. *See, e.g.*, CRIM. JUS. STANDARDS: DEF. FUNCTION § 4-1.2(d) (AM. BAR ASS'N 2017) ("Defense counsel should act zealously within the bounds of the law and standards on behalf of their clients . . . .").

hurdle of proving prejudice.[37] As ethics scholar Bruce Green has noted, "as a normative matter, because constitutional decisions demand so little from criminal defense lawyers, the case law tends to undermine the dictates of the ethics codes rather than reinforce them."[38] Chronic and widespread underfunding of indigent defense further undermines realization of the role of the defender as set out in the rules and standards.[39] In short, role definition and guidance is one thing; embodying the role in the context of near-immunity from subpar representation and severe resource deprivation is quite another. As one public defender concluded, "[t]he role of the defense attorney is not adequately conceived of or appreciated in the legal profession, despite its critical role in the American justice system."[40]

Particularly when it comes to defense advocacy at the individual client level, one might argue that the theory of lawyering and role of the lawyer is exactly the same in a progressive prosecution jurisdiction as in any other place: zealous advocacy within the bounds of the ethical rules.[41] Susan Carle and Scott Cummings have described the "longstanding debate" in legal ethics in these terms:

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37 *See* Strickland v. Washington, 466 U.S. 668, 687–88 (1984) (holding that the standard for ineffective assistance of counsel is a demonstration that 1) counsel's performance was deficient as defined by prevailing professional norms; and 2) that deficient performance prejudiced the defense); *see also* Smith, *supra* note 33, at 242 (describing *Strickland* as "the case that gutted *Gideon* by holding that poor people's lawyers can be inept and still comport with the Sixth Amendment") (footnote omitted).

38 Green, *supra* note 31, at 1170; *see also* Rayza B. Goldsmith, *Is It Possible to Be an Ethical Public Defender?*, 44 N.Y.U. Rev. L. & Soc. Change 13, 36 (2019) ("Comparing the Model Rules and the Defense Function directly with constitutional decisions highlights not only the inadequacy of the constitutional interpretations of effective assistance, but also the wide discrepancy between the role of defense counsel envisioned by the ABA and the role actually shaped by the Constitution.").

39 *See* Green, *supra* note 31, at 1169 (discussing how "under-funding of indigent defense also raises a serious and inadequately recognized problem of professional ethics: the systemic neglect of indigent defendants by their appointed lawyers").

40 Goldsmith, *supra* note 38, at 14–15. Goldsmith's important critique documents how the ethical rules governing defense counsel fail to account for the realities of public defense. For example, although the rules "contemplate" problems like severe under-resourcing of indigent defense, they "do not do enough to recognize their significance. As such, the rules also fail to guide defenders in the world in which we operate. Instead, they provide guideposts that are largely irrelevant to the working environment of many defense attorneys, particularly public defenders." *Id.* at 46–47.

41 *See* Model Rules of Pro. Conduct pmbl. para. 2 (Am. Bar Ass'n 2020) ("As advocate, a lawyer zealously asserts the client's position").

> whether rules of professional conduct should aspire to unify the profession—binding everyone to the same standards of conduct in order to promote uniform behavior and professional cohesion—or whether the application of the rules should be more context-specific, recognizing that specific forms of practice may raise different ethics concerns.[42]

They posed this important question in the context of movement lawyering, and the issues they raise are thus more relevant to the question of criminal defense lawyers advocating for systemic change rather than advocacy in the individual case—although the two are closely intertwined.

A unitary role definition—pushing as hard as is permissible for the best outcome given the client's goals—is complicated by a number of factors on the ground. For example, most individuals facing criminal charges are represented by a defense lawyer who is a "repeat player" in a jurisdiction with a relatively small group of prosecutors and judges. They must thus grapple with the reality that pushing hard for one client on one day might affect their ability to get the best outcome for another client that same day, or week, or month.[43]

Legal ethics scholar Ellen Yaroshefsky posits that "[d]efense lawyers should have an ethical obligation to act beyond the proverbial 'do the very best you can as a zealous advocate for your client.'"[44] She further explains that this entails an "obligation to challenge truth to power" by "target[ing] ways in which specific prosecutorial conduct violates the minister of justice role, even if

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42 Carle & Cummings, *supra* note 36, at 473; *see also* Susan D. Carle, *Power as a Factor in Lawyers' Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 135–36 (2006) (arguing that ethics concerns for lawyers who represent clients with little power are different from those for lawyers who represent clients with great power).

43 *See* Charlie Gerstein, *Dependent Counsel*, 16 STAN. J.C.R. & C.L. 147, 173–74 (2020) (discussing the potential conflict of interest when defense counsel represents many clients in front of the same judge and with the same prosecutors). This is obviously the case for public defenders and other government-funded counsel. But many private defense lawyers are also repeat players who confront the same small group of prosecutors and judges in multiple cases. *Cf.* Carle & Cummings, *supra* note 36, at 465 (noting, in the context of movement lawyering, that standard legal ethics analysis fails to account for this tension, and instead "tends to treat these representations just like any other, in which lawyers should defer to clients about the resolution of each discrete representation").

44 Ellen C. Yaroshefsky, *Duty of Outrage: The Defense Lawyer's Obligation to Speak Truth to Power to the Prosecutor and the Court When the Criminal Justice System is Unjust*, 44 HOFSTRA L. REV. 1207, 1220 (2016) ("Our system contemplates individual client-centered advocacy, maximizing the autonomy and dignity of each individual. But, this does not fully answer the question of what a lawyer should or must do when a client's case is the consequence of episodic or systemic injustice.") (footnote omitted).

the conduct falls short of a constitutional or statutory violation."[45] Yaroshefsky offers an example in the context of a prosecutor requesting bail for an individual recently out of surgery—with tubes dangling from his stomach—facing a first offense on a misdemeanor domestic violence assault charge. Here, "even if the [prosecutor's] office policy for domestic violence cases is to request bail," the defender would have an obligation—beyond the zealous bail argument—to "summon[] evidence-based reports on the effects of bail [and] should argue the reasons why the prosecutor's recommendation is in derogation of his role as a minister of justice."[46] While she acknowledges the legitimate fear defenders may have with respect to negative reverberations for clients, Yaroshefsky hopes that over time, speaking truth to power "will be viewed as part of the role of defense counsel, not as a personal or political attack on the individual prosecutor."[47]

Even taking into account valid critiques of the ways ethical rules, professional standards, and constitutional norms fail to adequately define the role of the criminal defense lawyer on the ground, most commentators would likely agree that the core role of that defender does not change simply because the stated goals and some positions of the prosecutor in the jurisdiction have changed. The criminal defense lawyer's role remains zealous advocacy (perhaps including speaking truth to power) without crossing ethical lines. But that is an unsatisfying answer to the question of whether it is really the same to be a defense lawyer in a jurisdiction with a traditional prosecutor as it is in a jurisdiction with a prosecutor who is a self-proclaimed criminal legal system reformer. While the theoretical role remains the same, strategy and tactics may change, even within individual client representation. Before examining a few concrete ways defense lawyers may face new contexts, challenges, and opportunities in a progressive prosecution jurisdiction, the next section puts some names to those contexts.

B. Typologies: "Progressive Prosecutors" and Defenders in "Progressive Prosecution" Jurisdictions

It is impossible to embark on a discussion of defense lawyering in a progressive prosecution jurisdiction without a foray

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45 *Id.* at 1221–22.

46 *Id.* at 1221; *see also id.* at 1218 ("[W]e need to incorporate our current understanding of the system's flaws, mass incarceration, and many other ills in examining the necessary and effective role of counsel.").

47 *Id.* at 1222–23.

into the meaning of "progressive prosecution." To keep the focus here on defenders, I will only briefly explore this threshold issue. The term "progressive prosecutor" "means many different things to many different people."[48] Noting the importance of definition and classification—in part to expose those who might claim the title "to advance their careers and yet sidestep growing critiques of mass incarceration,"[49]—Benjamin Levin offers a helpful typology of "four ideal types" of progressive prosecutors.[50]

First is the "progressive who prosecutes," someone with generally progressive politics, but who does not "bring her politics to her job or to the administration of criminal law."[51] These prosecutors are the "least likely to receive the progressive prosecutor mantle."[52] Next is the "proceduralist prosecutor," focused on getting their house in order by fighting corruption and misconduct while striving to ensure defendants are given fair process.[53] While these prosecutors pursue positive goals like increasing transparency and strengthening conviction

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48 Benjamin Levin, Essay, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1417 (2021); *see, e.g.*, Avanindar Singh & Sajid A. Khan, *A Public Defender Definition of Progressive Prosecution,* 16 STAN. J.C.R. & C.L. 475, 476 (2021) ("We define 'progressive prosecution' as the model of prosecution committed to truth-telling about systemic racism, shrinking mass criminalization, addressing root causes of crime, and bringing the criminal legal system in line with basic notions of justice and humanity."); Heather L. Pickerell, Note, *How to Assess Whether Your District Attorney Is a Bona Fide Progressive Prosecutor*, 15 HARV. L. & POL'Y REV. 285, 293–300 (2020) (providing "weighted constellation" on various issues ranging from bail reform to prosecutorial accountability to evaluate the progressiveness of a prosecutor); EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 271–98 (2019).

49 Levin, *supra* note 48, at 1417–18.

50 *Id.* at 1428 ("These types are not meant to be exhaustive and are, of course, potentially overlapping."); *see also* Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707, 712 (2020) ("Although commentators often describe progressive prosecution as a challenge to a traditional prosecutor model, that dichotomy is misleading and likely counterproductive. Progressive prosecutors take advantage of the fact that there is no consensus about what prosecutors should be doing."). Although Levin is clear that his four types approach is a bit of a moving target, his categories helpfully describe the setting for many situations on the progressive prosecution ground, and the remainder of the article will occasionally reference his typology.

51 Levin, *supra* note 48, at 1428–30 (describing Kamala Harris as an example of a prosecutor who has progressive views on a range of issues that did not necessarily extend to her views on criminal justice). Although these prosecutors typically fall left of the political center, Levin notes how equating "progressive" in the realm of criminal policy with a party glosses over the bipartisan history of mass incarceration.

52 *Id.* at 1428.

53 *Id.* at 1432–33.

integrity units, they risk increasing the perceived legitimacy of the criminal legal system when it is not clear that they would address injustices in other areas.[54]

Third is the "prosecutorial progressive," who embraces their role and "the power of state violence" but exercises that power to address "structural inequality and substantive . . . justice."[55] Prosecutorial progressives "accept[] the fundamental legitimacy and desirability of the criminal system" but seek to redirect resources to advance different priorities.[55a] These include addressing crimes "committed by powerful defendants" or that "further historical inequality or subordination," or "redistributing criminal justice resources."[56]

Finally, there is the "anti-carceral prosecutor[,] [who] harbors no illusions about criminal law as a vehicle for positive change."[57] Anti-carceral prosecutors view the system as "fundamentally flawed" and the prosecutor's goal as "shrink[ing] those institutions, or perhaps do[ing] away with them altogether."[58] The anti-carceral prosecutor "advocates for a divestment from prosecution and the criminal system" and "seeks to enact policies of declination" for certain categories of crime.[59] At the far end of this category, "the pure anti-carceral prosecutor would see her function purely as scaling back the system. 'Doing justice' to this prosecutor entails not prosecuting at all."[60]

This typology must be viewed against the backdrop of the significant backlash that can ensue when new prosecutors put new policies into place. The resistance to change has been

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54 *Id.* at 1433–34 (discussing a range of procedural reforms that include factoring in the financial cost of incarceration in sentencing recommendations).

55 *Id.* at 1438.

55a *Id.* at 1442.

56 *Id.* at 1438; *see also id.* at 1441 (discussing U.S. Attorney Preet Bharara's focus on white collar crime and D.A. Larry Krasner's focus on wage theft as examples of progressive priorities that address structural inequality and substantive justice).

57 *Id.* at 1444 ("The anti-carceral prosecutor's stance comes closest to resembling those embraced by prison abolitionists and other more radical critics of the carceral state.").

58 *Id.* However, as discussed below, even the most progressive of prosecutors have failed to include scaling back their own office's funding as part of divestment from prosecution. *See infra* Part III.B.1.

59 Levin, supra note 48, at 1445 (examining different declination policies, including Rachael Rollins' promises not to prosecute certain "quality of life offenses" and Kim Foxx's decision to not prosecute individuals for diving with licenses suspended for inability to pay fines or fees).

60 *Id.* at 1446 (describing the "pure" anti-carceral prosecutor as "a sort of double-agent committed to destroying the system from within").

especially vitriolic—and the potential consequences much more dire—when the newly elected prosecutor is a person of color, particularly a woman of color. For example, Kim Gardner, the former St. Louis, Missouri head prosecutor, faced death threats in connection with allegations of decreased convictions rates and tension between her office and the local police.[61] India Thusi's powerful article, *The Pathological Whiteness of Prosecution*, begins with a list of racial slurs and threats directed at Black women prosecutors.[62] Further, as Thusi notes, "Black women progressive prosecutors like Kimberly Foxx, Kimberly Gardner, and Marilyn Mosby were elected before [Philadelphia District Attorney Larry] Krasner and represent similarly important American cities (Chicago, St. Louis, and Baltimore, respectively), but rarely enjoy the laurels of the White liberal media."[63] Defense attorneys should be cognizant of this more precarious (and sometimes toxic) reality for some progressive prosecutors. That does not mean fighting less hard for clients or for change, but it does factor into the political and strategic backdrop of that fight.

The progressive prosecution typology must also be viewed against the backdrop of the prosecutor's entrenched role within the current criminal legal system. As Jonathan Rapping describes it, the system "is designed to primarily address poverty, substance abuse, mental illness, and many other social ills through punishment" and "based on the premise that certain populations need to be monitored and controlled."[64] Since prosecutors do not make the law (legislators do), and do not "decide[] who will be considered for punishment (law enforcement largely chooses who to arrest)," their role is limited to deciding "how harshly to treat those who the police bring them."[65]

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61 *See* Samantha Michaels, *Top Prosecutor Kim Gardner Has Faced Racism and Death Threats. Now She Faces Reelection.*, MOTHER JONES (Aug. 4, 2020), https://www.motherjones.com/2020-elections/2020/08/top-prosecutor-kim-gardner-has-faced-racism-and-death-threats-now-she-faces-reelection/ [https://perma.cc/GX3F-U46Q].

62 I. India Thusi, *The Pathological Whiteness of Prosecution*, 110 CALIF. L. REV. 795, 798 (2022).

63 *Id.* at 803.

64 Jonathan A. Rapping, *The Power to Transform is Stronger than the Power to Punish: Public Defenders Are the Key to Equal Justice,* 6 L.A. PUB. INT. L.J. 72, 78–79 (2015) (individuals in the criminal system "are seen as unworthy of treatment").

65 *Id.*; *see also* Holland & Zeidman, *supra* note 25, at 1469 ("[S]erious transformation of the criminal legal system cannot depend on, and thus resource with more power, prosecutors whose primary job description is to still pursue punishment in an adversary system.").

Rapping calls this "the power to destroy lives," and cautions against the temptation "to think 'good' prosecutors are the answer to this civil rights crisis."[66] Paul Butler offered a similar critique, ultimately concluding that good people should not be prosecutors.[67] Abbe Smith has long argued the same.[68]

Ultimately, under this view, even the "good" prosecutor "operates within, and perpetuates, a system that is designed to punish the poor."[69] In this harsh light, prosecutors might do less harm but will never end the injustice of the criminal legal system. They will never transform the system, even if they seek to reform around the edges of its inhumanity.

While Rapping "absolutely prefer[s] 'good' prosecutors to those who have wholeheartedly embraced the prevailing 'tough on crime' narrative," they still:

> cannot make prisons more humane, probation officers less overbearing, or collateral consequences less oppressive. The bulk of [their] energy will be spent ensuring that people who have made mistakes are thrust into a system that is neither equipped nor cares to address the myriad issues that landed the person in it in the first place.[70]

Aya Gruber has made many of these same points in the context of mainstream feminists' close and problematic connections to law enforcement and the carceral state.[71] And Leigh Goodmark has offered a thorough and searing indictment of the United States' misdirected and often harmful reliance on the criminal legal system to combat domestic violence.[72]

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66 Rapping, *supra* note 64, at 79.

67 *See* Paul Butler, *Should Good People Be Prosecutors?*, *in* LET'S GET FREE (2009).

68 *See* Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 398–400 (2001) (concluding no).

69 Rapping, *supra* note 64, at 79–80 ("We are desperate for prosecutors who will be a little more compassionate. We are thirsty for prosecutors who have some respect for the process. When a prosecutor actually expresses disapproval of the status quo, we can mistakenly think they are our guide to salvation."); *cf.* Note, *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748, 762 (2018) ("[T]he allure of the progressive prosecutor, and the chief selling point among proponents of reform, is that she can use her expansive powers to promote more just outcomes for defendants.").

70 Rapping, *supra* note 64, at 82–83.

71 *See generally* AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN'S LIBERATION IN MASS INCARCERATION (2020).

72 *See generally* LEIGH GOODMARK, IMPERFECT VICTIMS: CRIMINALIZED SURVIVORS AND THE PROMISE OF ABOLITION FEMINISM (2023); LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE (2018); LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM (2012).

These scholars' important work reminds us that the prosecutor remains a central force in a system of mass incarceration and mass criminalization that is unmatched in the world.[73] Certainly, at least in the short run, a progressive prosecutor's policies can lead to significant differences in outcomes for some individuals in the criminal legal system (or can keep them out of that system altogether). But overarchingly, the progressive prosecution movement is closely linked to reform of the existing criminal legal system, rather than any radical transformation. Indeed, the term "pure anti-carceral prosecutor" is oxymoronic, since all prosecutors incarcerate and even the most progressive will likely be able (or willing) to scale their own offices back only to a limited extent.[74]

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[73] Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), https://www.prisonpolicy.org/global/2021.html [https://perma.cc/YJ65-8QYR] (charting "incarceration rates of every U.S. state alongside those of the other nations of the world" and finding that "looking at each state in the global context reveals that, in every region of the country, incarceration is out of step with the rest of the world"); *see also* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 6 (2017) (detailing how prosecutors are the main cause of mass incarceration).

[74] Although scholars have called for defunding and abolition of both the police and prisons, there is little in legal academic scholarship explicitly discussing abolition of prosecutors (although that would be a natural byproduct of police and prison abolition). Cynthia Godsoe, without calling for outright abolition, has "conclude[d] that the only prosecutor who can transform the system is an abolitionist one." Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 211 (2022). Brooks Holland and Steven Zeidman, in an article focused on the importance of "fully resourcing public defender offices" as a "a far better approach to tackling the many harms of the criminal legal system," have recently noted: "we particularly support the idea of selective abolition in the prosecutor office itself." Holland & Zeidman, *supra* note 25, at 1484. Bennett Capers has declared that "it is time to turn away from prosecution as we know it," in asking: "[w]hat would it mean to replace a system where prosecutors hold a monopoly in deciding which cases are worthy of pursuit with a system in which 'we the people,' including those of us who have traditionally had little power, would be empowered to seek and achieve justice ourselves?" I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1563–64 (2020). Some community organizers have recently called for abolition of prosecutors. *See, e.g.*, Rachel Foran, Mariame Kaba & Katy Naples-Mitchell, *Abolitionist Principles for Prosecutor Organizing: Origins and Next Steps*, 16 STAN. J.C.R. & C.L. 496 (2020). These three authors describe how:

> [w]ithin the last six years, each of us has worked on campaigns in our cities and states demanding that prosecutors wield their discretion to *do less*—fewer prosecutions, fewer charges, fewer convictions, less incarceration, smaller budgets—on the road to *doing nothing*: an end to prosecution altogether. An abolitionist organizing strategy reduces the reach of the PIC; it shrinks the power, size, and scope of the prosecuting office without increasing its legitimacy.

Id. at 498; *see also* Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1, 44 (2022) (citing community activist framework

As abolition scholars have described, much reform of existing laws and systems fails to address the deeper, underlying issue of law as a system designed to oppress, with deep, direct ties to slavery and white supremacy.[75] Progressive prosecutors can be seen as calling for "reformist reform," meaning they fail to dismantle systemic race and class biases and instead tinker around the edges trying to fix what is—to some—an unfixable criminal legal system.[76] By contrast, as Marbre Stahly-Butts and Amna Akbar have described, transformative reforms question traditional notions of power, seeking to shrink the impact of the criminal legal system and consider the holistic outcomes of reforms on affected communities. Transformative reforms seek to shift resources from prosecutors and carceral systems to social programs that provide food, shelter, health, and educational services.[77]

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document in noting the position that "electing prosecutors, and by extension, judges, cannot be the end goal; rather, it is a means toward abolition of prosecutors' offices as they currently exist").

75 *See* Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. Rev. 1544, 1563 (2022) ("[P]rison abolitionists . . . understand the criminal legal system as a descendent of earlier systems of racial and economic exploitation such as chattel slavery and convict leasing."); Dorothy E. Roberts, Foreword, *Abolition Constitutionalism*, 133 Harv. L. Rev. 1, 20–29 (2019) (offering an abolitionist analysis of the origins of policing in slave patrols and other deliberate state means of oppressing Black Americans); Louisiana v. Bryant, 300 So. 3d 392, 393 (La. 2020) (Johnson, C.J., dissenting) (detailing, in dissent from denial of application for certiorari by a man sentenced to life at age 38 for an unsuccessful attempt to steal hedge clippers, how southern states used "Pig Laws" to impose "extreme sentences for petty theft associated with poverty" to allow continued "forced-labor (as punishment for a crime) by African Americans even after the passage of the Thirteenth Amendment"); *see also* Angela Davis, Are Prisons Obsolete? (2003); Ruth Wilson Gilmore, Rachel Herzing and Justin Piche, How to Abolish Prisons: Lessons from the Movement Against Imprisonment (2011); Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. Rev. 1156 (2015).

76 *See* Ruth Wilson Gilmore, Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California 242 (2007) (describing "reformist reform" as "reform [that] strengthens, rather than loosens, prison's hold," and contrasting it with an abolitionist approach that embraces "changes that, at the end of the day, unravel rather than widen the net of social control through criminalization"); Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 Harv. L. Rev. F. 90, 104 (2020); *cf.* Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 Yale L. J. 778, 786 (2021) ("Thanks to the radical visions of social movements, a vast range of possibilities stretches out before us, from cementing our current policing practices with improved specialization and increased resources, to abolishing our institutions of policing altogether.").

77 Stahly-Butts & Akbar, *supra* note 75, at 1557 ("Invest-divest campaigns . . . seek to shift resources into alternatives: to push the state to shift investments from prisons and police to education, health care, and other forms of what should be a social wage—an expanded social welfare net or decommodified access to entitlements like education, health care, and housing.").

The very idea of a transformative prosecutor is difficult to conceive. Even the most progressive prosecutor is highly unlikely to disrupt their own power or support handing more power over to others.[78] After all, that prosecutor ran on a platform that *they* would achieve the reform, not step back to allow others to transform.

This dynamic is reinforced by and intertwined with the well-studied concept of how the powerful are reluctant or even unable to give up their power. As psychologists have documented, the very skills that help a person get power, including empathy, are those that deteriorate once the person attains that power.[79] Studies "show that once people assume positions of power, they're likely to act more selfishly, impulsively, and aggressively, and they have a harder time seeing the world from other people's points of view."[80] Relatedly, Kay Levine and Ronald Wright conducted interviews with prosecutors that revealed how those who describe themselves as saviors and community protectors are also those more likely to commit discovery violations, to attack defenders, and to be overly punitive.[81]

Compared to prosecutors, whose core function is to employ the power of the carceral state in the name of public safety, defenders occupy a very different position. As Brooks Holland and Steven Zeidman have stated, "it is not prosecutors, no matter how powerful, who stand between the accused and the heavy-handed and racist power of the state. That is the role intended for the defense."[82] Certainly, many defenders fight hard for their clients and some for larger systemic change. However,

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78 *See generally* Godsoe, *supra* note 74. *See* Seema Tahir Saifee, *Decarceration's Inside Partners*, 91 FORDHAM L. REV. 53, 56 (2022) ("[T]he ideology of prosecution is in fundamental tension with large-scale decarceration."); Paul Butler, *Progressive Prosecutors Are Not Trying to Dismantle the Master's House, and the Master Wouldn't Let Them Anyway,* 90 FORDHAM L. REV. 1983, 1984 (2022) (examining "the progressive-prosecutor movement as a way of interrogating [Audre] Lorde's claim" that "the master's tools [will] never dismantle the master's house").

79 DACHER KELTNER, THE POWER PARADOX 100 (2016) ("We gain and maintain power through empathy, but in our experience of power we lose our focus on others."); *see also* Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 178 (2019) ("Those who say prosecutors have a lot of power mean that prosecutors have the ability to freely choose between different options (i.e., discretion).").

80 Dacher Keltner, *The Power Paradox*, GREATER GOOD MAG. (Dec. 1, 2007), https://greatergood.berkeley.edu/article/item/power_paradox [https://perma.cc/X69U-25B8]

81 Kay L. Levine & Ronald F. Wright, *Images and Allusions in Prosecutors' Morality Tales,* 5 VA. J. CRIM. L., 38, 58 (2017).

82 Holland & Zeidman, *supra* note 25, at 1484.

the very existence of things like the participatory defense movement (and to some extent court watching, although that is focused on all courtroom actors, not just defense counsel) illustrates how activists have concerns about the role defenders play in the exercise of state carceral power.[83] In short, defense lawyers are an integral part of the criminal legal system that transformers seek to dismantle or fully reconfigure.

Critical race theorists have long argued "that any significant transformation of the social structure of United States society is far more likely to occur through mass political movements than through litigation."[84] Current abolition and movement law scholars similarly describe how lawyers might assist with—but not lead—community activists' efforts for deep structural change.[85]

Against this multifaceted and dynamic backdrop, I will briefly sketch out a typology of defense lawyers in progressive

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83 *See* Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1298–1300 (2015) (arguing that participatory defense is a democracy-enhancing theory of criminal justice that will support shrinking of the carceral state); *see also* Jocelyn Simonson, *"We're Only Here to Watch": How Courtwatchers are Shifting the Power Dynamics in Criminal Courtrooms*, THE NATION (Aug. 15, 2023), https://www.thenation.com/article/society/radical-acts-justice-courtwatching/ [https://perma.cc/G59Q-NFAW]; Binny Miller, *Visibility and Accountability: Shining A Light on Proceedings in Misdemeanor Two-Tier Court Systems*, 63 ST. LOUIS U. L.J. 191, 207–210 (2019) (discussing court watching); Tracee Wilkins, *Activists Launch 'Court Watch' Program in Prince George's*, NBC WASHINGTON (Feb. 19, 2020), https://www.nbcwashington.com/news/local/prince-georges-county/activists-launch-court-watch-program-in-prince-georges/2219284/ [https://perma.cc/5HJJ-9VG6].

84 Kevin R. Johnson, *Lawyering for Social Change: What's a Lawyer to Do?*, 5 MICH. J. RACE & L. 201, 205 (1999). *See also* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021); Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1501–11 (2005).

85 *See, e.g.*, Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1689–1716 ("[M]ovement lawyering is the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain democratic social change goals that they define." (emphasis omitted)); *see also* Daniel Farbman, *Resistance Lawyering*, 107 CALIF. L. REV. 1877, 1947–48 (2019) (recommending defense bar organization around abolitionist ideals and suggesting that small shifts in defense bar practices may, in the aggregate, lead to substantial change). On movement lawyering more generally, see CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998); Carle & Cummings, *supra* note 36, at 452 ("We define movement lawyering as the use of integrated advocacy strategies, inside and outside of formal lawmaking spaces, by lawyers who are accountable to mobilized social movement groups to build the power of those groups to produce or oppose social change goals that they define"); *see also* Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464 (2017).

prosecution jurisdictions.[86] There are abolitionist defenders, working to replace extreme over-reliance on the criminal system to solve societal problems with less racist, more humane, and effective approaches even as they represent individual clients within that system. These defenders push for lasting, systemic change well beyond the hypothetical "pure anti-carceral prosecutor." In addition to their individual representation, which is less likely to shy away from the boundaries of the ethics rules and professional standards,[87] they are likely to be involved in systemic litigation where possible, to advocate for legislative change, and to be in dialogue with community activists.

It is a fair question whether any actor within the problematic criminal legal system can be a true abolitionist, as they gain a living from their work and are deeply intertwined with many of its most oppressive aspects. Still, some defenders come to the work with some understanding of the system's oppressive history and power and are fully committed to transformative change. Daniel Farbman has suggested that if the defense bar organizes its power and resistance within the courtroom around transformative aspirations, it can achieve aggregate systemic changes.[88] Lindsey Webb has described how defense lawyers working within an unfixable criminal legal system can adopt an abolitionist framework that "incorporate[s] the goal of eradicating prisons entirely," while including the concept of a "gradual project of decarceration," through measures like alternate sentencing options.[89]

Others—let's call them "reform defenders"—might believe in the fundamental soundness (or the necessity) of the criminal legal system, at least for more serious offenses. But they work for major reform on issues including decriminalization of low-level offenses, procedural fairness, and overly punitive felony sentencing schemes. These defenders might follow Yaroshefsky's call to challenge truth to power, incorporating evidence of broad systemic injustices into their individual advocacy.[90]

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86 Categorizing these different defender types is no easy task, in part because the outlook and approach of defense attorneys may differ significantly depending on the actual situation in the jurisdiction.

87 *See supra* text accompanying notes 29–36.

88 Farbman, *supra* note 85, at 1949–51 (offering a number of historical examples of such defense practices, by abolitionist lawyers working against the Fugitive Slave Law of 1850).

89 Lindsey Webb, *Slave Narratives and the Sentencing Court*, 42 N.Y.U. REV. L. & SOC. CHANGE 125, 148–49 (2018).

90 *See supra* text accompanying notes 44–47.

Still further along the defense lawyer spectrum would be those defenders who are simply thankful to have a progressive prosecutor in place and do not seek to rock the boat. Indeed, the prosecutor may have come from the defender's office, stepping from one role into the other. These "new status quo" defenders may fulfill their role in the adversary system in individual cases but are satisfied with allowing the prosecutor to lead any systemic reform efforts.[91] These defenders will likely push for even better outcomes against the backdrop of a less punitive prosecutorial approach (at least in some circumstances). In other words, they will not tamp down their individual advocacy in the face of a "fairer" prosecutorial baseline.

Finally, in a typology that is far from complete, there are nonprogressive defenders. This group generally takes fewer progressive positions than the elected prosecutor. They might be former prosecutors now in private practice, or perhaps defenders who do the work because they enjoy litigation and generally believe everyone has a right to counsel.[92] But they view some of the new prosecutor's policies as an undeserved windfall for their clients. This type of defender has always been problematic, but in a progressive prosecution jurisdiction they might be subject to claims of ineffective assistance of counsel and of violations of ethical rules and professional standards for failing to raise their advocacy to meet the new prosecutor's approach. As described below, one example of how this might arise is in the plea-bargaining process.[93] If the nonprogressive defender believes the progressive prosecutor's plea offers are generous, they may not counter-offer to seek an even better offer for a particular client. This would fall below prevailing norms for defense counsel negotiation and would thus at least violate the competency prong of the ineffective assistance of counsel test, as well as other norms.[94]

As with the progressive prosecutor typology, these defender types are neither exhaustive nor mutually exclusive. I offer them here to illustrate how different types of defenders

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91 Although one could certainly argue that concern with not rocking the boat will affect individual advocacy, competent "new status quo" defenders should push the boundaries in individual advocacy far beyond what any prosecutor would offer. *See infra* Part III.A.

92 *See* Barbara Allen Babcock, Commentary, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 177 (1983) (listing one reason for doing defense work as "The Garbage Collector's Reason," and describing it as "[y]es, it is dirty work, but someone must do it") (emphasis omitted).

93 *See infra* Part III.A.2.

94 *See infra* text accompanying notes 211–14.

may approach challenges or opportunities in a progressive prosecution jurisdiction. Before turning to the individual case and systemic reform approaches that the various types of defenders in progressive prosecution jurisdictions might take, the next Part examines an issue that all defenders in such jurisdictions must consider: prosecutors who explicitly or implicitly claim the reform narrative as their own. This complicates the role of the defender in a number of ways, particularly with respect to their relationship with their clients and the communities they serve.

II
Defenders Faced with Prosecutors who Claim the Reform Narrative

Running on a progressive platform, former Boston top prosecutor Rachael Rollins was elected in 2018 and headed the Suffolk County District Attorney's office for four years (before being appointed U.S. Attorney for the District of Massachusetts and resigning shortly after, in the face of serious ethics violations charges).[95] In Boston, Rollins was a prosecutor who could be characterized as anti-carceral at least on some low-level cases and perhaps a "prosecutorial progressive" on others.[96] For example, shortly after taking office, she ordered her line prosecutors to follow a default policy of declining to prosecute a list of fifteen misdemeanor offenses, with supervisory permission to deviate from the policy only in exceptional circumstances.[97]

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95 *Rachael S. Rollins Sworn in as United States Attorney for the District of Massachusetts*, U.S. Att'y's Off. Dist. Mass. (Jan. 10, 2022), https://www.justice.gov/usao-ma/pr/rachael-s-rollins-sworn-united-states-attorney-district-massachusetts [https://perma.cc/WSL2-XNF9]; *Rachael Rollins Tried to Influence DA Election, Leaked Info, Lied Under Oath, Inspector General Says*, CBS News Bos. (May 17, 2023), https://www.cbsnews.com/boston/news/rachael-rollins-report-inspector-general-us-attorney-massachusetts-resigns-violations/ [https://perma.cc/K5YD-4B5X].

96 *See supra* notes 50–60 and accompanying text.

97 Rachel Rollins, The Rachael Rollins Policy Memo App. D-1 (2019), https://static1.squarespace.com/static/5c671e8e2727be4ad82ff1e9/t/5d44a5f79807850001acc3d9/1564780028241/The+Rachael+Rollins+Policy+Memo..pdf [https://perma.cc/XE2V-A6VQ]; *see* Memorandum from Larry Krasner to Line Prosecutors 1 (Feb. 15, 2018), https://www.documentcloud.org/documents/4415817-Philadelphia-DA-Larry-Krasner-s-Revolutionary-Memo.html [https://perma.cc/692V-RNTK] (publicly released internal office policy memo from Krasner directing his line prosecutors to "decline certain charges," including possession of marijuana "regardless of weight," paraphernalia or buying from a person when the related drug is marijuana, and most prostitution charges).

Yet Rollins squarely positioned her office as the real voice for reform of the criminal legal system, while at the same time lashing out at public defenders. Her statements came about while she was a guest on an April 2020 call-in radio show. After one caller described how his attorney had failed to return his phone calls, Rollins responded: "There's this premise out here that somehow people who are public defenders are the heroes and the DA[s] are the villains. I am not going to allow that to continue any longer."[98] Making the further incendiary statement that "I'm not going to let these defendants suffer in silence," Rollins added the unethical suggestion that defendants contact her office to get information on their cases.[99]

Putting aside Rollins' inappropriate attacks on the defense bar, her reaction demonstrated how she both saw and wanted the public to see her (and her office), as the reformer-heroes. This type of rhetoric is not uncommon from progressive prosecutors—although Rollins went further than most by suggesting that defenders were the villains and by going beyond claiming the role of reformer to also embrace a narrative of prosecutor-as-hero. In a similar vein, as Brooks Holland and Steve Zeidman have described, "two prominent progressive prosecutors, Larry Krasner in Philadelphia, Pennsylvania and Rachael Rollins in Suffolk County, Massachusetts—apparently believing that they, and only they, know what is best and 'progressive'—publicly denounced their local community bail funds for having posted money bail for people accused of serious crimes."[100]

Others, such as Fairfax County Commonwealth's Attorney Steve Descano, have incorporated these sentiments as a central facet of their platform, promising as a candidate for reelection

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98 Andrea Estes, *District Attorney Rollins Calls Public Defenders Too White and Privileged, Setting off a Storm of Protest*, BOS. GLOBE (May 5, 2020), https://www.bostonglobe.com/2020/05/05/metro/district-attorney-rollins-calls-public-defenders-too-white-privileged-setting-off-firestorm-among-defense-lawyers/ [https://perma.cc/RRN4-DFBD] ("When you hear in my voice my disgust and outrage about CPCS not calling people back—their overwhelmingly privileged staff that aren't calling back poor, Black, and brown people because they're saying they're overworked and busy.").

99 *Id.* Although Rollins' entire tirade about public defenders was soundly critiqued, telling represented defendants to contact prosecutors who, under ethics rules, should not be speaking with them was particularly problematic. *See* MASS. R. PROF. CONDUCT 4.2.

100 Holland & Zeidman, *supra* note 25, at 1482. *See also* Steven Zeidman, *Virtuous Prosecutors?*, 25 CUNY L. REV. 1, 6 (2022) ("Those responsible for incarcerating so many people are not heroes.").

to "ensure that systemic discrimination based on race, wealth, and zip code is a thing of the past."[101] In Chicago, Kim Foxx stated: "[w]e have seen the impact of an unfair criminal justice system. I'm running to reform the system and bring equity and fairness to a system that, for too long, has disenfranchised low-income people and communities of color, like the ones I grew up in."[102] One news article characterized it as follows: "[t]hose who want to reform the criminal justice system are placing their bets on a new wave of prosecutors who have been voted in around the country."[103]

Progressive prosecutors claiming the reform narrative does not always (or even often) reflect reality.[104] Some who have adopted the progressive mantle still pursue policies that are more punitive than expected, given national criminal system reform trends. For example, former defense lawyer Mark Gonzalez, described as the "tattooed star of the 'progressive prosecutor' movement," successfully implemented some reforms when he headed the Nueces County District Attorney's Office, but he continued to pursue the death penalty more than five years after first taking office and more than a year after his 2020 reelection.[105] Gonzalez claimed his position was consistent with

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101 STEVE DESCANO, PROMISES MADE, PROMISES KEPT, intro., 17 https://static1.squarespace.com/static/5b08d8fd85ede1b5cc3e7d9c/t/645be9186148b547acb3fe99/1683745052147/Promises+Made.+Promises+Kept..pdf [https://perma.cc/MD6A-LB2R] (stating that Descano is "a founding member of Virginia Progressive prosecutors for reform, a group of reform-minded commonwealth's attorneys who have effectively lobbied the general assembly to improve the justice system.").

102 Kim Foxx, *Priorities*, KIM FOXX COOK CNTY. STATE'S ATT'Y, https://www.kimfoxx.com/priorities [https://perma.cc/U838-45E3].

103 Matt Daniels, *The Kim Foxx Effect: How Prosecutions Have Changed in Cook County*, THE MARSHALL PROJECT (Oct. 24, 2019), https://www.themarshallproject.org/2019/10/24/the-kim-foxx-effect-how-prosecutions-have-changed-in-cook-county [https://perma.cc/96DA-WPYD].

104 And note that Rollins has been more progressive than many other prosecutors. In particular, she published a list of fifteen misdemeanors that her office decline to prosecute under most circumstances. *See infra* text accompanying notes 171–72.

105 Michael Barajas, *The Tattooed Star of the 'Progressive Prosecutor' Movement Braces for His First Death Penalty Trial*, TEX. OBSERVER (Jan 23, 2019), https://www.texasobserver.org/the-tattooed-star-of-the-progressive-prosecutor-movement-braces-for-his-first-death-penalty-trial/ [https://perma.cc/BQ74-55Y6]; *see also* Carimah Townes, *Is Mark Gonzalez the Reformer He Promised to Be?*, THE APPEAL (Nov. 21, 2017), https://theappeal.org/is-mark-gonzalez-the-reformer-he-promised-to-be-462f199a60c/ [https://perma.cc/SD8B-AWUP] (expressing skepticism about Gonzalez's continued use of prosecutors who worked for his predecessor, including those "eager to 'convict at all costs" and commenting that it would be hard to change their mentality); Alexandria Rodriguez, *Nueces County District Attorney: Democrat Mark Gonzalez Wins Reelection Against Jon West*, CALLER TIMES, https://www.caller.com/story/news/politics/

the beliefs of the people of Nueces County (and that this would somehow be reflected through jury decision-making in a small number of capital sentencing hearings).[106] During his first two years in office, Gonzalez left the death penalty on the table as an option in six cases.[107]

Although Gonzalez changed his position on the death penalty in 2022,[108] his previous stance may demonstrate the limits of how much reform can be expected from progressive prosecutors in hard-won jurisdictions.[109] Defenders in these jurisdictions may not face the challenge of a prosecutor claiming the reformer narrative for themselves, since the prosecutor may not be easily able—or even want—to do so.

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elections/2020/11/03/nueces-county-texas-district-attorney-democrat-mark-gonzalez-faces-republican-jon-west/3744728001/ [https://perma.cc/6X9M-78P2] (last updated Nov. 4, 2023); Rachel Sharp, *Texas Prosecutor Refuses to Impose 'Unethical' Death Penalty Days After Requesting Killer's Execution Date*, The Independent (Apr. 18, 2022), https://www.the-independent.com/news/world/americas/crime/john-henry-ramirez-death-penalty-prosecutor-b2060146.html [https://perma.cc/WKG2-W6RX] ("Mr[.] Gonzalez said he will now refuse to seek the death penalty in any case that his office prosecutes and will also refuse to request execution dates for anyone already on death row.").

106 Barajas, *supra* note 105 (pointing out that Gonzalez's conservative stance on the use of the death penalty matches the cautious approach of other reform-minded prosecutors in Texas).

107 *Id.*

108 In 2022, Gonzalez joined a bipartisan group of fifty-six prosecutors calling for elimination of the death penalty. Fair and Just Prosecution, Joint Statement from Elected Prosecutors Pledging to Work Towards the Elimination of the Death Penalty 1 (Feb. 2022), https://fairandjustprosecution.org/wp-content/uploads/2022/02/FJP-Death-Penalty-Joint-Statement-2022.pdf [https://perma.cc/LCV9-9SJ3] (last updated Mar. 2, 2022) ("Although we hold varied opinions surrounding the death penalty and hail from jurisdictions with different starting points on the propriety of this sentence, we have all now arrived at the same inexorable conclusion: our country's system of capital punishment is broken."). Two months after Gonzalez signed this statement, one of his assistant district attorneys requested an execution date for John Henry Ramirez. Days later, Gonzalez moved to vacate the request, which the trial court denied. Kailey E. Hunt, *Judge Denies District Attorney's Request to Withdraw John Henry Ramirez's Execution Date*, Caller Times, https://www.caller.com/story/news/2022/06/21/judge-denies-das-motion-withdraw-death-row-inmates-execution-date/7689566001/ [https://perma.cc/D8GNK5DH] (last updated June 21, 2022). Ramirez was executed after losing his appeal and being denied clemency. Ruth Graham, *Texas Prosecutor Loses Attempt to Spare a Murderer from Execution*, N.Y. Times (Sept. 22, 2022), https://www.nytimes.com/2022/09/22/us/john-henry-ramirez-execution-texas.html [https://perma.cc/U49Q-KBEP]; María Luisa Paúl, *Texas Executes John Henry Ramirez, Who Won a Religious Rights Supreme Court Case*, Wash. Post (Oct. 6, 2022), https://www.washingtonpost.com/nation/2022/10/06/john-henry-ramirez-executed-texas/ [https://perma.cc/H8J3-J7SE].

109 Gonzalez has commented on the difficulties of his decision-making process, given his narrow support base. Townes, *supra* note 105 ("Almost half the [voters] didn't think I was the right person. I'm trying to earn people's vote every single day. . . .") (alteration in original).

Still, many defenders will have to grapple with the sometimes explicit, and always implicit, concept that a progressive prosecutor has arrived to lead efforts at much-needed reform of the criminal legal system. Prosecutors claiming the reform narrative put defenders in that jurisdiction in a difficult situation. Defending themselves against a specific (and clearly inappropriate) attack on a radio program is one thing;[110] however, figuring out where they fit into the reform narrative and the ways that these prosecutors' statements might affect defenders' relationships with their clients is a much more nuanced issue. Two issues in particular stand out for defenders. First is the question of how defenders should consider their own role as change agents when the prosecutor steps in to claim part of that space. Second is the more concrete problem of how defenders' relationships with their clients can be complicated by prosecutorial claims of the reform mantle, and defenders' potential responses to this complication.

A. Prosecutors are Not Change Agents; Are Defenders?

As discussed above, defenders are very much a part of the criminal legal system that some of them seek to abolish, others seek to transform (perhaps on the road to abolition), and still others simply wish to reform, either significantly or only at the edges.[111] Defenders can be effective supporters of community activists and others who seek change but must be attentive to their own fundamental role (and, some might say, complicity) within a deeply racist, overly-punitive system.[112]

These foundational critiques illustrate how problematic it would be for defenders to claim that they—not the progressive prosecutor—are the true change agents. However defenders

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110 The defense community did respond. Letter from Anthony J. Benedetti, Chief Couns., Comm. for Pub. Couns. Servs. to Rachel Rollins, Dist. Att'y, Suffolk Cnty.(May 1, 2020), https://twitter.com/BobMcGovernJr/status/1256317684632993792/photo/1 [https://perma.cc/5Q9N-4BHL]; *see also Rollins Attack on CPCS Unfounded and Unfair*, MASS. LAWS. WEEKLY (May 14, 2020), https://masslawyersweekly.com/2020/05/14/rollins-attack-on-cpcs-unfounded-and-unfair/ [https://perma.cc/U8GX-X367]. Rollins replied to the CPCS letter. *See* Letter from Rachael Rollins, Dist. Att'y, Suffolk Cnty. to Anthony Benedetti, Chief Couns., Comm. for Pub. Couns. Servs., and Victoria Kelleher, President, Mass. Ass'n of Crim. Def. Laws. (May 6, 2020), https://d279m997dpfwgl.cloudfront.net/wp/2020/05/DA-Rachael-Rollins-CPCS-MACDL-Letter-05.06.20-Final.pdf [https://perma.cc/BYS9-VA6P].

111 *See supra* text accompanying notes 82–85.

112 *See supra* text accompanying notes 88–89.

might choose to address prosecutorial claims to the reform mantle, any response must embrace the baseline position that no lawyer (and really no one person or group) should claim to be the hero within the system. A facile response to Rollins—something along the lines of "Hey, defenders do the real work here! You, prosecutor, are still locking people up!"—only compounds the problem. Still, it is dangerous to leave prosecutorial claims of "hero-reformer of the criminal legal system" unanswered.

Attuned to these realities, defenders must consider how or whether they will react to progressive prosecutors claiming the reform narrative. To return to the Rollins story, where does the defender "fit" in the reform picture when the prosecutor transgresses boundaries and seeks to claim that space? How should defenders envision and articulate their role?

One response is for defenders to more explicitly and collectively aim for criminal-legal-system transformation and eventual abolition rather than reform. Indeed, prosecutors claiming the reform narrative could have the positive effect of pushing defenders to push for transformation where those defenders otherwise would have been satisfied with—or failed to see beyond—more narrow reform efforts. As one example, defenders in progressive prosecution jurisdictions can credit the prosecutor for low-hanging, discretion-based reform on issues like declining to prosecute marijuana misdemeanor possession cases, while still pushing that prosecutor to support more lasting reform, such as radically lower sentencing schemes for serious convictions.[113]

To draw on the defender typology above, the prosecutorial claim of reformer might move some from the "reform defender" category to be abolitionists, or might light a fire under "new status quo" defenders to become more imaginative reformers.[114] "Non-progressive defenders," with their lack of interest in systemic reform, do not conceptualize their role as encompassing that of change agent, and so they are the least likely to respond to prosecutorial reformer (or even hero) claims. Unless, that is, such claims move them to change how they view their role. One reason they might do so is to stem the harm to their relationships with individual clients that result from prosecutorial reform narrative claims.

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113 *See infra* Part III.B.2.

114 *See supra* text accompanying notes 86–94 (setting out basic typology of defenders in progressive prosecution jurisdictions).

B. Dealing with Prosecutorial Claims to Reform Narrative Within the Defender-Client Relationship

On the individual representation level, any type of defense attorney in any progressive prosecution jurisdiction—but particularly one where the prosecutor claims ownership of the reform narrative—may face exacerbated tensions in what can already be difficult attorney-client relationship issues. Many studies have revealed such tensions between defense lawyers and the clients they serve. For example, one recent project described interviews of 200 individuals with mental health issues about their public defenders, revealing considerable confusion about the role of the various parties, something that is unfortunately not unique to this group of individuals. In the study, a full one-third of represented individuals had fundamental misunderstandings about the role of the judge and prosecutor, and this "may have contributed to the view held by some defendants that their attorney was not acting in their best interests."[115] Interviewees expressed views that their defense lawyer was "working for the judge and DA and not defending me[,]" or "had a strategy to get me to cop-out and seemed to be working with the DA."[116]

Two sociologists have documented similarly problematic dynamics. Matthew Clair's interviews with individuals facing criminal charges in Boston revealed that, when they attempted to advocate for themselves, their own lawyers silenced and coerced them.[117] And Nicole Gonzalez Van Cleve has documented how indigent defenders, while expressing concern about their clients' racially disparate treatment, ultimately engaged in racialized courtroom practices themselves.[118]

These studies are consistent with earlier explorations of the defender-client relationship. For example, in the 1972 book *American Criminal Justice: The Defendant's Perspective*, one individual facing criminal charges described defense counsel as "the prosecutor's assistant. Anything you tell this man, he's not gonna do anything but relay it back to the [prosecutor]."[119]

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115 Chelsea Davis, Ayesha Delany-Brumsey & Jim Parsons, Cover Story: *'A Little Communication Would Have Been Nice, Since This Is My Life:' Defendant Views on the Attorney-Client Relationship*, 40 CHAMPION 28, 29 (2016).

116 *Id.* at 29, 32.

117 MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT 3 (2020).

118 NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT 9 (2016).

119 JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 107–08 (1972); *see also* Heather Pruss, M. Sandys & S. M. Walsh, *"Listen, Hear My*

This was a common theme, with others voicing the opinion that defenders were willing to sell out some clients to get better plea offers for others, working closely with prosecutors to balance things out.[120] Citing these and related concerns, Alexis Hoag-Fordjour has argued that the Supreme Court should expand the constitutional right to counsel of choice—currently only conferred upon those who can afford to hire their own lawyer—to indigent defendants, to allow Black defendants to choose "Black and/or culturally competent public defenders [who have] the potential to help mitigate anti-Black racism in the criminal legal system" and the ability to form stronger attorney-client relationships and thus offer better representation.[121]

While many defenders have good relationships with their clients, the belief of some facing criminal charges that their lawyers are working hand-in-hand with the prosecution is not uncommon. Now, layer on top of that prosecutors who are touting themselves as the change agents for reform.[122] Even if those prosecutors are not simultaneously attacking defenders, their reformer claims can lead to more obstacles for defenders working to build trust with their clients, the vast majority of whom rely on government-funded lawyers that they do not hire and cannot choose.[123]

Side, Back Me Up": What Clients Want from Public Defenders, 43 JUST. SYS. J. 6 (2022).

120 CASPER, *supra* note 119, at 105; *see also* J. Battle, Note, *Comparison of Public Defenders' and Private Attorneys' Relationships with the Prosecution in the City of Denver*, 30 DENV. L. J. 101, 131 (1973) ("A remark often heard from inmates at county jail was that public defenders were 'cop-out men' who would 'sell them down the river.' These clients seemed especially afraid that if they admitted their guilt to a defender and told him the truth, he would cooperate in seeing them punished.").

121 Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. REV. 1493, 1498 (2021).

122 *Compare supra* notes 98–99 and accompanying text (describing how former Boston DA Rollins publicly criticized defense counsel while offering to help defendants facing challenges in their relationships with counsel), *with* Matthew Clair, *Being a Disadvantaged Criminal Defendant: Mistrust and Resistance in* Attorney-*Client Interactions*, 100 SOC. FORCES 194, 204 (2020) (describing interviews of defendants revealing how many mistrusted court-appointed defense counsel because they perceived them as friendly with the prosecution and believed they "don't want to fight").

123 *See* Hoag, *supra* note 121 (contending that the inability of indigent defendants to choose their own appointed counsel fosters distrust and negative perceptions towards their attorneys, particularly among Black defendants); *cf.* Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 77 (1993) (proposing vouchers so defendants can choose counsel, as "a practical and effective cure for many of the

III
The Defenders' Role in Individual Cases and Systemic Reform Efforts

Moving beyond the problematic claims over the narrative of hero-reformer (and how and why that matters), this Part considers how defenders in progressive prosecution jurisdictions might push the envelope, both in individual cases and in advocating for systemic change. Certainly, individual and systemic advocacy are closely intertwined. In an individual client's case, the defender seeks to protect the client's liberty and dignity.[124] And groups of defenders acting zealously and collectively "can transform the assumptions that make the system so destructive."[125] Defender offices with the political independence, will, and resources are also increasingly joining litigation and other advocacy efforts aimed at reform, and sometimes transformation, of the criminal legal system.[126]

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major ills of indigent defense organization, to the ultimate benefit of both defendants and the public").

124 *See* Freedman & Smith, *supra* note 32, at 15 (describing the adversary system as embodying a "core of basic rights that recognize and protect the dignity of the individual in a free society").

125 Rapping, *supra* note 64, at 84; *see also id.* at 87–88 (stating that every time a defender "refuses to go along with the status quo, she makes a difference" and that "collectively these public defenders are raising expectations of how poor people deserve to be treated," "are changing the assumptions that drive injustice," and "are transforming the system").

126 *See, e.g.*, *Impact Litigation Docket*, The Legal Aid Soc'y, https://legalaid-nyc.org/impact-litigation-docket/ [https://perma.cc/89NG-LL2M] (last visited Aug. 29, 2023) (detailing efforts challenging practices such as excessive police force, unconstitutional stops and searches, and incarceration for people accused of parole violations before any affirmative finding); *What We Do*, Tex. Def. Serv., https://www.texasdefender.org/what-we-do/ [https://perma.cc/G8KR-TX4R] (last visited Aug. 29, 2023) (detailing efforts to end the death penalty and excessive sentences); Press Release, Publ. Def. Serv. for the District of Columbia., *Public Defender Service for the District of Columba Files Suit Against the Bureau of Prisons* (Feb. 4, 2022), https://www.pdsdc.org/news/statements-press-releases/press-release-detail/pds-files-suit-against-the-bureau-of-prisons [https://perma.cc/9NRD-92XV] (announcing suit for unfair treatment of D.C. residents incarcerated at BOP); Press Release, Bronx Defs., *The Bronx Defenders Updated Statement in Response to the Mayor's New Directive for Involuntary Mental Health Removals* (Dec. 2, 2022), https://www.bronxdefenders.org/the-bronx-defenders-statement-in-response-to-the-mayors-new-directive-for-involuntary-mental-health-removals/ [https://perma.cc/CJ76-UT89] (urging mayor to rescind policy forcing unhoused populations into involuntary hospital admission, and instead invest in community-based healthcare and long-term, supportive housing); *cf.* Complaint, *Thomas v. Evers*, No. 2022CV001027 (Cir. Ct. Brown Cnty. Wis. Aug. 23, 2022), https://www.nacdl.org/getattachment/f9a8880e-1a54-4709-baa7-ec40b44da509/WIComplaint82322.pdf?lang=en-US [https://perma.cc/6ZKDSDVW] (NACDL and indigent defense organizations intervening to sue Governor and Public Defender for inadequate representation

Still, there are important differences between individual and systemic advocacy, including varying ethical rules.[127] Further, some of the issues discussed below involving individual representation are mostly relevant to line defenders in court on a regular basis.[128] Issues and recommendations involving systemic reform, including legislative efforts, are most relevant to the public defender office leaders and defender associations that are more likely to be leading advocacy aimed at system-wide change.[129]

A. Defense Lawyering in Individual Cases in Progressive Prosecution Jurisdictions

Context matters in criminal defense lawyering.[130] In some jurisdictions, zealous advocacy means fighting tooth and nail to get a client out of jail on a misdemeanor. In a progressive prosecution jurisdiction, the office may be implementing the elected prosecutor's campaign promise to decline prosecution in a significant list of misdemeanor charges.[131] The line prosecutors may not be seeking cash bail in some low-level felony cases—and judges are far more likely to release individuals when the government does not request bail.[132] The

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where defense counsel was not being appointed in a timely manner and defense services lacked adequate funding).

127 Carle & Cummings, *supra* note 36, at 465–66.

128 Defender office heads certainly influence line defender representation, via trainings and office culture. But defender culture in general allows for individualized defense lawyer approaches, including lawyering that pushes far beyond management boundaries. This is not the case in prosecutor's offices, where there is more pressure to conform to office culture and norms. Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1147, 1149–50 (2012) (finding that prosecutors in hierarchal offices experience very low autonomy and lack decision-making independence).

129 *See, e.g.*, *Home*, BLACK PUB. DEF. ASS'N, http://blackdefender.org/ [https://perma.cc/UE4VX2DQ] (last visited Aug. 29, 2023) (promoting a network of Black public defenders with the objective of combating mass incarceration); *Mission*, NAT'L ASS'N FOR PUB. DEF., https://publicdefenders.us/mission/ [https://perma.cc/4HFH-E8GF] (last visited June 1, 2024) (setting forth fifteen "Foundational Principles" for systemic reform); NAT'L ASS'N OF CRIM. DEF. LAWS., https://www.nacdl.org/ [https://perma.cc/FWM7-RASL] (last visited Aug. 29, 2023) (describing organizational strategic impact goals aimed at achieving systemic reform).

130 *See* Megan S. Wright, Shima Baradaran Baughman & Christopher Robertson, *Inside the Black Box of Prosecutor Discretion*, 55 U.C. DAVIS L. REV. 2133, 2143–45, 2186–89 (2022) (describing empirical findings that prosecutors charge and plea bargain in widely disparate ways across jurisdictions).

131 *See infra* Part III.A.1.a.

132 Birte Englich, Thomas Mussweiler & Fritz Strack, *The Last Word in Court—A Hidden Disadvantage for the Defense*, 29 LAW & HUM. BEHAV. 705, 707 (2005)

new prosecutor may even be making decarceral moves in felony cases, such as avoiding charging decisions that trigger mandatory minimum sentences.[133]

Given these shifts, some progressive prosecutors might prefer (or even expect) defenders to dial back their zealousness. But the new environment actually poses opportunities for defenders to push the mass criminalization and carceral needle back even further. The fact that a progressive prosecutor has slightly changed the balance in a system that stands out globally for its over-punitive approach should be seen as the preliminary move, not the end goal. This Part explores two critical points along the timeline of a criminal case where defenders might push for better outcomes for their clients in such jurisdictions: the charging and plea-bargaining stages.[134]

1. *Charging Decision Advocacy*

The prosecutor's decision to convert an arrest into a formal criminal proceeding initiates the adversarial process and thus a number of statutory and constitutional rules and protections. Filing criminal charges also leads to creation of a publicly available court record.[135] Prosecutors have enormous discretion about what charges to file, and what they choose affects every stage of the case, from the bail determination

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("Recent evidence in the context of criminal law provides further converging evidence that judges heavily weigh prosecution requests in their legal decisions.").

133 *See, e.g.*, Memorandum from Merrick Garland, Att'y Gen., Dep't of Just., to Federal Prosecutors 3 (Dec. 16, 2022), https://www.justice.gov/media/1265326/dl?inline [https://perma.cc/74ZH-LRCT] ("[C]harges that subject a defendant to a mandatory minimum sentence should ordinarily be reserved for instances in which the remaining charges . . . would not sufficiently reflect the seriousness of the defendant's criminal conduct, danger to the community, harm to victims, or other considerations outlined above.").

134 For an exploration of the close connection between the charging and plea-bargaining stages from the prosecutorial practice perspective, see Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29 (2002). For exploration of prosecutorial decision-making at each stage of a misdemeanor case, see Jenny Roberts, *Prosecuting Misdemeanors*, *in* OXFORD HANDBOOK OF PROSECUTORS AND PROSECUTION (Ronald F. Wright, Kay L. Levine, Russell M. Gold, eds., 2021).

135 *See, e.g.*, *Maryland Judiciary Case Search Criteria*, MD. JUDICIARY, https://casesearch.courts.state.md.us/casesearch/ [https://perma.cc/P4A5-CZK3] (last visited Aug. 29, 2023). Arrest records, which law enforcement agencies generally maintain, might be harder to access than court records but can still lead to employment, housing, and other collateral consequences. *See* MARGARET COLGATE LOVE, JENNY ROBERTS, & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE ch. 5 (4th ed. 2022).

to plea bargaining to sentencing. The choice of charges also plays a large role in which so-called "collateral consequences" are on the table, such as automatic deportation for almost all drug convictions or sex offense registration for conviction of certain offenses.[136] Prosecutors also have discretion to decline to charge a case brought to them by law enforcement.[137] One example of a post-arrest, pre-charge "declination" would be an agreement to forego the filing of a charge of driving with a license suspended for failure to pay parking tickets upon proof of payment for the tickets.[138]

Like almost all aspects of prosecutorial decision-making, the exercise of charging discretion is effectively immune from judicial review.[139] The limited exceptions to this general rule have mostly happened in progressive prosecution jurisdictions. For example, Northern Virginia Commonwealth's Attorney Parisa Dehghani-Tafti faced judicial intervention when she exercised her discretion in a manner seen as too lenient towards defendants.[140] As Paul Butler stated—discussing judicial intervention to appoint a special prosecutor to replace Chicago prosecutor Kim Foxx's office in the widely-publicized Jussie Smollett case—"Black women progressive prosecutors face a

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136 Under federal immigration law, any conviction "relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana" makes an individual deportable. 8 U.S.C. § 1227(a)(2)(B)(i); *see also id.* § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); *id.* § 1101(a)(43)(B) (defining "aggravated felony" to mean "illicit trafficking in a controlled substance . . . including a drug trafficking crime"); 18 U.S.C. § 924(c)(2) ("[T]he term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act . . . ."). For sex offense registration, each jurisdiction has a list of qualifying offenses. *See, e.g.*, MINN. STAT. § 243.166 subdiv. 1b(a) (2022).

137 *See supra* note 26.

138 *See, e.g.*, Tatiana Flowers, *Two Colorado Counties Want to Keep People with Low-Level Driving Offense Out of the Criminal Justice System*, COLO. SUN (Jan. 20, 2023), https://coloradosun.com/2023/01/20/pathways-diversion-program/ [https://perma.cc/HU7L-GN32] ("The Safe and Licensed Driver Program . . . is the most recent addition to the First Judicial District's Pathways Program. The programs—for people facing low-level drug or driving charges among other citations—divert participants into programming before charges are filed and before they become part of the criminal justice system, a major change from the previous Adult Diversion Program . . . , which required a guilty plea before program participation.").

139 *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 13–14 (2007).

140 Rachel Weiner, *Arlington's Top Prosecutor, Defender Clash with Judge*, WASH. POST (Nov. 13, 2020), https://www.washingtonpost.com/local/legal-issues/arlington-prosecutor-public-defender-challenge-judge/2020/11/13/1adc114e-1219-11eb-ba42-ec6a580836ed_story.html [https://perma.cc/988U-EY8F].

unique type of intransigence" from the judiciary and others on this front.[141]

There has also been executive branch interference in similar instances. Former Florida Governor Rick Scott appointed an alternative prosecutor via executive order in at least twenty-seven murder cases when elected (former) prosecutor Aramis Ayala announced that she would not seek the death penalty.[142] The Florida Supreme Court upheld that unprecedented intervention.[143] Also in Florida, Governor Ron DeSantis removed elected Hillsborough County State Attorney Andrew Warren from office after Warren made statements that contrasted with DeSantis's political positions.[144]

Despite these selective instances of judicial and executive branch intervention, most prosecutors' charging decisions are never scrutinized. Compounding that immunity is the fact that the pre-charge screening stage is particularly non-transparent. Unlike bail requests, plea offers, sentencing recommendations, and other prosecutorial decision points, charging decisions are conducted behind closed doors without judicial involvement and generally without defense counsel participation. In many places, particularly in misdemeanor cases, charging decisions happen before the procedural protections of the adversarial system, including the right to counsel, are in place for a defendant.

Some progressive prosecutors have effectively opened up their charging practices for scrutiny, either through campaign promises or—in a few places—publication of charging-policy memos. An example of a newly elected progressive prosecutor publishing a charging-policy memo can be found in what New York County (Manhattan) District Attorney Alvin L. Bragg called his "Day One Polices & Procedures." The memo's first instruction is that "[t]he Office will not prosecute the following

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141 Butler, *supra* note 78, at 1994, 1996–98. *See also* text accompanying notes 61–63. After two terms in office, Foxx announced that she would not seek reelection. Jessica D'Onofrio, Karen Jordan & Craig Wall, *Kim Foxx Won't Seek Reelection as Cook County State's Attorney*, ABC7 (Apr. 25, 2023), https://abc7chicago.com/kim-foxx-chicago-da-cook-county-states-attorney/13181281/#:~:text=Kim%20Foxx%20delivered%20a%20fiery,as%20Cook%20County%20state's%20attorney [https://perma.cc/A6RQTAVQ].

142 Butler, *supra* note 78, at 1995–96.

143 Ayala v. Scott, 224 So. 3d 755, 757 (Fla. 2017).

144 Lori Rozsa, *A Progressive Prosecutor Clashed with DeSantis. Now He's Out of a Job*, WASH. POST, https://www.washingtonpost.com/nation/2022/08/14/florida-desantis-warren-prosecutor-suspension/ [https://perma.cc/PHK3-BKJK] (last updated Aug. 14, 2022).

charges, unless as part of an accusatory instrument containing at least one felony count[.]"[145] It goes on to list various misdemeanor and violation offenses, ranging from trespass to theft of public transportation services.[146] Bragg also gave charging instructions about several felonies. For example, "[a]n act involving theft of property from a commercial establishment that could be charged" as a "C"-level felony "because such establishment is technically part of a larger structure that contains dwellings shall only be charged" as a lower "D"-level felony.[147] Philadelphia, Baltimore, and Chicago prosecutors are among those who have also published charging-policy memos.[148]

One example of a campaign promise related to charging can be found in Harris County, Texas—the third most populous county in the United States, encompassing the city of Houston. The county first elected Kim Ogg as District Attorney in 2016, the first Democrat to hold that position in almost forty years. One of Ogg's campaign promises was to offer pre-arrest diversion for marijuana possession of up to four ounces.[149] In 2017, Ogg published eligibility and fee requirements ($150) for the diversion program.[150] In early 2020, Ogg claimed success: "[t]oday, no one in Harris County is arrested for misdemeanor possession of Marijuana"[151]—although a recent study identified

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145 Memorandum from Alvin L. Bragg Jr., Dist. Att'y, Cnty. of N.Y., on Achieving Fairness and Safety to All Staff (Jan. 3, 2022), https://www.manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf [https://perma.cc/T7SJ-NBUM] [hereinafter Bragg Memo].

146 *Id.* at 1–2.

147 *Id.* at 3.

148 *See infra* notes 157–60 and accompanying text.

149 Tom Dart, *Houston's New District Attorney Stands by Her Bold Move to Decriminalize Marijuana*, GUARDIAN (Apr. 18, 2017), https://www.theguardian.com/us-news/2017/apr/18/houston-district-attorney-kim-ogg-marijuana-decriminalization-texas [https://perma.cc/LU8D-8U59].

150 KIM K. OGG, HARRIS CNTY. DIST. ATT'Y'S OFF., MISDEMEANOR MARIJUANA DIVERSION PROGRAM (2017), https://app.dao.hctx.net/sites/default/files/2017-03/MMDPOverview.pdf [https://perma.cc/3S2C-RXP6] (last visited Oct. 3, 2023) (setting out eligibility requirements); *see also* KIM. K. OGG, HARRIS CNTY. DIST. ATT'Y'S OFF., MISDEMEANOR MARIJUANA DIVERSION PROGRAM (2019), https://app.dao.hctx.net/sites/default/files/2019-05/4.10.19%20Misdemeanor%20Marijuana%20Diversion%20Program.pdf [https://perma.cc/WD9N-4APG] (same). Ogg appears to have lowered the fee to fifty dollars sometime after 2019. *See* HARRIS CNTY. DIST. ATT'Y'S OFF., MISDEMEANOR MARIJUANA DIVERSION PROGRAM 7 (2023), https://assets.nationbuilder.com/harriscountyda/pages/56/attachments/original/1694575598/Misdemeanor-Marijuana-Diversion-Program-revised-09.01.23.b.pdf?1694575598 [https://perma.cc/WD9N-4APG].

151 Kim Ogg Campaign, *Marijuana Reform*, KIM OGG FOR HARRIS CNTY DIST. ATT'Y (Jan. 2, 2020), https://www.kim-ogg.com/marijuana [https://perma.cc/S9CN-LQR4]. The data shows a drastic drop in misdemeanor marijuana prosecutions in

significant racial/ethnic and gender disparities in several aspects of the diversion program.[152]

Kay Levine has called for "reformist prosecutors to insist on consistency in the prosecutorial calculus," and critiqued the "generic" nature of various screening guidelines that would "authorize almost any decision a prosecutor would like to make in a given case and provide little by way of constraint."[153] She flags Philadelphia District Attorney Larry Krasner's memo to his line prosecutors setting out various categories of charges that they should decline to file as the type of office policy offering a "[h]eartier form of constraint."[154]

But these publicly posted policies and campaign promises relating to prosecutorial screening are the exception.[155] Even when they are public, but particularly when they are not, it is difficult to know whether a prosecutor's charging policies are consistently applied.[156] Absent follow-up and vigilance by

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the Harris County courts—from 11,098 filings in 2014 to only 1,842 for the first twenty months of Ogg's term. Jeff Reichman, *The Decline of Low Level Marijuana Cases in Harris County*, JANUARY ADVISORS (Sept. 30, 2018), https://www.januaryadvisors.com/low-level-marijuana-decline/ [https://perma.cc/AVK5-FQVL].

152 Helen F. Sanchez et al., *Racial and Gender Inequities in the Implementation of a Cannabis Criminal Justice Diversion Program in a Large and Diverse Metropolitan County of the USA*, 216 DRUG & ALCOHOL DEPENDENCE (2020). The Model Penal Code's newly-published Sentencing provisions call for record-keeping and data creation for deferred prosecutions, including the economic status, race, and gender of the participating individuals. *See* MODEL PENAL CODE: SENT'G, § 6.03 (14–15) (Am. L. Inst. 2023). *See also id.* (calling for prosecutors to "adopt and make publicly available written standards for its use of deferred-prosecution agreements," that include "criteria for selection of cases for the program," "content of agreements," "grounds and processes for responding to alleged breaches of agreements," and "benefits afforded upon successful completion of agreements").

153 Kay L. Levine, *Should Consistency Be Part of the Reform Prosecutor's Playbook?*, 1 HASTINGS J. CRIME & PUNISHMENT 169, 177–89 (2020) (citing guidelines in the National Prosecution Standards Manual as one example).

154 *Id.* at 178. *See also supra* note 8 (describing Krasner's declination memo).

155 Jessica A. Roth, *Prosecutorial Declination Statements*, 110 J. CRIM. L. & CRIMINOLOGY 477, 480–81 (2020) (noting historical lack of transparency relating to declinations and stating that "it is still true that prosecutors generally do not explain individual declination decisions, at least to a public audience"). *But cf.* Matt Daniels, *The Kim Foxx Effect: How Prosecutions Have Changed in Cook County*, THE MARSHALL PROJECT (Oct. 24, 2019), https://www.themarshallproject.org/2019/10/24/the-kim-foxx-effect-how-prosecutions-have-changed-in-cook-county [https://perma.cc/96DA-WPYD] ("One year into her term, Foxx did something no other state's attorney had ever done: she released six years of data outlining what happened in every felony brought to her office, offering an unprecedented view into the decision-making of prosecutors and its impact.").

156 *See* ROBIN OLSEN, LEIGH COURTNEY, CHLOE WARNBERG & JULIE SAMUELS, URB. INST., *Collecting and Using Data for Prosecutorial Decisionmaking* 1–2 (2018), https://www.urban.org/research/publication/collecting-and-using-data-prosecutorial-decisionmaking [https://perma.cc/EU89-84FZ] (surveying 158 state prosecutor's

those outside of the prosecutor's office, it is hard to assess even the "heartier" policies.

Defense lawyers in progressive prosecution jurisdictions can focus on two types of advocacy relating to the charging stage. First, they can hold prosecutors accountable for their declination policies and campaign promises. Second, they can divert resources freed up by misdemeanor declinations to focus on pre-charge negotiation in more serious cases.

a. *Defenders as Enforcers of Misdemeanor Declination Policies*

Like the Harris County marijuana declination policy, most progressive prosecution charging reform has been in the misdemeanor arena. For example, in Krasner's charging policy memo, all but one new standard relates to misdemeanors.[157] Former Baltimore prosecutor Marilyn Mosby first stopped charging several categories of misdemeanor offenses, including drug possession, prostitution, and trespassing, as a public-safety measure during the early part of the pandemic; she later made that declination policy permanent (although the subsequent State's Attorney appears to have rolled it back).[158] Chicago top prosecutor Kim Foxx did announce, as her first major policy initiative after taking office,[159] that her office would decline to prosecute shoplifting as a felony when the goods were valued under $1,000 ("a threshold three times higher than under the

offices and finding that it is "uncommon" to have any "systematic approaches for tracking compliance with office policies").

157 PHILA. DAO, PHILADELPHIA DAO NEW POLICIES 1–2, https://phillyda.org/wp-content/uploads/2022/04/DAO-New-Policies-2.15.2018-UPDATED.pdf [https://perma.cc/AAA4-HW4C] [hereinafter Krasner Memo]. The only non-misdemeanor charging policy is the requirement of supervisory approval to charge retail theft as a felony. *Id.* at 2.

158 Tom Jackman, *After Crime Plummeted in 2020, Baltimore Will Stop Drug, Sex Prosecutions*, WASH. POST (Mar. 26, 2021), https://www.washingtonpost.com/dc-md-va/2021/03/26/baltimore-reducing-prosecutions/ [https://perma.cc/8UKA-CVEL]; Madeleine O'Neill, *Bates Introduces Citation Docket for 'Quality-of-Life Offenses' in Baltimore*, DAILY RECORD (June 1, 2023), https://thedailyrecord.com/2023/06/01/bates-introduces-citation-docket-for-quality-of-life-offenses-in-baltimore/ [https://perma.cc/86AW-B5KY] (noting how Mosby's successor rolled back parts of her misdemeanor declination initiative, replacing the bar on prosecution with a modified diversion system that is dependent on the defendant's criminal history).

159 Steve Schmadeke, *Top Cook County Prosecutor Raising Bar for Charging Shoplifters with Felony*, CHI. TRIB., https://www.chicagotribune.com/news/breaking/ct-kim-foxx-retail-theft-1215-20161214-story.html [https://perma.cc/AZY5-Z6SQ] (last updated Dec. 15, 2016).

current state law").[160] This "led to a steep decline in [felony retail theft] charges, from 300 per month to about 70."[161]

Progressive prosecutors offer varying reasons for wholesale declination policies for entire low-level offense categories, including the need to remedy serious racial disparities in misdemeanor enforcement and to redistribute limited resources for more serious cases.[162] Whatever the reason for the policy, misdemeanor declination is significant, as the reality of lower criminal court prosecutions in many jurisdictions means numerous court appearances spread over many months, requiring work absences and sometimes onerous travel to court. As Malcolm Feeley has aptly described, these courts are places where "the process is the punishment."[163] It is important to hold prosecutors to declination policy promises and ensure that they are evenly applied.

Defenders representing clients charged with a crime that the prosecutor previously declared covered under a declination policy or campaign promise can play a critical role. Most obviously, defenders should advocate for declination of any filed charges that fit under the policy, as well as immediate expungement of any arrest record. Defender offices might also document policy violations.[164] For example, Corpus Christi, Texas voters elected Mark Gonzalez as their chief prosecutor based on his promise, among other things, to divert minor marijuana cases.[165] However, the diversion program Gonzalez established is problematic in several ways, starting with its troubling name of "Cite and Release." While minor marijuana possession is eligible for diversion, it is up to the police officer to decide between

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160 Daniels, *supra* note 103.

161 *Id.* Notably, the prior (non-progressive) prosecutor who Foxx replaced—and who charged the much higher number of felony retail theft cases—actively supported legislation to raise the $500 monetary bar (one of the lowest in the Midwest) for felony retail theft to $1000. Schmadeke, *supra* note 159.

162 KIM K. OGG, HARRIS CNTY. DIST. ATT'Y'S OFF., *supra* note 150, at 2 ("[I]t is this Office's responsibility to consider the total impact of arrest and conviction for minor law infractions upon all people, especially when past prosecutions have disproportionately impacted communities of color.").

163 MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT (1979).

164 As with any push for transparency and accountability, defenders should be prepared for pushback from prosecutors who, as self-proclaimed reformers, might critique the defense bar as hassling them over violations of their own policy.

165 *See* Timothy Bella, *The Most Unlikely D.A. in America*, POLITICO MAG. (May 6, 2018), https://www.politico.com/magazine/story/2018/05/06/most-unlikely-district-attorney-in-america-mark-gonzalez-218322 [https://perma.cc/NW5M-JUHP].

citation and arrest.[166] Further, diversion "requires payment of a $250 fine, which may still be out of reach for some but has netted the county $300,000 in revenue since its inception."[167] To the extent that defenders are (or can be) involved in any of these "cite and release" diversion cases, they can advocate for outright dismissal or, alternatively, waiver of the fine.

Although systemic defense advocacy is discussed more fully below,[168] it bears noting how individual advocacy is closely connected to systemic reform efforts. In the realm of charging decisions, for example, the local defense bar should push Gonzalez to decline charges in all marijuana cases, pointing out problems their clients can face once a court record is created (in addition to the obvious problems with payment to access diversion).[169] Defenders might also raise the well-documented racial disparities that arise when discretion to charge is left in the hands of police officers.[170]

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166 Eleanor Dearman, *Cite-and-Release Program in Nueces County Lets Officers Choose: Arrest or Issue Citation*, CALLER TIMES, https://www.caller.com/story/news/local/2019/04/24/what-know-cite-and-release-nueces-county/3541273002/ [https://perma.cc/CD7Y-PRLZ] (last updated Apr. 24, 2019).

167 *Some Prosecutors Promote Diversion Programs as an Alternative to Incarceration*, VERA INST. FOR JUST., https://web.archive.org/web/20210625190935/https:/www.vera.org/pieces/some-prosecutors-promote-diversion-programs-as-an-alternative-to-incarceration [https://perma.cc/CT7P-NKVM]. Indeed, when Texas adopted the "State Hemp Protection Plan," which defines hemp as having a THC concentration of up to .3 percent and thus makes prosecution of marijuana cases possible only with an onerous laboratory test for THC concentration, Gonzalez stated:

> Because we can't go forward on these cases, it means we can no longer generate the revenue, create the programs, education and then return that to the community . . . . [I]t really does impact our office in a way that's going to hurt us. Like I said, I don't know how I feel about it yet.

Eleanor Dearman, *Nueces County Among Those to No Longer Prosecute Low-Level Pot Cases Without Test*, CALLER TIMES (July 3, 2019), https://www.caller.com/story/news/crime/2019/07/03/report-nueces-county-wont-prosecute-some-pot-cases-without-testing/1639420001/ [https://perma.cc/K6C2-V2EE].

168 *See infra* Part III.B.

169 *See generally* Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 997–1000 (2019) (discussing the consequences of an arrest, including creation of an arrest record); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820–44 (2015) (discussing the same concepts).

170 Certainly, prosecutorial declination decisions at the individual level suffer from those same biases, and even when there is a declination policy for entire classes of offenses, eligibility reflects "the same bias and false beliefs that infect other areas of the criminal process." Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 794 (2020); *see also id.* at 792 ("A prosecutorial reform movement should not assume that eliminating mass incarceration would eliminate the racial injustice embedded in the system.").

Former top Boston prosecutor Rachael Rollins, while making the problematic remarks discussed above,[171] pushed the reform envelope in a number of areas, including her declination policy. She published a list of fifteen offenses with a default policy of declination that could be bypassed only in exceptional circumstances and with supervisory permission; offenses listed included trespassing, larceny under $250, disorderly conduct, disturbing the peace, minor driving offenses, and some resisting arrest charges.[172] Still, those promises were slow to be realized, and advocates called out her office for this failure, noting how charges on the memo's list were still being prosecuted several months into her tenure.[173]

Although press coverage discusses CourtWatch MA's "First 100 Days Project in Suffolk County" to hold Rollins accountable to her promises,[174] line public defenders are in court on a regular, lasting basis and have first-hand knowledge of whether prosecutors are carrying out their reform promises. Indeed, after Rollins's successor announced that the offenses on Rollins's declination list would now be subject to prosecution at the discretion of individual assistant district attorneys, a defender spoke to the press about the resumed prosecution of low-level misdemeanors, including incarceration of an older man for selling loose cigarettes.[175] More organized, consistent enforcement of declination policies by defender offices could make a real difference.

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171 *See supra* text accompanying notes 98–110.

172 ROLLINS, *supra* note 97, at app. D-1; *see also* Memorandum from Larry Krasner to Line Prosecutors, *supra* note 97, at 1 (publicly released internal office policy memo from Krasner directing his line prosecutors to "decline certain charges," including possession of marijuana "regardless of weight," paraphernalia or buying from a person when the related drug is marijuana, and most prostitution charges).

173 Eoin Higgins, *Progressive DA Rachael Rollins Hasn't Stopped Prosecuting Petty Crimes, Despite Pledge. Police Are Still Furious.*, THE INTERCEPT (Mar. 24, 2019), https://theintercept.com/2019/03/24/rachael-rollins-da-petty-crime/ [https://perma.cc/VRM4-A7HD].

174 *First 100 Days Project in Suffolk County*, COURT WATCH MA, https://www.courtwatchma.org/first-100-days [https://perma.cc/X6AU-KRSM] (last visited Sept. 3, 2023).

175 Yawu Miller, *Is DA Hayden Reversing Rollins' Policies?*, BAY STATE BANNER (June 22, 2022), https://www.baystatebanner.com/2022/06/22/is-da-hayden-reversing-rollins-policies/ [https://perma.cc/K2KL-D8WJ]. Rollins's successor changed the policy despite a study showing that the declination of nonviolent misdemeanors in the Boston area decreased the likelihood of subsequent criminal justice involvement. *See* Amanda Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution*, 138 Q.J. ECON. 1453, 1453 (2023).

Defense counsel might also advocate at the margins of declared declination policies, focusing on cases that are overcharged and might instead fall into a declination category. This is particularly important in the misdemeanor arena, where so many prosecutors' offices have historically done little to no screening of cases before charging (although this should not happen in a jurisdiction with robust declination policies).[176] For example, if a declination policy includes disorderly conduct, defenders might—in cases charging both disorderly conduct and resisting arrest—focus investigatory resources on whether the resisting charge is viable. If body-camera or other evidence shows that it is not, defenders should be pushing to re-categorize the case as one qualifying for declination.

The Baltimore Police Commissioner, discussing former State's Attorney Marilyn Mosby's decision to decline prosecution in most drug and nonviolent misdemeanor crimes, noted how this "meant a huge paradigm shift for police . . . . Officers who made drug arrests saw prosecutors dismissing the charges at the jail, and so the arrests mainly stopped."[177] In Chicago, after State's Attorney Foxx stopped charging shoplifting as a felony if the stolen goods were worth less than $1,000, police started bringing fewer such arrests to her office for felony review.[178]

These feedback loops to law enforcement are a critical part of prosecutorial declinations. Defense counsel has an analogous role to play here, becoming a significant part of the feedback loop holding progressive prosecutors responsible for their own declination policies.

b. *Pre-Charge Defense Lawyering*

Progressive prosecutors' misdemeanor declination and diversion policies should free up space for defender advocacy in

176 Most empirical study of misdemeanor case screening predates recent progressive prosecutor declination policies. For example, Iowa prosecutors' declination rate for public order misdemeanors in 2008 was substantially lower than that for any other offense category. The declination rate for simple misdemeanors, the lowest of Iowa's three levels of misdemeanor offenses, was approximately 0.5 percent, significantly lower than the felony declination rate of approximately seven percent and lower than the rate for any other level of crime. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1717 (2010). New York had similar trends for 2005–2008. *Id.* at 1716–17, 1720. The declination rate for misdemeanors in Alaska in 2015 was 3.7 percent. ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME 70 (2018).

177 Jackman, *supra* note 158.

178 Daniels, *supra* note 103.

other cases. After all, misdemeanors make up about 80% of the cases filed across the nation, and most of those misdemeanors are low-level offenses more likely to land on a declination list.[179]

While not every low-level misdemeanor confers a right to counsel, many defender offices serving indigent clients devote significant resources to lower-criminal-court representation.[180] For example, after Los Angeles District Attorney George Gascón published a directive to his line prosecutors to decline charging in 13 categories of misdemeanors with only narrow exceptions, there were more than 38,000 declinations in a period of 11 months.[181] Public defenders in L.A. "represent many misdemeanor defendants and say the shift has made their caseloads more manageable."[182] Further, misdemeanor declinations can in turn lead to lower overall recidivism rates, as one study of Rollins's Boston declination policy concluded.[183] Freeing up defender resources previously committed to misdemeanor cases does not seamlessly translate into more resources for felony representation, but a defender office with a significantly reduced lower court caseload should have more time and resources for other areas. This might include a defender focus on post-arrest, pre-charge negotiations in more serious cases. It is important to note that this is perhaps aspirational, as overburdened defender offices already struggle to deliver services in more serious cases.[184] Further, lower misdemeanor caseloads raise a real risk of already underfunded public defender

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179 *See* Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 746 (2018) (describing high percentage of misdemeanor cases); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 281 (2011) (same). *See also* Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1106–07 (2013) (citing FBI and other data on categories low-level misdemeanor arrests).

180 *See* Roberts, *Why Misdemeanors Matter*, *supra* note 179, at 310–12 (summarizing federal right-to-counsel floor and state constitutional and statutory rights that may rise above that floor to include counsel, in some jurisdictions, for all criminal charges regardless of incarceration potential).

181 Aaron Mendelson, *Misdemeanors 'Can Haunt a Person for Life': Why LA's DA Stopped Charging Many of Them*, LAIST (Dec. 6, 2021), https://laist.com/news/criminal-justice/misdemeanors-can-haunt-a-person-for-life-why-las-da-stopped-charging-many-of-them [https://perma.cc/S24W-ULXF].

182 *Id.*

183 Agan, Doleac, & Harvey, *supra* note 175, at 1453 (finding that, when Boston prosecutors declined to charge in non-violent misdemeanor cases, there was a large reduction "in the likelihood . . . of new criminal complaints [against the same individual] over the next two years").

184 *See infra* note 273; *see also* Green *supra* note 39, at 1169–70.

providers getting even less funding, something that they—as well as prosecutors and others—should firmly push back against.[185]

Most people who are arrested "enjoy[] no assistance at all in the process by which prosecutors investigate crime and choose whether and what to charge."[186] In Ronald Wright and Marc Miller's study of the New Orleans District Attorney's office, prosecutors interviewed over a seven-year period about pre-charge bargaining "gave a consistent reply: [d]efense attorneys contact them before the filing of charges only in extraordinary cases . . . . Defense attorneys offered the same view: [p]re[-]charge negotiations are rare events."[187] While this study found little pre-charge bargaining by both public defenders and private counsel,[188] there are more structural barriers to government-funded counsel undertaking pre-charge negotiations. One major obstacle is insufficient defense resources, which often means counsel is not appointed before the formal charging stage.[189] Yet defenders might move beyond that obstacle if they had more resources due to, for example, lower misdemeanor caseloads or increased funding (including parity of funding with prosecutor offices).[190]

Recognizing the importance of the prosecutor's initial charging decision and the general lack of charging-stage screening in most prosecutors' offices, defenders could play a significant role at this stage. In Wright and Miller's study, the New Orleans DA's investment of "serious resources in early evaluation of cases . . . [led] to relatively high rates of declination

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185 *See infra* Part III.B.1.

186 Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 887 (2014). The exception is white-collar cases where pre-charge negotiations are a core part of representation. *Id.* ("The most likely point of resource leverage for the corporate offender is at the stage of informal negotiation and litigation over charging decisions and, perhaps to a lesser extent, plea bargains.").

187 Wright & Miller, *supra* note 134, at 78.

188 *Id.* at 79.

189 *See* Abbe R. Dembowitz, Contribution, *Pleas, Sir, May I Have an Attorney? Why the Sixth Amendment Right to Counsel Should Extend to Pre-Indictment Plea Negotiations*, 56 AM. CRIM. L. REV. ONLINE 44, 44 (2019) (contending that the Sixth Amendment should apply pre-indictment); *see also* Maggie Q. Thompson, *You Have a Right to Counsel. So Why Doesn't Travis County Allow Attorneys at Bail Hearings?*, THE AUSTIN CHRON. (Aug. 4, 2023), https://www.austinchronicle.com/news/2023-08-04/you-have-a-right-to-counsel-so-why-doesnt-travis-county-allow-attorneys-at-bail-hearings/ [https://perma.cc/7G7U-WYLA] (describing the inability to institute counsel at first appearance despite widespread support from all criminal legal system actors).

190 *See infra* Part III.B.1.

(that is, refusals to prosecute a case after the police recommend charges)."[191] But the study recognized that the structured, consistent system necessary for robust screening is an environment not typically present in most prosecutors' offices, and thus screening is not typically done.[192] Other scholars have found a similar lack of consistency and little guidance in the realm of prosecutorial charging discretion.[193]

Defender advocacy at the pre-charging stage could serve several functions. First, it would nudge progressive prosecutors to invest screening resources up front. Second, it would force prosecutorial attention to those individual cases with zealous defender pre-charge advocacy even without broader screening resources. Together, this could lead to more prosecutors declining to file charges altogether in some cases (beyond any existing low-level declination policies) and avoiding overcharging in other cases. Defense involvement at the charging stage would effectively move bargaining earlier, away from the current system of post-charge plea bargaining.[194] But it would be bargaining with a lot more potential for avoiding some of the worst features of later-stage plea bargaining, including negotiating against the highly coercive backdrop of an overcharged case.[195] Early defender advocacy could also encourage prosecutors to offer more pre-charge, pre-plea—rather than post-charge, and often post-plea—diversion in felony cases.

Defender participation in pre-charge negotiations would devote attention to one of the most intractable drivers of mass incarceration: prosecutorial discretion, with felony charging practices playing a central role.[196] Although progressive prosecutors claim to be committed to combatting mass incarceration, racial bias, and other injustices in the criminal legal system, their focus on low-level nonviolent misdemeanor declination and general exclusion of "violent" crimes

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191 Wright & Miller, *supra* note 134, at 34.

192 *Id.* at 31–32 (proposing prosecutorial screening as an alternative to the plea-bargaining system that currently dominates criminal case outcomes).

193 *See* Levine, *supra* note 153 and accompanying text; Wright, Baughman, & Robertson, *supra* note 130.

194 *But see* Wright & Miller, *supra* note 134, at 31 (proposing screening as the "principal alternative to plea bargains"); Levine, *supra* note 153, at 190 (noting how "creative defense lawyering might fall by the wayside" if there was office-wide consistency in the exercise of prosecutorial discretion).

195 Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85–105 (1968).

196 PFAFF, *supra* note 73.

from sentencing and other policies belies that commitment.[197] Defenders might explicitly highlight the progressive prosecutor's announced commitments to combatting injustices and use empirical evidence demonstrating the need to rachet down overcharging and other unfair practices to achieve these purported goals.

Defender pre-charging advocacy might develop over time as resources are shifted away from the lower criminal courts (assuming progressive prosecutors continue misdemeanor declination practices and assuming the continued national march towards marijuana legalization). With sufficient resources, defenders would ideally pursue pre-charge advocacy for clients whose cases they would continue to handle assuming the case continued. This would allow for the preferred practice of "vertical" representation where "the same attorney continuously represents the client until completion of the case."[198]

The detailed (and challenging) logistics of defense pre-charge advocacy is beyond the scope of this Article. However, one example might be defender offices establishing pre-charge units. For decades, Neighborhood Defender Service of Harlem has offered "pre-arrest services."[199] The organization's website describes the many advantages to such representation:

> Early entry into a criminal case allows NDS attorneys to interview clients and witnesses earlier, begin investigations, negotiate with law enforcement, and make other preparations before the client goes to court for the first time. NDS can also arrange a client's surrender to law enforcement, facilitating a safe interaction with police for our clients. Occasionally, NDS's ability to enter into a case early results in the police not making an arrest.[200]

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197 *See, e.g.*, Memorandum from Larry Krasner to Line Prosecutors, *supra* note 97, at 2 (the policies for declination and plea bargaining do not extend to "violent" felony cases); *see also* Cecelia Klingele, *Labeling Violence*, 103 MARQ. L. REV. 847, 853 (2020) (in many states, crimes of violence include "in essence, emotional assault" and in several states, "include behaviors whose connection to violence is tenuous at best, e.g., theft of a firearm or drug offenses").

198 ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 3 (2002), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf [http://perma.cc/NZ88-TVXY].

199 NEIGHBORHOOD DEF. SERVS., *Pre Arrest Services*, NDS, https://neighborhooddefender.org/services/pre-arrest-services/ [https://perma.cc/7RYR-KH3U] (last visited Mar. 13, 2024).

200 *Id.*; *see also* Kay L. Levine, Ronald F. Wright, Nancy J. King, & Marc L. Miller, *Sharkfests and Databases: Crowdsourcing Plea Bargains*, 6 TEX. A&M L.

Cooperation by the prosecutor's office and law enforcement, in terms of facilitating the logistics of attorney-client communication and even providing defenders with names of those recently arrested but yet to be formally charged, could prove critical to defender efforts.

Zealous pre-charge advocacy is no panacea to long-standing injustices in the criminal legal system. Prosecutors and defenders alike may treat defendants facing similar allegations differently, and implicit and explicit biases will still undoubtedly play a nefarious role.[201] Still, more declinations—particularly in cases beyond the low-level misdemeanor realm—would lead to fewer people unnecessarily enmeshed in the system. And charging practices that have been through the adversarial process might lead to fewer instances of unfair overcharging.

2. *Plea Bargaining in a Progressive Prosecutor Jurisdiction*

Running for county prosecutor in 2019 in northern Virginia on a reform platform, one of Parisa Dehghani-Tafti's promises was to "[o]nly offer fair plea deals."[202] Her website describes how "plea deals can be important" to victims and efficiency before noting how "studies have found evidence of racial bias and coercion in the use of plea deals, forcing people to give up their day in court and plead guilty, sometimes to crimes they did not commit."[203] Then, the promise: "Parisa will create guidelines for plea bargaining to ensure that plea deals are reasonable and fair."[204] Four years later, it remains to be seen what these guidelines will contain and whether they will be public.[205]

REV. 653, 663–65 (2019) (proposing that defense attorneys create and have "access to a shared database that capture[s] key features of past plea negotiations" and describing how "[e]fforts to assemble rudimentary databases along these lines are starting to appear in practice").

201 *See* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1187 (2018); *see also* Wright & Miller, *supra* note 134, at 94 (acknowledging that pre-charge negotiations are not necessarily a bad thing, but cautioning that "negotiations before charging, like negotiations for plea bargains after charging, risk more inconsistent treatment across similar defendants").

202 *On the Issues*, PARISA FOR JUST., https://parisaforjustice.com/on-the-issues/ [https://perma.cc/QKQ5-68Y3] (last visited Aug. 29, 2023).

203 *Id.*

204 *Id.*; *cf.* Levine, *supra* note 153, at 177 ("[T]he reform prosecutor ought to decide which approach—or combination of approaches—she would like her line prosecutors to adopt, and then instruct them on how to make that approach come to life in their everyday decision-making.").

205 According to Arlington County Public Defender Brad Haywood, as of August 2022, Dehghani-Tafti's office had neither published nor shared with his

This lack of transparency in plea-bargaining practices is widespread, even within the progressive prosecution community.[206] Former top Boston prosecutor Rachael Rollins published a Policy Memo that included a requirement that all plea offers by her office be "memorialized in writing and placed within the case file."[207] Despite a promise that her office "will be developing a set of plea guidelines to reframe our objectives in the criminal justice system" so that the "ADAs will have clear direction about what is expected of them,"[208] these guidelines were not published, if they were ever developed.

These promises of plea guidelines raise important considerations for defenders. First are a set of questions related to the substance and creation of guidelines, including: what is "reasonable and fair"? Who defines fairness and will defenders and their clients be invited to the guidelines drafting table? Will progressive prosecutors publish the guidelines, making them accessible to defenders and to the public?

Beyond these threshold issues are those relating to the actual bargaining process. How does a defender negotiate when the prosecutor has positioned her office as coming to the bargaining table with plea offers already vetted for fairness and potential bias? Indeed, in Dehghani-Tafti's case, she has deep experience as an innocence project attorney and public defender—a background not dissimilar from other progressive prosecutors.[209]

The reality on the ground is a near-total lack of transparency when it comes to prosecutorial discretion and plea bargaining. As one recent study details:

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office any guidelines. Telephone Interview with Brad Haywood, Arlington Pub. Def., Va. Indigent Def. Comm. (Aug. 2, 2022).

206 *See, e.g.*, Brandon L. Garrett et al., *Open Prosecution*, 75 STAN. L. REV. 1365, 1369 (2023) ("Efforts by prosecutors to create data dashboards have not resulted in the documentation of plea negotiations."). *See generally* Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining,* 22 NEW CRIM. L. REV. 434, 436 (2019) ("We argue that information, or lack thereof, is a significant limitation in ensuring the legitimacy of plea bargaining and the entire criminal legal system."); Wright & Miller, *supra* note 134, at 55 (pointing out that "good information about the operation of prosecutor['s] offices is hard to find or collect"); Jenia I. Turner, *Transparency in Plea Bargaining*, 96 NOTRE DAME L. REV. 973, 978 (2021) (discussing the reasons for the lack of transparency in plea bargaining and offering proposals to improve transparency without significant costs to the criminal legal system).

207 ROLLINS, *supra* note 97, at 37.

208 *Id.*

209 *Meet Parisa*, PARISA FOR JUST., https://parisaforjustice.com/about-parisa/ [https://perma.cc/R59C-EXUQ] (last visited Aug. 29, 2023).

> In general, there is very little formal policy on how prosecutors should negotiate pleas, and it is unusual for a prosecutor's office to have written policies regarding plea bargaining. In place of a written policy, prosecutors' plea decisions can be informed by group norms, informal discussions among colleagues, and formal supervisory feedback. In the rare circumstance that an office has plea guidelines in place, the policy is often oriented to more, rather than less, punitive dispositions. For example, offices may offer "price lists," setting out schedules of plea offers for certain offenses.[210]

While this may be starting to change,[211] defenders have opportunities in progressive prosecution jurisdictions that cannot await transparency that may never arrive. However fair (or less unfair than previous practices) any eventual guidelines or specific plea offers may appear to be, they set a new baseline against which defenders must bargain.

Indeed, pushing for a better outcome in an individual client's case against a progressive prosecutor's "fair" (or less unfair) bargaining baseline is required under defense counsel's Sixth Amendment duty to provide effective assistance of counsel. The first prong of the ineffective assistance of counsel test in *Strickland v. Washington* involves showing that trial counsel's representation fell below prevailing professional norms.[212] Justice Marshall, dissenting in *Strickland*, noted how "the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the standard of performance mandated by the Sixth Amendment vary by locale?"[213] Indeed, although courts use national standards as

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210 Garrett et al., *supra* note 206, at 1380–81.

211 *See* FAIR AND JUST PROSECUTION, PLEA BARGAINING, 7 (2022), https://fairandjustprosecution.org/wp-content/uploads/2022/02/Plea-Bargaining-Issue-Brief.pdf [https://perma.cc/7CF2-NGF5] (describing how the Philadelphia and Dallas District Attorneys have recently published instructions to their line prosecutors relating to plea offers); *id.* at 6 (calling on prosecutors to "take immediate action and make changes to their offices' plea bargaining practices to strengthen due process, increase transparency, and reduce unnecessary incarceration"). One of the few published prosecutor memos with at least some guidance on plea bargaining is that of Philadelphia District Attorney Larry Krasner. Yet the "Plea Offers" portion of the memo is short (with only three points) and vague; it also categorically excludes many offenses including all "violent crimes." Krasner Memo, *supra* note 157.

212 *See* Strickland v. Washington, 466 U.S. 668, 687–88 (1984) (holding that in ineffective assistance of counsel claims, the defendant must show that, first, counsel's representation was incompetent as judged by prevailing professional norms; and second, that this incompetence prejudiced the defendant); Hill v. Lockhart, 474 U.S. 52, 58 (1985) (applying the *Strickland* test to claims of ineffective assistance of counsel in the guilty plea context).

213 *Strickland*, 466 U.S. at 708 (Marshall, J., dissenting).

a metric here, they have also relied on local norms.[214] Under this doctrinal framework, if a local progressive prosecutor has plea guidelines (or makes an offer) that they hold out as fair and reasonable, the defender cannot simply present that offer to the client without pushing for a better bargain. Unless defenders in that jurisdiction are generally taking that approach—which would be highly problematic—failing to push more would fail to meet the prevailing norm. And even it did meet the local norm, national norms still call for zealous bargaining.[215]

There are specific ways defenders can push for even better outcomes. For example, in all cases defenders should seek the prosecutor's pledge to request a sentence no higher than that offered in any rejected plea bargain, should the client exercise their right to trial and be convicted. Against the well-documented background of the so-called "trial tax," defenders should insist that any truly progressive prosecutor would commit to eradicating this coercive practice. Indeed, given that even the Supreme Court has finally recognized that "plea bargaining is . . . not some adjunct to the criminal justice system; it *is* the criminal justice system,"[216] such a commitment is one of the more significant policies that a progressive prosecutor might announce.

The American Bar Association, in its recently published Plea Bargaining Principles, "encourages all jurisdictions to adopt policies that limit the size of sentencing differentials to ensure that the difference between the sentence offered prior to trial and the sentence received after trial is reasonable and not impermissibly coercive."[217] Fair and Just Prosecution, a progressive prosecution organization, has called for an end to the trial penalty—with a back-up suggestion of capping that penalty

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214 *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 367–68 (2010) (citing a variety of sources for the norm—constitutionalized in the *Padill*a decision—of counseling clients about deportation consequences of a conviction).

215 Nat'l Legal Aid & Def. Org., Performance Guidelines for Crim. Def. Representation §§ 1.1, 6.2, (2006).

216 Missouri v. Frye, 566 U.S. 134, 144 (2012).

217 Am. Bar Ass'n, Resolution 502, Principle 3 para. 2 (Aug. 2023), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2023/502-annual-2023.pdf [https://perma.cc/8TN8-GYY6]; *see also* Thea Johnson, *2023 Plea Bargain Task Force Report* 17, Am. Bar Ass'n (Feb. 22, 2023) https://www.americanbar.org/content/dam/aba/publications/criminaljustice/plea-bargain-tf-report.pdf [https://perma.cc/B788-FJN8] ("[T]he Task Force believes that each jurisdiction should engage in a deliberative and considered analysis of this issue to determine what they believe constitutes a reasonable and non-coercive differential between the pretrial offer and the posttrial sentence.").

at "no more than 15% above the plea offer, absent special circumstances (such as additional evidence coming to light)."[218]

Even with this back-up approach, whose exception could swallow the policy, it appears that no prosecutor has announced any such policy for felony charges—but doing so would take a heavy thumb off the plea-bargaining coercion scale. Los Angeles District Attorney George Gascón's misdemeanor directive does state that, for plea offers on misdemeanors not subject to declination or diversion, "[o]nce conveyed to the defendant, no offer shall be increased in response to the defendant exercising their right to pursue a jury trial or pretrial motion."[219] The "Plea Offer" section of Philadelphia District Attorney Larry Krasner's memo to his prosecutors does not discuss the trial tax or offer any pledge to avoid it. However, the memo requires prosecutors, "at sentencing, [to] state on the record the benefits and costs of the sentence you are recommending," and includes detailed guidance on things like costs to the taxpayer.[220]

Even if there were no effective trial tax in misdemeanor cases, defenders may need to change their approach. In a survey of almost 600 defense attorneys about plea bargaining, approximately one-third of the misdemeanor attorneys reported their belief that clients "infrequently" or "never" paid a sentence "tax" for rejecting a plea offer and going to trial. Yet these same attorneys also reported that they themselves made plea offers to prosecutors on behalf of their clients that were simply "reasonable," rather than "somewhat favorable" or "extremely favorable."[221] If these defenders are correct that there is no "tax" for going to trial in misdemeanor cases, then their own approach to bargaining makes no sense and is actually harmful to their clients. Rather, they should be advocating for outright dismissal in most misdemeanor cases. And if that fails, they

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218 FAIR AND JUST PROSECUTION, *supra* note 211, at 9.

219 Special Directive No. 20-07 from George Gascón, Dist. Att'y, L.A. Cnty., to Deputy District Attorneys 5 (Dec. 7, 2020), https://da.lacounty.gov/sites/default/files/pdf/SPECIAL-DIRECTIVE-20-07.pdf [https://perma.cc/B6UC-AD7B] [hereinafter Gascón Memo].

220 Krasner Memo, *supra* note 157. This includes a directive to use, "[i]n talking about the financial cost to the taxpayer," the "arguably low, but much-repeated cost of[] $42,000.00 per year to incarcerate one person ($3,500 per month or $115.00 per day)." *Id.* at 3.

221 Ronald F. Wright, Jenny Roberts & Betina Cutaia Wilkinson, *The Shadow Bargainers*, 42 CARDOZO L. REV. 1295, 1338–39 (2021).

should be going to trial should their clients agree with such an approach.[222]

Related studies reveal that defense lawyers generally may not be engaging in zealous plea bargaining. For example, in a recent study of bargaining in Durham, North Carolina, prosecutors reported communicating with defense attorneys in 73% of all cases before making an initial offer, but that those attorneys provided information related to a more lenient plea offer in only 38% of all cases—despite the fact that defense advocacy, when it did happen, "resulted in frequent and meaningful changes to ultimate results."[223] Relatedly, prosecutors reported that defense attorneys influenced their initial plea offers "a lot" in only 9% of cases, and "not at all" in 42% of overall cases (although those percentages were more favorable for individuals represented by the public defender).[224]

Another study, involving interviews of public defenders, showed that defenders rarely made first offers and although they usually made counteroffers, they themselves described those counters as "unfavorable" to their own clients in almost half of the cases and "extremely favorable" in only 15% of cases.[225] And this is all against the well-documented dynamic of anchoring in negotiation, where prosecutors' initial offers often serve as a "high anchor that makes a subsequent, revised offer appear reasonable in comparison."[226] Still, if defender offices focus more on training related to plea bargaining, this troubling dynamic could shift.[227] While such training is critical in all defender offices, those in progressive prosecution jurisdictions may be leaving more on the bargaining table.

There are other types of coercion beyond the trial tax. For example, one qualitative study involving in-depth interviews of forty defense lawyers around the United States found, among many other problematic things, that "[a] majority of defense attorneys we interviewed noted that bringing suppression

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222 *See* Roberts, *Crashing the Misdemeanor System*, *supra* note 179, at 1099. I realize that this blanket statement about going to trial does not apply to all situations, such as the noncitizen defendant who would accept a guilty plea to a non-deportable misdemeanor, even if it might entail heavier punishment than the charged, deportable, misdemeanor.

223 Garrett et al., *supra* note 206, at 1402–03.

224 *Id.*

225 Wright, Roberts & Wilkinson, *supra* note 221, at 1338–39.

226 Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 201 (2007).

227 *See* Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY L. REV. 1445, 1452 (2016).

motions often necessitates walking away from favorable plea offers by the prosecution."[228] One defender described how they "had a DA tell me that if a specific client didn't take a deal that she would take the deal off of the table for another client that was completely unrelated."[229]

Defenders should also hold progressive prosecutors to their promises to combat racial bias in the criminal legal system and insist that this promise include their own plea-bargaining practices. Data on race and plea bargaining is available in a few jurisdictions, even if for limited time periods. For example, two years of data from the Manhattan District Attorney's office revealed that Black and Latino defendants "were more likely to . . . receive a custodial sentence offer as a result of the plea bargaining process."[230] Another study documented racial bias in plea bargaining in Wisconsin.[231] While defenders' use of data is complicated—data that they can use in favor of one client may cut against their next client—it is an important tool in the limited (but growing) places where it is available and can be incorporated into defenders' bargaining practices. Some defender offices are now gathering their own data on prosecutorial plea practices, although this is a resource-intensive process that requires funding.[232]

Progressive prosecutors will have other policies that defenders must factor into the plea-bargaining equation. For example, if the prosecutor's office had pledged not to exercise

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228 Esther Nir & Siyu Liu, *Defending Constitutional Rights in Imbalanced Courtrooms*, 111 J. CRIM. L. & CRIMINOLOGY 501, 522–23 (2021).

229 *Id.* at 523.

230 BESIKI KUTATELADZE, WHITNEY TYMAS & MARY CROWLEY, VERA INST. FOR JUST., RACE AND PROSECUTION IN MANHATTAN 3 (2014), https://www.vera.org/downloads/publications/race-and-prosecution-manhattan-summary.pdf [https://perma.cc/HS7E- KWA4].

231 *See* Carlos Berdejó, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1213 (2018); *see also* Elayne E. Greenberg, *Unshackling Plea Bargaining from Racial Bias*, 111 J. CRIM. L. & CRIMINOLOGY 93, 137–41 (2021) (identifying a racialized presumption of guilt against Black men and suggesting various steps both defenders and prosecutors can take to alleviate the effects of racial bias on the plea outcome); Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor,* 16 N.Y.U. J. LEGIS. & PUB. POL'Y 821, 836–38 (2013) (describing data from Vera Institute of Justice study on prosecutorial practices, including plea bargaining).

232 *See* Levine, Wright, King & Miller, *supra* note 200, at 664 ("A few public defender offices ask their attorneys to record key information about their cases, to share only with their office colleagues."); Pamela Metzger & Andrew Guthrie Ferguson, *Defending Data*, 88 S. CAL. L. REV. 1057, 1075-77 (2015) (discussing how "public defenders are impoverished in their access to technology," and how this has made data collection challenging).

peremptory challenges during jury selection (or an individual prosecutor agreed to this approach),[233] that would change the "shadow of trial" influencing the bargaining process.[234] The prospect of a trial less infected by juror bias would allow for a stronger defense bargaining position and also for defendants to make less coerced choices.

One area where progressive prosecutor plea bargaining guidelines are unlikely to be sufficiently comprehensive is bargaining around the collateral consequences of any likely conviction.[235] While some prosecutors are more attentive to things like immigration consequences in the wake of the Supreme Court's decision in *Padilla v. Kentucky*,[236] they are too often unaware of the effects of a criminal record on employment, housing, and educational opportunities. To the extent that prosecutorial policies and individual prosecutors account for collateral consequences, they are more likely to focus on consequences situated in statutes or regulations than on "informal" collateral consequences that "do not attach by express operation of law"—such as a landlord or employer who checks an online criminal record database when making hiring or renting decisions.[237]

Defenders can play an important role here by pushing for better outcomes that avoid collateral consequences that are not intended as part of the punishment and that actually

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233 Dehghani-Tafti claims that her office does not rely on peremptory challenges, but she has tweeted that they will use peremptories "[i]f the articulated and lawful cause [for striking the juror] is denied." Parisa Dehghani-Tafti (@parisa4justice), TWITTER (Aug. 20, 2021, 2:42 PM), https://twitter.com/parisa4justice/status/1428789677784457217 [https://perma.cc/T7X8-HMCF]. This exception swallows the promise. On progressive prosecution and peremptory challenges, see generally Savanna R. Leak, Comment, *Peremptory Challenges: Preserving an Unequal Allocation and the Potential Promise of Progressive Prosecution,* 111 J. CRIM. L. & CRIMINOLOGY 273, 280 (2020) ("[P]rogressive prosecution may change the current landscape of fairness in the peremptory challenge context to warrant an equal number of peremptory challenges for both sides.").

234 Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464 (2004).

235 *See* Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2654 (2013) (discussing doctrine and practice relating to bargaining around collateral consequences).

236 Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (holding that defense attorneys have a Sixth Amendment duty to affirmatively inform clients about automatic deportation consequences of a conviction).

237 Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1104 (2013); *see also* LOVE, ROBERTS & LOGAN, *supra* note 135, at ch. 1. Some such "informal" decisions are constrained by anti-discrimination laws or federal or state fair-credit-reporting-act requirements, but many employers and landlords violate those constraints.

cut against prosecutors' public safety goals.[238] Taking progressive prosecutors up on their call for more evidence-based practices,[239] defenders can use data demonstrating that collateral consequences lead to higher recidivism rates.[240] In general, defense attorneys may fare better when revealing information about a collateral consequences in a progressive prosecution jurisdiction than in a nonprogressive one—where that same information could be viewed negatively and possibly result in even harsher consequences.

There may even be opportunities for pre-charge bargaining to avoid a formal charge altogether.[241] This would be significant in many instances, where the charge alone can lead to informal consequences and the initial charge is likely to remain on public databases even where a later conviction is to a lesser charge.[242]

Bargaining to account for collateral consequences is an area where defense lawyering in a progressive prosecution jurisdiction might differ from other environments. All defenders have a federal constitutional obligation to counsel about deportation,[243] and may have state constitutional or statutory obligations to advise clients about—and perhaps even bargain to avoid—other severe consequences (such as sex-offender registration).[244] Defenders are also guided by professional standards that call for advising about other consequences.[245] But in

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238 *See* Christopher Uggen, Mike Vuolo, Sarah Lageson, Ebony Ruhland & Hilary K. Whitham, *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 643–45 (2014) (finding that employment candidates with arrest records or misdemeanor convictions are less likely to be offered a job).

239 *See, e.g.*, VERA INST. OF JUST., *Reshaping Prosecution Initiative*, VERA, https://www.vera.org/ending-mass-incarceration/criminalization-racial-disparities/prosecution-reform/reshaping-prosecution-initiative [https://perma.cc/FA6A-3XVQ] (last visited Feb. 7, 2023) (explaining how Vera's team works with reform-minded prosecutors to implement data-driven policies).

240 *See, e.g.*, MARINA DUANE, NANCY LA VIGNE, MATHEW LYNCH & EMILY REIMAL, URB. INST., CRIMINAL BACKGROUND CHECKS: IMPACT ON EMPLOYMENT AND RECIDIVISM (Mar. 2017), http://www.urban.org/sites/default/files/publication/88621/criminal-background-checks-impact-on-employment-and-recidivism.pdf [https://perma.cc/774X-L6NT].

241 *See supra* Part III.A.2.

242 Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 328–31, 346.

243 *See* Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

244 *See, e.g.*, People v. Fonville, 804 N.W.2d 878, 894–95 (Mich. Ct. App. 2011).

245 CRIM. JUS. STANDARDS: DEF. FUNCTION 4–5.4 (AM. BAR ASS'N 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunction-FourthEdition/ [https://perma.cc/E8H5-R993].

many jurisdictions, defense lawyers are plea bargaining with a carcerally focused prosecutorial adversary and thus little room for attention to all but the most severe and easy-to-determine collateral consequences. While defenders in such situations should push beyond those boundaries, defenders in progressive prosecution jurisdictions *must* do so, particularly in low-level felony and misdemeanor cases where incarceration is not a likely outcome.

Defenders should pay particular attention to progressive prosecutor plea offers that may ultimately lead to more intervention in their client's life and potentially more punishment at the end of the day. This happens most frequently in the problem-solving court context but also in other cases involving the completion of various programs as a condition of a plea bargain. For example, the prosecutor may offer the "carrot" of a non-jail plea offer should the defendant complete certain programming with the "stick" of a higher-than-usual sentence should the defendant fail to complete the conditions. Here, defenders might advocate for pre-plea diversionary offers so that failure to complete conditions does not simply lead to re-sentencing (as it would with post-guilty-plea diversion)—which too often is incarceration.

Again, while this is the type of individual representation norm that applies to all defenders regardless of the type of prosecutor they face, a defense lawyer in a progressive prosecution jurisdiction operates in an environment that is, theoretically, more conducive to non-carceral solutions and outcomes that avoid the creation of harmful criminal records. Where defenders facing non-progressive prosecutorial adversaries might struggle to get non-jail plea offers, defenders in a progressive prosecution jurisdiction have the opportunity to look beyond that immediate client goal.

One thing defenders in progressive prosecution jurisdictions may find particularly challenging is that line prosecutors are relatively inexperienced, sometimes even in serious cases. This is because elected reform prosecutors have either chosen to replace many line prosecutors to change office culture or have faced a significant exodus of more experienced prosecutors from the office.[246] But early-career prosecutors are more

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246 *See* Chris Palmer, Julie Shaw, & Mensah M. Dean, *Krasner Dismisses 31 from Philly DA's Office in Dramatic First-Week Shakeup*, PHILA. INQUIRER (Jan. 5. 2018), https://www.inquirer.com/philly/news/crime/larry-krasner-philly-da-firing-prosecutors-20180105.html-2 [https://perma.cc/2DYL-LV4G] (last visited Sept. 26, 2023) ("Krasner's spokesman . . . said the dismissals were part

likely to be highly adversarial.[247] One former Philadelphia public defender described how, when the prosecutor's office experienced significant turnover after the election of Larry Krasner, new hires with little experience had to handle serious cases and were more punitive than their more experienced, departed, peers.[248]

Many defenders focus on individual client advocacy without direct involvement in calls for systemic change. This might be due to time and resource constraints, a belief that the criminal legal system is ultimately a fair system, the concern that calling for change would harm individual clients, or some combination of these and other reasons. Focusing on zealous individual advocacy is not in conflict with systemic change.[249] But in a progressive prosecution jurisdiction, there is more opportunity for defenders to call for transformative changes rather than simple reforms that entrench the current carceral state, or to work on systemic reforms that advance such transformation.

This might come in the form of defenders supporting community activists pushing for transformation.[250] It might also

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of a 'broad reorganization' of the office's structure and a way to implement a culture change in an institution Krasner frequently criticized during the campaign."); Max Mitchell, *Krasner Beefs Up Philadelphia Prosecutor Ranks With 38 New Hires*, LEGAL INTELLIGENCER (Sept. 11, 2018), https://www.law.com/thelegalintelligencer/2018/09/11/krasner-beefs-up-prosecutor-ranks-with-38-new-hires/?slreturn=20190017133621 [https://perma.cc/JH2U-ZLSC] (describing how Krasner hired almost 40 new attorneys, most of them recent law school graduates, in his attempt to change the office culture). *See also* Garrett et al., *supra* note 206, at 1396 ("As of October 2020, only 7 of the 21 prosecutors were hired under the previous administration, with 14 hired by District Attorney Deberry.").

247 Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1065 (2014); Kay L. Levine & Ronald F. Wright, *Prosecutor Risk, Maturation, and Wrongful Conviction Practice*, 42 L. & SOC. INQUIRY 648, 648 (2017).

248 Interview with Victoria Clark, former Pub. Def., Def. Ass'n of Phila. (Jan. 23, 2023). Of course, this is at least in part a failure of training and oversight by Krasner and his supervisors. *Cf.* Curtis Black, *Where Does Criminal Justice Reform Stand One Year After Kim Foxx Elected?*, THE CHI. REP. (Dec. 7, 2017), https://www.chicagoreporter.com/where-does-criminal-justice-reform-stand-one-year-after-kim-foxx-elected/ [https://perma.cc/6E7G-8YD3] (last visited Sept. 22, 2023) (noting how Foxx experienced challenges implementing reforms due to hundreds of staff being holdovers from the previous "tough on crime" administration).

249 *See* Farbman, *supra* note 85, at 1947–48 (noting that a lawyer with a developed critique of an unjust practice "will use her bully pulpit in court . . . to attack the practice in the aggregate as well as the specific. The changes in tactics here may be small, but this kind of small shift can be and has been meaningful in the aggregate.") (footnote omitted).

250 *See supra* text accompanying notes 84–85. As Abbe Smith has put it, "[a]s a breed of 'movement lawyer,' indigent criminal defenders understand we are in it not for ourselves, but to support others." Smith, *supra* note 33, at 265. *Cf.* Renée

entail defenders stepping out of their individual representation role more than the limited ways in which some now do. Such advocacy will generally (but not always) be led by the head defenders or a specialized unit in larger offices—given the complexity of issues that intersect (and might conflict) with individual advocacy.[251] The next section discusses specific ways defenders in progressive prosecution jurisdictions might work for systemic change.

B. Defense Lawyering for Systemic Change in Progressive Prosecution Jurisdictions

The terms "progressive prosecutor" and "progressive prosecution jurisdiction," which I use throughout this Article, describe an ephemeral environment. It is also a precarious environment for the new prosecutor.[252] One prosecutor can be voted out or recalled, replaced by someone far less progressive.[253] Or the prosecutor may become less progressive over time, perhaps co-opted by the carceral culture, worn out by the nonelected line prosecutors who do not share the views of their boss, or reacting to rising crime rates.[254]

Graham, *Don't Be an Ally. Be an Accomplice*, BOS. GLOBE (June 20, 2019), www.bostonglobe.com/opinion/2019/06/20/don-ally-accomplice/sdU0ulbN9q8SYLMgsxJfWI/story.html [https://perma.cc/N69P-CJEW] (distinguishing allies from accomplices and stating that, "accomplices make demands. They are not on the sidelines offering tacit support. This is not hashtag activism from behind the safety of a cellphone or computer screen. It's doing the hard work over long days, and listening and learning from those who know. It's using white privilege to destroy that very structure, and to agitate for the betterment of all instead of one select group.").

251 *See infra* text accompanying notes 259–62.

252 *See, e.g.*, Rozsa, *supra* note 144 (describing Florida Governor Ron DeSantis's controversial removal of elected Hillsborough County State Attorney Andrew Warren after Warren made various statements that contrasted with DeSantis's political positions).

253 *See, e.g.*, Mallory Moench & Megan Cassidy, *S.F.'s New D.A. is Brooke Jenkins, the Prosecutor Who Left Chesa Boudin's Office and Joined the Recall*, S.F. CHRON. (July 7, 2022), www.sfchronicle.com/sf/article/S-F-s-new-D-A-is-Brooke-Jenkins-the-17290873.php [https://perma.cc/CCB2-HPR4] (discussing how, after former District Attorney Chesa Boudin's recall in San Francisco, the Mayor appointed Brooke Jenkins, who is decidedly less progressive, to the position).

254 *See, e.g.*, Sharman Sacchetti, *One-on-One with Suffolk County DA Kevin Hayden After His Win in Controversial Primary*, WCVB5 (Sept. 22, 2022, 5:14 PM), https://www.wcvb.com/article/one-on-one-with-suffolk-county-da-kevin-hayden-after-his-win-in-controversial-primary/41341681 [https://perma.cc/479L-S8DG] (discussing the Boston prosecutor who replaced Rachael Rollins, noting that he "calls himself a criminal justice reformer, but unlike his predecessor said there's no list of crimes he'll decline to prosecute"); *see also* Bellin, *supra* note 50, at 710 ("If crime spikes again or politics shift for other reasons, voters may become less

Further, the police, legislators, and judges may not be on board with, or may actively work to undermine, any progressive policies or leniency in individual cases.[255] Defenders in progressive prosecution jurisdictions can play an important role in advocating for lasting, systemic change, both by holding prosecutors to their platform promises and by independently pushing for more transformative changes.

Progressive prosecutors were elected on specific campaign promises. As these prosecutors run on reform platforms and later seek reelection, defenders in their jurisdictions have an inside view into whether they are living up to their promises. One defense attorney put it this way: "Outside of district attorneys themselves, there may be no figures in the criminal justice system better positioned to assess the role of prosecutors than defense attorneys."[256] Surely, individuals facing criminal prosecution, crime survivors, and their families are also qualified assessors on many aspects of the prosecutor's work. Judges are also in a good position to assess, and, often coming from the local prosecutor's office, tend to have inside

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receptive to progressive prosecution, even in liberal jurisdictions."). *See also supra* note 246 and accompanying text; *infra* note 356 and accompanying text.

255 *See, e.g.*, Rashad Robinson, *The People Who Undermine Progressive Prosecutors*, N.Y. TIMES (June 11, 2020), https://www.nytimes.com/2020/06/11/opinion/george-floyd-prosecutors.html?referringSource=articleShare [https://perma.cc/5UQP-2M6G] ("[T]he district attorneys elected to carry out progressive policies over the last five years have been met with resistance from police departments and unions, as well as from judges, lawmakers and even some corporations. They have used their power to prevent these prosecutors from doing their jobs."); Weiner, *supra* note 140 ("[J]udges in the Arlington Circuit Court have resisted [elected head prosecutor] Dehghani-Tafti's efforts to stop prosecuting marijuana possession, saying she must offer good reason to drop each individual case. She also has a petition before the state Supreme Court saying they have infringed on her authority in those cases."); Commonwealth v. Webber, No. SJ-2019-0366, 2019 WL 4263308, at *1 (Mass. Sept. 9, 2019) (granting Boston prosecutor's office motion to order judge, who had refused to accept the entry of a nolle prosequi for charges brought against protestors, to enter that nolle). *See also* Fryer, *supra* note 170, at 780 ("Rather than viewing prosecutors as having unilateral power to affect mass incarceration and racial justice, it instead appears that prosecutors have a *contingent power*—that is, one that is dependent on other criminal justice officials assisting them in attaining their goals."); Holland & Zeidman, *supra* note 25, at 1477 (detailing "the political, institutional, and systemic challenges that even committed progressive prosecutors face to the good work they seek to accomplish").

256 Watkins, *supra* note 27; *see also* Smith, *supra* note 33, at 270 ("Defenders can also speak out powerfully—and credibly—because we know more than most about the day-to-day reality of the system: the randomness of justice, pervasiveness of injustice, routine cruelty, entrenched racism, and the cost of overcriminalization and mass incarceration to individuals, families, and communities.").

information.[257] But defenders are well-positioned repeat players with the broad inside knowledge to make these assessments.

Assessing is one thing; acting on that assessment is another. It is easy to critique the prosecutor's progress, or lack thereof, in an internal defender office discussion. It is harder to make those critiques public, and yet another matter to act on those critiques. Policing progressive prosecutors is complicated in part because defenders may not want to take public positions against prosecutors who are—even if they are not doing all they said they would do—far better than their predecessors.[258] There is also the unfortunately valid concern that defenders' clients will be punished for positions their lawyer might verbalize or act upon.[259] Still, as time goes on and reelection looms for some progressive prosecutors, defenders might feel compelled to take a more active role in holding prosecutors accountable.

Alex Bunin, chief defender in Harris County, Texas (where Kim Ogg, who holds herself out as progressive, is chief prosecutor[260]), has noted how "public advocacy is especially important for a chief public defender, because there are also strong incentives that keep defense attorneys from reporting the systemic problems they experience day to day."[261] However, the likelihood and ability of a head public defender to advocate for systemic change depends in part upon that defender's level of independence. As Bunin documents, "[t]he type of political

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257 Although judges are the least likely to speak publicly about prosecutors failing to meet campaign promises, they could certainly make inquiries when they see, for example, disparate treatment of similarly-situated defendants. Unfortunately, many judges are extremely reluctant to acknowledge bias, even when confronted with hard data. *See* Josh Salman, Emily Le Coz & Elizabeth Johnson, *Florida's Broken Sentencing System*, HERALD TRIB. (Dec. 12, 2016), http://projects.heraldtribune.com/bias/sentencing/ [https://perma.cc/XJ37-ZBPD] (documenting deep and widespread racial bias in sentencing and describing reluctancy of judges to accept data even about their own sentencing patterns).

258 *See* Moench & Cassidy, *supra* note 253; *see also* Monivette Cordeiro, *Orange-Osceola State Attorney Aramis Ayala to Leave Office When Term Ends but Says 'I'm Not out of the Fight,'* ORLANDO SENTINEL, https://www.orlandosentinel.com/news/crime/os-ne-aramis-ayala-leaves-state-attorney-20191031-uz25n7oiv5bhpn7cvcmmojafaa-story.html [https://perma.cc/Y6CM-G78E] (last updated Nov. 1, 2019).

259 *See* Alex Bunin, *Public Defender Independence*, 27 TEX. J. ON C.L. & C.R. 25, 35 (2021) ("If you're a public defender who notices prosecutorial misconduct . . . , speaking out on those problems could make it a lot more difficult to do your job. If you report a prosecutor for misconduct (complaints that almost always go nowhere), that prosecutor may not offer your other clients favorable plea bargains."); *cf.* Nir & Liu, *supra* note 228, at 522–23 (discussing how defense counsel have reported "choosing" not to file suppression motions because that advocacy could lead to revocation of a plea offer).

260 *See supra* text accompanying notes 149–52.

261 Bunin, *supra* note 259, at 35.

issues that can endanger chief public defenders are often systemic challenges."[262] The need for public defense independence is well-recognized, and the American Bar Association and other national organizations have called for it.[263] Recognizing that not all head defenders have enough independence to protect them from interference, management is still far more likely than line defenders to have the time and ability to lead systemic reform efforts and to hold prosecutors accountable.

Defender offices can also partner with community activists for prosecutorial accountability purposes. For example, in 2020 voters in Multnomah County, Oregon elected Mike Schmidt, who ran on a reform platform. However, the community group that helped elect him, Oregon DA for the People, also critiqued Schmidt for failing to offer specific proposals on issues including decriminalization and declination of certain offenses. A representative of the group noted after the election that it "will be watching [Schmidt] closely" and will "continue to push and educate him on those issues on which we still are not aligned."[264] The organization had a "First 100 Days campaign" to hold Schmidt accountable to community demands.[265]

Coordination between defenders, who watch the prosecutor's office in action every day, and community groups with the political will and mission to push for accountability, could—and has, in some instances—prove quite powerful.[266] Public

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262 *Id.* at 32.

263 ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *supra* note 198, at 2; NAT'L ASS'N FOR PUB. DEF., NATIONAL ASSOCIATION FOR PUBLIC DEFENSE FOUNDATIONAL PRINCIPLES (2017), https://www.publicdefenders.us/files/NAPD%20Foundational%20Principles_FINAL_March%2016%202017(1).pdf [https://perma.cc/DAA4-J3AK]; NAT'L RIGHT TO COUNS. COMM., JUSTICE DENIED 185 (2009), https://www.opensocietyfoundations.org/publications/justice-denied-americas-continuing-neglect-our-constitutional-right-counsel [https://perma.cc/HA2E-DRDN].

264 Daniel Nichanian, *Progressive Winner in Portland D.A. Race Expects 'Shock Waves' in Oregon's Punitive System*, THE APPEAL (May 20, 2020), https://theappeal.org/politicalreport/portland-district-attorney-election/?utm_source=The+Appeal&utm_campaign=b958053c1a-EMAIL_CAMPAIGN_2018_06_22_03_58_COPY_02&utm_medium=email&utm_term=0_72df992d84-b958053c1a-58422983 [https://perma.cc/RSG4-K36D].

265 *First 100 Days*, OR. DA FOR THE PEOPLE, https://www.oregondaforthepeople.com/first-100-days-mult-co [https://perma.cc/ZM5G-6K4P] (last visited Sept. 5, 2023).

266 *See, e.g.*, *The Cop Accountability Project*, THE LEGAL AID SOC'Y, https://legalaidnyc.org/programs-projects-units/the-cop-accountability-project/ [https://perma.cc/86X4-JGCV] (last updated Sept. 7, 2023) ("The Cop Accountability Project . . . empowers organizations and communities across New York City to hold police accountable for human rights violations."); *see also* Wilkins, *supra* note 83.

defenders, an integral part of an oppressive criminal legal system (even if it is one that they hope to help dismantle), must be particularly attuned to the ways in which they can best support those seeking to transform the system.[267] In this light, defenders can serve as important sources of information and assessment for local and national organizations that keep tabs on progressive prosecutor promises.[268]

In addition to these accountability measures, defenders should be particularly attentive to any systemic changes that might outlast the particular prosecutor. Lessening prosecutorial power and discretion via legislative enactments such as lower sentencing schemes is considered by some to be the gold standard for reform.[269] However, even short of lasting legislative change, defenders should encourage prosecutorial office reforms based on data and individual narratives that help demonstrate effectiveness and fairness, thereby making it harder for the next prosecutor to roll things back.[270] For example, shining a light on the fiscal savings *and* the public safety benefits when minor misdemeanors are no longer prosecuted may make it more difficult for any prosecutor replacing the progressive one to return to mass misdemeanor criminalization in the future.[271]

This section considers two areas where defenders in progressive prosecution jurisdictions might focus systemic advocacy efforts: urging the prosecutor to give up some of their funding (and to support diverting it to non-criminal legal system streams); and pushing prosecutors to support reform in

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267 *See supra* notes 82–85 and accompanying text.

268 Indeed, having a non-defender organization at the forefront can take some of the heat off of the defender office, which might mitigate potential repercussions for clients.

269 *See* Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 MICH. L. REV. 1365, 1390–92 (2021) (reviewing EMILY BAZELON, CHARGED (2019)).

270 There are a number of approaches beyond the scope of this Article that address the need for more lasting change. Those include defenders seeking appointment or election to the bench and to state legislatures. *See* Molly Bernstein & Sean McElwee, *New York and California Voters Want More Public Defenders, Civil Rights Lawyers on the Federal Bench*, THE APPEAL (Jan. 26. 2020), https://theappeal.org/the-lab/polling-memos/new-york-and-california-voters-want-more-public-defenders-civil-rights-lawyers-on-the-federal-bench/ [https://perma.cc/W5HS-UBTS] (discussing poll of voters); Bellin, *supra* note 79, at 198 ("Legislators are clearly more powerful than prosecutors.").

271 *See generally* Agan, Doleac & Harvey , *supra* note 175; Roberts, *Crashing the Misdemeanor System*, *supra* note 179, at 1091 ("Although mass incarceration continues to plague states around the nation, the current criminal justice crisis is more aptly characterized as one of mass misdemeanor processing.") (footnote omitted).

more difficult cases, such as lower sentences for offenses categorized as "violent."

1. *Defenders Pushing Progressive Prosecutors to Give Up Funding*

Any truly progressive prosecutor would aim to shrink their own footprint, consistent with their acknowledgments that the criminal system is too large and too punitive.[272] In particular, they might advocate for diverting some of their office's funding into social and educational services, recognizing the need to address the core issues that drive crime.

Progressive prosecutors might also call for increased funding of defender services, in recognition of the well-documented and woefully inadequate resources allocated to government-funded defense offices, which represent approximately 80% of individuals charged in criminal cases.[273] Yet even the most progressive of prosecutors have yet to come out strongly in favor of any of these measures, other than the rare support for enhanced defender funding that is tied to enhanced prosecutor funding. Calling for reduced prosecutorial funding raises a number of challenges and considerations for defender offices and attorneys. Though complicated, strategically-phrased and -timed defender advocacy for lower prosecutor office funding could help move the needle in the critical push for less prosecutorial power.[274]

A recent empirical study of prosecutorial lobbying showed that prosecutors' most likely lobbying activity was support of

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272 *See Editorial: The Empire Strikes Back—Against Progressive Prosecutors*, L.A. TIMES (Oct. 31, 2023), https://www.latimes.com/opinion/story/2022-10-31/progressive-prosecutors-attacked [https://perma.cc/AE2E-CA5U] (quoting Philadelphia DA Larry Krasner as saying: "I am hopeful that at some point this movement leads to a much less punitive, much more rehabilitative system, one premised much more on prevention rather than punishment"); *see also* Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 249–50 (2021) (calling on progressive prosecutors to "relinquish your power," and stating that "[p]rosecutors who are committed to transforming our broken system must be willing to weaken the power their own office wields in order to protect criminal defendants from themselves and their assistants, as well as their successors"); Godsoe, *supra* note 74, at 229–33.

273 Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still A National Crisis?*, 86 GEO. WASH. L. REV. 1564, 1578–90 (2018) (depicting the bleak indigent defense funding problems across several jurisdictions); *see also* Garrett et al., *supra* note 206, at 1399–1400 (stating that nearly 80% of individuals charged in one-year period in Durham, North Carolina, were eligible for public defender services).

274 *See generally* PFAFF, *supra* note 73.

bills for their own funding.[275] The study cautions that state and local data may diverge from this national trend, and notes how the rise of progressive prosecution is one reason "prosecutorial politics—and by extension prosecutorial lobbying—is in a state of flux."[276] Still, a search of several progressive prosecutor organizations' websites reveals a number of statements in favor of criminal justice reform, but nothing supporting lower funding for their offices or for movement of social service funding out of their control.

For example, the Virginia Progressive Prosecutors for Justice (VPPFJ) describes itself as "a professional association of local prosecutors who support left-of-center criminal justice policies."[277] While the VPPFJ supports significant reform—including removing mandatory minimum sentencing laws and abolishing the death penalty—its website makes no mention of funding. Indeed, at least three VPPFJ members sought significant funding increases shortly after being elected.[278] One of the three advocated for a threefold increase in his budget during his first full year in office; the county gave him a 30% increase in response to his claim that he needed to triple his staff.[279] The Prosecutors Alliance of California pledges to "support[] and amplif[y] the voices of California prosecutors, victim advocates, and allies committed to reforming our criminal justice system" and to "work in partnership with communities to make our state safe, healthy and whole."[280] Similar to the VPPFJ, the organization's website does not discuss reduced funding to prosecutors. Indeed, the "2022 Legislative Year" page lists a bill

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275 See Carissa Byrne Hessick, Ronald F. Wright & Jessica Pishko, *The Prosecutor Lobby*, 80 WASH. & LEE L. REV. 143, 185 (2023).

276 *Id.* at 220.

277 *Virginia Progressive Prosecutors for Justice*, INFLUENCE WATCH, https://www.influencewatch.org/non-profit/virginia-progressive-prosecutors-for-justice/ [https://perma.cc/ESS7-TERY] (last visited Aug. 29, 2023) (describing how, in July 2020, eleven members of the Virginia Association of Commonwealth's Attorneys—representing approximately 40% of Virginia's population—broke off "to advocate for left-of-center policies, though they retained their VACA memberships").

278 Eric Burk, *Northern Virginia Commonwealth's Attorneys Seek Big Budget Increases*, TENN. STAR (May 7, 2021), https://tennesseestar.com/2021/05/07/northern-virginia-commonwealths-attorneys-seek-big-budget-increases/ [https://perma.cc/JVH4-UP89].

279 *Id.*

280 *Who We Are*, PROSECUTORS ALLIANCE CALIFORNIA, https://prosecutorsalliance.org/about [https://perma.cc/PQX4-WFB3] (last visited Aug. 29, 2023).

that would require (under state law) expanded funding to local District Attorneys' offices.[281]

Notably, the VPPFJ did call for expansion of deferred disposition, a mechanism that reduces or dismisses charges upon fulfillment of agreed-upon conditions.[282] Deferred disposition is a common method of tethering social services, such as drug treatment or anger management, to a criminal case. At first glance, support for more deferred disposition may look like—or lead to—support for reduced prosecutorial funding. In fact, the opposite is often true, particularly when the prosecutor serves as gatekeeper for limited slots in specialized court (such as drug court) programs offering the social services.[283] Prosecutors can also access significant funding streams for such diversionary programs.[284]

Prosecutors who support enhanced social services often seek to keep fiscal and policy control over them by tethering program access to the criminal case. Prosecutors' reluctance to move funding for services away from their offices and

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281 *Legislative Initiatives*, PROSECUTORS ALLIANCE CALIFORNIA, https://prosecutorsalliance.org/legislative-initiatives/ [https://perma.cc/TGB6-L34L] (last visited Aug. 29, 2023) (linking to AB 2418, "District Attorney Data Collection").

282 Letter from Virginia Progressive Prosecutors for Justice to Senator Surovell, Leader Herring, and Chair Bagby, Va. Progressive Prosecutors for Just. (July 13, 2020), https://wtop.com/wp-content/uploads/2020/07/VPPFJ-July-13-2020-Final.pdf [https://perma.cc/22C6-DZSS] (VPPFJ's letter to legislators in favor of expansion of deferred disposition, along with a number of other reforms). *See also* VA Code § 19.2-298.02 (granting courts, as of 2020, broad authority to enter deferred dispositions in criminal cases).

283 *See* Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1580 (2021) (describing problem-solving court as "self-reinforcing institutions that are protected from meaningful external scrutiny."); *see generally* Mae C. Quinn, *Whose Team Am I On Anyway? Musings of a Public Defender About Drug Treatment Court Practice,* 26 N.Y.U. REV. L. & SOC. CHANGE 37 (2000).

284 *See* Wesley Lowery & Ilica Mahajan, *Who's Really Cycling In and Out of Cleveland's Courts?*, THE MARSHALL PROJECT (Oct. 26, 2022), https://www.themarshallproject.org/2022/10/26/who-s-really-cycling-in-and-out-of-cleveland-s-courts [https://perma.cc/F3ZB-KYYE]; Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1481, 1487 n.140 (2004) (describing how initial drug court funding can come from the federal government and is an incentive for prosecutors); *cf.* Jan Hoffman, *Opioid Settlement Money Is Being Spent on Police Cars and Overtime*, N.Y. TIMES (Aug. 14, 2023), https://www.nytimes.com/2023/08/14/health/opioids-settlement-money.html?utm_source=TMP-Newsletter&utm_campaign=ab3ae6f9dd-EMAIL_CAMPAIGN_2023_08_22_11_03&utm_medium=email&utm_term=0_5e02cdad9d-ab3ae6f9dd-%5BLIST_EMAIL_ID%5D [https://perma.cc/8T7D-89EY] (describing how opioid litigation settlement funds, designated for addiction treatment and related services, are being funneled to law enforcement for purchases "like new cruisers, overtime pay for narcotics investigators, phone-hacking equipment, body scanners to detect drugs on inmates and restraint devices").

the criminal system altogether raises many issues. These include net-widening that draws individuals into lengthy, court-connected treatment when they face minor charges that would normally have been dismissed—perhaps outright, or perhaps after completion of a small number of community service hours. Tethering criminal case outcomes to program success also leads to a carrot-stick approach that too often ends in more punishment for individuals who participate in diversion as compared to those who do not. [285]

The refusal to relinquish control and funding even in the lowest-level cases is illustrated by some progressive prosecutors' marijuana diversion policies.[286] Many marijuana diversion programs require completion of drug education to gain dismissal of the case, and most of the education programs have a fee, which may be waived or reduced if the person is indigent—although that information is not always shared with defendants. For example, Harris County District Attorney Kim Ogg, who has described herself as "part of the national reform movement,"[287] touts her Misdemeanor Marijuana Diversion Program, which has a $50 fee (that used to be $150).[288] Her office's public statements focus on savings from the new program, as compared to what the county spent prior to Ogg taking office on the prosecution of misdemeanor marijuana possession.[289] Given Harris County's geographic location and Texas state law, that focus may have been politically necessary at the program's inception; however, Ogg won reelection in 2020.

Defenders are well aware of clients' struggles to pay for dismissals through programs that require time, and either internet access or travel, so they are well positioned to question why Ogg and others do not simply decline to prosecute marijuana possession rather than requiring onerous diversionary

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285 Quinn, *supra* note 283, at 61–63 (noting that individuals in drug court often end up serving longer sentences than they would have had they been sentenced in a regular courtroom).

286 *See supra* notes 149–52 and accompanying text.

287 Sam Degrave, *The Interview: Harris County District Attorney Kim Ogg*, TEX. OBSERVER (July 26, 2017), https://www.texasobserver.org/the-interviewkim-ogg/ [https://perma.cc/2GZ4-J99A].

288 *See supra* note 150 (discussing updated fees, which are waivable upon the District Attorney's office determination of indigency).

289 *See* MISDEMEANOR MARIJUANA DIVERSION PROGRAM, *supra* note 150; Taylor Goldenstein & Austin Bureau, *Texas House OKs Marijuana Decriminalization Bill Again as Senate Hurdles Remain*, HOUS. CHRON. (Apr. 27, 2023) ("In the [marijuana diversion] program's first two years, the Harris County District Attorney's Office estimated it saved $35 million and led to 14,000 fewer arrests.").

programs.[290] Do prosecutors running such diversionary programs continue to gain political capital by insisting on an educational program run by their offices and required to avoid arrest for marijuana possession? And, if the programming is truly helpful to people, why not release the resources used to run it to a community group and give up all oversight and control?

Further, Ogg sought more funding to hire more prosecutors for her office, even after implementing her promised marijuana diversion policy. In 2017, Ogg claimed that the policy would "free up resources to focus on prosecuting violent crimes."[291] This was because Harris County expended "significant prosecutor time and effort prosecuting marijuana cases," to the tune of $4,780,000 annually to pay for approximately 100,000 misdemeanor marijuana prosecutions (over 10% of cases on Harris County court misdemeanor dockets) before Ogg's reforms.[292] In 2019, Ogg's office estimated that it had saved $35 million since the initiative's launch two years earlier (to say nothing of saved police and court costs).[293] Yet shortly before that public announcement, Ogg argued for a $20 million budget increase to hire 102 more prosecutors to reduce case backlogs.[294] After

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290 Texas's recent agriculture law amendment to legalize the growing of hemp, combined with the difficulty and expense involved in proving that a substance is marijuana and not hemp in court, has led to a drastic decline in marijuana prosecutions in Harris and most other counties. Ted Oberg, *Pot Cases Down, Confusion Up After Pot Law Change*, ABC13 HOUSTON (April 14, 2021), https://abc13.com/harris-county-pot-marijuana-prosecution-law-texas-hemp/10512797/ [https://perma.cc/H8EH-XS8Q]. Still, Ogg's office continued to prosecute at least some marijuana cases. *Id.* (stating that, in the nineteen months following the June 2019 effective date of the hemp law, Ogg's office filed 286 marijuana-possession cases in court).

291 Danny Clemens, *Everything You Need to Know About Harris Co.'s New Pot Policy*, ABC13 HOUSTON (Mar. 2, 2017), https://abc13.com/kim-ogg-marijuana-in-harris-county-houston-news-pot/1757801/ [https://perma.cc/4UBK-NQY2].

292 *See* DIST. ATT'Y OF HARRIS CNTY., TX., THE ECONOMICS OF MISDEMEANOR MARIJUANA PROSECUTION 2 (2017) https://app.dao.hctx.net/sites/default/files/2017-03/MMDPEconomics_0.pdf [https://perma.cc/22RE-RR55] (noting the $4.78 million annual cost to the DA's office for misdemeanor marijuana prosecutions).

293 Samantha Ketterer & Keri Blakinger, *DA Credits Diversion Program for Drop in Marijuana Arrests*, HOUS. CHRON. (Mar. 29, 2019), https://www.chron.com/news/houston-texas/houston/article/DA-credits-diversion-program-for-drop-in-13726470.php [https://perma.cc/8TQ9-ATQK].

294 Katie Watkins, *Harris County Leaders Vote Against District Attorney's $20 Million Budget Request to Hire More Prosecutors*, HOUS. PUB. MEDIA (Feb. 12, 2019), https://www.houstonpublicmedia.org/articles/news/2019/02/12/321434/commissioners-court-votes-against-oggs-20-million-budget-request-to-hire-more-prosecutors/ [https://perma.cc/QE2R-VB78].

the County denied Ogg's request, she scaled it down but resubmitted it several times.[295]

Defenders can provide an important perspective in pushing back against progressive prosecutors' calls to increase their budgets. They might also provide behind-the-scenes support to community organizers, civil rights, and other advocacy groups calling for decreased prosecutorial funding.[296] For example, Fairfax County, Virginia chief public defender Steve Descano published an article noting how his county's purportedly progressive prosecutor "sought dozens of new prosecutor positions from Fairfax County in the same year that the county . . . attempted to slash public defender pay" (while recognizing that, with respect to some issues, that prosecutor "has attempted to lead his office in the right direction").[297] To counter prosecutors' perennial demands for more funding, defenders should call for legislatures or county councils to instead take resources away from prosecutors.[298] Fewer resources could push prosecutors to make screening choices about what types of cases to pursue and what simply does not belong in the criminal legal system.[299] However, with state and local legislative bodies hesitant

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295 Roxanna Asgarian, *Harris County D.A. Kim Ogg Didn't Deliver on Her Promise of Reform. Now Another One of Her Former Prosecutors Is Running Against Her.*, The Appeal (Dec. 5, 2019), https://theappeal.org/carvana-cloud-harris-county-district-attorney-kim-ogg [https://perma.cc/MQ2V-6KK3].

296 *See, e.g.*, Watkins, *supra* note 294 (describing how "progressive groups, such as the Texas Organizing Project and the Texas Criminal Justice Coalition," publicly opposed Ogg's call for more funding to hire more prosecutors, "accusing Ogg of violating her campaign pledge to reform the criminal justice system"); *It's Time to Transform What It Means To Be a Prosecutor*, ACLU (Feb. 2020), https://www.aclu.org/news/smart-justice/our-vision-to-transform-what-it-means-to-be-a-prosecutor/ [https://perma.cc/9NQC-4JNR] (The "truly transformational prosecutor actively seeks to shrink their own influence in the criminal legal system, including by shrinking their own discretion.").

297 Haywood, *supra* note 18.

298 Although prosecutors are generally county-level officials, their offices are funded in a variety of ways, ranging from federal grants to county or state tax allotments to asset forfeiture funds. *See* Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 Iowa L. Rev. 219, 237 n.70 (2004); *cf.* Julie Grace & Patrick Hughes, *Problems with Prosecutor Funding in Wisconsin*, Badger Inst. (Jan. 10, 2020), https://www.badgerinstitute.org/News/2019-2020/Problems-with-prosecutor-funding-in-Wisconsin.htm [https://perma.cc/QT2N-Q9BT] ("A complex formula used to determine which counties get more money from Madison to pay for state-funded prosecutors creates perverse incentives for district attorneys to over-charge cases."). *See generally* Ronald F. Wright, *Persistent Localism in the Prosecutor Services of North Carolina*, 41 Crime & Just. 211 (2012) (describing a combination of local and state funding and federal and private grants).

299 *See generally* Wright & Miller, *supra* note 134.

to remove even unconstitutional crimes from the books,[300] let alone to legalize or decriminalize minor offenses,[301] defense advocacy in favor of lower prosecutorial funding is challenging even in tight budget times.

Defenders should also push prosecutors to support funding parity for public defense and to agree to divert some of their own funding towards such parity (recognizing that diversion poses logistical challenges, given the likelihood of different funding sources). Ideally, funding for both would reach parity and then drop off significantly as the criminal legal system shrinks. Disparities in spending for prosecution and defense are well-documented. "Nationwide, $2.2 billion was spent by states on indigent defense in FY 2012—the lowest amount in the past five years. By comparison, the total budget of all state prosecutors' offices is roughly $6 billion a year (this figure is from 2007, the most recent available)."[302]

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300 *See, e.g.*, MISS. CODE ANN. § 97-29-59 (providing up to 10 years' imprisonment for "unnatural intercourse,"); TEX. PENAL CODE ANN. § 21.06(a) (prohibiting "deviate sexual intercourse with another individual of the same sex"). Each of these laws is unconstitutional under Lawrence v. Texas, 539 U.S. 558 (2003), but they each remain on the books.

301 For example, a majority of Americans believe marijuana should be legalized. Ted Van Green, *Americans Overwhelmingly Say Marijuana Should Be Legal for Medical or Recreational Use*, PEW RSCH. CTR. (Nov. 22, 2022) https://www.pewresearch.org/short-reads/2022/11/22/americans-overwhelmingly-say-marijuana-should-be-legal-for-medical-or-recreational-use/#:~:text=An%20overwhelming%20share%20of%20U.S.,10%2D16%2C%202022 [https://perma.cc/PP7S-84PL]. However, until 2018, no state had legalized marijuana through the legislative process. Michael Hartman, *Cannabis Overview*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 31, 2022), https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx [https://perma.cc/53YN-GDRH] (noting that Vermont became the first state to legalize marijuana through its legislature rather than by ballot initiative). That trend is shifting, as Mississippi legislatively established a medical marijuana program, and states such as Rhode Island, Minnesota, Maryland, and Connecticut have legalized through legislative action. Mona Zhang & Paul Demko, *Where Cannabis Legalization Efforts Stand Across the Country*, POLITICO (Aug. 3, 2022), https://www.politico.com/news/2022/08/03/cannabis-legalization-efforts-across-the-states-00049224 [https://perma.cc/FT5Y-K5F5]; *see also Minnesota: Adult Use Legalization Law Takes Effect*, NORML (July 26, 2023) https://norml.org/blog/2023/07/26/minnesota-adult-use-legalization-law-takes-effect-next-week/ [https://perma.cc/XFZ5-TCHC]; *Maryland: Adult-Use Marijuana Legalization Laws Take Effect*, NORML (June 23, 2023), https://norml.org/blog/2023/06/23/maryland-adult-use-marijuana-legalization-laws-take-effect-next-week/ [https://perma.cc/PQ6Q-R5PF]; *Connecticut: Law Change Permitting Adults to Home Cultivate Cannabis Takes Effect on Saturday*, NORML (June 28, 2023), https://norml.org/blog/2023/06/28/connecticut-law-change-permitting-adults-to-home-cultivate-cannabis-takes-effect-on-saturday/ [https://perma.cc/L96P-W293].

302 Oliver Roeder, *Just Facts: A Different Kind of Defense Spending*, BRENNAN CTR. FOR JUST. (July 25, 2014), https://www.brennancenter.org/our-work/

Moreover, 40 percent of county-based public defender offices employed no investigators in 2007, while on the prosecutor's side, medium-sized offices employed a median of two investigators, with larger offices employing more. These resources are in addition to investigations conducted by the police and sheriff's departments, which support the prosecutor's case.[303]

There have long been calls for funding parity between prosecutors and defenders. As Barbara Babcock has documented, "Clara Foltz, lawyer and suffragist, inaugurated the public defender movement with a speech at the Chicago World's Fair in 1893,"[304] where she envisioned a system with parity. In Foltz's model, "[f]or every public prosecutor there should be a public defender chosen in the same way and paid out of the same fund."[305] Today, one of the ABA's Ten Principles of a Public Defense Delivery System is "parity between defense counsel and the prosecution with respect to resources[,] and defense counsel is included as an equal partner in the justice system."[306]

While seeking the Democratic nomination for president (and under some fire for touting but not following progressive values during her time as a prosecutor), then-Senator Kamala Harris introduced the Ensuring Quality Access to Legal Defense Act, which would have established, among other things,

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analysis-opinion/just-facts-different-kind-defense-spending [https://perma.cc/VT4K-2JH4].

303 Roy L. Austin, Jr., Kirk Bloodsworth, Carlos J. Martinez, & Allison Goldberg, *Prosecution and Public Defense: The Prosecutor's Role in Securing a Meaningful Right to an Attorney*, Inst. for Innovation in Prosecution (Mar. 2019), at 5, https://static1.squarespace.com/static/5c4fbee5697a9849dae88a23/t/5c8fd934ec212dd423606d0f/1552931124841/IIP+ES+-+Prosecutors+and+Public+Defense+FINAL.pdf [https://perma.cc/H767-GABM]; *See also* Roeder, *supra* note 302.

304 Barbara Allen Babcock, *Inventing the Public Defender*, 43 Am. Crim. L. Rev. 1267, 1269 (2006).

305 *Id.* at 1271 ("She described the public defender as a powerful, resourceful figure to counter and correct the prosecutor, to balance the presentation of the evidence, and to make the proceedings orderly and just.").

306 ABA Standing Comm. on Legal Aid and Indigent Defendants, *supra* note 198, at 3 ("There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense."); *see also* Bryan Furst, *A Fair Fight: Achieving Indigent Defense Resource Parity*, Brennan Ctr. for Just. (2019), at 8 https://www.brennancenter.org/sites/default/files/2019-09/Report_A%20Fair%20Fight.pdf [https://perma.cc/7N93-DJWG] ("In order to ensure that indigent defense providers are comparably experienced to their prosecutor counter parts, it is essential to have salary parity at every staff level, from line attorneys to chief public defenders and district attorneys."); Justice Forward Virginia, *Justice Reform Lobby Day Policy Primer—Pay Parity for Public Defenders Explainer* (2022), https://www.youtube.com/watch?v=Yq6b5KhsJvw [https://perma.cc/Y4YP-UL24].

pay parity between public defenders and prosecutors over a five-year period.[307] That bill died in committee, and a similar version suffered a similar fate in 2022.[308] There are also rare instances of prosecutorial support for pay parity, including in Ventura County, California in the mid-1990s when prosecutors and defenders formed a union with a common goal of bringing their pay up to the level of other government attorneys.[309]

More recently, the Virginia Beach public defender's office got additional funding from the City Council after at least one council member expressed how he was "extraordinarily surprised" to see a $20,000 disparity between prosecutor and public defender starting salaries.[310] Although the funding boost was barely half of that needed to even out salaries, and the public defender pledged to continue to push for parity, "the two sides will now be closer."[311]

In New York City in 2019, prosecutors and public defenders pushed for pay parity with other, higher-paid, city-government lawyers.[312] At the City Council's hearing on the issue, the Manhattan District Attorney's office called for more than half a million dollars in additional annual funding to increase salaries for entry-level prosecutors. Although the office's written

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307 Kyung Lah, *Kamala Harris to Introduce Legislation Aimed at Aiding Public Defenders*, CNN (May 8, 2019), https://www.cnn.com/2019/05/08/politics/kamala-harris-public-defender-bill [https://perma.cc/7892-8MKX]; Ensuring Quality Access to Legal Defense Act of 2019, S. 1377, 116th Cong. (2019).

308 Ensuring Quality Access to Legal Defense Act of 2022, H.R. 9325, 117th Cong. (2022).

309 Barbara Murphy, *Prosecutors and Defenders to Form Union*, L.A. TIMES (Oct. 28, 1994), https://www.latimes.com/archives/la-xpm-1994-10-28-me-55745-story.html [https://perma.cc/E2XN-FFUC]; *cf. It's Time to Transform What it Means to Be a Prosecutor*, *supra* note 296 (urging "transformational prosecutor[s]" to "use their immense lobbying power to champion systemic reforms—even those outside their direct purview—including . . . providing more resources to public defenders").

310 *VB Budget Helps Narrow Pay Gap Between Public Defenders, Prosecutors*, WAVY (May 21, 2021), https://www.wavy.com/news/local-news/virginia-beach/vb-budget-helps-narrow-pay-gap-between-public-defenders-proescutors/ [https://perma.cc/SUN5-C3S4].

311 *Id.*

312 David Brand, *Public Defenders and Prosecutors Agree on Pay Parity, Funding Increases*, QUEENS DAILY EAGLE (March 19, 2019), https://queenseagle.com/all/2019/3/19/public-defenders-and-prosecutors-can-agree-raise-pay [https://perma.cc/47G6-UKEF]; *see also* Noah Goldberg, *City's Public Defenders to Get Pay Parity with City Lawyers*, BROOKLYN DAILY EAGLE (June 14, 2019), https://brooklyneagle.com/articles/2019/06/14/citys-public-defenders-to-get-pay-parity-with-city-lawyers/#:~:text=New%20York%20City's%20public%20defenders,agreement%20for%20fiscal%20year%202020 [https://perma.cc/6T8V-QQ9Q]].

testimony noted that both "prosecutors and indigent defense agencies must be able to recruit and retain the brightest legal minds," it made no mention of actual pay parity for defenders.[313] Further, in a demonstration of the challenges in getting even self-proclaimed progressive prosecutors to agree to any diminished funding, the Manhattan DA's office—in this same testimony—noted the county's "steady downward trend in all areas of crime over the past decade" and acknowledged how "a detached observer might conclude that there is a reduced need for prosecutors to handle the smaller incoming case volume."[314] To the contrary, the office posited, the "more sophisticated" nature of criminal activity and the fact that the office worked "to consider collateral consequences and alternatives to incarceration at very early stages of a case" meant that more, and not less, funding was in order.[315]

In New Orleans, then-Councilman Jason Williams led the successful fight for a law requiring parity of funding between the city's District Attorney and Public Defender offices.[316] Williams, running for District Attorney on a progressive platform when the ordinance passed, held it up as "absolutely required."[316a] However, after taking office, Williams called for more funding for his office and did not support a similar influx for the public defender, arguing that having a "cold case" unit and other responsibilities meant he needed more resources than the defenders.[317] One year later, Williams called for an even bigger funding increase for his office only, claiming his ability to hire an "elite" group of new prosecutors would end New Orleans' reputation as the "murder capital."[318]

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313 N.Y. CNTY. DIST. ATTY'S OFF., WRITTEN TESTIMONY BY CHIEF ASSISTANT DISTRICT ATTORNEY KAREN FRIEDMAN-AGNIFILO FOR CITY COUNCIL COMMITTEE ON JUSTICE SYSTEM OVERSIGHT HEARING ON PAY PARITY AND RETENTION RATES FOR ADAS AND PUBLIC DEFENDERS 1 (2018), https://www.manhattanda.org/wp-content/uploads/2018/10/10.25.18-City-Council-Hearing-re-pay-parity-final.pdf [https://perma.cc/CG7S-JN4A].

314 *Id.* at 2.

315 *Id.*; *cf.* Vida B. Johnson, *A Plea for Funds: Using* Padilla, Lafler, *and* Frye *to Increase Public Defender Resources*, 51 AM. CRIM. L. REV. 403 (2014) (arguing that defense counsel's increased responsibilities in the wake of these three Supreme Court cases should lead to increased defense funding).

316 Nick Chrastil, *Now DA, Williams Backs off on the Need For Funding Parity Between Prosecutors, Defenders*, THE LENS (Nov. 10, 2021), https://thelensnola.org/2021/11/10/now-da-williams-backs-off-on-the-need-for-funding-parity-between-prosecutors-defenders/ [https://perma.cc/PNW9-JMM8].

316a *Id.*

317 *Id.*

318 Jillian Kramer, *DA Jason Williams: With Funding for 'Elite' Prosecutors, New Orleans Won't Be Murder Capital*, NOLA.COM (Nov. 1, 2022), https://www.nola.com/

The fact that progressive prosecutors will not even agree to maintain their resource status quo shows how difficult it will be to get prosecutorial support for more defender resources, whether that be in the form of fair pay or other funding. Yet any true progressive prosecutor would acknowledge the well-documented crisis in indigent defense,[319] and support more resources for defender offices. This encompasses not just salary parity, but also increased budgets for investigators, experts, and other necessary aspects of thorough defense work.

One paper, co-written by a former federal prosecutor, death row exoneree, head public defender, and Institute for Innovation in Prosecution staff member, emphasized how the right to counsel is central to the prosecutor's mission.[320] This paper is significant (and unique) in recognizing that the health of the defender office is "fundamental to prosecutors' mission of public safety and fairness."[321] Noting how, "[a]s communities demand, and prosecutors strive towards, a more equitable and effective justice system, prosecutors should be prepared to answer: How are you going to ensure a robust defense for all?," the paper offers ten concrete actions prosecutors can take to ensure this constitutional right. Some of these actions, such as "advocate for alternatives to incarceration," "collect and publish case data," and "ensure the integrity of forensics,"[322] are actions one would expect of any ethical prosecutor.[323] Others,

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news/courts/da-jason-williams-with-funding-for-elite-prosecutors-new-orleans-wont-be-murder-capital/article_54d9419a-5a2f-11ed-8585-6fcc1e58ce82.html [https://perma.cc/WW5B-RVAN].

319 *See, e.g.*, Backus & Marcus, *supra* note 273; Holland & Zeidman, *supra* note 25, at 1487 ("[T]he record is clear what happens when public defense is under-resourced, regardless of whether the current prosecutor self-identifies as progressive: prospects for an adversarial system suffer, and the prosecutor, as a result, wields even more power over the experience and outcomes in the criminal legal system.").

320 Austin, Bloodsworth, Martinez, & Goldberg, *supra* note 303, at Executive Summary ("All legal stakeholders should be concerned with the state of indigent defense and its implications for constitutional protections, equality under the law, and justice. In our adversarial system, prosecutors, in particular, have a role to play in securing a meaningful right to an attorney.").

321 *Id.* at 4.

322 *Id.* at Executive Summary.

323 *See* MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020) (prosecutors "should be mindful of deficiencies in the administration of justice"); CRIM. JUST. STANDARDS: PROSECUTION FUNCTION 3-1.2(e) (AM. BAR ASS'N 2017) ("The prosecutor should be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction."); U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-27.250 (2018) (federal prosecutors should consider alternatives to prosecution when they are available for a particular case); *id.* at § 9-5.003

such as "scrutinize arrests and decline to prosecute low-level cases," and "endorse alternatives to cash bail," have happened in some progressive prosecution jurisdictions.[324]

However, the very first action listed—"support funding for public defense"[325]—goes beyond what many progressive prosecutors have recognized as part of their mission, let alone supported as a practical measure. The paper acknowledges how "[p]rosecutors, as democratically elected officials and chief local law enforcement officers, have a strong voice in policy debates and legislative matters, and an important public platform to support funding for indigent defense."[326] Further, "it is reasonable to expect that elected prosecutors support funding for public defenders' offices, as resources for indigent defense is in fact fundamental to prosecutors' mission of safety and fairness."[327] Importantly, the paper notes opportunities for "reinvestment from interconnected inequities," offering the example of the high costs of death penalty prosecutions that could be redirected to indigent defense.[328]

Still, the paper implicitly weaves support for enhanced prosecutorial funding into the analysis, encouraging "[c]hief prosecutors and chief public defenders [to] . . . work together to speak to state legislatures for greater budget allocations towards crime labs, alternatives to incarceration, and other common goals."[329] Presumably, funding for these types of items would go to—and benefit—prosecutors and not defenders or their clients (and indeed might even harm them).

(requiring disclosure of information supporting forensic evidence such as underlying documentation, photographs of physical evidence, chain-of-custody logs, laboratory notes, and laboratory procedures and protocols).

324 Austin, Bloodsworth, Martinez & Goldberg, *supra* note 303, at Executive Summary, 14–15.

325 *Id.* at Executive Summary; *see also id.* at 4 ("What is the role of the prosecutor—a public official dedicated to enforcing the law and representing the public—in ensuring that all individuals in the justice system have a reasonably adequate defense?").

326 *Id.* at 8.

327 *Id.* This support for the right to counsel could be read, cynically but not unrealistically, as in part an attempt to avoid post-conviction claims of ineffective assistance of counsel and ensure the validity and finality of convictions.

328 *Id.* (cautioning that prosecutorial opposition to the death penalty is not always without cost, offering the example of former Central Florida prosecutor Aramis Ayala, who came under heavy scrutiny for announcing that she would seek life without parole rather than the death penalty in a murder case). Ayala eventually declined to run for re-election. Cordeiro, *supra* note 258.

329 Austin, Bloodsworth, Martinez, & Goldberg, *supra* note 303, at 8.

Jocelyn Simonson has described how "the radical visions of social movements" have led to proposals for governance that "shift[s] power over policing to those who have historically been the targets of policing."[330] Shifting funding from prosecutors to defenders does not exactly fit into Simonson's "power lens" description, as defenders are part of the power and carceral structure in many ways. And the resource shift that abolitionists and others seek is one out of the criminal system altogether and towards other systems that provide education, housing, and public health services.[331] Still, increasing defense funding while decreasing prosecution funding does shift resources to serve individuals involved in the criminal legal system.

In a rare example of such a shift, a 2014 voter-approved California initiative recategorized a number of nonviolent crimes from felonies to misdemeanors and redirected savings from state incarceration to community-based resources. This led to a $6 million grant shared between one county's public defender office and Housing and Homeless Services Department that included "substantial funds [to] be applied toward preserving or providing housing for approximately 35 percent of public defender clients who are unhoused or at risk."[332] This type of funding movement is particularly significant because it comes from a voter initiative, and thus is not easily changed. Defenders should be especially focused on funding changes ensconced in state or local law rather than potentially temporary policy shifts.

2. *Beyond Misdemeanor Declination: Defenders Pushing Progressive Prosecutors on Serious Cases*

Most progressive prosecutors are tackling the low-hanging fruit, things that community groups, defenders, and others have fought for over many years. It is not particularly progressive to decline to prosecute misdemeanor marijuana cases when the majority of voters support legalization. Certainly, it is not problematic for progressive prosecutors to hold up how

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330 Simonson, *supra* note 76, at 786.

331 *See, e.g.*, *Mission & Vision*, CRITICAL RESISTANCE, http://criticalresistance.org/mission-vision/ [https://perma.cc/8SZJ-XBN8] (last visited Aug. 29, 2023) ("Our goal is not to improve the [punishment] system even further, but to shrink the system into non-existence. We work to build healthy, self-determined communities and promote alternatives to the current system . . . . [W]e know that things like food, housing, and freedom are what create healthy, stable neighborhoods and communities.").

332 Chouteau, *supra* note 331.

they hold off on low-level crime prosecutions. Nor is it problematic (from a non-abolitionist perspective) to place truly violent and serious crime at the center of their mission; all communities want to be safe. But too often this focus does not lead to more safety. Instead, as detailed above, progressive prosecutors regularly request more resources;[333] they sometimes also call for (or at least do not oppose) harsher sentencing schemes in serious and violent crimes that already have overly harsh penalties.

As political scientist Marie Gottschalk put it:

> The intense focus in criminal justice reform today on the non-serious, non-violent, non-sexual offenders—the so-called non, non, nons—is troubling. Many contend that we should lighten up on the sanctions for the non, non, nons so that we can throw the book at the *really* bad guys. But the fact is that we've been throwing the book at the *really* bad guys for a really long time.[334]

Yet the evidence is clear that the United States' mass incarceration crisis cannot end without major reform at the serious end of the spectrum.[335] Given that progressive prosecutors do or have recently held office in some of nation's most populous counties—including counties in New York City, Philadelphia, Los Angeles, Chicago, and Houston[336]—this small but impactful group has the ability to move the needle in this difficult area.

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333 *See supra* Part III.B.

334 Interview by Conor Kilpatrick with Marie Gottschalk, *Not Just the Drug War*, JACOBIN (Mar. 5, 2015), https://www.jacobinmag.com/2015/03/mass-incarceration-war-on-drugs [https://perma.cc/MWT3-H9B8]; *see also* MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015); *cf.* Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUM. HUM. RTS. L. REV. 983 (2020) (calling for equal protection challenges to the death penalty based on the undervaluation of Black lives). "If proven, the appropriate remedy is *not* to extend capital punishment to those who murder Black victims, because absent automatic death sentencing for certain crimes, which the Court already invalidated, the law cannot force prosecutors to seek death and juries to impose death in Black victim cases. Rather, the appropriate remedy is to abolish the death penalty altogether." *Id.* at 991.

335 PFAFF, *supra* note 73.

336 *See* Jamil Smith, *"Progressive Prosecutors" Are Working Within the System to Change It. How Is That Going?*, VOX (July 30, 2021) (quoting Philadelphia DA Larry Krasner as stating that, "[i]f we look at the phenomenon of a grassroots movement for criminal justice reform electing progressive prosecutors, what we see is that right now 10 percent of the United States has done exactly that, and often in the biggest jurisdictions, the jurisdictions that control mass incarceration to some extent").

In Cook County (Chicago), Kim Foxx "released six years of data outlining what happened in every felony brought to her office, offering an unprecedented view into the decision making of prosecutors and its impact."[337] A study of that charging data—which included the first two and a half years of Foxx's tenure—showed that gun charges (something Foxx campaigned on as central to her public safety role) were the only felony category in which she brought more charges than her predecessor (albeit at a time of falling crime rates in most categories).[338] In contrast, Los Angeles DA George Gascón faced criticism for failing to implement promised felony re-sentencing efforts. One defense attorney "remembers getting dozens of phone calls around the time of Gascón's swearing in from people facing the kinds of lengthy sentences that his policies were meant to help. But he said he's only been able to aid a few."[339] Gascón's spokesperson responded that "the [re-sentencing] unit is meant to prioritize inmates serving long sentences for 'nonserious, nonviolent, non-sex offenses' who are over the age of 50 'because those individuals are generally believed to be less likely to recidivate,' as well as juveniles charged as adults who would not be today."[340]

One role of the defender in a progressive prosecution jurisdiction is to push prosecutors to join reform efforts relating to serious cases (the non-"non, non, non"). As a recent study noted, "[t]hose who wish to make the criminal law more lenient may find their legislative agenda more likely to advance if they secure the support of prosecutors."[341] Although cautioning that "it is a mistake to treat prosecutor lobbying as a single national phenomenon" due to significant differences among jurisdictions, the study noted:

> Prosecutors are less likely to support bills to create new defenses, reduce punishments, or otherwise make criminal law more lenient than they are to support bills that would make

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337 Daniels, *supra* note 103.

338 *Id.* Oddly, Cook County Public Defender Amy Campanelli publicly praised Foxx for focusing on serious cases. Amy Campanelli, *Public Defender: Foxx's Leadership, Bond Court Reform Are Marks of Progress*, CHI. TRIB. (June 6, 2019) ("Never before have we had a prosecutor prioritize resources for more serious cases, while diverting less serious cases—until Foxx.").

339 James Queally, *Frustration and Criticism as L.A. County D.A. Struggles to Reform Sentencing*, L.A. TIMES (Aug. 15, 2023), https://www.yahoo.com/news/l-godfather-progressive-prosecutors-struggling-100006294.html?guccounter=1 [https://perma.cc/LWC9-UP9H].

340 *Id.*

341 Hessick, Wright & Pishko, *supra* note 275, at 150.

> criminal law harsher. Once they take the plunge to support such lenient bills, however, prosecutors succeed more often than they do for other types of bills. Indeed, prosecutor lobbyists are most effective when they play against expectations.[342]

If state legislative conditions are favorable, defenders can pursue progressive prosecutors to join them and community organizations in seeking things like sentencing reform. There are pros and cons to any such collaboration. On the one hand, defender-prosecutor alliances might add to the well-documented tensions in the defender-client relationship explored above.[343] There is also the risk that defenders will accept compromises that do not reflect the goals of the clients and communities they represent just to get some sort of outcome on a particular issue.[344] On the other hand, particularly where defender-prosecutor positions align with expressed community goals, a united front might prove effective in advancing legislation.

The very existence of a progressive prosecutor may make it more difficult for defenders to get a place at the table for discussions of policies that will affect their offices and thus their clients. For example, with Philadelphia's steady rise in shootings and homicides, the mayor in 2019 announced a gun-violence reduction effort.[345] News articles described it as a "collaborative effort among a variety of agencies," stating that "representatives from agencies including the Office of Violence Prevention, the Police Department, and the District Attorney's Office are meeting regularly to work through details."[346] Although earlier efforts at a similar program were "overly centered on law enforcement," the article does not note inclusion of defense lawyers in the new initiative.[347] Instead, it quotes

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342 *Id.* at 150–51.

343 *See supra* notes 115–23 and accompanying text.

344 *See* Raj Jayadev, *What is "Participatory Defense"*, ALBERT COBARRUBIAS JUST. PROJECT, https://acjusticeproject.org/about/purpose-and-practice [https://perma.cc/H72P-8U6F] (last visited Aug. 29, 2023) ("To limit the discussion of criminal court reform to just the lawyers is like saying solving the health care crisis is only up to the doctors.")

345 Chris Palmer, *Philly Wants to Bring Back a Version of an Old Strategy to Fight Gun Violence. Specifics are Pending.*, PHILA. INQUIRER (Dec. 6, 2019), https://www.inquirer.com/news/philadelphia-focused-deterrence-david-kennedy-group-violence-intervention-20191206.html [https://perma.cc/4ZSB-Q35G] (describing "group violence intervention").

346 *Id.*

347 *Id.* This issue predates the progressive prosecution movement. Defenders have long been denied a role in discussions, not only on initiatives relating to policing, but also those relating to the very court systems in which they work on a daily basis.

liberally from District Attorney Larry Krasner on the need for alternatives to policing and the criminal legal system to reduce violence. Krasner, who might fall into the "anti-carceral" category of progressive prosecutor on some issues,[348] often sounds like a defender when speaking to the public. But his office is still prosecuting people and cannot replace the defender's perspective.[349]

While having a progressive prosecutor involved in reform initiatives can undermine defenders' attempts to be included, that is not always the case. Brooklyn District Attorney Eric Gonzalez included defense attorneys—as well as formerly incarcerated individuals—in discussions that led to "Justice 2020," his office's list of seventeen recommendations for "more thoughtful use of [prosecutorial] power."[350] Still, there were only two recommendations that directly addressed serious offenses—one to "consider recommending parole when the minimum sentence is complete" and the other to "[e]nhance prosecution of cases of gender-based violence, including acquaintance rape and sexual assault cases."[351]

It is challenging to get prosecutorial support for reform beyond low-level cases, as the response to the deadly Covid-19 situation for incarcerated individuals revealed. At the beginning of the pandemic, thirty-four progressive prosecutors signed a joint statement calling for "concrete steps in the near-term to dramatically reduce the number of incarcerated individuals and the threat of disastrous outbreaks."[352] However, prosecutorial support for release of individuals incarcerated at the start of the pandemic was focused on those held on bail pre-trial

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348 *See* text accompanying notes 57–60.

349 *See, e.g.*, U.S. ATTY'S OFFICE, N.D. CAL., *Oakland Crime Summit – Bringing Law Enforcement and the Community Together to End Violence*, U.S. DEP'T OF JUST., https://www.justice.gov/usao-ndca/oakland-crime-summit-bringing-law-enforcement-and-community-together-end-violence [https://perma.cc/W9ZN-37BV] (last updated Dec. 29, 2014) (describing crime summit that, while including community organizations in one day of the gathering, did not include the public defender's office and restricted the second day to "law enforcement only").

350 ERIC GONZALEZ, JUSTICE 2020: AN ACTION PLAN FOR BROOKLYN 45–50 (2020), http://www.brooklynda.org/wp-content/uploads/2019/03/Justice2020-Report.pdf [https://perma.cc/NH2L-HMJ5].

351 *Id.* at 13, 35.

352 *Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of Those in Custody*, FAIR AND JUST PROSECUTION (Mar. 2020), https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf [https://perma.cc/96DU-MPKM] (expressing support for releasing those charged or convicted of crimes who do not "pose a serious risk to public safety").

(and thus presumed innocent), those serving short sentences for low-level offenses, and in some cases those nearing the end of a longer prison term and almost due for release.[353] Some progressive prosecutors supported the release of elderly or ill individuals serving prison sentences, but generally limited it to those convicted of non-violent offenses.[354]

To be sure, progressive prosecutor support for reform in the realm of the non-non-non is very challenging. For example, Gascón issued a "special directive" barring his deputies from using prior serious or violent felony convictions to seek longer prison sentences under California's Three Strikes law.[355] The union that represents about 800 deputy district attorneys under Gascón sued, "claiming his directives forced prosecutors to violate their obligations under the Three Strikes law."[356]

However, in individual cases, some prosecutors did not oppose the release—during the Covid-19 pandemic—of older or highly vulnerable prisoners convicted of very serious offenses.[357] If recidivism rates among these individuals are consistent with earlier studies showing low rates for those let out under other early release mechanisms,[358] that might provide

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353 *See, e.g.*, BRENNAN CTR. FOR JUST., *Prosecutors Responses to Covid-19* (Nov. 18, 2021), https://www.brennancenter.org/our-work/research-reports/prosecutors-responses-covid-19 [https://perma.cc/ART7-L8FQ] (stating that the Salt Lake DA "is releasing at least 90 nonviolent individuals incarcerated for technical violations, with further releases forthcoming to free 150–200 beds to fight COVID-19 by making space for possible quarantining.").

354 *See, e.g.*, *Philly DA Larry Krasner Urges for Early Release of Low-risk Prisoners to Prevent Spread of COVID-19,* FOX 29 PHILA (March 19, 2020), https://www.fox29.com/news/philly-da-larry-krasner-urges-for-early-release-of-low-risk-prisoners-to-prevent-spread-of-covid-19 [https://perma.cc/7XCH-JFKH].

355 Gascón Memo, *supra* note 219.

356 Matthew Ormseth, *Gascon Appeals Order That Knocked Down Prior Strikes Directive to California Supreme Court*, L.A. TIMES (July 15, 2022, 5:54 PM), https://www.latimes.com/california/story/2022-07-15/gascon-appeals-order-that-knocked-down-prior-strikes-directive-to-california-supreme-court-to [https://perma.cc/YBC3-AXZS].

357 *See, e.g.*, Order Granting Compassionate Release at 1, United States v. Campbell, No. 1976 FEL 100953, (D.C. Super. Ct. Nov. 3, 2020) (Ryan, J.) (government consent to release of individual convicted of seven counts of rape, after serving 42 years and at 63 years of age).

358 *See* OFF. OF THE INSPECTOR GEN. EVALUATION AND INSPECTIONS DIV., THE FEDERAL BUREAU OF PRISONS' COMPASSIONATE RELEASE PROGRAM 49–51 (2013) (reporting recidivism rates of those granted compassionate release from federal prison between 2006–2011 that are much lower than average federal prisoner, and describing low-level, nonviolent offenses for which a small percentage of those released were rearrested); Paul Duggan, Keith L. Alexander & Peter Hermann, *Released Early After a Murder Conviction, D.C. Man is Charged in New Homicide*, WASH. POST

the basis that even progressive prosecutors feel they need to support major reform in serious crime sentencing and early release mechanisms.[359]

Perhaps even more important than empirical evidence are narratives about individuals released that illustrate their successful (if difficult) reentry and about those denied release that illustrate the injustice of long prison sentences.[360] Defender organizations can play a significant role in calling attention to these critical narratives. While the formerly or currently incarcerated and their family members, as well as community groups, might lead any endeavors,[361] defenders are well-positioned to suggest, promote, or assist in efforts to put compelling narratives in front of prosecutors and legislators. In addition to early release for medically vulnerable prisoners (the reform most directly connected to the pandemic), defenders should push progressive prosecutors to support more second look act-type legislation (allowing resentencing of individuals convicted for offenses committed at a young age or who have served a certain

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(Mar. 12, 2021), https://www.washingtonpost.com/local/public-safety/darrell-moore-second-murder-charge/2021/05/12/3786cf54-b2a6-11eb-ab43-bebddc5a0f65_story.html [https://perma.cc/Y3JH-NKSS] (describing how, during the first five years after legislation allowing resentencing of certain individuals convicted in D.C. of serious crimes before their eighteenth birthday, sixty-four prisoners were released and only four charged with new crimes—all but one of them nonviolent).

359 Even before the pandemic, there was empirical evidence that overall recidivism rates among individuals released after serving sentences for violent-crime convictions was low. *See, e.g.*, J.J. Prescott, Benjamin Pyle & Sonja B. Starr, *Understanding Violent-Crime Recidivism*, 95 NOTRE DAME L. REV. 1643, 1669–70, 1676 (2020); U.S. SENT'G COMM'N, THE EFFECTS OF AGING ON RECIDIVISM AMONG FEDERAL OFFENDERS (2017), https://www.ussc.gov/research/research-reports/effects-aging-recidivism-among-federaloffenders [https://perma.cc/C3CL-F88J]; *The Ungers, 5 Years and Counting: A Case Study in Safely Reducing Long Prison Terms and Saving Taxpayer Dollars*, JUST. POL'Y INST. (Nov. 15, 2018), https://justicepolicy.org/research/reports-2018-the-ungers-5-years-and-counting-a-case-study-in-safely-reducing-long-prison-terms-and-saving-taxpayer-dollars/ [https://perma.cc/S6CH-43XX].

360 Casey Tolan, *Compassionate Release Became a Life-or-Death Lottery for Thousands of Federal Inmates During the Pandemic*, CNN (Sept. 30, 2021, 7:05 AM), https://www.cnn.com/2021/09/30/us/covid-prison-inmates-compassionate-release-invs/index.html [https://perma.cc/SGK3-W3MB]; *see also* Mira Edmonds, *Why We Should Stop Talking About Violent Offenders: Storytelling and Decarceration*, 16 NE. U. L. REV. 51 (2023); Binny Miller, *George Floyd and Empathy Stories*, 28 CLINICAL L. REV. 281, 282 (2021) ("While the idea of case theory as a story is no longer new, a renewed focus on empathy and proximity can more securely ground lawyers in the lived experience of their clients."); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994).

361 *See supra* notes 83–84 (discussing the importance of lawyers supporting but not coopting community-led efforts).

number of years in prison), and presumptions of release for certain prisoners.[362]

There are many potential avenues for systemic advocacy by defenders in progressive prosecution jurisdictions. When the prosecutor is already implementing some misdemeanor reform, there is an opportunity for defenders to seek reform in more serious cases. Further, defenders can push for a shift in funding away from prosecutors and towards social services located outside of, and completely independent from, the criminal legal system. Finally, and relatedly, defenders should continue to seek parity in both pay and resources with prosecutors.

Conclusion

There is much commentary on the definition, opportunities, and limits of the progressive prosecution movement. Yet in each progressive prosecution jurisdiction, there are defenders who must adapt to the changing environment. This new environment offers opportunities but also poses challenges. For example, any defense office previously overwhelmed with clients charged with low-level misdemeanor cases will have the opportunity to reassign resources if the new prosecutor has a declination policy encompassing many of those misdemeanors. At the same time, defenders must find ways to earn their clients' trust and support community reform efforts when prosecutors tout themselves as the real reformer, or even transformer, of the criminal legal system.

The core role of the criminal defense attorney—zealously seeking the best outcomes given the client's goals—does not change when a progressive prosecutor enters the picture. But the fact that the prosecutor's goals and role may be different than in the past shifts the defender goalposts in significant ways. These shifts must be accounted for in assessing the opportunities and challenges for defenders, as well as their performance, in these relatively new situations.

362 *See* Tinto & Roberts, *supra* note 9 (calling for such presumptions to overcome proven hesitation to release even the sickest, oldest prisoners).