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## **Adopting a Robust Immigration Agenda: The Call for the Progressive Prosecutor to End the Deportation Pipeline**

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### *Abstract*

*“Progressive prosecutors” seek to redefine the role of the prosecutor and question the purpose of the criminal legal system, ushering in the need to reexamine the scope and substance of their duties toward all, but particularly immigrant defendants, seeing as they suffer outsized punishment for most criminal offenses. Ten years ago, Padilla v. Kentucky broke ground in finally recognizing that defense counsel is constitutionally obligated to advise immigrants of the clear risks of deportation associated with a plea. Nevertheless, immigrants ensnared in the criminal legal system have since faced deportation at ever-increasing rates. Given the entwinement of immigration and criminal law, organizers and scholars have recognized that local prosecutors serve as gatekeepers to the federal criminal removal system. Yet, prosecutors around the country wildly differ in their treatment of immigrant defendants, at times ignoring or misusing this gatekeeping role.*

*In the last decade, new prosecutorial goals—ensuring fairness and equity, promoting community integrity, tackling disproportionate treatment of Black and Brown communities in policing and incarceration, addressing root causes of crime—have gained increasing popularity, by some. Decriminalization and decarceration have been tools utilized to meet these goals. The specific goals strived for by so-called “progressive prosecutors” require an examination of their treatment of migrants and application of an immigrant’s rights lens to their current practices. Their policies toward immigrant defendants to date have been tepid and at times, harmful.*

*Yet, careful study reveals “progressive prosecutors” have expansive obligations to immigrant defendants—rooted in the progressive prosecution movement’s own rhetoric about the appropriate role of the prosecutor and the underlying purposes of the criminal legal system, prosecutorial ethical and professional standards, and Supreme Court jurisprudence. The progressive prosecutor’s duty is simple—to exercise their discretion to avoid the double punishment of criminal sentence and deportation. This means ensuring that policy choices that*

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*purport to support communities of color and poor communities do not neglect immigrant defendants, thereby creating disproportionate consequences for this population.*

*Due to the immigration consequences that might flow from **any** contact with the criminal legal system, “progressive prosecutors” need not only look at their role in the plea-bargaining process, but beyond. A progressive prosecutor’s work then is to first, understand her role as gatekeeper to the federal deportation machine and second, act to stop feeding it. This Article proposes a series of policy recommendations prosecutors can institute toward these ends, including institutional changes as well as the adoption of specific practices that consider immigration consequences at all stages of criminal proceedings – arrest, conviction, sentencing and beyond.*

*“Progressive federalism” reinforces that prosecutors can take this kind of action. The political theory suggests that by using their local powers to pursue a robust immigration agenda, progressive prosecutors will move closer to securing proportionate outcomes for migrants in the criminal legal system. Adoption of the agenda simultaneously begins to disentangle the criminal and immigration systems and influences national immigration enforcement policy.*

## Introduction

“...[P]rosecutors are elected officials tasked with distributing punishment within an unequal and violent society...” – Abolitionist Principles & Campaign Strategies for Prosecutor Organizing, COMMUNITY JUSTICE EXCHANGE

“[T]he prosecutor’s job is not to exact the greatest possible punishment. It is not to win at all costs. It’s to offer mercy in equal measure to justice.” – Emily Bazelon, author of *Charged*<sup>1</sup>

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In August 2014 I received a panicked call from my client Elsa. I could only make out “they took him” through her sobs. Luis was her eighteen-year-old son—a soft-spoken high school senior. They shared a one-bedroom apartment in East Williamsburg, Brooklyn, on the border of Queens. Luis had arrived in the United States from El Salvador six months earlier, escaping brutal violence at the hands of his father. Elsa explained that he was hanging out with some friends on their stoop when he was arrested and taken to the precinct for marijuana possession. This was his first arrest. She panicked about what would happen to her undocumented son. As I began to head to Kings County Criminal Court in Brooklyn, Luis called me and said that he had been released directly from Central Booking. He was never charged in court and was now safely home.

My heart was pounding. At the time, I was an immigration attorney at Brooklyn Defender Services representing clients at the crosshairs of the criminal and immigration systems. The month beforehand another client, Jacklyn, had been arrested three blocks from Luis’ home on the same charge, but suffered a radically different fate. Jacklyn had come to the U.S. in the 1990s from Haiti to reunite with her father. I was in the process of helping her obtain her green card. Although she lived three blocks from Luis, she technically lived in a different borough of New York. After arrest, she was taken to the local precinct and then to Central Booking, in Queens. Twenty hours later she appeared before a judge where she was charged with a misdemeanor for marijuana possession. The judge dismissed the case. As she was walking to exit the courtroom, she was approached by two plain-clothed officers who handcuffed and arrested her. They were officers from Immigration and Customs Enforcement (“ICE”). She was transferred to an immigration detention center where she suddenly faced deportation.

Luis and Jacklyn experienced drastically different outcomes. This was not by luck, but rather, by design. Kenneth Thompson was the District Attorney in Brooklyn at the time of Luis’s arrest. He was the first African American district attorney in Kings County. Prior, he had a successful career as a civil rights attorney and ran on a platform promising reform. Shortly before Luis’s arrest, DA Thompson enacted a blanket policy ordering line prosecutors not to prosecute the majority of first-time marijuana possession arrests, in part due to the disproportionate impact these

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<sup>1</sup> EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019).

arrests had on Black and Brown communities, including deportation. Because of this, Luis never stepped foot in a courtroom and never faced criminal charges. Jacklyn, on the other hand, was arrested blocks away, so her case fell under the jurisdiction of long-time “tough-on-crime” Queens District Attorney Richard Brown. He was known for his aggressive prosecution of low-level offenses notwithstanding the embedded civil consequences. We later learned of a directive in his office for line prosecutors to call ICE when handling the case of an undocumented defendant. Thus, despite her criminal case being dismissed, ICE arrested Jacklyn in open court. This was not the case of a lone wolf in the prosecutor’s office calling ICE, this was an office-wide practice.

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In the last several years, the “progressive prosecution movement” has emerged, born out of a groundswell of community organizing exposing the deep-seated racial injustices of the criminal legal system.<sup>2</sup> The uprisings sparked by the coldblooded murder of Trayvon Martin led to the birth of the Black Lives Matter movement. With it, came heightened scrutiny, not only of police, but of the prosecutor and her role in entrenching racial inequity. A small but growing and influential group of so-called “progressive prosecutors” have risen to power calling for—decriminalization, decarceration, increased transparency—as independent goals and tools to reduce racialized results pervading the criminal legal system. Many “progressive prosecutors” are career public defenders or civil rights attorneys, like Chesa Boudin or Ken Thompson, who set their sights on the district attorney post, promising to reform the role based on their firsthand experience.

While there been great hype about the nascent movement, there is no singular definition of a “progressive prosecutor.”<sup>3</sup> Those who lay claim to the title have greatly varied in their policies, many policies seeming hardly “progressive” at all.<sup>4</sup> Yet, they have also made important gains. Undeniably, the progressive prosecution movement has advanced some reforms that benefit immigrant defendants such as eliminating cash bail; however, its approach to immigration issues

<sup>2</sup> For a discussion of how ‘systems theory’ came to shape our thinking about the “criminal justice system,” specifically, the interconnection between police, jails, courts and prosecutors; and the limitations of an ahistorical “systemic” framing to understand and critique the modern mass criminalization crisis, see Sara Mayeux, *The Idea of the Criminal Justice System*, 45 AM. J. CRIM. L. 55, 58-60 (2018).

<sup>3</sup> The question of whether a prosecutor can ever be “progressive” is a highly contested one. In her recent essay, Professor Abbe Smith concludes that she is “unsure.” Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. L. 411 (2019). In 2001, she famously asked the question “*Can You Be A Good Person and a Good Prosecutor?*” and ultimately proclaimed “I hope so, but I think not.” Fifteen years later, in discussing the emergence of “progressive prosecution movement” Professor Angela J. Davis wrote: “we need good ethical people, who understand the crisis we have with regard to mass incarceration and racial disparity to be defenders and to be prosecutors.” EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 159 (2019)(quoting Professor Davis). There are important critiques raised in the debate over whether prosecution can ever be progressive, but that is beyond the scope of this Article. Despite the imperfect definition, I refer to the “progressive prosecution movement” as a subset of recently-elected local prosecutors who self-identify as “progressive reformers” and have commonly promised policy initiatives to combat racial inequities—including decarceration, decriminalization, increased accountability and centering community safety and power.

<sup>4</sup> For example, while prosecutors have framed creation of “conviction integrity units” as a “progressive” policy, it might be more astutely framed as prosecutors doing their jobs. These units seek to overturn convictions that were “wrongful” because the individuals were indeed innocent. While they often expose racialized policing and over-aggressive prosecution, they are not inherently progressive.

has fallen short. Close scrutiny of individual progressive prosecutors' initiatives, once elected, reveal polices that tend to focus more on protecting immigrant witnesses and encouraging immigrant cooperation with the police than questioning their approach toward prosecuting immigrant defendants. Few have adopted policies that meaningfully consider and prevent the disproportionate punishment of immigrants. This is so despite the fact that many of these defendants come from the very communities of color "progressive prosecutors" claim their policy reforms seek to protect.

Nevertheless, the recent emergence of the "progressive prosecutor," presents a renewed opportunity to examine the role *local* prosecutors play as the "gatekeepers" to the *federal* deportation system<sup>5</sup> and raises the question of how they might approach the prosecution of immigrants. Just as the criminal system is reckoning with calls for decriminalization and decarceration, the Abolish ICE/immigrant rights movement is increasingly calling for an end to the government's over-reliance on the detention and "criminalization" of migrants.<sup>6</sup> At bottom, both movements reveal a common thread—local and state prosecutors<sup>7</sup> are the arbiters whose decisions determine who is locked away and removed from society and who is free to survive.

Scholars have well-documented the immense powers of the prosecutor.<sup>8</sup> Immigrants<sup>9</sup> especially Black and Brown immigrants, like Luis and Jacklyn, who are disproportionately targeted by both the criminal justice and immigration enforcement systems, have long been crushed by the weight of this power. One prosecutor's decision—even one as seemingly minor as bringing a misdemeanor charge in court—can mean the difference between remaining in this country with family or permanent exile. An officewide policy to do or not do something can be a lifeline.

Due to the paring down of judicial discretion and the expansion of convictions triggering removal grounds in the last few decades, local and state prosecutors have now become the gatekeepers to deportation. They specially wield great influence over immigrant defendants in two key ways—by directly impacting the substantive outcomes of defendants' immigration matters and by influencing who is detected for ICE enforcement. First, the federal immigration laws incorporate and analyze state convictions—even minor offenses—to determine if an individual is

<sup>5</sup> Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 558, 580 (2013).

<sup>6</sup> "Criminalization of migrants" refers to both prosecuting migrants for the act of migrating and linking deportations to criminal history.

<sup>7</sup> I am particularly focused on state and local prosecutors because the majority of U.S. criminal matters are prosecuted in state courts. Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 6 (2019). Therefore, the majority of immigration consequences flow from local or state criminal contact. Nevertheless, the discussion and many proposals contained in this piece can and should also be considered by federal prosecutors for the same reasons articulated herein. Additionally, federal prosecutors have a unique role to play in potentially decriminalizing of border crossing and other migration related crimes. [See https://lawdigitalcommons.bc.edu/bclr/vol61/iss6/2/](https://lawdigitalcommons.bc.edu/bclr/vol61/iss6/2/).

<sup>8</sup> See Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203 (2020)

<sup>9</sup> I use the term "immigrant," "non-citizen," and "migrant" interchangeably throughout the paper. The term "immigrant" has a distinct meaning in the Immigrant and Nationality Act, an individual intending to reside in the U.S permanently. It is distinct from nonimmigrants, a class of individuals who reside in the United States, under a host of categories, but do not intend to do so permanently. Because "immigrant" is used to refer to "non-citizens" in common parlance, I will use the terms interchangeably.

deportable or should face other immigration penalties. These laws also greatly stripped immigration adjudicator discretion where there is a conviction. Prosecutors are the most influential players in state case resolutions. Thus, a prosecutor's decision on how to charge and plea bargain may ultimately become *the* dispositive factor in later federal immigration proceedings. Counterintuitively, it is the discretion of the *state* prosecutor that is most determinative of *federal* immigration outcomes today. Second, immigration enforcement has increasingly looked to local criminal courts and jails to target immigrants for removal. Thus, a local prosecutor's decisions regarding whether to pursue charges, what charges to bring, or who to detain pretrial, has a direct impact on whether an immigrant may be detected and targeted for deportation in the first place.

Under the current legal regime, immigrants increasingly face deportation for prior criminal contacts, including decade-old convictions and minor offenses that are not considered crimes under state law.<sup>10</sup> For decades, immigrant rights groups have organized to challenge the ways in which the immigration system relies on the criminal legal system to feed the deportation machine.<sup>11</sup> Yet, as is often the case, the courts lagged far behind. It wasn't until 2010, in *Padilla v. Kentucky*, when the Supreme Court finally acknowledged that because the criminal system is intricately connected to the immigration system, a migrant had a constitutional right to understand the clear deportation risks associated with a plea.<sup>12</sup> Defense counsel bore this duty. Deportation was all too often the result of criminal proceedings. The Court turned its focus to the state criminal courts where the vast majority of immigration consequences are created. But prosecutors, too, bear a burden.

In dicta, the Court acknowledged that prosecutors have an interest in ensuring the integrity of the plea-bargaining process for migrants, but stopped there. After *Padilla* some prosecutors take immigration status into account to militate against immigration penalties, while others seek to use immigration status as a way to enhance punishment.<sup>13</sup> This inconsistency has been of great consequence to immigrants who have radically different experiences when facing prosecution around the nation.

This Article explores the role of the state prosecutor in shaping the fate of immigrant defendants. It builds upon scholarship that discusses the local prosecutors' immense power in both the criminal legal and the federal immigration systems to posit that prosecutors' failure to

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<sup>10</sup> For instance, a disposition for NYPL sec. 221.05, possession of a small amount of marijuana, is a violation and not a crime under NY state law. Nevertheless, it meets the definition of conviction for immigration purposes and carries attendant immigration consequences.

<sup>11</sup> See, e.g., Frank Sharry, *Backlash, Big Stakes, and Bad Laws: How the Right Went for Broke and the Left Fought Back in the Fight Over the 1996 Immigration Laws*, 9 DREXEL L. REV. 269, 271 (2017) (describing the "Fix 96" campaign, an effort that sought to roll back some of the harshest provisions in the 1996 laws, AEDPA and IIRIRA).

<sup>12</sup> *Padilla v. Kentucky*, 559 U.S. 356, 369, 374 (2010) ("Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.").

<sup>13</sup> See Ingrid V. Eagly, *Criminal Justice for NonCitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1163, 1166, 1170 (2013) (describing "alienage neutral model" whereby prosecutors consider the collateral immigration-enforcement consequence of deportation in plea bargaining, avoid inquiring into immigration status in court, and status is "rarely, if ever, argued as a sentence aggravator" and the "illegal-alien-punishment" jurisdictions whereby prosecutors use immigration status to treat noncitizen defendants more punitively in plea bargaining and bail determinations).

adequately consider and account for the outsized penalties suffered by immigrants has greatly contributed to the deportation crisis today. The Article then goes on to analyze the recent emergence of the “progressive prosecution movement” and contributes to the scholarly literature by examining an underexplored topic, the shortcomings of the progressive prosecution movement’s approach towards prosecuting immigrant defendants. Many incorrectly presume that because progressive prosecutors purport to advance policies that seek to reduce harms to Black and Brown communities, these policies equally benefit immigrant defendants, many of whom hail from the very same communities. This is not the case. Immigrant defendants often constitute to face outsized immigration consequences after being prosecuted in these jurisdictions. Immigrants are often overlooked by the “progressive prosecutor.” What it means to be a “progressive prosecutor” with respect to immigrant defendants remains undefined. This Article’s attempts to begin exploring this question. It suggests a new framework to understand the prosecutor’s obligation and provides a number of alternative approaches to prosecutorial practice and policy that are well within their powers and more consistent with the “progressive prosecutors” stated goals and ideals.

Indeed, as described below, progressive prosecutors have expansive obligations toward immigrant defendants—rooted in ethical and professional standards, Supreme Court precedent, and their own framing of the purpose of the criminal legal system and the stated motivations. Taken together, the outcome is simple—progressive prosecutors should exercise their discretion to avoid adverse immigration consequences.

The “progressive prosecutor” has an obligation to first comprehend that her role is intimately and directly connected to the consequences in the immigration system. In fact, she *controls* those consequences. She is the *de facto* adjudicator in the federal immigration system. The charge of the progressive prosecutor then, is to view *every* part of the criminal justice system as an important component of the immigration system, evaluating fairness and proportionality in prosecutorial decision-making at every stage of the criminal process, not only in plea bargaining.

But how do “progressive prosecutors” achieve fair and proportionate results? They begin by adopting an explicit and robust agenda that reflects and embodies an understanding of the ways in which prosecutorial actions or inactions in every component of criminal proceedings create immigration consequences. And by then enacting policies that seeks to prevent them. A robust agenda includes policies and practices in *all* areas of prosecutorial functions—charging practices, pre-trial detention policies, plea bargaining, sentencing, post-conviction relief policies, etc.

Many prosecutor policies to date do not sufficiently reflect the attendant harms faced by immigrant defendants and may inadvertently hurt them. For example, allowing a plea to be vacated after participation in an alternative to incarceration program may avoid a conviction under state law. However, the initial plea still qualifies as a “conviction” for immigration purposes<sup>14</sup> and can be the basis for later deportation.

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<sup>14</sup> See INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2018) (explaining a *nolo contendere*, “no contest” plea or plea of guilt combined with any restraint on liberty, like probation, constitutes a conviction for immigration purposes).

A byproduct of enacting a robust immigration agenda, will be the beginning of the disentanglement of the criminal legal system from the immigration system. Through local action, prosecutors can shape *national* immigration enforcement and policy debate. This is supported by the political theory of “progressive federalism”—whereby local and state actors and sub-actors use their local powers to combat national policies they disagree with—to advocate for change traditionally associated with the left. “Progressive prosecutors” can use their local authority to promote fairness for immigrants in the absence of immigration reform at the federal level. Without the need to change a single law, through adopting policies in line with their stated vision, prosecutors would stymie the federal deportation machine.<sup>15</sup>

This Article concludes by setting forth some key considerations for the “progressive prosecutor” in shaping her immigration agenda. It identifies the areas of criminal practice that should be of prime concern as they engage in agenda setting locally. It also suggests concrete proposals that prosecutors can adopt. Recognizing that each jurisdiction is varied and has unique considerations, the agenda is meant as a starting point for district attorneys to build upon in consultation with local immigrant communities, policy makers, defense attorneys, and other leaders within their jurisdiction. An agenda might include the creation of an immigrant integrity unit to review and revamp all areas of practice, expanded use of prosecutorial nullification, adoption of sentencing guidelines that take into account the unique proportionality considerations of a sentence for immigrant defendants, reconsideration of the mechanisms behind and use of diversion programs, encouragement of pre-arrest diversion, prohibiting information sharing with ICE, to name a few—to account for the specific and ever-shifting immigration consequences of criminal justice involvement.

Part I of the Article describes the way in which the federal immigration removal today is dependent on state and local actors in the criminal legal system. It focuses on the role local prosecutors plays as gatekeepers to federal removal and how immigration enforcement today targets and disproportionately harms Black and Brown immigrants. Part II discusses the emergence of the progressive prosecution movement, its theoretical underpinnings, and some of the policies it has enacted to date. It ends by looking at what the movement has done to date vis-à-vis immigrant defendants. Part III describes a new conception of the progressive prosecutor’s obligation to immigrant defendants in light of their stated priorities and view of criminal punishment, ethical and professional obligations, and Supreme Court jurisprudence. It recommends progressive prosecutors meet this obligation through adopting a robust immigration agenda. This adoption is further supported by the political theory of “progressive federalism,” suggesting local prosecutors can and should make decisions that ultimately influence and shape federal policy. Finally, Part IV outlines the scope and guiding principles for agenda formation and suggests concrete proposals.

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<sup>15</sup> According to the Trump administration’s released data, in FY 2019, the majority of immigrants deported—sixty-five percent—had criminal convictions or pending criminal matters. Narrowing to “interior removals”—those apprehended outside of the border region—ninety-one percent had criminal convictions or pending criminal matters. U.S. IMMIGRATION & CUSTOMS ENF’T, FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 22 (2019), <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf>.



## I. Federal Immigration Removal is Dependent on State and Local Actors in the Criminal Legal System

The deportation of “criminal aliens” is now the driving force in American immigration enforcement. In recent years, the Congress, the Department of Justice, the Department of Homeland Security, and the White House have all placed criminals front and center in establishing immigration enforcement priorities . . . *In effect, federal immigration enforcement has become a criminal removal system.*

—Prof. Ingrid Eagly, 2013<sup>16</sup>

The modern immigration removal system, despite being a purely federal function, is reliant on actors in the state and local criminal legal system. This is so because, particularly over the last few decades, policymakers have deeply intertwined immigration law with criminal law.<sup>17</sup> While technically civil in nature, statutory provisions governing eligibility for immigration status, expulsion, and detainment while awaiting proceedings, all now incorporate reference to criminal law.<sup>18</sup> The majority of criminal prosecutions in the U.S. arise in state court.<sup>19</sup> A wide range of state convictions trigger federal consequences. An individual committing an offense alone—without conviction—can render her subject to severe immigration penalties.<sup>20</sup> Not only has criminal law been subsumed by and enmeshed in immigration law, but immigration violations have increasingly become criminalized.<sup>21</sup> Immigration enforcement has become militarized and largely resembles criminal law enforcement today.<sup>22</sup> Professor Juliet Stumpf has coined the examination of the intersection of criminal and immigration law and the ways in which they bring out the most damaging aspects of one another, “crimmigration.”<sup>23</sup>

<sup>16</sup> Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1128 (2013) (emphasis added)(footnotes omitted).

<sup>17</sup> See César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458 (2014) (identifying formative crimmigration legislation in the 1980s); The term “crimmigration”, the convergence of immigration and criminal law, was coined by scholar Juliet Stumpf and ushered in a new era of scholarship. See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM U. L. REV. 367 (2006); Katherine Becket & Heather Evans, *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*, 49 L. & SOC’Y REV. 241, 242 (2015) (describing how “legally hybrid techniques” that tether the criminal and immigration enforcement apparatus are likely to enhance the state’s power to detain and punish).

<sup>18</sup> See Immigration and Nationality Act (INA) § 237(a)(2), U.S.C. § 1227(a)(2) (2018) (criminal grounds of deportability); INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (2018) (criminal grounds of inadmissibility); INA § 236(a), 8 U.S.C. 1226 (a) (2018) (discretionary detention, eligible to request bond from immigration judge).

<sup>19</sup> Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 6 (2019).

<sup>20</sup> See, e.g., INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2018) (rendering an individual inadmissible for admitted commission of a controlled substance offense).

<sup>21</sup> See, e.g., Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 76 (2003) (discussing criminalization of entry without inspection).

<sup>22</sup> See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 380-83 (2006) (border patrol has become increasingly militarized).

<sup>23</sup> See *id.* at 376.

Changes to immigration laws and enforcement practices—particularly in the last three decades—have been sweeping, complex, and utterly devastating to immigrant communities.<sup>24</sup> The great expansion of immigration laws coupled with heightened enforcement through states and localities has had a disparate impact on Black and Brown immigrants.<sup>25</sup> Because most arrests, convictions and immigration enforcement itself occur through state criminal systems, to truly understand how this merger operates, one must look local.<sup>26</sup> The state criminal system feeds the pipeline to federal removal and state and local prosecutors, by and large, control the flow.<sup>27</sup>

### A. Recent Changes that Created the Modern Criminal Removal System

The convergence of immigration and criminal law has led immigration law to become quasi-criminal in nature.<sup>28</sup> Notwithstanding, many of the protections afforded to defendants in criminal proceedings, such as a constitutional right to counsel or the rules of evidence, do not extend to respondents facing removal.<sup>29</sup>

Over the last century, the Immigration and Nationality Act (“INA”) has evolved from a short text containing few barriers to entry,<sup>30</sup> into an intricate web of provisions designed to shut out and deport.<sup>31</sup> The area of greatest growth has been the treatment of prior criminal conduct.<sup>32</sup> Professor

<sup>24</sup> See Daniel Kanstroom, MASSACHUSETTS CONTINUING LEGAL EDUCATION, INC., IMMIGRATION PRACTICE MANUAL-CHAPTER 1 to IMMIGRATION LAW: CURRENT CHALLENGES, TRAGEDY, AND FARCE, 1 (3d ed. Supp. 2019).

<sup>25</sup> See Elizabeth Aranda & Elizabeth Vaquera, *Racism, the Immigration Enforcement Regime, and the Implications for Racial Inequality in the Lives of Undocumented Young Adults*, 1 SOC. RACE & ETHNICITY 88, 89-91, 94, 100-01 (2015) (describing how law enforcement agents’ inherent biases against racialized markers, such as skin color or language use, contribute to selective enforcement of immigration policies).

<sup>26</sup> See Ingrid V. Eagly, *Criminal Justice for NonCitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1128-30 (2013).

<sup>27</sup> *Id.* at 1128; see also Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 558, 568, 573, 575, 588, (2013).

<sup>28</sup> See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 384-86, 90-92 (2006). Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012).

<sup>29</sup> See e.g., KATE M. MANUEL, CONG. RES. SERV., R43613, ALIENS’ RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF 6 (2016).

<sup>30</sup> Immigration and Nationality Act of 1952, ch. 477, § 202(b), 66 Stat. 163, 177 (1952) (amended 1965) (establishing special quota for persons tracing ancestry to races indigenous to “Asia-Pacific triangle” area), *repealed by* Immigration and Nationality Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911.

<sup>31</sup> See MARY GIOVAGNOLI, AMERICAN IMMIGRATION COUNCIL- IMMIGRATION POLICY CENTER, PERSPECTIVE: OVERHAULING IMMIGRATION LAW: A BRIEF HISTORY AND BASIC PRINCIPLES OF REFORM 1-2 (2013), <https://www.americanimmigrationcouncil.org/sites/default/files/research/perspectivescirprimerwe111213.pdf>.

<sup>32</sup> See Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1672-73 (2011) (describing how the list of offenses triggering immigration penalties has lengthened over the years with new labels such as “crime involving moral turpitude,” “controlled substance” offense, and “aggravated felony.”). An individual can be subject to a criminal ground of inadmissibility for “admitted commission” of criminal conduct even if they were never convicted of the offense. INA § 212(a)(2)(A)(i), 8 U.S.C § 1182(a)(2)(A)(i) (2018). Due to this, in certain parts of this paper, I refer to “prior criminal conduct” or “prior criminal contacts” to be inclusive of these circumstances. The deportability grounds of removal require a “conviction,” as defined by the INA, in order to trigger deportation.

Alina Das has documented the ways in which racial animus drove the development of crime-based removal.<sup>33</sup> While beginning in 1875 individuals with specific criminal histories were prohibited from entering the U.S., individuals who committed crimes after entry did not face expulsion as a result.<sup>34</sup> The law began to enmesh criminal convictions with deportation in 1917.<sup>35</sup> This began the birth of the criminal removal system.

### 1. Focus on Criminal Grounds of Removal

There has been a great focus on criminal grounds of removal over other violations of the INA, particularly over the last thirty years. Congress has greatly expanded the criminal grounds of removal—the umbrella term for exclusion and deportation.<sup>36</sup> These grounds not only govern who is subject to expulsion but also operate as barriers to attaining immigration benefits.<sup>37</sup> Dramatic expansion of these grounds began in the late 1980s.<sup>38</sup> “Aggravated felonies” were created as a basis for deportation in 1988.<sup>39</sup> Federal lawmakers greatly expanded the list in 1990, and massively proliferated it through the adoption of two sweeping pieces of legislation, the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and the Illegal Immigration Reform and Immigration Responsibility Act (“IIRIRA”) in 1996 (“the 1996 laws”).<sup>40</sup> “Aggravated felonies” often do not involve violence and may be categorized as “misdemeanors” under state law. Yet, they carry severe penalties.<sup>41</sup> Criminal grounds can also subject immigrants to mandatory detention.<sup>42</sup>

### 2. Reducing Immigration Adjudicator Discretion

While passing laws that expanded the punitive way in which criminal conduct was treated within immigration law, Congress repealed a number of statutes providing avenues of relief for

<sup>33</sup> Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 184-85 (2018) (detailing how anti-Chinese laws in California laid the blueprint for the Page Act of 1875, adopting the initial criminal bars to immigration); see also Carrie L. Rosenbaum, *Crimmigration—Structural Tools of Settler Colonialism*, 16 OHIO ST. J. CRIM. L. 9 (2018).

<sup>34</sup> See Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 380 (2006).

<sup>35</sup> GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 22 (1996).

<sup>36</sup> See Muzaffar Chishti & Michelle Mittelstadt, *Unauthorized Immigrants with Criminal Convictions: Who Might Be a Priority for Removal?*, MIGRATION POL’Y INST. (Nov. 2016), <https://www.migrationpolicy.org/news/unauthorized-immigrants-criminal-convictions-who-might-be-priority-removal>. While Congress renamed the grounds of “exclusion” as “inadmissibility,” at various points in this paper, I refer to the concept of exclusion or the “exclusionary grounds” because, in my view, that better describes their function. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

<sup>37</sup> See Jennifer M. Chacón, *The 1996 Immigration Laws Come of Age*, 9 DREXEL L. REV. 297, 319 (2017); INA § 245(a)(2), 8 U.S.C. § 1255(a)(2) (2018) (criminal grounds of inadmissibility bar adjustment of status, absent a waiver).

<sup>38</sup> César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458 (2014).

<sup>39</sup> Kari Hong, *The Absurdity of Crime-based Deportation*, U.C. DAVIS L. REV. 2067, 2087 (2017).

<sup>40</sup> *Id.*; INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2018).

<sup>41</sup> Kari Hong, *The Absurdity of Crime-based Deportation*, U.C. DAVIS L. REV. 2067 (2017) (add pin cite)

<sup>42</sup> INA § 236(c), 8 U.S.C. § 1226 (including crimes involving moral turpitude, aggravated felonies, controlled substance convictions, certain firearms offenses and various other crimes). Before this time, immigration detention was rarely used even for individuals with criminal histories. See Margaret H. Taylor, *The 1996 Immigration Act: Detention and Related Issues*, 74 No. 5 INTERPRETER RELEASES 209, 210 (1997).

migrants with criminal histories.<sup>43</sup> Significantly, Congress greatly reduced immigration judges and immigration officers' discretion to decide if an individual should remain in the U.S.<sup>44</sup> These shifts, in effect, rendered thousands of immigrants with minor criminal convictions subject to mandatory deportation.

## **B. These Shifts Make Federal Immigration Enforcement Reliant on Actors in State and Local Criminal Legal System**

As a result of these legislative changes, federal immigration enforcement today depends on actors in the state and local criminal legal system to function. Counterintuitively, in effect, it is now largely up to local actors, to determine strictly federal questions, such as who is deported or who qualifies for an immigration benefit.

### *1. Local Prosecutors Drive Criminal Grounds of Removal*

Because local and state prosecutors are the most powerful players in the criminal legal system they, in effect, create federal conviction-based grounds of removal.<sup>45</sup> Prosecutors exercise great power over who gets convicted and for what crimes. Prosecutors have immense discretion and generally lack oversight. The majority of cases arise in the state criminal system<sup>46</sup> and resolve in pleas.<sup>47</sup> Prosecutors control the charging process, which determines the range of potential plea options. They are undoubtedly the most influential players in plea-bargaining.<sup>48</sup> State prosecutors directly impact the substantive outcomes of immigration matters because a vast range of state crimes trigger federal immigration consequences.<sup>49</sup> Thus, the prosecutor's approach to plea bargaining may ultimately become *the* dispositive factor in later immigration proceedings.

The structure of criminal removal today creates a system where independent local prosecutorial decision-making *directly* results in immigration consequences. This has turned local and state prosecutors, rather than administrative agencies, into "de facto" immigration adjudicators.<sup>50</sup> As

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<sup>43</sup> See, e.g., Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050 (repealing the judicial recommendation against deportation ("JRAD"), a statutory provision allowing criminal sentencing judges to prevent deportation in certain cases); Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996, Div. C of Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546 (repealing INA sec. 212(c) which provided a waiver of deportability for certain lawful permanent residents).

<sup>44</sup> See e.g., INA § 240A(a)(3), 8 U.S.C. § 1229B(a)(3) (2012) (barring Cancellation of Removal for Lawful Permanent Residents for any individual convicted of an "aggravated felony"); INA § 240A(b)(1)(C), 8 U.S.C. § 1229a(b)(1)(C) (2018) (barring Cancellation of Removal for Non-Lawful Permanent Residents for any individual convicted of any offense listed in the inadmissibility grounds); INA §§ 208(b)(2)(A)(ii), 208(b)(2)(B)(i), 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1158(b)(2)(B)(i) (2018) (barring asylum eligibility for any individual convicted of a "particularly serious crime," including any "aggravated felony").

<sup>45</sup> See Zohra Ahmed, *The Sanctuary of Prosecutorial Nullification*, 83 ALB. L. REV. 239, 240 (2020).

<sup>46</sup> See Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 576-77 (2013).

<sup>47</sup> See Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1204 (2011) (over ninety percent).

<sup>48</sup> See Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1203-04 (2011).

<sup>49</sup> See *supra* Part I.A.

<sup>50</sup> Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U.L. REV. 1281, 1289 (2010); see also Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 555-56, 577 (2013).

Professor Stephen Lee describes, prosecutors now serve a unique “gatekeeping” function<sup>51</sup> by controlling the valve to the deportation pipeline.<sup>52</sup> Local and state prosecutors are key immigration removal actors.

## 2. Local Actors Directly Influence Who is Detected by ICE

The removal system is reliant on local enforcement’s contact with non-citizens to identify immigrants for deportation.<sup>53</sup> Historically, immigration enforcement and state law enforcement were wholly separate spheres, with the former being exclusively reserved for the federal government. In recent years, this separation has been eroded.<sup>54</sup> State and local law enforcement, today, are the frontline workers in the federal removal system.<sup>55</sup> According to DHS’ released data, in FY 2019, the majority of immigrants deported—sixty-five percent—had criminal convictions or pending criminal matters.<sup>56</sup> When looking at “interior removals” (those apprehended outside of the border region) ninety-one percent had criminal convictions or pending criminal matters.<sup>57</sup>

While there have been shifts in how the federal government utilizes local systems to detain and deport non-citizens, one thing has remained constant, migrants who have contact with the state criminal legal system are the most vulnerable to detention and removal. The Bush administration piloted Secure Communities and the Obama administration widely rolled it out nationwide.<sup>58</sup> Through fingerprint sharing the federal government obtained information about immigrants upon arrest.<sup>59</sup> By issuing “detainers,” the Department of Homeland Security (“DHS”),<sup>60</sup> requested local actors hold immigrants eligible for removal for federal agents to take them into custody at the

<sup>51</sup> Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 571 (2013) (describing how prosecutors perform a gatekeeping function in crime-based removal system).

<sup>52</sup> See Zohra Ahmed, *The Sanctuary of Prosecutorial Nullification*, 83 ALB. L. REV. 239, 240 (2020).

<sup>53</sup> See Zohra Ahmed, *The Sanctuary of Prosecutorial Nullification*, 83 ALB. L. REV. 239, 246-47, 276, 279 (2020) (finding this reliance began in the 1980s).

<sup>54</sup> See Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1013-15 (2016) (discusses the impact of 287(g) agreements, Secure Communities, state and local immigration enforcement laws, and the establishing of enforcement priorities).

<sup>55</sup> See Jennifer Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 642-46 (2012).

<sup>56</sup> In FY 2019, the U.S. Department of Homeland Security (“DHS”) Immigration and Customs Enforcement reported deporting over 267,000 people from the United States. U.S. IMMIGRATION & CUSTOMS ENF’T, FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 22 (2019),

<https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf>; see Transactional Records Access Clearinghouse, Latest Data: Immigration and Customs Enforcement removals (2020), <https://trac.syr.edu/phptools/immigration/remove/> (reporting over 50% of individuals removed had criminal convictions.)

<sup>57</sup> U.S. IMMIGRATION & CUSTOMS ENF’T, FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 22 (2019), <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf>.

<sup>58</sup> Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Right*, 64 UCLA L.R. 1464, 1472-73 (2017).

<sup>59</sup> See U.S. IMMIGRATION & CUSTOMS ENF’T, SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS 1-2 (2009), [https://www.ice.gov/doclib/foia/secure\\_communities/securecommunities\\_strategicplan09.pdf](https://www.ice.gov/doclib/foia/secure_communities/securecommunities_strategicplan09.pdf).

<sup>60</sup> DHS was created in reaction to September 11<sup>th</sup> World Trade Center bombing. In addition to its numerous other functions, DHS created Immigration and Customs Enforcement (“ICE”) which took over the interior enforcement operations of the prior INS. Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 85–86 (2005).

conclusion of criminal detention.<sup>61</sup> Eventually, after great resistance from local jurisdictions, including enacting immigrant-friendly policy and legislation limiting cooperation,<sup>62</sup> President Obama discontinued the program. He replaced it with the Priority Enforcement Program (“PEP”), restricting detainer requests to removable immigrants with “serious” convictions.<sup>63</sup>

The cornerstone of his approach to enforcement was “felons not families.”<sup>64</sup> PEP was short-lived. With the election of Donald Trump, came a return to Secure Communities, including renewed efforts to use local authorities to detain arrested undocumented individuals, regardless of whether or not they are ultimately convicted.<sup>65</sup>

While local law enforcement generally plays the greatest role in making arrests and thus have greatest power over ICE detection, prosecutors play an important role here too. Immigration enforcement increasingly looks to local criminal courts and jails as sites to target removable immigrants and not only at arrests.<sup>66</sup> Thus, a prosecutor’s decision regarding whether to pursue a case at all, what charges to pursue or who to detain pretrial, may directly impact whether an immigrant will be targeted for deportation depending on the enforcement program in effect.

ICE consistently relies upon decisions made in the local criminal legal system to fuel its removal operations and its enforcement operations continue to steadily grow.<sup>67</sup> Without the cooperation of local actors, the criminal removal system would be derailed.

### C. Disproportionate Targeting and Impact on Black and Brown Immigrants

<sup>61</sup> U.S. IMMIGRATION & CUSTOMS ENF’T, SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS 4 (2009), [https://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiesstrategicplan\\_09.pdf](https://www.ice.gov/doclib/foia/secure_communities/securecommunitiesstrategicplan_09.pdf); When ICE has an interest in deporting an individual held in custody, they issue a “detainer” and send that request to the custodian at the facility holding the non-citizen. Under Secure Communities, detainers were issued based upon fingerprints taken upon arrest and run through a series of databases to try to determine immigration status. *Id.* at 2; see Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1015 (2016). For an in-depth discussion on detainers as a critical mechanism for immigration enforcement and the constitutional concerns raised by their use, see Christopher N. Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOY. L.A. REV. 629 (2013).

<sup>62</sup> Upon being informed by DHS that they could not opt out of the Secure Communities program, some jurisdictions redesigned their arrest policies, declining to comply with these detainer requests and refusing to hold individuals in custody past their scheduled release date. Jennifer M. Chacón, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1343-45 (2019).

<sup>63</sup> See Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1021 (2016).

<sup>64</sup> *Id.*

<sup>65</sup> See Exec. Order No. 13,768, 82 Fed. Reg. 8,799, 8,800 (Jan. 25, 2017).

<sup>66</sup> See *supra* Part I.B.

<sup>67</sup> Compare U.S. DEP’T HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2020 27, <https://www.dhs.gov/publication/fy-2020-budget-brief> (in 2018, ICE’s budget was over \$7.5 billion dollars and CBP’s for \$14 billion), and *The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL (July 7, 2020), <https://www.americanimmigrationcouncil.org/research/the-cost-of-immigration-enforcement-and-border-security> (in 2019, ICE’s budget was \$7.6 billion and CBP’s was for \$17.1 billion).

The narrowing in on individuals with criminal legal contacts by immigration enforcement has had devastating results, disproportionately harming Black and Latinx migrants. “By allowing state and local governments to be the pipeline through which federal immigration law is enforced, racial bias can manipulate the overall outcomes of those who are removed.”<sup>68</sup> Unsurprisingly, pervasive racial disparities in the criminal legal system have replicated in the detention and deportation systems.<sup>69</sup> Because race plays a pivotal role in determining who is arrested and/or convicted of crime,<sup>70</sup> similar racial disparities infect the deportation and detention systems.

Black immigrants—who are more likely to have criminal contacts due to rampant racial profiling and racist policing—disproportionately face removal and detention due to criminal grounds.<sup>71</sup> The modern criminal removal system also disproportionately detains and deports Latinx communities.<sup>72</sup>

As Professor Alexander describes, the politics of white supremacy engender new systems of racial and social control over time.<sup>73</sup> Over the last decade, while there has been growing bipartisan commitment and effort to reduce prison populations and other criminal reforms, at the same time, many of the same mechanisms of racialized social control have been used to grow the detention and deportation systems.<sup>74</sup> While racial injustice in the immigration system is a bit different than that at the heart of the criminal legal system, they cannot be divorced. Both need attention.

## II. The Emergence of the Progressive Prosecution Movement and Its Impact on Immigration

In 2019, Tiffany Cabán entered the democratic primary for the Queens District Attorney calling for an end to mass incarceration, terminating the War on Drugs, and decriminalizing sex work.<sup>75</sup> She sought to replace Richard Brown, a “tough on crime” prosecutor, who reigned

<sup>68</sup> Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 646–47 (2015).

<sup>69</sup> See César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1461–66 (2014) (examining the history of racial animus towards immigrants).

<sup>70</sup> See Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1021 (2016); see also ALEC KARAKATANIS, UNUSAL CRUELTY—THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM (2020) (discussing how race is systemically determinative of what illegal conduct is prosecuted).

<sup>71</sup> See JULIANA MORGAN-TROSTLE & KEXIN ZHANG, N.Y.U. IMMIGRANTS’ RTS. CLINIC & BLACK ALLIANCE FOR JUST IMMIG., THE STATE OF BLACK IMMIGRANTS REPORT PART II: BLACK IMMIGRANTS IN THE MASS CRIMINALIZATION SYSTEM 15, 20–21, 24–26 (2016), <http://stateofblackimmigrants.com>.

<sup>72</sup> See Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 640–54 (2015); Aarti Kohli et al., *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, BERKELEY L. SCH. 2 (Oct. 2011), [https://www.law.berkeley.edu/files/Secure Communities by the Numbers.pdf](https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf) (revealing that Latinx immigrants were disproportionately targeted through Secure Communities).

<sup>73</sup> See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, preface to 10<sup>th</sup> Anniversary edition xiv (2020)(10 year anniversary edition).

<sup>74</sup> See MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS, preface to 10<sup>th</sup> Anniversary edition xiii, xxxiii, xxxix (2020)(10 year anniversary edition).

<sup>75</sup> *Tiffany’s Commitments*, CABÁN FOR QUEENS DIST. ATTORNEY, <https://www.Cabánforqueens.com/issues/> (last visited Aug. 21, 2020).

over Queens for almost thirty years.<sup>76</sup> Queens is the most diverse jurisdiction in the continental U.S.<sup>77</sup> Cabán promised reform to combat the racial inequities that radiated over every aspect of the criminal legal system.<sup>78</sup> Tiffany Cabán rose to power on the shoulder of others, many of whom, like her, were not career district attorneys, but public defenders or civil rights attorneys, seeking to reform the criminal legal system from within.<sup>79</sup> And they gained power from the energy produced by activists long pushing for systemic change. Cabán exploded into the national scene and although ultimately lost, has been an inspiration to others seeking prosecutorial seats nationwide.<sup>80</sup>

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The “progressive prosecution movement” was born out of community organizing exposing the entrenched racial injustices of the criminal legal system.<sup>81</sup> The state sanctioned murder of Black men and women at the hands of police have led to uprisings demanding systemic change for decades.<sup>82</sup> In 2014, police officer Darren Wilson shot Michael Brown six times and left him for dead in Ferguson, Missouri.<sup>83</sup> People took to the streets in Ferguson. One year earlier, George Zimmerman was acquitted for the cold-blooded murder of Trayvon Martin, sparking the birth of Black Lives Matter.<sup>84</sup> These uprisings spotlighted the national epidemic of police brutality against Black people, especially youth.<sup>85</sup> But they also scrutinized the ways in which district attorneys work hand in hand with police (and protect them), and exposed the ways in which DA policies are designed to target, incarcerate and punish Black and Brown people.<sup>86</sup> Activists centered the ways in which the modern carceral system has been used as a means of racialized social control to

<sup>76</sup> Jan Ransom, *With a Tough-on-Crime D.A. Stepping Down, Will Queens Turn to a Reformer*, N.Y. TIMES, Jan. 9, 2019, at A19.

<sup>77</sup> Selim Algar, *Queens is Crowned Nation’s Most Diverse Large County*, N.Y. POST (July 4, 2019), <https://nypost.com/2019/07/04/queens-is-crowned-nations-most-diverse-large-county/>.

<sup>78</sup> See Libby Rainey, *Revolt of the Outsiders: First AOC, now Tiffany Cabán*, INDEPENDENT (June 3, 2019), <https://independent.org/2019/06/revolt-of-the-outsiders-first-aoc-now-tiffany-caban/>.

<sup>79</sup> See Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW 360 (Apr. 7, 2019), <https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor>.

<sup>80</sup> Despite ultimately losing, Cabán’s campaign was deemed a large success as it pushed her opponent, Melinda Katz, to the left. Aaron Morrison, *In Queens D.A. Race, Criminal Justice Reform is the Real Winner*, APPEAL (July 30, 2019), <https://theappeal.org/in-queens-d-a-race-criminal-justice-reform-is-the-real-winner/>.

<sup>81</sup> See Liane Jackson, *Change Agents: A New Wave of Reform Prosecutors Upends the Status Quo*, A.B.A. J. (June 1, 2019), <https://www.abajournal.com/magazine/article/change-agents-reform-prosecutors>.

<sup>82</sup> Paul Butler, *The System is Working the Way It is Supposed to: The Limits of Criminal Justice Reform*, 2019 GEO. U.L. CTR. 76, 81 (2016).

<sup>83</sup> Jake Halpern, *The Cop*, NEW YORKER (Aug. 10 & 17, 2015), <https://www.newyorker.com/magazine/2015/08/10/the-cop>; Jay Caspian Kang, *Our Demand Is Simple: Stop Killing Us*, N.Y. TIMES (May 4, 2015), <https://www.nytimes.com/2015/05/10/magazine/our-demand-is-simple-stop-killing-us.html>.

<sup>84</sup> Mychal Denzel Smith, *How Trayvon Martin’s Death Launched a New Generation of Black Activism*, NATION (Aug. 27, 2014), <http://www.thenation.com/article/181404/howtrayvon-martins-death-launched-new-generation-black-activism>.

<sup>85</sup> A. Christson Adedoyin, et. al., *The Dehumanization of Black Males by Police: Teaching Social Justice —Black Life Really Does Matter!*, 39 J. TEACHING SOC. WORK 111, 114-15 (2019).

<sup>86</sup> See Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 262 (2007) (“It would be hard to conjure up a mechanism that more effectively subjugates a group of people than state-imposed mass incarceration, capital punishment, and police terror...”).



preserve the white supremacist and capitalist power relationships inherent in slavery.<sup>87</sup> In response to these uprisings, a number of prosecutors have risen to power arguing they can reduce racial disparities in the criminal legal system from within.<sup>88</sup>

In order to achieve this, those who identify as “progressive prosecutors” commonly call for policies promoting decriminalization, decarceration, centering community input in policing and prosecution, and enhanced transparency.<sup>89</sup> They promise to bring “fairness” to the legal system by approaching their role and to work from a racial and social justice lens.<sup>90</sup> Yet, this “progressive” stance does not always extend to their treatment of immigrant defendants.

### A. Rise of the Progressive Prosecution Movement

In order to understand the progressive prosecution movement, it is imperative to review the context from which it emerged. There are over 2,000 local prosecutor offices in the United States, typically organized by county.<sup>91</sup> These offices vary in size and have wide-ranging differences arising out of geographic, demographic, political, economic and other factors. Prosecution in each jurisdiction is deeply informed by specific local dynamics.<sup>92</sup> Most offices are led by a “chief” district attorney,<sup>93</sup> who is generally elected for a limited term.<sup>94</sup> Yet, district attorneys are some of the most entrenched positions in our democracy.<sup>95</sup> Most are incumbents and run unopposed,<sup>96</sup> and are overwhelmingly white and male.<sup>97</sup> Prosecutorial elections have historically garnered little attention and participation, and the electorate has a very limited view into the district attorney’s

<sup>87</sup> See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 20-22 (2012).

<sup>88</sup> See e.g., Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 7-8, (2019) (discussing how DA candidate Kim Foxx challenged her incumbent Anita Alvarez on her delay in prosecuting the police officer who killed Laquan McDonald).

<sup>89</sup> See EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019); see also Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 7, 18, 25-6 (2019).

<sup>90</sup> See Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 22 (2019).

<sup>91</sup> OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, PROSECUTORS OFFICES, <https://www.bjs.gov/index.cfm?ty=tp&tid=27> (last visited on Aug. 22, 2020).

<sup>92</sup> See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 409-10 (2001) (describing the power to charge as the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion).

<sup>93</sup> The chief prosecutor, in some jurisdictions is called “state’s attorney,” “district attorney,” etc. Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 6 (2019).

<sup>94</sup> Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 6 (2019).

<sup>95</sup> See *id.*

<sup>96</sup> Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 593 (2009) (noting how in general election campaigns, prosecutor incumbents ran unopposed in 85% of the races they entered).

<sup>97</sup> *Tipping the Scales: Challengers Take on the Old Boys Club of Elected Prosecutors*, REFLECTIVE DEMOCRACY CAMPAIGN, <https://wholeads.us/tipping-the-scales-read-the-report/> (Oct. 2019) (prosecutors are ninety-five percent white, seventy-five percent white men, and only two-percent women of color and three-percent men of color).

operations and policies.<sup>98</sup> What's more, district attorneys are subject to little additional oversight.<sup>99</sup> They hold enormous discretion in how to carry out their duties.<sup>100</sup>

On the heels of the Civil Rights movement, in the 1970s, the government began massive divestment from communities of color. At the same time, it utilized “tough on crime” policing and prosecution as a mechanism of continued social control and criminalization of marginalized communities.<sup>101</sup> District attorneys largely embraced “tough on crime” approaches.<sup>102</sup> For decades, they carried out the War on Drugs and Broken Windows theory in courtrooms, aggressively pursuing harsh penalties for low-level quality of life offenses, continuing regulation of poor Black and Brown communities through punishment.<sup>103</sup> By and large, prosecutors have measured success through the number of convictions achieved.<sup>104</sup> Recently, however, there have been some cracks in these norms.

Over the last decade, a small group of “reformer” prosecutors have risen to power in various jurisdictions.<sup>105</sup> Organizations have launched community education campaigns highlighting the important role and power of the local prosecutor over everyday lives, and have emphasized the importance of voting in prosecutorial elections.<sup>106</sup> Large donors have poured funds into local

<sup>98</sup> Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 6 (2019).

<sup>99</sup> Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 439-48 (2001) (examining the failures of the three existing mechanisms that purport to hold prosecutors accountable: the electoral process, budgetary restrictions, and time and jurisdictional limitations).

<sup>100</sup> See *id.* at 408 (describing the power to charge as the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion).

<sup>101</sup> See THE CTR. FOR POPULAR DEMOCRACY, ET AL., LAW FOR BLACK LIVES & BLACK YOUTH PROJECT 100, FREEDOM TO THRIVE—REIMAGINING SAFETY AND SECURITY IN OUR COMMUNITIES, CENTER FOR POPULAR DEMOCRACY 3 (2017),

<https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf>; see also Cheyenne Morales Harty, *The Causes and Effects of Get Tough: A Look at How Tough-on-Crime Policies Rose to Agenda and an Examination of Their Effects on Prison Populations and Crime* 27-30 (Feb. 29, 2012) (unpublished Ph.D. dissertation, University of South Florida) (on file with the Graduate School at Scholar Commons), <https://scholarcommons.usf.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=5262&context=etd> (describing how the tough on crime approach born out of the 1970s was a significant shift from treatment and rehabilitative policies leading up to its development).

<sup>102</sup> See David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 669-70 (2017) (describing how prosecutors lobbied for stiff mandatory penalties).

<sup>103</sup> See THE CTR. FOR POPULAR DEMOCRACY ET AL., FREEDOM TO THRIVE: REIMAGINING SAFETY AND SECURITY IN OUR COMMUNITIES 3 (2017),

<https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf>

<sup>104</sup> Lara Bazelon, *Ending Innocence Denying*, 47 HOFSTRA L. REV. 393, 431 (one prosecutor said “[t]he theoretical premium is justice but the real premium is winning and at times, winning at all costs so justice gets lost at times.”).

<sup>105</sup> See Liane Jackson, *Change Agents: A new Wave of Reform Prosecutors Opens the Status Quo*, A.B.A. J. (June 1, 2019), <https://www.abajournal.com/magazine/article/change-agents-reform-prosecutors> (Aramis Ayala in Orange County, FL in 2016, Larry Krasner in Philadelphia, PA in 2017, Wesley Bell in St. Louis, MO in 2018); David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647-49 (2017) (Kenneth Thompson in Brooklyn, NY in 2013, Marilyn Mosby in Baltimore, MD in 2014, Scott Colom in Columbus, MS in 2015, Mark Gonzalez in Nueces County, TX in 2016 and Kim Foxx in Cook County, IL in 2016).

<sup>106</sup> E.g., Meet Your DA, AMERICAN CIVIL LIBERTIES UNION (“ACLU”), <https://meetyourda.org>, (last visited on Aug. 23, 2020).

campaigns.<sup>107</sup> While it is difficult to point to a singular agenda, given varied local dynamics,<sup>108</sup> reformers have been unified in their push, in name at least, for increased transparency, accountability and enhanced “fairness” in the criminal legal system.<sup>109</sup>

“Progressive prosecutors” constitute a subset of these reformers. While there is no singular definition<sup>110</sup> of the “progressive prosecutor” and many have laid claim to the title,<sup>111</sup> I refer to a particular subset of prosecutors herein. Many were career public defenders or civil rights attorneys who set their sights on the district attorney’s office as an attempt to disrupt what they have seen on the other side. The key aspect that “progressive prosecutors” suggest distinguishes them from other “reformers” is their focus on and motivation to combat the pervasive racial disparities in the criminal legal system, from arrest to sentencing. They also characterize themselves as questioning the very function of the prosecutor herself and focusing on using the prosecutor’s powers to reconsider how and when to enforce the law.<sup>112</sup> They have commonly called for—decriminalization, decarceration, increased transparency—as independent goals and tools to reduce pervasive racialized outcomes. Yet, each prosecutor has committed to address the racial inequities of mass criminalization to varying degrees and has prioritized these goals differently.<sup>113</sup>

Most “progressive prosecutors” propose they redirect their immense power to adopt policies and practices that move away from mass incarceration, but still prioritize other methods of state oversight.<sup>114</sup> For example, they may invest in prosecuting those against whom the law has been underenforced (i.e. wage theft or financial crimes) or seek to reduce racial bias in prosecutorial

<sup>107</sup> See David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 657-58, 660, 663 (2017) (philanthropist George Soros has funded various PACs supporting progressive district attorney candidates).

<sup>108</sup> David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. 25, 27 (2017).

<sup>109</sup> See e.g., David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 658-61, 664, 667 (2017) (giving examples across candidates).

<sup>110</sup> See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. XX (forthcoming 2021); cf. Steven Zeidman, *Some Modest Proposals for a Progressive Prosecutor*, UCLA CRIM. JUST. L. REV. 3 (forthcoming 2021) (suggesting a prosecutor’s “progressiveness” should be measured by their willingness to surrender their immense power over the trial process and other prevailing prosecutorial practices).

<sup>111</sup> Famously, Vice President Harris had proclaimed herself to be a “progressive prosecutor” despite championing and enforcing a law that prosecuted parents of truant students. Melanie Mason & Michael Finnegan, *Kamala Harris regrets California truancy law that led to arrest of some parents*, L.A. Times (Apr. 17, 2019), <https://www.latimes.com/politics/la-na-pol-kamala-harris-truancy-20190417-story.html>

<sup>112</sup> Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 22-23 (2019) (including polices such as opposing cash bail, implementing diversion programs, committing to never charge juveniles as adults, or refusing to seek the death penalty) (including Kim Foxx, Larry Krasner, Dan Satterberg, Aramis Ayala and Rachael Rollins as examples of progressive prosecutors).

<sup>113</sup> *Id.* This Article will not do a survey of progressive prosecutor policies but it will rather build upon some of the earlier surveys other scholars such as David Alan Sklansky and Angela J. Davis have done regarding some of the individuals and their platforms. It will look at some new initiatives over the last few years to do a deeper dive into some of the policy examples progressive prosecutors have enacted.

<sup>114</sup> For an important discussion on why progressive prosecutors might consider a “servant-of-the-law” approach to prosecutorial behavior, one that actually places constraints on prosecutorial excess, rather than a model that promotes the use of broad prosecutorial power to “do justice,” see Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203 (2020).

action.<sup>115</sup> A very small, but growing number of candidates, have begun to embrace an anticarceral or abolitionist ethic—seeking to reduce their own power, pursuing policies that ultimately shrink state violence and redirecting resources to address social ills outside the carceral state.<sup>116</sup>

The nascent “progressive prosecution movement” has had mixed results. Progressive prosecutorial races<sup>117</sup> and newly elected progressive prosecutors<sup>118</sup> have revealed wide differences in the breadth and depth of the policies proposed. Prosecutors have varied greatly in their campaign promises and their later-adopted policies, many policies seeming hardly “progressive” at all.<sup>119</sup> There has been fluctuation in its membership, with some progressive prosecutors facing great backlash<sup>120</sup> and others slow to, or altogether failing to, deliver on campaign promises.<sup>121</sup> Others have mounted large campaigns only to lose their seat.<sup>122</sup> Even where unsuccessful, campaigns have pushed the discourse toward the left.<sup>123</sup> There has been increasing effort to fortify “progressive

<sup>115</sup> See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 101, 132 (forthcoming 2021) (describing the “prosecutorial progressive prosecutor” prototype, whose “mission or approach accepts the fundamental legitimacy and desirability of the criminal system and carceral state violence.”).

<sup>116</sup> See *id.* at 134-135 (forthcoming 2021) (describing the anti-carceral prosecutor as advocating for divestment from prosecution and the criminal system as they view criminal law and the carceral state as being fundamentally flawed). Levin describes the anti-carceral prosecutor as coming the “closest to resembling those embraced by prison abolitionists” and believing the problem is not that the wrong people are incarcerated but that people are incarcerated at all. *E.g.*, Elizabeth Weil-Greenberg, *Public Defender Chesa Boudin Wins San Francisco D.A. Race in Major Victory for Progressive Prosecutor Movement*, APPEAL (Nov. 9, 2019), <https://theappeal.org/public-defender-chesa-boudin-wins-san-francisco-da-race-in-major-victory-progressive-prosecutor-movement/> (Chesa Boudin promises to shift responses to problems with non-criminal responses and to reinvest power in the hands of the community).

<sup>117</sup> *E.g.*, David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 647-49 (2017).

<sup>118</sup> *E.g.*, Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 6-15 (2019).

<sup>119</sup> For example, while prosecutors have framed creation of “conviction integrity units” as a “progressive” policy, it might be more astutely framed as prosecutors doing their jobs. These units seek to overturn convictions that were “wrongful” because the individuals were indeed innocent. While they often expose racialized policing and over-aggressive prosecution, they are not inherently progressive.

<sup>120</sup> *E.g.* Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 18-19 (2019) (Aramis Ayala sought to not seek the death penalty soon after being elected in 2016, but Florida’s governor took death penalty cases away from her jurisdiction and the Florida Supreme the Court upheld the governor’s action). While Ayala decided not to run for reelection, Monique Worrell, a progressive candidate endorsed by Caban and Ayala took the seat in November 2020. Daniel Nichanian, *Austin and Orlando Elect Prosecutors Who Vow to Fight Mass Incarceration*, APPEAL (Nov. 3, 2020), <https://theappeal.org/politicalreport/jose-garza-monique-worrell-criminal-justice-reform/>.

<sup>121</sup> *E.g.*, Alice Speri, *Can the Anti-Trump Resistance Take the Philadelphia DA’s Office?*, INTERCEPT (May 15, 2017), <https://theintercept.com/2017/05/15/can-the-anti-trump-resistance-take-philadelphias-da-office/> (while Philadelphia DA Larry Krasner eliminated cash bail for 25 charges, critics said these changes fell short of his campaign promise of eradicating cash bail).

<sup>122</sup> *E.g.*, Aaron Morrison, *In Queens D.A. Race, Criminal Justice Reform is the Real Winner*, APPEAL (July 30, 2019), <https://theappeal.org/in-queens-d-a-race-criminal-justice-reform-is-the-real-winner/> (describing the ultimate loss of candidate Tiffany Cabán).

<sup>123</sup> Aaron Morrison, *In Queens D.A. Race, Criminal Justice Reform is the Real Winner*, APPEAL (July 30, 2019), <https://theappeal.org/in-queens-d-a-race-criminal-justice-reform-is-the-real-winner/> (Cabán pushed Katz and most of the crowded field of candidates to the left on issues like marijuana and sex work).

reformers.” Fair and Just Prosecution (FJP) was created to support newly-elected prosecutors by providing research support and on the ground training for their staff on “reform initiatives.”<sup>124</sup>

Today, there are approximately twenty-five chief prosecutors, who have embraced “progressive” policy reforms, to varying degrees. Still, a number of “progressive” candidates were successful in November 2020 and are running in November 2021.<sup>125</sup> Still, self-identified “progressive prosecutors” occupy a very small percentage of prosecutorial offices nationwide. But many represent influential jurisdictions governing large populations—like Eric Gonzales in Kings County, NY (Brooklyn), Kim Foxx in Cook County, Illinois (Chicago), Jose Garza in LA County, California, or Chesa Boudin in San Francisco, California. These DAs run large offices; their policies have wide reaching impact. Their initiatives have garnered attention. Although small in number, progressive prosecutors’ vision has received outsized influence in criminal legal policy debates.<sup>126</sup> This is in part because their agendas have come out of years of organizing efforts demanding decriminalization, decarceration and promotion of a community safety model of justice. Decades of community groundwork for reforms and a reinvestment in communities has paved the way for progressive prosecutors to advance these platforms.<sup>127</sup>

## B. Theory and Practice of the Progressive Prosecutor

### 1. Theory: Questioning the Role and Function of the Prosecutor, the Purposes of Criminal Legal System, and Consideration of Collateral Consequences

Progressive prosecutors have sought to challenge the function of the prosecutor that had become widely accepted, namely, to secure convictions and be “tough on crime.” Further, the progressive prosecution movement centrally questions how longstanding practices achieve the purposes of the criminal legal system. To that end, so-called “progressive prosecutors” have

<sup>124</sup> See *About FJP/ Our Work and Vision*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/about-fjp/our-work-and-vision/> (last visited on Aug. 24, 2020). Cf. *Promoting Racial Equity in Prosecution*, VERA INST. OF JUST., <https://www.vera.org/securing-equal-justice/promoting-racial-equity-in-prosecution> (last visited on Aug. 24, 2020). E.g., BRENNAN CTR. FOR JUST. & JUST. COLLABORATIVE, 21 PRINCIPLES FOR THE 21<sup>ST</sup> CENTURY PROSECUTOR (2018), [https://www.brennancenter.org/sites/default/files/publications/FJP\\_21Principles\\_FINAL.pdf](https://www.brennancenter.org/sites/default/files/publications/FJP_21Principles_FINAL.pdf) (a manifesto for prosecutors seeking to adopt a “progressive” agenda—one that sees jail as the exception, not the rule, promotes reform based on evidence-based analytics, and encourages prosecutorial transparency). *But see*, Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575 XXX (2019) (critiquing the 21<sup>st</sup> century recommendations report and suggesting it “actually endorses an expansion of carceral policing logics beyond the discrete institutional- spatial sites of prisons, jails, detention centers, and juvenile facilities.”)

<sup>125</sup> 2020 Endorsements, REAL JUSTICE, <https://realjusticepac.org/endorsements/> (last visited on Aug. 23, 2020); Jane Wester, *Manhattan DA Candidates Tout Progressive Bona Fides in ‘Meet and Greet’ Ahead of 2021 Election*, N.Y. L.J. (Aug. 19, 2020) (Manhattan race already well underway with 9 challengers for November 2021).

<sup>126</sup> See generally EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019).

<sup>127</sup> See generally, THE CTR. FOR POPULAR DEMOCRACY ET AL., FREEDOM TO THRIVE: REIMAGINING SAFETY AND SECURITY IN OUR COMMUNITIES (2017), <https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf>

largely moved away from policies justified as deterrent<sup>128</sup> or retributive<sup>129</sup> and push for policies rooted in rehabilitative<sup>130</sup> or restorative purposes.<sup>131</sup> These goals reflect a more general embrace of an abolitionist ethic, by addressing wrongdoing outside of a punitive setting.<sup>132</sup>

The Supreme Court has said that the prosecutor’s “interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.”<sup>133</sup> Ethical rules and professional standards governing prosecutorial conduct provide further insight into the prosecutor’s role.<sup>134</sup> The American Bar Association’s (ABA) professional standards characterize prosecutors as “administrator[s] of justice” whose “duty . . . is to seek justice, not merely to convict.”<sup>135</sup> According to the National District Attorneys Association (NDAA) professional standards, the prosecutor’s primary responsibility to be an “independent administrator of justice.”<sup>136</sup> The commentary to the ABA standards state that prosecutors should “act with integrity and balanced judgment to increase public safety . . . protect the innocent, convict the guilty, consider the interests of victims and witnesses and respect the constitutional and legal rights of . . . defendants.”<sup>137</sup> The rules go on to say prosecutors should “seek to reform and improve the administration of criminal justice.” Reform and reevaluation are built into the professional standards themselves.<sup>138</sup>

<sup>128</sup> See Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 83, 136-37 (2010) (describing how the practice of seeking the death penalty has become less popular with state prosecutors across the country).

<sup>129</sup> For example, district attorneys are working to correct past injustices of lengthy and disproportionate sentences. See, e.g., see *Revisiting Past Extreme Sentences: Sentencing Review and Second Chances*, FAIR & JUST PROSECUTION (Jan. 2020), [https://fairandjustprosecution.org/wp-content/uploads/2020/02/FJP\\_Issue-Brief\\_SentencingReview.pdf](https://fairandjustprosecution.org/wp-content/uploads/2020/02/FJP_Issue-Brief_SentencingReview.pdf) (describing practices of Prosecuting Attorney Dan Satterberg, Eric Gonzalez, and Jeff Rosen).

<sup>130</sup> See *Transcript: Into the Philadelphia D.A.’s Office*, NBC NEWS (July 16, 2020), <https://www.nbcnews.com/podcast/into-america/transcript-philadelphia-d-s-office-n1234092> (Larry Krasner speaking on the importance of rehabilitative and preventative policies).

<sup>131</sup> Cf. Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors’ Perspective*, 88 FORDHAM L. REV. 2287 (2020) (examining Natasha Irving and Chesa Boudin’s use of restorative justice processes and arguing that restorative justice better reduces recidivism).

<sup>132</sup> See *infra* Part III; Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1172 (2015) (an abolitionist ethic “seeks to end the use of punitive policing and imprisonment as the primary means of addressing what are essentially social, economic, and political problems” and recognizes the racialized “violence, dehumanization, and moral wrong inherent in any act of caging or chaining—or otherwise confining and controlling by penal force.”).

<sup>133</sup> *Berger v. United States*, 295 U.S. 78, 98 (1935).

<sup>134</sup> MODEL RULES OF PROF’L CONDUCT r. 3.8, r.3.8 cmt. (AM. BAR ASS’N 1983) (listing the special responsibilities of a prosecutor); CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2 (AM. BAR ASS’N 2017) (listing the functions and duties of the prosecutor). For other rules of professional conduct that apply to prosecutors, see MODEL RULES OF PROF’L CONDUCT r. 5.1 (AM. BAR ASS’N 1983) (listing responsibilities of partner or supervisory lawyer); MODEL RULES OF PROF’L CONDUCT r. 5.3 (AM. BAR ASS’N 1983) (listing responsibilities of lawyer regarding nonlawyer assistance); MODEL RULES OF PROF’L CONDUCT r. 8.3 (AM. BAR ASS’N 1983) (describing duty for reporting professional misconduct).

<sup>135</sup> CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2 (AM. BAR ASS’N 2017) (laying out the functions and duties of the prosecutor).

<sup>136</sup> NAT’L PROSECUTION STANDARDS WITH REVISED COMM. § 1-1.1 (NAT’L DIST. ATTORNEYS ASS’N 2009), <https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf>.

<sup>137</sup> CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(B) (AM. BAR ASS’N 2017).

<sup>138</sup> CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(B) (AM. BAR ASS’N 2017).

Progressive prosecutors have sought to reenvision the role of the prosecutor and have grappled with defining what it means to ensure “justice shall be done.” They rhetorically embrace the “minister of justice” role and suggest they seek to execute the laws to that end.<sup>139</sup> Relevant guidelines state prosecutors should use “balanced judgment” in treatment of a case, and consider all involved, including the accused.<sup>140</sup>

Consideration of the “accused,” raises the question of how progressive prosecutors should approach collateral consequences of convictions. The ABA guidelines suggest prosecutors consider collateral consequences and their proportionality as part of charging and dismissal decisions.<sup>141</sup> The 2017 revisions to the Model Penal Code on Sentencing suggest *all* players must consider proportionality in sentencing decisions.<sup>142</sup> Notably, the model rules of professional conduct do not include any special provisions regarding prosecutors’ obligations during plea negotiations.<sup>143</sup> This is so, despite the fact that 95% of convictions today arise from pleas<sup>144</sup> and an increasing awareness of the potentially devastating impact of collateral consequences. However, the more recent NDAA standards “intimate prosecutorial mindfulness of the situation of the defendant” in plea bargaining.<sup>145</sup> Further, progressive prosecutors have embraced increased consideration of collateral consequences in their rhetoric.

## 2. *Progressive Prosecutors Platforms and Policy Initiatives in General*

Progressive prosecutors commonly call for decriminalization, decarceration, increased transparency and accountability. It is worthwhile to review some of the policies they have proposed

<sup>139</sup> MODEL RULES OF PROF’L CONDUCT r. 3.8 cmt. (AM. BAR ASS’N 1983) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); *see also* Lara Bazelon, *Ending Innocence Denying*, 47 HOFSTRA L. REV. 393, 397 (2018) (describing how “in recent years, a counter-narrative has taken a tentative foothold: a good prosecutor is a protector of the innocent and a crusader for the truth.”).

<sup>140</sup> CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(B) (AM. BAR ASS’N 2017) (functions and duties of a prosecutor).

<sup>141</sup> CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4 (AM. BAR ASS’N 2017) (identifying as a factor to consider in pursuing or dismissing criminal charges, “(vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender”).

<sup>142</sup> MODEL PENAL CODE: SENTENCING Proposed final draft, §1.02(2), 13 (AM. LAW INST. 2017) (emphasis added). Section 1.02(2) makes clear the “general purposes of the provisions of sentencing are applicable to all official actors in the sentencing system, including... prosecutors, appellate courts, corrections officers, prison-release decisionmakers...” § 6.02A specifically provides some new structure for prosecutors to use deferred prosecution. *Id.* at 50. The central objection to this provision is to encourage prosecutors to use their authority “parsimoniously” and, when appropriate, in ways that avoid the often-severe collateral consequences imposed on individuals who have been charged with a crime or who have made an admission of guilt in open court. *Id.* at 51.

<sup>143</sup> Brian Murray, *Prosecuting Responsibility and Collateral Consequences*, 12 STAN. J. C.R. & C. L. 213, 242 (2016); *see* MODEL RULES OF PROF’L CONDUCT r. 3.8, r.3.8 cmt. (AM. BAR ASS’N 1983) (listing prosecutors’ special responsibilities).

<sup>144</sup> Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. 8, 9 (2018); NACDL, *THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* (2018).

<sup>145</sup> *See* Brian Murray, *Prosecuting Responsibility and Collateral Consequences*, 12 STAN. J. C.R. & C. L. 213, 234, 242-43 (2016) (The NDAA considers the prosecutor’s primary responsibility to be an “independent administrator of justice.” Regarding plea negotiations and plea agreements, prosecutors should consider several factors, including any “undue hardship caused to the defendant.”).

as part of their efforts to target the racial inequities of modern mass criminalization system. Many have urged adoption of “evidence-based” policy initiatives to reduce racial disparities.<sup>146</sup> DA Eric Gonzales has promised to acquire updated data and analytics to drive reforms.<sup>147</sup> He argues tracking data will reveal the racialized results of prosecutorial decision-making and will provide a roadmap for policy adjustments to reduce racial disparities. With this, he hopes to tackle the ways in which racial bias pervades prosecutorial decision-making.<sup>148</sup> Gonzales posits that data-based policy decisions ensure more transparency and accountability.<sup>149</sup>

In another effort to reduce disproportionate impacts and harms on Black and Latinx communities,<sup>150</sup> progressive prosecutors have pushed decarceration policies. As of 2018, there were 2.2 million people in U.S. prisons and jails. More than 60% of the people in prison are people of color. Black men make up 40% of the prison population, even though they represent only 13% of the overall population.<sup>151</sup> Decarceration initiatives have sought to address the problem from the “front” and “back end” of the system.

From the front, prosecutors have adopted policies seeking to move away from pretrial detention. One prime example has been wide scale efforts to eliminate cash bail,<sup>152</sup> which for decades, had disproportionately led poor, and more often than not, individuals of color, to languish in jails before trial solely because they could not afford bail. Cash bail has led many to plead guilty to more serious counts than they would have had they been released during the course of their criminal proceeding.<sup>153</sup> DA Chesa Boudin made good on his promise to eliminate cash bail within a year in office, and others have worked towards lessening the use of the practice, with a goal of

<sup>146</sup> E.g., *District Attorney Boudin Pioneers First in the Nation Policy Directives*, CITY AND COUNTY OF SAN FRANCISCO DISTRICT ATT’Y (Feb. 28, 2020), <https://sfdistrictattorney.org/article/district-attorney-boudin-pioneers-first-nation-policy-directives>.

<sup>147</sup> E.g. ERIC GONZALEZ, BROOKLYN DISTRICT ATTORNEY’S OFF., JUSTICE 2020-AN ACTION PLAN FOR BROOKLYN 29, 32, 40 (2020), <http://www.brooklynda.org/justice2020/>.

<sup>148</sup> See *id.* at 32, 43. But see Max Rivlin-Nadler, *California Could Soon End Money Bail, But at What Cost?*, APPEAL (AUG. 22, 2018), <https://theappeal.org/california-could-soon-end-money-bail-but-at-what-cost/> (discussing how some data analytic tools, such as “risk assessment tools” are notoriously biased against people of color and the poor as they rely on data such as employment and criminal history that’s tainted by discrimination).

<sup>149</sup> ERIC GONZALEZ, BROOKLYN DISTRICT ATTORNEY’S OFFICE, JUSTICE 2020-AN ACTION PLAN FOR BROOKLYN 9, 38, (2020), <http://www.brooklynda.org/justice2020/>.

<sup>150</sup> Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. 8, 8 (2018).

<sup>151</sup> *Fact Sheet: Trends in U.S. Corrections*, SENTENCING PROJECT (2018), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Trends-in-USCorrections.pdf> [<https://perma.cc/57KR-XUDV>] (last visited August 22, 2020); see also Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. 8, 8 (2018) (finding Black men are 6 times as likely to be incarcerated as white men and Latino men are 2.7 times as likely).

<sup>152</sup> E.g. *San Francisco District Attorney Chesa Announces Elimination of Cash Bail*, CITY AND COUNTY OF SAN FRANCISCO DISTRICT ATTORNEY (Feb. 10, 2020), <https://sfdistrictattorney.org/article/san-francisco-district-attorney-chesa-boudin-announces-elimination-cash-bail> (forbids prosecutors from requesting money bail under any circumstances).

<sup>153</sup> Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. JUSTICE (June 2, 2020), <https://www.brennancenter.org/our-work/research-reports/how-cash-bail-works>.



one day ending it.<sup>154</sup> In other decarceration efforts, progressive prosecutors have promised to create a culture where jail is the exception and not the norm—by offering a host of alternative to incarceration programs to resolve criminal matters.<sup>155</sup> Philadelphia DA Larry Krasner, sought to attack decarceration from the “back end,” by creating an office-wide committee to review cases of those serving juvenile life sentences to assess if his office should request sentence reductions.<sup>156</sup> Many took action (albeit insufficiently) to decarcerate when the Coronavirus pandemic struck.<sup>157</sup>

Progressive prosecutors have also decriminalized conduct. Prosecutors have done so through their prosecutorial nullification powers.<sup>158</sup> Cook County DA Kim Foxx enacted guidance directing prosecutors not to bring felony retail theft charges against individuals unless the value of the item alleged to have been taken was over \$1,000.<sup>159</sup> This despite the statute permitting felony charge when the item at issue was more than \$500 in value.<sup>160</sup> Studies found that a large number of individuals had been languishing in pretrial detention for this charge when the item was valued between \$500-\$1000.<sup>161</sup> Foxx’s policy decriminalized and decarcerated in one fell swoop.

Perhaps the most common example of decriminalization has been the refusal to prosecute low level marijuana possession in most circumstances,<sup>162</sup> despite statutes remaining on the books.

<sup>154</sup> Colin Doyle, *Chesa Boudin’s New Bail Policy is Nation’s Most Progressive. It also Reveals Persistence of Tough-on-Crime Norms*, APPEAL (Jan. 20, 2020), <https://theappeal.org/politicalreport/chesa-boudin-cash-bail-predictions/> (describing how Rachael Rollins and Larry Krasner’s bail policies limit cash bail).

<sup>155</sup> E.g., Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 13 (2019) (describing the Law Enforcement Assisted Diversion (“LEAD”) program instituted in 2011 in King County, Washington, under which individuals who possess less than a gram of drugs or are engaged in prostitution activity are diverted without being booked, charged, or brought to court).

<sup>156</sup> See EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 164 (2019) (only some of the sentence modification requests were granted by judges).

<sup>157</sup> Various prosecutors announced policies to limit or stop new prosecutions for non-violent or low-level offenses during the pandemic. Cf., *Prosecutors Responses to Covid-19*, BRENNAN CTR. FOR JUST. (Mar. 2020), <https://www.brennancenter.org/our-work/research-reports/prosecutors-responses-covid-19> (describing policies of Baltimore DA Marilyn Mosby, Brooklyn DA Eric Gonzalez, and Seattle, WA DA Dan Satterberg).

<sup>158</sup> See Zohra Ahmed, *The Sanctuary of Prosecutorial Nullification*, 83 ALB. L. REV. 239, 294 (2020) (“Nullification... is when a prosecutor decides not to prosecute because she disagrees with ‘the wisdom of the law or of the desirability of punishing a culpable wrongdoer.’”) Even prosecutors who have not traditionally demonstrated a “progressive approach,” like Cyrus Vance, have utilized this strategy. E.g., *News Reports, Ending the Prosecution of “Turnstile Jumping” (Q7)* MANHATTAN DIST. ATTORNEY’S OFFICE (Nov. 1, 2019), <https://www.manhattanda.org/category/news/reports/>. But see Duffy Rice, *Cyrus Vance and the Myth of Progressive Prosecution*, N.Y. TIMES (Oct. 16, 2017), <https://www.nytimes.com/2017/10/16/opinion/cy-vance-progressive-prosecutor.html> (describing Vance’s continued use of “draconian practices”, including zealous prosecution of misdemeanors against Black and Latino defendants).

<sup>159</sup> Steve Schmadek, *Top Cook County Prosecutor Raising Bar for Shoplifters with Felony*, CHI. TRIB. (Dec. 15, 2016), <https://www.chicagotribune.com/news/breaking/ct-kim-foxx-retail-theft-1215-20161214-story.html>.

<sup>160</sup> The theft of property valued at more than \$500 and not more than \$10,000 is a Class 3 felony in Illinois. See *id.*

<sup>161</sup> Nearly 80 percent of felony retail theft cases charged in Illinois between 2010 and 2012 were for a loss of less than \$1,000. In 2015, 76 defendants charged with felony shoplifting spent more time in jail than their eventual prison sentence. *Id.*

<sup>162</sup> Shortly after taking office, Kenneth Thompson, Brooklyn District Attorney from 2014 to 2016, largely ended prosecutions for low-level marijuana offenses. David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 652, (2017); but see Jake Offenhartz, *Despite Policy Change*,

Another common policy to decriminalize and decarcerate has been the expanded use of specialized courts that seek to address root causes of crime, such as mental health, drug treatment, and trafficking courts.<sup>163</sup>

Nearly all self-proclaimed progressive prosecutors focus on the need to enhance accountability and transparency in their offices and the broader criminal legal system. Historically, prosecutors have fomented distrust among the public, in part, because their decisions are often obscured from public scrutiny, and because of their close relationships with corrupt police departments. Progressive prosecutors have sought to address these concerns by explicitly promising to bring enhanced accountability to the criminal legal system.<sup>164</sup> To that end, nearly every progressive prosecutor has created a conviction integrity unit.<sup>165</sup> These units were created in recognition of the prevalence of wrongful convictions. Conviction integrity units have overturned convictions often due to systemic corrupt policing and scrutiny of evidence. Some so-called “progressive prosecutors” have brought criminal charges against officers for killings,<sup>166</sup> after decades of practical immunity from prosecution (and continued impunity). DA Eric Gonzales and others have sought to enhance accountability by creating community task forces to help create prosecutorial goals. His initiative, Justice 2020, brought together religious and other community leaders to discuss policy goals and projects for the new decade.<sup>167</sup>

### C. Progressive Prosecution Movement and Immigration

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*Brooklyn DA Continues to Prosecute Most Low-Level Marijuana Offenses*, GOTHAMIST (sept. 7, 2017), <https://gothamist.com/news/despite-policy-change-brooklyn-da-continues-to-prosecute-most-low-level-marijuana-offenses>; *E.g., Press Releases: Baltimore State’s Attorney Marilyn Mosby to Stop Prosecuting Marijuana Cases, Says Prosecutions Provide No Public Safety Value and Undermine Public Trust in Law Enforcement*, OFFICE STATE’S ATTORNEY FOR BALT. CITY (Jan. 2019), <https://www.stattony.org/media-center/press-releases/1597-baltimore-state-s-attorney-marilyn-mosby-to-stop-prosecuting-marijuana-cases-says-prosecutions-provide-no-public-safety-value-and-undermine-public-trust-in-law-enforcement>; (regardless of quantity or criminal history).

<sup>163</sup> *E.g., Alternative Programs Bureau*, BROOKLYN DISTRICT ATTORNEY’S OFF., <http://www.brooklynda.org/alternative-programs-bureau/> (last visited on Aug. 25, 2020) (including three court parts that are aimed at diverting drug-addicted offenders into treatment in lieu of incarceration, as well as the Youth Diversion Part, the Veterans Court Part and the Mental Health Court Unit); *but see* DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE, DRUG POLICY ALL. (2011) (finding that drug courts have not demonstrated cost savings, reduced incarceration, or improved public safety and have made been more punitive toward addiction).

<sup>164</sup> *See* David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 661, 671 (2017).

<sup>165</sup> *See id.* at 652-53, 664, 667, 671.

<sup>166</sup> *See e.g.,* Raya Jalabi & Sabrina Siddiqui, *Marilyn Mosby: Young Chief Prosecutor Electrifies Baltimore with Police Charges*, GUARDIAN (May 1, 2015), <https://www.theguardian.com/us-news/2015/may/01/marilyn-mosby-baltimore-states-attorney-freddie-gray> (Mosby charged Baltimore police officers who killed Freddie Gray within month of killing); *but see* Bill Turque & Elise Schmelzer, *After Dropping Charges, Marilyn Mosby Still Hailed as Both Hero and Hack*, WASH. POST (July 27, 2016), [https://www.washingtonpost.com/local/md-politics/for-bold-young-prosecutor-effect-of-failed-prosecutions-unclear/2016/07/27/a7d0b6ac-540b-11e6-bbf5-957ad17b4385\\_story.html](https://www.washingtonpost.com/local/md-politics/for-bold-young-prosecutor-effect-of-failed-prosecutions-unclear/2016/07/27/a7d0b6ac-540b-11e6-bbf5-957ad17b4385_story.html) (Mosby’s office announced that it was dropping all criminal charges against the officers after three acquittals and one hung jury).

<sup>167</sup> ERIC GONZALEZ, BROOKLYN DISTRICT ATTORNEY’S OFFICE, JUSTICE 2020-AN ACTION PLAN FOR BROOKLYN 25 (2020), <http://www.brooklynda.org/justice2020/>.

The progressive prosecution movement has advanced some helpful reforms for immigrant defendants,<sup>168</sup> however, there has been a deficiency in the way they have approached immigration issues. While many progressive prosecutors nod to the idea of “protecting immigrants” as part of their campaign promises,<sup>169</sup> once in power, most progressive prosecutors have adopted few policies that explicitly benefit immigrant defendants.<sup>170</sup> If anything, progressive prosecutors have advanced policies focused more on protecting immigrant witnesses and encouraging immigrant cooperation with the police and focused less, or not at all, on their treatment of immigrant defendants.<sup>171</sup> These are glaring omissions given the serious adverse consequences of the interconnected nature of the criminal and immigration systems which can largely be influenced by prosecutorial action or inaction.<sup>172</sup> To be sure, policies such as eliminating cash bail<sup>173</sup> and decriminalization are generally beneficial to non-citizens as well; however, other policies have been adopted without adequate consideration and care for their effects on immigrants. For instance,

<sup>168</sup> See Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 *FORDHAM L. REV.* 8, 10-11 (2018).

<sup>169</sup> E.g., See Waseem Salahi, *Democratic Candidates Debate Ahead of Brooklyn DA Primary Elections*, *APPEAL* (Aug. 29, 2019), <https://theappeal.org/democratic-candidates-debate-ahead-of-brooklyn-da-primary-elections-f67f830e508a/> (Gonzalez provided little specifics about how he would carry out his campaign promises to protect immigrants and prevent them from facing criminal charges resulting in an unwarranted deportation; *But see Protect Our Immigrant Communities*, CHESA BOUDIN FOR DISTRICT ATTORNEY 2019, <https://web.archive.org/web/20191231112801/https://www.chesaboudin.com/immigration> (last visited on Aug. 26, 2020) (promising to create immigration unit, eliminate collateral consequences based solely on immigration, investigate and prosecute crimes by ICE violations of sanctuary law, and advocate for universal representation for people facing deportation, among other promises); see also George Gascón’s plan to ensure resolution parity for the undocumented, *GEORGE GASCÓN* (Oct. 14, 2020), <https://www.georgegascon.org/campaign-news/george-gascons-plan-to-ensure-resolution-parity-for-the-undocumented/> (promising to be aware of and mitigate collateral consequences of offenses, expanding pre-arrest and pre-plea diversion programs, and reduce prosecution of lower-level “quality of life offenses, among other promises).

<sup>170</sup> E.g. Maya Dukmasova, *Kim Foxx Gets a Report Card*, *CHI. READER* (Dec. 7, 2017), <https://www.chicagoreader.com/Bleader/archives/2017/12/07/kim-foxx-gets-a-report-card> (describing Foxx as making little progress in reducing the collateral consequences of criminal prosecution on immigration status, based off a report by Reclaim Chicago, the People’s Lobby, and the Chicago Appleseed Fund for Justice). George Gascón’s was just elected in November 2020 so we have yet see if he makes good on his campaign promises. His platform regarding immigrant defendants is certainly the most ambitious to date.

<sup>171</sup> E.g., *Cook County State’s Attorney Creates Immigration Fraud Hotline*, *COOK COUNTY STATE’S ATTORNEY* (Feb. 24, 2017), <https://www.cookcountystatesattorney.org/news/cook-county-state-s-attorney-creates-immigration-fraud-hotline>. While Melinda Katz touted herself as a progressive candidate in the 2019 race who would support noncitizens in her district, her promises consisted of securing protections for noncitizen workers and glaringly omitted policies to decriminalize offenses or decarcerate, which were the center of Tiffany Cabán’s campaign, her opponent. See Naeisha Rose, *Katz Positions Herself As Champion of Immigrants, Works in DA Race*, *QUEENS COUNTY POL.* (Feb. 8, 2019), <https://www.queenscountypolitics.com/2019/02/08/katz-positions-herself-as-champion-of-immigrants-workers-in-da-race/> (promising to establish a Worker Protection Bureau with a multilingual team of outreach workers).

<sup>172</sup> *Supra* Section I.

<sup>173</sup> Efforts that move away from pre-trial detention have unique benefits for non-citizens. Spending less time in a custodial setting generally reduces the chances of ICE detection. Certainly, under the reinstated Secure Communities program, DHS can issue a detainer against any removable individual to request that the local custodian transfer that person to ICE custody upon arrest alone. See Jennifer M. Chacón, *Immigration Federalism in the Weeds*, 66 *UCLA L. REV.* 1330, 1343 (2019); U.S. Immigr. & Customs Enf’t, *Secure Communities*, <https://www.ice.gov/secure-communities> (last visited on Aug. 28, 2020). However, if no detainer has dropped and a removable individual is arraigned and released without being subjected to further pre-trial detention, the likelihood of detection at that time is greatly reduced.

many prosecutors push alternative to incarceration programs that require up-front pleas, that while may be later vacated under state law, can still lead to deportation.<sup>174</sup>

At most, progressive prosecutors have enacted two or three concrete policy items, that mention immigrant defendants explicitly or appear designed to reflect concerns about harsh adverse consequences for immigrant defendants, but their efforts have generally been limited to plea bargaining. To that end, several progressive prosecutors have hired one or two immigration attorneys who are centrally focused on advising prosecutors as to immigration consequences of plea negotiations.<sup>175</sup> Some prosecutors have issued written policy directives (although many are presumptive not mandatory) requiring line attorneys consider outsized immigration consequences and militate against them through immigration-safe plea offers, where appropriate.<sup>176</sup> Notably, these policies are generally limited to low level offenses. Outside of express policies regarding plea negotiations, there has been little guidance to line prosecutors on immigration ramifications or policies embedded with mitigation against these consequences.

Some progressive prosecutors have taken action on interrelated issues impacting immigrants outside of their purview—from participating in lawsuits seeking to prevent ICE from making arrests in criminal court<sup>177</sup> to issuing public statements encouraging the release of ICE detainees

<sup>174</sup> While Marilyn Mosby, State’s Attorney of Baltimore, started a drug distribution diversion program, Aim to B’more, for first time drug distribution offenders, the program results in a “probation before judgment” disposition, which is considered a conviction in immigration proceedings. See Zachary Babo, *Marijuana Possession No Longer Prosecuted in Baltimore, State’s Attorney’s Office Announce*, WMAR 2NEWS BALT. (Jan. 30, 2019), <https://www.wmar2news.com/marijuana-possession-no-longer-prosecuted-in-baltimore-states-attorneys-office-announces>; see INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2018).

<sup>175</sup> See e.g., *Acting Brooklyn District Attorney Eric Gonzalez Announces New Policy Regarding Handling of Cases Against Non-Citizen Defendants*, BROOKLYN DISTRICT ATTORNEY’S OFF. (Apr. 24, 2017), <http://www.brooklynda.org/2017/04/24/acting-brooklyn-district-attorney-eric-gonzalez-announces-new-policy-regarding-handling-of-cases-against-non-citizen-defendants/> (two newly-hired immigration attorneys will train staff and advise on offers) (include something about current attorney?); Claire Sasko, *DA Larry Krasner Hires Staffer to Protect Immigrants’ Rights*, PHILLY MAG (Jan. 25, 2018), <https://www.phillymag.com/news/2018/01/25/larry-krasner-immigration-counsel/> (appointed immigration attorney Caleb Arnold). Recently elected Travis County District Attorney José Garza was previously an immigrant rights activist and attorney and shows promise for implementing a more expansive agenda for non-citizens. Drew Night, *Democrat José Garza to become Travis County’s next district attorney*, KVUE (Nov. 4, 2020), <https://www.kvue.com/article/news/politics/vote-texas/travis-county-district-attorney-2020-election-results-jose-garza/269-967d0f1d-358c-4392-8cb2-a1c47c77ff83>; *Protect Immigrant Communities*, JOSÉ GARZA FOR DIST. ATTORNEY, <https://www.joseforda.com/protect-immigrants> (last visited Dec. 21, 2020) (Garza’s immigration platform).

<sup>176</sup> The first memo of this kind, was issued by Santa Clara District Attorney, Jeffrey Rosen, in 2011. *Memo Re Collateral Consequences*, OFFICE DISTRICT ATTORNEY (Sept. 14, 2011), [https://www.ilrc.org/sites/default/files/resources/unit\\_7b\\_4\\_santa\\_clara\\_da\\_policy.pdf](https://www.ilrc.org/sites/default/files/resources/unit_7b_4_santa_clara_da_policy.pdf); see also Christopher Lee, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> but see Shaun King, *Philadelphia DA Larry Krasner Promised a Criminal Justice Revolution. He’s Exceeding Expectations.*, INTERCEPT (Mar. 20, 2018) <https://theintercept.com/2018/03/20/larry-krasner-philadelphia-da/> (the second sentence of the memo informed staff that “all policies are presumptive, not mandatory requirements.”).

<sup>177</sup> E.g., Renee Algarin, *Prosecutors, Public Defenders, and Community Groups File Lawsuit to lock Immigration Arrests in Courthouses*, SUFFOLK COUNTY DISTRICT ATTORNEY’S OFFICE. (Apr. 29, 2019),

during the COVID-19 outbreak.<sup>178</sup> Others have issued statements in support of criminal legislation designed to mitigate an immigrant defendant's exposure to immigration consequences.<sup>179</sup> Given the serious adverse immigration consequences that flow directly from prosecutorial action or inaction, these tepid reforms are not enough to prevent the disparate treatment and disproportionate punishment of immigrant defendants.<sup>180</sup>

### III. What Progressive Prosecutors Should Do Regarding Immigration

#### A. Progressive Prosecutors Must Do More

Progressive prosecutors have expansive obligations to immigrant defendants for three principal reasons. First, prosecutorial ethical and professional standards demand consideration of all consequences (direct and collateral) for all defendants. Second, jurisprudence supports the notion that prosecutors have an obligation to migrant defendants. Notably, these two rationales apply to *all* prosecutors, suggesting *all* prosecutors have obligations to immigrant defendants that they must seriously contend with. But the so-called progressive prosecutor has a third reason that heightens their obligation to immigrant defendants. They should live up to their own movement's rhetoric regarding the role of the prosecutor and the purposes of the criminal justice system. These three sources, *taken in tandem*, suggest any prosecutor who identifies as "progressive" has a duty to immigrant defendants that has been underdeveloped in scholarship and only lightly explored in prosecutorial imagination to date.

Their obligation is to look at each non-citizen defendant holistically to assess the unique risks that individual faces and to use prosecutorial discretion to prevent immigration penalties. It follows that where the consequences triggered could lead to deportation or an inability to regularize one's status, a progressive prosecutor would see their obligations towards immigrants as heightened. As described below, for a progressive prosecutor, deportation or other immigration penalties would likely never be a just and proportionate result of interacting with the criminal legal system.<sup>181</sup>

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<https://www.suffolkdistrictattorney.com/press-releases/items/2019/4/29/prosecutors-public-defenders-and-community-groups-file-federal-lawsuit-to-block-immigration-arrests-in-courthouses> (Rachael Rollins, District attorney in Boston, was part of the group that filed a lawsuit to block immigration arrests in courthouses).

<sup>178</sup> *Joint Statement from Elected Prosecutors on COVID\_19 and Addressing the Rights and Needs of Those in Custody*, FAIR & JUST PROSECUTION (Mar. 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf>.

<sup>179</sup> *E.g., One Day to Protect New Yorkers*, IMMIGRANT DEF. PROJECT, <https://www.immigrantdefenseproject.org/wp-content/uploads/One-Day-Press-Release-2019.4.1-FINAL.pdf> (last visited on Aug. 28, 2020) (passed on Apr. 1, 2019) (changing the maximum penalty for a misdemeanor in New York to 364 days as an effort to avoid mandatory deportation under immigration law).

<sup>180</sup> In some jurisdictions, less publicized and formalized actions might be seen as necessary for political considerations. While this may sometimes be the case, less transparency should be the exception, not the norm.

<sup>181</sup> There might be a circumstance in which even a progressive prosecutor feels deportation is justified. I would suggest that no matter the circumstance, it would never be fair or proportionate to doubly punish someone based on place of birth. Nevertheless, assuming the progressive prosecutor concludes there are instances that merit deportation, the number of cases is so few that it should not eclipse nor alter this general principle.

### 1. Prosecutorial Ethical and Professional Standards Support Obligations to Immigrant Defendants

Governing ethical and professional standards suggest prosecutors should seek to reduce outsized immigration penalties arising out of criminal prosecution.<sup>182</sup> The ABA guidelines state that prosecutors should “consider collateral consequences of a conviction” before entering into a plea agreement.<sup>183</sup> While the professional standards do not take into account the prosecutor’s disproportionate power in plea bargaining, especially over collateral consequences, scholarship has highlighted this.<sup>184</sup> Professor Eisha Jain warns that “informed consideration” by prosecutors alone should not be equated with better outcomes for defendants.<sup>185</sup> Indeed, her study reveals, that prosecutors often have incentive structures to “prosecute” collateral consequences through plea bargaining—using their immense power to create civil penalties.<sup>186</sup> Because of this, Professor Brian Murray has argued that prosecutors should be required to disclose collateral consequences as part of the plea-bargaining process.<sup>187</sup> He argues there is fertile ground for imposition of disclosure obligations regarding collateral consequences as either a constitutional command akin to *Brady*,<sup>188</sup> or through adoption of more explicit ethical rules.<sup>189</sup> Because collateral consequences may result in “civil death,” they too should be understood as part of the plea deal.<sup>190</sup>

The current ethical rules and governing prosecutorial professional standards —particularly those requiring they act as “ministers of justice” and be “mindful of the defendant’s situation”—suggest that prosecutors should militate against unfair and disproportionate collateral consequences resulting from their decision-making, including charging, dismissing and plea bargaining, to ensure “justice shall be done.”<sup>191</sup>

Ethical considerations weigh in favor of prosecutors having a duty to avoid immigration consequences in their prosecution of non-citizens given the clear hardship caused and the disproportionality of deportation.<sup>192</sup> Some prosecutors view collateral consequences outside the criminal system as generally disproportionate.<sup>193</sup> Collateral mitigation should be a central

<sup>182</sup> See section above on ethics.

<sup>183</sup> CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-5.6(c) (AM. BAR ASS’N 2017). (Conduct of Negotiated Disposition Discussions).

<sup>184</sup> See generally, Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, (2016).

<sup>185</sup> Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1202 (2016).

<sup>186</sup> Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1216 (2016); see also Brian Murray, *Prosecuting Responsibility and Collateral Consequences*, 12 STAN. J. C.R. & C. L. 213, 240 (2016).

<sup>187</sup> *Id.* at 237.

<sup>188</sup> *Id.* at 229-235 (suggesting there is fertile constitutional ground for such an obligation rooted in the Court’s plea-bargaining jurisprudence combined with *Brady* and its progeny).

<sup>189</sup> *Id.* at 232-237 (2016); See also Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1243 (2016).

<sup>190</sup> Brian Murray, *Prosecuting Responsibility and Collateral Consequences*, 12 STAN. J. C.R. & C. L. 213, 229 (2016).

<sup>191</sup> *Berger v. United States*, 295 U.S. 78, 98 (1935) (emphasis added). Most collateral consequences will be unfair and disproportionate under these ethical considerations combined with the values espoused by the progressive prosecution movement. Progressive prosecutors should take into account the racialized impacts of the criminal legal system in assessing fairness and proportionality.

<sup>192</sup> E.g., NAT’L PROSECUTION STANDARDS WITH REVISED COMM. § 5-3.1 (2009).

<sup>193</sup> Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1217 (2016).

consideration in a progressive prosecutor's policy implementation. Prosecutors who view poverty as a root cause of crime have embraced collateral mitigation.<sup>194</sup> Progressive prosecutors who have encouraged resolving drug or mental health-related cases through alternative courts should also naturally embrace collateral mitigation. This impulse toward collateral mitigation would, arguably, be even greater where immigration consequences are at play. Although failing to resolve whether a direct or collateral consequence, *Padilla* made clear that deportation is a unique heightened consequence given its interwoven nature into criminal punishment.<sup>195</sup>

Lastly, the professional standards state that prosecutors should "...respect the constitutional and legal rights of . . . defendants."<sup>196</sup> It is wholly appropriate for prosecutors to comport their actions to protect the Constitutional rights of immigrants under *Padilla*.<sup>197</sup>

## 2. Supreme Court Jurisprudence Supports Prosecutorial Obligations to Immigrants

*Padilla* and subsequent Supreme Court jurisprudence further reinforce a reading that prosecutors have expansive obligations. In dicta, the *Padilla* Court acknowledged the prosecutor's interest in plea bargaining with immigrant defendants, albeit, narrowly in scope and substance.<sup>198</sup> But Justice Stevens undeniably opened the door for deeper prosecutorial engagement with immigrant defendants.<sup>199</sup> Two years later in companion cases, *Lafler v. Cooper*<sup>200</sup> and *Missouri v. Frye*,<sup>201</sup> the Court expounded on the Sixth Amendment obligations of defense counsel during plea negotiations.<sup>202</sup> The Court again underscored that informed consideration is relevant to the fairness of the plea itself.<sup>203</sup> These cases brought an expansion of judicial scrutiny over the oft-opaque plea-

<sup>194</sup> Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1221 (2016) (suggesting prosecutors can use their power to shape public policy outcomes they disagree with).

<sup>195</sup> *Padilla v. Kentucky*, 559 U.S. 356, 356, 365, 373 (2010) (describing deportation as "drastic", "a particularly severe penalty", and the "equivalent of banishment or exile").

<sup>196</sup> CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2017) (emphasis added). CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2017).

<sup>197</sup> See Eric S. Fish, *Prosecutorial Constitutionalism*, Southern Cal Law Rev. (2017)

(arguing that prosecutors should preserve defendants' constitutional rights even if judicial doctrine does not require it, and even if doing so lowers the chance of obtaining a conviction).

<sup>198</sup> See *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) ("...informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties... the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.").

<sup>199</sup> Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO L.J. 1, 22-25(2012) (discussing how the Court sanctioned prosecutorial involvement in *Padilla*). However, the Court's cursory discussion failed to recognize the centrality of the prosecutor in determining case resolutions in today's criminal legal system, and interconnectedly, whether deportation will ensue. See Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2653 (2013)(discussing how the *Padilla* does not examine the defendant's right to a lawyer who meets minimal constitutional standards for "effective" plea bargaining between the defense attorney and the prosecutor, but only focusing on the discussion between defense counsel and noncitizen).

<sup>200</sup> 566 U.S. 156 (2012).

<sup>201</sup> 566 U.S. 134 (2012).

<sup>202</sup> Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 565 (2013).

<sup>203</sup> Brian Murray, *Prosecuting Responsibility and Collateral Consequences*, 12 STAN. J. C.R. & C.L. 213, 237 (2016).

bargaining process. Light was shone on prosecutorial behavior in plea-bargaining.<sup>204</sup> In *Frye*, the Court even suggested practices for prosecutorial conduct in negotiations.<sup>205</sup> *Padilla*, *Frye*, and *Lafler*, when read together, suggest that prosecutors should carefully evaluate their conduct vis-à-vis defendants in plea bargaining and that they do not operate free from judicial scrutiny.

*Padilla* emphasized that deportation is indeed a punishment deeply intertwined with criminal penalties, precisely because deportation is unique and cannot adequately be characterized as “collateral” to a criminal proceeding.<sup>206</sup> Scholar Heidi Altman, in her seminal piece, suggests that *Padilla*, read together with relevant ethical standards, supports prosecutors offering pleas that militate against immigration penalties.<sup>207</sup> Even though the Court does not say so explicitly, the post-*Padilla* landscape makes clear, without prosecutorial cooperation in plea bargaining, *Padilla*’s protections are greatly diminished.<sup>208</sup> Understanding that the prosecutor is the true arbiter of justice in today’s mass criminalization system, her willingness to negotiate and agree to immigration-safe resolutions is critical to give *Padilla* meaning.<sup>209</sup>

### 3. Progressive Prosecutors’ Rhetoric Supports Obligations to Immigrant Defendants

The progressive prosecution movement’s own stated policy platforms and rhetoric suggest they have a heightened obligation to immigrants. The very same motivating forces behind the progressive prosecution movement logically leads to this result. The movement’s defining characteristics—combatting racist overpolicing and mass incarceration, and promoting fairness—should apply to immigrant defendants who are subjected to similar systemic racism and injustices in the criminal system, and thereafter, in the deportation and detention systems.<sup>210</sup> Deportation and detention disproportionately impact Black and Latinx immigrants.<sup>211</sup> The mass incarceration of immigrants continues to rise.<sup>212</sup> Progressive prosecutors have sought to fight these greater ills in the criminal legal system, but should go further to ensure their policies do not leave a subset of

<sup>204</sup> See Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 565 (2013).

<sup>205</sup> See *id.* at 556-67.

<sup>206</sup> “[D]eportation is... intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century... [W]e find it ‘most difficult’ to divorce the penalty from the conviction in the deportation context.” *Padilla v. Kentucky*, 559 U.S. 356, 365-66 (2010).

<sup>207</sup> Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO L.J. 1, 6-7 (2012). see also Ingrid V. Eagly, *Criminal Justice for NonCitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1163, 1166 (2013) (describing how, post-*Padilla*, some prosecutors have adopted an “alienage neutral model” whereby prosecutors consider the collateral immigration-enforcement consequence of deportation in plea bargaining, avoid inquiring into immigration status in court, and how status is “rarely, if ever, argued as a sentence aggravator”).

<sup>208</sup> See Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 559 (2013). See also, Ingrid Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1170 (2013) (describing “illegal-alien-punishment” jurisdictions where, even after *Padilla*, prosecutors use immigration status to treat noncitizen defendants more punitively in plea bargaining and bail determinations).

<sup>209</sup> See Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 558 (2013).

<sup>210</sup> See Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1035 (2016).

<sup>211</sup> See Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1026 (2016).

<sup>212</sup> *Supra* Section I, Part C.



defendants vulnerable to the very same forces they have worked to combat. Prosecutors understanding the nuanced implications of prosecutorial decisions on immigrant defendants would ameliorate this imbalance. It would ensure that prosecutors do not make decisions that would undermine the policy goals they have carefully set in place and promote fairness. To fail to use their discretionary power in this way not only renders prosecutors complicit in immigration enforcement<sup>213</sup> but also undermines community integrity for Black and Brown families—a central goal articulated by the progressive prosecutor.

Another cornerstone of progressive prosecution has been to alter the prosecutor’s function by moving toward a community centered approach to addressing wrongdoing. Progressive prosecutors and their supporters have reasoned in order to keep communities safe, they should aim to keep communities together. Adopting practices to ensure that immigrant defendants do not end up detained and deported, furthers the goals of the progressive prosecutor. Ultimately, the prosecutor’s discretionary power bears an incredible influence on how communities survive and thrive over time intergenerationally.<sup>214</sup> Exercising discretionary power without considering its complicity in family separation or doing so with immigration consequences as an afterthought is an infliction of violence on communities of color and poor communities.

Progressive prosecutors have tried to challenge the assumption that prosecutors’ central goal is to seek conviction. To consistently and comprehensively pursue their goal of redefining the purpose and role of the prosecutor, they should ensure progressive policies apply to immigrant defendants.

Similarly, the justifications for the criminal legal system promoted by progressive prosecutors buttress expansive obligations towards immigrant defendants. Progressive prosecutors urge enacting policies rooted in rehabilitation, restitution and restorative justice.<sup>215</sup> If rehabilitation and restitution are the primary purposes of punishment, then prosecutors should want to ensure that migrants experience a similar level of penalty as all other defendants. With restorative justice as a guiding principle, undoing the harms and injustices created by the crimmigration system becomes a goal of the progressive prosecutor.

Double punishment, based on where one was born, would simply not serve the purposes of rehabilitation and restoration, and would be retributive. Promoting prosecutorial engagement that militates against disproportionate consequences stemming from criminal legal contacts is a sound goal for a prosecutor who sees the primary purpose of the justice system as rehabilitation and restoration. Deportation as a consequence would not serve these purposes.

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<sup>213</sup> See Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 558 (2013).

<sup>214</sup> See Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993 (2016)

<sup>215</sup> E.g., *Putting Balanced and Restorative Justice into Practice*, COOK COUNTY STATE’S ATTORNEY, <https://www.cookcountystatesattorney.org/outreach/putting-balanced-and-restorative-justice-practice> (last visited on Aug. 28, 2020) (describing how Prosecutors may choose to divert cases to a BARJ-based program in lieu of filing formal charges).

In sum, a “progressive prosecutor,” who foundationally seeks to establish fairness and accountability in criminal proceedings, has a duty to first, understand the nuances of her role as the gatekeeper to deportation<sup>216</sup> and, second, take that role seriously, by using her broad discretion to adopt policies that account for the unique concerns and special considerations presented by immigrant defendants. Understanding their gatekeeping function must inform all aspects of their work. Once a progressive prosecutor understands her role as *the* person in direct control of deportation, she will naturally be concerned with the implications of her decisions on migrants.<sup>217</sup>

The charge for the progressive prosecutor is to view every part of the criminal justice system as an important component of the immigration system. For the progressive prosecutor, carefully crafted prosecutorial policies that do not create immigration consequences at any stage of the criminal process becomes key to fairness.

## **B. Progressive Prosecutors Can Do More**

*“Local decisions can serve as a much-needed catalyst for national debates. Local politics don’t undermine national politics; they fuel it.” – Dean Heather Gerken<sup>218</sup>*

The natural question becomes *how* do progressive prosecutors meet their duty to understand and mitigate against adverse immigration consequences in practice. Some prosecutors have raised “federalism” concerns in regard to taking any actions whatsoever that implicate immigration issues. This stems from a misguided belief that because immigration is exclusively reserved for the federal government, local prosecutors cannot make decisions that “encroach” upon immigration in any way.<sup>219</sup> To be clear, by utilizing their local powers to adopt a series of proposals that embed within them an understanding of harsh potential immigration consequences *and* seek to mitigate them, progressive prosecutors would not be acting as federal actors nor would they be impermissibly encroaching on federal powers. In taking these actions, local prosecutors are not making determinations regarding the immigration status or immigration case of an individual, that is still ultimately reserved for an immigration adjudicator.<sup>220</sup> Local prosecutors are well within their powers to use their inherent enforcement discretion how they see fit, even if that decision may have some bearing upstream on a separate immigration matter. In fact, immigration law embeds consideration of state criminal matters within it.<sup>221</sup> Local prosecutorial decisions and judgments regarding guilt or innocence will ultimately be considered by immigration down the line. The system is designed this way and local prosecutors can no longer ignore this reality.

Progressive prosecutors do not need any special authority to meet their duty to immigrant defendants in the ways suggested below. Prosecutors need not take any actions beyond those that

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<sup>216</sup> See Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 558 (2013).

<sup>217</sup> See Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553 (2013).

<sup>218</sup> Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY J. 37 (2012).

<sup>219</sup> Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO L.J. 1, 51-53 (2012).

<sup>220</sup> Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO L.J. 1, 53-54 (2012).

<sup>221</sup> Section I, Part A.

fall squarely within their broad discretionary powers under state and local law. Nevertheless, the political philosophy of “progressive federalism” provides a useful framework for the hesitant prosecutor. This view of federalism sheds light on the ways in which prosecutors can use their local powers to influence federal immigration enforcement policy. This framing of federalism moves away from the traditional state versus federal powers lens. Rather, it flips the theory on its head, and centers the way in which state, local and sub-local actors use their powers to ultimately influence federal policy.<sup>222</sup> The quintessential example has been local clerks who issued marriage licenses to same-sex couples at a time of great national disagreement over the issue.<sup>223</sup> Progressive federalism posits that local clerks used their powers in a way that influenced the national debate and, that ultimately, led to the Supreme Court’s ultimate striking down of the federal Defense of Marriage Act.

Progressive prosecutors are well within their authority to engage in actions, even if they may ultimately impact a federal issue, like immigration enforcement, on a broader scale. Progressive federalism suggests this is indeed how federalism works. “Progressive federalism”<sup>224</sup> suggests that progressive prosecutors have broad powers, beyond the local, to use their discretion to influence immigration policy nationally. Progressive federalism incorporates<sup>225</sup> a reconceiving of federalism, “federalism all the way down,” focusing on the vast power local and sub-state actors have to enact innovative policies that express political dissent,<sup>226</sup> and thereby impact national narrative.<sup>227</sup> Sub-federal actors have increasingly used local powers to combat national policies they disagree with—to promote change traditionally associated with the left.<sup>228</sup>

This recent embrace of federalism by some on the left has not been without controversy. Due to its dark history, progressives have traditionally had an aversion to “federalism.” “State’s rights” have oft been used as a justification for Jim Crow and opposition to civil rights measures.<sup>229</sup> Yet,

<sup>222</sup> Heather Gerken and Joshua Revesz, *Progressive Federalism: A User’s Guide*, 44 DEMOCRACY J. 1 (2017),

<sup>223</sup> See Nancy J. Knauer, *Same-Sex Marriage and Federalism*, 17 TEMP. POL. & C.R. L. REV. 421, 425-29 (2008) (discussing states that recognized same-sex marriage rights before its federal legalization).

<sup>224</sup> *Id.*

<sup>225</sup> This moves away from traditional visions of federalism concerned with state versus federal rights, focusing on the way in which the sub-state, local and sub-local actors exert power in ways that influence national debate.

<sup>226</sup> Dean Heather Gerken suggests that because the local level provides more possibility for experimentation and many more diverse voices are represented, and local actors can express dissent through implementing innovative policies. Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY J. 37 (2012). Progressive federalism is simply the use of “federalism all the way down,” a politically neutral approach to understanding sub-federal and federal relationships, for progressive ends. Indeed, the same concept can be applied in the contrary, as many local and sub-local actors have engaged in this process to advance conservative ends on issues such as gun rights. See Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 106 (2014).

<sup>227</sup> Progressive federalism posits that minorities and voices of dissent express their preferred views through state and local institutions, and thereby influence federal policy, which is critically important for a healthy democracy. Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 81 (2014).

<sup>228</sup> Recently, local and state actors have increasingly used their powers to enact a series of progressive policies in disagreement with the national viewpoint, and have in turn, influenced the national debate on a host of issues including same-sex marriage, clean air, and placing body cameras on police officers. See Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1696, 1715-1716 (2017).

<sup>229</sup> Heather Gerken, *We’re About to See States’ Rights Used Defensively Against Trump*, VOX (Jan. 20, 2017), <https://www.vox.com/the-big-idea/2016/12/12/13915990/federalism-trump-progressive-uncooperative>.

some on the left have begun to embrace this conception of federalism as a method of effecting national change. Through the lens of progressive federalism, local prosecutorial decisions not only directly impact individual cases<sup>230</sup> but can also drive national policy.<sup>231</sup> Because of the entanglement with the federal government,<sup>232</sup> local criminal prosecutors have the discretion to not only influence outcomes for individual immigrant defendants, but also have the power to undermine rhetoric on a national level and the criminal removal system as a whole.<sup>233</sup> Through use of their local authority, progressive prosecutors can affect the federal government's efforts to deport immigrants and dilute immigration enforcement as it operates today.

Progressive prosecutors already engage in progressive federalism through using their powers in ways that encourage national policy debates in other areas of disagreement. Numerous prosecutors have chosen to decriminalize simple marijuana possession by not charging it in state court, despite its continued criminalization on the federal level.<sup>234</sup> As understood through the lens of progressive federalism, this both expresses the will of their constituents and contributes to and pushes forward the national debate regarding decriminalization and legalization of marijuana.<sup>235</sup> It fills a gap in light of the failure to pass legislative reform at the federal level.

States and localities have enacted a number of “sanctuary policies” that have similarly sought to contend with legislative deadlock in enacting federal immigration reform. Sanctuary policies are where progressive federalism has been most experimented with in the immigration sphere.<sup>236</sup> The bulk of sanctuary policies enacted over the last decade have sought to limit the actions of local actors, such as police officers, local governmental entities, school boards,<sup>237</sup> and other local officials from divulging information to and/or collaboration between local officials and federal

<sup>230</sup> See *supra* Section I, Part E.

<sup>231</sup> Progressive federalism theorists suggest that local actors, such as school boards, juries, local prosecutors, bureaucratic officials, use of sources of state law and constitutional restraints on federal power, advance progressive policies on federal level. See Paul Stanton Kibel, *California Rushes In—Keeping Water Instream for Fisheries Without Federal Law*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 477, 478 (2018); See generally Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY J. 37 (2012).

<sup>232</sup> See *supra* Section I.

<sup>233</sup> “Ultimately, control over enforcement discretion is the key to shaping immigration policy, and that control is increasingly exercised at the state and local level.” Jennifer Chacón, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1334 (2019).

<sup>234</sup> District Attorneys across the country use their discretionary power to decline prosecuting low-level marijuana possession offenses, demonstrating that “prosecutors do not need to wait for state or federal marijuana decriminalization or legalization to provide justice.” Lucy Lang, *American Prosecutors Need Not Wait for Marijuana Legalization*, GOTHAM GAZETTE (Aug. 7, 2019), <https://www.gothamgazette.com/opinion/8718-american-prosecutors-need-not-wait-for-marijuana-legalization>.

<sup>235</sup> Ben Rosen, *How Public Attitudes about Marijuana Expanded Political Debate*, CHRISTIAN SCI. MONITOR (Nov. 7, 2016), <https://www.csmonitor.com/USA/2016/1107/How-public-attitudes-about-marijuana-expanded-political-debate>.

<sup>236</sup> Numerous cities across the United States have adopted “sanctuary laws,” rejecting unrestricted cooperation by law enforcement with federal immigration authorities with respect to the removal of “nonserious criminal offenders.” See Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1018 (2016)(discussing which cities have implemented sanctuary policies).

<sup>237</sup> Christopher N. Lasch et. al., *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. 1703, 1745-1748 (2018)).

immigration enforcement.<sup>238</sup> These laws have largely been intended as protective measures for local immigrant communities. Numerous sub-federal<sup>239</sup> actors have used their local authority to combat the entanglement of the criminal and immigration system.<sup>240</sup> But there has been insufficient focus on local prosecutors in sanctuary laws and policies.<sup>241</sup> California has enacted legislation requiring prosecutors “consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution.”<sup>242</sup> This is the only statute of its kind in the country.<sup>243</sup> State and local jurisdictions could consider enacting a range of legislation or other policies that contemplate and restrict the role of the prosecutor in furtherance of sanctuary for immigrant communities,<sup>244</sup> but have much work to do to fill this gap.

Similarly, there is no scholarship considering the local prosecutor’s impact on national immigration policy through a “federalism all the way down” or “progressive federalism” lens. Professor Jennifer Chacón’s groundbreaking 2019 article analyzed “federalism all the way down” in the immigration context by describing how a series of sub-federal actors’ policy decisions influenced federal immigration enforcement in two counties in California.<sup>245</sup> By tracking the actions of a number of local and state actors, such as sheriffs, county officials, public colleges, she provides a thorough analysis of how this vision of federalism works (and sometimes fails to work) to influence immigration enforcement. But her piece does not address the local prosecutor.

<sup>238</sup> See, e.g., N.Y.C., N.Y., ADMIN. CODE tit. 10, ch. 1, § 10-178 (2017) (prohibiting all city employees from asking individuals about their immigration status, as well as prohibit the use of city resources for the purposes of immigration enforcement.) Notably, much of the scholarship regarding sanctuary laws and policies center on analyzing them along the lines of traditional conceptions of federalism—considering anti-commandeering principles emerging from Tenth Amendment jurisprudence. See, e.g. Rose Cuison Villazor, “Sanctuary” Cities and Local Citizenship, 37 FORDHAM URB. L.J. 573, 576 (2010) (exploring how “sanctuary laws illustrate the tension between national and local citizenship”).

<sup>239</sup> This term includes state level actors all the way down to and including local and sub-local actors such as county clerks, local school boards and including state police officers.

<sup>240</sup> Christopher N. Lasch et. al., *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. 1703, 1741 (2018) (describing various ways local jurisdictions have avoided cooperation with federal immigration enforcement such as the Alameda County Sheriff’s office declining immigration detainers from ICE, distinguishing between “an arrest warrant signed by a judge, and an immigration detainer signed by an ICE Agent.”).

<sup>241</sup> See Zohra Ahmed, *The Sanctuary of Prosecutorial Nullification*, 83 ALB. L. REV. 239, 250 (2020) (describing how New York City’s sanctuary laws do not regulate District Attorney (DA) offices because DA offices are county actors and, therefore, county policies and practices can undermine city laws).

<sup>242</sup> CAL. PENAL CODE § 1016.3 (2016).

<sup>243</sup> While the statute requires prosecutors to contemplate avoidance of adverse consequences, it does not limit the prosecutor’s conduct as other sanctuary provisions have done regarding other local actors, such as school boards, public hospitals, local police, etc. E.g., Geoff Maleman, *CCUSD declares campuses as ‘safe zones,’* CULVER CITY NEWS (Dec. 1, 2016), <https://www.culvercitynews.org/ccusd-declares-campuses-as-safe-zones/> (on November 22, 2016, the Culver City Unified School District passed the resolution, declaring that district personnel were not to inquire about students’ or their families’ immigration status).

<sup>244</sup> E.g., Tom Davis, *NJ Imposes New Rules On Turning Over Unauthorized Immigrants*, N.J. PATCH (November 29, 2018), <https://patch.com/new-jersey/pointpleasant/nj-imposes-new-rules-turning-over-unauthorized-immigrants> (issuing a directive limiting the types of voluntary assistance that state, county and local law enforcement agencies, including prosecutors, may provide to immigration authorities) (emphasis added).

<sup>245</sup> Jennifer Chacón, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330 (2019).

Dean Heather Gerken, who coined the phrase “federalism all the way down” and its use towards progressive ends, explicitly contemplates the prosecutor as the kind of local actor that can undercut and shape federal policy through innovative local decision-making.<sup>246</sup> Nevertheless, the way in which the local prosecutor might engage in “federalism all the way down” to influence progressive change in the national immigration sphere or might be regulated through sanctuary policies has been understudied.

This Article seeks to fill this gap. “Federalism all the way down” is a philosophy that can be utilized by progressive prosecutors to ultimately impact immigration enforcement decisions nationally, to further the “progressive” agenda they aspire. “Progressive federalism” implies that progressive prosecutors have broad power to influence national immigration policy.

“Ultimately, control over enforcement discretion is the key to shaping immigration policy, and that control is increasingly exercised at the state and local level.”<sup>247</sup> Local prosecutors, by and large, control who faces deportation.<sup>248</sup> Progressive prosecutors possess broad authority to adopt policies that reflect the way they seek to exercise discretion. Adopting a robust immigration agenda would leverage their authority in a way that would help protect migrants from immigration ramifications at all stages. This is central to fulfilling the progressive prosecutor’s duty to migrants.<sup>249</sup>

Prosecutors undeniably possess the discretion to decide who and how to prosecute individuals, even where the results of that local decision may have later implications on a federal level or may express disagreement with federal policy.<sup>250</sup> Adopting local policies that seek to achieve

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<sup>246</sup> Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 8 (2010) (describing how institutions that constitute states and cities—such as juries, zoning commissions, local school boards, and locally elected prosecutors’ offices—have not yet been envisioned as playing important roles in our larger democratic system); Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY J. 37 (2012) (stating the way in which local decisions often serve as a catalyst for national debates).

<sup>247</sup> Jennifer Chacón, *Immigration Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1334 (2019).

<sup>248</sup> See *supra* Section I, Part E.

<sup>249</sup> See *supra* Section II, Part B.

<sup>250</sup> Prosecutors and other local actors have expressed reluctance in making decisions that might influence “immigration” in some way. Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 51 (2012) (describing a prosecutor raising federalism concerns in their consideration of immigration consequences of criminal convictions as part of a survey). This resistance has often been located in “federalism” concerns, fearing that because immigration is exclusively reserved for the federal government, a local actor cannot make decisions that “encroach” upon immigration in any way. This framing is misguided. *Id.* at 51-53. Local prosecutors absolutely can use their enforcement power how they see fit even that decision may ultimately later have some sort of bearing on separate immigration matter in some way. Significantly, local prosecutors are not making determinations regarding the immigration status or case of an individual, that is still reserved for an immigration adjudicator. See *id.* at 53-54. Rather, local prosecutors here must understand that under the laws, as written today, their local decisions greatly influence the immigration status and future of migrant defendants. And they should use their discretion in the way they see fit fully aware of those impacts. Local prosecutors are not instructing or telling the federal government what to do by deciding how to act in the case of an individual immigration defendant, rather, they are deciding how to use their immense local powers to decide what implications they want *their* actions to have and that is well within their power. See *id.* at 51-54. To the contrary, to fail to act in a way that takes into account an understanding of the impact of their decisions would be irresponsible and harmful to their duties to the electorate.

proportionate results for immigrants in the execution of their local authority is the very kind of experimentation supported by progressive federalism.

A robust immigration agenda would also advance the voice of dissent, that of the local electorate that backed the progressive prosecutor, by putting forward a policy that protects local immigrant community members from disproportionate and unfair consequences of incarceration and removal sought by the federal criminal removal system.<sup>251</sup> This policy agenda will, in turn, influence other prosecutors around the U.S., and will influence national immigration enforcement.

#### IV. Setting the Progressive Prosecutor's Immigration Agenda

A “robust immigration agenda” is a series of policies that anticipate, account for and seek to prevent the wide range of immigration consequences that emerge from contact with the criminal legal system. This agenda should be rooted in “immigrant equality,” a justification for criminal justice policy coined by Professor Ingrid Eagly. Under this justification, localities consider the realities of modern criminal removal system to “insulate non-citizens from harsher forms of punishment, racial and ethnic profiling and other substantive and procedural distortions that immigration imposes on criminal cases involving non-citizens.”<sup>252</sup> How exactly each prosecutor's office aims to tackle this may vary. These are local choices that are best made in consultation with local immigrant communities, defense counsel and other community leaders. Together, they can think through how to incorporate an understanding of on-the-ground realities of immigration enforcement into policies.<sup>253</sup> But the agenda must be broad in scope. Below, I provide some guiding principles for agenda creation and suggest a number of concrete policy proposals that progressive prosecutors could consider adopting or modifying, focusing on areas of the criminal legal system where immigrants face the greatest potential harms. These proposals are meant as starting points, to be built upon and developed by local actors, informed by impacted communities.

##### A. Scope and Guiding Principles

###### 1. Scope of Agenda

It is the duty of a chief prosecutor who identifies as “progressive” to adopt policies that embed mitigation of immigration consequences. All stages of prosecutorial work—charging practices, plea negotiations, sentencing, post-conviction relief, must be included in these proposals.<sup>254</sup>

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<sup>251</sup> See e.g. *Community Responses to Stop Deportation Dragnet*, IMMIGRANT DEFENSE PROJECT (2017) <https://www.immigrantdefenseproject.org/community-responses/> (containing links to local, city, and state policies and organizations dedicated to protecting communities' immigrants from deportation, including policies to prevent ICE arrests in courthouses in Santa Clara, CA and Washington, support for sentencing reform in NY, CA, WA, and NV, and community-based organizations fighting back against ICE raids around the country).

<sup>252</sup> Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 245 (2016).

<sup>253</sup> E.g., Immigrants along the southern border might face a different immigration enforcement reality than communities living inland. Communities that have been targeted due to sanctuary policies may have specific concerns due to increasing immigration raids that the prosecutor should take into account in devising policy.

<sup>254</sup> See Christie Thompson, *Helping Protect Immigrants from Trump*, VICE NEWS (May 18, 2017), [https://www.vice.com/en\\_us/article/pg7wvn/prosecutors-are-quietly-helping-protect-immigrants-from-trump](https://www.vice.com/en_us/article/pg7wvn/prosecutors-are-quietly-helping-protect-immigrants-from-trump).

Immigration concerns cannot simply be an afterthought or a separate agenda item. Rather, the office's approach to every stage of prosecution, from plea to post conviction relief, must incorporate an understanding of potential immigration consequences and reflect that understanding. Despite *Padilla*'s focus on plea-bargaining, it is clear in its aftermath, that the plea-bargaining stage is not the only significant moment where immigration consequences emerge.<sup>255</sup> Criminal charge alone can lead to deportation even where later dismissed.<sup>256</sup> Sentencing decisions can have a profound impact on a non-citizen's ability to remain in the country.<sup>257</sup> Availability of post-conviction relief may determine if one is subject to mandatory detention and deportation.<sup>258</sup>

Enacting clear policies that account for and incorporate risk mitigation will ensure that there are uniform policies that are most fair to immigrants. This is critical because line prosecutors are those who carry out the agenda of the chief prosecutor. A uniform approach will minimize discretion in the hands of line prosecutors to make decisions that could have devastating consequences. Having a robust and clear agenda that centers avoiding immigration consequences, in every aspect of prosecutorial work, is the call of the progressive prosecutor.

## 2. *Guiding Principles: In Writing, Abolitionist vs. Liberal Reforms, Flexibility*

Prosecutors should have the following guiding principles top of mind when contemplating agenda creation. As a matter of course, policies should be formalized, adopted in writing and made public.<sup>259</sup> Written policies limit individual discretion of line prosecutors to deviate from the will of the chief prosecutor.<sup>260</sup> To the extent that chief prosecutors are worried about tying the hands of individual prosecutors too tightly, chief prosecutors could adopt policies that are presumptive.<sup>261</sup> Any deviation from the policy could require supervisory approval. Written policies also enhance transparency within the office and with the electorate, which helps build community trust.<sup>262</sup> Increased transparency has been foundational to the progressive prosecution movement and this

<sup>255</sup> See *supra* Sections I and II.

<sup>256</sup> See *supra* Section I, Part B.

<sup>257</sup> Deportable non-citizens with aggravated felony convictions, including certain convictions carrying a sentence of one year or longer, are generally subjected to mandatory deportation. AM. IMMIGRATION COUNCIL, AGGRAVATED FELONIES: AN OVERVIEW 2-3 (2016), <https://www.americanimmigrationcouncil.org/research/aggravated-felonies-overview>. A sentence of 364 days rather than 365 days, for example, will avoid triggering certain aggravated felony grounds of removal. See e.g. INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G)(2018).

<sup>258</sup> Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO L.J. 1, 23 (2012).

<sup>259</sup> While some progressive prosecutors might be hesitant for fear of attack during a reelection campaign or for other political considerations, in the balance, it is best to be transparent, for the reasons described herein.

<sup>260</sup> See Madison McWithey, *Taking a Deeper Dive into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography: Part I: Internal Constraints*, 61 B.C. L. REV. 32, 57 (2020).

<sup>261</sup> In 2018, Philadelphia District Attorney Larry Krasner released a memo to staff outlining new policies that aimed to “end mass incarcerations and bring balance back to sentencing.” The second sentence of the memo informed staff that “all policies are presumptive, not mandatory requirements.” Shaun King, *Philadelphia DA Larry Krasner Promised a Criminal Justice Revolution. He's Exceeding Expectations.*, INTERCEPT (Mar. 20, 2018), <https://theintercept.com/2018/03/20/larry-krasner-philadelphia-da/>.

<sup>262</sup> See Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1234 (2016).



agenda should be no exception. Finally, a policy in writing can be easily shared with and adapted by other jurisdictions and can serve as models for reform efforts nationwide.<sup>263</sup>

The second guiding principle: progressive prosecutors should think critically and intentionally about the nature of the reforms they adopt. By this, I mean, what ends do the reforms and policies serve?<sup>264</sup> Amongst those on the “left,” there has been increasing debate about two specific approaches to criminal law reform: liberal and abolitionist.<sup>265</sup> The former, refers to “reformist reforms” that seek to “better” the criminal legal system as it functions today (e.g. moving from incarceration to e-monitoring).<sup>266</sup> Some critics argue these changes, ultimately, further entrench the system and its harm.<sup>267</sup> Abolitionists suggest adoption of “non-reformist reforms,”<sup>268</sup> policies that serve and incrementally move towards the ultimate goal of demolishing an inherently oppressive criminal system<sup>269</sup> (e.g. reducing the police department by 25% and reinvesting those funds in health services). Critics of abolitionism argue there is a need to retain parts of the criminal legal system to address certain violent acts.<sup>270</sup> Prosecutors must contend with these theories in crafting reforms and understand what ends each policy serves.

<sup>263</sup> See *supra* Section III, Part A.

<sup>264</sup> “The limit to any reform. . . is the system itself: reform tends to strengthen institutions, especially those geared to social control. . .” Ruth Wilson Gilmore, *Globalisation and U.S. Prison Growth: From Military Keynesianism To Post-Keynesian Militarism*, 40 RACE & CLASS 2-3, 183 (1998); Zohra Ahmed, *The Sanctuary of Prosecutorial Nullification*, 83 ALB. L. REV. 239, 279-92 (2020) (discussing the merits of achieving decriminalization through prosecutorial nullification of broken windows offenses, using both a traditional liberal law reform framework and one rooted in an abolitionist ethic).

<sup>265</sup> See Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 409–10 (2018) (contrasting the 2016 policy platform of the Movement for Black Lives with the Department of Justice reports on Ferguson and Baltimore to draw out the differences between “traditional liberal approaches to criminal law reform” with a “decarceral agenda rooted in an abolitionist imagination”).

<sup>266</sup> See Ruth Wilson Gilmore & James Kilgore, *The Case for Abolition*, MARSHALL PROJECT (June 19, 2019), <https://www.themarshallproject.org/2019/06/19/the-case-for-abolition> (describing reformist reforms as build gender-responsive jails or broaden the scope of parole and other forms of carceral control)

<sup>267</sup> Ruth Wilson Gilmore, *Race, Prisons and War: Scenes from the History of U.S. Violence*, 45 SOCIALIST REG. 73, 82 (2009) (describing how “[r]eform, then as now, opened the door to expanding prison under the guise of social improvement.”). See also Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575 (2019) ““reformist approaches fail to recognize that the very logics of the overlapping criminal justice and policing regimes *systemically* perpetuate racial, sexual, gender, colonial, and class violence through carceral power.”).

<sup>268</sup> Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114 (2019) (defining non-reformist reforms as “those measures that reduce the power of an oppressive system while illuminating the system’s inability to solve the crises it creates.” . . .[A]bolitionists strive to make transformative changes in carceral systems with the objective of demolishing those systems rather than fixing them.)

<sup>269</sup> “An abolitionist ethic provides a constant reminder that ‘history lives in the present, in that white supremacy, settler colonialism and racial capitalism are inextricable from the origins, logic and practices of ‘criminal justice.’” Nicole Smith Futrell, *Pragmatic Idealism: Practicing and Teaching Carceral Abolition in a Criminal Defense Clinic*, XXXXX (citing Michael J. Coyle & Judah Schept, *Penal Abolition Praxis*, 26 CRITICAL CRIMINOLOGY 319, 320 (2018). “Abolition requires that we change one thing: everything.” RUTH WILSON GILMORE, CHANGE EVERYTHING: RACIAL CAPITALISM AND THE CASE FOR ABOLITION (Forthcoming 2021).

<sup>270</sup> Cf. Kelsey Mohamed and Andrew Neilson, *Should Prisons Be Abolished?*, NEW INTERNATIONALIST (March 4, 2020) <https://newint.org/features/2020/02/10/should-prisons-be-abolished> (debating whether or not prisons should be abolished, with Neilson arguing that there are some violent crimes that cannot be safely managed in the community).

Recently, impacted communities and advocates have loudly called for sweeping changes to the mass criminalization system.<sup>271</sup> Progressive prosecutors would be wise to pay attention to these demands. Sparked by the brutal police murder of George Floyd in summer 2020, massive uprisings erupted and abolitionist demands, such as “defund the police,” have been taken up in mainstream policy debates.<sup>272</sup> For years, Black and Brown communities have been advocating for abolitionist policies that shrink rather than strengthen “the state’s capacity for violence”<sup>273</sup> and reinvestment in education and social services, to address root causes of harm and rebuild safe and vibrant communities.<sup>274</sup> Policymakers are reacting.<sup>275</sup> As a result of mass protests, some municipalities have promised unprecedented funding cuts to police and reallocation of funds to services.<sup>276</sup>

Impacted communities have begun calling for the need to abolish prosecution as we know it as well.<sup>277</sup> Organizations are increasingly engaged in “defunding election work” to educate community members about local candidates, such as sheriffs and prosecutors, and their great powers to shape the criminal legal system.<sup>278</sup> These campaigns activate voters to hold decisionmakers accountable and influence which reforms decisionmakers engage in once elected. Advocating for policies that move toward the goal of abolition and do not further entrench racialized harms, has been central to activist efforts. Calls for prosecutors to adopt an abolitionist ethic will likely deepen and prosecutors who identify as “progressive” must grapple with this.

<sup>271</sup> Bill Keller, *What Do Abolitionists Really Want?*, MARSHALL PROJECT (June 13, 2019), <https://www.themarshallproject.org/2019/06/13/what-do-abolitionists-really-want> (discussing how abolitionist ideas have moved into the mainstream in recent years).

<sup>272</sup> See Sam Levin, *The movement to defund police has won historic victories across the US. What's next?*, GUARDIAN (Aug. 15, 2020), <https://www.theguardian.com/us-news/2020/aug/15/defund-police-movement-us-victories-what-next>.

<sup>273</sup> See Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114 (2019).

<sup>274</sup> Black Youth Project 100 Chicago organized to demand a participatory city budget in which the public has the power to defund the Chicago Police Department and reinvest those resources in Black futures by setting a living wage and by fully funding healthcare, social services, public schools, and sustainable economic development projects. See CTR. FOR POPULAR DEMOCRACY, ET. AL., FREEDOM TO THRIVE—REIMAGINING SAFETY AND SECURITY IN OUR COMMUNITIES 20 (2017),

<https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf>

<sup>275</sup> E.g., N. Jamiyla Chisholm, *The Movement for Black Lives Introduces the BREATHE Act*, COLORLINES (July 7, 2020), <https://www.colorlines.com/articles/movement-black-lives-introduces-breathe-act> (describing how House Representatives Ayanna Pressley (D-Mass.) and Rashida Tlaib (D-Mich.) will bring the BREATHE Act to the Congressional floor).

<sup>276</sup> Jemima McEvoy, *At Least 13 Cities Are Defunding Their Police Departments*, FORBES (Aug. 13, 2020), <https://www.forbes.com/sites/jemimamcevoy/2020/08/13/at-least-13-cities-are-defunding-their-police-departments/#67db36d629e3>.

<sup>277</sup> See *Abolitionist Principles & Campaign Strategies For Prosecutor Organizing*, CMTY. JUST. EXCH., [HTTPS://WWW.COMMUNITYJUSTICEEXCHANGE.ORG/ABOLITIONIST-PRINCIPLES](https://www.communityjusticeexchange.org/abolitionist-principles)

<sup>278</sup> E.g., Dream Defenders, *A Webinar on The Power of Sheriffs in Florida*, Advancement Project (Aug. 10, 2020, 2:00 P.M. E.S.T.), <https://advancementproject.org/resources/webinar-recording-and-deck-on-the-power-of-sheriffs-in-florida/>. (urging individuals to get involved in a local sheriff election in Florida, arguing the importance of encouraging officials to adopt policy reforms that are less harmful to communities and advance the abolitionist cause).

Anyone seeking the office of chief prosecutor will need to engage with the debate between liberal and abolitionist approaches to reform as they consider their policy platform.<sup>279</sup> It bears repeating—criminal arrest alone and prosecution for a number of minor “quality of life” offenses lead to devastating immigration consequences.<sup>280</sup> Ending prosecutions as we know them today would certainly be the fastest way to stop the deportation pipeline and the dangerous intermingling of the criminal and immigration systems. However, ending all prosecutions is not realistic any time soon. Abolitionists recognize that abolition will not occur overnight.<sup>281</sup>

Prosecutors must also contend with some of the central tenants of abolitionism—how and when they should wield their power and what the scope of that power should be. Weighing this is critical, especially when considering the devastating impacts prosecutorial policies may have on non-citizen defendants. There are aspects of the concrete proposals suggested below that are rooted in an abolitionist ethic and others that contain elements of liberal approaches to reform. Where useful, I articulate these components to animate these principles in concrete terms and to demonstrate the kind of thinking that is important when crafting specific policies.

The third guiding principle is an understanding that the immigration consequences stemming from criminal contacts are constantly changing.<sup>282</sup> The substantive law and enforcement practices have rapidly shifted over the last two decades and are ever more complex today. The intersection of criminal and immigration law is one of the most challenging facets of immigration practice. This means that the agenda must be fluid and adaptable. At the helm of agenda creation, there must be experts in the intersection of these areas, closely following legal developments.<sup>283</sup> This requires

<sup>279</sup> In 2019, Tiffany Cabán ran on a “progressive” platform that included closing Rikers, halting the construction of new jails, decriminalizing recreational marijuana use, ending cash bail and civil-asset forfeiture, reducing recidivism, prosecuting ICE, and seeking shorter sentences for felonies. Isabel Cristo, *Tiffany Cabán Wants to Transform What It Means to Be a DA*, THE NATION (June 13, 2019), <https://www.thenation.com/article/archive/tiffany-caban-queens-da-interview/>. Although Cabán was narrowly beat by her opponent, Melinda Katz, other progressive candidates have succeeded in their DA races using similar platforms. Numerous candidates who won in November 2020 and are up for election in November 2021 have advanced similar agendas. *2020 Endorsements*, REAL JUST., <https://realjusticepac.org/endorsements/> (last visited on Aug. 23, 2020); Jane Wester, *Manhattan DA Candidates Tout Progressive Bona Fides in ‘Meet and Greet’ Ahead of 2021 Election*, N.Y. L.J.

<sup>280</sup> See *supra* Part I. Turnstile jumping convictions can lead to deportation for a number of immigrants, even green card holders who have lived here for decades. Max Rivlin-Nadler, *Yes, New Yorkers CAN Be Deported For Jumping A Turnstile*, VILLAGE VOICE (Feb. 27, 2017), <https://www.villagevoice.com/2017/02/27/yes-new-yorkers-can-be-deported-for-jumping-a-turnstile/>.

<sup>281</sup> See Ruth Wilson Gilmore and James Kilgore, *The Case for Abolition*, MARSHALL PROJECT (June 16, 2019), <https://www.themarshallproject.org/2019/06/19/the-case-for-abolition> (“We know we won’t bulldoze prisons and jails tomorrow, but as long as they continue to be advanced as the solution, all of the inequalities displaced to crime and punishment will persist. We’re in a long game.”).

<sup>282</sup> See WALTER A. EWING, ET. AL., AM. IMMIGRATION COUNCIL, THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES 1 (2015), [https://www.americanimmigrationcouncil.org/sites/default/files/research/the\\_criminalization\\_of\\_immigration\\_in\\_the\\_united\\_states.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/the_criminalization_of_immigration_in_the_united_states.pdf) (describing how immigration policies are an “ever-evolving assortment of laws” and immigration-enforcement mechanisms designed to punish immigrants).

<sup>283</sup> However, these “experts” must be individuals with a genuine interest in enacting proportionate outcomes for immigrants, not simply individuals who may simply purport to understand “immigration” law. There is a great

one or more people whose responsibility it is to craft, adapt and reinvent the agenda over time, *and* communicate and implement the new policies across the board within the office.<sup>284</sup>

## B. The Agenda: Concrete Proposals

The specifics of the immigration agenda might vary by jurisdiction but below I provide a number of concrete proposals prosecutors might adopt or use to brainstorm ideas.<sup>285</sup> The policies focus on the areas of the criminal legal system that are most dangerous for non-citizens, such as pretrial detention, plea bargaining and sentencing. They seek to avoid potential harms and are in furtherance of the larger goals professed by the progressive prosecution movement.

### 1. Create an Immigration Integrity Unit to audit and revise policies and remedy past harm.

I recommend progressive prosecutors create an internal immigration integrity unit (“IIU”). The IIU should begin its work by auditing policies across all areas of prosecutorial practice to assess the office’s current approach and impact on immigrant defendants. The IIU should have sufficient freedom to revamp and recreate policies that have immigration harm reduction baked into them. Immigration should not be a separate issue but rather addressed inherently in all policies. To be clear, this unit is distinct from what several progressive prosecutors, like Eric Gonzales<sup>286</sup> or Chesa Boudin,<sup>287</sup> have created, by hiring potentially one or two internal immigration attorneys. These efforts, while a step in the right direction, are insufficient for two key reasons. First, the hired attorneys have generally been junior and do not have the decision-making authority needed to do the needed work.<sup>288</sup> Hierarchy and rank are of utmost importance to exert influence in most DA

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difference between the two. [should I mention Brooklyn example? Interview and cite BDS about it]. Nor should the need for in-house expertise be read to replace or decenter defense counsel’s role in negotiating on behalf of immigrant clients. It is defense counsel’s Constitutional obligation (in consultation with immigration counsel) to put forth and pursue the best immigration-safe resolution for their particular immigrant client, given their individualized circumstances, and it would be inappropriate for the prosecutor’s in-house expert to seek to supplant that judgment.

<sup>284</sup> See *infra* Section IV, Part A.

<sup>285</sup> It was extremely helpful to consider some of the issues areas and policy proposals think tanks have suggested as a starting point for my thinking. See, e.g., ROSE CAHN, IMMIGRANT LEGAL RES. CTR., *MODEL PROSECUTOR POLICIES & PRACTICES ON IMMIGRATION ISSUES*, (2018), [https://www.ilrc.org/sites/default/files/resources/model\\_prosec\\_pol\\_prac\\_immig\\_issues-20181121.pdf](https://www.ilrc.org/sites/default/files/resources/model_prosec_pol_prac_immig_issues-20181121.pdf).

<sup>286</sup> Press Release, Brooklyn District Attorney, Acting Brooklyn District Attorney Eric Gonzalez Announces New Policy Regarding Handling of Cases against Non-Citizen Defendants (Apr. 24, 2017), <http://www.brooklynda.org/2017/04/24/acting-brooklyn-district-attorney-eric-gonzalez-announces-new-policy-regarding-handling-of-cases-against-non-citizen-defendants/> (describing DA’s aim to prevent collateral consequences of convictions by being aware of immigration status of defendants and offering appropriate plea deals, and announcing hiring of two immigration attorneys to train staff and advise on offers).

<sup>287</sup> Michael Barba, *SF public defender running for DA calls for unit to protect immigrants from deportation*, S.F. Examiner (June 11, 2019) <https://www.sfexaminer.com/the-city/sf-public-defender-running-for-da-calls-for-unit-to-protect-immigrants-from-deportation/>.

<sup>288</sup> Interview Danny Alicea

offices.<sup>289</sup> Second, most of their work has been limited to advising on immigration-safe pleas and limited to the plea-bargaining process.<sup>290</sup> In contrast, the IIU should be made up of high-level experts in the intersection of immigration and criminal law. But, knowledge-based expertise is not enough. The members of the IIU must be committed to the chief prosecutor's vision of enacting fair and proportionate measures for immigrants and not see their roles as limited to only advising when consequences might emerge.<sup>291</sup> The IIU must be adequately resourced.<sup>292</sup>

Immigration integrity units, much like conviction integrity units,<sup>293</sup> should be a centerpiece of a progressive prosecutor's office. An IIU would symbolically, and in reality, recognize the damage that has been done to immigrants in the past due to insufficient attention to prosecutorial policies that caused harm to non-citizens. Much like a conviction integrity unit, the IIU would not only be tasked with identifying the criminal/immigration overlap but would also look for ways to *remedy these failings*. An IIU can ensure that immigration concerns are a central issue that will be accounted for in all prosecutorial processes. The IIU could do the necessary but painstaking work of figuring out exactly how to achieve this in the jurisdiction. There should be high-ranking individuals in the unit who have the authority to suggest policy modifications across the office that will be taken seriously. That is critical for its efficacy and for this agenda to take hold in an office historically rooted in bureaucracy and resistant to change.<sup>294</sup> The rest of the proposals below are examples that might emerge from the IIU's work. They provide concrete examples of how policies can incorporate immigration considerations into their framing.

## 2. Expand the use of prosecutorial nullification to avoid unfair application of the law.

Use of prosecutorial nullification is of utmost importance given today's immigration landscape.<sup>295</sup> Prosecutors influence deportation based on who they choose to charge criminally.<sup>296</sup>

<sup>289</sup> Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 914 (2009).

<sup>290</sup> E.g., Shaun King, *Philadelphia DA Larry Krasner Promised a Criminal Justice Revolution. He's Exceeding Expectations.*, THE INTERCEPT (March 20, 2018), <https://theintercept.com/2018/03/20/larry-krasner-philadelphia-da/> (Krasner's memo ordering prosecutors to make plea offers "below the bottom end of the mitigated range of the PA Sentencing Guidelines for most crimes."). See Christie Thompson, *Prosecutors are Quietly Helping Protect Immigrants from Trump*, VICE (May 18, 2017), [https://www.vice.com/en\\_us/article/pg7wvn/prosecutors-are-quietly-helping-protect-immigrants-from-trump](https://www.vice.com/en_us/article/pg7wvn/prosecutors-are-quietly-helping-protect-immigrants-from-trump) (suggesting areas where prosecutors should consider immigration issues but without detailed plans to address these concerns).

<sup>291</sup> There is a great difference between having knowledge of potential consequences and being committed to crafting creative solutions to mitigate them. **[mention current Brooklyn example]**

<sup>292</sup> As discussed *infra* Section IV, Part J, while funding is often scarce, if the DA were to enact some of the other measures described hereto, she would be able to reinvest some funds to this kind of unit in furtherance of her mission.

<sup>293</sup> See *supra* Section IV, Part A. Conviction integrity units were created due to a recognition of a pattern of corrupt police and prosecutorial practices in the past that led to wrongful convictions.

<sup>294</sup> See Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 532 (2020) (exploring how transformative change, including in prosecutors' offices, is often stymied by institutional resistance).

<sup>295</sup> See Zohra Ahmed, *The Sanctuary of Prosecutorial Nullification*, 83 ALB. L. REV. 239, 243 (describing the #nycdontprosecute campaign requesting prosecutors exercise nullification powers over certain misdemeanors to prevent detection of immigrants vulnerable to removal, especially in light of Trump's executive order).

<sup>296</sup> Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 577 (2013); Jennifer Chacón, *Immigration*

Charging alone can have unintended consequences,<sup>297</sup> especially given the return to Secure Communities by the Trump Administration in 2017.<sup>298</sup> Prosecutors have unfettered discretion in charging decisions after an arrest is made, and drafting the language contained in the charging documents, is their task alone.<sup>299</sup> Prosecutorial nullification is the process by which a prosecutor “declines prosecution because of a disagreement with that law or because of the belief that the application of that law to a particular defendant or in a particular context would be unwise or unfair.”<sup>300</sup> Progressive prosecutors already utilize nullification, particularly in the context of low-level misdemeanors, but in other instances as well, generally for reasons besides immigration.<sup>301</sup>

Nullification’s definition itself, requires prosecutors consider the wisdom and fairness of the application of a criminal charge in a *specific* context. The prosecution of non-citizens and the risk of immigration consequences is the very kind of context under which prosecutors might consider using this tool. Indeed, the ABA’s ethical guidelines suggest prosecutors consider collateral consequences and their proportionality as part of charging and dismissal decisions.<sup>302</sup> Prosecutors, then, should carefully consider the consequences of charging individuals, given that this alone can lead to ICE detection and deportation, especially for undocumented individuals.<sup>303</sup>

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*Federalism in the Weeds*, 66 UCLA L. REV. 1330, 1380 (2019) (deciding whether or not to bring charges impacts immigration enforcement directly).

<sup>297</sup> *Id.*; FAIR AND JUST PROSECUTION, ADDRESSING IMMIGRATION ISSUES (2017), <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Immigration.9.25.pdf>.

<sup>298</sup> Exec. Order No. 13768, 82 C.F.R. 8799 § 10 (2017); *see also supra* Section I, Part B.

<sup>299</sup> Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775 (2016). Prosecutors assess which, if any, crimes have been demonstrated by probable cause, a much lower standard than the reasonable doubt standard the state must prove to secure conviction. Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. 1, 9 (2018).

<sup>300</sup> Roger A. Fairfax Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011). There has been exploration of the likelihood of success of legal challenges to categorical non-prosecution. John E. Foster, *Charges to be Declined: Legal Challenges and Policy Debates Surrounding Non-Prosecution Initiatives in Massachusetts*, 60 B.C. L. REV. 2511 (2019) (exploring the likelihood of success of legal challenges to categorical non-prosecution, primarily whether non-prosecution unconstitutionally violates the separation of powers).

<sup>301</sup> *See e.g.*, *Charges to Be Declined*, RACHAEL ROLLINS FOR SUFFOLK DA, <https://rollins4da.com/policy/charges-to-be-declined/> (proposing non-prosecution of certain criminal laws, chiefly non-violent misdemeanors).

<sup>302</sup> CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4 (AM. BAR ASS’N 2017)(identifying as a factor to consider in pursuing or dismissing criminal charges, “(vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender.”).

<sup>303</sup> In some jurisdictions, if a locality shares fingerprint data with ICE after arrest but before criminal charge, prosecutorial nullification may not be sufficient to ensure an individual won’t be detected. Nevertheless, prosecutorial nullification may be useful because if someone is released from police custody without charge, they may be released without being turned over to ICE depending on the speed of the detainer request. Moreover, some jurisdictions may have policies limiting police cooperation with ICE. For example, the NYPD is prohibited from complying with most ICE detainer request. *See, e.g.*, N.Y.C., N.Y., ADMIN. CODE tit. 10, ch. 1, § 14-154 (2017) (disallowing compliance unless there is a judicial warrant and the individual “poses a significant current danger.”) Progressive prosecutors could encourage local legislators to adopt such laws and can take direct action to stop fingerprint data sharing in the first place. Claire Sasko, *Kennedy Says City Will End ICE Data-Sharing Agreement*, CITY LIFE (July 27, 2018), <https://www.phillymag.com/news/2018/07/27/philadelphia-pars-ice-agreement/> (Larry Krasner voted to end an agreement to share initial arrest data with ICE which it used to arrest non-citizens).

Knowing potential deportation can ensue from criminal charge alone, puts into relief the wisdom of pursuing charges for a number of criminal offenses. This could include both low-level and high-level offenses because deportation can arise simply due to arrest, regardless of the nature of the charges.<sup>304</sup> Prosecutorial nullification here could mean selecting a number of statutes and refusing to prosecute those offenses—across the board—much like prosecutors have chosen to do in the context of drug offenses or other conduct they believe should not lead to criminal punishment.<sup>305</sup> This calculation could be done and justified because a prosecutor may not believe that disproportionate immigration consequences should result from criminal charge. This need not only be applied in the case of an immigrant defendant, but could be a policy applied to *all* defendants, justified by immigration concerns.<sup>306</sup> This is likely the wisest use of nullification as it is the most consistent and does not leave room for error in its application. Alternatively, prosecutors could also decide to use nullification in a specific case, where they learn a particular defendant would face particularized immigration consequences from the criminal charge and thereby decide, on a case-by-case basis, not to prosecute. Prosecutors constantly make judgment calls, in terms of when to bring charges and how, and it should be no different when considering immigration ramifications. Again, in some instances this individualized approach could make sense but given the difficulty in and questionable wisdom of prosecutors trying to ascertain citizenship status<sup>307</sup> in the short time between arrest and arraignment for each and every defendant, adopting blanket nullification of certain statutes appears the wiser approach.<sup>308</sup>

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<sup>304</sup> Progressive prosecutors should consider not only reserving nullification for low-level offenses, but also in cases of more serious offenses when considering the outsized consequences that might flow to immigrant defendants as a result of charges being lodged. As Prof. Ruthie Wilson Gilmore warns, a charitable approach to reform—focused on seeking the release of “deserving” incarcerated individuals—detracts from the larger cornerstones of prison abolition, namely large-scale fights for social, economic and environmental justice. RUTH WILSON GILMORE, FOREWORD TO DAN BERGER, *THE STRUGGLE WITHIN: PRISONS, POLITICAL PRISONERS, AND MASS MOVEMENTS IN THE UNITED STATES* (2014). If progressive prosecutors seek to challenge and reframe the system as a whole, they must not get stuck in the trap of only enacting policies that benefit the “deserving,” instead enacting policies that sensibly focus on changing the system in a way that is consistent with the principles they seek to advance

<sup>305</sup> This is analogous to DAs declaring they will not seek the death penalty. See <https://www.mercurynews.com/2020/07/21/exclusive-santa-clara-county-da-abandoning-death-penalty-pursuit/>.

<sup>306</sup> Critics to this approach suggest that immigrants shouldn’t receive “better” treatment in the criminal legal system than citizens. They suggest that all defendants should receive “equal” treatment. To see more about why this framing is misguided please see section below on proportionality of sentencing section. See *infra* Section IV, Part D. Nevertheless, by adopting this kind of blanket across the board approach would appease critics.

<sup>307</sup> This is not a simple inquiry. Figuring out an individual’s immigration status often requires specialized knowledge of immigration law and closeness to the facts of the case. Given complex derivative citizenship laws and other complex immigration provisions individuals may be citizens or lawful permanent residents and not know it. See Eamonn Hart, Comment, *Citizens All Along: Derivative Citizenship, Unlawful Entry, and the Former Immigration and Nationality Act*, 82 U. CHI. L. REV. 2119 (2015). Furthermore, prosecutors do not share attorney-client relationships with those they prosecute and seeking to engage in this kind of analysis raises a host of ethical and legal concerns. Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO L.J. 1, 58 (2012). It is wisest not to engage in this kind of inquiry given these concerns. A uniform approach across the board would be simpler to enforce and less risky.

<sup>308</sup> Although not exactly nullification, progressive prosecutors could also consider expunging old arrest warrants, minimizing the risk of non-citizens being arrested on old warrants being exposed to deportation today. FAIR AND JUST PROSECUTION, ADDRESSING IMMIGRATION ISSUES 6 (2017), <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Immigration.9.25.pdf>. (describing Brooklyn (NY) Acting DA Eric Gonzalez’s lead; “his “Begin Again” program is reported to have cleared over 2,100 arrest warrants without a single arrest.)

Lastly, the practice of prosecutorial nullification also has a role to play in plea bargaining. Imposing no sanction at all, even where penalty may be justified, could be a fair response in some cases of immigrant defendants.<sup>309</sup> Nullification in the plea-bargaining process is a tool prosecutors might consider when it comes to immigrant defendants as a class or potentially using under certain specific circumstances that could be expounded upon in a policy directive.

3. *Require avoidance of immigration consequences in plea negotiations, using written guidance.*

Progressive prosecutors have been most active in addressing immigration concerns in plea negotiations.<sup>310</sup> The strongest policies have been clearly articulated in writing,<sup>311</sup> as an effort to encourage consistent and transparent application of their desired approach to plea negotiations by all line attorneys in the office. Santa Clara District Attorney Jeffrey Rosen was the first chief prosecutor to send a written memo to attorneys advising them on the approach to plea negotiations on the heels of *Padilla*.<sup>312</sup> Other DAs later followed suit.<sup>313</sup> While most of these policies encourage prosecutors to consider mitigation against immigration consequences in the case of minor criminal offenses, they suggest that this kind of mitigation is not recommended in the case of felony or other “serious” offenses.<sup>314</sup> As discussed in more detail below in the proportionate sentencing section,<sup>315</sup> progressive prosecutors should challenge themselves to think through whether this is the correct approach. Fairness and proportionately concerns, central to progressive prosecution, suggest consideration of whether deportation is *ever* a valid punishment for criminal conduct or if mitigation should, at least, be considered in all scenarios. Under the current criminal removal system, local prosecutors hold the power to make decisions that directly lead to deportation. With this power comes great responsibility to carefully think through whether that power should be used to pursue non-criminal penalties generally, and deportation specifically.

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<sup>309</sup> See Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1217(2016).

<sup>310</sup> See generally *supra* Section II, Part A.

<sup>311</sup> For the reasons stated above, *supra* section III, Part B.

<sup>312</sup> JEFF ROSEN, COUNTY SANTA CLARA OFFICE DIST. ATTORNEY, MEMO RE COLLATERAL CONSEQUENCES (2011), [https://www.ilrc.org/sites/default/files/resources/unit\\_7b\\_4\\_santa\\_clara\\_da\\_policy.pdf](https://www.ilrc.org/sites/default/files/resources/unit_7b_4_santa_clara_da_policy.pdf).

<sup>313</sup> Cf. *Acting Brooklyn District Attorney Eric Gonzalez Announces New Policy Regarding Handling of Cases Against Non-Citizen Defendants*, BROOKLYN DIST. ATTORNEY’S OFFICE (Apr. 24, 2017), [www.brooklynda.org/2017/04/24/acting-brooklyn-district-attorney-eric-gonzalez-announces-new-policy-regarding-handling-of-cases-against-non-citizen-defendants/](http://www.brooklynda.org/2017/04/24/acting-brooklyn-district-attorney-eric-gonzalez-announces-new-policy-regarding-handling-of-cases-against-non-citizen-defendants/) (announcing in 2017 that two newly-hired immigration attorneys would train staff and advise on plea offers).

<sup>314</sup> E.g. JEFF ROSEN, COUNTY SANTA CLARA OFFICE DISTRICT ATTORNEY, MEMO RE COLLATERAL CONSEQUENCES (2011), [https://www.ilrc.org/sites/default/files/resources/unit\\_7b\\_4\\_santa\\_clara\\_da\\_policy.pdf](https://www.ilrc.org/sites/default/files/resources/unit_7b_4_santa_clara_da_policy.pdf). This was before California enacted a statewide law in 2016 mandating that prosecutors consider the avoidance of adverse immigration consequences of a conviction. See Kendra Sena, *State Criminal Law and Immigration: How State Criminal Systems Can Cause Deportations, or Limit Them*, ALB. L. SCH. GOV’T L. CTR. (May 6, 2019), <https://www.albanylaw.edu/centers/government-law-center/Immigration/explainers/Pages/State-Criminal-Law-and-Immigration-How-State-Criminal-Justice-Systems-Can-Cause-Deportations-or-Limit-Them.aspx>

<sup>315</sup> *Infra* Section IV, Part D.



Written plea policies then, might adopt stronger language *requiring* consideration of avoidance of deportation in any and all cases not limited by the severity of the charge.<sup>316</sup> For instance, the California legislature requires prosecutors to “consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution.”<sup>317</sup> Notably, it does not limit this avoidance principle to low-level offenses. A past NDAA president, Robert M.A. Johnson, has said in some cases the only palatable plea is one that avoids collateral consequences.<sup>318</sup> Progressive prosecutors might consider using language along the lines of the California statute, understanding that this directive does not mandate an outcome, but encourages prosecutors to try to avoid deportation in all cases where *just*, irrespective of the level of charge.

#### 4. *Eliminate the Practice of Overcharging*

The common practice of overcharging cannot be ignored in understanding the dangers faced by immigrants accused of crime. Prosecutors commonly overcharge—bringing more charges than they can prove at trial—in order to give themselves an advantage at the plea-bargaining stage.<sup>319</sup> The majority of cases that begin as felonies resolve in felonies.<sup>320</sup> This, taken together with the known harsh immigration consequences of criminal convictions, especially for felonies, should incentivize progressive prosecutors to issue written guidance discouraging overcharging.<sup>321</sup> Chief prosecutors could urge prosecutors to only bringing charges that would likely be proven at trial, encouraging attorneys to air on the side of charging misdemeanors over felonies where it is unclear if a felony could be proven at trial. This would assuage concerns about the uneven playing field in the plea-bargaining process.

#### 5. *Consider proportionate sentencing as the principal factor in sentencing recommendations*

<sup>316</sup> See *id.* The sentencing considerations articulated below should equally apply and be incorporated into these policies, to the extent they provide guidance around sentencing for district attorneys.

<sup>317</sup> CAL. PENAL CODE § 1016.3 (2016) (codifying and expanding upon the language of Padilla in cross-reference section CAL. PENAL CODE § 1016.2).

<sup>318</sup> See Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1216 (2016).

<sup>319</sup> Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 5 (2019) (explaining the standard to bring a charge—demonstrating charge met by probable cause—is so much lower than the reasonable doubt standard required for proof of guilt at trial).

<sup>320</sup> Ronald F. Wright & Rodney L. Engen, *Charge Movement and Theories of Prosecution*, 91 MARQ. L. REV. 9, 26-27 (2007) (finding, in their North Carolina study of felony prosecutions that only 25% of cases that begin as felonies result in misdemeanors).

<sup>321</sup> Chicago Appleseed Fund for Justice has worked alongside Chicago District Attorney Kim Foxx since her election in November 2016 to hold her to her campaign promising of ending overcharging by prosecutors. The group, along with other community partners, published a report on her first year in office, evaluating her progress on ending overcharging practices, among her other goals. The report found Foxx’s office appeared to be taking active steps to ensure all charging decisions are consistent with the standards recommended by the ABA and the NDAA and made further recommendations for Foxx to get closer to her goal of ending overcharging. RECLAIM CHI., THE PEOPLE’S LOBBY & CHI. APPLESEED FUND FOR JUSTICE, IN PURSUIT OF JUSTICE FOR ALL—AN EVALUATION OF KIM FOXX’S FIRST YEAR IN OFFICE 11 (2017), <https://www.thepeopleslobbyusa.org/wp-content/uploads/2017/12/Equal-Justice-for-All-A-Report-on-Kim-Foxxs-First-Year-ForPrint.pdf>.

Progressive prosecutors should be guided by proportionality concerns when considering supposed “collateral” consequences.<sup>322</sup> These resultant harms must be conceived as part and parcel of the criminal punishment.<sup>323</sup> The proportionality of punishment must then include an assessment of “collateral” consequences as part of the criminal sentence itself. This proportionality should be the principal factor in sentencing. *Padilla* reinforced that deportation is so closely related to criminal penalty that it is often subsumed as part of the punishment.<sup>324</sup> For many immigrant defendants the subsequent immigration harm is more significant than the criminal penalty.<sup>325</sup> Progressive prosecutors should recommend sentences that tend to avoid harsh adverse consequences like exile.<sup>326</sup> Consideration of proportionately is not only at issue in cases where conviction will clearly lead to deportation. It is also relevant where conviction might lead to other adverse immigration penalties, such as rendering an individual ineligible for asylum or a green card. Accounting for a resultant harm that would render individuals ineligible for status (and in many cases ensure they remain or become undocumented) is equally critical for proportionality.

Where there are immigration implications, the actual sentence in a case, necessarily includes the immigration consequences as part of the calculation of the sentence. The prosecutor and all other parties must always ask if this cumulative sentence is indeed proportionate to the crime.<sup>327</sup> For a progressive prosecutor, the sentence is not limited to the narrow understanding of criminal penalties that arise under criminal and criminal procedure law.<sup>328</sup> Dan Satterberg, King County Prosecutor, said with respect to approaching prosecution of immigrant defendants:

[t]here’s certainly a line of argument that says, ‘Nope, we’re not going to consider all your individual circumstances, we want to treat everybody the same. But more and more, my eyes

<sup>322</sup> Progressive prosecutors question the use of harsh penalties that have, by and large, dominated the criminal legal system for decades (such as the presumption of incarceration, three strike laws, etc.), acting to combat mass incarceration and moving away from overreliance on excessively harsh penalties. *E.g.*, Erin Durkin, *Brooklyn DA Gonzalez Pushes for Law to Review and Reduce Long-Term Sentences*, POLITICO (Oct. 23, 2019), <https://www.politico.com/states/new-york/albany/story/2019/10/23/brooklyn-da-gonzalez-pushes-for-law-to-review-and-reduce-long-term-sentences-1225895>. At its core, they aim to challenge whether such harsh penalties are truly proportionate to the crimes prosecuted. They should do the same where so-called collateral consequences are at stake.

<sup>323</sup> See Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 181 (2017) (calling for judges to engage in “informed misdemeanor sentencing” incorporating collateral penalties into sentencing to attain fair and proportionate outcomes).

<sup>324</sup> *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010); see Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1451-59 (2011).

<sup>325</sup> See Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 201-202 (2017).

<sup>326</sup> For an interesting discussion of whether deportation on the basis of criminal conviction in subject to constitutional proportionality challenges in their own right., see MICHAEL J. WISHNIE, PROPORTIONALITY IN IMMIGRATION LAW: DOES THE PUNISHMENT FIT THE CRIME IN IMMIGRATION COURT?, IMMIGRANT.. POLICY CTR. AM. IMMIGRATION COUNSEL 5 (2012), [https://www.americanimmigrationcouncil.org/sites/default/files/research/wishnie\\_-\\_proportionality\\_in\\_immigration\\_041112.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/wishnie_-_proportionality_in_immigration_041112.pdf) (“[a]ny contention that removal due to a criminal conviction is not punitive [and thus clearly subject to proportionality challenges] thus fails in the face of *Padilla*.”).

<sup>327</sup> See Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 191 (2017).

<sup>328</sup> Indeed, one important aspect of the newly updated Model Penal Code revisions on Sentencing is its focus on the collateral consequences of a conviction in order to ensure that the punishment doled out be proportional to the offense. See MODEL PENAL CODE: SENTENCING, Proposed final draft, § 6.02(4) (AM. LAW INST. 2017).

are open that treating people the same means that there isn't a life sentence of deportation that might accompany that conviction.<sup>329</sup>

Robert M.A. Johnson, former NDAA president emphasized: “[a]t times, the collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system without disproportionate collateral consequences.”

Where there are immigration consequences in addition to the criminal sanctions that all convicted persons experience, it will be more difficult to justify additional consequences as proportionate to the crime. Progressive prosecutors who promise to center concerns of fairness and equality, should be wary of pursuing penalties that will undeniably lead to much harsher results for those, who by chance, happen to be born in another country.<sup>330</sup>

Another way to address this might be for chief prosecutors to require line attorneys to draft internal written sentence justification memos in the case of every immigrant defendant that lays out the full extent of the punishment imposed, including specific immigration consequences. This memo could require supervisory approval for the sentence recommendation in every case. Supervisors with training in the complexities of the resultant immigration consequences of criminal contacts would be best positioned to review and sign off on these recommendations (perhaps members of the IIU). As an example of such a practice, Philadelphia District Attorney Larry Krasner requires prosecutors to detail, on the record, the costs associated with every sentence the court will impose to ensure the true costs and scale of the sentence imposed is clear.<sup>331</sup> DA Krasner created this directive as an effort to reduce overcriminalization and mass incarceration.<sup>332</sup> Requiring prosecutors to similarly assess the true cost of a sentence by taking into consideration the particular “immigration cost” would achieve a similar result—reduce overincarceration and overcriminalization of Black and Brown communities. This would ensure all line DAs contemplate the worth of a crime before recommending a sentence.<sup>333</sup> Requiring internal supervisory approval

<sup>329</sup> FAIR AND JUST PROSECUTION, ADDRESSING IMMIGRATION ISSUES (2017), <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Immigration.9.25.pdf>.

<sup>330</sup> Relatedly, the revised Model Penal Code on Sentencing states that “the sentencing system must be permitted in ‘exigent’ circumstances to take account of third-party consequences of the penalties it imposes, and avoidable future harms that may be generated by the legal system itself.” MODEL PENAL CODE: SENTENCING, Proposed final draft, §305.7 (AM. LAW INST. 2017). One of the primary goals under the revised code is preserving families and ensuring that the effectiveness of the sentencing system as a whole is measured in part by “the effects of criminal sanctions on families and communities,” as stated in the general purposes enumerated in section §1.02(b)(vii). *Id.* Prosecutors should similarly contemplate the impact of their decisions on individuals and their families and communities.

<sup>331</sup> Larry Krasner, *New Policies Announced February 15, 2018*, PHILA. OFFICE OF DIST. ATTORNEY (2018), <https://www.scribd.com/document/373860422/Finalized-Memo-Mar-13-2018>; Bobby Allyn, *Philadelphia’s New DA Wants Prosecutors to Talk Cost of Incarceration While in Court*, NPR (Mar. 31, 2018), <https://www.npr.org/2018/03/31/598318897/philadelphias-new-da-wants-prosecutors-to-talk-cost-of-incarceration-while-in-cou>.

<sup>332</sup> See 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>.

<sup>333</sup> COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS § 19-2.4(a) at 3 (AM. BAR. ASS’N 3d ed. 2004)(indicating that sentencing courts ought to consider “applicable collateral sanctions in

before suggesting a sentence in the case of an immigrant defendant would ensure consistency and transparency, within and outside the office.

6. *Increase accessibility to diversion opportunities, such as alternatives to incarceration*

The progressive prosecution movement largely rejects the presumption of incarceration and embraces a presumption of alternatives to incarceration as a means of resolving criminal matters.<sup>334</sup> This has commonly been achieved through two approaches—growing specialized problem-solving courts<sup>335</sup> and offering programming, such as mental health or drug treatment,<sup>336</sup> as a sentence to resolve cases arising in traditional criminal courts. Surprisingly, few progressive prosecutors ensure that immigrant defendants can safely participate in the range of alternative to incarceration programs offered.<sup>337</sup>

Participation in such programs often require defendants plead guilty or enter a “no contest” plea before entering the program.<sup>338</sup> Upon completion of the program, the case is often dismissed under state law.<sup>339</sup> However, under federal immigration law, an upfront guilty or “no contest” plea constitute a “conviction” and could carry immigration consequences, rendering someone deportable or ineligible for a green card.<sup>340</sup> These nuances of immigration law necessitate enacting policies that allow non-citizens to access problem solving courts and other alternative to incarceration programs.<sup>341</sup> With this in mind, today, some jurisdictions permit individuals to participate in diversion programs, without requiring pleading guilty upfront, and upon program

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determining an offender's overall sentence” and supporting the idea that the prosecutor should also be suggesting sentencing that take into account collateral consequences when recommending sentences).

<sup>334</sup> See FAIR & JUST PROSECUTION, PROMISING PRACTICES IN PROSECUTOR-LED DIVERSION (2017), <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Diversion.9.26.pdf>.

<sup>335</sup> Specialized courts have been greatly criticized for continuing a punitive approach towards social problems rather than a health-based approach. See e.g., DRUG POLICY ALL., DRUG COURTS ARE NOT THE ANSWER: TOWARDS A HEALTH-CENTERED APPROACH TO DRUG USE (2011), [https://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer\\_Final2.pdf](https://www.drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer_Final2.pdf).

<sup>336</sup> See, e.g., *Improving Justice System Responses to Individuals with Mental Illness*, FAIR & JUST PROSECUTION (JULY 2018), <https://fairandjustprosecution.org/wp-content/uploads/2018/07/FJP.Brief.MentalHealth.pdf> (examples of mental health programs); *Harm Reduction Responses to Drug Use*, FAIR & JUST PROSECUTION (Aug. 2019), [https://fairandjustprosecution.org/wp-content/uploads/2019/08/FJP\\_Brief\\_HarmReduction.pdf](https://fairandjustprosecution.org/wp-content/uploads/2019/08/FJP_Brief_HarmReduction.pdf) (examples of drug treatment programs, from more punitive to less).

<sup>337</sup> While many progressive prosecutors may offer some diversion programs that permit participation without an upfront plea of any kind, they all still offer a host of programs that maintain this requirement.

<sup>338</sup> Philadelphia’s prostitution diversion, first time non-violent and drug felonies, other drug offenses and some misdemeanors require “no contest” pleas before entry into the program. *Diversion Unit*, DISTRICT ATTORNEY, <https://www.phila.gov/districtattorney/diversion/Pages/default.aspx> (last visited Aug. 28, 2020).

<sup>339</sup> See FAIR AND JUST PROSECUTION, ADDRESSING IMMIGRATION ISSUES (2017), <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Immigration.9.25.pdf>.

<sup>340</sup> Under the INA, a conviction includes a formal judgment of guilt or *nolo contendere* plea combined with any restraint on liberty, including any programming. See INA § 101(a)(48)(A); 8 U.S.C. § 1101(a)(48)(A) (2018).

<sup>341</sup> Alina Das, *Immigrants and Problem-Solving Courts*, 33 CRIM. JUST. REV. 308, 309, 311 (2008) (describing the “unique challenge” that faces problem-solving courts working with immigrant communities). However, permitting undocumented immigrant defendants to participate in alternatives to incarceration may still raise detection concerns. Thus, progressive prosecutors must weigh this in determining whether the case should remain in the criminal courts given the risk of immigration detection and arrest. *Supra* Section I, Part B.

completion, can receive a dismissal.<sup>342</sup> The easiest way to ensure fairness would be for prosecutors to offer pre-plea diversion resolutions across the board, for citizens and non-citizens alike.

Such a policy is also consistent with progressive prosecutors' broader goals of moving away from a retribution, by permitting individuals to participate in programs without needing to dangle a prior plea admission over their heads. Encouraging broad participation in programs to resolve matters is "rehabilitative" and "restorative" at its core. As described above,<sup>343</sup> this reform is "liberal" in nature as it maintains court oversight over resolution.<sup>344</sup>

Progressive prosecutors could also enact a policy that specifically allows for non-citizens to avoid upfront pleas due to the serious concerns regarding the INA's definition of conviction.<sup>345</sup> However, adopting a policy that applies equally to all, and is not limited to immigrants would be advisable, as it would be much easier to administer, ensure that no one falls through the cracks, and that all non-citizens would actually benefit from it.<sup>346</sup> Deferred prosecution could be utilized too. Progressive prosecutors could support legislative efforts to permit pre-plea diversion if such a statute does not exist in their jurisdiction.<sup>347</sup>

Progressive prosecutors however cannot stop there. There are ever-increasing critiques of "problem-solving courts"<sup>348</sup> and alternatives to incarceration that remain ultimately supervised by

<sup>342</sup> Cf. Some states have enacted legislation to permit pre-plea diversion in certain cases. Cf. AB 208 Deferred Entry of Judgment: Pretrial Diversion (Cal. 2017-2018) (revised definition), [http://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180AB208](http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB208). FAIR AND JUST PROSECUTION, ADDRESSING IMMIGRATION ISSUES 5 (2017), <https://fairandjustprosecution.org/wp-content/uploads/2017/09/FJPBrief.Immigration.9.25.pdf>. (including examples of pre-trial diversion programs in Cook County, Illinois, Seattle, and Washington, with California having proposed a bill that allows individuals to participate in a treatment program before entering a plea. The California bill was passed after FJP published its report.

<sup>343</sup> *Supra* Section III, Part B.

<sup>344</sup> Most programs, even if run by outside agencies, require regular check-ins with the court for status updates. Generally, where an individual fails to comply with program requirements, they can face criminal sanctions by the court. *E.g.*, *The Brooklyn Mental Health Court*, CTR. CT. INNOVATION, <https://www.courtinnovation.org/programs/brooklyn-mental-health-court> (last visited Aug. 30, 2020) (every participant is required to return to court regularly to meet with case managers and appear before the judge to report on progress. Defendants who comply with all treatment mandates have their charges dismissed or reduced).

<sup>345</sup> *E.g.*, *San Francisco DA Chesa Boudin Announces Primary Caregiver Diversion Program*, CITY & COUNTY S.F. (Feb. 10, 2020), <https://www.sfdistrictattorney.org/article/san-francisco-da-chesa-boudin-announces-primary-caregiver-diversion-program> (the policy aims to keep children united with their parents and end a generational cycle of incarceration. The policy is available to primary parents of minor children who can earn a dismissal through a rigorous diversion program that includes parenting classes).

<sup>346</sup> Many non-citizens are uncomfortable talking about their immigration status. *See* Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 35-37 (2013). Given the complexities of immigration law, some non-citizens might not even know their own status. *See* Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship* 28 GEO. IMM. L.J. 277, 281-82 (2014). Thus, it is advisable and more equitable to devise a universal policy that will impact non-citizens and citizens the same. Prosecutors should not be afraid to adopt policies that are designed to protect immigrants as they have wide latitude in their powers to enforce the laws as they see fit.

<sup>347</sup> *See, e.g.*, AB 208 Deferred Entry of Judgment: Pretrial Diversion (Cal. 2017-2018) (recently revised), [http://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180AB208](http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB208).

<sup>348</sup> *See* DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE, DRUG POLICY ALL. (2011), [https://www.drugpolicy.org/sites/default/files/Drug%](https://www.drugpolicy.org/sites/default/files/Drug%20Policy%20Report%202011.pdf)

the courts.<sup>349</sup> If prosecutors are pursuing matters that they truly believe are rooted in health concerns or other social ills, that they believe can and should be resolved through treatment and social services, it begs the question of whether the criminal legal system is the proper venue to resolve the matter in the first place. Keeping these kinds of cases within the court system, even in “problem solving” courts, maintains a punitive approach to social problems by holding the threat of incarceration over individuals while they engage in programming, whether or not upfront pleas are required. Compliance becomes coercive, and the programs reinforce the carceral paradigm rather than combat it. Further, the efficacy of this approach to address underlying causes of crime, such as addiction, has been greatly debated, and progressive prosecutors would be well-advised to contend with these critiques.<sup>350</sup>

### 7. *Shrinking Power and the Expanded Use of Pre-Arrest Diversion*

If progressive prosecutors are serious about their commitment to combat incarceration and criminalization and their disparate racialized results, questioning whether the criminal legal system is in the best position to address certain social concerns that undergird criminal activity seems urgent. If the answer is “no,” then prosecutors should support creating systems that allow for certain matters to be resolved outside of the criminal legal system full stop. This requires prosecutors engage in the difficult but necessary abolitionist task of reducing their own powers<sup>351</sup> to allow for certain issues to resolve outside of their purview. This shrinkage of power moves closer towards another abolitionist goal—encouraging community resolution of wrongdoing. Yet, abolitionists make clear this alone is insufficient to address root causes of crime, rather there must be a reinvestment of resources from the criminal legal system into community functions like education and social services, in order to ensure community health and safety.<sup>352</sup> While it is surely difficult for anyone to reduce their own power, prosecutors should seriously contend with these questions and calls. This reckoning is important to meet some of the promises the progressive prosecution movement has made and the platforms they have endorsed, like decriminalization and a framing of the underlying causes of crime as rooted in poverty and structural inequality.

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[20Courts%20Are%20Not%20the%20Answer\\_Final2.pdf](#) (describing how drug courts have not led cost savings, reduced incarceration, or improved public safety, and how they have made the criminal justice system more punitive toward addiction).

<sup>349</sup> See Jessica M. Eaglin, *Against Neorehabilitation*, 66 SMU L. REV. 189, 196 (describing limitations to neoliberalism as including focusing on the wrong offenders, exacerbating racial disparities, and distorting our perception of criminal justice).

<sup>350</sup> Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748 (2018). In 2019, 43,535 noncitizens were deported for the manufacturing, distribution, sale, or possession of illegal drugs. MIKE GUO, DEP’T HOMELAND SEC.: OFFICE OF IMMIGRATION STATISTICS, IMMIGRATION ENFORCEMENT ACTIONS: 2019 at 11 tbl. 8 (2019),

[https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement\\_actions\\_2019.pdf](https://www.dhs.gov/sites/default/files/publications/immigration-statistics/yearbook/2019/enforcement_actions_2019.pdf) (constituting 29.9% of all crime-based removals, the highest number of any criminal category).

<sup>351</sup> Steven Zeidman, *Some Modest Proposals for a Progressive Prosecutor*, UCLA CRIM. JUST. L. REV. 3 (forthcoming 2021).

<sup>352</sup> See CTR. FOR POPULAR DEMOCRACY ET AL., FREEDOM TO THRIVE—REIMAGINING SAFETY AND SECURITY IN OUR COMMUNITIES 1, 79-80 (2017) (highlighting current or prospective campaigns that seek to divest resources away from police and prisons towards communities and their development, which the report refers to as “the invest divest framework”).

Of course prosecutors, alone, do not control whether matters will be resolved outside the criminal legal system. One important reason for this, is they only control whether to bring charges in court, but do not control arrest decisions.<sup>353</sup> Nevertheless, a progressive prosecutor could take steps with police and legislators towards moving certain matters outside of the criminal legal system. But without the parameters of permissible arrests and police conduct changing, there could continue to be scenarios (and have been) of an onslaught of arrests for conduct that prosecutors believe qualify for alternative resolution or dismissal.<sup>354</sup> Even if prosecutors choose to dismiss charges altogether, this does not negate the host of harms attendant to arrest. One important consequence being ICE detection, which can occur upon arrest and fingerprinting alone.<sup>355</sup>

Due to this risk and their general policy platforms, progressive prosecutors should seriously consider supporting and expanding pre-arrest diversion efforts, especially for issues they suggest are rooted in social ills and should not be dealt with criminally. Ensuring certain matters are never brought to court in the first place would address the host of concerns raised by continued court oversight discussed herein. It would also eliminate the innumerable harms associated with criminal arrest.<sup>356</sup> Organizers in Atlanta successfully advocated for the development and implementation of a community driven pre-arrest diversion program and repealed “40 quality of life ordinances.”<sup>357</sup> Prosecutors can work closely to support similar organizing and legislative efforts in their jurisdictions. Prosecutors generally work closely with police and are often tasked with training police officers in certain circumstances.<sup>358</sup> This relationship presents an opportunity to influence

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<sup>353</sup> See Alexandra Natapoff, *When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26 2018.), <https://www.nytimes.com/2018/12/26/opinion/police-prosecutors-misdemeanors.html>).

<sup>354</sup> A prime example of this was during the summer of 2020 where the police continued to arrest peaceful protesters during the uprisings in New York City in the wake of the murder of George Floyd. Some local prosecutors refused to charge those cases in court or dismiss charges. <https://www.nytimes.com/2020/08/07/nyregion/ny-protest-arrests.html-NEEDS>; Cf. Ali Watkins, *They Were Arrested During the Protests. Here's What Happened Next*, N.Y. TIMES (Aug. 7, 2020). This can be compared to the opposite course taken by federal prosecutors who aggressively prosecuted two activist lawyers arrested on federal charges for throwing a Molotov cocktail in a broken window of an empty police cruiser in New York City. See Murtaza Hussain, *Two Brooklyn Lawyers Accused of Throwing Molotov Cocktails Are the Public Face of Trump Administration's Crackdown on Dissent*, INTERCEPT (June 19, 2020) <https://theintercept.com/2020/06/19/brooklyn-lawyers-molotov-cocktails-trump/>.

<sup>355</sup> See *supra* Section I, Part B.

<sup>356</sup> See Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 3 (2019) (finding the collateral consequences of mass incarceration to include disenfranchisement, loss of public house and public benefits, difficulty finding employment, separation of families, and fiscal burdens on state and federal budgets).

<sup>357</sup> See CTR. FOR POPULAR DEMOCRACY ET. AL., FREEDOM TO THRIVE—REIMAGINING SAFETY AND SECURITY IN OUR COMMUNITIES, 10 (2017).

<sup>358</sup> ABA Standard 3-3.2(c) instructs prosecutors to “keep law enforcement personnel informed” of relevant legal and legal ethics issues and developments as well as prosecution policies and procedures. Section (d) requires a representative from the prosecutor’s office to “meet and confer regularly with law enforcement agencies” regarding prosecution and law enforcement policies. The prosecutor’s office should also assist with training programs for law enforcement personnel, including for “matters submitted for charging, and the law related to law enforcement activities.” CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-3.2(c) (AM. BAR ASS’N 2017).

the creation of a pre-arrest diversion policy.<sup>359</sup> While prosecutors are not ultimately responsible for police policy, they have an obligation to work closely and explore these issues with the police.

Expansion of pre-arrest diversion would simultaneously advance many of the goals articulated by the progressive prosecution movement. To achieve the promise of reduced incarceration and criminalization, progressive prosecutors need to seriously engage with pre-arrest diversion efforts, to try to eliminate certain classes of cases before they even hit their desks.<sup>360</sup> As a result, migrant defendants would also be more protected from immigration enforcement because a wide range of conduct, for instance, certain “quality of life offenses,” could no longer lead to arrest.<sup>361</sup> The criminal to deportation pipeline would close before it even had a chance to open. This policy would protect Black and Brown immigrants who are disproportionately arrested for these kinds of offenses and meet some of the central goals of the movement.

8. *Set up a post-conviction relief review board to review old convictions that resulted in immigration consequences*

The devastating immigration consequences that a criminal conviction may have on a non-citizen cannot be overstated.<sup>362</sup> With this in mind, lead prosecutors should set up an internal post-conviction review board to consider motions to vacate old convictions and/or review old cases on

<sup>359</sup> While prosecutors do not ultimately decide police protocols, they certainly can have influence, depending on the local politics. Cf. Rahel Gebreyes, *The Close Relationship Between Prosecutors and Police Officers*, HUFFPOST (Jan. 12, 2016), [https://www.huffpost.com/entry/police-prosecutor-relationship\\_n\\_56951b56e4b09dbb4bac9218](https://www.huffpost.com/entry/police-prosecutor-relationship_n_56951b56e4b09dbb4bac9218) (describing how prosecutors have generally in the past worked closely with police departments to bring indictments and convictions, resulting in a cozy relationship between the two offices. The bond is described as going beyond day-to-day relationships, with police unions and fraternal orders being common contributors to the political campaigns of prosecutors.). However, tensions and conflict often emerge as well between police and prosecutors, as has been the case in some jurisdictions where progressive prosecutors have been elected. See Meg Hilling, *Relationship Between Prosecutors and Police May be Changing*, NEWSY (June 18, 2020), <https://www.newsny.com/stories/relationship-between-prosecutors-and-police-may-be-changing/> (discussing how progressive prosecutors are now seeking criminal justice reforms to better hold police accountable for wrongdoing).

<sup>360</sup> To truly be “progressive,” some suggest that prosecutors have a duty to undo prior injustices by adopting policies expressly designed to repair. See CTR. FOR POPULAR DEMOCRACY ET AL., *FREEDOM TO THRIVE—REIMAGINING SAFETY AND SECURITY IN OUR COMMUNITIES*, 79-80 (2017), <https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf>. This calls into question whether decriminalization of certain offenses is enough or if additional policies should be pursued to remedy the deep historical and current injustices of the criminal legal system. Progressive prosecutors should think through and support efforts that not only seek to decriminalize certain conduct but question whether more should be done to restore and repair the deep harms caused to Black and Brown communities by the criminal legal system for centuries, including those harms suffered by Black and Brown immigrants enmeshed within.

<sup>361</sup> Some DAs have stopped shy of pre-arrest diversion but instituted other diversion efforts that avoiding booking and charging. E.g., Dan Satterberg, the District Attorney in King County, Washington, cofounded the LEAD program, in which police officers immediately divert individuals in possession of less than a gram of illegal drugs or engaged in prostitution activity. “LEAD differs from other diversion programs because individuals in the program are never booked, charged, or brought to court.” Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 13 (2019).

<sup>362</sup> *Supra* Section I; Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011) (describing the far-reaching consequences of state misdemeanor convictions including deportation and the concurrent misdemeanor representation crisis).



their own initiative where there are adverse immigration consequences.<sup>363</sup> Federal and state courts have varied on their treatment of post-conviction relief, based on ineffective assistance of counsel due to failure to advise on immigration consequences, for convictions that pre-date *Padilla*.<sup>364</sup> While courts ultimately render decisions in post-conviction matters, if the parties agree to a modification and propose a settlement, generally, the matter need not be fully litigated.<sup>365</sup> For this reason, a centralized internal prosecutorial board would be used to review and develop the DA's position on post-conviction relief for convictions both pre and post-*Padilla* (without making a distinction). Such a board may be willing to agree to or suggest a modification and possible settlement. Central tenants to the progressive prosecution movement—fairness and transparency—support the creation of an internal post-conviction review board with a streamlined process to review all prior convictions that have created immigration consequences. The Brooklyn DA's office set up a board for this purpose immediately following *Padilla*, to assess and decide their position on the slew of motions filed after the decision.<sup>366</sup> Salt Lake City's DA's office has tasked a board to consider post-conviction relief motions, not limited to the immigration context.<sup>367</sup>

Given the complexities of post-conviction relief and the rigid requirements for any conviction modification to be recognized for federal purposes,<sup>368</sup> the board must be comprised of individuals

<sup>363</sup> Often defendants will move by motion for post-conviction relief but will first try to seek prosecutorial agreement to move the court jointly, which could help avoid litigation of certain issues and make it theoretically more likely to succeed. See ROSE CAHN, IMMIGRANT LEGAL RES. CTR. & CALIFORNIANS FOR SAFETY & JUSTICE, HELPING IMMIGRANT CLIENTS WITH POST-CONVICTION LEGAL OPTIONS 63-66 (2019), [https://safeandjust.org/wp-content/uploads/CSJ\\_Immigration-ONLINE-appendix-F-021719.pdf](https://safeandjust.org/wp-content/uploads/CSJ_Immigration-ONLINE-appendix-F-021719.pdf). Yet, there is nothing preventing prosecutors from considering, on their own, old cases, and seeking to move to modify the resolution in those cases should they believe such an action is just. Analogously, Larry Krasner created various internal mechanisms to review prior convictions and to move to challenge convictions and/or sentences in certain circumstances. Cf. Tom Jackamn, *As Prosecutors Take Larger Role in Wrongful Convictions, Philadelphia DA Exonerates 10 Men Wrongly Imprisoned for Murder*, WASH. POST.(Nov. 12, 2019), <https://www.washingtonpost.com/crime-law/2019/11/12/prosecutors-take-larger-role-reversing-wrongful-convictions-philadelphia-da-exonerates-men-wrongly-imprisoned-murder/>(the unit is part of a growing wave in prosecutors' offices nationwide, with 49 conviction review units in place in district attorneys' offices). Something similar could exist rooted in immigration considerations.

<sup>364</sup> Some states, as in New York, only permit vacatur where ineffectiveness claim arose after *Padilla*'s issuance. *New York State Court of Appeals Finds Padilla Not Retroactive*, IMMIGRANT DEFENSE PROJECT (June 30, 2014), <https://www.immigrantdefenseproject.org/court-appeals-padilla-not-retroactive/>. Others, like in Massachusetts, have found *Padilla*'s protections retroactive to cases pre-dating *Padilla*. *Student Project: Padilla v. Kentucky-Immigration Consequences of a Conviction: Retroactivity of Padilla in State Courts*, PACE L. SCH. LIBR., <https://libraryguides.law.pace.edu/c.php?g=628454&p=4560949#:~:text=Pursuant%20to%20the%20original%20Teague%20framework%2C%20as%20understood.state%20law%20convictions.%20Padilla%20Retroactive%20in%20New%20Mexico> (last visited on Aug. 30, 2020) (other retroactive states include New Mexico; other non-retroactive states include South Dakota and Maryland).

<sup>365</sup> See ROSE CAHN, IMMIGRANT LEGAL RES. CTR. & CALIFORNIANS FOR SAFETY & JUSTICE, HELPING IMMIGRANT CLIENTS WITH POST-CONVICTION LEGAL OPTIONS 63-66 (2019), [https://safeandjust.org/wp-content/uploads/CSJ\\_Immigration-ONLINE-appendix-F-021719.pdf](https://safeandjust.org/wp-content/uploads/CSJ_Immigration-ONLINE-appendix-F-021719.pdf).

<sup>366</sup> Interview Marianne or Ruben.

<sup>367</sup> See Salt Lake County District Attorney Office forms a Conviction Integrity Unit, SALT LAKE COUNTY DISTRICT ATT'Y, <https://slco.org/district-attorney/conviction-integrity/> (last visited Aug. 30, 2020).

<sup>368</sup> There are stringent criteria for a conviction that has been vacated or modified under state or federal law to be treated as such under immigration law. In order for a conviction or sentence modification to be given weight, the vacatur

who understand these specific nuances. Putting into place a sound and systematic way to address errors that may have occurred in prior matters and/or to seriously consider fairness and equity surrounding convictions that create immigration consequences advances accountability. This board could be housed within the DA's office, and could contain members from the IIU, or even could be addressed by an entity created outside of the DA's office. This external entity might ensure less biased review of old cases<sup>369</sup> and could make recommendations to the DA regarding their position on a post-conviction matter.

Beyond establishing a review board, progressive prosecutors can try to tackle other issues related to post-conviction more broadly. To this end, they may want to support efforts that seek to expand post-conviction options under law.<sup>370</sup> California created a post-conviction remedy in instances where the defense attorney failed to apprise the defendant of an available immigration-safe alternative plea.<sup>371</sup> Legislation can provide a more straightforward vehicle through which post-conviction relief can be achieved which could lessen the work of the prosecutor in these matters. For example, California enacted a statute whereby non-citizens may vacate a case that had been previously dismissed for "deferred entry of judgment" under its prior definition which nevertheless constituted a "conviction" under federal law.<sup>372</sup> This legislation provides a straightforward vehicle and remedy in state law, without having to involve a complex process or much involvement from the prosecutor's office. These legislative efforts seek to address some of the inherent injustices in the immigration system's treatment of prior criminal contacts. This is advantageous to immigrant defendants and progressive prosecutors. It allows prosecutors to prevent unfair results from prior convictions, but requires little involvement from them. Designing positions that seek to address immigrant defendants' post-conviction concerns in a uniform and consistent way will help promote fairness and benefits both sides.

#### 9. *Incorporate immigration considerations in decarcerating efforts and learning from COVID-19 releases*

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must be for legal defect and not solely for immigration or rehabilitative purposes. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) ([I]f a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a 'conviction' within the meaning of section 101(a)(48)(A).); *Matter Thomas/Matter of Thompson*, 27 I&N Dec. 674 (A.G. 2019) (extending the legal defect requirement for sentence modification). Therefore, prosecutors must be mindful that vacatur or modification ordered by the Court must be due to legal defect in order to be recognized by immigration. *See also* ROSE CAHN, IMMIGRANT LEGAL RES. CTR. & CALIFORNIANS FOR SAFETY & JUSTICE, HELPING IMMIGRANT CLIENTS WITH POST-CONVICTION LEGAL OPTIONS 21 (2019), [https://safeandjust.org/wp-content/uploads/CSJ\\_Immigration-ONLINE-appendix-F-021719.pdf](https://safeandjust.org/wp-content/uploads/CSJ_Immigration-ONLINE-appendix-F-021719.pdf).

<sup>369</sup> *See* Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1237 (2016) (discussing how prosecutors have no particular institutional competence to decide public policy for collateral consequences at large and thus might be led to seek collateral consequences based on their workloads or their views on public policy).

<sup>370</sup> Forty-five states, including California, Massachusetts, and New York, have some form of postconviction procedure that allows defendants to have convictions vacated when they were not advised or defended against immigration consequences. *See, e.g.*, CAL. PENAL CODE § 1473.7 (2016); MASS. R. CRIM. P. 30; N.Y. CRIM. PROC. LAW § 440.10. However, some are more restrictive than others. *See* CAL. PENAL CODE § 1016.3 (2016).

<sup>371</sup> CAL. PENAL CODE § 1473.7 (1) (2016).

<sup>372</sup> CAL. PENAL CODE § 1203.43 (2016) (a means of vacating a federal "conviction" obtained under the former definition of Deferred Entry of Judgment for legal error). This statute was designed to address the concern that a case dismissed under state law could still be deemed a federal conviction.

The progressive prosecution movement maintains decarceration as a goal and a tool to address racial disparities present in the jailed population.<sup>373</sup> Yet, many prosecutors have engaged in decarceration efforts that do not adequately account for immigration concerns. Philadelphia DA Larry Krasner engaged in an effort to reduce the sentences and release certain individuals serving long term sentences,<sup>374</sup> but there is no indication that he flagged consideration of the immigration consequences in those decisions. Certainly, shortening jail sentences is positive for most incarcerated individuals and should be pursued, but prosecutors can carefully consider ways in which these efforts might be done that incorporate immigration considerations.<sup>375</sup> For instance, prosecutors could consider, as part of release efforts, to agree to support formal sentence modifications in such a way that might avoid immigration consequences altogether<sup>376</sup> and/or not lead to transfer to immigration custody upon termination of criminal custody.<sup>377</sup> Prosecutors should, alongside decarceration efforts, simultaneously encourage local policymakers to adopt policies refusing to comply with immigration detainers, such that individuals may not be released to immigration custody upon their release from criminal custody.<sup>378</sup> A multipronged strategy to support meaningful decarceration efforts, both pre- and post-trial, would have more impact and would avoid layered harms to immigrant defendants. Simply releasing an individual into another carceral setting—immigration detention—where the same racial disparities are replicated, would inadvertently undermine the purpose of the decarceration effort in the first place.

<sup>373</sup> E.g., Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 2-5 (2019).

<sup>374</sup> See Larry Krasner, *New Policies Announced February 15, 2018*, PHILA. OFFICE OF DIST. ATTORNEY (2018), <https://www.documentcloud.org/documents/4415817-Philadelphia-DA-Larry-Krasner-s-Revolutionary-Memo.html>.

<sup>375</sup> While it is true that more serious offenses tend to have more severe immigration consequences, individuals with convictions might still be eligible for certain defenses against deportation. Because it cannot be presumed that migrants serving long jail sentences will face certain deportation when released from criminal custody (or face immediate transfer to immigration custody), prosecutors should understand local rules in their jurisdiction regarding detainer policies, and consider the specifics of each case as part of their efforts to reduce incarcerated populations. This could mean ensuring that incarcerated immigrants receive immigration advice from independent immigration counsel while incarcerated to understand next steps in their immigration process *before* commuting a sentence. The right to counsel is not guaranteed in immigration proceedings. See KATE M. MANUEL, CONG. RESEARCH SERV., R43613, ALIENS' RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF 6 (2016). These efforts would help ensure that their decisions regarding decarceration meet their goals.

<sup>376</sup> (cite back to fn talking about *Pickering*). For example, if a sentence for a certain kind of theft offense is one year or more it might be considered and aggravated felony for immigration purposes but if the sentence is for less than one year it would not be. However, note under *Matter of Thomas/Thompson*, a sentence modification must be for a constitutional defect in order to be given force in immigration law. See Rose Cahn, Kathy Brady & Andrew Wachtenheim, *AG Overturns Sentence Modification Rule: Matter of Thomas & Matter of Thompson*, IMMIGRANT LEGAL RES. CTR. (Oct. 2019), [https://www.ilrc.org/sites/default/files/resources/matter\\_of\\_thomas\\_sentence\\_pcr.pdf](https://www.ilrc.org/sites/default/files/resources/matter_of_thomas_sentence_pcr.pdf).

<sup>377</sup> Prosecutors do not want to inadvertently release someone from criminal custody to just be taken into immigration custody if that could have been avoided. That would undermine the purpose of the decarceration effort in the first instance.

<sup>378</sup> See *supra* Section I, Part B. Numerous jurisdictions have adopted laws to stop the transference of individuals into immigration custody despite the existence of a detainer. Some have adopted provisions with carveouts for certain non-citizens. See, e.g., N.Y., N.Y.C ADMIN. CODE tit. 10, ch. 1, §§ 9-131, 14-154 (2017) (disallowing NYPD or DOC compliance unless there is a judicial warrant and the individual “poses a significant current danger.”)

Much can be learned from the unprecedented number of individuals released from criminal carceral settings in 2020 in response to COVID-19, that can open up new ways of thinking about decarceration efforts and their impact on immigrant defendants. Some jurisdictions agreed to release incarcerated individuals from criminal custody because jail settings are extremely dangerous hotbeds for COVID-19 transmission and outbreak.<sup>379</sup> The Coronavirus pandemic briefly placed the carceral system under the microscope. It consequently forced our society to question the purpose of incarceration both pre- and post-trial. The folly of locking people in cages came to the forefront. Leaders and communities grappled with the underlying premises of the U.S. punishment system and scrutinized whether incarceration really achieved those purposes. COVID-19 releases and changes in prosecutorial behavior, such as dropping certain cases altogether and changes in the frequency of asking for pre-trial custody,<sup>380</sup> brought into focus that perhaps incarceration is often not needed to address wrongdoing. This reckoning could lead to fundamental changes in the use of incarceration. Beyond the implications COVID-19 releases can have on the use of incarceration in specific cases, there is a larger lesson to draw for the progressive prosecutor.

When something is understood as a crisis, we are better positioned to closely scrutinize its purpose and function. What would happen if the “criminal to deportation pipeline” entered into the popular consciousness as the national crisis that it truly is—one that has steadily increased and led to millions of deportations and family separations well beyond the recent focus on separations at the border? If the entangled systems were understood as such, this too might create the conditions for close interrogation of the entanglement and would put into relief the urgency with which they should be disentangled. Progressive prosecutors should learn from the impact COVID-19 has had on framing and understanding incarceration<sup>381</sup> to consider how to frame and promote understanding of the harms stemming from crimmigration for the electorate. Framing the criminal to deportation pipeline as the calamity it is, could lead to support of changes to the criminal legal system that seek to reduce the harms caused by their marriage.

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<sup>379</sup> E.g., The New Jersey Supreme Court approved an agreement for local law enforcement to release up to 1,000 people from county jails. *NJ Order to Release People in County Jails Breaks New Ground in COVID-19 Pandemic*, ACLU N.J. (Mar. 23, 2020), <https://www.aclu-nj.org/news/2020/03/23/nj-order-release-people-county-jails-breaks-new-ground-covid>; but see Colleen O’Dea, *NJ’s COVID-19 Release Program for Prisoners Is Slammed for Major Failings*, NJ SPOTLIGHT NEWS (May 26, 2020), <https://www.njspotlight.com/2020/05/njs-covid-19-release-program-for-prisoners-is-slammed-for-major-failings/> (criticizing the actual implementation of the release program in that many fewer than 1000 people were released and a number of individuals died in custody).

<sup>380</sup> For examples of organizational responses and calls to action, see *Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of Those in Custody*, FAIR & JUST PROSECUTION (Mar. 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/03/Coronavirus-Sign-On-Letter.pdf>; *Aligning Immigration and Criminal System Demands for COVID-19*, IMMIGRANT DEF. PROJECT (Apr. 2020), <https://www.immigrantdefenseproject.org/wp-content/uploads/immigration-and-criminal-demands-for-covid.pdf>.

<sup>381</sup> For a discussion of how the current crisis led to the May 2020 uprisings and abolition becoming a “household term”, see *Resist Policing Summer 2020 Newsletter: Cooking Up Rebellion*, CRITICAL RESISTANCE (summer 2020), <http://criticalresistance.org/against-policing-summer-2020-rebellions/>. For a discussion of how the crisis of COVID-19 highlights the failings of the prison and detention system, particularly with regards to pretrial detention, see Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 N.W.U. L. REV. ONLINE 59 (2020) (describing the failings of the system in the overcrowding in the jails and how the large numbers of people held in jails is not because they present a true risk but because they are poor, targeted by discriminatory laws and policing practices, unable to make bail, pay for a condition of release, or simply have nowhere else to go).

### 10. Limit information sharing and cooperation with ICE

Chief prosecutors are well within their powers to adopt policies to limit their attorneys' cooperation with or information sharing with ICE. There are a wide range of actions prosecutors can take to this effect. Prosecutors could issue blanket policies forbidding prosecutors to contact ICE regarding individual cases of non-citizens, which sadly was not the case when my client Jacklyn was prosecuted in Queens in 2014. Lead prosecutors can take other affirmative steps to stop systematic information sharing. For example, Larry Krasner provided the second of the three necessary votes required to end the PARS contract, an agreement which allowed ICE access to arraignment data from the Philadelphia Police Department's database.<sup>382</sup> As described above, local prosecutors can also support local legislative initiatives forbidding local police or corrections departments' cooperation with immigration detainers—stopping the turnover of immigrants to immigration custody at the end of criminal proceedings.<sup>383</sup> DA Chesa Boudin signed a moratorium on transferring people to immigration custody from local custody during COVID-19 outbreak,<sup>384</sup> setting an example of how prosecutors can take bold action and use their power in this way.

Prosecutors can engage in other efforts, outside of using their direct authority, to challenge ICE's reliance on the criminal legal system to engage in enforcement. For example, a number of district attorneys have spoken out against ICE's common tactic of arresting non-citizens in criminal court houses.<sup>385</sup> Others have supported similar legislative efforts, such as New York's Protect Our Courts Act, prohibiting ICE arrests inside or on the way to or from all state court appearances.<sup>386</sup> District Attorneys Rachel Rollins of Boston and Eric Gonzales of Brooklyn filed

<sup>382</sup> See Claire Sasko, *Kenney Says City Will End ICE Data-Sharing Agreement*, CITY LIFE (July 27, 2018), <https://www.phillymag.com/news/2018/07/27/philadelphia-pars-ice-agreement/>.

<sup>383</sup> See, e.g., In June 2019, District Attorney Rachael Rollins supported the Massachusetts Supreme Court's decision that attorneys cannot demand immigration status of witnesses in most cases, as well as telling her staff that if they observe ICE, DHS, or other civil immigration authorities "apprehending or questioning parties scheduled to appear in court about residency status in or around the public areas of any Suffolk County courthouse, they are to immediately notify me... my First Assistant, or my General Counsel." See Renee Algarin, *Statement of District Attorney Rachael Rollins on Deployment of Tactical Units in Neighborhoods*, SUFFOLK COUNTY DISTRICT ATTORNEY'S OFF. (Feb. 19, 2020) (Rollins also spoke out against immigration authorities following the deployment of CBP Tactical Units in neighborhoods in her district).

<sup>384</sup> See *Criminal Justice Leaders Call for Protection of Immigrants in Midst of COVID-19 Pandemic*, FAIR & JUST PROSECUTION (May 1, 2020), <https://fairandjustprosecution.org/wp-content/uploads/2020/05/CA-Immi-Transfer-Amicus-Brief-Release-FINAL.pdf> (Chesa Boudin was among those who filed the amicus brief with the California Supreme Court).

<sup>385</sup> E.g., Noelle Phillips, *Mayor Hancock Tells ICE: Back Off Arrests in Courthouses and Near Schools*, DENVER POST (APR. 6, 2017), <http://www.denverpost.com/2017/04/06/denver-ice-agents-courthouse-school-raids/> (Denver DA Beth McCann condemning arrests); Catherine Shoichet, *L.A. Officials to ICE: Stop Calling Yourselves Police*, CNN (Mar. 13, 2017), <http://www.cnn.com/2017/03/10/us/immigration-ice-police-los-angeles/index.html> (LA City Attorney Mike Feur condemning ICE's predatory enforcement practices).

<sup>386</sup> Jonathan Sperling, *DAs Urge Legislature to Pass Protect Our Courts Act, Stanch ICE's Courthouse Presence*, QUEENS DAILY EAGLE (June 17, 2019), <https://queenseagle.com/all/district-attorneys-urge-legislature-to-pass-protect-our-courts-act> (District attorneys across New York State urging the legislature to pass the Protect Our Courts Act during June of 2019); Protect Our Courts Act (S425/A2176) (on July 22, 2020, the legislation was enacted); *Governor Cuomo Signs the 'Protect Our Courts' Act*, GOVERNOR ANDREW M. CUOMO (Dec. 15, 2020), <https://www.governor.ny.gov/news/governor-cuomo-signs-protect-our-courts-act>.

lawsuits to try to keep ICE out of courts. The latter of which was victorious in the district court in June 2020,<sup>387</sup> shortly before the passage of the Protect Our Courts Act.

### *11. Take a stand on external efforts and legislation impacting immigrants*

A robust immigration agenda is not limited to the progressive prosecutor modifying and reimagining their own policies and practices in ways to address disproportionate harms to immigrant defendants. While not legislators themselves, progressive prosecutors can work closely with local and state legislators to advance statutory reforms that systemically tackle harsh immigration consequences that arise out of the criminal legal system.<sup>388</sup> For example, California,<sup>389</sup> New York,<sup>390</sup> Nevada,<sup>391</sup> and Washington<sup>392</sup> have enacted legislation reducing the maximum penalty for a misdemeanor conviction from one year to 364 days, in an effort to avoid mandatory deportation under federal law.<sup>393</sup>

It is also imperative that progressive prosecutors see their role and work as intersectional. Because the criminal legal system is interconnected to other systems and creates a host of other consequences for those it punishes,<sup>394</sup> progressive prosecutors should be concerned with and take a stand on issues outside of four walls of their work and outside of the criminal legal system. It is important that progressive prosecutors take a stand on immigration issues that brush up against their expertise as part of their immigration agenda. DA Chesa Boudin has done so through a series of actions: 1) disavowing ICE practices of detaining juveniles,<sup>395</sup> 2) critiquing the ongoing

<sup>387</sup> *New York v. U.S. Immigration & Customs Enft*, 19-cv-8876(JSR) (S.D.N.Y. Jun. 10, 2020); Catherine E. Shoichet & Bian Vitagliano, *Federal Judge in New York Rules ICE Courthouse Arrests Are Illegal*, CNN (June 10, 2020), <https://www.cnn.com/2020/06/10/us/new-york-ice-courthouse-arrests/index.html>.

<sup>388</sup> California has enacted another series of immigration reform laws that seek to remedy some of the immigration consequences of criminal contacts. For instance, California has enacted a legislative remedy to remove, for immigration purposes, a conviction that has been dismissed pursuant to a deferred entry of judgment. **CAL. PENAL CODE § 1203.43 (2016)**

<sup>389</sup> CAL. PENAL CODE §18.5 (2014).

<sup>390</sup> See NYPL § 70.15(1) and (3)(2019), as amended by the Budget Bill, Part OO, § 1, and NYPL § 70.15(1-a)(a), as added by the Budget Bill, Part OO, § 2.

<sup>391</sup> NEV. REV. STAT. § 193.140 (2013).

<sup>392</sup> WASH. REV. CODE § 9A.20.021 et seq. (2011).

<sup>393</sup> See *Advocates Cheer as One Day to Protect New Yorkers Act Passes in NY Budget Deal*, IMMIGRANT DEFENSE PROJECT & FORTUNE SOC'Y (Apr. 1, 2019).

<sup>394</sup> See RUTH GILMORE WILSON, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 246 (2007) (“[v]oters and legislators decided to lock immigrants out of social services, to lock more people into prison for part or all of their lives, and to put a personal lock on opportunities in public sector education, employment, and contracts. This triple-pronged attack on working people demonstrates the potential for identifying linkages between immigrant, labor, and antiprison activism.”).

<sup>395</sup> See Samantha Michaels, *Immigrant Kids Were Restrained to Chairs with Bags Over Their Heads at a Juvenile Hall in Virginia*, MOTHERJONES (Jan. 22, 2020), <https://www.motherjones.com/crime-justice/2020/01/district-attorneys-raise-concerns-about-treatment-of-migrant-teens-at-a-virginia-juvenile-hall/> (a group of district attorneys from around the country—including Chesa Boudin, have filed a brief citing concerns about the teens’ treatment).

detention of migrants during the COVID-19 outbreak, and 3) supporting efforts to close all immigration detention facilities in the state of California.<sup>396</sup>

## 12. Set an agenda in partnership with community and implement open budgeting

One of the biggest critiques of the prosecutor's office stems from the opaque nature of its operation. A way to address this might be to have more open processes for community members to help set the agenda and priorities of prosecutor.<sup>397</sup> This kind of engagement is paramount to setting an agenda that is actually responsive to the communities' needs and the realities on the ground. Prosecutors are tasked with representing the "people," and the electorate should have a say over response to crime.<sup>398</sup> Too often there is policy without input from those impacted or without letting them lead in policymaking. That kind of shift is necessary to enact meaningful policy change on all fronts.<sup>399</sup> In order to devise an immigration agenda specifically, progressive prosecutors must build trust with immigrant communities and organizations serving them to better understand the realities of immigration enforcement in the area. Community desires must be incorporated into policy. The realities on the ground should shape the immigration agenda, as there are significant differences in enforcement depending on where an individual is located in the country, and this is always evolving.

Another way to address critiques of the lack of transparency of the prosecutor's office would be creation of a participatory budgeting process for the allocation of prosecutorial funds. This would provide increased transparency and accountability—a call the progressive prosecution movement has promised to answer. As Martin Luther King, Jr., famously said: "budgets are moral documents."<sup>400</sup> This has renewed meaning today as cities have recently been pushed by organizing efforts and local uprisings to reinvest funds into social programs, diverted from the police.<sup>401</sup> Abolitionist organizations have long demanded participatory city budget processes. The Black

<sup>396</sup> See Tatiana Sanchez, *Coronavirus: SF D.A., Activists, Doctors Call for Undocumented Immigrants' Release*, S.F. CHRON (Mar. 26, 2020), <https://www.sfchronicle.com/bayarea/article/Coronavirus-SF-district-attorney-activists-15160016.php> (Chesa Boudin, DA of San Francisco was amongst those pressuring Governor Gavin Newsom to use his executive power to close the detention centers in the state).

<sup>397</sup> E.g., Eric Gonzales launched a Justice 2020 Initiative whereby he included a host of community members including clergy, defense counsel and others to help set priorities for the future of his office. e.g. *Justice 2020 Action Plan—Press Release*, BROOKLYN DISTRICT ATTORNEY'S OFFICE (Mar. 11, 2019), <http://www.brooklynda.org/justice2020/>.

<sup>398</sup> See Ryan Grim & Akela Lacy, *Progressive Prosecutor Movement Makes Major Gains in Democratic Primaries*, INTERCEPT (Aug. 6, 2020), <https://theintercept.com/2020/08/06/district-attorney-races-progressive-prosecutors/> (Kim Gardner said that the broad coalition of people "came out against a powerful status quo" to elect her are evidence that voters support the need for change).

<sup>399</sup> *Id.*

<sup>400</sup> See THE CTR. FOR POPULAR DEMOCRACY ET AL., FREEDOM TO THRIVE: REIMAGINING SAFETY AND SECURITY IN OUR COMMUNITIES 3 (2017), <https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf> (discussing the moral nature of a budget).

<sup>401</sup> See THE CTR. FOR POPULAR DEMOCRACY ET AL., FREEDOM TO THRIVE: REIMAGINING SAFETY AND SECURITY IN OUR COMMUNITIES 79-80 (2017), <https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf> (describing participatory budgeting).

Youth Project 100 (“BYP100 Chicago”) has pushed for participatory city budgeting in Chicago, arguing the public should have the power to defund city police and reallocate for reinvestment in service that can enhance Black and Brown communities’ futures, like sustainable economic projects, public education, health care, etc.<sup>402</sup>

While progressive prosecutors may be reluctant to open up their budgets to participation from the public, it is worth contemplating and, at a minimum, considering how the process might be more transparent. Extreme budget cuts resulting from the COVID-19 outbreak and the concurrent demands for racial justice, could be the right moment for prosecutors and those seeking the office to rethink how budgets are made. If moving away from criminalization is a true goal, progressive prosecutors should think of ways they may create budgets that reflect a move away from policies rooted in retributive punishment. Prosecutors could grapple with the abolitionist calls to defund criminalization at this moment where funds are scarce.<sup>403</sup> However, simply taking money away is not enough to address the ills of criminal legal system. Reinvestment back in communities is critical to meet the needs and allow communities to flourish. Money should not just be cut from prosecutorial budgets but be diverted to efforts that seek to build community power and safety.<sup>404</sup>

## **Conclusion**

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<sup>402</sup> See THE CTR. FOR POPULAR DEMOCRACY ET AL., FREEDOM TO THRIVE: REIMAGINING SAFETY AND SECURITY IN OUR COMMUNITIES 20 (2017), <https://populardemocracy.org/sites/default/files/Freedom%20To%20Thrive%2C%20Higher%20Res%20Version.pdf> (demanding a participatory city budget in which the public has the power to defund the Chicago Police Department and reinvest those resources in Black futures by setting a living wage and by fully funding healthcare, social services, public schools, and sustainable economic development projects).

<sup>403</sup> See Section III, Part B.

<sup>404</sup> Although prosecutors might not have control over how the city reallocates funds diverted from their office, they could try to earmark funds for a certain purpose or publicly state their hopes for how the funds might be spent. Further, they could work with local and state government to advocate for the investment of funds in a particular manner.