

Defense Lawyering in the Progressive Prosecution Era Jenny Roberts*

The so-called “progressive prosecution” movement, at first quietly funded by George Soros and then much less quietly supported by a broader coalition,¹ has resulted in the election of a number of prosecutors in major cities and suburbs who pledge to shrink and reform the criminal legal system. As one news article described things, “[s]ounding more like liberal activists and civil rights lawyers than traditional hard-nosed DAs, the prosecutors are seeking to transform criminal justice systems. ‘Philadelphia doesn’t have a prosecutor,’ says U.S. Atty. William McSwain, the top federal law enforcement official in the city and a leading adversary of [recently-elected DA Larry] Krasner. ‘The city has a public defender with power.’”²

It is certainly not the case that Philadelphia, or any other place with a progressive prosecutor, has instead a public defender with power. After all, Krasner is still prosecuting plenty of people. And the jury is still out on which if any of these recently-elected prosecutors are truly “progressive,” if there is even consensus about the meaning of that term. However, significant change has already happened in some jurisdictions. This includes prosecutors declining to charge in entire categories of low-level misdemeanors,³ and, more recently, a small number of prosecutors joining defense counsel on motions for release due to the COVID-19 pandemic.⁴ There is a growing body of policy papers and legal academic scholarship devoted to the topic of a progressive prosecution, including one article entitled “The Progressive Prosecutor’s Handbook.”⁵ An emerging body of empirical work studies these prosecutors, often using data those very offices provide.⁶ There is an

* Professor of Law and Co-Director, Criminal Justice Clinic, American University Washington College of Law.

¹ See, e.g., Matt Ferner, *George Soros, Progressive Groups to Spend Millions to Elect Reformist Prosecutors*, HUFFINGTON POST, May 12, 2018, <https://www.politico.com/story/2016/08/george-soros-criminal-justice-reform-227519>; https://www.huffpost.com/entry/george-soros-prosecutors-reform_n_5af2100ae4b0a0d601e76f06; See also Hey, Meet Your DA!, <https://meetyourda.org/> (ACLU of Northern California project featuring video of John Legend explaining that “[i]t is up to every Californian to make sure our elected DAs represent our interests in the criminal justice system”); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1 (2019).

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

³ See, e.g., Larry Krasner, *New Policies Announced February 15, 2018*, Philadelphia District Attorney, <https://www.documentcloud.org/documents/4415817-Philadelphia-DA-Larry-Krasner-s-Revolutionary-Memo.html> (publicly-released internal office policy memo from Krasner directing his line prosecutors to “decline certain charges,” including possession of marijuana “regardless of weight,” paraphernalia or buying from a person when the related drug is marijuana, and most prostitution charges); Rachel Rollins for District Attorney, *Charges to Be Declined*, (last visited Jan. 23, 2012), <https://rollins4da.com/policy/charges-to-be-declined/> (listing fifteen types of charges with a default policy of declination that can be bypassed only in exceptional circumstances and with supervisory permission, including all drug possession, trespassing, larceny under \$250, disorderly conduct, disturbing the peace, minor driving offenses, and some resisting arrest charges).

⁴ See Eda Katherine Tinto and Jenny Roberts, *Covid and Compassion*, Oh. St. J. Crim L. (forthcoming 2021).

⁵ David Allan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. 25 (2017).

⁶ See, e.g., Vera Instit. of Justice, *Reshaping Prosecution* (“Vera is partnering with prosecutors to put their campaign promises into action as concrete, data-informed policies and practices.”).

organization run by progressive prosecutors, and another focused on electing them.⁷ In short, there is a lot of attention right now on just about all facets of the progressive prosecution movement.

But what of the defense lawyer representing clients in a so-called progressive prosecution jurisdiction? For some public defender offices and private defense attorneys, things changed overnight—from a highly-charged adversarial relationship with a harsh law-and-order prosecutor to, well, something quite different. In some jurisdictions, at least some members of the defense bar could be seen as less progressive (or less protective of defendants' rights) than the newly-elected head prosecutor.⁸ Some of the things defenders had to fight hard to achieve for clients—release without bail on misdemeanor cases, diversion for low-level cases, dismissal of marijuana charges—might suddenly be a given. In some jurisdictions, defenders may have supported the progressive prosecutor during the election. Now what? At least on its face, “the allure of the progressive prosecutor, and the chief selling point among proponents of reform, is that she can use her expansive powers to promote more just outcomes for defendants.”⁹ Is this also the chief selling point for defenders and their clients?

There is no handbook for the defender in a progressive prosecution jurisdiction. Note that I am not writing here about defense lawyers who fail to zealously represent their clients. That is another issue, a problem with much commentary in the literature on underfunded defense, defender systems, and ineffective assistance of counsel.¹⁰ While that is an important problem, this article focuses on the zealous, committed defender who now faces new choices after the election of a progressive prosecutor. This article will address some of the overarching issues for these defenders, including:

- What is zealous advocacy in a place where the prosecutor is touted—or even touts herself—as the change agent for reform?¹¹
- How do defenders in such jurisdictions avoid being seen by their clients and clients' families as complicit with prosecutors, when both sides appear to be on the same page and when defenders often already struggle to gain their clients' trust?¹²
- Related to both questions above, the “evil prosecutor” trope (even if not expressed that way) is intertwined with the call for robust defense lawyering. How can the need for well-funded, robust defense be articulated in a progressive prosecution

⁷ See Fair and Just Prosecution, <https://fairandjustprosecution.org/> (describing how the organization “brings together newly-elected local prosecutors as part of a network of leaders committed to promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility.”), <https://realjusticepac.org/> (“The Real Justice PAC works to elect reform-minded prosecutors at the county and municipal level who are committed to using the powers of their office to fight structural racism and defend our communities from abuse by state power.”).

⁸ See, e.g., San Francisco District Attorney (describing how newly-elected DA Chesa Boudin, a former public defender “rejects” old models for public safety and seeks “a progressive path forward”), <https://www.sfdistrictattorney.org/about-us/>.

⁹ Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 762 (2018).

¹⁰ See, e.g., [too many possibilities to cite, add later].

¹¹ See *infra* Part I.

¹² See *infra* notes 51-54 and accompanying text.

jurisdiction (or how to avoid losing funding, since there is—some will argue--less to do)?¹³

- Related to all three prior points, how should defenders respond when progressive prosecutors claim the narrative on reform as their own,¹⁴ getting press attention and putting out public statements and memoranda? This usually happens against the backdrop of greater prosecutorial resources for such publicity, with defenders in many jurisdictions unlikely to have publicity staff.
- How much should defenders collaborate with the progressive prosecutor?¹⁵ What are the pros and cons of cooperative endeavors? Does it differ if it is cooperation for systemic reform rather than within the context of an individual case? A microcosm of these questions can be found in debates over the role of defense counsel in problem-solving courts, which are touted as collaborative and cooperative rather than adversarial (and are problematic for that same reason).
- How can defenders best use the time and resources they might have otherwise spent on advocating for things that the progressive prosecutor might already support, such as broader discovery, no cash bail, or more declination and diversion?¹⁶

It is impossible to embark on a discussion of defense lawyering in a progressive prosecution jurisdiction without a foray into the meaning of “progressive prosecution.” To keep the focus here on defenders, I will only briefly explore this threshold issue. The term “progressive prosecutor” “means many different things to many different people.”¹⁷ Noting the importance of definition and classification—in part to expose those who might claim the title “to advance their careers and yet sidestep growing critiques of mass

¹³ See, e.g., Katie Watkins, [Harris County Leaders Vote Against District Attorney’s \\$20 Million Budget Request To Hire More Prosecutors](https://www.houstonpublicmedia.org/articles/news/2019/02/12/321434/commissioners-court-votes-against-oggs-20-million-budget-request-to-hire-more-prosecutors/), *Houston Public Media*, Feb. 12, 2019 (describing how progressive prosecutor, Harris County DA Kim Ogg, called for a \$20 million budget increase to hire 102 more line prosecutors, arguing that she needed this to reduce the county’s backlog of cases), at <https://www.houstonpublicmedia.org/articles/news/2019/02/12/321434/commissioners-court-votes-against-oggs-20-million-budget-request-to-hire-more-prosecutors/>. After being denied by the County Commissioners Court, Ogg scaled down her requests and repeated them several times. [Harris County D.A. Kim Ogg Didn’t Deliver On Her Promise Of Reform. Now Another One Of Her Former Prosecutors Is Running Against Her. - The Appeal](#)

¹⁴ See *infra* text accompanying notes 34-35 (detailing Boston DA Rachel Rollins’ describing defenders as villains and positing herself as the hero-reformer)

¹⁵ See, e.g., Philadelphia Participatory Defense Hubs, <https://phillydefenders.org/criminal-justice-reform-advocates-push-for-community-driven-approach-of-participatory-defense/> (“Participatory defense is a pilot initiative that includes intervention by the Defender Association of Philadelphia, the Philadelphia District Attorney’s Office, courts, and the community. The program pairs individuals accused of crimes with stakeholders that provide support by walking the defendant and their family through the criminal justice system. It also provides prosecutors, defenders and judges with a clearer picture of the person behind the alleged crimes.”).

¹⁶ Matt Wakins, *Prosecutor Power #2: A Public Defender on the Urgency of Reform*, Center for Court Innovation, <https://www.courtinnovation.org/publications/public-defender-power-prosecutors> (Interview with Brooklyn public who describes the three most important changes progressive prosecutors can make: Charging decisions, Bail, Open Discovery).

¹⁷ Benjamin Levin, *Imagining the Progressive Prosecutor*, *MINN. L. REV.* (forthcoming), <https://ssrn.com/abstract=3542792> at 3-4; see also EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019).

incarceration,”¹⁸—Benjamin Levin offers a helpful typology of “four ideal types” of progressive prosecutors.¹⁹

First is the “progressive who prosecutes,” someone who is a “progressive in the sense of her general politics,” but does not “bring her politics to her job or to the administration of criminal law.”²⁰ Levin quickly dismisses these prosecutors as the “least likely to receive the progressive prosecutor mantle.”²¹ Next is the “proceduralist prosecutor,” who focuses on getting her house in order by fighting corruption and misconduct, and bringing procedural justice by ensuring defendants are given fair process.²² While these prosecutors pursue positive goals like increasing transparency and strengthening conviction integrity units, they risk increasing the perceived legitimacy of the criminal legal system when it is not clear that they would address injustices in other areas.²³ The third type is the “prosecutorial progressive,” who embraces her role and “the power of state violence”, but exercises that power to address “structural inequality and substantive . . . justice.”²⁴ These prosecutorial progressives “accept[] the fundamental legitimacy and desirability of the criminal system” but seek to redirect resources to advance different priorities. These include addressing crimes “committed by powerful defendants” or that “further historical inequality or subordination,” or “redistributing criminal justice resources.”²⁵ Finally, the “anti-carceral prosecutor harbors no illusions about criminal law as a vehicle for positive change.”²⁶ Anti-carceral prosecutors view the system as “fundamentally flawed” and the prosecutor’s job as “shrink[ing] those institutions, or perhaps do away with them altogether.”²⁷ This fourth type of prosecutor “advocates for a divestment from prosecution and the criminal system” and “seeks to enact policies of declination” for certain categories of crime.²⁸ The anti-carceral prosecutor views incarceration as the problem, and would

¹⁸ *Id.*

¹⁹ *Id.* at 12 (“These types are not meant to be exhaustive and are, of course, potentially overlapping.”); *see also* Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. OF CRIM. LAW AND CRIMINOL. 707, 712 (2020) (“Although commentators often describe progressive prosecution as a challenge to a traditional prosecutor model, that dichotomy is misleading and likely counterproductive. Progressive prosecutors take advantage of the fact that there is no consensus about what prosecutors should be doing.”)

²⁰ Levin, *supra* note 17, at 12-13 (describing Kamala Harris as an example of a prosecutor who is progressive views on a range of issues did not necessarily extend to her views on criminal justice). Although these prosecutors typically fall left of the political center, Levin notes how equating “progressive” in the realm of criminal policy with a party glosses over the bipartisan history of mass incarceration.

²¹ *Id.* at 12.

²² *Id.* at 16, 17.

²³ *Id.* at 17-18 (discussing a range of procedural reforms that extend to factoring in the financial cost of incarceration in sentencing recommendations). *See also id.* at 20-21 (discussing how proceduralist prosecutors are limited in addressing problems other areas of the criminal system like the policing stage, the legislative stage, the trial stage, and the sentencing stage).

²⁴ *Id.* at 21.

²⁵ *Id.* at 21, 25; *see also id.* at 24 (discussing U.S. Attorney Preet Bharara’s focus on white collar crime and D.A. Larry Krasner’s focus on wage theft as examples progressive priorities that address structural inequality and substantive justice).

²⁶ *Id.* at 27; *see also id.* at 28 (“The anti-carceral prosecutor’s stance comes closest to resembling those embraced by prison abolitionists and other more radical critics of the carceral state.”).

²⁷ *Id.* at 27.

²⁸ *Id.* (examining different policies of declination like D.A. Rachael Rollins’ promises not to prosecute certain “quality of life offenses” and Cook County State’s Attorney Kim Foxx’s decision to not prosecute individuals for diving with licenses suspended for inability to pay fines or fees).

push to treat all defendants with the “lenience, mercy, and humanity often reserved for the most powerful.”²⁹ At the far end of this category, “the pure anti-carceral prosecutor would see her function purely as scaling back the system. ‘Doing justice’ to this prosecutor entails not prosecuting at all.”³⁰

Against this backdrop, I could set out a typology of defense lawyers in progressive prosecution jurisdictions. For example, there are abolitionist defenders, working to replace this country’s extreme over-reliance on the criminal system to solve societal problems with less racist, and more humane and effective approaches. These defenders would push hard for lasting, systemic change beyond even the “pure anti-carceral prosecutor.”³¹ Other defenders—let’s call them “reform defenders”—might believe in the fundamental soundness of the criminal legal system, at least for more serious offenses, but work for major reform relating to issues including decriminalization of low-level offenses, procedural fairness, and reform of overly-punitive felony sentencing schemes. Still further along the defense lawyer spectrum would be those who are simply thankful to have a progressive prosecutor in place and do not seek to rock the boat. Indeed, the prosecutor may have come from the defender’s office, stepping from one role into the other. These “new status quo” defenders will fulfill their role in the adversary system but are satisfied with allowing the prosecutor to lead reform efforts. Finally, in a typology that is far from complete, there are non-progressive defenders. This group has generally less progressive positions than the elected prosecutor. They might be former prosecutors now in private practice, or perhaps defenders who do the work because they enjoy litigation and believe everyone has a right to counsel,³² but they will view some of the new prosecutor’s policies that benefit their clients as an undeserved windfall.

Categorizing different defender types within a progressive prosecution context is no easy task, in part because the outlook and approach of defense attorneys may differ significantly depending on the actual situation on the ground in the progressive prosecutor jurisdiction. However, Levin’s categories helpfully describe the setting for many situations on the ground, and the remainder of the article will occasionally reference his typology in considering the defense role. Instead of further pursuing the task of setting out a defender typology, this Article will consider defense lawyering in the progressive prosecution era in two ways: lawyering in individual cases and lawyering for systemic change.

Before turning to specific examples in those two broad areas, Part I will offer some preliminary (cautionary?) thoughts to frame the later discussion of individual and systemic approaches a defender might take in a progressive prosecution jurisdiction. This frame is the narrative of prosecutor-as-criminal-legal-system-reformer, -transformer, or even –hero, that some progressive prosecutors seek to advance and others do not disclaim. The answer is not that defenders should claim this narrative, as they do not own it. However,

²⁹ *Id.* at 28.

³⁰ *Id.* at 29 (describing the “pure” anti-carceral prosecutor as “a sort of double-agent committed to destroying the system from within”).

³¹ Note that I do not agree with Levin’s label of “pure anti-carceral” as applied to any prosecutor, since they will all incarcerate and even the most progressive will likely be able (or willing) to scale back only to a limited extent.

³² See Barbara Allen Babcock, *Defending the Guilty*, 32 CLEVELAND L. REV. 175, 177 (1983) (listing one reason for doing defense work as “the garbage collector’s reason,” and describing it as “Yes, it is dirty work, but someone must do it”).

nor should defenders simply ignore this narrative, as doing so might negatively affect their relationships with clients, their families, and the communities that defenders serve.

Part II addresses the most immediate issue for defense lawyers in a jurisdiction with a newly-elected progressive prosecutor: what will change in the day-to-day prosecution of their individual clients, given new policies and perhaps new personnel?³³ What changes should defenders make in their individual representation, to get better outcomes for clients? Although such changes could touch upon every phase of a criminal case—from charging to sentencing and any post-conviction litigation—this Part will consider defense advocacy around charging decisions and plea bargaining with the progressive prosecutor to explore these broader questions of individual representation.

Finally, Part III turns to the defender’s role in advocating for systemic change in the potentially (although not necessarily) receptive environment of a progressive prosecution jurisdiction. While there are any number of potential reforms or transformation in the mass criminalization era, Part II considers three: defenders pushing progressive prosecutors to give up some of their own funding; defenders challenging prosecutors to move beyond low-hanging fruit like declinations in minor misdemeanor cases and take on more difficult issues relating to more serious and violent charges; and defenders collaborating with the prosecutor on certain projects.

I. Defenders Faced with Prosecutors Who Claim the Reform Narrative

“There’s this premise out here that somehow people who are public defenders are the heroes and the DA’s are the villains,” [Boston DA Rachel Rollins] said. ‘I am not going to allow that to continue any longer.’³⁴ Rollins made this incendiary statement while a guest on an April 2020 call-in radio show, where she lashed out at defenders after one caller described how his attorney had failed to return his phone calls. Among other critiques, Rollins squarely positioned her office as the real voice for reform of the criminal legal system. Declaring that “I’m not going to let these defendants suffer in silence,” Rollins went so far as to urge defendants to contact her office to get information on their cases.³⁵

Putting aside Rollins’ inappropriate attacks on the defense bar, her reaction demonstrates how she—a prosecutor who could be characterized as anti-carceral at least on some low-level cases and perhaps a “prosecutorial progressive” on others³⁶—both sees herself, and wants the public to see her (and her office), as the reformer-hero. And she goes even further, suggesting that the defender is a villain. This puts defenders in her jurisdiction in an odd situation. Defending themselves against her specific attack on the

³³ See *infra* notes __, discussing Larry Krasner firing high-level prosecutors and hiring new attorneys right out of law school in an attempt to change the office culture.

³⁴ Andrea Estes, *District Attorney Rollins Calls Public Defenders Too White And Privileged, Setting Off a Storm Of Protest*, Boston Globe (May 5, 2020), <https://www.bostonglobe.com/2020/05/05/metro/district-attorney-rollins-calls-public-defenders-too-white-privileged-setting-off-firestorm-among-defense-lawyers/> (“When you hear in my voice my disgust and outrage about CPCS not calling people back — their overwhelmingly privileged staff that aren’t calling back poor, Black, and brown people because they’re saying they’re overworked and busy”).

³⁵ *Id.* Although Rollins’ entire tirade about public defenders was soundly critiqued, telling represented defendants to contact prosecutors who under ethics rules should not be speaking with them was particularly problematic.

³⁶ See Ben Levin typology, *supra* notes 19-30.

radio program is one thing;³⁷ figuring out where they fit into the reform narrative, and the ways that Rollins' statements might affect their relationships with their clients, is a much more nuanced issue.

Not all progressive prosecutors make such radical, extreme claims as Rollins.³⁸ Indeed, some who have adopted the mantle of progressive prosecutor and reformer may still pursue policies that are more punitive than expected, given national trends on criminal legal system reform. For example, former defender Mark Gonzalez, described in one news article as the “tattooed star of the ‘progressive prosecutor’ movement,” has successfully implemented some reforms in the Nueces County District Attorney’s Office but continues to pursue the death penalty.³⁹ Gonzalez claims that he wants his stance on the issue to reflect what the people of Nueces County believe (and that this would somehow be reflected through jury decision-making in a small number of capital sentencing hearings).⁴⁰ During his first two years in office, Gonzalez left the death penalty on the table as an option in at least six cases.⁴¹ Gonzalez’s stance on the death penalty may demonstrate the limits of how much reform can be expected from progressive prosecutors in hard-won jurisdictions.⁴² Defenders in similar jurisdictions may not find themselves challenged to reclaim the reformer narrative, since the prosecutor may not be easily able—or even want—to claim it for himself.

It is worth pausing here to note that the term “reform” itself might be considered problematic, at a time of calls for abolition and defunding.⁴³ As abolition scholars have described, reform around the edges of existing laws and systems fails to address the deeper, underlying issue of law as a system designed to oppress, with deep, direct ties to slavery and white supremacy.⁴⁴ Many progressive prosecutors can be seen as calling for

³⁷ The defense community did respond. See The Committee for Public Counsel Services, <https://twitter.com/BobMcGovernJr/status/1256317684632993792/photo/1> [link to the actual letter only via twitter]; see also <https://masslawyersweekly.com/2020/05/14/rollins-attack-on-cpcs-unfounded-and-unfair/>. Rollins replied to the CPCS letter, <https://d279m997dpfwgl.cloudfront.net/wp/2020/05/DA-Rachael-Rollins-CPCS-MACDL-Letter-05.06.20-Final.pdf>.

³⁸ And note that Rollins has been more progressive than many other prosecutors in other areas. In particular, she both announced and then published a list of 15 misdemeanors that her office will not prosecute under most circumstances. See *infra* text accompanying notes __ - __.

³⁹ Michael Barajas, *The Tattooed Star of the ‘Progressive Prosecutor’ Movement Braces for His First Death Penalty Trial*, Texas Observer (Jan 23, 2019); see also Carimah Townes, *Is Mark Gonzalez the Reformer He Promised to Be?*, The Appeal (Nov. 21, 2017) (expressing skepticism about Gonzalez’s continued use of prosecutors who worked for his predecessor, including those “eager to ‘convict at all costs’” and commenting that it would be hard to change the mentality of some prosecutors who overcharge).

⁴⁰ Barajas, *supra* note 39 (pointing out that Gonzalez’s conservative stance on the use of the death penalty matches the cautious approach that other reform-minded prosecutors in Texas have adopted).

⁴¹ *Id.*

⁴² Gonzalez has commented on the difficulties of his decision-making process, given the narrowness of his support base in Nueces County. Townes, *supra* 39 (“Almost half the [voters] didn’t think I was the right person. I’m trying to earn people’s vote every single day.”)

⁴³ Interestingly, although activists and scholars have called for defunding and abolition of both the police and prisons, there does not appear to be a call for abolishing prosecutors. Although surely many would consider that a natural byproduct of police and prison abolition.

⁴⁴ See Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 20-29 (2019) (describing the abolitionist analysis of the origins of policing within slave patrols and other deliberate state means of oppressing Black Americans); ANGELA DAVIS, ARE PRISONS OBSOLETE? (2003); Ruth Wilson Gilmore, RACHEL HERZING AND JUSTIN PICHE, HOW TO ABOLISH PRISONS: LESSONS FROM THE MOVEMENT AGAINST IMPRISONMENT (2011);

“reformist reform,” meaning they fail to dismantle systemic race and class biases and instead tinker around the edges trying to fix what is—to some—an unfixable criminal legal system.⁴⁵ By contrast, “[t]ransformative reforms recognize that the problem of racial injustice within the criminal legal system is much deeper than anything an individual prosecutor can fix. Reforms should disrupt the power imbalance between the prosecutors and the prosecuted because a criminal legal system that operates as a racial caste system is illegitimate.”⁴⁶ However, the very idea of a transformative prosecutor is difficult to conceive. Further, even the most progressive prosecutor is unlikely to seriously disrupt their own power and hand more over to others, including defenders. After all, that prosecutor ran on a platform that likely included the claim that *they* would achieve the reform, not step back to allow others to transform. This dynamic is reinforced by and intertwined with the well-studied concept of how the powerful are reluctant or even unable to give up their power.⁴⁷

While defenders might support and work towards transformative reform, the very idea of lawyers claiming ownership of criminal legal system reform is troubling. Critical race theorists have long argued “that any significant transformation of the social structure of United States society is far more likely to occur through mass political movements than through litigation.”⁴⁸ Current abolition scholars similarly describe how lawyers might assist with—but not lead—community activists’ efforts for deep structural change.⁴⁹ Further complicating things is the fact that defense lawyers are an integral part of the criminal legal system that transformers seek to dismantle or fully reconfigure. While many

Allegra McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. Rev. 1156 (2015). See also *Louisiana v. Bryant*, No. 2020-KO-00077 (LA S.Ct. July 31, 2020) (Johnson, C.J., dissenting) (detailing, in dissenting from denial of cert grant for man sentenced to life at age 39 in 1997 for unsuccessful attempt to steal hedge clippers, how southern states used “Pig Laws” to impose “extreme sentences for petty theft associated with poverty” to allow continued “forced labor (as punishment for a crime) by African Americans even after the passage of the Thirteenth Amendment”).

⁴⁵ See *Paradox*, supra note 9, at 759 (“Mainstream progressive prosecution is silent on the project of redistributing power, and instead focuses on encouraging highly empowered individuals to usher in fairer policies.”). See also Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 104 (2020) Transformative Reforms of the Movement for Black Lives 4–5 (2017) (“Whereas reformist reforms aim to improve, ameliorate, legitimate, and even advance the underlying system, non-reformist reforms aim for political, economic, social transformation: for example, socialism or abolition democracy.”). Cf. Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L. J. (forthcoming 2021) (ssrn draft at 7, “Thanks to the radical visions of social movements, a vast range of possibilities stretches out before us, from cementing our current policing practices with improved specialization and increased resources, to abolishing our institutions of policing altogether.”).

⁴⁶ See *Paradox*, supra note 9 at 759.

⁴⁷ DACHER KEITNER, *THE POWER PARADOX* (2016) (describing how the skills that help a person get power, including empathy, are the skills that deteriorate once the person has power); cf. Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 178 (2019) (“Those who say prosecutors have a lot of power mean that prosecutors have the ability to freely choose between different options (i.e., discretion).”).

⁴⁸ Kevin Johnson, *Lawyering for Social Change*, MI J. L. REF. 1999 at 205; I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1 (2019). See also Amna A. Akbar, Sameer M Ashar, and Jocelyn Simonson, *Movement Law*, forthcoming Stanford L. Rev. (2021), available at <https://ssrn.com/abstract=3735538>; Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1501-08 (2005).

⁴⁹ See, e.g. Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. (forthcoming 2020) (manuscript at 154-61), <https://ssrn.com/abstract=3670952> (describing such a supporting role by lawyers).

defenders fight hard for their clients and for larger systemic change, the very existence of things like the participatory defense movement and, to some extent, court watching, illustrates the central role defenders play in the exercise of state carceral power.⁵⁰ Recognizing this, defenders might still consider how or whether they will react to progressive prosecutors who seek to claim the reform narrative.

To return to the Rollins story, where does the defender “fit” in the reform picture when the prosecutor seeks to claim that space? How should defenders envision and articulate their role? One response is for defenders to more explicitly and collectively aim for transformation rather than reform. Indeed, prosecutors claiming the reform narrative could have the positive effect of pushing defenders to push for transformation where they otherwise would have been satisfied with—or failed to see beyond—more narrow reform efforts. Surely, any defender response must embrace the baseline position that no lawyer (and really no one person or group) should claim to be the system’s hero. A facile response to Rollins—something along the lines of “Hey, defenders do the real work here! You are still locking people up!”—only compounds the problem. Still, it seems dangerous to leave prosecutorial claims of hero reformer of the criminal legal system unanswered.

These foundational critiques illustrate how problematic it would be for defenders to claim that they, and not the progressive prosecutor, are the true reformers. It would be problematic both for trying to own “reform,” and for failing to move beyond mere reform. On a more practical level, defense attorneys in any progressive prosecution jurisdiction—but particularly one where the prosecutor claims ownership of the reform narrative—may face exacerbated tensions in what can already be difficult attorney-client relationship issues. Many studies have revealed such tensions between defense lawyers and the clients they serve. For example, one recent project described results of interviews of 200 defendants with mental health issues and their public defenders, where there was considerable confusion about the role of the various parties, something that is unfortunately not unique to this group of defendants. In the study, a full two-thirds of defendants had fundamental misunderstandings about the role of the judge and prosecutor, and this “may have contributed to the view held by some defendants that their attorney was not acting in their best interests.”⁵¹ Interviewees expressed views that included how the defender was “working for the judge and DA and not defending me,” or how defenders “had a strategy to get me to cop-out and seemed to be working with the DA.”⁵²

These remarks are consistent with earlier studies on the defender-client relationship. In *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE*, one defendant described defenders as “the prosecutor's assistant. Anything you tell this man, he's not gonna do anything but

⁵⁰ See About Participatory Defense, <https://www.participatorydefense.org/about> (“Participatory Defense is a community organizing model for people facing charges, their families, and communities to impact the outcomes of cases and transform the landscape of power in the court system.”); NBCWashington, *Activists Launch ‘Court Watch’ Program in Prince George’s*, Feb. 19, 2020, <https://www.nbcwashington.com/news/local/prince-georges-county/activists-launch-court-watch-program-in-prince-georges/2219284/>.

⁵¹ Chelsea Davis et al., *A Little Communication Would Have Been Nice, Since This Is My Life: Defendant Views on the Attorney-Client Relationship*, 40-Jul CHAMPION 28 (Nat’l Ass’n of Crim. Def. Lawyers), July 2016, at 29 (Vera Institute project, funded by the National Institute of Justice).

⁵² *Id.* at 32.

relay it back to the [prosecutor]”).⁵³ This was a common theme, with others voicing the opinion that defenders are willing to sell out some clients to get better deals for others, working closely with prosecutors to balance things out.⁵⁴ While many defenders have good relationships with their clients, defendants’ belief that their lawyers are working hand-in-hand with the prosecution are not uncommon. Now, layer on top of that prosecutors who are touting themselves as the change agents for reform. Even if those prosecutors are not simultaneously attacking defenders, their reformer claims can lead to more obstacles for defenders working to build trust with clients who do not hire them, and cannot chose them.⁵⁵

Moving beyond the rhetorical battle of who truly advances reform (and how and why that matters), the next Parts consider more specific areas in which defenders in progressive prosecution jurisdictions might push the envelope.

II. Defense Lawyering in Individual Cases in Progressive Prosecution Jurisdictions

Progressive prosecutors claiming the reform narrative can lead to significant obstacles for defenders in their day-to-day client representation. But there are also significant opportunities at the individual client representation level in a progressive prosecutor jurisdiction. This Part explores two critical points along the timeline of a criminal case where defenders might push for better outcomes for their clients in such jurisdictions: the charging stage, and the plea bargaining stage.

A. Engaging in Charging Decision Advocacy in a Progressive Prosecutor Jurisdiction

The prosecutor’s decision to file charges is a critical juncture, as it initiates the adversarial process and thus many statutory and constitutional rules and protections. The filing of charges also leads to creation of a court record. This is significant in the data era, with court records generally free or cheap and easily viewed through electronic databases, whereas arrest records might be harder to access.⁵⁶ The decision to convert an arrest into a formal criminal proceeding is particularly significant in misdemeanor cases, which can last many months and—in some jurisdictions—through many court appearances. This requires the defendant, and sometimes the complainant, to miss work and travel to court. For these and related reasons, Malcolm Feeley aptly described the lower criminal courts as a place

⁵³ JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT’S PERSPECTIVE* 107-108 (1972); *see also* Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 *YALE L.J.* 1179 (1975).

⁵⁴ *Id.* at 105. *See also* J. Battle, Note, *Comparison of Public Defenders’ and Private Attorneys’ Relationships With the Prosecution in the City of Denver*, 30 *Den. L. J.* 101, 131 (1973) (“A remark often heard from inmates at county jail was that public defenders were ‘cop-out men’ who would ‘sell them down the river.’ These clients seemed especially afraid that if they admitted their guilt to a defender and told him the truth, he would cooperate in seeing them punished.”).

⁵⁵ *Cf.* Stephen j. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 *Am. Crim. L. Rev.* 73, 77 (1993) (proposing, among other things, vouchers for defendants to use for defense attorneys as “a practical and effective cure for many of the major ills of indigent defense organization, to the ultimate benefit of both defendants and the public at large”).

⁵⁶ Law enforcement agencies generally maintain arrest records. Although not as easy to access as court records, arrest records can themselves lead to various employment, housing, and other collateral consequences.

where “the process is the punishment.”⁵⁷ This section focuses on misdemeanor cases, as this is where some progressive prosecutors have pulled aside the heavy veil of secrecy surrounding their charging discretion. That opens up new space for defender advocacy in individual cases in ways that may not have been possible previously.

Prosecutors have enormous discretion about whether and what charges to file. Exercising this discretion, prosecutors can decline to file formal charges in an individual case after a person has been arrested.⁵⁸ This is generally called a “declination,” although there are variety of names across jurisdictions (such as “no papering” in the District of Columbia).⁵⁹ The 2017 update to the Model Penal Code’s sentencing provisions uses the term “deferred prosecution,” which it defines as “the practice of declining to pursue charges against an individual believed to have committed a crime in exchange for completion of specified conditions.”⁶⁰ An example of a such a conditional pre-charge declination would be an agreement to forego the filing of a charge of driving with a license suspended for failure to pay parking tickets upon proof of payment of (or perhaps a payment plan for) the tickets.

Like almost all aspects of prosecutorial decision-making, declination discretion is effectively immune from judicial review.⁶¹ Compounding that immunity is the fact that the pre-charge screening stage (when a prosecutor might choose to decline a case) is particularly non-transparent. Unlike other prosecutorial decision points—bail requests, plea offers, sentencing recommendations—screening is conducted behind closed doors and without defense counsel or judicial involvement. Screening also almost always happens before the procedural protections of the adversarial system are in place for a defendant.

But some progressive prosecutors have opened up their charging practices for scrutiny, either through campaign promises or—in a few places—publication of policy memos about declination practices. And some of these prosecutors have committed to wholesale declination for entire classes of misdemeanor cases, sometimes citing the need to remedy serious racial disparities in misdemeanor enforcement and sometimes focusing on the need to use limited resources for more serious cases.

For example, in 2016 in Harris County (Houston), Texas—the third most populous county in the United States—Kim Ogg was the first Democrat elected District Attorney in almost forty years. One of Ogg’s campaign promises was to offer pre-charge diversion for marijuana possession of up to four ounces.⁶² Ogg formally followed through on that

⁵⁷ MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979).

⁵⁸ Law enforcement can also decline to arrest even when there is probable cause, instead issuing a formal or informal warning. In addition to ending the encounter at a very early stage, this means that there is no potentially damaging arrest record. However, even mere contact with the police can cause its own sort of harm, particularly if such interactions are persistent—such as in neighborhoods where young Black men are consistently stopped and frisked. Tracey Meares, *Policing and Procedural Justice: Shaping Citizens’ Identities to Increase Democratic Participation*, 111 *NORTHWESTERN L. REV.* at 1529–1530 (2017).

⁵⁹ Prosecutorial dismissals after charges have been filed are discussed below in the “Plea Bargaining” section. *See infra* Part II.B.

⁶⁰ Model Penal Code, Sentencing, § 6.01(4) (2017) (proposed final draft).

⁶¹ *See* ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007).

⁶² Tom Dar, *Houston’s New District Attorney Stands by Her Bold Move to Decriminalize Marijuana*, *THE GUARDIAN*, April 18, 2017, available at <https://www.theguardian.com/us-news/2017/apr/18/houston-district-attorney-kim-ogg-marijuana-decriminalization-texas>.

promise by establish the diversion program,⁶³ and now claims that “[t]oday, no one in Harris County is arrested for misdemeanor possession of Marijuana.”⁶⁴

But it can be difficult to check such claims, and difficult to know how and whether diversion programs are working.⁶⁵ Defenders who represent clients charged with a crime that the prosecutor declared covered under a declination policy can play a critical role here. Most obviously, they should be advocating for declination of any filed charges that fit under the policy. But defender offices might also organize to aggregate anecdotal instances of such policy violations, and to uncover flaws in the policy. For example, Corpus Christi, Texas voters elected Mark Gonzalez as their chief prosecutor based on his promise, among other things, to divert minor marijuana cases.⁶⁶ However, the actual diversion program Gonzalez established is problematic in several ways, starting with its troubling name of “Cite and Release.” While minor marijuana possession is indeed covered, it is up to the police officer to decide whether to cite or arrest the individual.⁶⁷ Further, diversion “requires payment of a \$250 fine, which may still be out of reach for some but has netted the county \$300,000 in revenue since its inception.”⁶⁸ To the extent that defenders are involved in any of these “cite and release” diversion cases, they should be advocating for outright dismissal or, alternatively, waiver of the fine. And the defender office should be pushing Gonzalez to simply decline to pursue charges in all of these cases, pointing out the problems their clients can face once a court record is created (in addition to the obvious

⁶³ Misdemeanor Marijuana Diversion Program, Office of the District Attorney, Harris County, TX, <https://app.dao.hctx.net/MMDP> (setting out eligibility requirements).

⁶⁴ <https://www.kim-ogg.com/marijuana>. The data appears to support Ogg’s claim (although note that it costs money and time to get diversion). There were 11,098 misdemeanor marijuana cases filed in 2014. For the eighteen months beginning with the new policy’s effective date of March 2017, there were only 1,842 misdemeanor marijuana cases in the Harris County courts, and those cases are likely explained by failures to complete the pre-charge diversion program, possession in a school zone (not covered by the policy), or charges that were dropped down from felony to misdemeanor. Jeff Reichman, *The Decline of Low-Level Marijuana Cases in Harris County*, January Advisors, Sept. 30, 2018, at <https://www.januaryadvisors.com/low-level-marijuana-decline/>. 2018. Voters recently re-elected Ogg with 54% of the vote, to 46% for the Republican challenger, a lawyer for the Houston Police Officers’ Union. *See Harris Co. District Attorney Kim Ogg Fends Off Police Union-Backed Mary Nan Huffman*, ABC13 Eyewitness News, Nov. 4, 2020, at <https://abc13.com/harris-county-das-race-district-attorney-election-kim-ogg-mary-nan-huffman/7642313/>.

⁶⁵ *See infra* notes 105-108, discussing difficulty assessing Ogg’s Misdemeanor Marijuana Diversion Program.

⁶⁶ Timothy Bella, *The Most Unlikely D.A. in America*, POLITICO, May 6, 2018, at <https://www.politico.com/magazine/story/2018/05/06/most-unlikely-district-attorney-in-america-mark-gonzalez-218322>.

⁶⁷ [What to know about cite and release in Nueces County \(caller.com\)](http://www.caller.com/story/news/crime/2019/07/03/report-nueces-county-wont-prosecute-some-pot-cases-without-testing/1639420001/).

⁶⁸ <https://www.vera.org/pieces/some-prosecutors-promote-diversion-programs-as-an-alternative-to-incarceration>. Indeed, when Texas adopted the “State Hemp Protection Plan,” which defines hemp as having a THC concentration of up to .3 percent and thus makes prosecution of marijuana cases possible only with an onerous laboratory test for THC concentration, Gonzalez stated: “Because we can’t go forward on these cases, it means we can no longer generate the revenue, create the programs, education and then return that to the community. . . . And so it really does impact our office in a way that’s going to hurt us. Like I said, I don’t know how I feel about it yet.” <https://www.caller.com/story/news/crime/2019/07/03/report-nueces-county-wont-prosecute-some-pot-cases-without-testing/1639420001/>.

problems with the fine), as well as the well-documented racial disparities that arise when discretion to charge is left in the hands of police officers.⁶⁹

Top Boston prosecutor Rachel Rollins, while making the problematic remarks discussed in Part II, has actually gone much further than many other progressive prosecutors in a number of areas, including declination policy. She published a list of fifteen types of charges with a default policy of declination that could be bypassed only in exceptional circumstances and with supervisory permission, included trespassing, larceny under \$250, disorderly conduct, disturbing the peace, minor driving offenses, and some resisting arrest charges.⁷⁰ This list repeated published campaign promises.⁷¹ The statistical picture of whether she has followed through on this promise is complicated by the fact that there is only one fiscal year's worth of data, and only half of it is from after Rollins took office, before the COVID-19 pandemic hit.⁷² Still, defenders are—or soon will be again—in the lower criminal courts where the offenses on Rollins' list would be prosecuted. If Rollins' office is charging individuals despite the policy, defender will be representing them.⁷³

[I have yet to decide if I'll expand this section to discuss the defender's role in charging advocacy in felony cases. Probably not, as defenders have more of a role in declination in misdemeanors, for the reasons explained above. But I do still need to write a concluding sentence or two for this section!]

B. Plea Bargaining in a Progressive Prosecutor Jurisdiction

Running for county prosecutor in northern Virginia on a reform platform, one of Parisa Dehghani-Tafti's promises was to “[o]nly offer fair plea deals.”⁷⁴ Her website describes how

⁶⁹ As well as documented racial bias when prosecutors make declination decisions at a more individual level (or even at the level of entire classes of offenses), but where eligibility reflects “the same bias and false beliefs that infect other areas of the criminal process.” Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 794 (2020); *see also id.* at 792 (“A prosecutorial reform movement should not assume that eliminating mass incarceration would eliminate the racial injustice embedded in the system.”).

⁷⁰ This list is part of a 66-page document, that addresses policy in a number of areas, including plea bargaining and sentencing. The Rachel Rollins Policy Memo, March 2019, at <https://static1.squarespace.com/static/5c671e8e2727be4ad82ff1e9/t/5d44a5f79807850001acc3d9/1564780028241/The+Rachael+Rollins+Policy+Memo..pdf>. Another progressive prosecutor, Larry Krasner of Philadelphia, publicly released a policy memo in 2018 that included a section directing his line prosecutors to “decline certain charges.” The misdemeanors in the section included possession of marijuana “regardless of weight,” paraphernalia or buying from a person when the related drug is marijuana, and prostitution charges against a sex worker unless that person has three or more prior prostitution convictions (in which case the person would be referred to a specialized court). Philadelphia District Attorney, *New Policies Announced*, Feb. 15, 2018, at <https://www.documentcloud.org/documents/4415817-Philadelphia-DA-Larry-Krasner-s-Revolutionary-Memo.html>.

⁷¹ Rachel Rollins for District Attorney. n.d. “Charges to Be Declined,” <https://rollins4da.com/policy/charges-to-be-declined/>.

⁷² Several months after her election, in early 2019, advocates did call out her office for continuing to prosecute at least some of these misdemeanors <https://theintercept.com/2019/03/24/rachael-rollins-da-petty-crime/>. Data at <https://www.mass.gov/lists/trial-court-statistics-for-fiscal-year-2020> is by fiscal year, so there is June 2018-June 2019 which is only half Rollins, and then June 2019-June 2020, which is half of a year during COVID-19 and its effect on arrests and court proceedings.

⁷³ As far as I know, Boston is not a jurisdiction with high levels of “waiver” of the right to counsel, but I need to look into this more.

⁷⁴ <https://parisaforjustice.com/on-the-issues/>

“plea deals can be important” to victims and for efficiency,⁷⁵ before noting how “studies have found evidence of racial bias and coercion in the use of plea deals, forcing people to give up their day in court and plead guilty, sometimes to crimes they did not commit.” Then, the promise: “Parisa will create guidelines for plea bargaining to ensure that plea deals are reasonable and fair.”⁷⁶ It remains to be seen what these guidelines will contain, and whether they will be public.⁷⁷

But her promise does raise important considerations for defenders in the jurisdiction (and others like it). First are a set of questions related to the substance and creation of guidelines. These include: What is “reasonable and fair”? Who defines fairness and who will be included in the process of drafting the guidelines? Will Dehghani-Tafti bring defenders and their clients to the drafting table?

Beyond these threshold issues are questions relating to the actual process of bargaining with a progressive prosecutor. How does a defender negotiate when the progressive prosecutor has positioned herself as a “good person,” someone who is “fair”? Indeed, in Dehghani-Tafti’s case, she has deep experience as a public defender and innocence project attorney. Ethical considerations, professional guidelines, and a commitment to zealous advocacy may point towards pushing for deals that are far better than the guidelines of the progressive prosecutor.

However fair any guidelines or specific plea offers may appear be, they simply set a new baseline against which defenders will bargain. There are specific ways that defenders can push for even better outcomes, given any prosecutor plea bargaining guidelines or policies that are more “fair” (or at least less unfair) than previous practices. For example, defenders should be advocating for outright dismissal in almost all misdemeanor cases. In a survey of almost 600 defense attorneys that I conducted with Ronald Wright about plea bargaining, almost one-third of the misdemeanor attorneys reported their belief that that clients “infrequently” or “never” paid a “tax” for going to trial. In other words, in some places there was no cost for going to trial in a misdemeanor case, in terms of a higher sentence if convicted. Yet the same attorneys who reported little to no trial tax also reported making plea offers to prosecutors on behalf of their clients that were simply “reasonable,” rather than “somewhat favorable” or “extremely favorable.”⁷⁸ If there is really no tax for going to trial—something that should be even more likely in a progressive prosecution jurisdiction where the line prosecutor would, hopefully, not seek a higher sentence after a rejected plea and then trial—then defenders should be looking for dismissals or going to trial, should their clients agree with such an approach.⁷⁹

Defenders should also seek the prosecutor’s commitment to ask for no sentence higher than the prosecutor offered in any rejected plea bargain, should the client exercise their right to trial and be convicted. Indeed, given even the Supreme Court’s recognition that “plea bargaining is . . . not some adjunct to the criminal justice system; it is the criminal

⁷⁵ Efficiency in bargaining not necessarily a progressive stance but this platform seems to be trying to reach everyone on the issue.

⁷⁶ <https://parisaforjustice.com/on-the-issues/>

⁷⁷ A recent search turned up no results, but it’s very early in her time in office.

⁷⁸ Ronald Wright, Jenny Roberts, and Betina Wilkinson, *The Shadow Bargainers*, *Cardozo L. Rev.* (forthcoming 2021) (empirical research, part on CCs and bargaining. Pp24-25 on SSRN).

⁷⁹ Jenny Roberts, *Crashing the Misdemeanor System*, 70 *WASH. & LEE L. REV.* 1089 (2013).

justice system,”⁸⁰ such a commitment is one of the more important things a progressive prosecutor could announce.⁸¹ Prosecutors will likely have other policies that need to be factored into the plea bargaining equation and that defenders might proactively raise. For example, if the prosecutor were to announce that the office would not exercise any peremptory challenges during jury selection,⁸² that would change the “shadow of trial” that purportedly influences the bargaining process.⁸³ The prospect of a trial less infected by juror bias would allow for a stronger defense bargaining position, and also for defendants to make less coerced choices (similar to a plea v. trial decision made against the backdrop of an assurance of no trial tax).

One area where progressive prosecutor plea bargaining guidelines are unlikely to be sufficiently comprehensive is bargaining around the collateral consequences of any likely conviction.⁸⁴ While some prosecutors are more attentive to things like immigration consequences in the wake of the Supreme Court’s decision in *Padilla v. Kentucky*,⁸⁵ they are too often unaware of the effects of a criminal conviction on employment, housing, and educational opportunities. In particular, prosecutorial policies or knowledge are likely to focus on so-called formal collateral consequences, meaning consequences situated in statutes or regulations. They are far less likely to be aware of “informal” collateral consequences that “do not attach by express operation of law,”⁸⁶ such as a landlord or employer who checks an online database for criminal records when making hiring or renting decisions.⁸⁷ Defenders should play an important role here, pushing for better outcomes based on collateral consequences that are not intended as part of the punishment and that actually cut against prosecutors’ public safety goals. With progressive prosecutors, who tend to call for more evidence-based practices, defenders should be using data showing that many collateral consequences actually lead to higher recidivism rates.

Indeed, pushing for better outcomes against a more “fair” bargaining baseline may be required under defense counsel’s Sixth Amendment duty to provide the effective assistance of counsel.⁸⁸ The first prong of the test for a post-conviction claim of ineffective assistance

⁸⁰ *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

⁸¹ I recognize all the potential dynamics that could backfire here, such as how prosecutors might ratchet up plea offers so any post-trial sentence is not low.

⁸² See Chesa Boudin in SF.

⁸³ See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); see also Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

⁸⁴ See Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 Yale L. J. 2650 (2013) (discussing doctrine and practice relating to bargaining around collateral consequences); Jenny Roberts and Ronald Wright, *Training for Bargaining*, 57 WILLIAM & MARY L. REV. 1445 (2016) (collateral consequences section).

⁸⁵ 559 U.S. 356 (2010) (holding that defense attorneys have a Sixth Amendment duty to affirmatively inform clients about any automatic deportation consequences of a conviction, and noting the importance of plea bargaining “creatively” around unintended consequences).

⁸⁶ Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1104 (2013).

⁸⁷ Some such decisions are constrained by anti-discrimination law or federal or state fair credit reporting act requirements, but many employers and landlords violate those constraints.

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

of counsel involves showing that trial counsel's representation fell below prevailing professional norms. Courts have sometimes used national norms as a metric here, but have also relied on local norms.⁸⁹ If a progressive prosecutor already has guidelines that are held out as fair and reasonable, and the defender agrees and simply holds the deal out to the client as fair and reasonable without pushing harder, does that meet the prevailing norm? If it does, defenders should work to move the norm.

Finally, defenders should pay particular attention to progressive prosecutor plea offers that—while they may come from a place of genuine concern—will actually lead to more intervention in the client's life and potentially more punishment at the end of the day. This happens most frequently in the problem-solving court context, but also in other cases. For example, the prosecutor may offer the "carrot" of a non-jail plea offer should the defendant complete certain programming, with the "stick" of a higher-than-usual sentence (or recommendation to the judge) should the defendant fail to complete the conditions. Here, defenders should be advocating for pre-plea diversionary offers, so that failure to complete conditions does not simply lead to re-sentencing—which too often is a sentence to incarceration.

Many defenders focus on advocacy for individuals rather than explicitly calling for systemic change—whether because of time and resource constraints, a belief that the criminal legal system is ultimately a fair system, a belief that calling for change would harm individual clients, or some combination of those and other reasons. Certainly, zealous individual advocacy can lead to systemic change, and a focus on individual client representation is not always in conflict with reform or even transformation. But in a progressive prosecution jurisdiction, defenders might push themselves to call for transformation, or to work on systemic reforms that advance transformation. This might come in the form of defenders supporting community activists working for transformation.⁹⁰ It might also entail defenders stepping out of their individual representation role more than the limited ways in which some now do. The next Part discusses a few specific ways that defenders in progressive prosecution jurisdictions might support systemic reform or transformation.

[Not saying the paper is polished above this line, but it gets decidedly draftier below. Suggestions in either direction much appreciated!]

III. Defense Lawyering for Lasting Reform in Progressive Prosecution Jurisdictions

The term "progressive prosecution jurisdiction," which I use throughout this Article, describes an ephemeral environment. One prosecutor can be voted out, replaced by someone far less progressive after a spike in crime rates or even one well-publicized crime in the locality.⁹¹ Or the prosecutor may become less progressive over time, perhaps co-opted by the carceral culture or simply worn out by the non-elected line prosecutors who

⁸⁹ *Padilla*, 559 U.S. at __ (citing a variety of sources for the norm—constitutionalized in the *Padilla* decision—of counseling clients about deportation consequences of a conviction).

⁹⁰ See *supra* text accompanying notes 48-49.

⁹¹ See Bellin, *supra* note 19 at 710 ("If crime spikes again or politics shift for other reasons, voters may become less receptive to progressive prosecution, even in liberal jurisdictions.").

do not share the views of their boss.⁹² Further, one or more of the other actors central to the criminal legal system—the police, legislators, and judges—may not be on board with, or may even actively work to undermine, any progressive policies or leniency in individual cases.⁹³

Still, progressive prosecutors were elected based on specific campaign promises. As these prosecutors run on reform platforms and later seek reelection, defenders have an inside view into whether they are living up to their promises. One defense attorney put it this way: “Outside of district attorneys themselves, there may be no figures in the criminal justice system better positioned to asses[sic] the role of prosecutors than defense attorneys.”⁹⁴ Some might not fully agree with that statement, as defendants, victims, and their families are also well-positioned assessors—at least with respect to some aspects of the prosecutor’s work.⁹⁵ Judges are also in a good position to assess, and many come from the local prosecutor’s office so have critical inside information.⁹⁶ Still, defenders are surely well-positioned to make these assessments.

Assessing is one thing; acting on that assessment is another. It is easy to critique the prosecutor’s progress, or lack thereof, in an internal defender office discussion. It is harder to make those critiques public, and yet another matter to act on those critiques. Policing progressive prosecutors is complicated in part because defenders may not want to take public positions against prosecutors who are—even if they are not doing all they said they

⁹² *But see* Chris Palmer et al, *Krasner Dismisses 31 from Philly DA’s Office in Dramatic First-Week Shakeup*, The Philadelphia Inquirer, Jan. 5. 2018, <https://www.inquirer.com/philly/news/crime/larry-krasner-philly-da-firing-prosecutors-20180105.html-2> (“Krasner’s spokesman, Ben Waxman, said the dismissals were part of a “broad reorganization” of the office’s structure and a way to implement a culture change in an institution Krasner frequently criticized during the campaign.”); Max Mitchell, *Krasner Beefs up Philadelphia Prosecutor Ranks with 38 New Hires*, THE LEGAL INTELLIGENCE, Sept. 11, 2018, <https://www.law.com/thelegalintelligencer/2018/09/11/krasner-beefs-up-prosecutor-ranks-with-38-new-hires/?sreturn=20190017133621> (describing how Krasner hired almost 40 new attorneys, most of them recent law school graduates, in his attempt to change the office culture).

⁹³ *See* Rachel Weiner, *Arlington’s Top Prosecutor, Defender Clash with Judge*, Wash. Post, Nov. 13. 2020 at https://www.washingtonpost.com/local/legal-issues/arlington-prosecutor-public-defender-challenge-judge/2020/11/13/1adc114e-1219-11eb-ba42-ec6a580836ed_story.html (“judges in the Arlington Circuit Court have resisted Dehghani-Tafti’s efforts to stop prosecuting marijuana possession, saying she must offer good reason to drop each individual case. She also has a petition before the state Supreme Court saying they have infringed on her authority in those cases”); *Commonwealth v. Webber*, No. SJ-2019-0366, 2019 WL 4263308, at *1 (Mass. Sept. 9, 2019) (District Attorney Rachel Rollins wins judgment against a judge who refused to accept the entry of a nolle prosequi for charges brought against protestors). *See also* Fryer, *supra* note 69, at 780 (“Rather than viewing prosecutors as having unilateral power to affect mass incarceration and racial justice, it instead appears that prosecutors have a contingent power—that is, one that is dependent on other criminal justice officials assisting them in attaining their goals.”).

⁹⁴ <https://www.courtinnovation.org/publications/public-defender-power-prosecutors>.

⁹⁵ *See supra* note 50 discussing participatory defense and other ways in which system-involved individuals and their families seek a greater role in the criminal process.

⁹⁶ Although judges are the least likely to speak up publicly on prosecutors failing to meet campaign promises, they could certainly make inquiries when they see, for example, disparate treatment of similarly-situated defendants. Unfortunately, many judges are extremely reluctant to acknowledge bias even when confronted with hard data. *See* Josh Salman, Emily Le Coz and Elizabeth Johnson, *Florida’s Broken Sentencing System*, HERALD-TRIBUNE, Dec. 12, 2016 (documented deep and widespread racial bias in sentencing and quoting judges who seem reluctant to accept the hard data even about their own practices).

would do—far better than their predecessor.⁹⁷ There is also an unfortunately valid concern that defenders’ clients will be punished for positions the lawyer might speak out or act upon. Still, as time goes on and reelection looms for some progressive prosecutors, defenders might feel compelled to take a more active role in holding prosecutors accountable where they have not met campaign promises.

One organization puts defenders front and center in policing prosecutors. The Defender Impact Initiative’s “Prosecutor Accountability Project” seeks to “take[] a new, innovative approach:

In our era of so-called progressive prosecutors — elected on promises of reform and systemic change — a new kind of accountability is needed to make sure that those promises are kept. While there must still be work done to bring to light and challenge misconduct and harm by prosecutors around the country, DII sees a unique challenge before us now: making sure the big changes being promised by a growing number of prosecutors around the country actually happen. Public defenders are critical to making this happen.⁹⁸

This relates closely to the organization’s mission statement, which notes how “public defenders are uniquely – and critically – positioned to advance the transformation [that our system of mass criminalization] desperately needs.”⁹⁹

Defenders can also partner with community activists for prosecutorial accountability purposes. For example, voters in Multnomah County, Oregon recently elected Mike Schmidt, who ran on a reform platform. However, the community group that helped elect him, Oregon DA for the People, also critiqued Schmidt for failing to offer specific proposals on issues including decriminalization and declination of certain offenses. A representative of the group noted after the election that it “will be watching [Schmidt] closely” to “hold him accountable to what he said he would do,” and will “continue to push and educate him on those issues on which we still are not aligned.”¹⁰⁰ Coordination between defenders, who watch the prosecutor’s office in action every day, and community groups who have the political will and mission to push for accountability, could prove quite powerful (and has, in some instances)¹⁰¹.

⁹⁷ See FL and Aramis Ayala—didn’t run for re-election after being embattled her entire term. <https://www.orlandosentinel.com/news/crime/os-ne-aramis-ayala-leaves-state-attorney-20191031-uz25n7oiv5bhpn7cvcmmojafaa-story.html>. Although another “progressive prosecutor” won election after Ayala, that outcome was not evident. See also Seema Gajwani, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement’s Promise*, 64 N.Y.L. Sch. L. Rev. 69 (2019-2020). This article discussed the difficulties PPs have keeping their promises, particularly hitting on resistance PPs face on reforms and how line prosecutors in SF who were hired for being more progressive hardened over time.

⁹⁸ <https://defenderimpact.org/prosecutor-accountability-project/>; cf. Legal Aid Society’s Cop Accountability Project.

⁹⁹ <https://defenderimpact.org/>. [There’s not much on DII’s website. Anything happening with the accountability project, or the org more generally?]

¹⁰⁰ https://theappeal.org/politicalreport/portland-district-attorney-election/?utm_source=The+Appeal&utm_campaign=b958053c1a-EMAIL_CAMPAIGN_2018_06_22_03_58_COPY_02&utm_medium=email&utm_term=0_72df992d84-b958053c1a-58422983

¹⁰¹ See, e.g., Courtwatch in PG County MD.

Against this backdrop, defenders should be particularly attentive to any systemic reforms that might outlast the particular prosecutor. They should also encourage other reforms, where data and individual narratives can demonstrate effectiveness and fairness, perhaps making it harder for the next prosecutor to roll things back.¹⁰² This Part focuses on three systemic reforms or approaches that defenders in a progressive prosecution jurisdiction might pursue: reducing funding for prosecutors; pushing legislators to tackle—and prosecutors to support—reform in more difficult cases, such as sentences for violent crime; and finding points of collaboration, or areas where prosecutors and defenders might work together.

A. Defenders Pushing Progressive Prosecutors to Give Up Funding

A truly progressive prosecutor¹⁰³ will enthusiastically agree to divert some of their office’s funding into much-needed social and educational services, recognizing the need to address the core issues that drive crime. Yet too often, these prosecutors will support such services but seek to keep control over them by tethering programs to the criminal case. This raises many issues, including the net-widening that happens with too many services based in the criminal system. Making criminal case outcomes dependent on success with services also leads to a carrot-stick approach that too often ends in more punishment for the defendant.¹⁰⁴

Above, this Article detailed several prosecutors’ move to diversion for marijuana and sometimes other low-level offenses.¹⁰⁵ Many of those programs require completion of some sort of drug education to gain dismissal of the case, and most of the education programs require a fee (that may be waived or reduced if the person is indigent, although that information is not always shared with defendants).¹⁰⁶ For example, Kim Ogg has a website touting the Harris County DA’s Misdemeanor Marijuana Diversion Program. The program’s official page offers little information and does not mention the fee-based, four-hour class that individuals must complete to avoid arrest.¹⁰⁷ It takes some searching to uncover these details.¹⁰⁸ The official page—and Ogg’s public statements about marijuana diversion—focus on the savings with the new program, because the county previously spent \$100 million prosecuting more than 100,000 individuals over a decade for misdemeanor marijuana possession. While that focus may have been politically expedient (or even needed) at the program’s inception, given geographic location and state law, Ogg has since won reelection and is serving her second term. Defenders, who are well-aware of the problems with clients having to pay for dismissals through programs that require time,

¹⁰² There are a number of approaches beyond the scope of this Article that address the need for more lasting change. Those include defenders seeking appointment or election to the bench and to state legislatures. *See* Molly Bernstein and Sean McElwee, *New York and California Voters Want More Public Defenders, Civil Rights Lawyers on the Federal Bench*, THE LAB, Jan. 26, 2020 (discussing poll of voters); Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. Rev. 171, 198 (2019) (“Legislators are clearly more powerful than prosecutors.”).

¹⁰³ Or perhaps an anti-carceral prosecutor is the better term here. *See supra* Ben Levin typology. But as noted elsewhere, it is not clear there are any truly anti-carceral prosecutors, only those willing to lessen punishment, and sometimes only in certain types of cases.

¹⁰⁴ *See supra* text accompanying notes 89-90.

¹⁰⁵ *See supra* ___ to ___.

¹⁰⁶ <https://courtsolutionsonline.com/MMDP/>

¹⁰⁷ <https://app.dao.hctx.net/MMDP>.

¹⁰⁸ <https://app.dao.hctx.net/misdemeanor-marijuana-diversion-program-unveiled>.

sometimes internet access, and perhaps travel, should be asking Ogg why she doesn't simply let marijuana prosecutions go.¹⁰⁹ Is she really continuing to gain political capital by insisting on an educational program run by her office and required to avoid arrest for marijuana possession? And, if the program is truly helpful to people, then why not release the resources used to run it to a community group and give up all oversight and control?

Another reason that defenders should push prosecutors to give up some of their funding is to get more funding for criminal defense.¹¹⁰ There have long been calls for funding parity between prosecutors and defenders, one of the ABA's Ten Principles of a Public Defense Delivery System. There are also calls for prosecutors to support public defenders as part of their vision for reform. For example, one group notes how "transformational prosecutor[s]" can "use their immense lobbying power to champion systemic reforms — even those outside their direct purview — including . . . providing more resources to public defenders."¹¹¹ Another paper, co-written by a former federal prosecutor, death row exoneree and advocate, current head public defender, and staff member at the Institute for Innovation in Prosecution at John Jay College of Criminal Justice, emphasizes that the right to counsel is central to the prosecutor's mission.¹¹² Noting how, "[a]s communities demand, and prosecutors strive towards, a more equitable and effective justice system, prosecutors should be prepared to answer: How are you going to ensure a robust defense for all?," the paper offers ten concrete actions prosecutors can take to ensure this constitutional right. Some of these actions, such as "advocate for alternatives to incarceration" "collect and publish case data," and "ensure the integrity of forensics,"¹¹³ are actions one would expect of any ethical prosecutor.¹¹⁴ Others, such as

¹⁰⁹ With Texas' new hemp law, she may have done just that—so I may change my example. But plenty of other DA offices tether low-level offense dismissals to services.

¹¹⁰ Ideally, funding for both would reach parity and then drop off significantly, as the criminal legal system shrinks.

¹¹¹ ACLU, It's Time to Transform What it Means to be a Prosecutor, Feb. 2020, <https://www.aclu.org/news/smart-justice/our-vision-to-transform-what-it-means-to-be-a-prosecutor/> ("The "truly transformational prosecutor actively seeks to shrink their own influence in the criminal legal system, including by shrinking their own discretion").

¹¹² Prosecution and Public Defense: The Prosecutor's Role in Securing a Meaningful Right to an Attorney ("All legal stakeholders should be concerned with the state of indigent defense and its implications for constitutional protections, equality under the law, and justice. In our adversarial system, prosecutors, in particular, have a role to play in securing a meaningful right to an attorney.") Exec summary, pdf3 (no page on doc) (paper sponsored by the Institute for Innovation in Prosecution at John Jay College of Criminal Justice).

¹¹³ *Id.* at __/

¹¹⁴ See, e.g., Model Rules of Prof'l Conduct Preamble (Am. Bar Ass'n 2020) (Prosecutors "should be mindful of deficiencies in the administration of justice"); Criminal Justice Standards for the Prosecution Function standard 3-1.2 (Am. Bar Ass'n 2017) (prosecutor should "be knowledgeable about, consider, and where appropriate develop or assist in developing alternatives to prosecution or conviction"); U.S. Dep't of Justice, Justice Manual § 9-27.250 (2018) (federal prosecutors should consider alternatives to prosecution when they are available for a particular case). See also Criminal Justice Standards for the Prosecution Function standard 3-5.4 (Am. Bar Ass'n 2017) and U.S. Dep't of Justice, Justice Manual § 9-5.001 (2018) (obligating federal prosecutors to share exculpatory and impeachment evidence with the defense); Criminal Justice Standards for the Prosecution Function standard 3-5.5 (Am. Bar Ass'n 2017) and U.S. Dep't of Justice, Justice Manual § 9-5.003 (2018) (requiring disclosure of information supporting forensic evidence such as underlying documentation, photographs of physical evidence, chain-of-custody logs, laboratory notes, and laboratory procedures and protocols). Of course, this support for the right to counsel could be read, somewhat cynically

“support funding for public defense,” “scrutinize arrests and decline to prosecute low-level cases,” and “endorse alternatives to cash bail”¹¹⁵ go far beyond measures most prosecutors around the U.S. would support.

In addition to continuing to fight for funding parity, defenders should be calling for legislatures or county councils to simply take resources away from prosecutors,¹¹⁶ to force them to make choices about what to prosecute and what does not belong in the criminal legal system. Such a move would be consistent with William Stuntz’s account of legislative overcriminalization:

Legislators have good reason to criminalize more than they (or the public) would want punished in order to increase the likelihood and reduce the cost of punishing the conduct they (and the public) do want punished. There is no reason to believe criminal law, on its face, accurately captures the range of behavior the public thinks worthy of serious sanction. Indeed, there is good reason to believe the opposite.

Jocelyn Simonson has described how “the radical visions of social movements” have led to proposals for governance that “shifts power over policing to those who have historically been the targets of policing.”¹¹⁷ Shifting funding from prosecutors to defenders does not exactly fit into Simonson’s “power lens” description, as defenders are part of the power structure in many ways. Still, increasing defense funding while decreasing prosecution funding does shift resources to serve individuals involved in the criminal legal system—although the resource shift sought by abolitionists and others is a shift out of the criminal system altogether, towards other systems addressing education, housing, and public health.

B. Pushing Progressive Prosecutors to Tackle Difficult Issues

Most progressive prosecutors are just tackling the low-hanging fruit, things that others have fought for over many years. It is not that radical to decline to prosecute misdemeanor marijuana cases when the majority of voters support legalization. Here, the role of defenders may be to push in the harder cases, even if it means incremental change.

As Marie Gottschalk put it:

The intense focus in criminal justice reform today on the non-serious, non-violent, non-sexual offenders — the so-called non, non, nons — is troubling. Many contend that we should lighten up on the sanctions for the non, non, nons so that we can throw the book at the really bad guys. But the fact is that we’ve been throwing the book at the really bad guys for a really long time.¹¹⁸

but not unrealistically, as at least in part an attempt to avoid post-convictions claims of ineffective assistance of counsel and ensure the validity and finality of convictions.

¹¹⁵ Prosecution and Public Defense, *supra* note 112, at ___. At some point in article, I should address and reject argument (in some of the commentary) that prosecutors refusing to prosecute certain low-level crimes violations separation of powers between the executive and legislative branches. Broad grants of prosecutorial discretion and overcriminalization by legislatures were never intended to force Ps to use every tool (and of course Ps don’t use every tool. See, e.g., paucity of white collar prosecutions).

¹¹⁶ Prosecutors are county-level officials, funded in a wide variety of ways across the country (ranging from federal grants, to county tax allotments to asset forfeiture funds).

¹¹⁷ Simonson, *supra* note **Error! Bookmark not defined.**

¹¹⁸ <https://www.jacobinmag.com/2015/03/mass-incarceration-war-on-drugs>; see also MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS __ (2015); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2014). Cf. Alexis Hoag, *Valuing Black Lives: A*

It is not only that progressive prosecutors hold up how they hold off on low-level crime prosecution to focus on the more serious stuff, but that they may even call for (or not oppose) harsher penalties for serious and violent crimes that already have overly-harsh penalties.¹¹⁹

The COVID-19 crisis in prisons has put progressive prosecutors to the test when it comes to the non-non, non, nons (e.g. the serious, violent, and sex offenses). [Here, I'll develop how some PP offices joined defense motions for medically vulnerable or elderly inmates, many of whom had already served significant sentences for homicide and other serious underlying convictions. I may contrast that to my own clinic's experience litigating compassionate release cases under DC's new CR Act (passed early on in the pandemic, made permanent in Jan. 2021), where the DC US Attorney's Office—not an office anyone would call progressive—fought against in almost all cases.]

On the other side of (although not completely in tension with) defenders working to hold prosecutors accountable is defenders cooperating or collaborating with prosecutors.

C. Collaborating with Progressive Prosecutors

If state legislative conditions are favorable, defenders can push progressive prosecutors to join them and community organizations in seeking things like sentencing reform, taking crimes off the books, and expanding expungement laws. The New York State discovery reform fight might be a good example here, where even progressive prosecutors were only willing to go so far and there was a big role for various defense organizations to push the envelope. Another example can be seen in current debates over the amendment of state laws governing police use of force, where progressive prosecutors may feel constrained in the position they can take but might quietly support or at least not oppose defense efforts.

Cooperation between defenders and progressive prosecutors might also be critical in overcoming resistance from other criminal legal system actors. As one recent NY Times op-ed noted, “the district attorneys elected to carry out progressive policies over the last five years have been met with resistance from police departments and unions, as well as from judges, lawmakers and even some corporations. They have used their power to prevent these prosecutors from doing their jobs.”¹²⁰ One example of this played out in Seattle, where the progressive prosecutor and the public defender's office filed a joint letter accusing a judge of improper conduct. One commenter noted how he has “never seen a prosecutor and a defender unite to pursue a concern about judicial behavior.”¹²¹ Of course, defenders can face similar resistance from others and are even more vulnerable as they are

Case for Ending the Death Penalty, 51 Colum. Hum. Rights J. 985 (2020) (calling for challenging the death penalty on equal protection ground based on the undervaluation of Black lives). Hoag notes how, “If proven, the appropriate remedy is *not* to extend capital punishment to those who murder Black victims, because absent automatic death sentencing for certain crimes, which the Court already invalidated, the law cannot force prosecutors to seek death and juries to impose death in Black victim cases. Rather, the appropriate remedy is to abolish the death penalty altogether.” *Id.* at 991

¹¹⁹ <https://www.jacobinmag.com/2015/03/mass-incarceration-war-on-drugs>;

¹²⁰ <https://www.nytimes.com/2020/06/11/opinion/george-floyd-prosecutors.html?referringSource=articleShare>.

¹²¹ <https://www.seattletimes.com/seattle-news/politics/seattles-top-prosecutor-and-public-defender-accuse-presiding-judge-of-improper-conduct/>.

not generally elected. For example, in Montgomery County, Pennsylvania, two senior defenders were fired for filing an amicus brief in support of bail reform.¹²²

However, the very existence of a progressive prosecutor may make it more difficult for defenders to get a place at the table for discussions of policies that will affect their clients.¹²³ For example, with Philadelphia’s recent steady uptick in shootings and homicides, the mayor announced a gun-violence reduction approach called “group violence intervention.” News articles describe this as a “collaborative effort among a variety of agencies,” stating that “representatives from agencies including the Office of Violence Prevention, the Police Department, and the District Attorney’s Office are meeting regularly to work through details.”¹²⁴ Although earlier efforts at a similar program was criticized as “overly centered on law enforcement,” the article does not note any inclusion of the public defender’s office in the discussions.¹²⁵ Instead, it quotes liberally from District Attorney Larry Krasner on the need for alternative approaches to use of policing and the criminal legal system to reduce violence. Krasner, who might fall into the “anti-carceral” category of progressive prosecutor on some issues,¹²⁶ often sounds like a defender when speaking to the public. But his office is still prosecuting people, and cannot replace the perspective of the public defender’s office. Indeed, in other jurisdictions that have adopted similar anti-violence strategies, issues arose that defenders and their clients might have flagged had they been included in the process.¹²⁷

Having a progressive prosecutor involved in an initiative may undercut defenders’ attempts to be included in—or even learn of—such initiatives. Further, a progressive prosecutor’s participation makes it more difficult for the defense community to fight against any problematic aspects of the initiative that the prosecutor might support.¹²⁸

Conclusion

[definitely not ready to conclude...]

¹²² <https://www.washingtonpost.com/opinions/2020/03/02/pennsylvania-county-fired-its-two-top-public-defenders-doing-their-jobs/>. Both Texas and Missouri have “STRIKE” Forces that exist to protect DCs from sanctions for doing their work. Push PPs to eliminate this necessity.

¹²³ This issue certainly predates the PP movement. Defenders have long been denied a role in discussions not only on initiatives relating to policing, but also on the very court systems in which they work on a daily basis.

¹²⁴ <https://www.inquirer.com/news/philadelphia-focused-deterrence-david-kennedy-group-violence-intervention-20191206.html>

¹²⁵ Need to check if there’s more on this/if defenders involved in any way not reflected in articles—maybe there’s something more recent? It seems like even Krasner’s office was added into the discussions on the later end of things, see <https://www.witf.org/2019/01/18/philadelphia-devotes-44-million-to-holistic-anti-violence-programs/>. Ask someone in Philly PD

¹²⁶ See *supra* Levin typology.

¹²⁷ See, e.g. Oakland.

¹²⁸ E.g. PP support for non-carceral but still criminal system-focused approach to “gang-involved” youth could undercut defender pointing to problems that flow from “gang” label and the lists used to generate such a label.