

SOME MODEST PROPOSALS FOR A PROGRESSIVE PROSECUTOR

Steven Zeidman*

Abstract

The progressive prosecutor movement has spawned several races for District Attorney where candidates fight to claim the mantle of most progressive potential prosecutor. However, the promises made by self-described forward thinking, if not exactly radical, prosecutor candidates, as well as those made by newly elected District Attorneys, are at best the kind of reformist reforms criticized by many as having little impact on entrenched systems of oppression and as ultimately expanding their reach.

It is incumbent on those looking for fundamental change in prosecutorial practices to try and assess whether any candidates are willing to take bolder steps than simply promising to prosecute more fairly and compassionately. Instead, the inquiry must be whether the candidate is willing to give up any aspects of the awesome power and the vast resources bestowed upon the office, particularly when it comes to the trial process.

This Essay provides a list of proposals that a prosecutor truly bent on far-reaching change should adopt. Taken together, the proposals pave the way for abolition of the role of the prosecutor.

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* Professor of Law and Co-Director of Defenders Clinic, CUNY School of Law, J.D., Duke University School of Law. I thank Mari Curbelo for critique and encouragement, and Nayeon Kim and Sophie Whitin for extraordinary research and editing assistance.

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Introduction

The progressive prosecutor movement seeks to distinguish between old guard prosecutors and new candidates who pledge to address mass incarceration and the criminal law’s disproportionate impact on people of color. In several elections, the contrast between the old and the new is readily apparent, but in many cities the candidates vying for the top prosecutorial role fight to claim the title of “most progressive potential prosecutor.”¹ These self-described progressive candidates promise a new approach to prosecuting and purport to agree with those who point accusatorial fingers at prosecutors as the primary cause for the crisis of mass incarceration.²

1. See, e.g., Jane Wester, *Manhattan DA Candidates Tout Progressive Bona Fides in ‘Meet and Greet’ Ahead of 2021 Elections*, N.Y.L.J. (Aug. 19, 2020, 12:17 AM), <https://www.law.com/newyorklawjournal/2020/08/19/manhattan-da-candidates-tout-progressive-bona-fides-in-meet-and-greet-ahead-of-2021-election> [<https://perma.cc/B3UK-4N3Y>].
2. See generally JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017) (arguing that prosecutors bear responsibility for mass incarceration); Eli Hager & Bill Keller, *Everything You Think You Know About Mass Incarceration Is Wrong*, MARSHALL PROJECT (Feb. 9, 2017, 5:45 PM), <https://www.themarshallproject>.

Reflecting on some of the promises made by prosecutor candidates across the country reveals just how punitive prosecutorial practices have become. Consider the self-described progressive positions staked out by many District Attorney candidates, such as declining to prosecute low-level possession of marijuana in certain circumstances, not requesting monetary bail in designated minor offenses, and not seeking the maximum sentence in every case, among others.³ Yet these reforms merely mitigate what are already overly-punitive prosecutorial practices.

Recently, groups of prosecutors have banded together to urge more reforms. In Virginia, eleven elected prosecutors are pressing for restrictions on “no-knock” warrants, the end of mandatory six-month driver’s license revocations for certain drug convictions, and increased accountability over police misconduct.⁴ Several prominent and vocal progressive prosecutors coauthored an article that spelled out similar steps and added significant financial recommendations, including supporting and funding community-led programs, divesting from the criminal legal system, and maintaining budget transparency.⁵

But however beneficial all of these reforms and positions might be to the accused, it lowers the reform bar considerably to describe them as progressive.⁶ All of these proposals are most noticeable for what they lack: a willingness to give up the virtually unfettered power the prosecutor has when someone has the temerity to insist on their constitutional right to plead not guilty, reject plea offers, and insist on a trial.

org/2017/02/09/everything-you-think-you-know-about-mass-incarceration-is-wrong [https://perma.cc/5E95-HRQY].

3. See, e.g., Emily Bazelon & Miriam Krinsky, *There’s a Wave of New Prosecutors. And They Mean Justice*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html> [https://perma.cc/3BPF-W2X5]; Press Release, Cook County State’s Attorney, State’s Attorney Foxx Announces Major Bond Reform (June 12, 2017), <https://www.cookcountystatesattorney.org/news/state-s-attorney-foxx-announces-major-bond-reform> [https://perma.cc/6G53-RZV4] (announcing State’s attorney Kim Foxx plan to seek pretrial release in appropriate cases).
4. Peter Dujardin, ‘*Progressive Prosecutors’ Press for Criminal Justice, Police Reform at General Assembly*, DAILY PRESS (July 27, 2020), <https://www.dailypress.com/government/virginia/dp-nw-progressive-prosecutors-group-20200727-3ru-w7blwxncbvhk4dngZrqpem-story.html> [https://perma.cc/3T4L-WTDU].
5. Diana Becton et al., Opinion, ‘*Prosecutors are Not Exempt from Criticism*,’ POLITICO (Aug. 25, 2020), <https://www.politico.com/news/magazine/2020/08/25/black-prosecutors-11-ideas-393577> [https://perma.cc/Z27Y-VBCM].
6. There certainly is not any general understanding of what it means to be “progressive.” See, e.g., Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1417 (2021) (explaining that “progressive prosecutor” means many different things to many different people). A colleague argues that it is important to celebrate even seemingly minor reforms because many of them had previously seemed unimaginable, and that profound change usually occurs in increments. To many, these kinds of changes merely take prosecutorial practice to the most minimal form of basic human decency and barely merit description even as a reform.

By now, it is well-known that the overwhelming number of criminal cases are resolved by guilty plea.⁷ Perhaps the primary reason so few people demand their right to a trial is because the prosecutor is vested with such awesome power that the chances of prevailing at trial are slim, and if convicted, the sentence meted out will be substantially higher than the prosecutor's plea offer.⁸ And while the overwhelming majority of convictions in the United States are the result of guilty pleas, a recent study of 2,400 exonerations found that 80 percent of the exonerations followed conviction at trial and that 28 percent of those trials included official misconduct.⁹ It is therefore incumbent on those searching for candidates willing to upend (if not dismantle) prevailing prosecutorial practices to find ways to measure how "progressive" a candidate may truly be. One way to do so is by evaluating their willingness to surrender at least some aspects of the awesome power prosecutors wield over the trial process.

With that task in mind, here are some modest proposals to help gauge the depths of a candidate's progressive agenda concerning trial and other prosecutorial functions.

I. Filing Charges

A. *The Decision of Whether and Where to File Charges*

While the police decide whom to arrest, it is the prosecutor who then decides what to do with that arrest—whether to prosecute and what charges to file.¹⁰ Following an arrest, the principal function of the prosecutor must be to serve as a stout and steadfast gatekeeper:¹¹ one who ensures that the police fully respected the accused's constitutional rights and that there is sufficient evidence to justify filing charges.¹² Even if

7. Barbara A. Babcock, *Taking the Stand*, 35 WM. & MARY L. REV. 1, 5 (1993).

8. *Id.*

9. SAMUEL R. GROSS ET AL., NAT'L REGISTRY OF EXONERATIONS, GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT 96 (2020).

10. Not to mention other critical decisions such as what bail to recommend and what plea offer to make.

11. Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 312 (2017) ("It is also important to recognize that the prosecutor is the gatekeeper of the system, uniquely positioned to mediate between the police and the judiciary . . ."); David W. Neubauer, *After the Arrest: The Charging Decision in Prairie City*, 8 L. & SOC'Y REV. 495, 497 (1974) (arguing that whoever controls the charging decision is the gatekeeper and regulates inputs into the court).

12. There is much disagreement regarding just how sure a prosecutor should be of the accused's guilt before filing and prosecuting criminal charges thereafter. See, e.g., Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 497 (2009) ("The charging decision calls for some gatekeeping to avoid prosecuting innocent individuals, but there is no agreement on how much."); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1547 (1981). See

the charges are ultimately dismissed, the fact that charges were filed may follow that person in perpetuity.¹³ It is therefore critical that prosecutors do everything possible to ensure the truth and constitutionality of the charges before any formal accusatory instrument is filed in court.

Yet even amid a documented history of police corruption in the form of perjury¹⁴—lying in reports and lying on the witness stand—prosecutors regularly abdicate this essential gatekeeping function and mechanically file charges based on the unexamined word of the arresting officer.¹⁵

Since in many cases the assessment of truth begins and ends with the narrative provided by the arresting police officer, how can (and should) prosecutors evaluate the veracity of what police officers tell them? If past is prologue, suspicious and skeptical attitudes from prosecutors toward police witnesses will not be sufficient to tackle the entrenched problem of police perjury. Instead, prosecutors must employ a purposely confrontational stance marked by combative adversarial testing of police officer narratives.

However, given the inherently interconnected nature of the prosecutor/police officer relationship, ultimately the best approach is to cede

generally ANN. MODEL RULES PROF. CONDUCT § 3.8(a) (2019) (“The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . .”).

13. *See, e.g.*, *Martin v. Hearst Corp.*, 777 F.3d 546, 547 (2d Cir. 2015) (holding that a local newspaper was not liable for continuing to run a story on its website of the plaintiff’s arrest, even after charges were dismissed and arrest records were erased pursuant to state statute); *Smith v. Sandusky Newspapers, Inc.*, No. 3:17CV1135, 2018 U.S. Dist. LEXIS 103245 at *7 (N.D. Ohio June 20, 2018).
14. Former Ninth Circuit federal judge Alex Kozinski was quoted to say: “[I]t is an open secret long shared by prosecutors, defense lawyers, and judges that perjury is widespread among law enforcement officers.” Interview with Stuart Taylor, Jr., *For the Record*, AM. LAW (Oct. 1995), at 72; *see also* Stephen W. Gard, *Bearing False Witness: Perjured Affidavits and the Fourth Amendment*, 41 *Suffolk U. L. Rev.* 445, 448 (2008) (“[S]ubstantial evidence demonstrates that police perjury is so common that scholars describe it as a ‘subcultural norm rather than an individual aberration.’”); I. Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 *IND. L.J.* 835, 870 (2008) (stating that former prosecutors describe police lies as “commonplace” and “prevalent”); Morgan Cloud, *The Dirty Little Secret*, 43 *EMORY L.J.* 1311, 1311–12 (1994) (“Judges, prosecutors, defense lawyers, and repeat offenders all know that police officers lie under oath. The empirical studies on the subject suggest that perjured testimony is common . . .”).
15. Kate Levine, *How We Prosecute the Police*, 104 *Geo. L.J.* 745, 757 (2016) (explaining that prosecutors file charges without checking the evidence presented by the police); Alexandra Natapoff, *Misdemeanors*, 85 *S. CAL. L. REV.* 1313, 1328 (2012) <https://advance.lexis.com/search/?pdmfid=1000516&crd=92fd-3bc9-4eb2-438e-9cc9-93e3413acd89&pdsearchterms=104+Geo+LJ+745&pdstartin=hlc%3A1%3A1&pdtypeofsearch=searchboxclick&pdsearchtype=-SearchBox&pdqtype=and&pdsf=&pdquerytemplateid=urn%3Aquery-template%3A2b5db386c0bfe6b83d350eb8dcd2d411~%5ELaw%2520Reviews%2520and%2520Journals&ecomp=5pfLk&earg=pdsf&prid=a408b7c9-2ce0-4ffc-8b29-bd1a8cd16ad1> (“Prosecutors fail to screen and instead charge arrestees based solely on allegations in police reports.”).

initial interviews for precharge screening purposes to an independent group or organization comprised of, among others, members of the affected community, or to establish and enable such an entity to regularly review prosecutorial charging practices. As two eminent prosecutorial ethics scholars observed:

Maintaining independence from the police is difficult as a practical matter. Whether or not prosecutors work hand-in-glove with police in the investigative stage, prosecutors are dependent on the police At a minimum, prosecutors and police officers deal with each other professionally on a daily basis and must treat each other as colleagues. They may become friends, and identify, with their counterparts.¹⁶

In contrast, a direct role for civilian community members in matters of policing surfaced in the federal stop-and-frisk class action in New York City.¹⁷ After finding that the City of New York was liable for violating the Fourth and Fourteenth Amendment rights of the plaintiff class, Judge Shira Scheindlin focused on devising remedies, and described the importance of giving the affected community a seat at the table:

[C]ommunity input is perhaps an even more vital part of a sustainable remedy in this case. The communities most affected by the NYPD's use of stop and frisk have a distinct perspective that is highly relevant to crafting effective reforms. No amount of legal or policing expertise can replace a community's understanding of the likely practical consequences of reforms in terms of both liberty and safety.¹⁸

Judge Scheindlin mandated a Joint Remedial Process designed to create appropriate community-led remedies for the NYPD's unlawful stop-and-frisk practices. Judge Scheindlin specified that the process should include, inter alia, members of the communities where stops most often take place; representatives of religious, advocacy, and grassroots organizations; representatives of groups concerned with public schooling, public housing, and other local institutions; local community leaders; and Communities United for Police Reform.¹⁹ In similar fashion, community members most impacted by police and prosecutorial practices should play a role in deciding whether arrests proceed to criminal charges.²⁰

16. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 Wis. L. REV. 837, 863 n.95 (2004). See also Sally Kohn, *First Mike Brown, Then Eric Garner: Prosecutors Can't Be Trusted to Try Cops*, DAILY BEAST (Dec. 3, 2014), <https://www.thedailybeast.com/first-mike-brown-then-eric-garner-prosecutors-cant-be-trusted-to-try-cops> [<https://perma.cc/NG45-J9AV>] (“Attorneys who usually work hand-in-hand with the police in pursuing other criminal cases can’t honestly be expected to be impartial and aggressive in then prosecuting those same officers.”).

17. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 620–21 (S.D.N.Y. 2013).

18. *Floyd v. City of New York*, 959 F. Supp. 2d 668, 686 (S.D.N.Y. 2013).

19. *Id.*

20. See, e.g., Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 Nw. U. L. REV. 1609, 1623 (2017) (“There is reason to

The American Bar Association (ABA) Criminal Justice Standards for the Prosecution Function dictate that “a prosecutor should . . . file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, [and] that admissible evidence will be sufficient to support conviction beyond a reasonable doubt.”²¹ Given the consequences that flow the moment formal charges are filed, it is imperative that the bar be raised—in other words, the prosecutor should not file nor maintain criminal charges unless they are convinced beyond a reasonable doubt that the arrest was lawful and that the accused is guilty.²²

Further, regardless of who makes the charging decision, whether the arrest was constitutional, and whether there is sufficient admissible evidence to prove guilt beyond a reasonable doubt, charges ultimately should not be filed unless, as the ABA admonishes, “the decision to charge is in the interests of justice.”²³ The factors to be evaluated in the calculus of whether charges are in the interests of justice include the host of negative consequences that attach to arrest and/or conviction;²⁴ the longstanding racial disparities in arrest, prosecution, and adjudication; and the impact on the wellbeing of the accused, their family, and their community.²⁵

think that if those most likely to be arrested and incarcerated were given truly equal influence over policy, and if policymaking happened more locally, then the criminal justice system would be less rather than more punitive.”); Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748, 759 (2018) (“[T]he prosecuted should be integral to the process of crafting these reforms.”).

21. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-4.3 (2015).
22. See, e.g., MONROE H. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS 219 (1st ed. 1990) (“Conscientious prosecutors do not put the destructive engine of the criminal process into motion unless they are satisfied beyond a reasonable doubt that the accused is guilty.”); Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 353–54 (2001) (arguing that a prosecutor should be personally convinced of guilt beyond a reasonable doubt before pursuing charges).
23. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION, *supra* note 21.
24. See, e.g., Gabriel J. Chin, *Collateral Consequences and Criminal Justice: Future Policy and Constitutional Directions*, 102 MARQ. L. REV. 233, 235 (2018); See generally MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE (2016).
25. See, e.g., K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 286 (2014) (“Black and Latino people are routinely and aggressively prosecuted under statutes and local ordinances that go largely unenforced in white and wealthy areas.”); Timothy Williams, *Black People are Charged at a Higher Rate than Whites. What if Prosecutors Didn’t Know Their Race?*, N.Y. TIMES (June 12, 2019), <https://www.nytimes.com/2019/06/12/us/prosecutor-race-blind-charging.html> [<https://perma.cc/86V6-CFMC>]; Maranda Fritz, *To Deal with Racial Injustice, Don’t Stop with Law Enforcement: Prosecutorial Conduct Matters Too*, N.Y.L.J. (June 19, 2020), <https://www.law.com/newyorklawjournal/2020/06/19/to-deal-with-racial-injustice-dont-stop-with-law-enforcement-prosecutorial-conduct-matters-too> [<https://perma.cc/M5LZ-4TVB>].

More generally, the interests of justice and racial equality dictate that prosecutors should decline to prosecute any arrest that falls under the rubric of “Broken Windows,” “quality of life,” or “zero tolerance” policing.²⁶ The massive amount of arrests for minor offenses has been disproportionately and destructively inflicted upon people of color,²⁷ and studies show that these policies have no measurable impact on crime rates.²⁸

Further, declining to prosecute should not mean relying on the diversion and specialty or “problem-solving” court industrial complex. Many argue that these courts are yet another example of net-widening governmental intrusion into people’s lives, and that services should be available and provided to the extent that a person needs them, independent and outside of the punitive strictures and control of the criminal court.²⁹ Societal problems are better addressed in sectors like public health rather than in the criminal legal system.³⁰

There are myriad concerns with diversion and so-called problemsolving courts. Often, the accused has to pay out-of-pocket for the privilege of participating,³¹ and these programs are sources of revenue for some local District Attorney offices.³² Scholars have also noted that many programs require the accused to waive a host of constitutional

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26. While some of the newly elected prosecutors vowed to decline to prosecute many low-level offenses, their list of charges that fall into that category fails to include many minor crimes and offenses, and, in any event, there is evidence that they have not even followed through on their limited promise. See, e.g., Emma Whitford, *Suffolk County D.A. Rachael Rollins’s Office is Still Prosecuting Cases She Pledged to Drop*, THE APPEAL (Feb. 6, 2019), <https://theappeal.org/suffolk-county-da-rachael-rollins-office-is-still-prosecuting-cases-she-pledged-to-drop> [<https://perma.cc/WF6L-RXFU>].
 27. See K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. L. & SOC. CHANGE 271 (2009); Steven Zeidman, *Shatter ‘Broken Windows’ Policing*, N.Y. DAILY NEWS (June 10, 2020, 5:00AM), <https://www.nydailynews.com/opinion/ny-oped-shatter-broken-windows-policing-20200610-iozn54pfwnhzbps3oqnx7dvhum-story.html> [<https://perma.cc/2VCS-R4Z3>].
 28. See generally BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2001).
 29. See generally MAYA SCHENWAR & VICTORIA LAW, *PRISON BY ANY OTHER NAME* (2020).
 30. Cynthia Alkon, *Have Problem-Solving Courts Changed the Practice of Law?*, 21 CARDOZO J. CONFLICT RESOL. 597, 608 (2020); James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1561 (2003) (discussing programmatic expansion as well as extending court authority into people’s lives in unprecedented ways).
 31. Shaila Dewan & Andrew W. Lehren, *After a Crime, the Price of a Second Chance*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/us/crime-criminal-justice-reform-diversion.html> [<https://perma.cc/JM75-QY9T>].
 32. Jessica Pishko, *How a Criminal Justice Reform Became an Enrichment Scheme*, POLITICO (July 14, 2019), <https://www.politico.com/magazine/story/2019/07/14/criminal-justice-reform-pretrial-diversion-louisiana-227354> [<https://perma.cc/B6NN-UP77>].

rights, including the right to a jury trial by demanding an up-front guilty plea.³³ By insisting on guilty pleas, these programs effectively fast forward to sentencing with scant concern about constitutional rights or whether there is sufficient evidence of guilt.³⁴ Ultimately, these programs remain punishment-focused with the looming threat of incarceration as the default in the event that the accused fails to satisfy program administrators' expectations for all that was required of them.³⁵

Instead, progressive prosecutors should embrace a shift from a law enforcement focused punishment paradigm to community-based interventions³⁶ and restorative justice (RJ).³⁷ Independent RJ programs that operate at arms-length from the District Attorney's office offer support to survivors while empowering them to help decide how perpetrators of violence can repair the harm they caused, thereby providing for accountability without perpetuating the harms associated with mass incarceration.³⁸ In fact, while most prosecutors never offer a survivor a

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33. See, e.g., NAT'L ASS'N CRIM. DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 25 (2009); Tiffany Cartwright, "To Care for Him Who Shall Have Borne the Battle": *The Recent Development of Veterans Treatment Court in America*, 22 STAN. L. POL'Y REV. 295, 306 (2011); Nolan, Jr., *supra* note 30, at 1559 (explaining that the accused often must sign forms waiving a variety of constitutional rights in order to participate); Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1533 (2000) ("In their mad rush to dispose of cases, drug courts are risking the due process rights of defendants and turning all of us—judges, staff, prosecutors, and public defenders alike—into cogs in an out-of-control case-processing machine."); Jane M. Spinak, *Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts*, 40 AM. CRIM. L. REV. 1617, 1620 (2003) (regarding the "current trend in drug court procedure of requiring a guilty plea or waiver of other due process rights as a condition of entering treatment, rather than permitting the defendant to begin treatment without entering a plea . . .").
34. See, e.g., Cait Clarke & James Neuhard, "From Day One": *Who's in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?*, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 28 (2004) (arguing that specialized courts "are essentially extended sentencing courts").
35. Alkon, *supra* note 30, at 597.
36. See, e.g., CAHOOTS: CRISIS ASSISTANCE HELPING OUT ON THE STREETS, [WWW.WHITEBIRDCLINIC.ORG/CAHOOTS](http://www.whitebirdclinic.org/cahoots) [<https://perma.cc/6DK9-4RFV>] (last visited Aug. 31, 2020).
37. See generally Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors' Perspective*, 88 FORDHAM L. REV. 2287 (2020); Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y.L. SCH. L. REV. 70 (2020).
38. See generally DANIELLE SERED, UNTIL WE RECKON (2019). The mission statement of Sered's organization, Common Justice, is to "advance solutions to violence that transform the lives of those harmed and foster racial equity without relying on incarceration." See COMMON JUSTICE, <https://www.commonjustice.org> [<https://perma.cc/Y955-79K7>] (last visited Aug. 24, 2020). It is a fundamental tenet of restorative justice programs that survivors voluntarily agree to participate. Much has been written about relationships between prosecutors and victims and the weight a prosecutor should give to the victim's views regarding whether to initiate, decline or dismiss charges. See ABA Crim. Just § 3–4.4 (2020). There are also various laws and rules regarding victims' rights about sentencing. See ABA

scenario other than incarceration for the person who caused them harm, the RJ organization Common Justice in New York found that 90 percent of victims of violent crime chose a restorative path when given a choice between seeking incarceration or RJ.³⁹

II. The Complaint

A. Drafting the Accusatory Instrument

In reviewing what must be contained in an accusatory instrument (the pleadings in a criminal case), New York State's highest court stressed that there must be "facts of an evidentiary character" demonstrating "reasonable cause" to believe the accused committed the crime charged.⁴⁰ The court emphasized the critical nature of the reasonable cause determination since a complaint can serve as the basis for an arrest warrant, and is meant to provide the court with sufficient facts to decide whether the accused should be held for further proceedings.⁴¹ Given those potential consequences, it is critical that the accusatory instrument is comprised of evidentiary facts instead of conclusory statements. The concurrence also stressed the need for specific factual allegations so that "prosecutions do not become routinized."⁴²

And yet the typical criminal court complaint drafted by a prosecutor is a template with no more than a few sentences and is devoid of any facts regarding the legality of the search and seizure. In order to enhance police transparency and accountability, and to fully apprise the accused of the nature of the charges against them, the complaint should include factual details that support each element of every crime charged as well as facts that establish the constitutionality of arrest.

III. Discovery

Too often, police testimony is tailored to overcome constitutional objections to the acquisition of evidence or to shore up the prosecution's case at trial.⁴³ As a result, the prosecutor should videotape every inter-

Crim. Just. § 3–72 (2020). While the ABA Standards provide that "[t]he prosecutor generally serves the public and not any particular . . . witness or victim," analysis of the relationship between a progressive prosecutor and a victim is beyond the scope of this Essay. ABA Crim. Just. Standard § 3–1.3.

39. Michelle Alexander, *Reckoning with Violence*, N.Y. TIMES (Mar. 3, 2019), <https://www.nytimes.com/2019/03/03/opinion/violence-criminal-justice.html> [<https://perma.cc/W999-ZPUD>].

40. *People v. Dumas*, 497 N.E.2d 686 (N.Y. 1986). While I refer here specifically to New York State, the practices highlighted are fairly uniform across the country.

41. *Id.* at 687.

42. *People v. Alejandro*, 511 N.E.2d 71 (N.Y. 1987) (Bellacosa, J., concurring).

43. See, e.g., Steven Zeidman, *Policing the Police; The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 326–28 (2005); David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 461 (1999) ("Police will commit perjury to further the prosecution of a citizen by adding inculpatory 'evidence' to better secure a conviction, to gild the lily of police conduct,

view with law enforcement witnesses, in particular the initial interview with the arresting officer when facts are fresh in mind.⁴⁴ The videotape should be provided to the accused as soon as the interview is completed.

It has only recently come to light that some District Attorney offices compile lists of police witnesses suspected of having committed perjury or who otherwise have dubious credibility.⁴⁵ Those lists were not provided to the accused.⁴⁶ Prosecutors should maintain those lists on an ongoing basis along with written explanations for the conclusion that the police officer lacks credibility.⁴⁷ Those lists should be provided to any public defender or similar defense organization in the relevant community and should also be made publicly available.

In addition, when a police officer is believed to have engaged in misconduct, it is imperative that all convictions in which that officer played any material role should be vacated.⁴⁸ It is not enough to dismiss

or merely to sanitize the record of uncomfortable facts.”).

44. Just as there is a national movement to videotape law enforcement interrogations of suspects, so, too, should prosecutorial interviews of all witnesses be videotaped. See, e.g., Michael S. Schmidt, *In Policy Change, Justice Dept. to Require Recording of Interrogations*, N.Y. TIMES (May 22, 2014), <https://www.nytimes.com/2014/05/23/us/politics/justice-dept-to-reverse-ban-on-recording-interrogations.html> [https://perma.cc/2W95-98V6].
45. George Joseph & Emma Whitford, *Lawsuit: Manhattan D.A.’s Office Tracks Cops with ‘Credibility’ Problems But Refuses to Release Its List*, THE APPEAL (Oct. 22, 2018), <https://theappeal.org/lawsuit-manhattan-d-a-s-office-tracks-cops-with-credibility-problems-but-refuses-to-release-its-list> [https://perma.cc/25ET-M5RF]; George Joseph & Ali Winston, *When Prosecutors Bury Police Lies*, THE APPEAL (Sep. 17, 2019), <https://theappeal.org/prosecutors-police-lies> [https://perma.cc/F5NJ-GNQP]; Joseph Goldstein, *Why 7 Police Officers Were Blacklisted in Brooklyn*, N.Y. TIMES (Nov. 7, 2019), <https://www.nytimes.com/2019/11/07/nyregion/police-credibility-brooklyn-district-attorney.html> [https://perma.cc/56DW-T2EB]; Mark Fazlollah et al., *Philadelphia’s DA Office Keeps Secret List of Suspect Police*, PHILADELPHIA INQUIRER (Feb. 13, 2018), <https://www.inquirer.com/philly/news/philadelphia-police-misconduct-list-larry-krasner-seth-williams-meek-mill-20180213.html> [https://perma.cc/275H-VLQC]; Justin Fenton, *Baltimore’s State’s Attorney Says She Has a List of 300 Officers with Credibility Issues. Public Defenders Are Demanding to See It*, BALTIMORE SUN (Feb. 11, 2020), <https://www.baltimoresun.com/news/crime/bs-md-ci-cr-do-not-call-list-compel-20200211-xsjzrh2we5df7etqreyxgu2e4y-story.html> [https://perma.cc/FLQ7-H6UL].
46. See *supra* note 45.
47. Elizabeth Weill-Greenberg, *When Cops Lie, Should Prosecutors Rely Upon their Testimony at Trial?*, THE APPEAL (July 29, 2019), <https://theappeal.org/advocates-demand-da-do-not-call-lists-dishonest-biased-police> [https://perma.cc/6DXY-QJX7].
48. See Grace Hauck, *Prosecutors Have Thrown Out Nearly 100 Convictions Tied to ‘Rogue’ Chicago Cop*, USA TODAY (Feb. 11, 2020), <https://www.usatoday.com/story/news/nation/2020/02/11/chicago-police-misconduct-convictions-tied-ronald-watts-vacated/4724876002> [https://perma.cc/77J9-JFEM] (reporting that District Attorney Kim Foxx says her office will not call ten officers associated with the disgraced police officer out of concerns about their own credibility); Josh Girsky et al., *Baltimore Prosecutor Seeks to Throw Out Nearly 800 Criminal Convictions*, CNN (Oct. 4, 2019), <https://www.cnn.com/2019/10/04/>

or vacate one particular case in which a police officer is suspected of malfeasance.⁴⁹ As but one example, in Brooklyn, New York it was discovered that two police officers, Stephen Caracappa and Louis Eppolito, were actually “hit men” for the mob. Both officers were convicted of racketeering and sent to federal prison for life. It is unconscionable that any case in which they played a material role should still stand, and yet people remain in New York State prison having been convicted of crimes in which Caracappa or Eppolito were the only police officers who investigated the case and testified at trial.⁵⁰

Arrests require that police officers fill out reports. Those reports should be immediately provided to the accused along with any other documents completed or received in connection with the case. Any report or document that is not provided, and any redaction to any report that is provided, must be promptly explained to the accused in writing.

Similarly, more and more police officers are using body-worn and/or dashboard cameras. Subject to relevant privacy laws, the accused must have immediate access to all video that pertains to the case.⁵¹

IV. Bail

The bail reform movement has firmly taken root across the country.⁵² Money bail (meaning, pay your way out of jail pending trial) has been revealed as a way to punish the poor even before they are convicted.⁵³ Prosecutors should in all cases decline to seek bail in the form of a monetary amount. Currently, prosecutors often request money bail

us/baltimore-police-corruption-cases [https://perma.cc/2QGT-Z53T] (reporting that State’s Attorney Marilyn Mosby’s office investigated 2,500 cases and will vacate 790 where the suspected corrupt officers were deemed to be material to the case).

49. See Kevin Rector et al., *Hundreds of Cases Involving LAPD Officers Accused of Corruption Now Under Review*, L.A. TIMES (July 28, 2020), <https://www.latimes.com/california/story/2020-07-28/lacey-flags-hundreds-of-cases-linked-to-charged-lapd-officers-for-possible-review> [https://perma.cc/3T35-V3VC] (reporting that Los Angeles prosecutors examining pending cases where corrupt police officers were involved, and also revisiting past convictions, including where there was a guilty plea, where those officers were involved).
50. See, e.g., Rocco Parascandola, *Brooklyn Man Busted by Crooked Mafia Cop in Cabbie’s Murder Sees Request to Toss Conviction Rejected*, N.Y. DAILY NEWS (Sep. 12, 2017), <https://www.nydailynews.com/new-york/brooklyn/mob-linked-murderer-sees-request-toss-conviction-rejected-article-1.3490362> [https://perma.cc/SBD7-R4P3].
51. See JOEL M. SCHUMM, *POLICING BODY CAMERAS: POLICIES AND PROCEDURES TO SAFEGUARD THE RIGHTS OF THE ACCUSED* 21 (2017).
52. See, e.g., Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399 (2017).
53. Zina Makar, *Unnecessary Incarceration*, 98 OR. L. REV. 607, 609 (2020) (“In the past few years, reinvigorated consciousness about the pernicious effects of money bail has led to a wave of bail reform litigation and legislation.”); Cherise Fanno Burdeen, *The Dangerous Domino Effect of Not Making Bail*, THE ATLANTIC (Apr. 12, 2016), <https://www.theatlantic.com/politics/archive/2016/04/the-dangerous-domino-effect-of-not-making-bail/477906> [https://perma.cc/7JGX-SKCW].

in part due to learned, common practice and incentives created by the money bail system that serve to keep people without access to funds behind bars and more likely to accept a plea offer.⁵⁴

Prosecutors should abide by the presumption of innocence and be guided by a corresponding presumption of release. Bail should be focused exclusively on an evaluation of whether the accused will return to court as directed and should not include any factor having to do with predictions of future dangerousness. Risk assessment tools should be avoided because there is ample evidence they are infected with baked-in racial bias.⁵⁵ Currently, these flawed tools are often used when deciding whether a defendant should be released on bail. In cases where a prosecutor believes there is a substantial likelihood the accused will not return to court, the prosecutor should seek the least restrictive means available to ensure the accused's attendance (e.g., unsecured or partially secured bonds).

Recently, two prominent progressive prosecutors, Larry Krasner in Philadelphia County, Pennsylvania, and Rachael Rollins in Suffolk County, Massachusetts, publicly denounced their local bail funds for having posted money bail for people accused of serious crimes.⁵⁶ Bail funds are a necessary response to the continued existence of monetary bail, and a progressive prosecutor should commit to supporting their independence and to refrain from criticizing a bail fund's decision to help someone pay for their freedom.⁵⁷

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54. Gaby Del Valle, *Most Criminal Cases End in Plea Bargains, Not Trials*, THE OUTLINE (Aug. 7, 2017), <https://theoutline.com/post/2066/most-criminal-cases-end-in-plea-bargains-not-trials>; see Joshua Vaughn, *Pleading Guilty to Get Out of Jail*, THE APPEAL (Jun. 6, 2019), <https://theappeal.org/franklin-county-pennsylvania-bail-jail-high-jail-population>; Clarke & Neuhard, *supra* note 34, at 28.
55. Bernard E. Harcourt, *Against Predication: Profiling, Policing, and Punishing in an Actuarial Age* (U. Chi. L. Sch., Pub. L. & Legal Theory Working Paper No. 94, 2005); Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. 2218 (2019).
56. *Philadelphia DA Larry Krasner: Trump Is a "Wannabe Fascist." I Will Charge His Agents If They Break the Law*, DEMOCRACY NOW! (July 23, 2020), https://www.democracynow.org/2020/7/23/larry_krasner_philadelphia_protests_federal_agents [<https://perma.cc/3YXW-LWRA>] (in this interview, Krasner criticized bail funds for bailing out people that "[need] to be held in custody"); Reggie Shuford, *Larry Krasner Is Not Living Up to His Reputation as a Progressive Reformer*, PHILA. INQUIRER (Aug. 3, 2020), <https://www.inquirer.com/opinion/commentary/larry-krasner-cash-bail-pandemic-philadelphia-district-attorney-20200803.html> [<https://perma.cc/3UYG-FB6X>]; Liam Knox, *Rollins Criticizes Group That Bailed Out Repeat Sex Offender Charged in New Rape*, WBUR NEWS (Aug. 11, 2020), <https://www.wbur.org/news/2020/08/11/da-rollins-mass-bail-fund-criticism> [<https://perma.cc/CQJ9-PEDR>] (reporting that District Attorney Rollins was joined by the Boston Police Commissioner in condemning the Massachusetts Bail Fund); Malik Neal, *What the Pandemic Revealed About Progressive Prosecutors*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/2021/02/04/opinion/prosecutors-bail-reform.html> [<https://perma.cc/XSJ5-T7WJ>].
57. See Sandra Susan Smith, *The Massachusetts Bail Fund Is on the Right Side of the Law—and Justice*, BOSTON GLOBE (Aug. 18, 2020), <https://www.bostonglobe.com/2020/08/18/opinion/massachusetts-bail-fund-is-right-side-law-justice> [<https://perma.cc/U7KW-KFP5>].

V. Pretrial

A. Interrogation

In an amicus brief submitted in *Miranda v. Arizona*, the American Civil Liberties Union urged that the only way to dispel the coercion inherent in custodial interrogation was to require the presence of defense counsel.⁵⁸ In addition, while a rich person is likely to respond with “Call my lawyer” when law enforcement seeks to interrogate, a person without means to hire a lawyer is more apt to accede to law enforcement importuning them to talk. Allowing interrogation only with counsel present is one way to better balance the scales between rich and poor and to ensure that the accused’s right to remain silent is fully respected.⁵⁹

Further, it is now common knowledge that many wrongful convictions were based in large part on false confessions.⁶⁰ Providing counsel prior to any interrogation will help end false or coerced confessions and limit the possibility of an innocent person being convicted. Therefore, a progressive prosecutor should insist that defense counsel be present before any interrogation of a suspect by any prosecutor or member of any law enforcement agency.

Prosecutors, in conjunction with the relevant Department of Corrections, must end the practice of taping and otherwise monitoring personal and/or legal phone calls by people in jail or prison.⁶¹ As it stands, prosecutors can and do use recordings of such calls to prosecute

58. See Brief for American Civil Liberties Union as Amicus Curiae at 22–31, *Miranda v. Arizona*, 384 U.S. 436 (1965) (No. 759).

59. A rule requiring counsel’s presence during any interrogation is not without precedent. For many years, New York City police officers had the benefit of the “48-hour rule” that provided they could not be interrogated about any suspected wrongdoing until 48 hours had passed and they had the opportunity to obtain counsel. See Leonard Levitt, *Judge Zaps ‘48-Hour Rule’*, N.Y. NEWSDAY, Sept. 17, 2003.

60. See, e.g., Saul Kassin & David Thompson, *Videotape All Police Interrogations*, N.Y. TIMES (Aug. 1, 2019), <https://www.nytimes.com/2019/08/01/opinion/police-interrogations-confessions-record.html> [<https://perma.cc/VEC5-EV3C>] (stating that 28 percent of DNA exonerations involve false confessions); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 920–21 (2004) (stating that the problem of false confessions has been featured prominently in studies as one among many leading causes of wrongful convictions).

61. See Joe Sexton, *Using Prisoner Phone Calls to Convict? NY’s Highest Court Puts Critical Question on Hold*, PROPUBLICA (Aug. 31, 2016), <https://www.propublica.org/article/prisoner-phone-calls-convict-new-york-highest-court-question-on-hold> [<https://perma.cc/BT8D-H8HT>]; Jordan Smith & Micah Lee, *Not So Securur*, THE INTERCEPT (Nov. 11, 2015), <https://theintercept.com/2015/11/11/securur-hack-prison-phone-company-exposes-thousands-of-calls-lawyers-and-cients> [<https://perma.cc/R3DL-HE5J>]; Ken Armstrong, *A Phone Call from Jail? Better Watch What You Say*, MARSHALL PROJECT (Sep. 4, 2015), <https://www.the-marshallproject.org/2015/09/04/a-phone-call-from-jail-better-watch-what-you-say> [<https://perma.cc/CQ3S-V35X>].

already incarcerated defendants.⁶² At a minimum, prosecutors should agree to never use anything said on those phone calls as evidence against the accused—people should be able to talk freely with family and friends, especially in a time when visits are curtailed.

B. *Grand Jury*

Thirty-five years ago, New York’s former Chief Judge, Sol Wachtler, proposed abolishing the grand jury system of bringing indictments. Wachtler famously observed that district attorneys hold so much sway over grand juries that they could get them to “indict a ham sandwich,”⁶³ and added later that grand juries “operate more often as the prosecutor’s pawn than the citizen’s shield.”⁶⁴ Several years earlier, Supreme Court Justice William O. Douglas issued a similar warning about the grand jury, writing that “[I]t is indeed common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the government, is now a tool of the Executive.”⁶⁵

Prosecutors are simultaneously adept at presenting evidence in a way that all but guarantees the grand jury will not indict. Prime examples include the failure of the grand jury to indict Police Officer Daniel Pantaleo in Staten Island, New York for killing Eric Garner, or Police Officer Darren Wilson in Ferguson, St. Louis for killing Michael Brown.⁶⁶ While grand juries typically rubber stamp the DA’s request for an indictment of defendants without a connection to law enforcement, in each of the few cases of police shootings that former Ferguson County DA Robert McCullough reluctantly brought to the grand jury, not a single one resulted in an indictment.⁶⁷

62. See *People v. Vining*, 28 N.Y.3d 686, 688 (2017).

63. Marcia Kramer & Frank Lombardi, *New Top State Judge: Abolish Grand Juries & Let Us Decide*, N.Y. DAILY NEWS (Jan. 31, 1985), <https://www.nydailynews.com/news/politics/chief-judge-wanted-abolish-grand-juries-article-1.2025208> [<https://perma.cc/U9CE-JLQX>].

64. *Do We Need Grand Juries?*, N.Y. TIMES (Feb. 18, 1985), <https://www.nytimes.com/1985/02/18/opinion/do-we-need-grand-juries.html> [<https://perma.cc/J7LM-AWWB>].

65. *United States v. Mara*, 410 U.S. 19, 23 (1973) (Douglas, J., dissenting).

66. Erik Eckholm, *Witnesses Told Grand Jury that Michael Brown Charged at Darren Wilson, Prosecutor Says*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/us/witnesses-told-grand-jury-that-michael-brown-charged-at-darren-wilson-prosecutor-says.html> [<https://perma.cc/KE9V-9SJM>]; Amy Davidson Sorkin, *What the Eric Garner Grand Jury Didn't See*, NEW YORKER (Dec. 4, 2014), <https://www.newyorker.com/news/amy-davidson/eric-garner-grand-jury-didnt-see> [<https://perma.cc/Z8DJ-D3EE>].

67. Ben Casselman, *It's Incredibly Rare for a Grand Jury to Do What Ferguson's Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014), <https://fivethirtyeight.com/features/ferguson-michael-brown-indictment-darren-wilson> [<https://perma.cc/P4DB-MGND>] (“According to the Bureau of Justice Statistics, U.S. attorneys prosecuted 162,000 federal cases in 2010, the most recent year for which we have data. Grand juries declined to return an indictment in 11 of them.”).

Prosecutors wield almost total and absolute power over the grand jury. There is no judge, no defense attorney, and the records are sealed.⁶⁸ In 1884, the U.S. Supreme Court ruled that states are not required to comply with the Fifth Amendment provision that a criminal prosecution must be initiated by a grand jury indictment.⁶⁹ A truly progressive prosecutor would replace grand juries and instead implement preliminary hearing with a judicial presence, mandated discovery, right to counsel, and live testimony, under oath, subject to cross-examination.

C. *Suppression Hearings*

Pretrial suppression hearings to test the lawfulness of searches, seizures, and arrests are few and far between.⁷⁰ In many cases, prosecutors make “one time only” plea offers on the eve of a scheduled suppression hearing and threaten a much more severe plea offer should the accused decline to plead guilty.⁷¹

Given the systematic Fourth Amendment and Equal Protection clause violations found in the federal stop-and-frisk litigation in New York⁷² and the national issues about disproportionate and hyper aggressive policing of Black and Brown communities, prosecutors should commit to immediate pretrial suppression hearings in all possessory offenses so that the arresting officers must testify under oath, in public, and subject to cross-examination about what they did and why they did it.⁷³

As with the “trial tax,” *infra*, the defendant should not receive harsher treatment by way of plea offers or sentencing after trial for having exercised their constitutional right to a pretrial hearing to determine the legality of the police conduct in their arrest.

68. William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 174 (1973) (“Today, the grand jury is the total captive of the prosecutor who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any grand jury”); Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 260 (2017).

69. *Hurtado v. California*, 110 U.S. 516, 538 (1884).

70. Steven Zeidman, *Whither the Criminal Court: Confronting Stops-and-Frisks*, 76 ALB. L. REV. 1187, 1188 (2013).

71. Joseph Goldstein, *Police ‘Testilying’ Remains a Problem. Here Is How the Criminal Justice System Could Reduce It*, N.Y. TIMES (Mar. 22, 2018), <https://www.nytimes.com/2018/03/22/nyregion/police-lying-new-york.html> [https://perma.cc/5CRM-B28R] (“More suppression hearings would be a good thing, almost everyone agrees. Yet the justice system often seems reluctant to hold them. It is not unusual for prosecutors to offer attractive plea deals shortly before a suppression hearing—with the provision that the defendant takes the deal immediately, defense lawyers said.”).

72. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013).

73. In a police misconduct scandal in the 1980s in New York, it was revealed that officers engaged in a practice they called “dropping your own dime.” Officers would disguise their voice, call 911, and report a fictitious crime inside of a building they wanted to enter. The ensuing radio call to all available police units in the vicinity gave them the cover they needed to enter the building without a warrant. See generally MIKE McALARY, BUDDY BOYS (1987).

D. Charge Reduction

In *Duncan v. Louisiana*, the Supreme Court held that the Sixth Amendment as applied to the states through the Fourteenth Amendment required that people accused of serious crimes are entitled to a trial by a jury.⁷⁴ Exactly what amounted to a “serious” crime was left unresolved until *Baldwin v. New York*.⁷⁵ In *Baldwin*, the court held that “serious” offenses were those that carried a maximum sentence of at least six months imprisonment.⁷⁶ If the charge contained a maximum of less than six months it was deemed to be “petty” and the right to a jury trial did not attach.⁷⁷

It is common prosecutorial practice to reduce charges on the eve of trial to a degree that the accused no longer has a right to a jury trial.⁷⁸ In New York, a class “A” misdemeanor carries a one-year maximum sentence and so the accused has a right to a jury trial.⁷⁹ Prosecutors often at the last minute reduce “A” misdemeanor charges to class “B” charges which carry a maximum sentence of three months, thereby denying the accused their right to a jury trial.⁸⁰ Instead, the ultimate determination of whether guilt is proven beyond a reasonable doubt will be made by a judge, often the very same judge who was urging the accused to accept a guilty plea and forego their right to a trial.

A progressive prosecutor would commit to end the practice of last-minute charge reduction and ensure the accused their fundamental right to a jury trial if they are opposed to the reduction of the charges.

74. *Duncan v. Louisiana*, 391 U.S. 145, 161–62 (1968).

75. *Baldwin v. New York*, 399 U.S. 66, 69 (1970).

76. *Id.*

77. The Court did note that a charge with a maximum sentence of less than six months imprisonment could become “serious” if other onerous consequences not involving incarceration attach. *See, e.g.*, *People v. Suazo*, 32 N.Y.3d 491, 508 (2018) (holding that the threat of deportation upon conviction meant the class B misdemeanor charges were sufficiently serious that the accused was entitled to a jury trial, notwithstanding that the maximum sentence was less than six months).

78. Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 807–8 (2016); Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 659 n.133, 662 n.142 (2014) ; *see also* M. Chris Fabricant, *Rethinking Criminal Defense Clinics in “Zero-Tolerance” Policing Regimes*, 36 N.Y.U. REV. L. & SOC. CHANGE 351, 372 n.106 (2012); Brandon K. Crase, *When Doing Justice Isn’t Enough: Reinventing the Guidelines for Prosecutorial Discretion*, 20 GEO. J. LEGAL ETHICS 475, 475–77 (2007) (describing a similar practice in the District of Columbia). In *People v. Urbaz*, 10 N.Y.3d 773 (2008), New York’s highest court gave its stamp of approval to the practice of last-minute charge reduction that foreclosed the right to a jury trial.

79. N.Y. Penal Law § 70.15(1) (2019).

80. *Id.* at § 70.15(2).

VI. Trial

A. Jury Selection—Peremptory Challenges

The jury is intended to be an “inestimable safeguard against the corrupt or overzealous prosecutor,”⁸¹ but prosecutors have been able to bypass that protection through the use of peremptory challenges.

A peremptory challenge allows a party to exclude a statutorily prescribed number of potential jurors without needing to offer any reason to the trial judge. There is a sordid and longstanding history of use by prosecutors to remove Black jurors, as captured in a memo written in 1963 by and for Dallas prosecutors that instructed: “Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated.”⁸²

In *Batson v. Kentucky*, the Supreme Court limited the use of peremptory challenges by holding that the prosecution’s use of peremptory challenges on the basis of race violated the juror’s right to equal protection.⁸³ While the court established a process by which so-called *Batson* claims should be raised and evaluated,⁸⁴ that process still left ample room for prosecutors to skirt the prohibition on race-based peremptory challenges.⁸⁵ As a result, there is indisputable evidence that prosecutors continue to use peremptory challenges to remove potential Black jurors.⁸⁶

81. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

82. Andrew Hammel, *Discrimination and Death in Dallas: A Case Study in Systematic Racial Exclusion*, 3 TEX. F. ON C.L. & C.R. 187, 197 (1997).

83. *Batson v. Kentucky*, 476 U.S. 79 (1986). Subsequently, in *J.E.B. v. Alabama*, 511 U.S. 127 (1994), the Court held similarly that use of peremptory challenges to remove potential jurors because of their gender violated the Equal Protection Clause of the Fourteenth Amendment.

84. First, the defendant must establish a prima facie case of purposeful discrimination. If such a case is established, the prosecutor must rebut the inference of discrimination by offering a race-neutral explanation for the challenge to the juror. *Batson*, 476 U.S. at 93–98.

85. The Supreme Court set an extremely high bar for a *Batson* violation. The judge must decide that a stated reason for a peremptory challenge was pretextual and meant to hide discriminatory intent. See Ronald Wright, *Yes, Jury Selection is as Racist as You Think. Now We Have Proof*, N.Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/opinion/juries-racism-discrimination-prosecutors.html> [<https://perma.cc/4LY6-Z4KM>]; Alafair S. Burke, *Prosecutors and Peremptories*, 97 IOWA L. REV. 1467, 1473 (2012) (referring to *Batson* as a “toothless” doctrine that allows prosecutors to discriminate against Black jurors); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U. MICH. J.L. REFORM 229, 235 (1993) (“[O]nly a small percentage of the neutral explanations for peremptory strikes were rejected”). See, e.g., *Stockton v. Commonwealth*, 402 S.E.2d 196 (Va. 1991) (prosecutor did not like the juror’s demeanor); *Lockett v. State*, 517 So. 2d 1346 (Miss. 1987) (juror wore a hat in the courtroom). Prosecutors have successfully repelled *Batson* violation claims by citing to the jurors’ “grimaces, sympathetic looks, smiles, nods, and blank stares.” Raphael & Ungvarsky, *supra*, at 248.

86. Wright, *supra* note 85. See also Burke, *supra* note 85, at 1471 (citing examples of prosecutors across the country regularly and disproportionately using peremptory challenges against Black jurors); Maureen A Howard, *Taking the High*

In 1969, another jury selection memo titled “Jury Selection for Criminal Cases” was written for Dallas prosecutors.⁸⁷ This memo continued to urge prosecutors to remove Black jurors⁸⁸ but also gave more advice about who prosecutors should seek to exclude from the jury:

“You can often spot the showoffs and liberals by how and to whom they are talking.”

“Look for physical afflictions. These people usually sympathize with the accused.”

“[P]eople from the east or west coasts often make bad jurors.”

“Intellectuals such as teachers, etc. generally are too liberal and contemplative to make good State’s jurors.”⁸⁹

These prosecutorial approaches to jury selection are not ancient history. Apparently, versions of the memo were still being distributed to Dallas prosecutors in the early 1980s.⁹⁰ In a case recently decided by the Fifth Circuit, it was discovered that the prosecutor’s jury selection notes included a spreadsheet with names of potential black jurors—and only potential black jurors—indicated in bold.⁹¹ Racist approaches to jury selection are not limited to Texas. A recent case in New York revealed a prosecutor’s handwritten notes that said, *inter alia*, “get white jurors” and “no Jews . . . Don’t want to [sic] many women.”⁹²

In February 2020, a bill was introduced in the California legislature to prohibit a party from using a peremptory challenge to remove a prospective juror on the basis of the prospective juror’s race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups.⁹³ The bill is backed by the California Public Defenders

Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges, 23 GEO. J. LEGAL ETHICS 369 (2010); Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Court Judges*, 73 CHI.-KENT L. REV. 475, 500 (1998); Miller-El v. Dretke, 545 U.S. 231, 267–70 (2005) (Breyer, J., concurring) (citing studies showing ongoing race-based jury selection); Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson’s Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075 (2011).

87. Hammel, *supra* note 82, at 197.

88. The memo provided that “minority races almost always empathize with the Defendant.” *Id.* at 198.

89. *Id.* at 197–98. See also Raphael & Ungvarsky, *supra* note 85, at 240 (stating that prosecutors often used peremptory challenges against social workers and teachers).

90. Hammel, *supra* note 82, at n.107.

91. See *Broadnax v. Lumpkin*, 987 F.3d 400 (5th Cir. 2021).

92. Rebecca Rosenburg, *Queens DA Wants Convictions Overturned Due to Prosecutor’s Racist Notes*, N.Y. POST (Dec. 10, 2020), <https://nypost.com/2020/12/10/dawants-convictions-overturned-due-to-prosecutors-racist-notes> [<https://perma.cc/T367-JV7T>].

93. A.B. 3070, 2019–2020 Reg. Sess. (Cal. 2019); Cheryl Miller, *New Amendments to Jury Selection Bill Curb Legislation’s Reach*, LAW.COM (Jul. 27, 2020), <https://www.law.com/therecorder/2020/07/27/amendments-to-jury-selection-bill-affect-criminal-trials-but-not-civil> [<https://perma.cc/46SN-ST4H>].

Association and several social justice organizations, but is opposed by the California District Attorneys Association.⁹⁴

Given the history and the seemingly intractable problems inherent in prosecutorial exercises of peremptory challenges, prosecutors should commit to never using a peremptory challenge.

B. *Forensic Evidence*

A comprehensive report from the National Academy of Sciences in 2009, “Strengthening Forensic Science in the United States: A Path Forward,” cast doubt on the scientific basis for virtually every forensic discipline used to convict people and send them to prison.⁹⁵ With the exception of DNA analysis, it found, “no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.”⁹⁶ While the report’s findings prompted vociferous criticism from the FBI, the National District Attorneys’ Association and other law enforcement organizations, critics continue to rail against the use of allegedly scientific techniques such as bite-mark and ballistics comparison, fingerprint matching, blood spatter analysis, and arson investigation.⁹⁷

Further, regardless of whether a specific type of alleged scientific evidence is more aptly described as junk science, jurors tend to assign this testimony enhanced credibility.⁹⁸ In addition to being of dubious scientific validity, a recent study of 2,400 exonerations found a large number involved situations where officials lied about forensic testing.⁹⁹

To avoid the recurring tragedy of innocent people being convicted based in whole or in part on these kinds of techniques, a progressive prosecutor should decline to use and/or rely on any such method unless and until it has been accepted as valid by the overwhelming majority of the relevant scientific community after rigorous testing and analysis.¹⁰⁰

94. Miller, *supra* note 93.

95. Liliana Segura & Jordan Smith, *Bad Evidence: Ten Years After a Landmark Study Blew the Whistle on Junk Science, the Fight Over Forensics Rages On*, THE INTERCEPT (May 5, 2019), <https://theintercept.com/2019/05/05/forensic-evidence-aafs-junk-science> [<https://perma.cc/P9H5-CYWE>].

96. *Id.*

97. Edward Hume, *Bad Forensic Science is Putting Innocent People in Prison*, L.A. TIMES (Jan. 13, 2019), <https://www.latimes.com/opinion/op-ed/la-oe-humes-forensic-evidence-20190113-story.html> [<https://perma.cc/6J9B-CC4F>] (“[C]ommon forensic techniques has been tainted by systematic error, cognitive bias (sometimes called ‘tunnel vision’) and little or no research or data to support it.”).

98. Radley Balko, *A D.C. Judge Issues a Much-Needed Opinion on ‘Junk Science’*, WASH. POST (Feb. 28, 2020), <https://www.washingtonpost.com/opinions/2020/02/28/dc-judge-issues-much-needed-opinion-junk-science> [<https://perma.cc/THH2-REN>].

99. Gross et al., *supra* note 9, at 96.

100. Jim Hilbert, *The Disappointing History of Science in the Courtroom: Frye, Daubert, and the Ongoing Crisis of “Junk Science” in Criminal Trials*, 71 OKLA.

C. *The Accused's Right to Testify*

The Fifth Amendment provides that “No person . . . shall be compelled in any criminal case to be a witness against himself.” While the affirmative right to testify on one’s behalf at trial is not explicitly mentioned in the Constitution or its Amendments, in *Rock v. Arkansas*,¹⁰¹ the Supreme Court held that it is a corollary of the right to remain silent.

However, rarely does the accused avail themselves of this cherished right.¹⁰² In some cases, that is because of the prosecution’s threat of perjury charges if they are convicted after having testified to their innocence.¹⁰³ In other cases, the accused declines to testify because they fear not being able to tell their narrative story well under pressure, or being tripped up or confused by cross-examination.¹⁰⁴ In many cases, people do not testify because the prosecutor intends to cross-examine them about prior unrelated convictions or bad acts.¹⁰⁵ Given the undeniable history of hyperaggressive policing in Black and Brown communities, concerns about cross-examination about prior convictions disproportionately affect people of color.

Not only does current practice mean that too few people are able to exercise their fundamental right to testify on their own behalf, juries undoubtedly, and despite judicial admonitions to the contrary, hold the accused’s silence against them.¹⁰⁶

As a result, prosecutors should refrain from cross-examining the accused if they testify at trial, or should limit their questioning to open-ended questions like “What happened?” and “What happened next?” If a prosecutor feels compelled to cross-examine the accused, their questioning should be limited to the facts of the instant charges, which would mean no questions regarding any alleged prior arrests, convictions, or bad acts.

D. *“Trial Tax” and “One Time Only” Plea Offers*

By now, it is common knowledge that people are punished more harshly if they decline to plead guilty, insist on their constitutional right to a trial, and are convicted.¹⁰⁷ As a result, the overwhelming number of convictions in criminal cases are the result of guilty pleas, as precious

L. REV. 759, 762–63 (2019) (“[T]he problem of junk science in criminal cases has undoubtedly resulted in wrongful convictions, including some death penalty cases . . .”).

101. *Rock v. Arkansas*, 483 U.S. 44 (1987).

102. Babcock, *supra* note 7.

103. *Id.* at 5.

104. Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 401 (2018).

105. *Id.* at 409.

106. Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 575 (2014).

107. See generally NAT’L ASS’N CRIM. DEF. LAWYERS, *THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* (2018); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1154 (2008); STEVEN BOGIRA, *COURTROOM 302* (2005).

few people are willing to exercise their right to a trial and the risk of a dramatically harsher sentence.¹⁰⁸

In most cases, prosecutors are complicit in the enhanced sentences that result as they urge judges to, in effect, punish defendants for exercising their right to a trial. One scholar estimates that by opting for a trial the defendant risks a two to six times increase in the odds of imprisonment and a 15 to 60 percent increase in the length of sentence over what they would have received had they pleaded guilty.¹⁰⁹

Prosecutors should remain silent at sentencing, presumptively seek the legally permissible minimum sentence, or adopt a scheme of sentencing that creates a ceiling to limit the impacts of any post-trial enhanced sentence.¹¹⁰

VII. Sentencing

Since it is hard to imagine even a self-proclaimed progressive prosecutor being in support of prison abolition, prosecutors should at least commit to seeking incarceration only, and truly, as a last resort.¹¹¹ In those unusual cases when they feel absolutely compelled to request incarceration, they should seek the minimum sentence permitted by law.¹¹²

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108. Even the Supreme Court has acknowledged that guilty pleas rule the day in the criminal legal system. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials.”); *see also*, William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) (“[P]lea bargaining is . . . not some adjunct to the criminal justice system; it is the criminal justice system.”).
109. Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313, 314 (2019).
110. *See, e.g.*, Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1265 (2008).
111. About the closest any prosecutor candidate seems to have come to taking even a quasi-prison abolitionist stance was Tiffany Cabán in her race for the District Attorney of Queens County, New York. Cabán was described as having a “radical vision” to “incarcerate as few offenders as possible.” Samantha Michaels, *Tiffany Cabán is on Her Way to Becoming Queens’ Next DA*, MOTHER JONES (Mar. 27, 2019), <https://www.motherjones.com/crime-justice/2019/03/tiffany-caban-public-defender-queens-incarceration-aoc-queens> [<https://perma.cc/79D8-DVHG>] (Cabán wants, *inter alia*, “to lock up fewer people”). In 2019, the District Attorney of Brooklyn, New York announced a reform plan that included the promise that incarceration was a last resort. Rob Abruzzese, *Jail is ‘Last Resort’ in Brooklyn DA’s New Reform Plan*, BROOKLYN EAGLE (Mar. 11, 2019), <https://brooklyneagle.com/articles/2019/03/11/brooklyn-da-unveils-justice-2020-reform-plan> [<https://perma.cc/QG4G-X9HH>]. Apparently, the “last resort” is a frequent occurrence as countless people in Brooklyn have been incarcerated since the reform plan was announced.
112. The weight a prosecutor should give to a victim’s stated desires regarding sentencing is beyond the scope of this Essay. *See supra*, note 38. However, many scholars have cautioned that in the extant criminal legal system, where victims are rarely given options besides incarceration, according too much weight to victims’ wishes would often lead to harsh sentences. *See, e.g.*, GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS’ RIGHTS IN CRIMINAL TRIALS 198–201 (1995) (“There is a danger that informal testimonials by the angry and aggrieved could

One of the primary reasons for mass incarceration is the length of sentences that have been regularly meted out over the past several decades. Prosecutors should publicly and officially support sentencing reforms to abolish mandatory minimums, to reduce maximums, and to eliminate enhanced sentencing mechanisms.

In addition to the crisis of mass incarceration, there is increasing awareness of the related travesty of mass supervision, which captures 4.5 million people on probation or parole.¹¹³ As with mass incarceration, mass supervision is marked by profound racial disparities as revealed by who is on probation or parole, for how long, and who faces revocation proceedings and a return to prison.¹¹⁴ Mass supervision inexorably feeds mass incarceration as the number of people incarcerated for violations of probation or parole has grown exponentially over the past few decades.¹¹⁵

While probation may have originally been imagined as a kind of alternative to incarceration in select circumstances, the net has widened to such a degree that too many people are unnecessarily under some form of supervision and are subject to restrictions on behavior, heightened scrutiny, and the looming threat, and constant reality, of imprisonment.¹¹⁶ A progressive prosecutor should scale back mass supervision by limiting requests for probation and either not seek a sanction or rely on restorative justice approaches instead.¹¹⁷

A Department of Justice report revealed that Ferguson, Missouri had a system in place whereby fines and fees were the county's second largest source of income.¹¹⁸ That reality is not limited to Ferguson. Numerous localities and cities pad their coffers with fines and fees imposed on people, overwhelmingly Black and Brown people, charged with myriad crimes and offenses.¹¹⁹ Fines and court fees often multiply over time and lead to mounting debt that adversely impacts employment, housing,

generate excessive sentences serving primarily the need for revenge.”); Donald J. Hall, *Victims' Voices in Criminal Court: The Need for Restraint*, 28 AM. CRIM. L. REV. 233 (1991) (proposing limitations on the victim's role in sentencing); Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996) (arguing against the use of victim impact statements in capital cases).

113. See ALLISON FRANKEL, HUMAN RIGHTS WATCH, REVOKED: HOW PROBATION AND PAROLE FEED MASS INCARCERATION IN THE U.S. 34–37 (2020).
114. *Id.* at 38.
115. Michelle S. Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, 35 L. & POL'Y 51, 66 (2013) (showing a correlation between increases in probation rates and increases in incarceration rates in the 1980s and 2000s).
116. Michelle Sue Phelps, *Why Ending Mass Probation is Crucial to U.S. Criminal Justice Reform*, SCHOLARS STRATEGY NETWORK (Sep. 14, 2018), <https://scholars.org/brief/why-ending-mass-probation-crucial-us-criminal-justice-reform> [<https://perma.cc/M39E-VNXH>].
117. *Id.* For more about restorative justice, see *supra* notes 37–39.
118. U.S. DEP'T OF JUST. C.R. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9 (2015).
119. See, e.g., Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 509–10 (2016).

public assistance, the ability to possess a driver's license, and even voting rights.¹²⁰ A prosecutor should rarely if ever seek a sentence that includes fines or fees, especially when the accused has limited financial assets.

In many cases, civil asset forfeiture attaches to criminal convictions. Civil forfeiture funds in some cities go directly to the District Attorney's office.¹²¹ As a result, prosecutors are incentivized to pursue civil forfeiture as a means to bolster their budget. Instead, these funds should be immediately allocated to the communities most impacted by hyperaggressive policing and the criminal legal system.¹²²

VIII. Parole

It is usually the case that prosecutors act in knee-jerk opposition to release when a person in prison becomes eligible for parole.¹²³ Progressive prosecutors should support release to parole as soon as the person becomes eligible, unless there is overwhelming and indisputable evidence that the individual is a current threat to public safety and that there are no viable alternatives in place to mitigate that risk.¹²⁴

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120. Brandon L. Garrett et al., *Fees, Fines, Bail, and the Destitution Pipeline*, 69 DUKE L.J. 1463, 1471 (2020). *See also*, Meghan Keneally, 'It's Not America: 11 Million Lose Driver's License Over Unpaid Fines', THE CRIME REPORT (Nov. 1, 2019), <https://thecrimereport.org/2019/11/01/its-not-america-11-million-lose-drivers-license-over-unpaid-fines> [<https://perma.cc/M39E-VNXH>]. In July 2020, the Supreme Court upheld a lower court order blocking people with felony convictions from voting if they had not paid any fees or fines owed; *see* Nina Totenberg, *Supreme Court Deals Major Blow to Felons' Right to Vote in Florida*, NPR (July 17, 2020), <https://www.npr.org/2020/07/17/892105780/supreme-court-deals-major-blow-to-ex-felons-right-to-vote-in-florida> [<https://perma.cc/Z5FF-3TLA>].
 121. *See* Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 477 (2017) ("Various federal and state laws allow prosecutors' offices to keep and use portions of assets that criminal defendants forfeit as ill-gotten gain.").
 122. *See, e.g.*, Reuven Blau, *High-Flying Cy: How Manhattan DA Vance Spent \$250K on Travel and Food*, THE CITY (Apr. 3, 2019), <https://www.thecity.nyc/2019/4/3/21211171/high-flying-cy-how-manhattan-da-vance-spent-250k-on-travel-and-food> [<https://perma.cc/88RQ-N6YU>].
 123. *See, e.g.*, R. Michael Cassidy, *Undue Influence: A Prosecutor's Role in Parole Proceedings*, 16 OHIO ST. J. CRIM. L. 293 (2019) (referring to "reflexive prosecutorial opposition at release hearings").
 124. Brooklyn, New York District Attorney Eric Gonzalez announced that his office would no longer automatically oppose parole as it had routinely done in the past. Tom Robbins, *Took a Plea? Brooklyn's DA Will Support Your Parole*, MARSHALL PROJECT (Apr. 17, 2019), <https://www.themarshallproject.org/2019/04/17/took-a-plea-brooklyn-s-district-attorney-will-support-your-parole> [<http://perma.cc/6BPN-6QHE>] (Gonzalez said his office would consent to parole at the initial hearing for all those who entered into plea agreements once they completed their minimum sentence, "absent extraordinary circumstances and subject to their conduct during incarceration"). While Gonzalez's effort should be applauded, the limitations of his consent to release to those who pleaded guilty reinforce the coercive aspects of plea bargaining that lead most people to abandon their constitutional right to a trial.

Parole release decisions are notoriously punitive, arbitrary, risk averse, and guided by political concerns.¹²⁵ To promote fairer parole proceedings, prosecutors should support a process that focuses on who the person is today as opposed to the facts of their crime of conviction, and also back a person's due process liberty interest in parole and all the rights attendant thereto.¹²⁶ A fairer parole process would help rebuild families and communities and reduce the impact of mass incarceration.

IX. Second Look and Second Chances

Prosecutors should support the American Law Institute's first ever revisions to the sentencing sections of the Model Penal Code that urge states to adopt "second look" legislation that provides for an automatic reexamination of a person's sentence after fifteen years regardless of their original sentence or crime of conviction.¹²⁷ While some jurisdictions seek to provide the prosecutor's office with the power to move for resentencing, it is imperative that any resentencing mechanism be mandatory or at the request of the incarcerated person.¹²⁸ At the time of resentencing, prosecutors should employ a presumption in favor of resentencing.

Similarly, to curtail the disproportionate impact of the criminal legal system on people of color, prosecutors should support proposals for automatic expungement of all convictions after a proscribed number of years.¹²⁹ More than seventy million Americans have a criminal

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125. See, e.g., Jennifer Gonnerman, *Prepping for Parole*, THE NEW YORKER (Nov. 25, 2019), <https://www.newyorker.com/magazine/2019/12/02/prepping-for-parole>; Alejo Rodriguez, *The Obscure Legacy of Mass Incarceration: Parole Board Abuses of People Serving Parole Eligible Life Sentences*, 22 CUNY L. REV. F. 33 (2019); Robert Gebeloff et al., *A Parole Decision in Minutes*, N.Y. TIMES (Dec. 4, 2016), <https://www.nytimes.com/interactive/2016/12/04/nyregion/new-york-parole-decision-in-minutes.html> [<https://perma.cc/UXR4-QRHK>].
126. See, e.g., Kimberly A. Thomas & Paul D. Reingold, *From Grace to Grids: Rethinking Due Process Protections for Parole*, 107 J. CRIM. L. & CRIMINOLOGY 213 (2017); *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 11 (1979) (holding that state parole boards have unbridled discretion to release or reject inmates that seek grants of discretionary parole release).
127. See MODEL PENAL CODE: SENTENCING § 305.6 (AM. L. INST. 2017); Steven Zeidman, *For Justice and Decarceration, Enact Second-Look Sentencing*, GOTHAM GAZETTE (June 26, 2018), <https://www.gothamgazette.com/opinion/7766-for-justice-and-decarceration-enact-second-look-sentencing> [<https://perma.cc/AUQ5-AQDB>].
128. 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> [<https://perma.cc/2JVW-WNM2>] ("Brooklyn DA Eric Gonzalez will push for state legislation letting prosecutors move to cut down harsh sentences handed down to people convicted of felony crimes.").
129. Sealing typically means that the criminal record nevertheless still exists in a legal and tangible sense. Expungement should dictate that any record of the arrest or conviction is deleted. See, e.g., JUSTIA, EXPUNGEMENT AND RECORD SEALING, <https://www.justia.com/criminal/expungement-record-sealing> [<https://perma.cc/>

record.¹³⁰ Convictions adversely impact people in myriad ways for many years (often indefinitely),¹³¹ including the loss of privileges of citizenship like the right to vote or to serve on a jury. In many cases, criminal records are accessible to employers, landlords and licensing agencies, and thus adversely impact employment, housing, education and other necessities of life in ways that make it almost impossible for people to live safe and productive lives.¹³²

As with second look sentencing, prosecutors should support self-executing, automatic expungement statutes. Putting the onus on a person to affirmatively apply to clear their criminal record runs the risk that people will be unaware that they can seek expungement, or costs and cumbersome procedures might create hurdles for people to overcome in order to enforce their statutory right to expungement.¹³³

Moreover, second look and second chance legislation must be applied retroactively so that all people have the opportunity to advocate for their freedom and for the restoration of their full array of rights and entitlements so that they can lead productive and safe lives.

X. Office Staffing

Prosecutors elected to reimagine prosecuting will have to surround themselves with people committed to that ideal, in particular at the upper levels of management.¹³⁴ That means that in addition to hiring people with similar beliefs, they will have to replace all high-ranking prosecutors who have worked under the very regime that the progressive candidate campaigned to dismantle.¹³⁵

R47E-5C5W].

130. Kenny Lo, *Expunging and Sealing Criminal Records*, CTR. FOR AM. PROGRESS (Apr. 15, 2020), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/04/15/483264/expunging-clearing-criminal-records> [https://perma.cc/RR8P-8JMG].
131. Eric Westervelt & Barbara Brosher, *Scrubbing the Past to Give Those with a Criminal Record a Second Chance*, NPR (Feb. 19, 2019), <https://www.npr.org/2019/02/19/692322738/scrubbing-the-past-to-give-those-with-a-criminal-record-a-second-chance> [https://perma.cc/84CD-5Q9H].
132. See *supra* note 24.
133. Jan Ransom, *Criminal Convictions Behind Them, Few Have Had Their Records Sealed*, N.Y. TIMES (July 4, 2018), <https://www.nytimes.com/2018/07/04/nyregion/criminal-conviction-records-sealed.html> [https://perma.cc/ABL3-C4K3].
134. Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 26 (2019) (“Hiring progressive prosecutors in supervisory positions should be one of the highest priorities as the District Attorney will not be able to monitor the daily decisions of ADAs, especially in large offices.”).
135. Daniel Denvir, *Philadelphia Media Slam Newly Elected DA Krasner for Firings but House Cleaning Advances His Promise of Equal Justice*, THE APPEAL (Jan. 16, 2018), <https://theappeal.org/philadelphia-media-slam-newly-elected-da-krasner-for-firings-but-house-cleaning-advances-his-f2da076ffb06> [https://perma.cc/XY67-4DH4] (“And as for the large numbers of people fired from the homicide unit: they were not fired not out of animosity toward the prosecution of murder

The importance of hiring and maintaining likeminded supervisors and managers is critical given that the day-to-day work of the District Attorney is handled by line prosecutors, many of whom will not share the progressive mandate of a newly elected boss or who will be tied, consciously or otherwise, to the old ways of doing things.¹³⁶ New leadership must carefully and regularly monitor the practices of staff prosecutors to ensure strict compliance with new policies.

In addition to replacing supervisors and those in other executive or management positions, it is also imperative to purge the office of prosecutors who courts find to have withheld exculpatory information from the accused or that otherwise have committed prosecutorial misconduct.¹³⁷

Finally, most elected District Attorneys and line staff are white men.¹³⁸ Progressive prosecutors must commit to hiring people with diverse backgrounds, perspectives, and experiences that reflect the community being served and who are better equipped to combat bias and promote more equitable outcomes.¹³⁹

cases but rather because the homicide unit was the home of some of the office's most veteran prosecutors—prosecutors who were likely deeply committed to the old way of doing things.”); Gabe Greschler, *Why Did San Francisco's New District Attorney Fire Seven Prosecutors?*, KQED (Jan. 12, 2020), <https://www.kqed.org/news/11795676/why-did-san-franciscos-new-district-attorney-fire-seven-prosecutors> [<https://perma.cc/SE3D-8N43>].

136. Seema Gajwani et al., *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movement's Promise*, 64 N.Y.L. SCH. L. REV. 69, 77 n.71 (2020) (noting that line prosecutors have ways to avoid policies they disagree with). In Los Angeles, the prosecutors' union filed a lawsuit to stop enforcement of newly elected District Attorney George Gascon's progressive agenda. Piper French, *The Prosecutors' Union That's Suing George Gascon Has a History of Zealous Opposition to Reform*, THE APPEAL (Jan. 27, 2021), <https://theappeal.org/george-gascon-lawsuit-prosecutors-union> [<https://perma.cc/FGX4-E6Z4>].
137. See, e.g., David Brand, *Prosecutorial Misconduct Lawsuits Prompt Depositions of Acting Queens DA, Top Prosecutors*, QUEENS DAILY EAGLE (Nov. 5, 2019), <https://queenseagle.com/all/prosecutorial-misconduct-lawsuits-depositions-acting-queens-da-top-prosecutors> [<https://perma.cc/Q9UV-BEKD>] (discussing a civil rights lawsuit claiming that the Queens County, New York District Attorney routinely ignored instances of prosecutorial misconduct).
138. NPR, *Report Highlights Lack of Racial Diversity Among U.S. Prosecutors*, (July 7, 2015), <https://www.npr.org/2015/07/07/420913863/report-highlights-lack-of-racial-diversity-among-u-s-prosecutors> [<https://perma.cc/U6PZ-ALYC>] (stating that 95 percent of elected prosecutors in the United States are white; 70 percent are white men); David A. Graham, *Most States Have No Black Prosecutors*, THE ATLANTIC (July 7, 2015), <https://www.theatlantic.com/politics/archive/2015/07/american-prosecutors-are-incredible-whitedoes-it-matter/397847> [<https://perma.cc/QTP4-DG6Y>]; KATHERINE J. BIES ET AL., STANFORD CRIM. J. CTR., DIVERSITY IN PROSECUTOR'S OFFICES: VIEWS FROM THE FRONT LINE 6 (2016) (stating that 70 percent of prosecutors in California are white, while 48 percent are female).
139. BIES ET AL., *supra* note 138, at 34 (noting the importance of, inter alia, cultural sensitivity, the appearance of fairness, and the cultivation of trust).

XI. Data—Racial Disparities

The ever-present and undeniable racial disparities in the criminal legal system,¹⁴⁰ although plainly obvious after spending even one day observing any criminal court, must be tracked at every level—policing, charging, bail, plea offers, adjudication, sentencing, parole, and reentry. The prosecutor should issue publicly available demographic reports on a quarterly basis outlining any disparities and the steps they are taking to address those results.¹⁴¹

XII. Funding

A. Public Defenders

It is well-known and universally acknowledged that public defense agencies are chronically underfunded and therefore unable to provide the fully effective assistance of counsel guaranteed to everyone accused of a crime.¹⁴² In addition to officewide resource deprivation, it is also the case that individual public defender salaries are substantially lower than those paid to prosecutors in the same jurisdictions and often require

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140. See, e.g., Rebecca C. Hetey & Jennifer L. Eberhardt, *The Numbers Don't Speak for Themselves: Racial Disparities and the Persistence of Inequality in the Criminal Justice System*, 27 CURRENT DIRECTIONS IN PSYCH. SCI. 183 (2018); ELIZABETH HINTON ET AL., VERA INST. OF JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM (2018); Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System is Racist. Here's the Proof*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system> [<https://perma.cc/F9EU-T2F6>]; Radley Balko, *21 More Studies Showing Racial Disparities in the Criminal Justice System*, WASH. POST (Apr. 9, 2019), <https://www.washingtonpost.com/opinions/2019/04/09/more-studies-showing-racial-disparities-criminal-justice-system> [<https://perma.cc/7QXD-TW5A>].
141. See, e.g., S.F. DIST. ATT'Y: JUSTICE DASHBOARD, <https://www.sfdistrictattorney.org/policy/justice-dashboard/#:~:text=The%20Justice%20Dashboard%20is%20a,racial%20disparities%20in%20the%20system> [<https://perma.cc/C6C5-JWHA>]; Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 226–27 (2007); BRENNAN CTR. FOR JUST., 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR 15 (2018) (recommending that prosecutors track and release racial data for actions including bail requests, charging decisions, plea offers, sentencing recommendations, and parole board recommendations).
142. See, e.g., AM. BAR ASS'N., GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING 3 (1982) (“The financing of criminal defense services for indigents is generally inadequate . . .”); Richard D. Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L. Q. 625, 627 (1986) (“[T]he severity of the underfunding of those agencies providing defense counsel to the indigent seriously endangers the sixth amendment guarantee to effective assistance of counsel.”); Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 838 (2004) (“[T]here is abundant evidence that systems of indigent defense routinely fail to assure fairness because of under-funding and other problems.”).

those lawyers to work an additional job to make ends meet.¹⁴³ Prosecutors should officially support and advocate for equal funding and equal pay between their office and the corresponding defense agency.¹⁴⁴

B. Redirect Funding and Cede Power

More and more, whether in the form of community courts, court watch programs, models of participatory defense, or the role of community groups in fashioning remedies to stop-and-frisk policing, the people most impacted by the criminal legal system are demanding ways to give input on how they are policed and prosecuted.¹⁴⁵ This is particularly the case given the close relationships prosecutors inevitably develop and maintain with the police department.

Rather than willingly relinquish any resources and power, bureaucracies regularly strive to expand their reach.¹⁴⁶ Not long after he became the District Attorney in Philadelphia, Larry Krasner asked the City Council for a 13 percent increase in funding.¹⁴⁷ Progressive prosecutors should seek to reduce their budgets by redirecting their taxpayer supplied funds to community groups and organizations devoted to providing healthcare, housing, education, and jobs for all. Ultimately, if we cannot replace the existing concept and practice of punitive prosecution with a credible and compassionate alternative, it is critical that those most impacted by prosecutors have the capacity and power for independent decisionmaking authority over the day-to-day function and overall policies of their local prosecutor's office.

Conclusion

If the criminal legal system continues to have a prosecutor's office, then it is imperative to identify concrete ways to limit the reach of prosecutorial power. Even those recently elected prosecutors who are often

143. Sonia Weiser, *Lawyers by Day, Uber Drivers and Bartenders by Night*, N.Y. TIMES (June 3, 2019), <https://www.nytimes.com/2019/06/03/nyregion/legal-aid-lawyers-salary-ny.html> [https://perma.cc/M6U5-K7BR].

144. See, e.g., *The High Costs of Low Pay for Public Defenders*, THE APPEAL (Nov. 1, 2018), <https://theappeal.org/the-high-costs-of-low-pay-for-public-defenders> [https://perma.cc/57BT-7BER]. A federal bill, the EQUAL Defense Act of 2019, requires pay parity between public defenders and prosecutors. See Debra Casens Weiss, *Under Newly Introduced Federal Bill, Public Defenders Would Get Same Pay as Prosecutors*, ABA J. (May 10, 2019), <https://www.abajournal.com/news/article/public-defenders-would-get-the-same-pay-as-prosecutors-under-federal-bill-introduced-by-this-candidate> [https://perma.cc/546P-F2AC].

145. See, e.g., Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 268–69 (2019).

146. Alice Speri, *The Criminal Justice System Is Not Broken. It's Doing What It Was Designed to Do*, THE INTERCEPT (Nov. 9, 2019), <https://theintercept.com/2019/11/09/criminal-justice-mass-incarceration-book> [https://perma.cc/CT6Z-J3AQ].

147. Joe Trinacria, *Krasner Requests Budget Increase for DA's Office*, PHILA. MAG. (Apr. 25, 2018), <https://www.phillymag.com/news/2018/04/25/krasner-budget-increase-da-office> [https://perma.cc/BE9T-2WVFV] (seeking 13 percent funding increase from Philadelphia City Council for salaries and technology).

held as examples of what it means to be a progressive prosecutor have been criticized by those who feel that they either have not kept their campaign promises,¹⁴⁸ or remain the primary driver of the mass incarceration of people of color, regardless of any salutary changes they have made.¹⁴⁹

This list of “modest proposals” barely scratches the surface of ways to rein in and redistribute prosecutorial power. Hopefully, people will continue to add to the list¹⁵⁰ so that ultimately the role of the prosecutor will be reduced to such an extent that people can imagine a world where that office no longer exists.¹⁵¹

148. See, e.g., Emma Whitford, *Suffolk County D.A. Rachael Rollins’s Office is Still Prosecuting Cases She Pledged to Drop*, THE APPEAL (Feb. 6, 2019), <https://the-appeal.org/suffolk-county-da-rachael-rollinss-office-is-still-prosecuting-cases-she-pledged-to-drop> [<https://perma.cc/QG42-ZHGC>]; see Malik Neal, *What the Pandemic Revealed About Progressive Prosecutors*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/2021/02/04/opinion/prosecutors-bail-reform.html> [<https://perma.cc/5J2N-VELU>].

149. See, e.g., DEMOCRACY NOW!, *Philadelphia DA Larry Krasner: Trump is a “Wanabe Fascist.” I Will Charge His Agents if They Break the Law* (July 23, 2020), https://www.democracynow.org/2020/7/23/larry_krasner_philadelphia_protests_federal_agents [<https://perma.cc/2MU8-H5TU>] (in this interview, Krasner criticized bail funds for bailing out people that “[need] to be held in custody”); Reggie Shuford, *Larry Krasner Is Not Living Up to His Reputation as a Progressive Reformer*, PHILA. INQUIRER (Aug. 3, 2020), <https://www.inquirer.com/opinion/commentary/larry-krasner-cash-bail-pandemic-philadelphia-district-attorney-20200803.html> [<https://perma.cc/9WAU-BJ7Q>].

150. As it is, it has been a challenge to keep up with the recommendations I receive on a regular basis.

151. While calls to defund the police and abolish prisons have been increasing in volume and magnitude, there is yet no comparable call to eliminate the role of the prosecutor. *But see* CMTY. JUST. EXCH., *ABOLITIONIST PRINCIPLES & CAMPAIGN STRATEGIES FOR PROSECUTOR ORGANIZING* (2020).