

PROGRESSIVE PROSECUTORS OR ZEALOUS DEFENDERS, FROM COAST-TO-COAST

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ABSTRACT

This Article challenges the narrative that the progressive prosecutor movement can meaningfully transform the criminal legal system and argues that the myopic focus on prosecutors as the solution to all that ails this system further diminishes the critical, and chronically under-resourced, role of the public defender.

In presenting this claim, we do not question the sincerity of many self-styled progressive prosecutors' desires to "make a difference" in the criminal legal system or whether these prosecutors have in fact modified norms and practices positively in some jurisdictions. But in our view, the record reveals mostly modest changes and substantial, multidirectional resistance to anything more. And this record should not be a surprise, as prosecutors are executive branch officers with a job description primarily of charging and punishing crime in an adversarial system. The progressive prosecutor movement nevertheless has become another way for prosecutor offices to expand their mission, deepen their resources, and accrue power to do "justice."

We emphasize a different path to meaningful change: well-resourced, highly functioning public defense systems. We do not claim that public defenders are a panacea or a comparable solution to abolition. But we explore how a greater commitment to public defense more meaningfully can change the lives of people and communities impacted by our criminal legal system by empowering the professionals with the role and training, the professional incentives, and the institutional values to pursue material and sustainable change. In our view, truly progressive prosecutors would cede more resources and power to the defense rather than expand the mission and power of prosecutors.

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INTRODUCTION

This Article critiques the “progressive prosecutor” movement as a vehicle for serious change in the criminal legal system and argues that fully resourcing defenders is a far better strategy.¹ The progressive prosecutor movement has generated significant political, professional, media, and academic attention in recent years with hyperbolic claims that progressive prosecutors will “end mass incarceration and restore fairness to the criminal system ‘without changing a single law.’”² In the movement’s most ambitious form, progressive prosecutors are cast as having the power to transform the criminal legal system into a true justice system.³ Embracing this trend, several prosecutors in recent years have branded themselves explicitly in their political identities as some form of progressive prosecutor.⁴

In sharing our critique, we start by acknowledging the obvious: as progressive academics and former public defenders, we would rather have a progressive-minded prosecutor than a traditional “law and order” prosecutor or, especially, one of the many available models of regressive prosecutors who still circulate.⁵ We

1. No universal definition exists for a “progressive prosecutor.” See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1416–18 (2021) (observing that “‘progressive prosecutor’ means many different things to many different people”). For our purposes, progressive prosecutor does not mean simply a prosecutor whose politics are progressive. We understand progressive prosecutor to mean a prosecutor who claims to seek progressive reform of the criminal legal system from within the power structures of that system.

2. Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 188 (quoting EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION xxvii (2019)); Hana Yamahiro & Luna Garzón-Montano, *A Mirage Not a Movement: The Misguided Enterprise of Progressive Prosecution*, 46 N.Y.U. REV. L. & SOC. CHANGE HARBINGER 130, 131 (2022) (“Mass incarceration has long been recognized as one of the most pressing civil rights issues of the modern era, and progressive prosecution has been heralded as a possible solution.”).

3. See Lee Rawles, *Can Change Really Come from Within? These 13 Prosecutors Think So*, A.B.A. J. (Nov. 30, 2022, 8:44 AM), <https://www.abajournal.com/books/article/podcast-episode-183> (reporting on a new book, *Change from Within: Reimagining the 21st-Century Prosecutor*, authored by Miriam Aroni Krinsky, Executive Director of Fair and Just Prosecution, which interviews several progressive prosecutors); Covert, *supra* note 2, at 202 (identifying a power of progressive prosecutors to include, for example, “protect[ing] against convicting the innocent . . . guard[ing] against racial bias . . . [and] curtail[ing] mass incarceration”); Brad Haywood, *Busting the Myth*, INQUEST (June 10, 2022), <https://inquest.org/busting-the-myth-progressive-prosecutors/> (referring to and debunking the thesis that “communities can completely transform their local criminal courts if they elect better prosecutors”).

4. See generally Covert, *supra* note 2, at 195–200 (listing examples of progressive prosecutors including where and how they came into office); Wendy N. Davis, *Progressive Prosecutors Are Encountering Pushback*, A.B.A. J. (July 21, 2022, 3:50 PM), <https://www.abajournal.com/web/article/progressive-prosecutor-pushback>.

5. See, e.g., Daniel Walters, *For Over 12 Years, Prosecutor Haskell’s Wife’s Posts Have Sparked Controversies About Him and His Office*, INLANDER (Feb. 11, 2022), <https://www.inlander.com/spokane/for-over-12-years-prosecutor-haskells-wifes-posts-have-sparked-controversies-about-him-and-his-office/Content?oid=23261324> (reporting on Spokane County Prosecutor Larry Haskell’s response to public disclosure that his wife for years had been advocating online as a self-avowed “white nationalist” and used the n-word to refer to a Black woman, arguing that while her comments were racist, she was not a racist, and her remarks did not

readily recognize the benefit of progressive prosecutors to individuals who will not face prosecution for certain minor crimes, who will face less serious consequences if convicted, or even those who may be exonerated due to progressive prosecution policies or practices.⁶ But the existence of some benefits to some people from the progressive prosecutor movement is not the issue we wish to debate.

Rather, our claim is that this movement has grown into an over-hyped, shiny object that has sucked too much air from the room and diverted resources, attention, and initiative from more ambitious efforts, including the abolition movement,⁷ despite a burgeoning consensus that the criminal legal system is fundamentally flawed in its creation and implementation.⁸ In the name of progressive prosecutor “reform” agendas,⁹ significant new power is being added to prosecutor offices nationwide. In our view, this power has brought, at best, modest or episodic reform, while it has substantially enhanced the capacity of prosecutors to add harm to an already unfair and imbalanced legal system. This harm is amplified when political or legal backlash undermines, or even reverses, progressive prosecutor reform but leaves the power intact.

This Article thus will critique the progressive prosecutor power narrative as, in fact, resistance to change. In Part I, we share anecdotal narratives of the reform agendas different progressive prosecutors have promised, coast to coast, and how these promises have fared modestly to poorly—sometimes in quick order. Part II will present our claim that serious transformation of the criminal legal system cannot depend on, and thus resource with more power, prosecutors whose primary job description is to still pursue punishment in an adversary system. In Part III, we will identify alternative paradigms for serious change.

reflect any issues with racial bias in his office, despite documented racial disparities in his office’s prosecutions); Emma Epperly, *Judge Denies Motion to Remove Spokane County Prosecutor Larry Haskell from Case Based in Part on His Wife’s Racist Comments*, SPOKESMAN-REV. (June 16, 2022, 9:37 AM), <https://www.spokesman.com/stories/2022/jun/15/judge-denies-motion-to-remove-spokane-county-prose/> (noting Haskell’s office’s response which characterized the disqualification motion as “political gamesmanship” and claimed that “the problem with racial disparity in the criminal justice system is ‘upstream’ from the prosecutor’s office”).

6. See, e.g., Covert, *supra* note 2, at 202–05.

7. See, e.g., Marbre Stahly-Butts & Amna A. Akbar, *Reforms for Radicals? An Abolitionist Framework*, 68 UCLA L. REV. 1544, 1544 (2022).

8. See generally I. India Thusi, *The Pathological Whiteness of Prosecution*, 100 CAL. L. REV. 795, 806 n.34 (2022) (observing that “[i]t is no longer controversial to claim that the criminal system is bloated and dysfunctional”); see also LOREN SIEGEL, *THE OPPORTUNITY AGENDA, A NEW SENSIBILITY: AN ANALYSIS OF PUBLIC OPINION RESEARCH ON ATTITUDES TOWARDS CRIME AND CRIMINAL JUSTICE POLICY* 1–4 (2016), <https://search.issuelab.org/resource/a-new-sensibility-an-analysis-of-public-opinion-research-on-attitudes-towards-crime-and-criminal-justice-policy.html> (indicating public opinion research shows that the majority of the public believes that criminal justice reform should be “a top or important priority”).

9. We use the term “reform” very intentionally. We are aware of a precious few, if any, self-styled progressive prosecutors who would refer to themselves as abolitionists.

I. THE LIMITS OF PROGRESSIVE PROSECUTION, FROM COAST TO COAST: CASE STUDIES

The progressive prosecutor movement emerged in the mid-2010s with prosecutors such as Marilyn Mosby in Baltimore.¹⁰ This movement gained political traction quickly, “and by 2021, progressive prosecutors could be found in cities and towns across the country.”¹¹ However, because these numbers still represent fewer than 100 of the approximately 2,400 elected prosecutors in the United States,¹² it is open to debate whether progressive prosecutors have actually mounted a “movement.”¹³ To be sure, plenty of traditional and even regressive prosecutors still fill offices around the country.¹⁴

But self-styled progressive prosecutors have emerged as a powerful political and legal force. Estimates suggest that George Soros-backed groups alone have contributed \$40 million in the last decade to elect prosecutors campaigning as progressive.¹⁵ A reader who Googles the words “progressive prosecutor” will find thousands of articles. These prosecutors have promised reform ranging from an end to the death penalty to police accountability and elimination of cash bail.¹⁶ And almost invariably, these prosecutors have encountered resistance to, if not outright rejection of, more ambitious reform, even in some of the most progressive bastions of local politics.

For example, California has always been at the forefront of change on many issues, both good and bad. In the 1980s and 1990s, California pioneered implementing tough-on-crime policies that eventually contributed to the problem of mass incarceration.¹⁷ Thus, California would presumably be at the crest of new

10. See Davis, *supra* note 4.

11. *Id.*

12. See Cheryl Corley, *Newly Elected DAs Vow to Continue Reforms, End Policies Deemed Unfair*, NPR (Nov. 26, 2020, 8:12 AM), <https://www.npr.org/2020/11/26/938425725/newly-elected-das-vow-to-continue-reforms-end-policies-deemed-unfair>; George Coppola, *States That Elect Their Chief Prosecutors*, OFF. OF LEGIS. RSCH. (Feb. 24, 2003), <https://www.cga.ct.gov/2003/rpt/2003-R-0231.htm>.

13. ARLO GUTHRIE, *ALICE'S RESTAURANT MASSACREE* (Warner Bros. Records Inc. 1967). Guthrie sings:

[A]nd three people do it, three, can you imagine, three people walking in, singin' a bar of Alice's Restaurant and walking out. They may think it's an organization. And can you, can you imagine fifty people a day, I said fifty people a day walking in singin' a bar of Alice's Restaurant and walking out. And friends, they may think it's a movement!

Id.

14. See, e.g., *supra* note 5.

15. Harriet Alexander, *George Soros-backed Groups Have Spent \$40 Million to Elect 75 Progressive Prosecutors Over the Last Decade - Meaning One in FIVE Americans Now Live in Areas Covered by his Criminal Justice Reformers*, DAILY MAIL (June 8, 2022, 8:40 AM), <https://www.dailymail.co.uk/news/article-10894581/George-Soross-groups-spent-40-million-elect-75-progressive-prosecutors-decade.html>.

16. See Davis, *supra* note 4; Allison Young, *The Facts on Progressive Prosecutors*, CTR. FOR AM. PROGRESS (Mar. 19, 2020), <https://www.americanprogress.org/article/progressive-prosecutors-reforming-criminal-justice/>.

17. Cristine Soto DeBerry, *California's Progressive Prosecutors Are Enhancing Safety Through Reform*, S.F. CHRON. (Mar. 9, 2021, 4:00 AM), <https://www.sfchronicle.com/opinion/openforum/article/California-s-progressive-prosecutors-are-16010360.php>.

waves of progressive prosecutors hoping to reform the criminal justice system. One of these Californian progressive prosecutors, when feeling the heat of public criticism, was able to ride his term out. However, another crashed when faced with opposition to his reform efforts.

In 2018, after serving as the District Attorney of San Francisco County for eight years, George Gascón decided not to seek reelection. Gascón cited family obligations, but widespread criticisms and his “tough on crime” opponent may have also contributed to Gascón’s sudden departure from politics.¹⁸

Gascón was originally appointed by then-Mayor Gavin Newsom as San Francisco District Attorney in 2011 after Kamala Harris was elected as state attorney general.¹⁹ Previously, Gascón served as San Francisco’s police chief for three years and was an assistant police chief for the Los Angeles Police Department.²⁰ His positions in law enforcement and inconsistent stances about the police force drew criticism from law enforcement and members of the community, especially members of color.²¹ Specifically, Gascón faced widespread criticism from law enforcement groups because he was the only law enforcement official in the state to support unsuccessful legislation, A.B. 931, which attempted to create stricter parameters for the use of deadly force by police.²² However, Gascón also decided not to prosecute police officers in high-profile killings.²³ Consequently, demonstrators regularly gathered at the steps of the Hall of Justice and called on Gascón to resign.²⁴

Gascón’s platform also wavered when faced with the question of a cash bail system. Gascón was active in efforts to reform California’s cash bail system and was even an early advocate of the Public Safety Assessment tools, which are now used by courts to determine a defendant’s risk upon release.²⁵ But, when cash bail was nearly eliminated, Gascón changed his tune and advocated for the importance of cash bail in certain cases.²⁶

While inconsistent at times, Gascón did engage in some substantial reforms by, among other things, refusing to criminalize homelessness through “quality of life”

18. See Evan Sernoffsky, *SF District Attorney George Gascón Decides Not to Seek Re-election*, S.F. CHRON. (Oct. 2, 2018, 9:16 PM), <https://www.sfchronicle.com/bayarea/article/San-Francisco-District-Attorney-George-Gasc-n-13276393.php>.

19. *Id.*

20. *Id.*

21. *Id.* (documenting Gascón’s, a former police chief, support for legislation aimed to reduce police use of deadly force yet declining to prosecute police officers in high-profile killings).

22. *Id.*; A.B. 931, 2017-2018 Leg., Reg. Sess. (Cal. 2018). A.B. 931 would have changed the legal standard for police officers to use deadly force from “reasonable” to “necessary.” Alex Emslie, *No Charges: S.F. DA Closes Two Controversial Police Shooting Cases That Led to Era of Reform*, KQED (May 24, 2018, 4:30 PM), <https://www.kqed.org/news/11670339/no-charges-s-f-da-closes-2-controversial-police-shooting-cases-that-led-to-era-of-reform>.

23. Sernoffsky, *supra* note 18.

24. *Id.*

25. *Id.*

26. *Id.*

ordinances.²⁷ In contrast, had Gascón run for reelection, he would have competed against Suzy Loftus, the assistant chief legal counsel for the San Francisco Sheriff's Department and former president of the San Francisco Police Commission.²⁸ Loftus was endorsed by Mayor London Breed who, while campaigning, backed a "tough-love approach" for individuals experiencing homelessness.²⁹

After taking a break from prosecuting, Gascón resurfaced in 2020 and won the Los Angeles County district attorney election.³⁰ Gascón unseated incumbent Jackie Lacey by winning more than fifty-three percent of the vote.³¹ Gascón made rapid, controversial changes, while cognizant of his reform efforts in San Francisco. He issued an expansive rule banning prosecutors from filing sentencing enhancements³²—an act that outraged families of crime victims, as well as some judges.³³ Consequently, Gascón backpedaled and changed his policy from strictly eliminating sentencing enhancements to permitting them in cases that involve the most vulnerable victims and extraordinary circumstances.³⁴ This modification, however, was not enough for some individuals. A union representing Los Angeles County prosecutors filed a lawsuit challenging Gascón's directives to eliminate three-strike allegations and sentencing enhancements.³⁵ On June 2, 2022, a California appellate court ruled that Gascón could not order prosecutors to sidestep the state's three-strike law.³⁶

Claiming Gascón was favoring the rights of criminals over victims, crime victims and law enforcement officials launched a recall effort.³⁷ To succeed, the campaign that sought his ouster required ten percent of people eligible to vote in the

27. Melissa Gira Grant, *San Francisco Deputy Public Defender Chesa Boudin Announces Run for District Attorney*, APPEAL (Jan. 15, 2019), <https://theappeal.org/san-francisco-deputy-public-defender-chesa-boudin-announces-run-for-district-attorney/>.

28. Sernoffsky, *supra* note 18.

29. *Id.*; Melissa Gira Grant, *Could New Cash to Fight Homelessness in San Francisco Mean Less Reliance on Police?*, APPEAL (Nov. 15, 2018), <https://theappeal.org/could-new-cash-to-tackle-homelessness-in-san-francisco-mean-less-reliance-on-police/>.

30. Ronald Brownstein, *Why California Wants to Recall Its Most Progressive Prosecutors*, ATLANTIC (Apr. 28, 2022), <https://www.theatlantic.com/politics/archive/2022/04/san-francisco-los-angeles-da-recalls/629701/>.

31. *Id.*; Destiny De La Cueva, *Timeline: A Look at Events That Led to Effort to Recall LA County DA George Gascón*, NBC L.A. (July 6, 2022, 6:07 PM), <https://www.nbclosangeles.com/news/local/timeline-a-look-at-events-that-led-to-effort-to-recall-la-county-da-george-gascon/2919522/>.

32. De La Cueva, *supra* note 31.

33. *Id.*

34. *Id.*

35. *Id.*; City News Service, *Prosecutors' Union Files Civil Lawsuit Over DA's New Directives*, NBC L.A. (Dec. 30, 2020, 6:02 PM), <https://www.nbclosangeles.com/news/local/prosecutors-union-files-civil-lawsuit-over-das-new-directives/2496053>.

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

37. De La Cueva, *supra* note 31; City News Service, *Victims Rights Advocates to Launch Recall Effort Against LA County DA George Gascon*, NBC L.A. (Feb. 27, 2021, 7:14 PM), <https://www.nbclosangeles.com/news/local/victims-rights-advocates-to-launch-recall-effort-against-la-county-da-george-gascon/2537813>.

election cycle to sign the petition, a total of 566,857 signatures.³⁸ The campaign submitted roughly 715,000 signatures.³⁹ Of these, 195,783 signatures—roughly twenty-seven percent—were invalid.⁴⁰ Thus, the campaign fell 46,807 votes shy and failed, and Gascón, to date, has withstood the public criticism against him.

Chesa Boudin, on the other hand, did not fare as well. Boudin, a former public defender, beat the mayor-appointed interim District Attorney Suzy Loftus in 2019 to be elected San Francisco's first open-race district attorney in more than 100 years.⁴¹ Boudin campaigned on promises to reduce the city's reliance on incarceration and to officially end cash bail.⁴² His platform aimed to hold people who break the law accountable but also to address the root causes to prevent crime.⁴³ Boudin defeated former San Francisco Police Commissioner Loftus, who was supported by Mayor London Breed and who as Interim District Attorney had taken a tougher stance on "quality of life" crimes.⁴⁴ During his two years in office, Boudin eliminated cash bail, decriminalized "quality-of-life" crimes—including public camping and urination—and refused to prosecute juveniles as adults.⁴⁵ As part of his policy directive, and to curtail mass incarceration, Boudin also declared he would not charge various strike and gang enhancements, except in extraordinary circumstances.⁴⁶

Boudin's progressive efforts came at the same time Mayor Breed rolled out her "tough on crime" initiative.⁴⁷ Her efforts appeared to undercut those of Boudin and

38. Soumya Karlamangla, *Effort to Recall Los Angeles District Attorney George Gascón Fails*, N.Y. TIMES (Aug. 16, 2022), <https://www.nytimes.com/2022/08/16/us/gascon-recall-district-attorney-los-angeles.html>.

39. James Queally, *Effort to Force L.A. Dist. Atty. George Gascón Into Recall Election Fails*, L.A. TIMES (Aug. 15, 2022, 4:59 PM), <https://www.latimes.com/california/story/2022-08-15/recall-effort-la-district-attorney-george-gascon-fails>.

40. *Id.*

41. Scott Shafer, *Reformer Chesa Boudin Defeats Suzy Loftus in Race for SF District Attorney*, KQED (Nov. 9, 2019), <https://www.kqed.org/news/11786019/reformer-chesa-boudin-defeats-suz-loftus-in-race-for-s-f-d-a>; Melissa Gira Grant, *San Francisco Deputy Public Defender Chesa Boudin Announces Run for District Attorney*, APPEAL (Jan. 15, 2019), <https://theappeal.org/san-francisco-deputy-public-defender-chesa-boudin-announces-run-for-district-attorney/>.

42. Elizabeth Weill-Greenberg, *How Chesa Boudin is Pursuing His Promise to Reduce Incarceration*, APPEAL (Mar. 18, 2021), <https://theappeal.org/chesa-boudin-san-francisco-district-attorney-reduce-mass-incarceration-criticism/>.

43. *Id.*; Brownstein, *supra* note 30.

44. *See Boudin Will Not Prosecute Prostitution, Public Camping, and Other 'Quality-Of-Life Crimes' Once Sworn In*, SFIST (Nov. 16, 2019), <https://sfist.com/2019/11/16/boudin-will-not-prosecute-prostitution-public-camping-and-other-quality-of-life-crimes-once-sworn-in/>.

45. Nicholas Turner & Sam McCann, *Chesa Boudin's Recall Isn't About Crime—It's About Gentrification*, VERA INST. OF JUST. (July 26, 2022), <https://www.vera.org/news/chesa-boudins-recall-isnt-about-crime-its-about-gentrification>.

46. OFF. OF THE S.F. DIST. ATT'Y, POLICY DIRECTIVE ON SENTENCING ENHANCEMENTS (2020), <https://sfdistrictattorney.org/wp-content/uploads/2020/11/Status-Sentencing-Enhancements.pdf>; *see also* Weill-Greenberg, *supra* note 42 (noting that under Boudin's initiatives, gang affiliation sentencing enhancements will not be charged except in extraordinary circumstances presenting unusual public safety risks).

47. *SF Mayor London Breed Announces Crime Crackdown; 'Less Tolerant of All the Bulls-t That Has Destroyed Our City'*, CBS NEWS BAY AREA (Dec. 15, 2021, 12:34 PM), <https://www.cbsnews.com/sanfrancisco/news/mayor-breed-orders-crackdown-on-crime-in-san-franciscos-tenderloin-neighborhood/>.

motivate his critics.⁴⁸ Two years into Boudin's term, he faced substantial backlash resulting in a recall election.⁴⁹ The "Recall Chesa Boudin Committee" expressed their frustrations with Boudin and described his policies as "fraud, a heinous misuse of public trust[,] . . . dangerous, and highly destructive."⁵⁰ The majority of the money behind the recall effort came from a single PAC and a few local uber-wealthy hedge fund managers, venture capitalists, and investment bankers.⁵¹ Boudin's own administration conducted a small poll that showed voters wanted their district attorney to review and reverse wrongful convictions, stop prosecuting children as adults, and abolish a cash bail system.⁵² Boudin implemented all of these requests, and yet voters still recalled him.⁵³

Boudin's successor, named by Mayor Breed, was a former prosecutor in Boudin's office, Brooke Jenkins.⁵⁴ Jenkins had previously worked for the district attorney's office for seven years.⁵⁵ Before that, she worked in corporate law.⁵⁶ Jenkins declared that she hoped to see San Francisco prosecutors regain the power to ask for cash bail and to use gang enhancements and "strikes," essentially overriding Boudin's changes.⁵⁷ Though Jenkins portrayed herself as a mere volunteer in the effort to recall Boudin, it soon surfaced that in fact she had been paid \$153,000 for her work to support this recall campaign.⁵⁸

In California, as demonstrated by Boudin's recall, local voters can be a major source of resistance to change, and they can thwart progressive policies.⁵⁹ Other political dynamics also can limit the scope of progressive prosecutor reform. In Florida, for example, twice-elected progressive prosecutor Andrew Warren was suspended from his position as State Attorney of the Thirteenth Judicial Circuit by Republican Governor Ron DeSantis.⁶⁰ Warren has since filed a lawsuit in federal

48. Turner & McCann, *supra* note 45.

49. *Id.*

50. Richie Greenberg, *Statement on the Successful Recall of Chesa Boudin*, RECALL CHESA BOUDIN (June 7, 2022), <https://recallchesaboudin.org/>.

51. Benjamin Schneider, *The Republican Billionaire Behind S.F.'s Recalls*, S.F. EXAMINER (Feb. 4, 2022), https://www.sfexaminer.com/archives/the-republican-billionaire-behind-s-f-s-recalls/article_0e483040-544b-5503-b435-7d468d5229bb.html.

52. Turner & McCann, *supra* note 45; @EskSF, TWITTER (May 16, 2022, 7:55 PM), <https://twitter.com/EskSF/status/1526350540115804160>.

53. Turner & McCann, *supra* note 45.

54. Joe Eskenazi, *Brooke Jenkins, the Riskiest Choice for Mayor London Breed, is Named DA*, MISSION LOC. (July 7, 2022), <https://missionlocal.org/2022/07/brooke-jenkins-district-attorney-chesa-boudin-recall/>.

55. *Id.*

56. Mallory Moench & Megan Cassidy, *S.F.'s New D.A. is Brooke Jenkins, The Prosecutor Who Left Chesa Boudin's Office and Joined the Recall*, S.F. CHRON. (July 7, 2022, 10:26 PM), <https://www.sfchronicle.com/sf/article/S-F-s-new-D-A-is-Brooke-Jenkins-the-17290873.php>.

57. Eskenazi, *supra* note 54.

58. Julie Pitta, *Interim DA Demotes City's First Cantonese-Speaking Head of Victim Services*, RICHMOND REV. (Sept. 15, 2022), <https://sfrichmondreview.com/2022/09/15/commentary-julie-pitta-8/> (reporting that Jenkins also fired fifteen staffers and demoted several others, far more than Boudin did when he took office).

59. Turner & McCann, *supra* note 45.

60. Press Release, Off. of Governor Ron DeSantis, Governor Ron DeSantis Suspends State Attorney Andrew Warren for Refusing to Enforce Florida Law (Aug. 4, 2022), <https://www.flgov.com/2022/08/04/governor-ron-warren-for-refusing-to-enforce-florida-law/>.

district court arguing DeSantis violated his First Amendment right to freedom of speech.⁶¹ Warren's position emphasizes democratic values and the right of voters to choose their elected officials.⁶² DeSantis maintains, as of August 2022, that under the Florida Constitution, a governor has the authority to suspend state officials for "misfeasance, malfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony."⁶³

Warren has openly spoken in favor of the right to abortion and gender-affirming medical care and signed, along with other prosecutors around the country, related petitions pledging to decline to use their offices' resources to criminalize certain health decisions.⁶⁴ Warren calls these pledges "value statements" that address his prosecutorial discretion.⁶⁵ On the contrary, Governor DeSantis had previously warned that "[p]rosecutors have a duty to enforce the law, not pick and choose which laws they agree with."⁶⁶

In place of Warren, at least temporarily, DeSantis appointed Susan Lopez, a long-time assistant state attorney whom DeSantis had recently named a county judge.⁶⁷ In contrast to Warren's self-described identity as a progressive prosecutor, Lopez is a member of the Federalist Society, "a conservative group that advocates an 'originalist interpretation' of the Constitution" and is supported by several members of the Supreme Court.⁶⁸ Since her appointment, Lopez has reversed many of Warren's policies, including his elimination of "biking while Black" crimes.⁶⁹

Similar to Florida, New York assigns the power to remove a district attorney to the governor, not to the voters.⁷⁰ If a governor has information suggesting a district attorney is not properly fulfilling their duties, the governor can request an investigation.⁷¹ New York's GOP gubernatorial candidates Andrew Giuliani and then-

desantis-suspends-state-attorney-andrew-warren-for-refusing-to-enforce-florida-law/ [hereinafter Governor DeSantis Press Release]; Greg Allen, *Suspended Florida Prosecutor Sues Gov. Ron DeSantis to Get His Job Back*, NPR (Aug. 17, 2022, 12:52 PM), [npr.org/2022/08/17/1117892818/suspended-florida-prosecutor-andrew-warren-sues-governor-ron-desantis-](https://www.npr.org/2022/08/17/1117892818/suspended-florida-prosecutor-andrew-warren-sues-governor-ron-desantis-)

61. Allen, *supra* note 60.

62. Sue Carlton, *Meet the Legal Team Trying to Reinstate Tampa's Ousted State Attorney*, TAMPA BAY TIMES (Aug. 19, 2022), <https://www.tampabay.com/news/florida-politics/elections/2022/08/19/meet-the-legal-team-trying-to-reinstate-tampas-ousted-state-attorney/>.

63. Governor DeSantis Press Release, *supra* note 60.

64. Allen, *supra* note 60.

65. Lori Rozsa, *A Progressive Prosecutor Clashed with DeSantis. Now He's Out of a Job.*, WASH. POST (Aug. 14, 2022, 2:00 PM), <https://www.washingtonpost.com/nation/2022/08/14/florida-desantis-warren-prosecutor-suspension/>.

66. Carlton, *supra* note 62.

67. Rozsa, *supra* note 65.

68. *Id.* Of the current bench, Justice Thomas, Justice Alito, Justice Kavanaugh, and Justice Barrett are associated with the Federalist Society. *Id.*

69. *Id.*

70. Zach Williams, *How Manhattan DA Alvin Bragg Could Get Removed from Office*, N.Y. POST (June 8, 2022, 5:29 PM), <https://nypost.com/2022/06/08/how-manhattan-nyc-da-alvin-bragg-could-get-removed-from-office/>; N.Y. PUB. OFF. LAW § 34 (Consol. 2022), <https://www.nysenate.gov/legislation/laws/PBO/34>.

71. Williams, *supra* note 70; PUB. OFF. § 34, *supra* note 70.

Congressman Lee Zeldin called on Governor Kathy Hochul to remove Manhattan District Attorney Alvin Bragg for, in their view, being soft on crime.⁷² These efforts began, in part, following the ouster of Boudin in California.⁷³

Bragg formerly served as Chief Deputy Attorney General in New York State and oversaw the office's cases against Harvey Weinstein and challenges to the Trump administration.⁷⁴ Prior to that, Bragg was the Executive Deputy Attorney General for Social Justice and was an Assistant U.S. Attorney in the Criminal Division for the Southern District of New York.⁷⁵

Since Bragg took office in January of 2022, he has sparked repeated criticism for reducing charges or lowering bail for defendants under his "Day One" directive.⁷⁶ Additionally, business groups in New York are expressing concerns that citizens fear violent crimes.⁷⁷ As a result, Bragg walked back some of his proposed policies about a month into his term.⁷⁸

Bragg's "Day One Letter" was published to his website.⁷⁹ The "Day One" policy promised that his office will not prosecute certain crimes, including marijuana misdemeanors, trespass, consensual sex trade, resisting arrest, and other outdated offenses like obscenity.⁸⁰ In response, a petition to recall Bragg characterizes these

72. Williams, *supra* note 70.

73. *Id.*

74. *About*, ALVIN BRAGG, <https://www.alvinbragg.com/about> (last visited Mar. 7, 2023); Michael R. Sisak, *Revived Trump Probe Puts Manhattan DA Back in Spotlight*, AP NEWS (Feb. 10, 2023), <https://apnews.com/article/drug-crimes-united-states-government-new-york-city-donald-trump-manchattan-6c5ace7d704c944fe2e4bc66c71a42ba>. As this Article went to print in March 2023, there was increasing attention on a potential indictment of Trump by Bragg in relation to Trump's "role in the payment of hush money to a porn star." William K. Rashbaum, Ben Protess & Jonah E. Bromwich, *Prosecutors Signal Criminal Charges for Trump Are Likely*, N.Y. TIMES (Mar. 21, 2023), <https://www.nytimes.com/2023/03/09/nyregion/trump-potential-criminal-charges-bragg.html>. Trump was ultimately indicted on March 30, 2023. Ben Protess, Jonah E. Bromwich, William K. Rashbaum, Kate Christobek, Nate Schweber & Sean Piccoli, *Trump Is Indicted, Becoming First Ex-President to Face Criminal Charges*, N.Y. TIMES (Mar. 30, 2023), <https://www.nytimes.com/2023/03/30/nyregion/trump-indictment-hush-money-charges.html>.

75. *Id.*; Press Release, Att'y Gen. Eric T. Schneiderman, A.G. Schneiderman Announces Appointment Of New Chief Deputy Attorney General Alvin Bragg And Executive Deputy Attorney General Margaret Garnett (Sept. 18, 2017), <https://ag.ny.gov/press-release/2017/ag-schneiderman-announces-appointment-new-chief-deputy-attorney-general-alvin>.

76. Tina Moore, Joe Marino & Bruce Golding, *Murder Charge Against NYC Bodega Worker Jose Alba is DA Bragg's Latest Controversy*, N.Y. POST (July 7, 2022, 8:24 PM), <https://nypost.com/2022/07/07/murder-charge-against-bodega-owner-is-braggs-latest-controversy/>.

77. Larry Celona, Charles Gasparino, Nolan Hicks, Carl Campanile & Mark Lungariello, *NYC Business Leaders Grill Manhattan DA Alvin Bragg Over Soft-on-crime Policies*, N.Y. POST (Jan. 21, 2022, 8:05 PM), <https://nypost.com/2022/01/21/nyc-business-leaders-grill-manchattan-da-alvin-bragg-over-prosecution-policies/>; Demand Recall, *Remove Manhattan DA Bragg. Demand a Recall Election Now*, CHANGE.ORG, <https://www.change.org/p/constituents-remove-manchattan-da-bragg-demand-a-recall-election-now> (last visited Mar. 4, 2022).

78. Williams, *supra* note 70.

79. Memorandum from Alvin L. Bragg Jr., Dist. Att'y, Cnty. of N.Y. on Achieving Fairness and Safety to All Staff (Jan. 3, 2022), <https://www.manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf> [hereinafter Day One Letter]. Bragg has documented his "year one" success on his campaign website. *See Year One*, ALVIN BRAGG, <https://www.alvinbragg.com/year-one> (last visited Mar. 7, 2023).

80. Day One Letter, *supra* note 79.

policies as “deeply irresponsible” and claims that “[t]o ‘not seek carceral sentence [s] other than for homicide[s]’ exposes Bragg[’s] ignorance, and inability to defend and protect his constituents.”⁸¹ The petition aims for 25,000 signatures. As of March 2023, the petition had 20,189 signatures.

New York’s Governor, Kathy Hochul, has acknowledged her removal powers and disclosed that she planned to have a conversation with Bragg to make sure their plans align.⁸² Hochul also revealed that she will be “monitoring the situation . . . very closely.”⁸³ Even so, some people, in the words of ex-NYPD Commissioner Ray Kelly, predict that Bragg will remain in office because removing the first Black Manhattan district attorney is “toxic as far as the politics are concerned.”⁸⁴

These examples, of course, are not exhaustive or uniform. But they illustrate the political, institutional, and systemic challenges that even committed progressive prosecutors face to the good work they seek to accomplish. And in our view, this good work is deeply limited by the inherently punitive nature of prosecution in our criminal legal system, especially with the many prosecutors around the country who do not subscribe to the progressive prosecutor movement in the first place. Consequently, as we explore further in the next sections, the progressive prosecutor movement amplifies prosecutorial power at the expense of reforms that could achieve more serious, durable change.

II. PROSECUTORIAL POWER IS NOT CHANGE

Even without the political obstacles, described above, that elected prosecutors face when trying to promote a reform agenda, it is dubious to look to prosecutors for fundamental change to the criminal legal system. We question the logic of looking for solutions and meaningful redress in the very position of authority that is responsible for the problem in the first place. Scholars, such as John Pfaff in his book *Locked In*, argue that prosecutors were the main drivers of the blight of mass incarceration.⁸⁵ As Paul Butler has written:

81. Demand Recall, *supra* note 77.

82. Bernadette Hogan, *Gov. Hochul Puts Manhattan DA Bragg On Notice Over Soft-on-crime Policies*, N.Y. POST (Jan. 26, 2022, 6:07 PM), <https://nypost.com/2022/01/26/kathy-hochul-will-talk-to-manhattan-da-alvin-bragg-over-soft-on-crime-policies/>.

83. *Id.*; Sam Raskin, *Ex-NYPD Commissioner Ray Kelly Predicts Hochul Won’t Boot DA Alvin Bragg*, N.Y. POST (June 12, 2022, 2:15 PM), <https://nypost.com/2022/06/12/ray-kelly-says-alvin-bragg-here-to-stay-after-sf-da-recall/>.

84. Raskin, *supra* note 83.

85. See generally JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 7 (Basic Books 2017) (arguing that prosecutors bear responsibility for mass incarceration); see also Bill Keller & Eli Hager, *Everything You Think You Know About Mass Incarceration Is Wrong*, MARSHALL PROJECT (Feb. 9, 2017, 5:45 PM), <https://www.themarshallproject.org/2017/02/09/everything-you-think-you-know-about-mass-incarceration-is-wrong> (“Pfaff’s most potent—and perhaps contentious—argument is that reforms should instead focus on bringing fewer felony charges against Americans in the first place. And that means zeroing in on prosecutors.”).

Becoming a prosecutor to help resolve unfairness in the criminal justice system is like enlisting in the army because you are opposed to the current war. It's like working as an oil refiner because you want to help the environment. Yes, you get to choose the toxic chemicals. True, the boss might allow you to leave one or two pristine bays untouched. Maybe, if you do really good work as a low-level polluter, they might make you the head polluter. But rather than calling yourself an "environmentalist," you should think of yourself as a polluter with a conscience.⁸⁶

Despite promises of significant change, progressive prosecutors have largely fulfilled Butler's expectation that the fox is not going to tear down the henhouse. Or, as Butler has framed the prosecutor problem, "progressive prosecutors are not trying to dismantle the master's house, and the master wouldn't let them anyway."⁸⁷ Whether due to the punitive nature of the job description of the prosecutor, or due to external pressures and incentives, too many promises of change remain unfulfilled.

The aspirations of the progressive prosecutor have not materialized for several reasons, beginning with the vehement opposition expressed by local law enforcement and police unions.⁸⁸ The newly elected district attorney also inherits a staff that might not share the new, progressive agenda. Veteran, line prosecutors are likely to bristle at top-down changes to the way they operated for years.⁸⁹ For instance, this dynamic may have been the case when District Attorney George Gascón was sued barely six weeks into his term by the Los Angeles District Attorneys' union over his sentencing enhancements policy.⁹⁰ Union leaders

86. PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* 102 (The New Press 2010).

87. Paul Butler, *Progressive Prosecutors Are Not Trying to Dismantle the Master's House, and the Master Wouldn't Let Them Anyway*, 90 *FORDHAM L. REV.* 1983, 1983 (2022) (quoting AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110, 112 (2007) (emphasis omitted) ("[T]he master's tools will never dismantle the master's house.")).

88. Marco della Cava, *New, More Progressive Prosecutors Are Angering Police, Who Warn Approach Will Lead to Chaos*, USA TODAY (Feb. 10, 2020, 11:50 AM), <https://www.usatoday.com/story/news/nation/2020/02/08/criminal-justice-police-progressive-prosecutors-battle-over-reform/4660796002/>; Sean Philip Cotter & Joe Dwinell, *National Police Group Knocks Incoming DA Rachael Rollins*, BOS. HERALD (Dec. 28, 2018, 3:09 PM), <https://www.bostonherald.com/2018/12/28/national-police-group-knocks-incoming-da-rollins/>; Ayanna Alexander, *Progressive Prosecutors Navigate Wary Cops, Anxious Communities*, BL (July 12, 2021, 4:58 AM), <https://news.bloomberglaw.com/social-justice/progressive-prosecutors-navigate-wary-cops-anxious-communities>; Zach Williams, *NYPD Detectives' Union Joins Fight Against Alvin Bragg*, CITY & STATE N.Y. (Jan. 12, 2022), <https://www.cityandstateny.com/politics/2022/01/nypd-detectives-union-joins-fight-against-alvin-bragg/360702/>; Heather L. Pickerell, *How to Assess Whether Your District Attorney is a Bona Fide Progressive Prosecutor*, 15 *HARV. L. & POL'Y REV.* 285, 288–90 (2020); Rachel E. Barkow, *Can Prosecutors End Mass Incarceration?*, 119 *MICH. L. REV.* 1365, 1377–78 (2021).

89. Pickerell, *supra* note 88, at 290; Haywood, *supra* note 3; Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, N.Y. TIMES MAG. (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html>.

90. Steve Chiotakis, *LA District Attorney Union Sues New Boss George Gascón Over Sentence Enhancement Prohibition*, KCRW (Feb. 1, 2021), <https://www.kcrw.com/news/shows/greater-la/la-da-lawsuit-sentence-enhancements-anaheim/george-gascon-district-attorneys-union-sue>; Jeremy B. White, *Los Angeles Prosecutors*

referred to Gascón's policies as "radical,"⁹¹ which makes one wonder what they would call any policy that even slightly tilted toward an abolitionist position. In some cases, the election of a self-proclaimed progressive prosecutor led to mass resignations of staff prosecutors.⁹²

While some might attribute these challenges and resignations to disagreement and displeasure with a progressive agenda, they highlight that for many prosecutors the essential purpose of the job is, after all, to prosecute—that is, to investigate, charge, convict, and punish.⁹³ Further, an entrenched culture quickly culturizes even new prosecutors who purport to share progressive ideals. As two scholars have noted, "[o]ver time, the new hires became increasingly punitive, and no amount of training could counter this trend."⁹⁴ And even when new policies are implemented, strong resistance can come from judges, many of whom were themselves prosecutors who, as institutional actors in the criminal legal system, can cling tightly to the status quo.⁹⁵

In addition to opposition from office staff, local police, and the judiciary, progressive prosecutors have faced an onslaught of hostility from elected officials. As detailed above, governors from Florida to New York have taken drastic action ranging from replacing or threatening to replace a progressive district attorney,⁹⁶ taking cases away from prosecutors,⁹⁷ and putting prosecutors on notice that they are being closely watched and are subject to removal.⁹⁸

Overwhelmingly Want to Oust Their Progressive Boss, POLITICO (Feb. 22, 2021, 6:35 PM), <https://www.politico.com/news/2022/02/22/los-angeles-prosecutors-progressive-da-gascon-00010798>.

91. Kcal News, *Former LAPD Chief Charlie Beck Rescinds Support of LA County DA George Gascón*, CBS NEWS (Feb. 11, 2022, 7:37 PM), <https://www.cbsnews.com/losangeles/news/former-lapd-chief-charlie-beck-rescinds-support-of-la-county-da-george-gascon/>.

92. Thomas Hogan, *The Prosecutor Exodus*, CITY J. (July 9, 2021), <https://www.city-journal.org/why-are-so-many-prosecutors-leaving-their-jobs>.

93. Yamahiro & Garzón-Montano, *supra* note 2, at 137 ("[B]eing a prosecutor requires prosecuting. In this country, that means sending poor people to prison, most of them Black and brown."); Haywood, *supra* note 3 ("Because if you believe the criminal justice system is fundamentally unfair, you probably do not want to put people in cages for a living. And to be frank, that is what prosecution entails."); Seema Tahir Saifee, *Decarceration's Inside Partners*, 91 FORDHAM L. REV. 53, 56 (2022) ("[T]he ideology of prosecution is in fundamental tension with large-scale decarceration.").

94. 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. 69, 70 (2019).

95. See, e.g., Maura Ewing, *The Search for Progressive Judges*, ATLANTIC (May 17, 2019), <https://www.theatlantic.com/politics/archive/2019/05/progressive-prosecutors-judges/589222/>; Sarah Fair George, *There Are Too Many Prosecutors on the Bench. Take It From Me, a Prosecutor*, APPEAL (Jan. 8, 2021), <https://theappeal.org/there-are-too-many-prosecutors-on-the-bench-take-it-from-me-a-prosecutor/>; Haywood, *supra* note 3; Pickerell, *supra* note 88, at 289–90; Barkow, *supra* note 88, at 1380–82.

96. See *supra*, notes 60–73 and accompanying text.

97. See, e.g., Adrienne Cutway, *Gov. Rick Scott Wins Legal Battle Against State Attorney Aramis Ayala*, CLICK ORLANDO (Aug. 31, 2017, 11:37 PM), <https://www.clickorlando.com/news/2017/09/01/gov-rick-scott-wins-legal-battle-against-state-attorney-aramis-ayala/> (reporting that the Florida Supreme Court permitted then-Florida Governor Rick Scott to take capital cases away from prosecutor who opposed the death penalty).

98. Raskin, *supra* note 83; *Governor Abbott Blasts the Dallas County DA's New Policy on Petty Crimes*, WBAP (Apr. 15, 2019), <https://www.wbap.com/2019/04/15/governor-abbott-blasts-the-dallas-county-das-new-policy-on-petty-crimes/>.

State legislatures have drafted and even passed numerous bills to make it easier to remove a duly elected prosecutor and to take classes of cases away from individual prosecutors. For example, when reformer Deborah Gonzalez was elected the first Latina district attorney in Georgia, the Governor tried to cancel the election.⁹⁹ The Republican state legislature then introduced a bill to remove state attorneys if they would not prosecute certain crimes.¹⁰⁰ Virginia, Missouri, and Texas introduced bills to allow the state to take control of cases the local district attorney would not prosecute.¹⁰¹ Pennsylvania introduced a bill to allow the state Attorney General to prosecute gun crimes.¹⁰² The Indiana legislature drafted a bill to address Marion County District Attorney Ryan Mears that would allow the state to take over prosecution of certain crimes if locally-elected prosecutors decide not to pursue them.¹⁰³ In New York, Republicans proposed a constitutional amendment to provide a means for voters to remove the elected district attorney.¹⁰⁴

The latest legislative effort to remove or curtail Philadelphia District Attorney Larry Krasner, a well-known progressive prosecutor, involves a subpoena for records regarding his office's approaches to addressing gun violence, all as part of an effort to explore possible impeachment.¹⁰⁵ The Pennsylvania House voted to hold Krasner in contempt after he failed to comply with the subpoena.¹⁰⁶

These efforts to thwart progressive prosecutors are fodder for daily stories in the media and in turn provide fuel to ignite opposition from people, especially those in the privileged class, who react with fear and animosity to a prosecutor with a progressive platform. That fear and animosity has translated into some of the recall efforts detailed above.¹⁰⁷ Especially noteworthy is that these efforts to obstruct or criticize progressive prosecutors are particularly harsh and strident when aimed at duly elected women of color.¹⁰⁸ As a scholar recently observed:

99. Chris Dowd, *Power to the People: Deborah Gonzalez Defeats Kemp*, ATHENS POL. NERD (Oct. 8, 2020), <https://athenspoliticsnerd.com/gonzalez-v-kemp/>.

100. Keri Blakinger, *Prosecutors Who Want to Curb Mass Incarceration Hit a Roadblock: Tough-on-Crime Lawmakers*, MARSHALL PROJECT (Feb. 3, 2022, 6:00 AM), <https://www.themarshallproject.org/2022/02/03/prosecutors-who-want-to-curb-mass-incarceration-hit-a-roadblock-tough-on-crime-lawmakers>.

101. *Id.*

102. *Id.* (noting that this bill only applied to Philadelphia until the end of Larry Krasner's first term).

103. *Id.*

104. Brian Lee, *GOP Proposal to Recall County DAs Heads to New York Attorney General for Opinion*, N.Y. L.J. (Sept. 20, 2022), <https://www.law.com/newyorklawjournal/2022/09/16/gop-proposal-to-recall-county-das-heads-to-new-york-attorney-general-for-opinion/>.

105. Chris Palmer, *The Pa. House Voted to Hold Philly DA Larry Krasner in Contempt for Defying a Subpoena*, PHILA. INQUIRER (Sept. 13, 2022), <https://www.inquirer.com/news/larry-krasner-impeachment-contempt-subpoena-20220913.html>.

106. *Id.*

107. See *supra* notes 37–58, 81 regarding Gascón, Boudin, and Bragg. In some lesser publicized cases, the seemingly more progressive candidate was re-elected despite otherwise ongoing backlash. Jamiles Lartey, *How Conservatives Are Trying to Shut Down the Progressive Prosecutor Movement*, MARSHALL PROJECT (Aug. 20, 2022, 12:00 PM), <https://www.themarshallproject.org/2022/08/20/desantis-warren-progressive-prosecutors> (regarding elections in Chittenden County, Vt. and Shelby County, Tenn.).

108. See, e.g., Thusi, *supra* note 8, at 831–32; Alexander, *supra* note 88.

In describing the prosecutorial endeavor as universally all-powerful, scholars have ignored the role that Whiteness plays in facilitating this power. Whiteness is at the top of the American social hierarchy and allows its beneficiaries to enjoy the privileges of full political participation and recognition. Prosecutorial power may derive in part from the Whiteness of the prosecutors themselves. When scholars fail to acknowledge that prosecutors' race may facilitate the punitiveness and administration of prosecution, the experiences of White prosecutors become normalized This portrayal of prosecution is unsurprising because prosecution is a remarkably White endeavor.¹⁰⁹

In a felt need to assuage concerns that they will not allow crime to run amok, progressive prosecutors commonly hold press conferences to announce the prosecution of someone accused or convicted of a violent crime.¹¹⁰ These pronouncements are made to contrast the prosecutors' stated policies of declining to seek bail or prosecute people for low-level misdemeanors or violations. By entertaining this distinction, prosecutors reinforce the public's thirst for punishment for those facing violent crime charges. Crucially, they further contribute to a societal unwillingness to confront the fact that lengthy sentences for violent crimes have driven a mammoth increase in the prison population over the last several decades.¹¹¹ This dichotomy reinforces the punishment paradigm that defines the criminal legal system.¹¹²

Thus, numerous pressures in our punitive criminal legal system ensure that, once in office, progressive prosecutors will not fulfill their promises altogether or will limit them to low-level or episodic instances of mercy.¹¹³ Even some of the most heralded progressive prosecutors walked back some of their avowed reformist policies, prosecuted low-level crimes on do-not-charge lists, and opposed bail reduction motions in various misdemeanor cases.¹¹⁴ In one case, a progressive

109. Thusi, *supra* note 8, at 819–20 (citations omitted).

110. See Covert, *supra* note 2, at 210–11 (referencing progressive prosecutors trumpeting their success prosecuting “violent criminals”).

111. Saifee, *supra* note 93, at 56–57 (pointing out that even the “tiny subset” of “progressive prosecutors” avoid progressive approaches to violent crime); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 50 n.111 (2012) (acknowledging that discussing and prosecuting violent crime must be considered in order to decarcerate meaningfully given that avoiding it allows tough-on-crime individuals to control the conversation about public safety).

112. Progressive prosecutors often highlight the ways they will vigorously prosecute police officers accused of misconduct. For some scholars, that approach, even though understandable given the history of lawless police behavior, will ultimately serve to legitimize the criminal legal system. See, e.g., Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. 997, 997, 1033 (2021) (arguing that prosecuting the police legitimizes the criminal legal system while displaying the “same racism and ineffectiveness that have been shown to pervade our prison-backed criminal machinery”).

113. Haywood, *supra* note 3 (surveying public defenders in more than thirty jurisdictions with a “reform-affiliated” prosecutor and finding that most defenders felt that “[their] prosecutor isn’t really progressive”); Jonathan Rapping, *Progressive Prosecutors: Pros and Cons: The Cost of the Progressive Prosecutor Movement*, 46 CHAMPION 12, *18, *20 (2022) (finding that defenders in three surveyed jurisdictions believe that despite the leadership of a progressive prosecutor and some policy reforms, for most people in criminal court, practices remained largely unchanged).

114. Barkow, *supra* note 88, at 1373–74 (discussing prosecutorial practices in Boston, Chicago, and Brooklyn); Pickerell, *supra* note 88, at 323.

prosecutor even changed his tune about pay parity between defenders and prosecutors.¹¹⁵

While progressive prosecutors and their proponents promised transformative change, in practice, their policies have been in the nature of isolated reforms.¹¹⁶ Progressive prosecution on the whole has proven to be reformist, but hardly radical, subversive, abolitionist, or even transformative.¹¹⁷ “At best, change has been modest and incremental. And in many jurisdictions, very little has changed at all.”¹¹⁸

The changes that are in fact enacted are best characterized by what they lack: any willingness explicitly, or even implicitly, to cede any piece of the prosecutor’s virtually unfettered power.¹¹⁹ As but one example, two prominent progressive prosecutors, Larry Krasner in Philadelphia, Pennsylvania and Rachael Rollins in Suffolk County, Massachusetts—apparently believing that they, and only they, know what is best and “progressive”—publicly denounced their local community bail funds for having posted money bail for people accused of serious crimes.¹²⁰ Widening the lens, district attorney associations have long been obstacles to legislative or judicial efforts to curtail their power.¹²¹ The District Attorneys Association of New York fought tooth and nail to defeat the creation of a

115. Nick Chrastil, *Now DA, Williams Backs Off on the Need for Funding Parity Between Prosecutors, Defenders*, LENS (Nov. 10, 2021), <https://thelensnola.org/2021/11/10/now-da-williams-backs-off-on-the-need-for-funding-parity-between-prosecutors-defenders/>.

116. Levin, *supra* note 1, at 1426 (asserting most definitions of progressive prosecution focus on specific policies as opposed to overarching goals).

117. Yamahiro & Garzón-Montano, *supra* note 2, at 154 n.158. Yamahiro and Garzón-Montano note:

The Movement for Black Lives characterizes ‘reformist reforms’ as those that work to ‘re-trench and legitimize current power arrangements.’ Marbre Stahly Butts & Amna A. Akbar, *Transformative Reforms of the Movement for Black Lives* 4 (unpublished manuscript) (2017), available at <https://perma.cc/6A24-H87Y>. The reforms instituted by progressive prosecutors are necessarily reformist because they rely on and entrench prosecution as an institution.

Id.; Butler, *supra* note 87, at 1984.

118. Haywood, *supra* note 3; see also Barkow, *supra* note 88, at 1366–67; Steven Zeidman, *Some Modest Proposals for a Progressive Prosecutor*, 5 UCLA CRIM. JUST. L. REV. 1, 2 (2021).

119. Rapping, *supra* note 113, at *20 (“[L]ike their more punitive predecessors, progressive prosecutors believe they should unilaterally determine who deserves justice and what justice looks like.”); Barkow, *supra* note 88, at 1388 (prosecutors must relinquish power in order for there to be transformative change).

120. *Philly 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 (interviewing District Attorney Larry Krasner, who criticizes bail funds for bailing out people who “need[] to be held in custody”); Reggie Shuford, Opinion, *Larry Krasner is Not Living Up to His Reputation as a Progressive Reformer*, PHILA. INQUIRER (Aug. 4, 2020), <https://www.inquirer.com/opinion/commentary/larry-krasner-cash-bail-pandemic-philadelphia-district-attorney-20200803.html>; Liam Knox, *Rollins Criticizes Group That Bailed Out Repeat Sex Offender Charged in New Rape*, WBUR (Aug. 11, 2020), <https://www.wbur.org/news/2020/08/11/da-rollins-mass-bail-fund-criticism> (reporting that District Attorney Rollins was joined by the Boston Police Commissioner in condemning the Massachusetts Bail Fund).

121. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728 (2005); Covert, *supra* note 2, at 232.

Commission on Prosecutorial Conduct despite the bill having bipartisan support.¹²² As two abolitionist scholars observed, “the distinction between a discretionary relinquishing of a particular power or decision to change a specific practice versus that power being stripped or practice being abolished is fundamental.”¹²³

But rather than shrink the prosecutorial footprint on the criminal legal system, progressive prosecutors commonly ask for more money in their budget to resource their proposed reforms with more line prosecutors, and other staff and needs. For example, not long after being elected the District Attorney in Philadelphia, Larry Krasner asked the City Council for a thirteen percent increase in funding.¹²⁴ Progressive prosecutors rarely, if ever, ask for these resources in a vacuum. To the contrary, local budgets often are a zero-sum equation, and more money to prosecutors means these funds may be diverted from community groups and organizations devoted, for instance, to providing healthcare, housing, education, and jobs for all. Instead, the power of resources route to the punishment paradigm.

Despite concerns among conservatives that progressive prosecutors are iconoclastic lawyers with insurrectionist goals, not even the most celebrated progressive prosecutor could be characterized as radical or transformative—let alone abolitionist.¹²⁵ Rather, “[t]he progressive prosecutor does not in himself take power or legitimacy away from the office of the prosecutor. Arguably ‘progressive prosecutors’ legitimize the the [sic] prosecutorial function by suggesting that the problem is with bad prosecutors rather than the office itself.”¹²⁶ After all, no matter how truly progressive a prosecutor acts, the prosecutor acts as an agent of an inherently oppressive, brutal, and racist system.¹²⁷ Ultimately, it is the nature of the criminal legal system and the prosecutor’s role within that system which dictate that

122. Brendan Roney, *District Attorneys File Legal Challenge to Oversight Commission*, LEGIS. GAZETTE (Apr. 2, 2019), <https://legislativegazette.com/district-attorneys-file-legal-challenge-to-oversight-commission/>.

123. Stahly-Butts & Akbar, *supra* note 7, at 1573.

124. Joe Trinacria, *Krasner Requests Budget Increase for DA’s Office*, PHILA. MAG. (Apr. 25, 2018, 9:06 AM), <https://www.phillymag.com/news/2018/04/25/krasner-budget-increase-da-office/> (seeking thirteen percent funding increase from Philadelphia City Council for salaries and technology); see also Udi Ofer, *Defunding Prosecutors and Reinvesting in Communities: The Case for Reducing the Power and Budgets of Prosecutors to Help End Mass Incarceration*, 2 HASTINGS J. CRIME & PUNISHMENT 31, 57–58 (2021) (discussing increase in funding for New York City prosecutors over recent decades); Keri Blakinger, *Harris County DA Again Asks for More Prosecutors to Deal with Fallout from Botched Drug Raid*, HOUS. CHRON. (July 26, 2019, 8:11 PM), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-DA-again-asks-for-more-prosecutors-14189247.php> (discussing DA lobbying for more resources and staff for DA’s office).

125. See Butler, *supra* note 87, at 1993–94.

126. Stahly-Butts & Akbar, *supra* note 7, at 1571.

127. See, e.g., Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CAL. L. REV. 1, 12 (2022) (“White supremacy is foundational to the criminal courts’ violence and social control function.”); Steven Zeidman, *Due Process and the Failure of the Criminal Court*, 40 FORDHAM URB. L.J. CITY SQUARE 116, 118 (2015); Note, *The Paradox of “Progressive Prosecution”*, 132 HARV. L. REV. 748, 750, 761–62 (2018) (arguing progressive prosecutors cannot deliver transformative reforms because they operate in a fundamentally flawed system); Rapping, *supra* note 113, at *17 (“Even the most compassionate prosecutors take the reins of a system in which no progressive outcome is possible.”).

progressive prosecutors will have little impact on rectifying a corrupt system and will actually serve to reify the *status quo*.¹²⁸

III. NON-PROSECUTION STRATEGIES FOR TRANSFORMATIONAL CHANGE

We agree with abolition and the need to dismantle the regnant criminal legal system.¹²⁹ Consistent with the concerns we have raised here, we particularly support the idea of selective abolition in the prosecutor office itself. As one scholar has observed, “those who hope to ‘decriminalize’ mental illness, addiction, and poverty should go beyond bail reform and diversionary programs by supporting the ‘defunding’ of their office to endow social services and treatment that does not occur in the shadow of the criminal system.”¹³⁰ Even more intuitively, lawyers with “prosecute and punish” attached to their resources will find ways to prosecute and punish, even if some prosecutors take a more progressive path in this mission.

But in the meantime, we offer alternative, non-prosecution strategies to address the failings of the criminal legal system in its current form. The laser-like focus on progressive prosecutors ignores a far better approach to tackling the many harms of the criminal legal system: fully resourcing public defender offices.¹³¹ The effort to prop up and champion progressive prosecutors has diminished the role of public defenders, despite the fact that the overwhelming majority of people facing criminal charges in state and federal courts are unable to afford to hire private counsel.¹³² Perhaps the starkest effort to minimize the role of defenders comes from Philadelphia District Attorney Krasner himself, who intoned at a gathering of law students that they should come prosecute with him because he was a “public defender with power.”¹³³ And yet it is not prosecutors, no matter how powerful, who stand between the accused and the heavy handed and racist power of the state. That is the role intended for the defense.¹³⁴

128. Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 164 (2022) (arguing that progressive prosecutors are “at best a half-measure to achieve real change” and at worst risk delegitimizing the extant criminal legal system).

129. See, e.g., Clair & Woog, *supra* note 127, at 33; Steven Zeidman, *Shut Down the Criminal Court*, GOTHAM GAZETTE (Feb. 25, 2016), <https://www.gothamgazette.com/130-opinion/6190-shut-down-the-criminal-court>.

130. Covert, *supra* note 2, at 194.

131. Premal Dharia, *The Progressive Prosecutor Movement is Great—But Without Funding Public Defenders It Won't Work*, SALON (Dec. 14, 2019, 7:00 AM), <https://www.salon.com/2019/12/14/the-progressive-prosecutor-movement-is-great-but-without-funding-public-defenders-it-wont-work/>; Abbe Smith, *Defending Gideon*, 26 U.C. DAVIS SOC. JUST. L. REV. 235, 243–44 (2022) (noting that “[o]f the more than \$146.5 billion spent annually on the criminal legal system, over half is spent on police and prosecutors, while only two to three percent goes to indigent defense”).

132. About eighty-two percent of state felony defendants in the seventy-five largest counties and sixty-six percent of federal defendants are represented by public defenders or government assigned counsel. See CAROLINE WOLF HARLOW, BUREAU OF JUST. STAT., DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), <https://bjs.ojp.gov/content/pub/pdf/dccc.pdf>.

133. Austen, *supra* note 89.

134. Rapping, *supra* note 113, at *18 (referring to defenders as providing a bulwark against prosecutorial excess).

Owing to *Gideon v. Wainwright*,¹³⁵ government-supplied attorneys, be they from public defender offices or individually assigned lawyers, represent the bulk of people charged with crimes.¹³⁶ People concerned about the rights of poor people who have been charged with crime talk longingly and despairingly about “the promise of *Gideon*.”¹³⁷ A search of that phrase online will yield countless references dating back to, well, *Gideon*.¹³⁸ Various lawsuits, myriad commissions, and numerous law review articles since time immemorial have detailed the crisis in indigent defense.¹³⁹ In fact, reference to “the promise of *Gideon*” is usually immediately preceded by reference to “the crisis in indigent defense.”¹⁴⁰

135. 372 U.S. 335, 339–40 (1963).

136. See HARLOW, *supra* note 132.

137. *Gideon*, 372 U.S. at 339–40 (overruling *Betts v. Brady*, 316 U.S. 455 (1942), and holding that the Sixth Amendment right to counsel is a fundamental right that applies to the states through the Fourteenth Amendment’s due process clause and guarantees indigent defendants the right to counsel in all felony cases).

138. See, e.g., Richard 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, 656 (1986); Note, *Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2062 (2000); *Evitts v. Lucey*, 469 U.S. 387, 397 (1985) (“[T]he promise of *Gideon* [is] that a criminal defendant has a right to counsel at trial[.]”); STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 38 (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [hereinafter *GIDEON’S BROKEN PROMISE*]; Opinion, *Gideon’s Promise, Still Unkept*, N.Y. TIMES (Mar. 18, 1993), <https://www.nytimes.com/1993/03/18/opinion/gideon-s-promise-still-unkept.html>; Anthony Lewis, *The Silencing of Gideon’s Trumpet*, N.Y. TIMES MAG. (Apr. 20, 2003), <https://www.nytimes.com/2003/04/20/magazine/the-silencing-of-gideon-s-trumpet.html> (discussing “endless failures to bring the promise of *Gideon* to life”).

139. See, e.g., *Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013); *Duncan v. State*, 791 N.W.2d 713, 713 (Mich. 2010); *Hurell-Harring v. State*, 930 N.E.2d 217, 225–27 (N.Y. 2010); AM. BAR ASS’N, *GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING* 3 (1982) [hereinafter *CRISIS IN INDIGENT DEFENSE FUNDING*]; COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., *FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK* 34 (2006), https://www.nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf (“The crisis in indigent representation in this state is a well-documented fact. The time for action is now.”); JOEL M. SCHUMM, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, *NATIONAL INDIGENT DEFENSE REFORM: THE SOLUTION IS MULTIFACETED* 5–6 (2012), https://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_national_indigent_defense_reform.pdf [hereinafter *A.B.A. NAT’L INDIGENT DEFENSE REFORM*]; Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 427 (2009) (“For years, scholars have documented the national crisis in indigent defense and its many tragic implications, and yet the crisis persists.”); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1036, 1039–41 (2006).

140. See, e.g., *GIDEON’S BROKEN PROMISE*, *supra* note 138, at 38 (“[I]ndigent defense in the United States remains in a state of crisis When we fail to deliver on the promise of *Gideon* . . . the integrity of the criminal justice system is eroded and the legitimacy of criminal convictions is called into question.”); Wayne A. Logan, *Litigating the Ghost of Gideon in Florida: Separation of Powers as a Tool to Achieve Indigent Defense Reform*, 75 MO. L. REV. 885, 885 (2010) (“Today, the promise long ago heralded by Clarence Gideon’s successful appeal goes unfulfilled, as public indigent defense systems nationwide operate in perpetual crisis mode.”) (citation omitted); Bill Piatt, *Reinventing the Wheel: Constructing Ethical Approaches to State Indigent Legal Defense Systems*, 2 ST. MARY’S J. LEGAL MAL. & ETHICS 372, 374–75 (2012) (“Forty years later, *Gideon*’s potential influence has been characterized as a broken promise. Attorney General Eric Holder recently characterized our

The typical public defender office is understaffed, under-resourced, and unable to provide the effective assistance of counsel that each person deserves.¹⁴¹ Only two to three percent of state and local spending on criminal justice goes toward defense.¹⁴² The perpetual underfunding of lawyers for the poor hinders the quality of representation they provide.¹⁴³ Given that most public defender clients are people of color, the chronic underfunding and resulting diminished quality of representation only amplify the racial disparities that are endemic in the criminal legal system.¹⁴⁴

Public defenders are not a cure-all for all that ails the criminal legal system. Many scholars have argued that public defenders even serve to provide a veneer of due process and degree of legitimacy that allows the criminal legal system to

indigent-defense systems as a ‘crisis.’”) (citations omitted); Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System*, CHAMPION 38, 43 (June 2012). Klein explained:

The academic literature has taken note of this [indigent defense] crisis and is filled with titles of articles such as *Gideon’s Muted Trumpet*, *Gideon’s Promise Unfulfilled*, *Gideon at 40: Facing the Crisis, Fulfilling the Promise*, *The Silence of Gideon’s Trumpet*, *Keeping Gideon from Being Blown Away*, and *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*.

Id. (citations omitted). In the recent case of *Garza v. Idaho*, 139 S. Ct. 738 (2018), Justices Thomas and Gorsuch questioned whether *Gideon* was correctly decided, and thus implicitly raised whether the constitution requires states to fund public defense services. *See id.* at 756–59 (Thomas, J., dissenting). This dissent may have seemed like an extreme, almost academic, outlier in the moment. But in light of the current Supreme Court’s apparent radical agenda to transform constitutional law, we hope a larger *Gideon* crisis is not plausible. *Cf., e.g.*, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022), and *id.* at 2300 (Thomas, J., concurring) (overturning *Roe v. Wade*, 410 U.S. 113 (1973)).

141. *See generally* Press Release, ACLU, *Inadequately Funded Public Defender Services Threaten Criminal Justice System*, ACLU Testifies (Mar. 26, 2009), <https://www.aclu.org/press-releases/inadequately-funded-public-defender-services-threaten-criminal-justice-system-aclu> (reporting on Congressional testimony from ACLU seeking federal oversight because “[t]he state of public defense services in this country is in crisis”); *cf., e.g.*, *Counties Suffer from Inadequate State Funding for Trial Court Public Defense Services*, Wash. State Assoc. of Counties (Jan. 14, 2020), <https://www.wsac.org/counties-suffer-from-inadequate-state-funding-for-trial-court-public-defense-services/> (reporting on costs of public defense in Washington State). We do not mean to assert that all prosecutor offices are fully staffed and resourced. *See, e.g.*, *Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122, 1127–28 n.7 (W.D. Wash. 2013) (finding that limitations on city resources resulted in sometimes ineffective representation from local prosecutor offices). But this mine-run disparity is ever-present, and the inadequacy of some local prosecution offices has never been offered as a source of the ills in the criminal legal system. Moreover, political incentives far more heavily favor resource allocations to law enforcement than to public defense.

142. Smith, *supra* note 131, at 243–44. For a description of state indigent defense systems and fiscal expenditures see HOLLY R. STEVENS, COLLEEN E. SHEPPARD, ROBERT SPANGENBERG, AIMEE WICKMAN & JON B. GOULD, SPANGENBERG PROJECT, CTR. FOR JUST., L. & SOC’Y, GEO. MASON UNIV., STATE, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008 (2010), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf.

143. Tina Peng, Opinion, *I’m a Public Defender. It’s Impossible for Me to Do a Good Job Representing My Clients.*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken-its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html.

144. Note, *Welfarist Prosecution*, 135 HARV. L. REV. 2151, 2156 n.26 (2022).

function.¹⁴⁵ Some argue that even a fully funded indigent defense system would not significantly improve the criminal legal system and its impact on people of color.¹⁴⁶ These arguments are persuasive reasons why our current system needs transformation, not reform. Even skilled and well-resourced public defenders cannot meaningfully confront and address, much less overcome, these barriers to justice.

But, in our existing punitive system, legal representation is crucial. In fact, the first thing scholars would recommend to an arrested friend or family member is calling the best available lawyer they could afford.¹⁴⁷ Given the importance of counsel, that source and degree of protection should be available to all persons, regardless of means. Studies show that well-resourced public defender offices, while not necessarily fostering systemic change,¹⁴⁸ can and do make a difference in measurable outcomes.¹⁴⁹ One comprehensive study found that people facing felony charges in counties with higher public defender and support staff caseloads were more likely to experience pretrial detention.¹⁵⁰ And the record is clear what happens when public defense is under-resourced, regardless of whether the current prosecutor self-identifies as progressive: prospects for an adversarial system suffer, and the prosecutor, as a result, wields even more power over the experience and outcomes in the criminal legal system.

The recent federal district court opinion in *Wilbur v. Mt. Vernon*,¹⁵¹ addressing public defense funding and caseload systems, offers a prime case study of this dynamic. Embracing *Gideon*'s underlying principles as an essential feature of the adversary system, the court declared unconstitutional a “meet [‘em] and plead [‘em]” public defense system in two Washington cities and ordered ongoing

145. See, e.g., Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2178–79 (2013); Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2251 (2013) (asserting that *Gideon* failed to prevent racial disproportionality in prison).

146. Butler, *supra* note 145, at 2178–79.

147. Smith, *supra* note 131, at 249–52 (describing how law professor Paul Butler, a skeptic of the potential positive impact of fully resourced public defenders, quickly availed himself of a highly skilled criminal defense attorney when he faced bogus criminal charges).

148. For the most part, public defense is primarily concerned with individual people accused of crime. See Alex Bunin, *Seeking Public Defender Autonomy*, 36 CRIM. JUST. 23, 24 (2022) (“Neither *Gideon* nor other cases and laws establishing the right to appointed counsel say anything about a public defender’s role in systemic reform.”). However, public defenders increasingly consider themselves as allies or “accomplices” with movements seeking systemic institutional and cultural change. See, e.g., Smith, *supra* note 131, at 265–67; Anna Roberts, *Defense Counsel’s Cross Purposes: Prior Conviction Impeachment of Prosecution Witnesses*, 87 BROOK. L. REV. 1225, 1245–46 (2022) (“An increasing number of public defender agencies—and the attorneys within them—are claiming a role in the legal system, and the public arena, that explicitly pursues longer-term, bigger-scale change.”).

149. See, e.g., Smith, *supra* note 131, at 249–51 (citing studies showing superior results obtained by lawyers from the Defender Association of Philadelphia and the Bronx Defenders).

150. Aaron Gottlieb & Kelsey Arnold, *Do Public Defender Resources Matter? The Effect of Public Defender and Support Staff Caseloads on the Incarceration of Felony Defendants*, 12 J. SOC’Y FOR SOC. WORK & RSCH 1, 1 (2021), https://www.prisonpolicy.org/scans/gottlieb_and_arnold/EffectofPublicDefenderResources.pdf.

151. 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

federal monitoring.¹⁵² Due to the limitations this contract system imposed on defense time and resources, the court found, “[a]dversarial testing of the government’s case was so infrequent that it was virtually a non-factor in the functioning of the Cities’ criminal justice system.”¹⁵³ This dynamic deprived criminal defendants in these cities of their Sixth Amendment rights, regardless of whether they could show individual prejudice in case outcomes.¹⁵⁴ The court reached this conclusion even though the court determined that the prosecution itself was ineffective due to various constraints the cities placed on prosecution resources.¹⁵⁵ In appointing a federal monitor to oversee public defense in these cities, the court reaffirmed that justice in an adversarial system does not function properly without a zealous defense.¹⁵⁶

Further, there is symbolic justice in providing vigorous, zealous representation to the accused. The law better approximates the long-promised commitment to equal justice when, in an adversarial system, it upholds every person’s right to trained, fully resourced counsel that stands between the accused and the vast power of the state.¹⁵⁷ This commitment not only recognizes the dignity of each person whom the law commands to answer for an alleged crime,¹⁵⁸ but also enhances the aspiration that the law is a moral guide for everyone and not simply a tool for the powerful.¹⁵⁹ In contrast, solutions from the power of progressive prosecution leave these punitive judgments in the beneficent discretion of state actors with an employment mandate to prosecute and punish. Rather than sink millions of dollars into prosecution, it is time to lift up the defense.

Prosecutors, after all, do not represent or even speak with the accused. Prosecutors speak with police officers, crime victims, and witnesses; they, in essence, work hand-in-glove with the police.¹⁶⁰ Defense attorneys, on the other hand, speak with the accused and their family and are the ones who identify defenses, weaknesses in the prosecution’s case, search and seizure and other constitutional issues, in addition to social stressors, mental health issues, developmental disabilities, and the myriad reasons why prosecution is harmful and

152. *Id.* at 1124–25, 1136–37.

153. *Id.* at 1124.

154. *Id.* at 1133; *see generally* Strickland v. Washington, 466 U.S. 668, 692 (1984) (creating standard for claims of ineffective assistance of counsel).

155. *See Wilbur*, 989 F. Supp. at 1127–28 n.7.

156. *Cf.* AM. BAR ASS’N, MODEL RULES OF PROF. CONDUCT 2 (2022) (observing that “when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done”).

157. *See, e.g.,* Smith, *supra* note 131, at 249–50.

158. *See id.*

159. *Cf.* Rafi Reznik, *Retributive Abolitionism*, 24 BERKELEY J. CRIM. L. 123, 126 (2019); Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873, 1876, 1892–93 (1999); Paul H. Robinson, *The Utility of Desert*, 91 NW. U. L. REV. 453, 457 (1997).

160. Chip Brown, *Cyrus Vance Jr.’s ‘Moneyball’ Approach to Crime*, N.Y. TIMES (Dec. 3, 2014), <https://www.nytimes.com/2014/12/07/magazine/cyrus-vance-jrs-moneyball-approach-to-crime.html> (quoting Manhattan District Attorney Cyrus Vance referring to the need for “extreme collaboration” with the police).

inappropriate.¹⁶¹ Even exonerations, which occasionally seem to provide progressive prosecutors with a degree of credibility, are usually initiated at the urging—if not begging—of the defense. As exonerations are proliferating across the country and evidence of police and prosecutorial misconduct comes to the fore,¹⁶² it is hopeful to imagine how much earlier, and how many times more, wrongful or unjust convictions would be uncovered with fully funded defenders.¹⁶³

Moreover, the racism intrinsic to criminal courts is by now well-documented, with racial disparities evident in bail determinations, charging decisions, plea offers, conviction rates, and sentencing.¹⁶⁴ Racism is also baked into prosecution: prosecutors prosecute over-policed communities of color and thus reinforce the legacy of racialized policing.¹⁶⁵ By exercising the vast powers and discretion of law enforcement, prosecutors bear great responsibility for reinforcing the disparities that define the criminal legal system.¹⁶⁶ Progressive prosecutors appear more

161. Covert, *supra* note 2, at 226–28.

162. See generally Peter A. Joy & Kevin C. McMunigal, *Controversy in Queens*, 37 CRIM. JUST. 56, 1 (2022), https://papers.ssm.com/sol3/papers.cfm?abstract_id=4260434 (identifying problem of under-addressed prosecutorial misconduct and effort of law professors to hold prosecutors accountable through twenty-one ethics complaints); cf. also Cynthia Godsoe, Abbe Smith & Ellen Yaroshefsky, Essay, *Can You Be a Legal Ethics Scholar and Have Guts?*, 35 GEO. J. LEGAL ETHICS 429, 432 (2022) (examining role of law professors in filing disciplinary complaint against prosecutors, and why more law professors did not join recent efforts).

163. Wrongful and unjust convictions can take many forms in our dysfunctional criminal legal system. See, e.g., Glenn Thrush, *Some Prisoners Remain Behind Bars in Louisiana Despite Being Deemed Free*, N.Y. TIMES (Dec. 11, 2022), <https://www.nytimes.com/2022/12/11/us/politics/louisiana-prison-overdetention.html> (reporting a practice of keeping prisoners in custody beyond release dates due to system failures, and that “[a]bout 200 to 250 inmates are held beyond their legal release dates in any given month, with the average additional time lasting around forty-four days in 2019”).

164. See, e.g., SENT’G PROJECT & ACLU, SHADOW REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN SENTENCING IN THE UNITED STATES (2018), https://www.sentencingproject.org/app/uploads/2022/10/07-14-2022_CERD-Shadow-Report-Draft_with-endnotes.pdf (providing data showing that racial disparity pervades the U.S. criminal justice system); Susan Nembhard & Lily Robin, *Racial and Ethnic Disparities Throughout the Criminal Legal System: A Result of Racist Policies and Discretionary Practices*, URBAN INST., (Aug. 2021), <https://www.urban.org/sites/default/files/publication/104687/racial-and-ethnic-disparities-throughout-the-criminal-legal-system.pdf>; Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 293 n.69 (2011) (noting that racial disparities are particularly evident with respect to misdemeanors); Darryl K. Brown, *Batson v. Armstrong: Prosecutorial Bias and the Missing Evidence Problem*, 100 OR. L. REV. 357, 365 (2022) (“By many measures, racial disparities are rife in the American criminal justice system”); 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/>.

165. Just because the police may independently adopt and enforce discriminatory upstream policies and practices to police marginalized communities, prosecutors cannot absolve themselves simply by claiming their work is “downstream” from the bias of these other actors. Cf. Epperly, *supra* note 5 (reporting local prosecutor’s argument that “racial disparity in the criminal justice system is ‘upstream’ from the prosecutor’s office” and therefore prosecutor is not ethically accountable).

166. Brown, *supra* note 160, at 363 (finding that “prosecutors’ decisions contribute to racially disparate effects in some jurisdictions” and “these effects occur not only in the initial charging decisions and peremptory challenges but with prosecutors’ discretionary choices in plea bargaining, dismissals, and sentencing inputs”); see Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 821, 832–33 (2013) (noting that prosecutors exercise almost unfettered discretion and their decisions control the criminal justice system); Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea Bargaining*, 59 B.C. L.

mindful of the racial impact of their decision-making and more likely to publish racial data and reports, which are, indeed, positive actions.¹⁶⁷ But much more is needed to combat the pervasive racism in criminal courts than internal agents of this system can be expected to accomplish. Well-resourced and independent defenders would be far better situated to call individual and systemic biases out, and push back, especially in conjunction with affected communities as the participatory defense movement gathers traction and momentum.¹⁶⁸

Undoubtedly, many will argue that the adversarial system is broken, defective, or works exactly as intended to maintain the status quo and will question the wisdom of trying to shore up the defense part of the system. Critics of the adversarial system, however, overlook a fundamental truth: there has never been a true adversary system. In practice, criminal courts are best described as administrative tribunals engaged in the swift and mass production of guilty pleas.¹⁶⁹ Criminal courts have functioned as assembly lines for as long as there have been criminal courts.¹⁷⁰

Rev. 1187, 1215 (2018) (observing that prosecutorial discretion leads to racial disparities); Besiki Kutateladze, Whitney Tymas & Mary Crowley, *Race and Prosecution in Manhattan*, VERA INST. OF JUST. (July 2014), <https://www.vera.org/publications/race-and-prosecution-in-manhattan>.

167. See, e.g., Colleen Slevin, *Colorado DAs Unveil Data Dashboards on Prosecution*, U.S. NEWS & WORLD REP. (Sept. 8, 2022), <https://www.usnews.com/news/best-states/colorado/articles/2022-09-08/colorado-das-unveil-data-dashboards-on-prosecutions> (reporting district attorneys, including in Colorado, Philadelphia, Chicago, and some counties in California, are using “data dashboards” to promote transparency).

168. This Article, while promoting the potential role of defense attorneys in the current system, also recognizes the critical role that participatory defense can, and must, occupy. The participatory defense movement centers community expertise instead of legal professionals, and it seeks to disrupt the hierarchy between institutional players and persons impacted by the criminal legal system. However, an in-depth discussion of participatory defense is beyond the scope of this Article. For insight into the movement, see THE PARTICIPATORY DEFENSE NETWORK, <https://www.participatorydefense.org/> (last visited Mar. 6, 2023); see also, e.g., Ava Cilia, *Participatory Defense: What is it and Why it Deserves Our Attention*, HARV. C.R.-C.L. L. REV. AMICUS (Oct. 20, 2021), <https://harvardcrcl.org/participatory-defense-what-it-is-and-why-it-deserves-our-attention/>; Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1283–88 (2015); Cynthia Godsoe, *Participatory Defense: Humanizing the Accused and Ceding Control to the Client*, 69 MERCER L. REV. 715, 716 (2018); Jocelyn Simonson, Essay, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 266–70 (2019); Mariame Kaba, *Free Us All: Participatory Defense Campaigns as Abolitionist Organizing*, NEW INQUIRY (May 8, 2017), <https://thenewinquiry.com/free-us-all/>; Godsoe, *supra* note 128, at 218–19. We also do not suggest that public defenders are immune from their own implicit biases that can undermine the quality of their work for clients. See generally L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2629–31, 2648 (2013) (“Despite the fact that many public defenders are committed to zealous and effective advocacy, there is abundant reason for concern that implicit racial biases may affect their decisions.”); see also Walter I. Gonçalves, Jr., *Narrative, Culture, and Individuation: A Criminal Defense Lawyer’s Race-Conscious Approach to Reduce Implicit Bias for Latinxs*, 18 SEATTLE J. SOC. JUST. 333, 333–35 (2020); Rayza B. Goldsmith, *Is It Possible To Be An Ethical Public Defender?*, 44 N.Y.U. REV. L. & SOC. CHANGE 13, 51–53 (2019).

169. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2118 (1998) (“[T]he American system as it actually operates in most cases looks much more like what common lawyers would describe as a non-adversarial, administrative system of justice than like the adversarial model they idealize.”).

170. PRESIDENT’S COMM’N ON LAW ENF’T & ADMIN. OF JUST., *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 128 (1967).

The evident institutional imperative has long been to process as many defendants, overwhelmingly people of color, through its doors as quickly and harshly as possible with, at best, lip service to constitutional rights.¹⁷¹ A well-resourced public defense system that largely reinforces a soft-adversarial system of high-volume, low-advocacy plea bargaining will still depend on prosecutorial power for outcomes which will maintain racial inequities¹⁷² and, thus, not disrupt this system as radically as it needs.¹⁷³

A related strategy to transform the criminal legal system short of abolition, therefore, could be to make it truly adversarial, instead of the conveyor-belt plea bargain justice that people facing criminal charges experience.¹⁷⁴ Jury trials serve many valuable functions in an adversary system¹⁷⁵ and critically inject the community's voice into the adjudication of criminal charges. With a jury trial, the prosecutor cannot obtain a judgment of conviction to condemn and punish the accused without the consent of the community as an independent check on prosecutorial power.¹⁷⁶ Because jurors are not dependent on elections or other state actors to exert their authority, this direct community participation in criminal adjudication has far more potential to disrupt the *status quo* than *status quo* actors, even prosecutors with a progressive bent.

Currently, due to coercive plea bargaining and the associated “trial penalty,” jury trials are few and far between, and juries do not serve as a serious check on prosecutors.¹⁷⁷ The paucity of jury trials is especially notorious in misdemeanor land, where the stakes remain high but the trial rate abysmal.¹⁷⁸ A significant factor in the low misdemeanor jury trial rate, however, is that many of these offenses do not even qualify for the Sixth Amendment jury trial right under the Supreme

171. See Steven Zeidman, *Eradicating Assembly-Line Justice: An Opportunity Lost by the Revised American Bar Association Criminal Justice Standards*, 46 HOFSTRA L. REV. 293, 293–94 (2017); William Glaberson, *Din of Assembly-Line Justice in New York*, N.Y. TIMES (Jan. 16, 1990), <https://www.nytimes.com/1990/01/16/nyregion/din-of-assembly-line-justice-in-new-york.html>.

172. Cf. Elayne E. Greenberg, *Unshackling Plea Bargaining from Racial Bias*, 111 J. CRIM. L. & CRIMINOLOGY 93, 95 (2020) (observing that “this efficient plea bargaining process also primes the deep-rooted racial biases of the legal actors to emerge and discriminatorily shape those outcomes”).

173. Cf. Brooks Holland, *The Two-Sided Speedy Trial Problem*, 90 WASH. L. REV. ONLINE 31, 33 (2015) (discussing the fewer frequency of adversarial trials supplanted by plea bargains, resulting in “a system of rushed, unconsidered justice with very few trials”).

174. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 98 (2d ed. 2019). See Lynch, *supra* note 169, at 2149.

175. See Brooks Holland, *Confronting the Bias Dichotomy in Jury Selection*, 81 LA. L. REV. 165, 176 n.40 (2020) (listing perspectives on the value of jury trials).

176. Cf. *id.* at 175–76 (arguing that an impartial jury empowers “a voice of community justice that operates independently of the state, including the judiciary”).

177. Barkow, *supra* note 88, at 1368–69; see, e.g., N.Y. STATE ASS'N OF CRIM. DEF. LAWS., *THE NEW YORK STATE TRIAL PENALTY: THE CONSTITUTIONAL RIGHT TO TRIAL UNDER ATTACK* 6, 9–10 (2021), https://www.law.umich.edu/special/exoneration/Documents/New_York_State_Trial_Penalty_Report_FINAL_03262021.pdf (documenting trial penalty in New York and recommending reforms).

178. See generally Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1316–17, 1344–45 (2012); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 298–300, 307–08 (2011).

Court's petty offense exception, which limits the right to offenses subject to over sixth months of incarceration.¹⁷⁹ Any experienced defense lawyer has witnessed prosecutors take cases out of the jury trial right by simply downgrading the offense to a bench-trial offense.¹⁸⁰ This practice transfers the jury's power right back to the prosecutor, progressive or otherwise. But public defense operates more effectively in fulfilling *Gideon's* promise when the prosecutor's authority is more accountable to the community through the jury trial right. This is because the jury provides the defense a transparent community check on whether the State can punish.¹⁸¹

In this vein, defenders around the country could file jury-demand motions in all misdemeanor cases, regardless of level or severity. This concept may seem fanciful under current precedent. But recent scholarship has studiously questioned this jury trial *status quo*, that in guaranteeing the right to a jury trial in "all" criminal prosecutions, the Sixth Amendment means only *some* criminal prosecutions, and in our misdemeanor-heavy system, not even the majority of cases.¹⁸² These Articles supply a persuasive roadmap for making this record which, these scholars explain, could appeal to range of judicial constitutional philosophies. It may especially appeal to the U.S. Supreme Court, which has demonstrated that it is not wed to precedent, even in constitutional criminal procedure.¹⁸³ If this global change occurred to the adversary system, the disruption to criminal system norms would be profound, even for progressive prosecutors, and would give public defenders much greater traction and leverage to do the work envisioned by *Gideon*.¹⁸⁴

179. See *Baldwin v. New York*, 399 U.S. 66, 68–71 (1970) (“[R]eaffirm[ing] the long-established view that so-called ‘petty offenses’ may be tried without a jury.”).

180. Reform already has occurred in this area, as New York has eliminated the New York City exception to the statutory right to a jury trial for lower-level misdemeanor offenses, which prosecutors had invoked for years to take cases out of the jury trial right. See N.Y. CRIM. PROC. LAW § 340.40 (McKinney 2022); see also IMMIGR. AND NAT’Y L. COMM., CRIM. JUST. OPERATIONS COMM. & CRIM. ADVOC. COMM., ASS’N OF THE BAR OF THE CITY OF N.Y., SUPPORT FOR LEGISLATION PERMITTING JURY TRIALS FOR B MISDEMEANORS (2021), https://s3.amazonaws.com/documents.nycbar.org/files/2019511-BMisdemeanor_Jury_Trials.pdf.

181. Cf. N.Y. STATE ASS’N OF CRIM. DEFENSE LAWS., *supra* note 177, at 6 (explaining that “[t]rials and pretrial motion practice provide a critical check on law enforcement overreach and abuse and assures public transparency in the administration of justice”).

182. See Andrea Roth, *The Lost Right to Jury Trial in “All” Criminal Prosecutions*, 72 DUKE L.J. 599, 601–04 (2022); John D. King, *Juries, Democracy, and Petty Crime*, 24 U. PA. J. CONST. L. 817, 817–19 (2022); see also Timothy Lynch, *Rethinking the Petty Offense Doctrine*, 4 KAN. J.L. & PUB. POL’Y 7, 7 (1994).

183. See, e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397, 1408 (2020) (overruling precedent as incorrectly decided that permitted non-unanimous jury verdicts in state courts); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (overruling *Roe-Casey* framework for reproductive health rights under the constitution); *New York State Rifle & Pistol Assoc’n. v. Bruen*, 142 S. Ct. 2111, 2122 (2022) (invalidating New York’s “good cause” gun license law and rendering most of the United States a shall-issue jurisdiction, subject only to particular historical analysis); cf. *Khorrami v. Arizona*, 142 S. Ct. 22, 23–27 (2022) (Gorsuch, J., dissenting from denial of certiorari) (arguing that the Court should review precedent permitting jury trials of serious crimes with fewer than twelve jurors as ahistorical and empirically unsound, regardless of how well-settled the precedent may appear).

184. After all, Clarence Earl Gideon wanted an attorney to represent him *at trial*. Gideon wrote, “It makes no difference how old I am or what color I am or what church I belong too [sic] if any. The question is I did not get a fair trial.” Answer to Respondent’s Response to Petition for Writ of Certiorari, *Gideon v. Cochran*, 370 U.S. 908 (1962) (No. 890 Misc.).

But to the extent progressive efforts have sought to reform the courts thus far, they instead have vested more power in the hands of the prosecutor than in the community. Consider, for example, the proliferation of problem-solving courts and diversion programs. Drug courts, mental health courts, gun courts, veterans courts, and the dizzying array of myriad other “specialty” courts are now firmly embedded in courthouses across the country.¹⁸⁵ Often, the alleged off-ramp provided to these courts exists at the sole discretion of the prosecutor.¹⁸⁶ Participation in many of these courts also requires the accused to plead guilty to the charges dictated by the prosecutor.¹⁸⁷ Assert your constitutional and supposedly sacred right to trial and you are unceremoniously dumped back into the “regular” court. The ever-expanding power of the prosecutor is also seen at the federal level where judges frequently bemoan their lack of discretion once the prosecutor has decided which charges to bring.¹⁸⁸

By contrast, public defenders are more directly accountable to the persons and communities most adversely affected by our criminal legal system. No single solution is a panacea to the many ills of this system. But public defenders have the relationships, skills, and incentives that, if fully resourced and operating on a level playing field with law enforcement, could much more fully transform the criminal legal system into something closer to a justice system.

CONCLUSION

This history of the expansion of prosecutorial power dictates that we must look elsewhere to undo or even address the damage inflicted by the criminal court, rather than to kinder, gentler, more progressive prosecutors. Recognizing that lawyers are not the answer to the many deeply entrenched harms regularly inflicted by the criminal legal system, we nevertheless ultimately argue that a far better

185. Tamar M. Meekins, “*Specialized Justice*”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 2–3, 13, 24, 27 (2006) (“Many officials and scholars theorize that frustration with the adversary system has in large measure led to the proliferation of specialty courts.”); Andrea L. Dennis, *Decriminalizing Childhood*, 45 FORDHAM URB. L.J. 1, 19–21 (2017).

186. Cynthia Alkon, *Have Problem-Solving Courts Changed the Practice of Law?*, 21 CARDOZO J. CONFLICT RESOL. 597, 610 (2020) (prosecutors retain the power to decide which defendants are eligible); John H. Guthmann, *Ramsey County Mental Health Court: Working with Community Partners to Improve the Lives of Mentally Ill Defendants, Reduce Recidivism, and Enhance Public Safety*, 41 WM. MITCHELL L. REV. 948, n.92 (2015) (“Whether a defendant is initially eligible for referral to a problem-solving court is generally considered within the prosecutor’s discretion.”).

187. Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1616 (2021) (acknowledging that the vast majority of problem-solving courts require defendants to plead guilty before they can participate); Alkon, *supra* note 186, at 610; Chrysanthi S. Leon & Corey S. Shdaimah, *JUSTifying Scrutiny: State Power in Prostitution Diversion Programs*, 16 J. POVERTY 250, 253 (2012) (“Defendants are often required to plead guilty to participate in problem-solving courts . . .”).

188. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 109–11 (2007); Paul Butler, *The Prosecutor Problem*, BRENNAN CTR. FOR JUST. (Aug. 23, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/prosecutor-problem> (describing prosecutors as “the most powerful actors in the criminal legal system” who “often ha[ve] more power over how much punishment someone convicted of a crime receives than the judge who does the actual sentencing”).

approach than progressive prosecutors is fully resourced defense counsel advocating for clients in a functioning adversarial system.¹⁸⁹

Still, resources continue to pour into progressive prosecutor campaigns, even amid skepticism about their efficacy and viability. In June 2022, it was reported that a Super PAC funded by George Soros gave \$300,000 to a candidate in a local district attorney race in Maine.¹⁹⁰ While we support efforts to elect prosecutors who pledge to try and mitigate some of the harm caused by their office, we again emphasize the opportunity cost of this single-minded focus on the prosecutor. In July 2022, a judge granted class action status to the ACLU in its lawsuit against Maine's public defender system for its failure to fund, train, and supervise its public defenders.¹⁹¹ The irony is hard to miss.

The verdict seems clear: progressive prosecutors are not a panacea for the many ills of the criminal legal system.¹⁹² Perhaps those behind the progressive prosecutor effort looked to prosecutors because of the power they have and wield, and maybe also because prosecutors hold an exalted position in American culture. But given the crisis of mass incarceration caused by decades of prosecutorial excess and political pressures to punish, it is time to take prosecutors off their pedestal and look instead to the defenders.¹⁹³

189. Robin Steinberg & Skylar Albertson, *Broken Windows Policing and Community Courts: An Unholy Alliance*, 37 CARDOZO L. REV. 995, 1013 (“Whatever its flaws may be, the adversarial model offers the best safeguards for protecting individual rights . . .”); Vida B. Johnson, *A Plea for Funds: Using Padilla, Lafler, and Frye to Increase Public Defender Resources*, 51 AM. CRIM. L. REV. 403, 423–26 (2014) (arguing that the increased responsibility placed on defense counsel should dictate an increase in funding).

190. David Sharp, Andrew Demillo & Geoff Mulvihill, *National Groups Flooding Local Prosecutor Races with Money*, AP NEWS (June 10, 2022), <https://apnews.com/article/2022-midterm-elections-maine-portland-government-and-politics-crime-2f8ad96c907729dff2f112d3cf1703a>.

191. *Class Status Granted to Lawsuit Over Public Defender System*, U.S. NEWS & WORLD REP. (July 18, 2022, 4:45 PM), <https://www.usnews.com/news/best-states/maine/articles/2022-07-18/class-status-granted-to-lawsuit-over-public-defender-system>.

192. Barkow, *supra* note 88, at 1372.

193. Steven Zeidman, *Virtuous Prosecutors?*, 25 CUNY L. REV. F. 1, 3–4, 6–7 (2022).