

THE CALL FOR THE PROGRESSIVE PROSECUTOR TO END THE DEPORTATION PIPELINE

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ABSTRACT

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

In the last decade, new prosecutorial goals—ensuring fairness and equity, promoting community integrity, tackling disproportionate treatment of Black and Brown communities in policing and incarceration, addressing root causes of crime—have gained popularity. Decriminalization and decarceration have been tools utilized to meet these goals. However, the specific goals strived for by self-described progressive prosecutors require an examination of their treatment of non-citizens, given the prosecutor’s outsized role in determining immigration consequences and application of an immigrant’s rights lens to current practices. Their policies toward immigrant defendants to date have been tepid and, at times, harmful.

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Careful study reveals “progressive prosecutors” have expansive obligations to immigrant defendants—rooted in the progressive prosecution movement’s own rhetoric about the appropriate role of the prosecutor and the underlying purposes of the criminal legal system, prosecutorial ethical and professional standards, and Supreme Court jurisprudence. The progressive prosecutor’s duty is simple—to utilize their powers to avoid the double punishment of criminal sentence and deportation. That is, progressive prosecutors must ensure that policy choices that purport to support communities of color and politically marginalized communities do not neglect immigrant defendants, thereby creating disproportionate consequences for this population.

Due to the immigration consequences that might flow from any contact with the criminal legal system, progressive prosecutors need to look at their role in plea negotiations and beyond. A progressive prosecutor’s work then is to both understand their role as gatekeeper to the federal deportation machine and act to stop feeding it. This Article proposes a series of guidelines and policy recommendations prosecutors can institute toward these ends, including institutional changes as well as the adoption of specific practices that consider immigration consequences at all stages of criminal proceedings—arrest, conviction, sentencing, and beyond. Some potential recommendations include creating an immigrant integrity unit to audit and revamp all areas of practice to establish policies like the expanded use of declination, the encouragement of pre-arrest diversion, and a prohibition on information sharing with ICE.

“Progressive federalism” suggests that by taking these kinds of actions, progressive prosecutors will move closer to securing proportionate outcomes for immigrants in the criminal legal system. Thus, while federal immigration reform remains at a stalemate, the local prosecutor’s adoption of a robust immigration agenda will simultaneously begin to detangle the criminal and immigration systems and influence immigration enforcement policy on a national level.

TABLE OF CONTENTS

INTRODUCTION	144
I. FEDERAL IMMIGRATION REMOVAL IS DEPENDENT ON STATE AND LOCAL ACTORS IN THE CRIMINAL LEGAL SYSTEM	153
A. <i>Recent Changes that Created the Modern Criminal Removal System</i>	155
1. Focus on Criminal Grounds of Removal	155
2. Reducing Immigration Adjudicator Discretion	156

2021]	THE CALL FOR THE PROGRESSIVE PROSECUTOR	143
	B. <i>These Shifts Make Federal Immigration Enforcement Reliant on Actors in State and Local Criminal Legal System</i>	157
	1. Local Prosecutors Drive Criminal Grounds of Removal	157
	2. Local Actors Directly Influence Who Is Detected by ICE	158
	C. <i>Disproportionate Targeting and Impact on Black and Brown Immigrants</i>	159
II.	THE EMERGENCE OF THE PROGRESSIVE PROSECUTION MOVEMENT AND ITS IMPACT ON IMMIGRATION	160
	A. <i>Rise of the Progressive Prosecution Movement</i>	161
	B. <i>Theory and Practice of the Progressive Prosecutor</i>	166
	1. Theory: Questioning the Role and Function of the Prosecutor, the Purposes of Criminal Legal System, and Consideration of Collateral Consequences	166
	2. Progressive Prosecutors' Platforms and Policy Initiatives in General	168
	C. <i>Progressive Prosecution Movement and Immigration</i>	171
III.	WHAT PROGRESSIVE PROSECUTORS SHOULD DO REGARDING IMMIGRATION	174
	A. <i>Progressive Prosecutors Must Do More</i>	174
	1. Prosecutorial Ethical and Professional Standards Support Obligations to Immigrant Defendants	174
	2. Supreme Court Jurisprudence Supports Prosecutorial Obligations to Immigrants	176
	3. Progressive Prosecutors' Rhetoric Supports Obligations to Immigrant Defendants	177
	B. <i>Progressive Federalism Suggests Progressive Prosecutors Can Do More</i>	179
IV.	SETTING THE PROGRESSIVE PROSECUTOR'S IMMIGRATION AGENDA	185
	A. <i>Scope and Guiding Principles</i>	185
	1. Scope of Agenda	185
	2. Guiding Principles: In Writing, Abolitionist Ethic, Flexibility	186
	B. <i>The Agenda: Concrete Proposals</i>	190

1. Create an Immigration Integrity Unit to Audit and Revise Policies and Remedy Past Harm	191
2. Expanded Use of Transparent Declination Policies and Prosecutorial Nullification to Avoid Unfair Application of the Law	193
3. Eliminate the Practice of Overcharging	195
4. Require Avoidance of Immigration Consequences in Plea Negotiations, Using Written Guidance	196
5. Consider Proportionate Sentencing as the Principal Factor in Sentencing Recommendations	197
6. Increase Accessibility to Diversion Opportunities, Such as Alternatives to Incarceration	200
7. Expanded Use of Pre-Arrest Diversion	202
8. Set Up an Independent Commission or Internal Board to Review Post-conviction Relief for Prior Convictions with Resultant Immigration Consequences	205
9. Incorporate Immigration Considerations in Decarceration Efforts and Learning from COVID-19 Releases	207
10. Prohibit Information Sharing and Cooperation with ICE	209
11. Use Power to Challenge ICE Enforcement and Supporting State and Federal Immigration Legislative Efforts	210
12. Set an Agenda in Partnership with the Community and Implement Open Budgeting	211
CONCLUSION	213

INTRODUCTION

... [P]rosecutors are elected officials tasked with distributing punishment within an unequal and violent society ...

– Abolitionist Principles & Campaign Strategies for Prosecutor Organizing¹

[T]he prosecutor's job is not to exact the greatest possible punishment. It is not to win at all costs. It's to offer mercy in equal measure to justice.

– Emily Bazelon, Author of *Charged*²

1. *Abolitionist Principles & Campaign Strategies for Prosecutor Organizing*, COMMUNITY JUSTICE EXCHANGE, <https://perma.cc/73CS-3LNB> (last updated Jan. 22, 2020).

2. EMILY BAZELON, *CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION* (2019).

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

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

The differences in outcomes for Luis and Jacklyn were not by luck, but by design. At the time of Luis’s arrest, Kenneth Thompson was the District Attorney (DA) in Brooklyn. He was the first African American DA in Kings County. Prior to becoming the District Attorney, Thompson had a successful career as a civil rights attorney and ran on a platform promising reform. Shortly before Luis’s arrest, DA Thompson enacted a blanket policy to not prosecute most first-time marijuana possession arrests, in part due to the disproportionate impact these arrests had on Black and Brown communities, including deportation. Because of this, Luis never stepped foot in a courtroom and never faced criminal charges. Jacklyn, on the other hand, was arrested blocks away, so her case fell under the jurisdiction of long-time “tough-on-crime” Queens DA Richard Brown. He was known for his aggressive prosecution of low-level offenses, notwithstanding the embedded civil consequences. We later learned of a directive in his office for line prosecutors to call ICE when handling the case of an undocumented defendant. Thus,

despite her criminal case being dismissed, ICE arrested Jacklyn in open court. This action was not that of a lone wolf in the prosecutor's office calling ICE; this was an office-wide practice.

In the last several years, the “progressive prosecution movement” has emerged out of a groundswell of community organizing exposing the deep-seated racial injustices of the criminal legal system.³ The uprisings sparked by the 2012 murder in cold blood of another unarmed Black man, Trayvon Martin, led to the birth of the Black Lives Matter movement (BLM).⁴ Although Trayvon Martin's killer, George Zimmerman, was not technically a police officer,⁵ Trayvon Martin's death highlighted the nationwide epidemic of police murders of unarmed Black people.⁶ BLM brought heightened scrutiny not only of the police but also of prosecutors and their role in entrenching racial inequity.⁷ A small but growing influential group of so-called progressive prosecutors have risen to power, calling for decriminalization, decarceration, and increased transparency as independent goals and tools to reduce racialized results pervading the criminal legal system.⁸ Many were career public defenders or civil rights attorneys, like Chesa Boudin or Kenneth Thompson, who set their sights on the district attorney post, promising to reform the role from within using their firsthand experience.⁹

Tensions exist between proponents of the progressive prosecution movement who suggest change can come through the insertion of “progressive” actors into the system and abolitionists who argue that the system itself is rotten to its core and meaningful change will only be realized upon its dismantling.¹⁰ Yet, abolitionists recognize the system will not be eradicated

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

4. Mychal Denzel Smith, *How Trayvon Martin's Death Launched a New Generation of Black Activism*, NATION (Aug. 27, 2014), <https://perma.cc/MTV5-RFVQ>.

5. Yamiche Alcindor, *Trial Turns to Zimmerman's Neighborhood-Watch Role*, USA TODAY (Jun. 25, 2013), <https://perma.cc/4UBE-ZSTV> (“Zimmerman was in charge of recruiting block captains for a neighborhood watch program and, after having been asked, was also part of a group to enforce parking rules in his community.”).

6. A. Christson Adedoyin, Michael Allen Robinson, Sharon E. Moore & Dewey Monroe Clayton, *The Dehumanization of Black Males by Police: Teaching Social Justice —Black Life Really Does Matter!*, 39 J. TEACHING SOC. WORK 111, 114–15 (2019).

7. See Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 262 (2008) (“It would be hard to conjure up a mechanism that more effectively subjugates a group of people than state-imposed mass incarceration, capital punishment, and police terror . . .”).

8. See BAZELON, *supra* note 2; see also Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 7, 18, 25–26 (2019).

9. See Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW 360 (Apr. 7, 2019), <https://perma.cc/2CW4-24EJ>.

10. See Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 170 (2021) (“An abolitionist ethic provides a constant reminder that ‘history lives in the present, in that white supremacy, settler colonialism and racial capitalism are inextricable from the origins, logic and practices of “criminal justice.”’)” (citing Michael J. Coyle & Judah Schept, *Penal Abolition Praxis*, 26 CRITICAL CRIMINOLOGY 319, 320 (2018)); RUTH

overnight.¹¹ An abolitionist approach to prosecution seems wise, given the inherent role prosecution plays in maintaining racial inequity and entrenching white supremacy in the United States.¹² To this end, progressive prosecutors should create policies that, like those explored in the final section of this article, inherently ask them to give up power in small and large ways and move toward the resolution of problems outside of the criminal legal system.

While there has been much fanfare about the nascent movement, there is no clear definition of a “progressive prosecutor.”¹³ Those who lay claim to the title have varied wildly in their policies, many seeming hardly “progressive” at all.¹⁴ Yet, they have made important gains too. Undeniably, the progressive prosecution movement has advanced some reforms that benefit immigrant defendants, such as eliminating cash bail;¹⁵ however, its approach to immigration issues has fallen short. Scrutiny of individual progressive prosecutors’ initiatives reveals policies that tend to focus more on protecting immigrant witnesses and encouraging immigrant cooperation with the police than questioning their approach toward prosecuting immigrant defendants.¹⁶ Few have adopted policies that meaningfully consider and prevent the

Wilson Gilmore, *Change everything: Racial Capitalism and The Case for Abolition* (forthcoming 2022) (“Abolition requires that we change one thing: everything.”).

11. See Ruth Wilson Gilmore & James Kilgore, *The Case for Abolition*, MARSHALL PROJECT (June 16, 2019), <https://perma.cc/YT6V-RNDK> (“We know we won’t bulldoze prisons and jails tomorrow, but as long as they continue to be advanced as the solution, all of the inequalities displaced to crime and punishment will persist. We’re in a long game.”).

12. See Roberts, *supra* note 7.

13. The question of whether a prosecutor can ever be progressive is a highly contested one. In her recent essay, Professor Abbe Smith concludes that she is “unsure.” Abbe Smith, *The Prosecutors I Like: A Very Short Essay*, 16 OHIO ST. J. CRIM. L. 411, 422 (2019). In 2001, she famously asked the question “can you be a good person and a good prosecutor?” and ultimately proclaimed “I hope so, but I think not.” Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 396 (2001). Fifteen years later, in discussing the emergence of “progressive prosecution movement,” Professor Angela J. Davis wrote: “we need good ethical people, who understand the crisis we have with regard to mass incarceration and racial disparity to be defenders and to be prosecutors.” EMILY BAZELON, *supra* note 2, at 159 (quoting Professor Davis). There are important critiques raised in the debate over whether prosecution can ever be progressive, but that is beyond the scope of this Article. Despite the imperfect definition, I refer to the “progressive prosecution movement” as a subset of recently-elected local prosecutors who self-identify as “progressive reformers” and have commonly promised policy initiatives to combat racial inequities—including decarceration, decriminalization, increased accountability and centering community safety and power.

14. For example, while prosecutors have framed creation of “conviction integrity units” as a “progressive” policy, it might be more astutely framed as prosecutors doing their jobs. These units seek to overturn convictions that were “wrongful” because the individuals were indeed innocent. While they often expose racialized policing and over-aggressive prosecution, they are not inherently progressive. Other self-proclaimed progressive prosecutors have accomplished far less than promised due to a number of structural constraints. See, e.g., Davis, *supra* note 8, at 18–19 (DA Aramis Ayala sought to not seek the death penalty soon after being elected, but Florida’s governor took death penalty cases away from her jurisdiction and the governor’s action was upheld. DA Ayala did not seek reelection).

15. See Colin Doyle, *Chesa Boudin’s New Bail Policy is Nation’s Most Progressive. It Also Reveals Persistence of Tough-On-Crime Norms*, APPEAL (Jan. 30, 2020), <https://perma.cc/P2U2-2KBR> (describing how Rachael Rollins and Larry Krasner’s bail policies limit cash bail).

16. See, e.g., *District Attorney Gonzalez and Attorney General James Win Lawsuit Against Trump Administration’s Illegal Policy of Making ICE Arrests at State Courthouses*, BROOKLYN DIST. ATTORNEY’S OFF. (June 10, 2020), <https://perma.cc/K997-Z7KQ>; WASHTENAW CNTY., OFF. OF THE PROSECUTING ATTORNEY, POLICY DIRECTIVE 2021-12: POLICY REGARDING IMMIGRATION AND IMMIGRATION ADJACENT ISSUES (2021).

disproportionate punishment of immigrants, despite the law's acknowledgment that immigration consequences are unique and often outsized.¹⁷ These inadequate policies have been advanced even though many of these defendants come from the very communities of color progressive prosecutors claim their policy reforms seek to protect.¹⁸

Nevertheless, the recent emergence of the progressive prosecutor presents a renewed opportunity to examine the role *local* prosecutors play as the “gatekeepers” to the *federal* deportation system¹⁹ and raises the question of how they might approach the prosecution of immigrants. Just as the criminal system is reckoning with calls for decriminalization and decarceration, the Abolish ICE/immigrant rights movement is increasingly calling for an end to the government's over-reliance on detention and “criminalization” of migrants.²⁰ Yet, at their core, both movements reveal a common thread—under the contemporary legal landscape, local and state prosecutors²¹ are the arbiters whose decisions determine who is locked away and removed from society and who is free to survive.

The immense powers of the prosecutor are well-documented.²² Immigrants,²³ especially Black and Brown immigrants like Luis and Jacklyn, who are disproportionately targeted by both the criminal justice and immigration enforcement

17. See *Padilla v. Kentucky*, 559 U.S. 356, 360–74 (2010) (explaining why deportation is unique and part of criminal punishment). This is not to suggest that other consequences of criminal justice contact such as loss of housing, loss of employment, etc., are not also devastating. These consequences, too, are of significant import and should be accounted for by prosecutors. Nevertheless, the unique and outsized entwined immigration consequences of criminal contact cannot be overlooked by the prosecutor, especially one who has ascended to power through a promise to promote the rights of the under-resourced and marginalized communities of color.

18. A focus on the impact of policies on non-citizens might raise tensions with other constituents seeking criminal legal reform, namely Black and Brown citizens accused of crime. There are certainly some instances where this might be true. However, as described in the policy proposals below, there are great number of policy changes that would benefit non-citizen and citizen defendants alike. To name a few: the expanded use of declination policies increasing the number of criminal charges that should not be prosecuted, a new conception of proportionality in sentencing that takes into account collateral issues as part of sentencing recommendation, and a reconceiving the use of pre-plea diversion and pushing for expanded pre-arrest diversion. In fact, there are a host of areas where there is overlap between the concerns of non-citizen and citizen (particularly of color) defendants and joint organizing would be advantageous for both groups targeted by the criminal legal system.

19. Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 558, 580 (2013).

20. “Criminalization of migrants” refers to both prosecuting migrants for the act of migrating and linking deportations to criminal history.

21. I am particularly focused on state and local prosecutors because most U.S. criminal matters are prosecuted in state courts. Davis, *supra* note 8, at 6. Therefore, the majority of immigration consequences flow from local or state criminal contact. Nevertheless, the discussion and many proposals contained in this piece can and should also be considered by federal prosecutors for the same reasons articulated herein. Additionally, federal prosecutors have a unique role to play in potentially decriminalizing border crossing and other migration related crimes. See Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C.L. REV. 1967 (2020).

22. See Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1203–53 (2020).

23. I use the term “immigrant,” “non-citizen,” and “migrant” interchangeably throughout the Article. The term “immigrant” has a distinct meaning in the Immigrant and Nationality Act, an individual intending to reside in the United States permanently. It is distinct from nonimmigrants, a class of individuals who reside in the United States, under a host of categories, but do not intend to do so permanently. Because “immigrant” is used to refer to “non-citizens” in common parlance, I use the terms interchangeably.

systems, have long been crushed by the weight of this power. One prosecutor's decision to act or refrain from acting—even an act as seemingly minor as bringing a misdemeanor charge in court—can mean the difference between remaining in this country with family or permanent exile. An officewide policy to do or *not do* something can be a lifeline.

Due to the paring down of immigration adjudicator discretion and the expansion of convictions triggering removal grounds in the last few decades, local and state prosecutors have become the gatekeepers to deportation.²⁴ By choosing how and who to charge, prosecutors wield influence over immigrant defendants in two important ways. At the outset, their decisions identify who is detected for ICE enforcement. Immigration enforcement has increasingly looked to local criminal courts and jails to target immigrants for removal.²⁵ Thus, a local prosecutor's decisions regarding whether to pursue charges, what charges to bring, or who to ask the judge to detain pretrial can directly impact whether an immigrant may be targeted for deportation in the first place.²⁶ Next, their choices directly impact the substantive outcomes of the defendant's later-decided immigration matters.²⁷ The federal immigration laws incorporate and analyze state convictions—even minor offenses—to determine if an individual is deportable or should face other immigration penalties.²⁸ Many offenses render non-citizens mandatorily deportable with no (or very narrow) avenues for relief.²⁹ These laws also largely strip immigration adjudicator discretion where there is a conviction. Prosecutors are the most influential players in state case resolutions.³⁰ Thus, a prosecutor's decision on how to charge and negotiate a resolution may ultimately become *the* dispositive factor in later federal immigration proceedings. Counterintuitively, under current legal frameworks, it is the discretion of the *state* prosecutor that is most determinative of *federal* immigration outcomes.

In today's legal landscape, immigrants increasingly face deportation for prior criminal contacts, including decades-old convictions and minor offenses that are not considered crimes under state law.³¹ For decades, immigrant rights groups have organized to challenge the ways in which the

24. For instance, deportable non-citizens with aggravated felony convictions, including certain convictions carrying a sentence of one year or longer, are generally subjected to mandatory deportation. *Aggravated Felonies: An Overview*, AM. IMMIGR. COUNCIL 2–3 (March 2021), <https://perma.cc/7NBJ-DF5X>. A sentence of 365 days or more for certain offenses (including many state misdemeanors) will trigger certain aggravated felony grounds of removal. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(G).

25. *See infra* Section I, Part B.

26. *See Lee, supra* note 19.

27. *See infra* Section I, Part A.

28. *See* Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1139–41 (2013).

29. *See* 8 U.S.C. § 1226 (including crimes involving moral turpitude, aggravated felonies, controlled substance convictions, certain firearms offenses and various other crimes).

30. *See* Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1203–04 (2011).

31. *See generally* N.Y. Penal Law § 221.05 (McKinney 2021), *repealed by* N.Y. State Senate Bill S854A, L.2021, c. 92, § 15 (2021) (finding that possession of a small amount of marijuana is a violation and not a crime under NY state law). Nevertheless, it meets the definition of conviction for immigration purposes and carries attendant immigration consequences.

immigration system relies on the criminal legal system to feed the deportation machine.³² Yet, as is often the case, the courts have lagged far behind. It was not until 2010, in *Padilla v. Kentucky*, when the Supreme Court finally acknowledged that, because the criminal system is intricately connected to the immigration system, a migrant had a constitutional right to understand the clear deportation risks associated with a plea.³³ Defense counsel bore this duty. Deportation was all too often the result of criminal proceedings. Significantly, the Court looked to the state criminal court, where most immigration consequences are created.³⁴ But prosecutors, too, bear a burden.

In dicta, the Court acknowledged that prosecutors have an interest in ensuring the integrity of the plea negotiation process for migrants, but stopped there.³⁵ After *Padilla*, some prosecutors take immigration status into account to militate against immigration penalties, while others seek to use immigration status to enhance punishment.³⁶ This inconsistency has been of grave consequence to immigrants who have radically different experiences when facing prosecution around the nation.

This Article explores the role of the state prosecutor in shaping the fate of immigrant defendants. It builds upon scholarship that discusses local prosecutors' immense power in both the criminal legal and the federal immigration systems to posit that prosecutors' failure to adequately consider and account for the outsized penalties suffered by immigrants has greatly contributed to the deportation crisis today. Next, the Article analyzes the recent emergence of the "progressive prosecution movement" and examines an underexplored topic—the shortcomings of the progressive prosecution movement's approach towards prosecuting immigrant defendants. One might incorrectly presume that because progressive prosecutors purport to advance policies that seek to reduce harms to Black and Brown communities, these policies would benefit immigrant defendants, many of whom hail from the very same communities. This is not the case, as prosecutors in these jurisdictions have

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

33. *Padilla*, 559 U.S. at 374 ("Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.").

34. See Eagly, *supra* note 28, at 1128–30.

35. "[I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties . . . the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does." *Padilla*, 559 U.S. at 373.

36. See Eagly, *supra* note 28, at 1163, 1166, 1170 (describing an "alienage neutral model" whereby prosecutors consider the collateral immigration-enforcement consequence of deportation in plea agreements, avoid inquiring into immigration status in court, and consider status as "rarely, if ever, argued as a sentence aggravator" and that the "illegal-alien-punishment" jurisdictions whereby prosecutors use immigration status to treat noncitizen defendants more punitively in plea negotiations and bail determinations).

largely failed to consider how their policies might trigger unintended immigration consequences. Immigrants are often overlooked by the self-described progressive prosecutor. Few have grappled with what it means to be a progressive prosecutor in their treatment of immigrant defendants. This Article begins exploring this question. It suggests a new framework to understand the prosecutor's obligation and provides alternative approaches to prosecutorial practice and policy that are well within prosecutors' powers and more consistent with progressive prosecutors' stated goals.

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

The progressive prosecutor has an obligation to recognize that their role is intimately and directly connected to the consequences in the immigration system. In fact, they *control* those consequences. They are the *de facto* adjudicator in the federal immigration system. The charge of the progressive prosecutor is then to view *every* part of the criminal justice system as an important component of the immigration system, evaluating fairness and proportionality in prosecutorial decision-making at every stage of the criminal process, not only in plea negotiations. To fail to use their discretionary power in this way not only renders prosecutors complicit in immigration enforcement³⁷ but also undermines community integrity for Black and Brown families—a central goal articulated by the progressive prosecution movement.

So how do progressive prosecutors achieve proportionate results for the immigrant defendant? Beginning by adopting an explicit agenda that reflects and embodies an understanding of how prosecutorial actions or inactions in every component of criminal proceedings create immigration consequences. Then, enact policies that seek to prevent them. A robust agenda includes policies and practices in *all* areas of prosecutorial functions—charging practices, pre-trial detention policies, plea negotiating, sentencing, and post-conviction relief policies, among other functions.

Many so-called progressive prosecutorial policies to date do not sufficiently reflect the attendant harms faced by immigrant defendants and may inadvertently hurt them.³⁸ For example, allowing a plea to be withdrawn after

37. See Lee, *supra* note 19, at 558.

38. While Marilyn Mosby, State's Attorney of Baltimore, started a drug distribution diversion program, Aim to B'more, for first-time drug distribution offenders, the program results in a "probation before judgment" disposition, which is considered a conviction in immigration proceedings. See Zachary Babo, *Marijuana Possession No Longer Prosecuted in Baltimore, State's Attorney's Office Announces*, WMAR 2NEWS BALT. (Jan. 30, 2019, 6:05 AM), <https://www.wmar2news.com/marijuana-possession-no-longer-prosecuted-in-baltimore-states-attorneys-office-announces> [archived at <https://perma.cc/B6JX-FVUV>]; see 8 U.S.C. § 1101(a)(48)(A).

participation in an alternative to incarceration program may avoid a conviction under state law.³⁹ However, the initial plea still qualifies as a “conviction” for immigration purposes⁴⁰ and could be the basis for deportation.

To be clear, adopting an immigration agenda of this sort is a stopgap—an act of harm reduction in the absence of meaningful federal legislative immigration reform. A byproduct of enacting this agenda would be the beginning of the disentanglement of the criminal legal system from the immigration system, a worthy goal of the self-described progressive prosecutor. Through local action, prosecutors can shape *national* immigration enforcement and policy debate. This is supported by the political theory of “progressive federalism”—whereby local and state actors and sub-actors use their local powers to combat national policies they disagree with—to advocate for change traditionally associated with the left.⁴¹ Progressive prosecutors can use their local authority to promote fairness for immigrants in the absence of immigration reform at the federal level, an area of “progressive federalism” that has been understudied. This Article fills this gap. Without the need to change a single law, through adopting policies in line with their stated vision, prosecutors can stymie the federal deportation machine.⁴²

This Article concludes by setting forth some key considerations for the (aspiring) progressive prosecutor in shaping their immigration agenda. It identifies the areas of criminal practice that should be of prime concern. It also suggests concrete proposals that prosecutors can adopt. Recognizing that each jurisdiction is varied and has unique considerations, the agenda is meant as a starting point for district attorneys to build upon in consultation with local immigrant communities, policymakers, defense attorneys, and other leaders within their jurisdiction. An agenda might begin with the creation of an immigrant integrity unit to review and revamp all areas of practice. Policy recommendations could include the expanded use of declination policies and prosecutorial nullification, adoption of guidelines that take into account the unique proportionality considerations in sentencing for immigrant defendants, reconsideration of the mechanisms behind and use of diversion

39. Philadelphia’s prostitution diversion, first time non-violent and drug felonies, other drug offenses and some misdemeanors require “no contest” pleas before entry into the program and may withdraw upon successful completion of the program, resulting in a dismissal. *Diversion Unit*, DISTRICT ATTORNEY, <https://perma.cc/WQ9W-S5A5> (last visited Sept. 15, 2021).

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

41. See Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1696, 1715–16 (2017) (describing ways in which local and state actors have increasingly used their powers to enact a series of progressive policies in disagreement with the national viewpoint, and have in turn, influenced the national debate on a host of issues including same-sex marriage, clean air, and placing body cameras on police officers); see generally Heather K. Gerken, *A New Progressive Federalism*, 24 DEMOCRACY J. 37, 37–38 (2012).

42. According to the Trump administration’s released data, in FY 2019, the majority of immigrants deported—sixty-five percent—had criminal convictions or pending criminal matters. Narrowing to “interior removals”—those apprehended outside of the border region—ninety-one percent had criminal convictions or pending criminal matters. U.S. IMMIGRATION & CUSTOMS ENF’T, FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 22 1, 21 (2019).

programs, encouragement of pre-arrest diversion, prohibiting information sharing with ICE, to name a few—to account for the specific and ever-shifting immigration consequences of criminal justice involvement.

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

I. FEDERAL IMMIGRATION REMOVAL IS DEPENDENT ON STATE AND LOCAL ACTORS IN THE CRIMINAL LEGAL SYSTEM

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

—Prof. Ingrid Eagly, 2013⁴³

The modern immigration removal system, despite being a purely federal function, is reliant on actors in the state and local criminal legal system. This is because policymakers have deeply intertwined immigration law with criminal law, particularly over the last few decades.⁴⁴ While technically civil, all

43. Eagly, *supra* note 28, at 1128 (emphasis added) (footnotes omitted).

44. Katherine Beckett & Heather Evans, *Crimmigration at the Local Level: Criminal Justice Processes in the Shadow of Deportation*, 49 L. & SOC'Y REV. 241, 242 (2015) (describing how "legally hybrid techniques" that tether the criminal and immigration enforcement apparatus are likely to enhance the state's power to detain and punish); see César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1458 (2014) (identifying formative crimmigration legislation in the 1980s); see also Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*,

statutory provisions governing eligibility for immigration status, expulsion, and detainment while awaiting proceedings now incorporate reference to criminal law.⁴⁵ The majority of criminal prosecutions in the United States arise in state court.⁴⁶ A wide range of state convictions trigger federal consequences. An individual committing an offense alone—without conviction—can render her subject to severe immigration penalties.⁴⁷

Just as criminal law has been enmeshed in immigration law, immigration violations have increasingly become criminalized.⁴⁸ Immigration enforcement has become militarized and largely resembles criminal law enforcement today.⁴⁹ Professor Juliet Stumpf has coined the term “cimmigration” to describe the examination of the intersection of criminal and immigration law and the ways in which they bring out the most damaging aspects of one another.⁵⁰

Changes to immigration laws and enforcement practices—particularly in the last three decades—have been sweeping, complex, and utterly devastating to immigrant communities.⁵¹ The expansion of immigration laws coupled with heightened enforcement through states and localities has had a disparate impact on Black and Brown immigrants.⁵² Because most arrests, convictions, and immigration enforcement occur through the state criminal system, one must look local to truly understand how this merger operates.⁵³ The state criminal system feeds the pipeline to federal removal, and state and local prosecutors control the flow.⁵⁴

56 AM. U. L. REV. 367, 376 (2006) (explaining the term “cimmigration,” the convergence of immigration and criminal law, was coined by scholar Juliet Stumpf and ushered in a new era of scholarship).

45. See 8 U.S.C. § 1182(a)(2) (criminal grounds of inadmissibility); 8 U.S.C. 1226 (a) (discretionary detention, eligible to request bond from immigration judge); U.S.C. § 1227(a)(2) (criminal grounds of deportability).

46. Davis, *supra* note 7, at 6.

47. See, e.g., 8 U.S.C. § 1182(a)(2)(A)(i)(II) (rendering an individual inadmissible for admitted commission of a controlled substance offense).

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

49. See Stumpf, *supra* note 44, at 386–89 (finding that border patrol has become increasingly militarized).

50. See *id.* at 376.

51. See Daniel Kanstroom, IMMIGRATION LAW: CURRENT CHALLENGES, TRAGEDY, AND FARCE, in IMMIGRATION PRACTICE MANUAL at 1.1 (Massachusetts Continuing Legal Education, Inc., 3d ed. Supp. 2019).

52. See Elizabeth Aranda & Elizabeth Vaquera, *Racism, the Immigration Enforcement Regime, and the Implications for Racial Inequality in the Lives of Undocumented Young Adults*, 1 SOC. OF RACE & ETHNICITY 88, 89–91, 94, 100–01 (2015) (describing how law enforcement agents’ inherent biases against racialized markers, such as skin color or language use, contribute to selective enforcement of immigration policies); JULIANA MORGAN-TROSTLE & KEXIN ZHANG, THE STATE OF BLACK IMMIGRANTS REPORT PART II: BLACK IMMIGRANTS IN THE MASS CRIMINALIZATION SYSTEM, N.Y.U. IMMIGRANTS’ RTS. CLINIC & BLACK ALLIANCE FOR JUST IMMIGR. 1, 13–18 (2016).

53. See Eagly, *supra* note 28, at 1128–30.

54. See *id.* at 1128; see also Lee, *supra* note 19, at 558, 568, 573, 575, 588.

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

The convergence of immigration and criminal law has led immigration law to become quasi-criminal in nature.⁵⁵ Yet, many of the protections afforded to defendants in criminal proceedings, such as a constitutional right to counsel or the rules of evidence, do not extend to respondents facing removal.⁵⁶

Over the last century, the Immigration and Nationality Act (“INA”) has evolved from a short text containing few barriers to entry⁵⁷ into an intricate web of provisions designed to shut out and deport.⁵⁸ The area of most significant growth has been the treatment of prior criminal conduct.⁵⁹ For instance, Professor Alina Das has documented how racial animus drove the development of crime-based removal.⁶⁰ While individuals with specific criminal histories were prohibited from entering the United States in 1875, individuals who committed crimes after entry did not face expulsion as a result.⁶¹ However, the law began to enmesh criminal convictions with deportation in 1917.⁶² With this began the birth of the criminal removal system.

1. *Focus on Criminal Grounds of Removal*

There has been tremendous focus on criminal grounds of removal over other violations of the INA, particularly in the last thirty years. Congress has vastly expanded the criminal grounds of removal—the umbrella term for

55. See Stumpf, *supra* note 44, at 384–86, 390–92 (2006); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 107–08, 112–20 (2012).

56. See, e.g., KATE M. MANUEL, CONG. RSCH. SERV., R43613, ALIENS’ RIGHT TO COUNSEL IN REMOVAL PROCEEDINGS: IN BRIEF 6 (2016).

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

58. See MARY GIOVAGNOLI, AM. IMMIGR. COUNCIL, PERSPECTIVES: OVERHAULING IMMIGRATION LAW: A BRIEF HISTORY AND BASIC PRINCIPLES OF REFORM 1–2 (2013), <https://perma.cc/W6WM-J22J>.

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

60. Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 182–85 (2018) (detailing how anti-Chinese laws in California laid the blueprint for the Page Act of 1875, adopting the initial criminal bars to immigration); see also Carrie L. Rosenbaum, *Crimmigration—Structural Tools of Settler Colonialism*, 16 OHIO ST. J. CRIM. L. 9, 23–27 (2018) (discussing how the integration of criminal and immigration law exasperates racial disparities).

61. See Stumpf, *supra* note 44, at 380.

62. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 22 (1996).

exclusion and deportation.⁶³ These grounds of removal not only govern who is subject to expulsion but also operate as barriers to the attainments of immigration benefits.⁶⁴ A dramatic expansion of these grounds began in the late 1980s.⁶⁵ As an example, “aggravated felonies”⁶⁶ were created as a basis for deportation in 1988.⁶⁷ Federal lawmakers expanded the list in 1990 and massively proliferated it through the adoption of two sweeping pieces of legislation, the Antiterrorism and Effective Death Penalty Act (“AEDPA”) and the Illegal Immigration Reform and Immigration Responsibility Act (“IIRIRA”) in 1996 (together, the “1996 laws”).⁶⁸ “Aggravated felonies” often do not involve violence and may be categorized as “misdemeanors” under state law. Yet, they carry severe penalties.⁶⁹ Criminal grounds can also subject immigrants to mandatory detention.⁷⁰

2. *Reducing Immigration Adjudicator Discretion*

While passing laws that expanded the punitive way in which criminal conduct was treated in immigration law, Congress repealed a number of statutes providing avenues of relief for migrants with criminal histories.⁷¹ Significantly, Congress sharply reduced immigration judges’ and immigration officers’ discretion to decide if an individual should remain in the United States.⁷² These shifts,

63. See Muzaffar Chishti & Michelle Mittelstadt, *Unauthorized Immigrants with Criminal Convictions: Who Might Be a Priority for Removal?*, MIGRATION POL’Y INST. (Nov. 2016), <https://perma.cc/V74K-NKNE>. While Congress renamed the grounds of “exclusion” as “inadmissibility,” at various points in this paper, I refer to the concept of exclusion or the “exclusionary grounds” because, in my view, that better describes their function. Pub. L. No. 104-208, 110 Stat. 3009-615 (1996).

64. See Jennifer M. Chacón, *The 1996 Immigration Laws Come of Age*, 9 DREXEL L. REV. 297, 318 (2017); 8 U.S.C. § 1255(a)(2) (criminal grounds of inadmissibility bar adjustment of status, absent a waiver).

65. Garcia Hernandez, *supra* note 44, at 1458.

66. 8 U.S.C. § 1101(a)(43). Aggravated felonies are categories of offenses (including many state misdemeanors) that carry the harshest of immigration penalties, generally subjecting individuals to mandatory detention and deportation. AM. IMMIGR. COUNCIL, AGGRAVATED FELONIES: AN OVERVIEW 2–3 (2016), <https://perma.cc/BMZ2-UTBR>.

67. Kari Hong, *The Absurdity of Crime-Based Deportation*, 50 U.C. DAVIS L. REV. 2067, 2087 (2017).

68. *Id.*; 8 U.S.C. § 1101(a)(43).

69. Hong, *supra* note 67, at 2074–76.

70. 8 U.S.C. § 1226(c) (including crimes involving moral turpitude, aggravated felonies, controlled substance convictions, certain firearms offenses and various other crimes). Before this time, immigration detention was rarely used even for individuals with criminal histories. See Margaret H. Taylor, *The 1996 Immigration Act: Detention and Related Issues*, 74 No. 5 INTERPRETER RELEASES 209, 210 (1997).

71. See, e.g., Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050 (repealing the judicial recommendation against deportation (“JRAD”), a statutory provision allowing criminal sentencing judges to prevent deportation in certain cases); Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) of 1996, Div. C of Pub. L. No. 104-208, § 240(B), 110 Stat. 3009-596 (repealing INA sec. 212(c) which provided a waiver of deportability for certain lawful permanent residents).

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

in effect, rendered thousands of immigrants with minor criminal convictions subject to mandatory deportation.

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

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

1. *Local Prosecutors Drive Criminal Grounds of Removal*

Local and state prosecutors are the most powerful players in the criminal legal system and control the triggering of federal conviction-based immigration consequences.⁷³ This is so because most cases arise in the *state* criminal system,⁷⁴ and the majority of convictions—over ninety percent—result from pleas.⁷⁵ Prosecutors control the charging process, which determines the range of potential plea options. As a result, prosecutors are undoubtedly the most influential players in plea negotiations.⁷⁶ They exercise great power over who gets convicted and for what crimes, and their actions are generally not subject to oversight. It follows then that state prosecutors directly impact the substantive outcomes of immigration matters because a vast range of state crimes trigger federal immigration consequences.⁷⁷ In other words, the local prosecutor's approach to plea agreements may ultimately become *the* dispositive factor in later federal immigration proceedings.

The structure of criminal removal today creates a system where independent local prosecutorial decision-making *directly* results in immigration consequences. This has turned local and state prosecutors, rather than administrative agencies, into “*de facto*” immigration adjudicators.⁷⁸ Whether a state offense subjects an individual to mandatory detention or renders them deportable is the subject of a substantial amount of litigation. As Professor Stephen Lee describes, prosecutors now serve a unique “gatekeeping” function⁷⁹ by controlling the valve to the deportation pipeline.⁸⁰ Local and state prosecutors are key immigration removal actors. Yet, few recognize and/or acknowledge this.

73. Zohra Ahmed, *The Sanctuary of Prosecutorial Nullification*, 83 ALB. L. REV. 239, 240 (2020).

74. See Lee, *supra* note 19, at 576–77.

75. See Jain, *supra* note 30, at 1204.

76. See *id.* at 1203–04.

77. See *supra* Section I, Part A.

78. Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U.L. REV. 1281, 1289 (2010); see also Lee, *supra* note 19, at 555–56, 577.

79. Lee, *supra* note 19, at 571–86 (describing and providing examples of how prosecutors perform a gatekeeping function in crime-based removal system).

80. See Ahmed, *supra* note 73.

2. *Local Actors Directly Influence Who Is Detected by ICE*

The removal system is reliant on local enforcement's contact with non-citizens to identify immigrants for deportation.⁸¹ Historically, immigration enforcement and state law enforcement were wholly separate spheres, with the former being exclusively reserved for the federal government. In recent years, this separation has been eroded.⁸² State and local law enforcement, today, are the frontline workers in the federal removal system.⁸³ According to the Department of Homeland Security's (DHS) released data, in FY 2019, 65 percent of immigrants deported had criminal convictions or pending criminal matters.⁸⁴ When looking at "interior removals" (those apprehended outside of the border region), 91 percent had criminal convictions or pending criminal matters.⁸⁵

While there have been shifts in how the federal government utilizes local systems to detain and deport non-citizens, one thing has remained constant—non-citizens who have contact with the state criminal legal system are the most vulnerable to detention and removal. The Bush administration piloted "Secure Communities", and the Obama administration widely rolled it out nationwide.⁸⁶ "Secure Communities" utilized fingerprint sharing in order for the federal government to obtain information about immigrants upon local arrest.⁸⁷ By issuing "detainers," DHS⁸⁸ requested local actors hold immigrants eligible for removal for federal agents to take them into custody at the conclusion of criminal detention.⁸⁹ Eventually, after resistance from local

81. See *id.* at 279 (finding that removal system's reliance on local enforcement's contact with non-citizens began in 1980s).

82. See Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 1013–16 (2016) (discussing the impact of 287(g) agreements, Secure Communities, state and local immigration enforcement laws, and the establishing of enforcement priorities).

83. See Chacón, *supra* note 64, at 642–46.

84. In FY 2019, the U.S. Department of Homeland Security ("DHS") Immigration and Customs Enforcement reported deporting over 267,000 people from the United States. U.S. & CUSTOMS ENF'T, FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 22 (2019); see TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, *Latest Data: Immigration and Customs Enforcement Removals* (2020), <https://perma.cc/M6VE-7JES> (reporting over fifty percent of individuals removed had criminal convictions).

85. FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT, *supra* note 84, at 22.

86. Sameer M. Ashar, *Movement Lawyers in the Fight for Immigrant Rights*, 64 UCLA L. REV. 1464, 1472–73 (2017).

87. See U.S. IMMIGR. & CUSTOMS ENF'T, SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS 1–2 (2009).

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

89. SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS, *supra* note 87, at 4 (2009). When ICE has an interest in deporting an individual held in custody, they issue a "detainer" and send that request to the custodian at the facility holding the non-citizen. Under Secure Communities, detainers were issued based upon fingerprints taken upon arrest and run through a series of databases to try to determine immigration status. *Id.* at 2; see Johnson, *supra* note 82, at 1015. For an in-depth discussion on detainers as a critical mechanism for immigration enforcement and the constitutional

jurisdictions, including enacting immigrant-friendly policy and legislation limiting cooperation,⁹⁰ President Obama discontinued the program. He replaced it with the Priority Enforcement Program (“PEP”), restricting detainer requests to removable immigrants with “serious” convictions.⁹¹ However, PEP retained many of the problematic components of Secure Communities, just under a new name. PEP, however, was short-lived.

With the election of President Donald Trump came a return to Secure Communities, including renewed efforts to use local authorities to detain arrested undocumented individuals, regardless of whether they were ultimately convicted.⁹² While local law enforcement makes arrests and thus has the largest influence over ICE detection, prosecutors play an important role here too. Immigration enforcement increasingly looks beyond recent arrests to local criminal courts and jails as sites to target removable immigrants.⁹³ Thus, a prosecutor’s decision to pursue a case at all, what charges to pursue, or who to detain pretrial may directly impact whether an immigrant will be targeted for deportation.

ICE consistently relies upon decisions made in the local criminal legal system to fuel its removal operations, and its enforcement operations continue to grow steadily.⁹⁴ Without the cooperation of local actors, the criminal removal system would be derailed.

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

Immigration enforcement’s narrowing in on individuals with criminal legal contacts has had devastating results, disproportionately harming Black and Latinx migrants.⁹⁵ “By allowing state and local governments to be the pipeline through which federal immigration law is enforced, racial bias can manipulate the overall outcomes of those who are removed.”⁹⁶ Unsurprisingly, pervasive racial disparities in the criminal legal system have

concerns raised by their use, *see* Christopher N. Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOY. L.A. REV. 629–702 (2013).

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

91. *See* Johnson, *supra* note 89, at 1021.

92. *See* Exec. Order No. 13768, 82 Fed. Reg. 8,799, 8,800 (Jan. 25, 2017).

93. *See supra* Section I, Part B.

94. *Compare* U.S. DEP’T HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2020 27 (in 2018, ICE’s budget was over \$7.5 billion dollars and CBP’s for \$14 billion), *with The Cost of Immigration Enforcement and Border Security*, AM. IMMIGR. COUNCIL (July 7, 2020), <https://perma.cc/N5KV-EJLB> (in 2019, ICE’s budget was \$7.6 billion and CBP’s was for \$17.1 billion).

95. *See* Juliana Morgan-Trostle & Kexin Zhang, *The State of Black Immigrants Report Part II: Black Immigrants in the Mass Criminalization System*, BLACK ALLIANCE FOR JUST IMMIGR. 15, 20–21, 24–26 (2016); *see* Johnson, *supra* note 89, at 1021.

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

replicated in the detention and deportation systems as well.⁹⁷ Moreover, because racism plays a pivotal role in determining who is arrested and/or convicted of a crime,⁹⁸ similar racial disparities infect the deportation and detention systems. The modern criminal removal system disproportionately detains and deports Latinx individuals.⁹⁹

However, Black immigrants—who are more likely to have criminal contacts due to rampant racial profiling and racist policing—face removal and detention due to criminal grounds at exceptionally high rates.¹⁰⁰ They also face biased immigration judges with expansive individual discretion in the immigration system, encountering double punishment.¹⁰¹

As Professor Michelle Alexander describes, the politics of white supremacy engender new systems of racial and social control over time.¹⁰² Over the last decade, there has been growing bipartisan commitment and effort to reduce prison populations and other criminal reforms.¹⁰³ Yet at the same time, many of the same mechanisms of racialized social control have been used to grow the immigration detention and deportation systems.¹⁰⁴ Racial injustice in the immigration system is different from that at the heart of the criminal legal system, but they cannot be divorced. Both need attention.

II. THE EMERGENCE OF THE PROGRESSIVE PROSECUTION MOVEMENT AND ITS IMPACT ON IMMIGRATION

The “progressive prosecution movement” was born out of community organizing exposing the entrenched racial injustices of the criminal legal system.¹⁰⁵ The state-sanctioned murders of Black men and women at the hands of police have led to uprisings demanding systemic change for decades.¹⁰⁶ In 2014, police officer Darren Wilson shot Michael Brown six times and left him for dead in Ferguson, Missouri.¹⁰⁷ People took to the streets. One year

97. See Hernández, *supra* note 44, at 1461–66 (examining the history of racial animus towards immigrants).

98. See Johnson, *supra* note 89, at 1021; see generally Alec Karakatsanis, UNUSUAL CRUELTY—THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM (2020) (discussing how race is systemically determinative of what illegal conduct is prosecuted).

99. See Vázquez, *supra* note 96, at 640–54; Aarti Kohli, Peter L. Markowitz & Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, BERKELEY L. SCH. 2 (Oct. 2011) (revealing that Latinx immigrants were disproportionately targeted through Secure Communities).

100. See Morgan-Trostle, *supra* note 95, 15, 20–21, 24–26.

101. Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 430 (2011).

102. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* xiv (10th ed. 2020).

103. See *id.* at xiii, xxxiii, xxxix.

104. See *id.*

105. See Liane Jackson, *Change Agents: A New Wave of Reform Prosecutors Upends the Status Quo*, A.B.A.J. (June 1, 2019), <https://perma.cc/CR24-36RJ>.

106. Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 2019 FREEDOM CTR. J. 76, 94 (2016).

107. Jake Halpern, *The Cop*, NEW YORKER (Aug. 10 & 17, 2015), <https://perma.cc/94SY-8KED>; Jay Caspian Kang, *Our Demand Is Simple: Stop Killing Us*, N.Y. TIMES (May 4, 2015), <https://perma.cc/NV8A-3GMP>.

earlier, George Zimmerman was acquitted for the cold-blooded murder of Trayvon Martin, sparking the birth of Black Lives Matter.¹⁰⁸ These uprisings spotlighted the national epidemic of police brutality against Black people, especially youth.¹⁰⁹ But they also showed the ways in which district attorneys work hand in hand with the police to protect them and exposed prosecutorial policies designed to target, incarcerate, and punish Black and Brown people.¹¹⁰ Through these uprisings, activists have centered the ways in which the modern carceral system has been used as a means of racialized social control to preserve the white supremacist and capitalist power relationships inherent in slavery.¹¹¹ Accordingly, many prosecutors have risen to power in the wake of these uprisings, arguing they can reduce racial disparities in the criminal legal system from within.¹¹² Yet this does not go far enough for abolitionists, who call for a complete reimagining of our approach to social problems and wrongdoing and the redistribution of political and economic power.¹¹³

Progressive prosecutors seek to reduce racial disparities largely through calls for policies promoting decriminalization, decarceration, centering community input in policing and prosecution, and enhanced transparency.¹¹⁴ They promise to bring “fairness” to the legal system by approaching their role and work from a racial and social justice lens.¹¹⁵ Yet, this “progressive” stance often fails to extend to their treatment of immigrant defendants.

A. *Rise of the Progressive Prosecution Movement*

In order to understand the progressive prosecution movement, it is imperative to locate it within the context from which it emerged. There are over 2,000 local prosecutor offices in the United States, typically organized by county.¹¹⁶ These offices vary in size and have wide-ranging differences arising out of geographic, demographic, political, economic, and other factors. Specific local dynamics deeply inform prosecution in each jurisdiction.¹¹⁷

108. Smith, *supra* note 4.

109. Adedoyin, *supra* note 6, at 114-15.

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

111. Alexander, *supra* note 102, at 20–22.

112. See, e.g., Davis, *supra* note 8, at 7–8 (discussing how DA candidate Kim Foxx challenged incumbent Anita Alvarez on her delay in prosecuting the police officer who killed Laquan McDonald).

113. See, e.g., THE MOVEMENT FOR BLACK LIVES, <https://perma.cc/5N62-G4SL> (last visited Oct. 11, 2021).

114. See BAZELON, *supra* note 2; see also Davis, *supra* note 8, at 7, 18, 25–26.

115. See Davis, *supra* note 8, at 25–26.

116. BUREAU OF JUSTICE STATISTICS, *COVID-19 Spurs 25% Drop in Inmates Held in Local Jails*, <https://perma.cc/N84F-MVFW>.

117. See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408–10 (2001) (describing the power to charge as the most important prosecutorial power and the strongest example of the influence and reach of prosecutorial discretion).

Most offices are led by a “chief” district attorney,¹¹⁸ who is generally elected for a limited term.¹¹⁹ Yet, district attorneys are some of the most entrenched positions in our democracy.¹²⁰ Most are incumbents and run unopposed.¹²¹ Nationwide, 95 percent of prosecutors are white, and 75 percent are white men.¹²² Historically, prosecutorial elections have garnered little attention and participation, and the electorate has a very limited view of the district attorney’s operations and policies.¹²³ What’s more, district attorneys are subject to little additional oversight.¹²⁴ As a result, they hold enormous discretion in how to carry out their duties.¹²⁵

In the 1970s, on the heels of the Civil Rights movement, the government began massive divestment from communities of color. At the same time, it utilized “tough on crime” policing and prosecution as a mechanism of continued social control and criminalization of marginalized communities.¹²⁶ District attorneys largely embraced “tough on crime” approaches.¹²⁷ For decades, they carried out the War on Drugs and Broken Windows theory in courtrooms, aggressively pursuing harsh penalties for low-level quality of life offenses, continuing regulation of low-income Black and Brown communities through punishment.¹²⁸ By and large, prosecutors have measured success through the number of convictions achieved.¹²⁹ Recently, however, these norms have begun to crack.

118. In most jurisdictions, the chief prosecutor is called the “district attorney” or “state’s attorney.” Davis, *supra* note 8, at 6.

119. *Id.*

120. *See id.*

121. Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 593 (2009) (noting how in general election campaigns, prosecutor incumbents ran unopposed in eighty-five percent of the races they entered).

122. REFLECTIVE DEMOCRACY CAMPAIGN, *Tipping the Scales: Challengers Take on the Old Boys Club of Elected Prosecutors*, 2 (2019), <https://perma.cc/DJG2-4GPI> (noting that only two percent of prosecutors are women of color and three percent men of color).

123. Davis, *supra* note 8, at 6.

124. Davis, *supra* note 117, at 439–48 (examining the failures of the three existing mechanisms that purport to hold prosecutors accountable: the electoral process, budgetary restrictions, and time and jurisdictional limitations).

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

126. *See Freedom to Thrive—Reimagining Safety and Security in Our Communities*, CTR. FOR POPULAR DEMOCRACY, L. FOR BLACK LIVES & BLACK YOUTH PROJECT 100, <https://perma.cc/VC59-D9PE> (2017); *see also* Cheyenne Morales Harty, *The Causes and Effects of Get Tough: A Look at How Tough-on-Crime Policies Rose to the Agenda and an Examination of Their Effects on Prison Populations and Crime* 27–30 (Feb. 29, 2012) (unpublished Ph.D. dissertation, University of South Florida) (on file with the Graduate School at Scholar Commons) (describing how the tough-on-crime approach born out of the 1970s was a significant shift from treatment and rehabilitative policies leading up to its development).

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

128. *See* THE CTR. FOR POPULAR DEMOCRACY, *supra* note 126.

129. Lara Bazelon, *Ending Innocence Denying*, 47 HOFSTRA L. REV. 393, 431 (2018) (quoting one prosecutor saying, “[t]he theoretical premium is justice but the real premium is winning and at times, winning at all costs so justice gets lost at times.”).

Over the last decade, a small group of “reformer” prosecutors has risen to power in various jurisdictions.¹³⁰ Organizations have launched community education campaigns highlighting the critical role and control of the local prosecutor over everyday lives and have emphasized the importance of voting in prosecutorial elections.¹³¹ Additionally, large donors have poured funds into local campaigns.¹³² While it is difficult to point to a singular agenda, given varied local dynamics,¹³³ reformers have been unified in their push, in name at least, for increased transparency, accountability, and enhanced “fairness” in the criminal legal system.¹³⁴

Progressive prosecutors constitute a subset of these reformers. While there is no singular definition¹³⁵ of the “progressive prosecutor,” and many have laid claim to the title,¹³⁶ I refer to a particular subset of prosecutors herein. Many were career public defenders or civil rights attorneys who seek the district attorney role in an attempt to disrupt what they have seen on the other side. The key aspect that “progressive prosecutors” suggest distinguishes them from other “reformers” is their focus on and motivation to combat the pervasive racial disparities in the criminal legal system, from arrest to sentencing. They also claim to question the very function of the prosecutor and focus on using the prosecutor’s powers to reconsider how and when to enforce the law.¹³⁷ Progressive prosecutors have commonly called for decriminalization, decarceration, increased transparency as independent goals and tools to reduce pervasive racialized outcomes. Yet, each prosecutor has committed to addressing the racial inequities of mass criminalization to varying degrees and has prioritized these goals differently.¹³⁸

130. See Liane Jackson, *Change Agents: A New Wave of Reform Prosecutors Upends the Status Quo*, A.B.A.J. (June 1, 2019), <https://perma.cc/E7VR-ZRV3> (Aramis Ayala in Orange County, FL in 2016, Larry Krasner in Philadelphia, PA in 2017, Wesley Bell in St. Louis, MO in 2018); Sklansky, *supra* note 127, at 647–49 (DA Thompson in Brooklyn, NY in 2013, DA Mosby in Baltimore, MD in 2014, DA Scott Colom in Columbus, MS in 2015, DA Mark Gonzalez in Nueces County, TX in 2016 and DA Foxx in Cook County, IL in 2016).

131. *E.g.*, Meet Your DA, AMERICAN CIVIL LIBERTIES UNION, <https://perma.cc/LZQ4-EWQM>.

132. See Sklansky, *supra* note 127, at 657–58, 660, 663 (philanthropist George Soros has funded various PACs supporting progressive district attorney candidates).

133. David Alan Sklansky, *The Progressive Prosecutor’s Handbook*, 50 U.C. DAVIS L. REV. ONLINE 25, 27 (2017).

134. See, *e.g.*, Sklansky, *supra* note 127, at 658–61, 664, 667 (giving examples across candidates).

135. See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1417 (2021); *cf.* Steven Zeidman, *Some Modest Proposals for a Progressive Prosecutor*, 5 UCLA CRIM. JUST. L. REV. 23, 25 (2021) (suggesting a prosecutor’s “progressiveness” should be measured by their willingness to surrender their immense power over the trial process and other prevailing prosecutorial practices).

136. Famously, Vice President Harris had proclaimed herself to be a progressive prosecutor despite championing and enforcing a law that prosecuted parents of truant students. Melanie Mason & Michael Finnegan, *Kamala Harris Regrets California Truancy Law That Led to Arrest of Some Parents*, L.A. TIMES (Apr. 17, 2019), <https://perma.cc/RN8F-WGZU>.

137. Davis, *supra* note 8, at 22–23 (including policies such as opposing cash bail, implementing diversion programs, committing to never charge juveniles as adults, or refusing to seek the death penalty) (including Kim Foxx, Larry Krasner, Dan Satterberg, Aramis Ayala and Rachael Rollins as examples of progressive prosecutors).

138. *Id.* This Article will not do a survey of progressive prosecutor policies, rather it will build upon some of the earlier surveys other scholars such as David Alan Sklansky and Angela J. Davis have done

The majority of progressive prosecutors propose they redirect their immense power to adopt policies and practices that move away from mass incarceration but still prioritize other methods of state oversight.¹³⁹ For example, they may invest in prosecuting those against whom the law has been underenforced (i.e., wage theft or financial crimes) or seek to reduce racial bias in prosecutorial action.¹⁴⁰ On the other hand, a small but growing number of candidates have begun to embrace an anticarceral or abolitionist ethic—seeking to reduce their own power, pursuing policies that ultimately shrink state violence, and redirecting resources to address social ills outside the carceral state.¹⁴¹

In 2019, Tiffany Cabán entered the democratic primary for the Queens DA in New York, calling for an end to mass incarceration, terminating the War on Drugs, and decriminalizing sex work.¹⁴² She sought to replace Richard Brown, a “tough on crime” prosecutor, who reigned over Queens for almost thirty years.¹⁴³ Queens is the most diverse jurisdiction in the continental United States.¹⁴⁴ Cabán promised reform to combat the racial inequities that radiated over every aspect of the criminal legal system.¹⁴⁵ Tiffany Cabán rose to power on the shoulders of others, many of whom, like her, were not career district attorneys but public defenders or civil rights attorneys seeking to reform the criminal legal system from within.¹⁴⁶ But they gained power from the energy produced by activists who had long pushed for systemic change. Cabán exploded onto the national scene and, although she ultimately lost, has inspired others to seek prosecutorial seats nationwide.¹⁴⁷

regarding some of the individuals and their platforms. It will look at some new initiatives over the last few years to do a deeper dive into some of the policy examples progressive prosecutors have enacted.

139. For an important discussion on why progressive prosecutors might consider a “servant-of-the-law” approach to prosecutorial behavior, one that actually places constraints on prosecutorial excess, rather than a model that promotes the use of broad prosecutorial power to “do justice.” See Bellin, *supra* note 22.

140. See Levin, *supra* note 135, at 1442 (describing the “prosecutorial progressive prosecutor” prototype, whose “mission or approach accepts the fundamental legitimacy and desirability of the criminal system and carceral state violence.”).

141. E.g., Elizabeth Weil-Greenberg, *Public Defender Chesa Boudin Wins San Francisco D.A. Race in Major Victory for Progressive Prosecutor Movement*, APPEAL (Nov. 9, 2019), <https://perma.cc/FH3N-MXKT> (announcing that DA Boudin promises to shift responses to problems with non-criminal responses and to reinvest power in the hands of the community); see *id.* at 1444 (describing the anticarceral prosecutor as coming the “closest to resembling those embraced by prison abolitionists” and believing the problem is not that the wrong people are incarcerated but that people are incarcerated at all).

142. *Issues*, CABÁN FOR QUEENS DIST. ATTORNEY, <https://perma.cc/R794-M8FE> (last visited Aug. 21, 2020).

143. Jan Ransom, *With a Tough-on-Crime D.A. Stepping Down, Will Queens Turn to a Reformer*, N.Y. TIMES (Jan. 9, 2019), <https://perma.cc/MK3H-WYSJ>.

144. Selim Algar, *Queens Is Crowned Nation’s Most Diverse Large County*, N.Y. POST (July 4, 2019), <https://perma.cc/FE2T-L77Y>.

145. See Libby Rainey, *Revolt of the Outsiders: First AOC, Now Tiffany Cabán*, INDEPENDENT (June 3, 2019), <https://perma.cc/5JLP-QNC4>.

146. See Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW 360 (Apr. 7, 2019), <https://perma.cc/S8GF-N2BA>.

147. Despite ultimately losing, Cabán’s campaign was deemed a large success as it pushed her opponent, Melinda Katz, to the left. See Aaron Morrison, *In Queens D.A. Race, Criminal Justice Reform Is the Real Winner*, APPEAL (July 30, 2019), <https://perma.cc/XQQ6-WW7U>.

The nascent “progressive prosecution movement” has had mixed results so far. Progressive prosecutorial races¹⁴⁸ and newly elected progressive prosecutors¹⁴⁹ have revealed vast differences in the breadth and depth of the policies proposed. Prosecutors have significantly varied in their campaign promises and their later-adopted policies, many policies seeming hardly “progressive” at all.¹⁵⁰ There has been a fluctuation in its membership, with some progressive prosecutors facing tremendous backlash¹⁵¹ and others being slow to, or altogether failing to, deliver on campaign promises.¹⁵² Some progressive prosecutors have mounted large campaigns only to lose their seats.¹⁵³ However, even where unsuccessful, campaigns have pushed the discourse to the left.¹⁵⁴ As a result, there has been increasing effort to fortify “progressive reformers.” Former prosecutors created the Fair and Just Prosecution (FJP) to support newly-elected prosecutors by providing research support and on-the-ground training for “reform initiatives.”¹⁵⁵

Today, there are approximately twenty-five chief prosecutors who have embraced “progressive” policy reforms to varying degrees. Still, only a few “progressive” candidates were successful in November 2020 and ran in November 2021.¹⁵⁶ Additionally, self-identified progressive prosecutors

148. *E.g.*, Sklansky, *supra* note 127, at 647–49.

149. *E.g.*, Davis, *supra* note 8, at 6–15.

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

151. *E.g.*, Davis, *supra* note 8, at 18–19 (DA Ayala sought to not seek the death penalty soon after being elected in 2016, but Florida’s governor took death penalty cases away from her jurisdiction and the Florida Supreme Court upheld the Governor’s action); see Sam Levin, *LA’s Top Prosecutor Adopted Major Reforms. Law Enforcement Is Fighting to Block Every Policy*, *GUARDIAN* (Mar. 10, 2021), <https://perma.cc/UDC5-YLYP>. While Ayala decided not to run for reelection, Monique Worrell, a progressive candidate endorsed by Caban and Ayala, took the seat in November 2020. See Daniel Nichanian, *Austin and Orlando Elect Prosecutors Who Vow to Fight Mass Incarceration*, *APPEAL* (Nov. 3, 2020), <https://perma.cc/KW6R-GSWU>.

152. *E.g.*, Alice Speri, *Can the Anti-Trump Resistance Take the Philadelphia DA’s Office?*, *INTERCEPT* (May 15, 2017), <https://perma.cc/8AU2-H5P2> (while Philadelphia DA Krasner eliminated cash bail for 25 charges, critics said these changes fell short of his campaign promise of eradicating cash bail).

153. *E.g.*, Morrison, *supra* note 147 (describing the ultimate loss of candidate Tiffany Cabán).

154. *Id.* (noting that Cabán pushed Katz and most of the crowded field of candidates to the left on issues like marijuana and sex work).

155. See, e.g., BRENNAN CTR. FOR JUST. & THE JUST. COLLABORATIVE, 21 PRINCIPLES FOR THE 21ST CENTURY PROSECUTOR, *FAIR AND JUST PROSECUTION* 1, 4, 19, 22 (2018), <https://perma.cc/P99P-7LXV> (describing a manifesto for prosecutors seeking to adopt a “progressive” agenda—one that sees jail as the exception, not the rule, promotes reform based on evidence-based analytics, and encourages prosecutorial transparency); *About FJP/Our Work and Vision*, *FAIR & JUST PROSECUTION*, <https://perma.cc/PFK8-DJWA> (last visited Aug. 24, 2020); cf. VERA INST. OF JUST., *Promoting Racial Equity in Prosecution*, <https://perma.cc/RS5L-VA2E> (last visited Aug. 24, 2020). But see, Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 *HARV. L. REV.* 1575, 1597 (2019) (critiquing the twenty-first century recommendations report and suggesting it “actually endorses an expansion of carceral policing logics beyond the discrete institutional-spatial sites of prisons, jails, detention centers, and juvenile facilities.”).

156. 2020 *Endorsements*, *REAL JUSTICE*, <https://perma.cc/JH36-FMW7> (last visited Aug. 23, 2020); Jane Wester, *Manhattan DA Candidates Tout Progressive Bona Fides in ‘Meet and Greet’ Ahead of 2021 Election*, *N.Y.L.J.* (Aug. 19, 2020), <https://perma.cc/EK5U-DU66> (Manhattan race had 9 challengers in November 2021 election).

occupy a small percentage of prosecutorial offices nationwide.¹⁵⁷ But many represent influential jurisdictions governing large populations—like DA Eric Gonzalez in Kings County, NY (Brooklyn), DA Kimberly Foxx in Cook County, Illinois (Chicago), DA George Gascón in LA County, California, or DA Chesa Boudin in San Francisco, California. Many run large offices; as a result, their policies have a wide-reaching impact. As a result, their initiatives have garnered attention. Although few in number, progressive prosecutors’ vision has had an outsized influence in criminal legal policy debates.¹⁵⁸ Their influence has been fueled by years of organizing by impacted communities demanding decriminalization, decarceration, and promotion of a community safety model of justice. Decades of community groundwork for reform and reinvestment in communities have paved the way for progressive prosecutors to advance these ideas.¹⁵⁹

B. *Theory and Practice of the Progressive Prosecutor*

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

Progressive prosecutors have sought to challenge the prosecutor’s widely accepted function of securing convictions and being “tough on crime.” Further, the progressive prosecution movement directly questions how long-standing practices achieve the purposes of the criminal legal system. To that end, so-called progressive prosecutors have largely moved away from policies justified as deterrent¹⁶⁰ or retributive¹⁶¹ and push for policies rooted in rehabilitative¹⁶² or restorative purposes.¹⁶³ These goals reflect a more general embrace of an abolitionist ethic, by addressing wrongdoing outside of a punitive setting.¹⁶⁴ But without a rigorous focus on immigration consequences,

157. BAZELON, *supra* note 2.

158. *See generally id.*

159. *See generally* FREEDOM TO THRIVE: REIMAGINING SAFETY AND SECURITY IN OUR COMMUNITIES, *supra* note 126.

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

161. For example, district attorneys are working to correct past injustices of lengthy and disproportionate sentences. *See, e.g.,* FAIR & JUST PROSECUTION, *Revisiting Past Extreme Sentences: Sentencing Review and Second Chances* 1, 11–12 (2020), <https://perma.cc/9TAA-6FZ8> (describing practices of Prosecuting Attorney Dan Satterberg, DA Gonzalez, and DA Rosen).

162. *See Transcript: Into the Philadelphia D.A.’s Office*, NBC NEWS (July 16, 2020, 4:10 PM), <https://perma.cc/5VUX-PWXK> (Larry Krasner speaking on the importance of rehabilitative and preventative policies).

163. *Cf.* Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors’ Perspective*, 88 FORDHAM L. REV. 2287, 2287–89 (2020) (examining Natasha Irving and Chesa Boudin’s use of restorative justice processes and arguing that restorative justice better reduces recidivism).

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

those with tenuous immigration status continue to be subject to immigration policies that are openly justified as deterrents.

The Supreme Court has said that the prosecutor's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done."¹⁶⁵ Ethical rules and professional standards governing prosecutorial conduct provide further insight into the prosecutor's role.¹⁶⁶ The American Bar Association's ("ABA") professional standards characterize prosecutors as "administrator[s] of justice" whose "duty . . . is to seek justice, not merely to convict."¹⁶⁷ According to the National District Attorneys Association ("NDAA") professional standards, the prosecutor's primary responsibility is to be an "independent administrator of justice."¹⁶⁸ The commentary to the ABA standards state that prosecutors should "act with integrity and balanced judgment to increase public safety. . . protect the innocent, convict the guilty, consider the interests of victims and witnesses and respect the constitutional and legal rights of . . . defendants."¹⁶⁹ The rules go on to say prosecutors should "seek to reform and improve the administration of criminal justice." Thus, reform and reevaluation are built into the professional standards themselves.¹⁷⁰

Progressive prosecutors claim to re-envision the role of the prosecutor and grapple with defining what it means to ensure "justice shall be done." They rhetorically embrace the "minister of justice" role and promise to execute the laws to that end.¹⁷¹ Relevant guidelines state that prosecutors should use "balanced judgment" in the treatment of a case and consider all involved, including the accused.¹⁷²

Consideration of the "accused" foregrounds how the prosecutors should approach consideration collateral consequences of convictions. The ABA guidelines indeed suggest prosecutors weigh collateral consequences and

165. *Berger v. United States*, 295 U.S. 78, 88 (1935).

166. MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 1983) (listing the special responsibilities of a prosecutor); CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2 (AM. BAR ASS'N 2017) (listing the functions and duties of the prosecutor). For other rules of professional conduct that apply to prosecutors, see MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR ASS'N 1983) (listing responsibilities of partner or supervisory lawyer); MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS'N 1983) (listing responsibilities of lawyer regarding nonlawyer assistance); MODEL RULES OF PRO. CONDUCT r. 8.3 (AM. BAR ASS'N 1983) (describing duty for reporting professional misconduct).

167. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION, *supra* note 166, § 3-1.2 (laying out the functions and duties of the prosecutor).

168. NAT'L PROSECUTION STANDARDS § 1-1.1 (NAT'L DIST. ATTORNEYS ASS'N 2009), <https://perma.cc/834Y-6QYB>.

169. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION, *supra* note 166, § 3-1.2(b).

170. *Id.*

171. MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 1983) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); *see also* Lara Bazelon, *Ending Innocence Denying*, 47 HOFSTRA L. REV. 393, 397 (2018) (describing how "in recent years, a counter-narrative has taken a tentative foothold: a good prosecutor is a protector of the innocent and a crusader for the truth.").

172. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION, *supra* note 166, at § 3-1.2(b) (functions and duties of a prosecutor).

their proportionality as part of charging and dismissal decisions.¹⁷³ Significantly, the 2017 revisions to the Model Penal Code on Sentencing suggest *all* players must consider proportionality in sentencing decisions.¹⁷⁴ Notably, the model rules of professional conduct do not include any special provisions regarding prosecutors' obligations during plea negotiations.¹⁷⁵ This is so even though ninety-five percent of convictions today arise from pleas,¹⁷⁶ and there is an increasing awareness of the potentially devastating impacts of collateral consequences. However, the more recent NDAA standards "intimate prosecutorial mindfulness of the situation of the defendant" in plea bargaining.¹⁷⁷ Consistent with these guidelines, some progressive prosecutors have embraced increased consideration of collateral consequences in their rhetoric.

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

Progressive prosecutors commonly call for decriminalization, decarceration, increased transparency, and accountability to the public. It is worthwhile to review some of the policies they have proposed as part of their efforts to target racial inequities in modern mass criminalization. Many progressive prosecutors have urged the adoption of "evidence-based" policy initiatives to reduce racial disparities.¹⁷⁸ For example, DA Gonzalez has promised to acquire updated data and analytics from within his own office as the basis for shaping policy reforms.¹⁷⁹ He argues that tracking data will reveal the racialized results of prosecutorial decision-making and provide a roadmap for policy adjustments to reduce racial disparities. With this, he and others hope to

173. *Id.* § 3-4.4 (AM. BAR ASS'N 2017) (identifying as a factor to consider in pursuing or dismissing criminal charges, "(vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender").

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

175. Brian Murray, *Prosecuting Responsibility and Collateral Consequences*, 12 STAN. J.C.R. & C. L. 213, 242 (2016); see MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 1983) (listing prosecutors' special responsibilities).

176. Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. 1, 2 (2018); NAT'L ASS'N OF CRIM. DEF. LAWS., *The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (July 10, 2018), <https://perma.cc/7TYV-G2XN>.

177. See Murray, *supra* note 175, at 213, 242–43 (The NDAA considers the prosecutor's primary responsibility to be an "independent administrator of justice." Regarding plea negotiations and plea agreements, prosecutors should consider several factors, including any "undue hardship caused to the defendant.").

178. *E.g.*, Press Release, S.F. Dist. Att'y, District Attorney Boudin Pioneers First in the Nation Policy Directives (Feb. 28, 2020), <https://perma.cc/834Y-6QYB>.

179. *E.g.*, Press Release, Brooklyn Dist. Att'y's Off., Brooklyn District Attorney Eric Gonzalez Unveils Sweeping Reforms His Office Is Implementing as Part of the Justice 2020 Initiative (Mar. 11, 2019), <https://perma.cc/H2TN-MHXB>.

tackle the ways in which racial bias pervades prosecutorial decision-making.¹⁸⁰ Additionally, DA Gonzalez posits that data-based policy decisions ensure more transparency and accountability to the electorate.¹⁸¹

In another effort to reduce disproportionate impacts and harms on Black and Latinx communities,¹⁸² progressive prosecutors have pushed for decarceration. As of 2018, there were 2.2 million people in United States prisons and jails. More than 60 percent of the people in prison are people of color.¹⁸³ Notably, Black men make up 40 percent of the prison population, even though they represent only 13 percent of the overall population.¹⁸⁴ Decarceration initiatives, thus, have sought to address the problem from both the “front” and “back end” of the system.

From the front, prosecutors have adopted policies seeking to move away from pretrial detention. One prime example has been the wide-scale efforts to eliminate cash bail¹⁸⁵—a practice that has disproportionately led under-resourced people and people of color to languish in jails before trial solely because they could not afford bail. Cash bail has led many to plead guilty to more serious counts than they would have had they been released during their criminal proceedings.¹⁸⁶ DA Boudin made good on his promise to eliminate cash bail within a year in office, and others have worked towards lessening the use of this practice, with a goal of one day ending it.¹⁸⁷ In other decarceration efforts, progressive prosecutors have promised to create a culture where incarceration is the exception and not the norm—by offering a host of alternatives to incarceration programs to resolve criminal matters.¹⁸⁸ For example, Philadelphia DA Larry Krasner sought to attack decarceration from the “back end” by creating an office-wide committee to review cases of those serving juvenile life sentences to assess if his office should request sentence

180. See *id.* But see Max Rivlin-Nadler, *California Could Soon End Money Bail, But at What Cost?*, APPEAL (Aug. 22, 2018), <https://perma.cc/8JME-NZ2X> (discussing how some data analytic tools, such as “risk assessment tools” are notoriously biased against people of color and the under-resourced as they rely on data such as employment and criminal history that’s tainted by discrimination).

181. Press Release, Brooklyn Dist. Att’y’s Off., *supra* note 179, at 38.

182. Davis, *supra* note 176, at 8.

183. The Sentencing Project, *Fact Sheet: Trends in U.S. Corrections*, <https://perma.cc/57KR-XUDV> (last visited Aug. 22, 2020); AM. FRIENDS SERV. COMM., *Facts About the Mass Incarceration of People of Color in the U.S.* (June 19, 2013), <https://perma.cc/7TGF-Y92E>.

184. The Sentencing Project, *supra* note 183.; see also Davis, *supra* note 176, at 8 (finding Black men are six times as likely to be incarcerated as white men and Latino men are 2.7 times as likely).

185. E.g., Press Release, S.F. Dist. Att’y, San Francisco District Attorney Chesa Announces Elimination of Cash Bail (Feb. 10, 2020), <https://perma.cc/ZLV5-WE7N> (forbidding prosecutors from requesting money bail under any circumstances).

186. Adureh Onyekwere, *How Cash Bail Works*, BRENNAN CTR. FOR JUST. (June 2, 2020), <https://perma.cc/USG7-X7JQ>.

187. Doyle, *supra* note 15 (describing how Rachael Rollins and Larry Krasner’s bail policies limit cash bail).

188. E.g., Davis, *supra* note 8, at 13 (describing the Law Enforcement Assisted Diversion (“LEAD”) program instituted in 2011 in King County, Washington, under which individuals who possess less than a gram of drugs or are engaged in prostitution activity are diverted without being booked, charged, or brought to court).

reductions.¹⁸⁹ Many took action—albeit insufficiently—to decarcerate when the COVID-19 pandemic struck in the United States.¹⁹⁰

Progressive prosecutors have also decriminalized certain conduct. Prosecutors have done so through their broad prosecutorial nullification powers.¹⁹¹ As one example, Cook County DA Foxx enacted guidance to decriminalize and decarcerate certain felony theft charges. Studies found that many individuals had been languishing in pretrial detention in Illinois for felony theft charges when the item was valued between \$500–\$1000.¹⁹² Accordingly, DA Foxx issued guidance directing prosecutors not to bring felony retail theft charges against individuals unless the value of the item alleged to have been taken was over \$1,000.¹⁹³ With that, DA Foxx decriminalized and decarcerated a class of theft charges in one action.

Perhaps the most common example of decriminalization has been the refusal to prosecute low-level marijuana possession in most circumstances,¹⁹⁴ despite statutes remaining on the books. Another common policy to decriminalize and decarcerate has been the expanded use of specialized courts that seek to address root causes of crime, such as mental health, drug treatment, and trafficking courts.¹⁹⁵

189. See BAZELON, *supra* note 2 (only some of the sentence modification requests were granted by judges).

190. Various prosecutors announced policies to limit or stop new prosecutions for non-violent or low-level offenses during the pandemic. *Cf. Prosecutors Responses to Covid-19*, BRENNAN CTR. FOR JUST. (Mar. 2020) (describing policies of Baltimore DA Marilyn Mosby, Brooklyn DA Eric Gonzalez, and Seattle DA Dan Satterberg).

191. See Ahmed, *supra* note 73, at 239, 295 (“Nullification . . . is when a prosecutor decides not to prosecute because she disagrees with ‘the wisdom of the law or of the desirability of punishing a culpable wrongdoer.’”) (quoting Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C.L. REV. 1243, 1262 (2011)). Even prosecutors who have not traditionally demonstrated a “progressive approach,” like New York County District Attorney Cyrus Vance, have utilized this strategy. *E.g.*, MANHATTAN DIST. ATT’Y’S OFF., *Ending the Prosecution of “Turnstile Jumping” (Q7)*, (Nov. 1, 2019), <https://perma.cc/29KQ-PAXG>. *But see* Josie Duffy Rice, *Cyrus Vance and the Myth of Progressive Prosecution*, N.Y. TIMES (Oct. 16, 2017), <https://perma.cc/PU9C-EK44> (describing District Attorney Vance’s continued use of “draconian practices,” including zealous prosecution of misdemeanors against Black and Latino defendants).

192. Steve Schmadeke, *Top Cook County Prosecutor Raising Bar for Charging Shoplifters with Felony*, CHI. TRIB. (Dec. 15, 2016), <https://perma.cc/5QWW-7QFP>. Nearly eighty percent of felony retail theft cases charged in Illinois between 2010 and 2012 were for a loss of less than \$1,000. In 2015, seventy-six defendants charged with felony shoplifting spent more time in jail than their eventual prison sentence. The theft of property valued at more than \$500 and not more than \$10,000 is a Class 3 felony in Illinois.

193. *Id.*

194. Shortly after taking office DA Thompson largely ended prosecutions for low-level marijuana offenses in Brooklyn. Sklansky, *supra* note 127, at 652; *See, e.g.*, Press Releases, Off. State’s Attorney for Balt. City, Baltimore State’s Attorney Marilyn Mosby to Stop Prosecuting Marijuana Cases, Says Prosecutions Provide No Public Safety Value and Undermine Public Trust in Law Enforcement (Jan. 2019), <https://perma.cc/4NU3-5KM5> (announcing policy to not prosecute regardless of quantity or criminal history). *But see* Jake Offenhartz, *Despite Policy Change, Brooklyn DA Continues to Prosecute Most Low-Level Marijuana Offenses*, GOTHAMIST (Sept. 7, 2017), <https://perma.cc/J67M-W879>.

195. *E.g.*, *Alternative Programs Bureau*, BROOKLYN DIST. ATT’Y’S OFF., <https://perma.cc/2GWS-2YCG> (last visited Aug. 25, 2020) (including three court parts that are aimed at diverting drug-addicted offenders into treatment in lieu of incarceration, as well as the Youth Diversion Part, the Veterans Court Part and the Mental Health Court Unit). *But see* DRUG POL’Y ALL., *DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE 2* (2011), <https://perma.cc/G28S->

Nearly all self-proclaimed progressive prosecutors rhetorically emphasize the need to enhance accountability and transparency in their offices and the broader criminal legal system. Historically, prosecutors have fomented distrust among the public, in part because their decisions are often obscured from public scrutiny and because of their close relationships with police departments. Progressive prosecutors have sought to address these concerns by explicitly promising to bring enhanced police and prosecutorial accountability to the criminal legal system.¹⁹⁶ To that end, nearly every progressive prosecutor has created a conviction integrity unit.¹⁹⁷ These units were created in recognition of the prevalence of wrongful convictions and have overturned convictions often due to systemic corrupt policing and scrutiny of evidence. For example, some progressive prosecutors have brought criminal charges against officers for killings¹⁹⁸ after decades of practical immunity from prosecution and continued impunity. Specifically, DA Gonzalez and others have sought to enhance accountability by creating community task forces to help create prosecutorial goals for his office. His initiative, Justice 2020, brought together religious and other community leaders to discuss policy goals and projects for the new decade.¹⁹⁹

C. *Progressive Prosecution Movement and Immigration*

The progressive prosecution movement has advanced some helpful reforms for immigrant defendants,²⁰⁰ such as decriminalizing marijuana. However, by and large, there has been a deficiency in the way the movement understands and approaches immigration issues. For instance, some progressive prosecutors have taken action on interrelated issues impacting immigrants outside of their purview—from participating in lawsuits seeking to prevent ICE from making arrests in criminal court²⁰¹ to issuing public statements encouraging the release of ICE detainees during the COVID-19 outbreak.²⁰² Others have issued statements in support of criminal legislation

7DN7 (finding that drug courts have not demonstrated cost savings, reduced incarceration, or improved public safety and have made been more punitive toward addiction).

196. See Sklansky, *supra* note 127, at 661, 670–71.

197. See *id.* at 652–53, 664, 667, 671.

198. See, e.g., Raya Jalabi & Sabrina Siddiqui, *Marilyn Mosby: Young Chief Prosecutor Electrifies Baltimore with Police Charges*, GUARDIAN (May 1, 2015), <https://perma.cc/T9ZA-8SPU> (State's Attorney of Baltimore Marilyn Mosby charged Baltimore police officers who killed Freddie Gray within month of killing). *But see* Bill Turque & Elise Schmelzer, *After Dropping Charges, Marilyn Mosby Still Hailed as Both Heroin and Hack*, WASH. POST (July 27, 2016), <https://perma.cc/YFSS-GQ4U> (State's Attorney Mosby's office announced that it was dropping all criminal charges against the officers after three acquittals and one hung jury).

199. Press Release, Brooklyn Dist. Att'y's Off., *supra* note 179, at 25.

200. See Davis, *supra* note 176, at 10–11.

201. E.g., Renee Algarin, *Prosecutors, Public Defenders, and Community Groups File Lawsuit to Block Immigration Arrests in Courthouses*, SUFFOLK CNTY. DIST. ATTY'S OFF. (Apr. 29, 2019), <https://perma.cc/W6KR-ENET> (Rachael Rollins, District Attorney in Boston, was part of the group that filed a lawsuit to block immigration arrests in courthouses).

202. FAIR & JUST PROSECUTION, *Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of Those in Custody* 4 (2020), <https://perma.cc/3GRJ-442W>.

designed to mitigate an immigrant defendant's exposure to immigration consequences.²⁰³ However, given the serious adverse immigration consequences that flow directly from prosecutorial action or inaction, these tepid reforms are simply not enough to prevent the disparate treatment and disproportionate punishment of immigrant defendants.²⁰⁴

While many progressive prosecutors nod to the idea of "protecting immigrants" in campaign promises,²⁰⁵ once in power, most progressive prosecutors have adopted few policies that explicitly benefit immigrant defendants.²⁰⁶ If anything, progressive prosecutors have advanced policies focused more on protecting immigrant witnesses and encouraging immigrant cooperation with the police and focused less, or not at all, on their treatment of immigrant defendants.²⁰⁷ These are glaring omissions given the serious adverse consequences of the criminal and immigration systems which can largely be influenced by prosecutorial action or inaction.²⁰⁸

One area of concern is that progressive prosecutors often do not seem to understand the nuances and complexities of immigration consequences. Policies like eliminating cash bail²⁰⁹ generally benefit non-citizens; however,

203. *E.g.*, IMMIGRANT DEF. PROJECT & FORTUNE SOC'Y, ONE DAY TO PROTECT NEW YORKERS 1 (2019), <https://perma.cc/3GRJ-442W> (changing the maximum penalty for a misdemeanor in New York to 364 days as an effort to avoid mandatory deportation under immigration law).

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

205. *See, e.g.*, Waseem Salahi, *Democratic Candidates Debate Ahead of Brooklyn DA Primary Elections*, APPEAL (Aug. 29, 2019), <https://perma.cc/KR22-TUSA> (District Attorney Gonzalez provided little specifics about how he would carry out his campaign promises to protect immigrants and prevent them from facing criminal charges resulting in an unwarranted deportation); *see also* George Gascón's *Plan to Ensure Resolution Parity for the Undocumented*, GEORGE GASCÓN (Oct. 14, 2020), <https://perma.cc/79WU-KARM> (promising to be aware of and mitigate collateral consequences of offenses, expanding pre-arrest and pre-plea diversion programs, and reduce prosecution of lower-level "quality of life" offenses, among other promises). *But see* *Protect Our Immigrant Communities*, CHESA BOUDIN FOR DIST. ATT'Y 2019, <https://perma.cc/ZK4N-22MW> (last visited Aug. 26, 2020) (promising to create immigration unit, eliminate collateral consequences based solely on immigration, investigate and prosecute crimes by ICE violations of sanctuary law, and advocate for universal representation for people facing deportation, among other promises).

206. *E.g.*, Maya Dukmasova, *Kim Foxx Gets a Report Card*, CHI. READER (Dec. 7, 2017), <https://perma.cc/7DVW-W5KU> (describing District Attorney Foxx as making little progress in reducing the collateral consequences of criminal prosecution on immigration status, based off a report by Reclaim Chicago, the People's Lobby, and the Chicago Appleseed Fund for Justice). DA Los Angeles County District Attorney Gascón was recently elected in November 2020, so we have yet to see if he will make good on his campaign promises. His platform regarding immigrant defendants is certainly the most ambitious to date.

207. *E.g.*, Jordan Owen, *Cook County State's Attorney Creates Immigration Fraud Hotline*, COOK CNTY STATE'S ATT'Y (Feb. 24, 2017), <https://perma.cc/ET6R-64P8>. While Melinda Katz touted herself as a progressive candidate in the 2019 race who would support noncitizens in her district, her promises consisted of securing protections for noncitizen workers and glaringly omitted policies to decriminalize offenses or decarcerate, which were center to her opponent Tiffany Cabán's campaign. *See* Naeisha Rose, *Katz Positions Herself as Champion of Immigrants, Workers in DA Race*, POLITICS NY (Feb. 8, 2019), <https://perma.cc/87D3-D2PB> (promising to establish a Worker Protection Bureau with a multilingual team of outreach workers).

208. *Supra* Section I.

209. Efforts that move away from pre-trial detention have unique benefits for non-citizens. Spending less time in a custodial setting generally reduces the chances of ICE detection. Certainly, under the reinstated Secure Communities program, DHS can issue a detainer against any removable individual to request

other policies have been adopted without adequate consideration and care for their effects on immigrants. For instance, many prosecutors continue to push alternatives to incarceration programs that require up-front pleas, that although could be later dismissed under state law, could still lead to deportation.²¹⁰

Another shortcoming is that prosecutors tend to narrowly focus on immigration concerns in the context of plea negotiations rather than considering adverse consequences for immigrant defendants in all areas of prosecutorial work. Some progressive prosecutors have hired one or two internal immigration attorneys, but they centrally focus on advising prosecutors as to the immigration consequences of plea negotiations.²¹¹ Other prosecutors have issued written policy directives (although many are presumptive, not mandatory) requiring line attorneys to consider outsized immigration consequences and militate against them through immigration-safe plea offers, where appropriate.²¹² Notably, these policies are generally limited to low-level offenses.

Lastly, beyond the dearth of policies that reflect an accounting for the harsh immigration consequences of a range of prosecutorial actions, where there are policies, there is a lack of specificity. Even express policies regarding plea negotiations tend to be suggestive, and there has been little guidance to line prosecutors on how to think about or account for immigration ramifications.

that the local custodian transfer that person to ICE custody upon arrest alone. *See* Chacón, *supra* note 90, at 1343; U.S. IMMIGR. & CUSTOMS ENF'T, *Secure Communities*, <https://perma.cc/PQY8-FTD8> (last visited Aug. 28, 2020). However, if no detainer has dropped and a removable individual is arraigned and released without being subjected to further pre-trial detention, the likelihood of detection at that time is greatly reduced.

210. While Marilyn Mosby, State's Attorney of Baltimore, started a drug distribution diversion program, "Aim to Baltimore," for first time drug distribution offenders, the program results in a "probation before judgment" disposition, which is considered a conviction in immigration proceedings. 8 U.S.C. § 1101(a)(48)(A); *see* Babo, *supra* note 38.

211. *See, e.g.,* Kings Cty. Dist. Att'y's Off., *Acting Brooklyn District Attorney Eric Gonzalez Announces New Policy Regarding Handling of Cases Against Non-Citizen Defendants*, DISTRICT (Apr. 24, 2017), <https://perma.cc/MS6V-RGY Y> (two newly-hired immigration attorneys will train staff and advise on offers); Claire Sasko, *DA Larry Krasner Hires Staffer to Protect Immigrants' Rights*, PHILLY MAG. (Jan. 25, 2018), <https://perma.cc/Q72N-Z6V3> (appointed immigration attorney Caleb Arnold). Recently elected Travis County District Attorney José Garza was previously an immigrant rights activist and attorney and shows promise for implementing a more expansive agenda for non-citizens. *See* Drew Knight, *Democrat José Garza Wins Election to Become Travis County's Next District Attorney*, KVUE (Nov. 4, 2020), <https://www.kvue.com/article/news/politics/vote-texas/travis-county-district-attorney-2020-election-results-jose-garza/269-967d0f1d-358c-4392-8cb2-a1c47c77ff83> [archived at <https://perma.cc/T2SA-864N>]; *Protect Immigrant Communities*, JOSÉ GARZA FOR DIST. ATT'Y, <https://perma.cc/TRP5-9BVD> (last visited Dec. 21, 2020) (District Attorney Garza's immigration platform).

212. The first memo of this kind was issued by Santa Clara District Attorney Rosen in 2011. Memorandum from Jeff Rosen, Dist. Att'y, to Fellow Prosecutors (Sept. 14, 2011) (on file with the Immigrant Legal Resource Center); *see also* Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, N.Y. TIMES (Oct. 30, 2018), <https://perma.cc/J3ZK-WYHP>. *But see* Shaun King, *Philadelphia DA Larry Krasner Promised a Criminal Justice Revolution. He's Exceeding Expectations*, INTERCEPT (Mar. 20, 2018, 3:59 PM), <https://perma.cc/L2PA-2SEM> (the second sentence of District Attorney Krasner's memo informed staff that "all policies are presumptive, not mandatory requirements.").

III. WHAT PROGRESSIVE PROSECUTORS SHOULD DO REGARDING IMMIGRATION

A. *Progressive Prosecutors Must Do More*

Progressive prosecutors have expansive obligations to immigrant defendants for three principal reasons. First, prosecutorial ethical and professional standards demand consideration of all consequences—direct and collateral—for all defendants. Second, jurisprudence supports the notion that prosecutors have an obligation to non-citizens. Notably, these two rationales apply to *all* prosecutors, suggesting *all* prosecutors have obligations to immigrant defendants that they must seriously contend with. But the so-called progressive prosecutor has a third reason that heightens their obligation to immigrant defendants: being true to the movement’s rhetoric. The movement has publicly proclaimed a particular vision of the prosecutor’s role and advanced certain theories regarding the purpose of punishment. Because of these public commitments, progressive prosecutors must ensure they do not neglect immigrant defendants. These three sources, *taken in tandem*, suggest any prosecutor who identifies as “progressive” has a duty to immigrant defendants. This understanding of the prosecutor’s obligation has been underdeveloped in scholarship and only lightly explored in prosecutorial imagination to date.

The progressive prosecutor must look at non-citizen defendants holistically, account for the unique risks facing individuals, and use prosecutorial discretion to prevent immigration penalties. It follows that where the consequences triggered could lead to deportation or an inability to regularize status, a progressive prosecutor would see their obligations towards immigrants as heightened. Further yet, prosecutors must consider how their office broadly supports the entire immigration enforcement system. Because prosecutors are the gatekeepers of immigration enforcement, they should act with resultant urgency system-wide and look beyond individual interventions. As described below, for a progressive prosecutor, deportation or other immigration penalties would likely never be a just and proportionate result of interacting with the criminal legal system.²¹³

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

Governing ethical and professional standards suggest that prosecutors should seek to reduce outsized immigration penalties arising out of criminal prosecution.²¹⁴ The ABA guidelines state that prosecutors should “consider collateral consequences of a conviction” before entering into a plea deal.²¹⁵

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

214. *See supra* Section II, Part B.

215. Crim. Just. Standards for the Prosecution Function § 3-5.6(c) (Am. Bar Ass’n 2017).

While the professional standards do not take into account the prosecutor's disproportionate power in plea negotiations, especially over collateral consequences, scholarship has highlighted this.²¹⁶ Professor Eisha Jain warns that "informed consideration" by prosecutors should not be equated with better outcomes for defendants.²¹⁷ Indeed, prosecutors often have incentive structures to "prosecute" collateral consequences through plea agreements—using their immense power to create civil penalties.²¹⁸ Due to this, Professor Brian Murray has argued that prosecutors should be required to disclose collateral consequences as part of plea negotiations.²¹⁹ There is fertile ground for the imposition of disclosure obligations regarding collateral consequences as either a constitutional command akin to *Brady*²²⁰ or through the adoption of more explicit ethical rules.²²¹ Because collateral consequences may result in "civil death," especially deportation, they too should be understood as part of the plea deal.²²²

The current ethical rules and governing prosecutorial professional standards—particularly those requiring prosecutors to act as "ministers of justice" and be "mindful of the defendant's situation"—suggest that prosecutors should militate against unfair and disproportionate collateral consequences. But this should extend to all areas of prosecutorial decision-making, including charging, dismissing, and plea bargaining, to ensure "justice shall be done."²²³

Ethical considerations weigh in favor of prosecutors having a duty to avoid immigration consequences in their prosecution of non-citizens, given that the consequences cause hardship to non-citizens and impact Black and Latinx migrants disproportionately.²²⁴ Some prosecutors view collateral consequences outside the criminal system as presumptively disproportionate.²²⁵ Mitigation of such consequences should be a central consideration in a progressive prosecutor's agenda. Prosecutors who view poverty as a root cause of crime have embraced collateral mitigation. For example, negotiating a resolution that would permit a defendant to remain in their home or retain

216. See generally Jain, *supra* note 30.

217. *Id.* at 1202.

218. Jain, *supra* note 30, at 1216; see also Murray, *supra* note 175, at 240.

219. Murray, *supra* note 175, at 237.

220. *Id.* at 229–35 (suggesting there is fertile constitutional ground for such an obligation rooted in the Court's plea-bargaining jurisprudence combined with *Brady* and its progeny).

221. *Id.* at 242–47; see also Jain, *supra* note 30, at 1243.

222. Murray, *supra* note 175, at 229.

223. *Berger v. United States*, 295 U.S. 78, 88 (1935) (emphasis added). Most collateral consequences will be unfair and disproportionate under these ethical considerations combined with the values espoused by the progressive prosecution movement. Progressive prosecutors should take into account the racialized impacts of the criminal legal system in assessing fairness and proportionality.

224. E.g., NAT'L DIST. ATT'YS. ASS'N, NAT'L PROSECUTION STANDARDS WITH REVISED COMMENT. § 5-3.1 (3d. ed. 2009).

225. Jain, *supra* note 30, at 1217.

employment is an act of collateral mitigation.²²⁶ Progressive prosecutors who have encouraged resolving drug or mental health-related cases through alternative courts should also naturally embrace collateral mitigation. This impulse toward collateral mitigation would, arguably, be even greater where immigration consequences are at play. Although it did not resolve whether deportation is a “direct” or “collateral” consequence, *Padilla* made clear that deportation is a uniquely heightened consequence given the way it is interwoven into criminal punishment.²²⁷

The professional standards state that prosecutors should “. . . respect the constitutional and legal rights of . . . defendants.”²²⁸ Thus, it is wholly appropriate for prosecutors to comport their actions to protect the Constitutional rights of immigrants preserved under *Padilla*.²²⁹

2. Supreme Court Jurisprudence Supports Prosecutorial Obligations to Immigrants

Padilla and subsequent Supreme Court jurisprudence further reinforce a reading that prosecutors have expansive obligations to immigrants.²³⁰ In dicta, the *Padilla* Court acknowledged the prosecutor’s interest in plea bargaining with immigrant defendants, albeit narrowly in scope and substance:

“. . . [I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties . . . the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.”²³¹

Justice Stevens undeniably opened the door for deeper prosecutorial engagement with immigrant defendants.²³² Two years later, in companion

226. *Id.* at 1215–21 (suggesting prosecutors can use their power to shape public policy outcomes they disagree with).

227. *Padilla*, 559 U.S. at 356, 365, 373 (describing deportation as “drastic,” “a particularly severe penalty,” and the “equivalent of banishment or exile”).

228. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS’N 2017) (emphasis added).

229. See Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CALIF. L. REV. 237 (2017) (arguing that prosecutors should preserve defendants’ constitutional rights even if judicial doctrine does not require it, and even if doing so lowers the chance of obtaining a conviction).

230. Prosecutors’ constitutional obligations have been recognized as rooted in the Due Process Clause, which has narrowly been interpreted to mean that prosecutors cannot affirmatively mislead defendants about immigration consequences.

231. *Padilla*, 559 U.S. at 373.

232. Heidi Altman, *Prosecuting Post-*Padilla*: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO L.J. 1, 22–25 (2012) (discussing how the Court sanctioned prosecutorial involvement in *Padilla*). However, the Court’s cursory discussion failed to recognize the centrality of the prosecutor in determining case resolutions in today’s criminal legal system, and interconnectedly,

cases, *Lafler v. Cooper*²³³ and *Missouri v. Frye*,²³⁴ the Court expounded on the Sixth Amendment obligations of defense counsel during plea negotiations.²³⁵ The Court again underscored that informed consideration is relevant to the fairness of the plea itself.²³⁶ These cases brought an expansion of judicial scrutiny over the often-opaque plea-bargaining process.²³⁷ In *Frye*, the Court even suggested practices for prosecutorial conduct in negotiations.²³⁸ *Padilla*, *Frye*, and *Lafler*, when read together, suggest that prosecutors should carefully evaluate their conduct vis-à-vis defendants in plea bargaining and highlight that they do not operate free from judicial scrutiny.

Padilla emphasized that deportation is indeed a punishment deeply intertwined with criminal penalties, and it cannot adequately be characterized as “collateral” to a criminal proceeding.²³⁹ This was a commonsense recognition of the drastic consequences the purportedly “unrelated” criminal adjudication can have on a non-citizen’s life. Scholar Heidi Altman, in her seminal piece, suggests that *Padilla*, read together with relevant ethical standards, supports prosecutors offering plea deals that militate against immigration penalties.²⁴⁰ Even though the Court does not say so explicitly, the post-*Padilla* landscape reveals that without prosecutorial cooperation in plea negotiations, *Padilla*’s protections are greatly diminished.²⁴¹ Because the prosecutor is the true arbiter of justice in today’s mass criminalization system, their willingness to negotiate and agree to immigration-safe resolutions is critical to giving *Padilla* meaning.²⁴²

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

The progressive prosecution movement’s own stated policy platforms and rhetoric suggest they have a heightened obligation to immigrants. The very same motivating forces behind the progressive prosecution movement

whether deportation will ensue. See Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2653 (2013) (discussing how the *Padilla* Court does not examine the defendant’s right to a lawyer who meets minimal constitutional standards for “effective” plea bargaining between the defense attorney and the prosecutor, but only focusing on the discussion between defense counsel and noncitizen).

233. *Lafler v. Cooper*, 566 U.S. 156 (2012).

234. *Missouri v. Frye*, 566 U.S. 134 (2012).

235. *Lee*, *supra* note 19, at 566.

236. *Murray*, *supra* note 175, at 237.

237. See *Lee*, *supra* note 19, at 565.

238. See *id.* at 568.

239. *Padilla*, 559 U.S. at 365–66 (“[D]eportation is . . . intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century[.] . . . [W]e find it ‘most difficult’ to divorce the penalty from the conviction in the deportation context.”).

240. Altman, *supra* note 232, at 7; see also Eagly, *supra* note 28, at 1163, 1166 (describing how, post-*Padilla*, some prosecutors have adopted an “alienage-neutral model” whereby prosecutors consider the collateral immigration-enforcement consequence of deportation in plea bargaining, avoid inquiring into immigration status in court, and how status is “rarely, if ever, argued as a sentencing aggravator”).

241. See *Lee*, *supra* note 19, at 559; see also Eagly, *supra* note 28, at 1170 (describing “illegal-alien-punishment” jurisdictions where, even after *Padilla*, prosecutors use immigration status to treat noncitizen defendants more punitively in plea bargaining and bail determinations).

242. See *Lee*, *supra* note 19, at 558.

logically lead to this result. The movement promises “innovative policies that work to end mass incarceration and protect people of color and low-income communities that have suffered at the hands of an unfair justice system.”²⁴³ This should extend to immigrant defendants who are subjected to similar systemic racism and injustices in the criminal system, and doubly again in the deportation and detention systems.²⁴⁴

Deportation and detention disproportionately impact Black and Latinx immigrants.²⁴⁵ And the mass incarceration of immigrants has continued to rise.²⁴⁶ Progressive prosecutors have sought to fight these greater ills in the criminal legal system but should go further to ensure their policies do not leave a subset of defendants vulnerable to the very same forces they have promised to combat. Prosecutors who understand the nuanced implications of prosecutorial decisions on immigrant defendants would be able to ameliorate this imbalance. Having that understanding would ensure that prosecutors do not make decisions that would undermine their carefully crafted policy goals. This would promote fairness. To fail to use their discretionary power in this way would further render prosecutors complicit in immigration enforcement²⁴⁷ while simultaneously undermining community integrity for Black and Brown families.

Another cornerstone of progressive prosecution has been to alter the prosecutor’s function by moving towards a community-centered approach to addressing wrongdoing.²⁴⁸ Progressive prosecutors and their supporters have reasoned that in order to keep communities safe, prosecutors should aim to keep communities together.²⁴⁹ Adopting practices to ensure that immigrant defendants do not end up detained and deported furthers the goals of the progressive prosecutor. Ultimately, the prosecutor’s discretionary power bears an incredible influence on how communities survive and thrive over time and intergenerationally.²⁵⁰ Exercising discretionary power without considering its complicity in family separation or immigration consequences is an infliction of violence on communities of color and politically marginalized communities.

Similarly, the justifications for the criminal legal system promoted by progressive prosecutors buttress expansive obligations towards immigrant defendants. Progressive prosecutors urge enacting policies rooted in

243. S.F. Dist. Att’y, *About the Office*, <https://perma.cc/NK9V-TZ25> (last visited Oct. 6, 2021).

244. See Johnson, *supra* note 82, at 1035 (2016).

245. *Id.* at 1026 (2016).

246. *Supra* Section I, Part C.

247. See Lee, *supra* note 19, at 558.

248. DA Gonzalez launched a Justice 2020 Initiative whereby he included a host of community members including clergy, defense counsel, and others to help set priorities for the future of his office. E.g., Press Release, Brooklyn Dist. Att’y’s Office, Justice 2020 Action Plan (Mar. 11, 2019) (on file with author).

249. E.g., Vaidya Gullapalli, *Family Separation and “A Longer View of Public Safety:” A Conversation with San Francisco D.A. Chesa Boudin*, APPEAL (Jan. 4, 2020), <https://perma.cc/3CCG-EHJ3>.

250. See Johnson, *supra* note 244, at 1026.

rehabilitation, restitution, and restorative justice.²⁵¹ If rehabilitation and restitution are the primary purposes of punishment, then prosecutors should want to ensure that non-citizens (many of whom have lived in the United States for decades) experience a similar level of penalty as all other defendants. With restorative justice as a guiding principle, undoing the harms and injustices created by the crimmigration system become a goal of the progressive prosecutor.

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

In sum, a progressive prosecutor, who seeks to establish fairness and accountability in criminal proceedings, has a duty to (1) understand the nuances of their role as the gatekeeper to deportation and²⁵² (2) take that role seriously by using their broad discretion to adopt policies that account for the unique concerns and special considerations presented by immigrant defendants. Understanding their gatekeeping function must inform all aspects of their work. Once a progressive prosecutor understands their role as *the* person directly in control of deportation, they should naturally be concerned with the implications of their decisions on non-citizens.²⁵³

The charge for the progressive prosecutor is to view every part of the criminal justice system as an important component of the immigration system. For the progressive prosecutor, carefully crafted prosecutorial policies that do not create immigration consequences at any stage of the criminal process become key to fairness unless and until the criminal and immigration systems are untangled. Promoting the separation of the two systems is a worthy goal for the progressive prosecutor.

B. *Progressive Federalism Suggests Progressive Prosecutors Can Do More*

Local decisions can serve as a much-needed catalyst for national debates. Local politics don't undermine national politics; they fuel it.

— Dean Heather Gerken²⁵⁴

251. *E.g.*, *Putting Balance and Restorative Justice into Practice*, COOK CTY. STATE'S ATT'Y, <https://perma.cc/UDG9-7JD3> (last visited Aug. 28, 2020) (describing how prosecutors may choose to divert cases to a BARJ-based program in lieu of filing formal charges).

252. *See* Lee, *supra* note 247, at 558.

253. *Id.* at 553.

254. Gerken, *supra* note 41, at 45.

The natural question becomes *how* do progressive prosecutors meet their duty to understand and mitigate against adverse immigration consequences in practice? Some prosecutors have raised “federalism” concerns in regard to taking any actions whatsoever that implicate immigration issues.²⁵⁵ This stems from a misguided belief that because immigration is exclusively reserved for the federal government, local prosecutors cannot make decisions that “encroach” upon immigration in any way.²⁵⁶ To be clear, by utilizing their local powers to adopt a series of proposals that embed within them an understanding of harsh potential immigration consequences *and* seek to mitigate against them, progressive prosecutors would not be acting as federal actors, nor would they be impermissibly encroaching on federal powers. This is because in taking these actions, local prosecutors are not making determinations regarding the immigration status or immigration case of an individual that are still ultimately reserved for an immigration adjudicator.²⁵⁷ Local prosecutors are well within their powers to use their enforcement discretion how they see fit, even if that decision may have some bearing upstream on a separate immigration matter. In fact, immigration law embeds consideration of state criminal matters within it.²⁵⁸ Local prosecutorial decisions and judgments regarding guilt or innocence will ultimately be considered by immigration adjudicators down the line. The system is designed this way, and local prosecutors can no longer ignore this reality.²⁵⁹

Progressive prosecutors do not need any special authority to act in the ways suggested below. Prosecutors need not take any actions beyond those that fall squarely within their broad discretionary powers under state and local law. Nevertheless, the political philosophy of “progressive federalism” provides a useful framework for the hesitant prosecutor. This view of federalism sheds light on the ways in which prosecutors can use their local powers to influence federal immigration enforcement policy. This framing of federalism moves away from the traditional state versus federal powers lens. Rather, it flips the theory on its head and centers the way in which state, local, and sub-local actors use their powers to ultimately influence federal policy.²⁶⁰ Take, for example, local clerks who issued marriage licenses to same-sex

255. See Altman, *supra* note 232, at 51–53.

256. See *id.* at 52–53.

257. See *id.* at 53–54.

258. See *supra* Section I, Part A.

259. Some prosecutors might think “staying out of” immigration issues altogether would indeed be the best course of action. They might further add that local prosecutors *should not* be involved in immigration decisions. While that argument is powerful and compelling, given how immigration laws are written today, simply “staying out of” immigration ramifications is not an option for the local prosecutor. Their decisions today will invariably impact subsequent immigration determinations. This should not prevent prosecutors from choosing to refrain from action in a given content due to immigration-related rationales. However, saying local actors should simply stay out of immigration would be turning a blind eye to the harm that contact with the local criminal legal system and its actors create for immigrant defendants.

260. Heather Gerken and Joshua Revesz, *Progressive Federalism: A User’s Guide*, DEMOCRACY J., <https://perma.cc/9JTS-P6PS> (last visited Sept. 24, 2021).

couples at a time of great national disagreement over the issue.²⁶¹ Progressive federalism posits that these local clerks used their powers in a way that influenced the national debate and that ultimately led to the Supreme Court's ultimate striking down of the federal "Defense of Marriage Act."²⁶²

Progressive prosecutors are well within their authority to engage in actions, even if they may ultimately impact a federal issue, like immigration enforcement, on a broader scale. "Progressive federalism"²⁶³ suggests this is indeed how federalism works. It supports the idea that progressive prosecutors have broad powers beyond the local to use their discretion to influence immigration policy nationally. Progressive federalism incorporates²⁶⁴ a reconceiving of federalism, "federalism all the way down," focusing on the vast power both local and sub-state actors have to enact innovative policies that express political dissent²⁶⁵ and thereby impact the national narrative.²⁶⁶ In fact, sub-federal actors have increasingly used local powers to combat national policies they disagree with—to promote change traditionally associated with the left.²⁶⁷

This recent embrace of federalism by some on the left has not been without controversy. Due to its dark history, progressives have traditionally been averse to federalism.²⁶⁸ "States' rights" have often been used as a justification for Jim Crow and opposition to civil rights measures.²⁶⁹ Nevertheless, some on the left have begun to embrace this concept of federalism as a method of effecting national change. Through the lens of progressive federalism, local prosecutorial decisions not only directly impact individual cases²⁷⁰ but can

261. See Nancy J. Knauer, *Same-Sex Marriage and Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 421, 425–29 (2008) (discussing states that recognized same-sex marriage rights before its federal legalization).

262. See Gerken, *supra* note 254, at 37–38.

263. See *id.* at 37.

264. This moves away from traditional visions of federalism concerned with state versus federal rights, focusing on how sub-state, local, and sub-local actors exert power in ways that influence national debate.

265. See Gerken, *supra* note 254, at 37–38 (suggesting that because the local level provides more possibility for experimentation and many more diverse voices are represented, local actors can express dissent through implementing innovative policies); see also Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 106 (2014) (explaining that progressive federalism is simply the use of "federalism all the way down," a politically neutral approach to understanding sub-federal and federal relationships, for progressive ends, and the same concept can be applied in the contrary, as many local and sub-local actors have engaged in this process to advance conservative ends on issues such as gun rights).

266. See *id.* at 81 (2014) (arguing that progressive federalism posits that minorities and voices of dissent express their preferred views through state and local institutions, and thereby influence federal policy, which is critically important for a healthy democracy).

267. See Gerken, *supra* note 41, at 1715–16 (discussing how recently, local and state actors have increasingly used their powers to enact a series of progressive policies in disagreement with the national viewpoint, and have in turn, influenced the national debate on a host of issues including same-sex marriage, clean air, and placing body cameras on police officers).

268. See Heather Gerken, *We're About to See States' Rights Used Defensively Against Trump*, VOX (Jan. 20, 2017), <https://perma.cc/8TYV-WGY8>.

269. See *id.*

270. See *supra* Section I, Part B.

also drive national policy.²⁷¹ Because of the entanglement with the federal government,²⁷² local criminal prosecutors have the discretion to influence outcomes for individual immigrant defendants and have the power to impact rhetoric on a national level and the criminal removal system as a whole.²⁷³ Through the use of their local authority, progressive prosecutors can affect the federal government's efforts to deport immigrants and dilute immigration enforcement as it operates today.

Progressive prosecutors already engage in progressive federalism by using their powers in ways that encourage national policy debates in other areas of disagreement. As one example, numerous prosecutors have chosen to decriminalize simple marijuana possession by not charging it in state court, despite its continued criminalization on the federal level.²⁷⁴ As understood through the lens of progressive federalism, this approach by prosecutors expresses the will of their constituents and pushes forward the national debate regarding decriminalization and the legalization of marijuana.²⁷⁵ It fills the gap created by the failure to pass legislative reform at the federal level.

States and localities have enacted a number of "sanctuary policies" that have similarly sought to contend with legislative gridlock in enacting federal immigration reform.²⁷⁶ Sanctuary policies are where progressive federalism has been the most experimented with, especially in the immigration sphere.²⁷⁷ The bulk of sanctuary policies enacted over the last decade have sought to limit the actions of local actors, such as police officers, local governmental entities, school boards,²⁷⁸ and other local officials, from divulging information to or collaborating with local officials and federal immigration enforcement.²⁷⁹ These laws have largely been intended as protective

271. Progressive federalism theorists suggest that local actors, such as school boards, juries, local prosecutors, bureaucratic officials and the use of sources of state law and constitutional restraints on federal power, advance progressive policies on federal level. Cf. Paul Stanton Kibel, *California Rushes in—Keeping Water Instream for Fisheries Without Federal Law*, 42 WM. & MARY ENVTL. L. & POL'Y REV. 477, 478 (2018). See generally Gerken, *supra* note 254, at 37.

272. See *supra* Section I.

273. Chacón, *supra* note 90, at 1334 ("Ultimately, control over enforcement discretion is the key to shaping immigration policy, and that control is increasingly exercised at the state and local level.").

274. District Attorneys across the country use their discretionary power to decline prosecuting low-level marijuana possession offenses, demonstrating that "prosecutors don't need to wait for state or federal marijuana decriminalization or legalization to provide justice." Lucy Lang, *American Prosecutors Need Not Wait for Marijuana Legalization*, GOTHAM GAZETTE (Aug. 7, 2019), <https://perma.cc/Q82E-9PLJ>.

275. See, e.g., Ben Rosen, *How Public Attitudes About Marijuana Expanded Political Debate*, CHRISTIAN SCI. MONITOR (Nov. 7, 2016), <https://perma.cc/T8BR-U3LN>.

276. Christopher N. Lasch, R. Linus Chan, Ingrid V. Eagly, Dina Francesca Haynes, Annie Lai, Elizabeth M. McCormick & Juliet P. Stumpf, *Understanding "Sanctuary Cities"*, 59 B.C.L. REV. 1703, 1722–23 (2018).

277. Numerous cities across the United States have adopted "sanctuary laws," rejecting unrestricted cooperation by law enforcement with federal immigration authorities with respect to the removal of "non-serious criminal offenders." See Johnson, *supra* note 82, at 1018 (discussing which cities have implemented sanctuary policies).

278. See Lasch, Chan, Eagly, Haynes, Lai, McCormick & Stumpf, *supra* note 276, at 1745–48.

279. See, e.g., N.Y.C., N.Y., ADMIN. CODE tit. 10, ch. 1, § 10-178 (2017) (prohibiting all city employees from asking individuals about their immigration status, as well as prohibiting the use of city resources for the purposes of immigration enforcement.). Notably, much of the scholarship regarding

measures for local immigrant communities. Additionally, numerous sub-federal²⁸⁰ actors have used their local authority to combat the entanglement of the criminal and immigration system.²⁸¹ However, there has been an insufficient focus on local prosecutors in sanctuary laws and policies.²⁸² Currently, California is the only state in the country²⁸³ that has enacted legislation requiring prosecutors to “consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution.”²⁸⁴ More states and local jurisdictions could consider enacting a range of legislation or other policies that contemplate and restrict the role of the prosecutor in the furtherance of sanctuary for immigrant communities.²⁸⁵

There is similarly no scholarship considering the local prosecutor’s impact on national immigration policy through a “federalism all the way down” or “progressive federalism” lens. Professor Jennifer Chacón’s groundbreaking piece analyzed “federalism all the way down” in the immigration context by describing how a series of sub-federal actors’ policy decisions influenced federal immigration enforcement in two counties in California.²⁸⁶ By tracking the actions of a number of local and state actors, such as sheriffs, county officials, and public colleges, Professor Chacón provides a thorough analysis of how this vision of federalism works—and sometimes fails to work—to influence immigration enforcement. Yet, her piece does not address the local prosecutor.

Dean Heather Gerken, who coined the phrase “federalism all the way down,” explicitly contemplates the prosecutor as a local actor that can shape

sanctuary laws and policies center on analyzing them along the lines of traditional conceptions of federalism—considering anti-commandeering principles emerging from Tenth Amendment jurisprudence. *See, e.g.,* Rose Cuison Villazor, “Sanctuary” Cities and Local Citizenship, 37 *FORDHAM URB. L.J.* 573, 576 (2010) (exploring how “sanctuary laws illustrate the tensions between national and local citizenship”).

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

281. *See* Lasch, Chan, Eagly, Haynes, Lai, McCormick & Stumpf, *supra* note 276, at 1741 (describing various ways local jurisdictions have avoided cooperation with federal immigration enforcement such as the Alameda County Sheriff’s office declining immigration detainees from ICE, distinguishing between “an arrest warrant signed by a judge, and an immigration detainer signed by an ICE Agent”).

282. *See* Ahmed, *supra* note 73, at 250 (describing how New York City’s sanctuary laws do not regulate DA offices because DAs are county actors and, therefore, county policies and practices can undermine city laws).

283. While the statute requires prosecutors to contemplate avoidance of adverse consequences, it does not limit the prosecutor’s conduct as other sanctuary provisions have done regarding other local actors, such as school boards, public hospitals, local police, etc. *E.g.,* Geoff Maleman, *CCUSD Declares Campuses as “Safe Zones,”* *CULVER CITY NEWS* (Dec. 1, 2016), <https://perma.cc/H3H6-98LE> (discussing a Culver City, CA school district resolution declaring that district personnel were not to inquire about students’ or their families’ immigration statuses).

284. CAL. PENAL CODE § 1016.3 (2016).

285. *E.g.,* Tom Davis, *NJ Imposes New Rules on Turning over Unauthorized Immigrants*, *PATCH* (Nov. 29, 2018), <https://perma.cc/JE52-SDNG> (describing a directive limiting the types of voluntary assistance that state, county and local law enforcement agencies, including *prosecutors*, may provide to immigration authorities) (emphasis added).

286. *See* Chacón, *supra* note 90.

federal policy through innovative local decision-making.²⁸⁷ Nevertheless, the ways in which the local prosecutor might engage in “federalism all the way down” to influence progressive change in the national immigration sphere or sanctuary policies has been understudied.

“Federalism all the way down” is a philosophy that can be utilized by progressive prosecutors to ultimately impact immigration enforcement decisions nationally to further a “progressive” agenda. Progressive prosecutors, thereby, have broad power to influence national immigration policy.

“Ultimately, control over enforcement discretion is the key to shaping immigration policy, and that control is increasingly exercised at the state and local level.”²⁸⁸ Local prosecutors, by and large, control who faces deportation.²⁸⁹ As a result, progressive prosecutors possess broad authority to adopt policies that reflect the way they exercise discretion. Adopting a robust immigration agenda would leverage their authority in a way that would help protect migrants from immigration ramifications at all stages. This is central to fulfilling the progressive prosecutor’s duty to immigrant defendants.²⁹⁰

Prosecutors undeniably possess the discretion to decide who and how to prosecute, even where the results of that local decision may have later implications on a federal level or may disagree with federal policy.²⁹¹ Utilizing discretion to adopt local policies that seek to achieve proportionate results for immigrants is the very kind of experimentation supported by progressive federalism.

A robust immigration agenda would also advance the “voice of dissent,” that is, the voice of the local electorate that backed the progressive prosecutor, by putting forward a policy that protects local immigrant community members from the disproportionate and unfair consequences of incarceration and removal.²⁹² This policy agenda will, in turn, influence other prosecutors to enact similar efforts around the United States and national immigration enforcement.

287. Heather K. Gerken, *The Supreme Court, 2009 Term: Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 8 (2010) (describing how institutions that constitute states and cities—such as juries, zoning commissions, local school boards, and locally elected prosecutors’ offices—have not yet been envisioned as playing important roles in our larger democratic system); Gerken, *supra* note 41 (stating the way in which local decisions often serve as a catalyst for national debates).

288. See Chacón, *supra* note 90, at 1334.

289. See *supra* Section I, Part B.

290. See *supra* Section III, Part B.

291. In fact, to fail to act in a way that takes into account an understanding of the impact of their decisions would be irresponsible and harmful to their duties to the electorate.

292. See, e.g., *Community Responses to Stop the Deportation Dragnet*, IMMIGRANT DEF. PROJECT (2017), <https://perma.cc/U7FQ-3SM6> (containing links to local, city, and state policies and organizations dedicated to protecting communities’ immigrants from deportation, including policies to prevent ICE arrests in courthouses in Santa Clara, CA and Kings County, WA; support for sentencing reform in NY, CA, WA and NV; and community-based organizations fighting back against ICE raids around the country).

IV. SETTING THE PROGRESSIVE PROSECUTOR'S IMMIGRATION AGENDA

A “robust immigration agenda” is a series of policies that anticipate, account for, and seek to prevent the wide range of immigration consequences that emerge from contact with the criminal legal system.²⁹³ This agenda should be rooted in “immigrant equality,” a justification for criminal justice policy advanced by Professor Ingrid Eagly.²⁹⁴ Under this justification, localities consider the realities of the modern criminal removal system to “insulate non-citizens from harsher forms of punishment, racial and ethnic profiling and other substantive and procedural distortions that immigration imposes on criminal cases involving non-citizens.”²⁹⁵

How exactly each prosecutor's office aims to tackle this may vary. These are local choices that are best made in consultation with key stakeholders, such as local immigrant communities, defense counsel, and other community leaders. Together, these stakeholders can think through how to incorporate an understanding of the on-the-ground realities of immigration enforcement into policies.²⁹⁶ But the agenda must be broad in scope. Below, I provide some guiding principles for agenda creation, followed by several concrete policy proposals that progressive prosecutors could consider adopting or modifying. In these policy proposals, I focus on areas of the criminal legal system where immigrants face the greatest potential harm. These proposals are meant as starting points to be built upon and developed by local actors and informed and driven by impacted communities.

A. *Scope and Guiding Principles*

1. *Scope of Agenda*

It is the duty of a chief prosecutor who identifies as “progressive” to adopt policies that embed mitigation of immigration consequences. All stages of prosecutorial work—charging practices, plea negotiations, sentencing, and post-conviction relief—must be included in these proposals.²⁹⁷ Because the federal law gives immense power to the local prosecutor in determining

293. While Washtenaw County Prosecuting Attorney's recent immigration policy directive fails to cover a number of the important areas of prosecutorial practice, it is a useful example of a written office-wide document/plan a prosecutor could adopt. It does provide a thorough accounting of tools line prosecutors might be able to use to mitigate against immigration consequences (e.g., striking harmful language from charging documents, etc.). The specificity is helpful for line attorneys to carry out the will of the chief prosecutor. Policy Directive 2021-12: Policy Regarding Immigration and Immigration-Adjacent Issues, WASHTEENAW CTY. OFF. OF THE PROSECUTING ATT'Y, at 6–7.

294. Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245, 245 (2016).

295. *Id.*

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

297. See Christie Thompson, *Prosecutors Are Quietly Helping Protect Immigrants from Trump*, VICE NEWS (May 18, 2017, 12:00 AM), <https://perma.cc/MM66-4G44>.

immigration outcomes, immigration concerns cannot simply be an afterthought or a separate agenda item. Rather, the office's approach to every stage of prosecution, from plea to post-conviction relief, must incorporate an understanding of potential immigration consequences.

Despite *Padilla's* focus on plea agreements, it is clear in its aftermath that plea negotiations are not the only significant moment where immigration consequences emerge.²⁹⁸ A criminal charge alone can lead to deportation even where later dismissed;²⁹⁹ sentencing decisions can have a profound impact on a non-citizen's ability to remain in the country; and,³⁰⁰ availability of post-conviction relief may determine if one is subject to mandatory detention and deportation.³⁰¹

Enacting clear policies that account for and incorporate risk mitigation will ensure that there are uniform policies that are most fair. This is critical because line prosecutors are those who carry out the agenda of the chief prosecutor. A uniform approach will minimize discretion in the hands of line prosecutors and ensure that prosecutors do not make decisions that could have devastating consequences. Having a robust and clear agenda that centers on the avoidance of immigration consequences in every aspect of prosecutorial work is the call of the progressive prosecutor.

2. *Guiding Principles: In Writing, Abolitionist Ethic, Flexibility*

The following guiding principles should be top of mind for the chief prosecutor contemplating agenda creation: policies should be written, prosecutors should be guided by an abolitionist ethic, and the agenda must be flexible. First, as a matter of course, policies should generally be formalized, adopted in writing, and made public.³⁰² Written policies limit individual discretion of line prosecutors and prevent deviation from the will of the chief prosecutor.³⁰³ To the extent that chief prosecutors are worried about tying the hands of individual prosecutors too tightly, chief prosecutors could adopt policies

298. See *supra* Sections I, II.

299. See *supra* Section I, Part B.

300. Deportable non-citizens with aggravated felony convictions, including certain convictions carrying a sentence of one year or longer, are generally subjected to mandatory deportation. *Aggravated Felonies: An Overview*, AM. IMMIGR. COUNCIL, 2-3 (2021), https://www.americanimmigrationcouncil.org/sites/default/files/research/aggravated_felonies_an_overview_0.pdf [archived at <https://perma.cc/S74C-NCF4>]. A sentence of 364 days rather than 365 days, for example, will avoid triggering certain aggravated felony grounds of removal. See, e.g., INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (2018).

301. *Post-Conviction Relief*, IMMIGR. LEGAL RES. CTR, <https://perma.cc/G42F-BLXN> (last visited Oct. 7, 2021); Andrew Moore, *Article: Criminal Deportation, Post-Conviction Relief and The Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 670 (2008) (“the issue of post-conviction relief can arise in other cases because the commission of a criminal offense can lead to other immigration consequences. Criminal violations can result in . . . mandatory detention, and the denial of discretionary relief from deportation. The implications of post-conviction relief are therefore broader than deportation . . .”).

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

303. See Don Stemen & Bruce Frederick, *Rules, Resources, and Relationships: Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1, 28–29 (2013).

that are presumptive,³⁰⁴ although ideally, policies should be as clear, detailed, and directive as possible. Any deviation from a policy could require supervisory approval. Additionally, written policies enhance transparency within the office and with the electorate, which helps build community trust.³⁰⁵ Increased transparency has been a foundational principle for the progressive prosecution movement, and this agenda should be no exception. Finally, a policy in writing can be easily shared with and adapted by other jurisdictions and can serve as models for reform efforts nationwide.³⁰⁶

Second, progressive prosecutors must think critically and intentionally about the nature of the reforms they adopt. They must ask the question: what ends do the reforms and policies serve?³⁰⁷ Prosecutors who want to meet their obligations to immigrants must be guided by an abolitionist ethic in policy formation described further below. Amongst those who identify as “progressive,” there has been increasing debate about two specific approaches to criminal law reform: liberal and abolitionist.³⁰⁸ The former refers to “reformist reforms” that seek to “better” the criminal legal system as it functions today (e.g., moving from incarceration to e-monitoring).³⁰⁹ Critics argue that these changes, ultimately, further entrench the system and its harms but also reinforce white supremacist and settler colonial ideologies.³¹⁰ In contrast, abolitionists suggest the adoption of “non-reformist reforms,”³¹¹ policies that serve and incrementally move towards the ultimate goal of demolishing an

304. In 2018, Philadelphia DA Larry Krasner released a memo to staff outlining new policies that aimed to “end mass incarcerations and bring balance back to sentencing.” King, *supra* note 212. The second sentence of the memo informed staff that “all policies are presumptive, not mandatory requirements.” *Id.*

305. See Jain, *supra* note 30, at 1234.

306. See *supra* Section III, Part A.

307. “The limit to any reform . . . is the system itself: reform tends to strengthen institutions, especially those geared to social control. . . .” Ruth Wilson Gilmore, *Globalisation and U.S. Prison Growth: From Military Keynesianism to Post-Keynesian Militarism*, 40 RACE & CLASS 2–3, 183 (1998–99); Ahmed, *supra* note 73, at 279–92 (discussing the merits of achieving decriminalization through prosecutorial nullification of broken windows offenses, using both a traditional liberal law reform framework and one rooted in an abolitionist ethic).

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

309. See Ruth Wilson Gilmore & James Kilgore, *The Case for Abolition*, MARSHALL PROJECT (June 19, 2019), <https://perma.cc/4XJG-7E6N> (describing reformist reforms as building gender-responsive jails or broadening the scope of parole and other forms of carceral control).

310. Ruth Wilson Gilmore, *Race, Prisons and War: Scenes from the History of U.S. Violence*, 45 SOCIALIST REG. 73, 82 (2009) (describing how “[r]eform, then as now, opened the door to expanding prison under the guise of social improvement”); see also Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1576 (2019) (“[R]eformist approaches fail to recognize that the very logics of the overlapping criminal justice and policing regimes *systemically* perpetuate racial, sexual, gender, colonial, and class violence through carceral power.”).

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

inherently racist and oppressive criminal system³¹² (e.g., defunding the police department and reinvesting those funds in community health services). Critics of abolition argue that there is a need to retain parts of the criminal legal system to address certain violent conduct.³¹³ Prosecutors must contend with these theories in crafting reforms and understand what ends each suggested policy serves.

Recently, impacted communities and advocates have loudly called for sweeping changes to the mass criminalization system.³¹⁴ Progressive prosecutors would be wise to pay attention to their demands. Sparked by the brutal police murder of George Floyd in summer 2020, massive uprisings erupted, and abolitionist demands, such as “defund the police,” have been taken up in mainstream policy debates.³¹⁵ For years, Black and Brown communities have been advocating for abolitionist policies, those that shrink rather than strengthen “the state’s capacity for violence”³¹⁶ and that promote reinvestment in education and social services to address root causes of harm and rebuild safe and vibrant communities.³¹⁷ Policymakers are reacting to these calls of action.³¹⁸ As a result of mass protests, some municipalities have promised unprecedented funding cuts to police and reallocation of funds to social services.³¹⁹

Impacted communities have begun calling for the abolition of prosecution as we know it too.³²⁰ Constituent-based organizations are increasingly engaged in “defunding election work” to educate community members about local candidates, such as sheriffs and prosecutors, and their great powers to

312. “An abolitionist ethic provides a constant reminder that “history lives in the present, in that white supremacy, settler colonialism and racial capitalism are inextricable from the origins, logic and practices of ‘criminal justice.’” Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159, 169 (2021) (citing Michael J. Coyle & Judah Schept, *Penal Abolition Praxis*, 26 CRITICAL CRIMINOLOGY 319, 319 (2018)). “Abolition requires that we change one thing: everything.” GILMORE, *supra* note 10.

313. Cf. Kelsey Mohamed and Andrew Neilson, *Should Prisons Be Abolished?*, NEW INTERNATIONALIST (Mar. 4, 2020), <https://perma.cc/THD2-5AV6> (debating whether or not prisons should be abolished, with Neilson arguing that there are some violent crimes that cannot be safely managed in the community).

314. Bill Keller, *What Do Abolitionists Really Want?*, MARSHALL PROJECT (June 13, 2019), <https://perma.cc/84LS-GZDG> (discussing how abolitionist ideas have moved into the mainstream in recent years).

315. See Sam Levin, *The Movement to Defund Police Has Won Historic Victories Across the US. What’s Next?*, GUARDIAN (Aug. 15, 2020), <https://perma.cc/84LS-GZDG>.

316. See Roberts, *supra* note 311, at 46.

317. Chicago organized to demand a participatory city budget in which the public has the power to defund the Chicago Police Department and reinvest those resources in Black futures by setting a living wage and by fully funding healthcare, social services, public schools, and sustainable economic development projects. See *Freedom to Thrive—Reimagining Safety and Security in Our Communities*, *supra* note 126.

318. E.g., N. Jamiyla Chisholm, *The Movement for Black Lives Introduces the BREATHE Act*, COLORLINES (July 7, 2020), <https://perma.cc/LB6W-KMX2> (describing how House Representatives Ayanna Pressley (D-Mass.) and Rashida Tlaib (D-Mich.) will bring the BREATHE Act to the Congressional floor).

319. Jemima McEvoy, *At Least 13 Cities Are Defunding Their Police Departments*, FORBES (Aug. 13, 2020), <https://perma.cc/E4JH-9BHE>.

320. See *Abolitionist Principles & Campaign Strategies for Prosecutor Organizing*, *supra* note 1.

shape the criminal legal system.³²¹ These campaigns have educated and activated voters to hold decision-makers accountable for the kinds of policies they might adopt once elected. Advocating for policies that move toward the goal of abolition and do not further entrench racialized harms has been central to mobilization efforts. Such calls for prosecutors to adopt an abolitionist ethic will likely deepen, and prosecutors who identify as “progressive” must grapple with them.

Although it may vary depending on local dynamics, many seeking the office of the chief prosecutor will need to engage with the debate between liberal and abolitionist approaches to reform as they consider their policy platform.³²² It must be emphasized that criminal arrest alone and prosecution for minor “quality of life” offenses can lead to devastating immigration consequences.³²³ Ending prosecutions as we know them today would certainly be the fastest way to stop the deportation pipeline and the dangerous intermingling of the criminal and immigration systems. Yet, immediately ending all prosecutions is unlikely. Abolitionists recognize that abolition will not occur tomorrow.³²⁴

However, prosecutors who proclaim to be progressive must contend with central questions raised by abolitionism—how and when the prosecutor should wield her power and what the scope of that power should be.³²⁵ These are especially critical when considering the devastating impacts prosecutorial policies may have on non-citizens. Prosecutors should utilize an abolitionist ethic by adopting policies that shrink the power of the prosecutor and move away from the carceral state.

321. *E.g.*, Dream Defenders, *A Webinar on the Power of Sheriffs in Florida*, ADVANCEMENT PROJECT (Aug. 10, 2020, 2:00 PM), <https://perma.cc/Z4RJ-H95P> (urging individuals to get involved in a local sheriff election in Florida, arguing the importance of encouraging officials to adopt policy reforms that are less harmful to communities and advance the abolitionist cause).

322. In 2019, Tiffany Cabán ran on a “progressive” platform that included closing Rikers, halting the construction of new jails, decriminalizing recreational marijuana use, ending cash bail and civil-asset forfeiture, reducing recidivism, prosecuting ICE, and seeking shorter sentences for felonies. Isabel Cristo, *Tiffany Cabán Wants to Transform What It Means to Be a DA*, THE NATION (June 13, 2019), <https://perma.cc/LVM9-ZMBE>. Although Cabán was narrowly beat by her opponent, Melinda Katz, other progressive candidates have succeeded in their DA races using similar platforms. Numerous candidates who won in November 2020 and are up for election in November 2021 have advanced similar agendas. *2020 Endorsements*, REAL JUST., <https://perma.cc/HR9C-HXQA> (last visited Aug. 23, 2020); Jane Wester, *Manhattan DA Candidates Tout Progressive Bona Fides in “Meet and Greet” Ahead of 2021 Election*, N.Y.L.J. (Aug. 19, 2020, 12:17 AM), <https://perma.cc/2TPU-AUUY>.

323. See *supra* Part I. Turnstile jumping convictions can lead to deportation for a number of immigrants, even green card holders who have lived her for decades. Max Rivlin-Nadler, *Yes, New Yorkers CAN Be Deported for Jumping A Turnstile*, VILLAGE VOICE (Feb. 27, 2017), <https://perma.cc/MZ98-JH4X>.

324. See Gilmore and Kilgore, *supra* note 309, at 45 (“We know we won’t bulldoze prisons and jails tomorrow, but as long as they continue to be advanced as the solution, all of the inequalities displaced to crime and punishment will persist. We’re in a long game.”).

325. Steven Zeidman, *Some Modest Proposals for a Progressive Prosecutor*, 5 UCLA CRIM. JUST. L. REV. 23, 26–51 (2021) (suggesting a prosecutor’s “progressiveness” should be measured by their willingness to surrender their immense power over the trial process and other prevailing prosecutorial practices).

Prosecutors should also be guided by an abolitionist approach in budgeting, agreeing to only adopt those policies that would allow for prosecutors to shrink their budget or, at a minimum, end up with a net-zero budget as a starting point. The key to abolition has been a commitment not to grow the carceral state but rather to encourage the divestment of resources from the criminal legal system into the investment into social and community needs.³²⁶ Many of the concrete proposals I suggest below are rooted in an abolitionist ethic with these considerations in mind. At times, I articulate specific components to demonstrate the kind of thinking I am suggesting prosecutors engage in when crafting policies.

The third guiding principle is an understanding that the immigration consequences stemming from criminal contacts are constantly changing.³²⁷ The substantive law and enforcement practices have rapidly shifted over the last two decades. The intersection of criminal and immigration law is one of the most complex facets of immigration practice today. This means that the agenda must be fluid and adaptable. At the helm of agenda creation, there must be experts closely following legal developments in the intersection of these areas.³²⁸ This requires one or more people whose responsibility is to craft, adapt, and reinvent the agenda over time *and* communicate and implement the new policies across the office.³²⁹ Notably, as described further below, in-house expertise should not be read to replace or decenter defense counsel's role in negotiating and seeking immigration-safe resolutions for their clients.

B. *The Agenda: Concrete Proposals*

The specifics of the immigration agenda might vary by jurisdiction, but below I provide concrete proposals that prosecutors can adopt or use to brainstorm ideas.³³⁰ The policies focus on the areas of the criminal legal system that are most dangerous for non-citizens, such as pretrial detention, plea negotiations, and sentencing. The proposals seek to avoid potential harms

326. See *Freedom to Thrive—Reimagining Safety and Security in Our Communities*, *supra* note 126, at 79–80 (highlighting current or prospective campaigns that seek to divest resources away from police and prisons towards communities and their development, which the report refers to as “the invest divest framework”).

327. See Walter E. Ewing, Daniel E. Martínez & Rubén G. Rumbaut, *The Criminalization of Immigration in the United States*, AM. IMMIGR. COUNCIL (July, 2015), <https://perma.cc/7GW7-MQQD> (describing how crimmigration policies are an “ever-evolving assortment of laws” and immigration-enforcement mechanisms designed to punish immigrants).

328. However, these “experts” must be individuals with a genuine interest in enacting proportionate outcomes for immigrants, not simply individuals who purport to understand “crimmigration” law. There is a great difference between the two.

329. See *supra* Section IV, Part A.

330. It was extremely helpful to consider some of the issues areas and policy proposals think tanks have suggested as a starting point for my thinking. See, e.g., Rose Cahn, *Model Prosecutor Policies & Practices on Immigration Issues*, IMMIGRANT LEGAL RES. CTR. (Nov. 21, 2018), <https://perma.cc/B546-8T64>.

and are consistent with many of the larger goals professed by the progressive prosecution movement.

1. *Create an Immigration Integrity Unit to Audit and Revise Policies and Remedy Past Harm*

I recommend progressive prosecutors create an internal immigration integrity unit (“IIU”). The IIU should begin by auditing policies across all areas of prosecutorial practice to assess the office’s current approach and impact on immigrant defendants. Additionally, the IIU needs to have sufficient freedom to revamp policies to bake in immigration harm reduction. Immigration should not be a siloed issue but rather inherently addressed in all policies. To be clear, this unit would be distinct from what several progressive prosecutors, like DA Gonzalez³³¹ or DA Boudin,³³² have created by hiring potentially one or two internal immigration attorneys to advise prosecutors across the office. The efforts by prosecutors like DA Gonzalez and DA Boudin are insufficient for two key reasons. First, the attorneys have generally been junior and do not have the decision-making authority needed to do the work required. This is a significant limitation because hierarchy and rank are of utmost importance to exert influence in most DA offices.³³³ Second, the immigration attorneys’ work has mostly been limited to advising on plea negotiations.³³⁴ In contrast, the IIU should be made up of high-level experts in the intersection of immigration and criminal law. But knowledge-based expertise is not enough. The members of the IIU must be committed to the chief prosecutor’s vision of enacting fair and proportionate measures for immigrants and not see their roles as limited to only advising when consequences might emerge.³³⁵

The IIU must be adequately resourced.³³⁶ Nevertheless, the IIU would most likely require budgetary investment at the beginning. However, once the audit is complete and new policies are enacted, the unit could reduce in

331. Press Release, Brooklyn Dist. Att’y, Acting Brooklyn District Attorney Eric Gonzalez Announces New Policy Regarding Handling of Cases against Non-Citizen Defendants (Apr. 24, 2017), <https://perma.cc/79TM-FCEF> (describing DA’s aim to prevent collateral consequences of convictions by being aware of immigration status of defendants and offering appropriate plea deals, and announcing hiring of two immigration attorneys to train staff and advise on offers).

332. Michael Barba, *SF Public Defender Running for DA Calls for Unit to Protect Immigrants from Deportation*, S.F. EXAMINER (June 11, 2019), <https://perma.cc/V36T-6FL3>.

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

334. See, e.g., King, *supra* note 212. (Krasner’s memo ordering prosecutors to make plea offers “below the bottom end of the mitigated range of the PA Sentencing Guidelines for most crimes.”); Christie Thompson, *Prosecutors Are Quietly Helping Protect Immigrants from Trump*, VICE (May 18, 2017), <https://perma.cc/43UF-E6K7> (suggesting areas where prosecutors should consider immigration issues but without detailed plans to address these concerns).

335. There is a great difference between having knowledge of potential consequences and being committed to crafting creative solutions to mitigate them.

336. As discussed *supra* Section IV, Part A, while funding is often scarce, if the DA were to enact some of the other measures described hereto, they would be able to reinvest some funds to this kind of unit in furtherance of their mission.

size, although it would need to maintain an ability to stay updated and react to everchanging crimmigration developments. Further, several of the policies suggested below would lead to budgetary savings due to a great reduction in the number of cases prosecuted, from the expansion of categorical declination policies and pre-arrest diversion (which would also lead to a reduction in office staffing). Some of the savings could initially go to support the creation of this unit, at least resulting in a net-zero budget at first, if not an overall reduction in budget.

Notably, the existence of an IIU or some immigration knowledge in the DA's office should not replace the defense counsel's appropriate role to drive and seek immigration-safe resolutions for their clients. It is the defense counsel's constitutional obligation—most often done in consultation with immigration counsel—to put forth and pursue the best resolution for a particular immigrant client, given the individualized circumstances.³³⁷ Thus, it would be inappropriate for the prosecutor's in-house expert to seek to supplant that judgment in a specific case. Instead, the work of an IIU should be tailored to shaping larger office-wide policies and practices. To the extent the members of the IIU are engaged in work relating to the resolution of specific cases or are asked to provide guidance on a specific matter, its members should be deferential to the defense counsel's recommendations on a specific matter given the unique responsibility and relationship the defense counsel has under *Padilla*. Further, given that prosecutors also have a duty to avoid immigration consequences,³³⁸ such deference is warranted.

Immigration integrity units, much like conviction integrity units,³³⁹ should be a centerpiece of a progressive prosecutor's office. An IIU would symbolically and functionally recognize the damage that has been done to immigrants in the past due to insufficient attention to prosecutorial policies that caused harm to non-citizens. Much like a conviction integrity unit, the IIU would not only be tasked with identifying the criminal/immigration overlap but would also look for ways to *remedy these failings*. For instance, an IIU can ensure that immigration concerns are a central issue that will be accounted for in all prosecutorial processes. The IIU can also do the necessary but painstaking work of figuring out exactly how to achieve this. Additionally, the IIU can be tasked with building relationships with and listening to impacted immigrant communities and incorporating their suggestions into these practices.³⁴⁰ Most importantly, there should be high-ranking individuals in the unit who have the authority to suggest policy modifications across the office that will be taken seriously. That is critical for the IIU's

337. See *Padilla*, 559 U.S. at 369, 374.

338. See *supra* Section III, Part A.

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

340. Claire Sasko, *DA Larry Krasner Hires Staffer to Protect Immigrants' Rights*, PHILA. MAG. (Jan. 25, 2018), <https://perma.cc/76ZQ-88NX>.

efficacy and for this agenda to take hold in an office historically rooted in bureaucracy and resistant to change.³⁴¹

The rest of the proposals below are policies that might emerge from the IIU's work. They provide concrete examples of how policies can incorporate immigration consequence mitigation into their framing.

2. *Expanded Use of Transparent Declination Policies and Prosecutorial Nullification to Avoid Unfair Application of the Law*

The use of transparent declination policies—formally refusing to bring charges—is of utmost importance given today's immigration landscape.³⁴² Prosecutors influence deportation based on who they choose to charge criminally.³⁴³ That is, prosecutors have unfettered discretion in charging decisions after an arrest is made, and drafting the language contained in the charging documents is their task alone.³⁴⁴ This is significant because charging alone can have unintended consequences,³⁴⁵ especially given the return to Secure Communities by the Trump administration in 2017.³⁴⁶

Given these concerns, prosecutors should consider the expansive adoption of categorical declination policies for specific subsets of offenses or for certain groups of people, like immigrants who have resided in the United States for five years or who are primary caretakers of children. These categories could vary depending on local priorities. In fact, progressive prosecutors already utilize declination policies, particularly in the context of certain classes of low-level misdemeanors.³⁴⁷

Prosecutorial nullification, more broadly, is the process by which a prosecutor “declines prosecution because of a disagreement with that law or because of the belief that the application of that law to a particular defendant or in a particular context would be unwise or unfair.”³⁴⁸ Nullification's

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

342. See Ahmed, *supra* note 73, at 240, 243 (describing the #nycdontprosecute campaign requesting prosecutors exercise nullification powers over certain misdemeanors to prevent detection of immigrants vulnerable to removal, especially in light of Trump's executive order).

343. Lee, *supra* note 19, at 557; Chacón, *supra* note 90, at 1380 (deciding whether or not to bring charges impacts immigration enforcement directly).

344. Paul T. Crane, Charging on the Margin, 57 WM. & MARY L. REV. 775, 798–99 (2016); Angela J. Davis, *The Progressive Prosecutor: An Imperative for Criminal Justice Reform*, 87 FORDHAM L. REV. 8, 9 (2018) (discussing how prosecutors assess which, if any, crimes have been demonstrated by probable cause, a much lower standard than the reasonable doubt standard the state must prove to secure conviction).

345. See Crane, *supra* note 344; *Addressing Immigration Issues*, FAIR & JUST PROSECUTION (2017), <https://perma.cc/SK9L-B495>.

346. Exec. Order No. 13768, 82 Fed. Reg. 8,799, 8,801 (Jan. 30, 2017); see also *supra* Section I, Part B.

347. See, e.g., Charges to Be Declined, Rachael Rollins for Suffolk Da, <https://perma.cc/LN5D-MVWJ> (last visited Sept. 21, 2021) (proposing non-prosecution of certain criminal laws, chiefly non-violent misdemeanors).

348. Roger A. Fairfax Jr., *Prosecutorial Nullification*, 52 B.C.L. REV. 1243, 1252 (2011). There has been exploration of the likelihood of success of legal challenges to categorical non-prosecution. John E.

definition itself suggests prosecutors consider the wisdom and fairness of the application of a criminal charge in a *specific* context. The risk of immigration consequences is the very kind of context under which prosecutors might utilize this tool. Indeed, the ABA's professional guidelines suggest prosecutors consider collateral consequences and their proportionality as part of charging and dismissal decisions.³⁴⁹ Prosecutors, then, should carefully consider the consequences of charging individuals, given that this alone can lead to ICE detection and deportation, especially for undocumented individuals.³⁵⁰

Knowing potential deportation can ensue from criminal charges alone puts into relief the wisdom of pursuing charges for a host of criminal offenses. This could include both low-level and more serious offenses because deportation can arise simply due to arrest, regardless of the nature of the charge.³⁵¹

Prosecutorial nullification then supports selecting specific statutes and declining to prosecute those offenses across the board, much like prosecutors have chosen to do in the context of drug offenses or other conduct they have determined should not lead to criminal punishment.³⁵² This calculation follows where a prosecutor does not believe that disproportionate immigration consequences should result from a criminal charge. This justification need not only be applied in the case of an immigrant defendant but can form the

Foster, *Charges to be Declined: Legal Challenges and Policy Debates Surrounding Non-Prosecution Initiatives in Massachusetts*, 60 B.C.L. REV. 2511 (2019) (exploring primarily whether non-prosecution unconstitutionally violates the separation of powers).

349. CRIM. JUST. STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4 (AM. BAR ASS'N 2017) (identifying as a factor to consider in pursuing or dismissing criminal charges, "(vi) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender.").

350. In some jurisdictions, if a locality shares fingerprint data with ICE after arrest but before criminal charge, prosecutorial nullification may not be sufficient to ensure an individual won't be detected. Nevertheless, prosecutorial nullification may be useful because if someone is released from police custody without charge, they may be released without being turned over to ICE depending on the speed of the detainer request. Moreover, some jurisdictions may have policies limiting police cooperation with ICE. For example, the NYPD is prohibited from complying with most ICE detainer request. *See, e.g.*, N. Y.C., N.Y., ADMIN. CODE tit. 14, ch. 1, § 14-154 (2017) (disallowing compliance unless there is a judicial warrant and the individual "poses a significant current danger"). Progressive prosecutors could encourage local legislators to adopt such laws and can take direct action to stop fingerprint data sharing in the first place. Claire Sasko, *Kenney Says City Will End ICE Data-Sharing Agreement*, PHILA. MAG. (July 27, 2018), <https://perma.cc/BPA5-MJGB> (discussing Larry Krasner's vote to end an agreement to share initial arrest data with ICE which it used to arrest non-citizens).

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

352. This is analogous to DAs declaring they will not seek the death penalty. *See* Robert Salonga, *Santa Clara County DA Abandoning Death Penalty Pursuit in All Cases*, MERCURY NEWS (July 22, 2020, 7:50 AM), <https://perma.cc/H4GB-HPWN>.

basis of a policy applied to *all* defendants.³⁵³ A blanket declination policy would be ideal because it does not leave room for some individuals who would have benefited from nullification to fall through the cracks.

Alternatively, prosecutors could also decide to use nullification on a case-by-case basis, where they learn a particular defendant would face particularized immigration consequences from the criminal charge and thereby decide not to prosecute. Prosecutors constantly make judgment calls in terms of when to bring charges and how, and it should be no different when considering immigration ramifications. Again, in some instances, this individualized approach could work, but given the difficulty in and questionable wisdom of prosecutors trying to ascertain citizenship status³⁵⁴ in the short time between arrest and arraignment for every defendant, adopting blanket declination policies for certain categories of statutes seems the wiser approach.³⁵⁵

Lastly, prosecutorial nullification also has a role to play in plea negotiations. Prosecutors could consider imposing no sanctions at all, even where the penalty may be justified because to do so would be “unfair” in the case of immigrant defendants.³⁵⁶ Nullification in the plea-bargaining process is a tool district attorneys could expand upon and encourage the use of even after charges have been lodged. Prosecutors could choose to encourage this use of nullification on a class-wide basis (e.g., in the case of all immigrant defendants) or potentially specify in a policy directive under which circumstances nullification might be appropriate in the case of a charged immigrant defendant (e.g., upon learning they will face removal proceedings if convicted).

3. *Eliminate the Practice of Overcharging*

The common practice of overcharging cannot be ignored in assessing the dangers faced by immigrants accused of a crime. Prosecutors commonly overcharge—bringing more charges than they can prove at trial—in order to

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

354. This is not a simple inquiry. Figuring out an individual's immigration status often requires specialized knowledge of immigration law and closeness to the facts of the case. Given complex derivative citizenship laws and other complex immigration provisions individuals may be citizens or lawful permanent residents and not know it. See Eamonn Hart, Comment, *Citizens All Along: Derivative Citizenship, Unlawful Entry, and the Former Immigration and Nationality Act*, 82 U. CHI. L. REV. 2119 (2015). Furthermore, prosecutors do not share attorney-client relationships with those they prosecute and seeking to engage in this kind of analysis raises a host of ethical and legal concerns. Altman, *supra* note 232, at 58. It is wisest not to engage in this kind of inquiry given these concerns. A uniform approach across the board would be simpler to enforce and less risky.

355. Although not exactly nullification, progressive prosecutors could also consider expunging old arrest warrants, minimizing the risk of non-citizens being arrested on old warrants being exposed to deportation today. *Addressing Immigration Issues*, *supra* note 346 (describing Brooklyn (NY) Acting DA Eric Gonzalez's lead; “his ‘Begin Again’ program is reported to have cleared over 2,100 arrest warrants without a single arrest.”).

356. See Jain, *supra* note 30, at 1217.

give themselves an advantage at the plea-bargaining stage.³⁵⁷ The majority of cases that begin as felonies resolve in felonies.³⁵⁸ This reality, taken together with the known harsh immigration consequences of criminal convictions, especially for felonies, should incentivize progressive prosecutors to issue written guidance discouraging overcharging.³⁵⁹ Chief prosecutors could urge prosecutors to only bring charges that would likely be proven at trial. With that, attorneys would err on the side of caution and likely bring misdemeanor charges over felonies that are easier to prove at trial. Doing so would also assuage concerns about the uneven playing field in plea negotiations.

4. *Require Avoidance of Immigration Consequences in Plea Negotiations, Using Written Guidance*

Progressive prosecutors today have been most active in addressing immigration concerns in plea negotiations.³⁶⁰ The strongest policies have been clearly articulated in writing³⁶¹ as an effort to encourage the consistent and transparent application of their desired approach to plea negotiations by all line attorneys in the office. Santa Clara DA Jeffrey Rosen was the first chief prosecutor to send a written memo to line attorneys advising them on the approach to plea negotiations on the heels of *Padilla*.³⁶² Other DAs later followed suit.³⁶³ While most of these policies encourage prosecutors to consider mitigation against immigration consequences in the case of minor criminal offenses, some policies suggest that this kind of mitigation is not recommended in the case of a felony or other “serious” offenses.³⁶⁴ As discussed in

357. Davis, *supra* note 7, at 5 (explaining the standard to bring a charge—demonstrating charge met by probable cause—is so much lower than the reasonable doubt standard required for proof of guilt at trial); see also Irene O. Joe, *Regulating Mass Prosecution*, 53 U.C. DAVIS L. REV. 1175, 1237 (2020) (describing the ethical concerns raised by overcharging).

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

359. Chicago Appleseed Fund for Justice has worked alongside Chicago DA Foxx since her election in November 2016 to hold her to her campaign promising of ending overcharging by prosecutors. The group, along with other community partners, published a report on her first year in office, evaluating her progress on ending overcharging practices, among her other goals. The report found Foxx’s office appeared to be taking active steps to ensure all charging decisions are consistent with the standards recommended by the ABA and the NDAA and made further recommendations for Foxx to get closer to her goal of ending overcharging. *In Pursuit of Justice for All—An Evaluation of Kim Foxx’s First Year in Office*, RECLAIM CHI., THE PEOPLE’S LOBBY & CHI. APPLSEED FUND FOR JUST. 11 (2017), <https://perma.cc/Y4JN-DY3D>.

360. See generally *supra* Section II, Part A.

361. For the reasons stated above, *supra* Section III, Part B.

362. Mem. Re Collateral Consequences from Jeff Rosen, Cty. Santa Clara Office Dist. Att’y, to Fellow Prosecutors (Sept. 14, 2011).

363. Cf. *Acting Brooklyn District Attorney Eric Gonzalez Announces New Policy Regarding Handling of Cases Against Non-Citizen Defendants*, BROOKLYN DIST. ATT’Y’S OFFICE (Apr. 24, 2017), <https://perma.cc/4KM8-MX26> (announcing in 2017 that two newly-hired immigration attorneys would train staff and advise on plea offers).

364. E.g., *supra* note 362, at 55. This was before California enacted a statewide law in 2016 mandating that prosecutors consider the avoidance of adverse immigration consequences of a conviction. See Kendra Sena, *State Criminal Law and Immigration: How State Criminal Systems Can Cause*

more detail below in the proportionate sentencing section,³⁶⁵ progressive prosecutors should challenge themselves to think through whether this is the correct approach. Indeed, fairness and proportionately concerns are *central* to progressive prosecution.³⁶⁶ That is, progressive prosecutors must consider whether deportation is *ever* a valid punishment for criminal conduct or if mitigation should at least be considered in all scenarios. Under the current criminal removal system, local prosecutors hold the power to make decisions that directly lead to deportation. With this power comes great responsibility—to carefully think through whether that power should be used to pursue criminal penalties generally and deportation specifically.

Written plea policies, then, might adopt stronger language *requiring* consideration of avoidance of deportation in all cases not limited by the severity of the charge.³⁶⁷ For instance, the California legislature requires prosecutors to “consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution.”³⁶⁸ Notably, it does not limit this avoidance principle to low-level offenses. A past NDAA president, Robert M.A. Johnson, has said in some cases, the only palatable plea is one that avoids collateral consequences.³⁶⁹ Progressive prosecutors might use language along the lines of the California statute, understanding that requiring attorneys to “consider the avoidance of adverse immigration consequences”³⁷⁰ does not mandate an outcome but encourages prosecutors to try to avoid deportation in all cases where it is *just*, irrespective of the level of charge.

5. *Consider Proportionate Sentencing as the Principal Factor in Sentencing Recommendations*

Progressive prosecutors should be guided by proportionality concerns when considering supposed “collateral” consequences.³⁷¹ These resultant harms must be conceived as part and parcel of the criminal punishment.³⁷²

Deportations, or Limit Them, ALB. L. SCH. GOV'T L. CTR. (May 6, 2019), <https://perma.cc/WZ86-CZME>.

365. *Infra* Section IV, Part D.

366. *See* Davis, *supra* note 7, at 22.

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

368. CAL. PENAL CODE § 1016.3 (2016) (codifying and expanding upon the language of Padilla in cross-reference section CAL. PENAL CODE § 1016.2).

369. *See supra* note 7, at 53.

370. *See supra* note 368.

371. Progressive prosecutors question the use of harsh penalties that have, by and large, dominated the criminal legal system for decades (such as the presumption of incarceration, three strike laws, etc.), acting to combat mass incarceration and moving away from overreliance on excessively harsh penalties. *E.g.*, Erin Durkin, *Brooklyn DA Gonzalez Pushes for Law to Review and Reduce Long-Term Sentences*, POLITICO (Oct. 23, 2019), <https://perma.cc/8GTW-JXC9>. At its core, they aim to challenge whether such harsh penalties are truly proportionate to the crimes prosecuted. They should do the same where so-called collateral consequences are at stake.

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

The proportionality of punishment must then include an assessment of “collateral” consequences as part of the criminal sentence itself. This proportionality should be the principal factor in sentencing. *Padilla* reinforced that deportation is so closely related to the criminal penalty that it is subsumed as part of the punishment.³⁷³ For many immigrant defendants, the subsequent immigration harm is more significant than the criminal penalty.³⁷⁴ Progressive prosecutors should recommend sentences that tend to avoid harsh adverse consequences like exile.³⁷⁵

Consideration of proportionality is not only at issue in cases where a conviction will clearly lead to deportation. It is also relevant where a conviction might lead to other adverse immigration penalties, such as rendering an individual ineligible for relief (e.g., DACA). The difference of a day in the sentence can destroy the availability of the petty offense exception, making a non-citizen ineligible for a green card.³⁷⁶ Even a suspended sentence could destroy someone’s ability to receive asylum.³⁷⁷ Thus, accounting for the resultant harm that would render individuals ineligible for status, and in many cases ensure they remain or become undocumented, is equally critical for proportionality.

Where there are immigration implications, the value of the sentence in a case necessarily includes the immigration consequences as part of the calculation of the sentence. The prosecutor and all other parties must always ask if this cumulative sentence is indeed proportionate to the crime.³⁷⁸ For a progressive prosecutor, the sentence is not limited to the narrow understanding of criminal penalties that arise under criminal and criminal procedure law.³⁷⁹ Dan Satterberg, King County Prosecutor, said with respect to approaching prosecution of immigrant defendants:

373. *Padilla*, 559 U.S. at 368; see Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1451–59 (2011).

374. See Roberts, *supra* note 372, at 201–02.

375. For an interesting discussion of whether deportation on the basis of criminal conviction is subject to constitutional proportionality challenges in their own right, see Michael J. Wishnie, *Proportionality in Immigration Law: Does the Punishment Fit the Crime in Immigration Court?*, IMMIGR. POLICY CTR. (2012), <https://perma.cc/HA7K-L8VY> (“[A]ny contention that removal due to a criminal conviction is not punitive [and thus clearly subject to proportionality challenges] thus fails in the face of *Padilla*.”).

376. Kathy Brady, *All Those Rules About Crimes Involving Moral Turpitude*, IMMIGRANT LEGAL RES. CTR. 16 (June 2021), <https://perma.cc/JDD7-V3EN>.

377. A felony or misdemeanor that qualifies as an aggravated felony is automatically considered a “particularly serious crime,” barring asylum eligibility. See 8 U.S.C. § 1158(b)(2)(B)(i). Several aggravated felony offenses require a sentence of imprisonment of at least one year or more, such as a “crime of violence,” codified at 8 U.S.C. § 1101(a)(43)(F). Significantly, under 8 U.S.C. § 1101(a)(48)(B), “sentence” includes “the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.”

378. See Roberts, *supra* note 372, at 191.

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

[t]here's certainly a line of argument that says, 'Nope, we're not going to consider all your individual circumstances, we want to treat everybody the same. But more and more, my eyes are open that treating people the same means that there isn't a life sentence of deportation that might accompany that conviction.'³⁸⁰

Robert M.A. Johnson, former NDAA president, emphasized: “[a]t times, the collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system without disproportionate collateral consequences.”³⁸¹

Where there are immigration consequences in addition to the criminal sanctions that all people with convictions experience, it will be more difficult to justify additional consequences as proportionate to the crime. Progressive prosecutors who promise to center concerns of fairness and equality should be wary of pursuing penalties that will undeniably lead to much harsher results for those who happen to be born in another country.³⁸²

Another way to address proportionality concerns might be for chief prosecutors to require line attorneys to write internal sentence justification memos in the case of every immigrant defendant that lay out the full extent of the punishment imposed, including specific immigration consequences. Such a memo could require supervisory approval for the sentence recommendation in every case. Supervisors with training in the complexities of the resultant immigration consequences of criminal contacts, such as members of the IIU, would be best positioned to review and sign off on these recommendations. As an example of such a practice, Philadelphia DA Krasner requires prosecutors to detail, on the record, the costs associated with every sentence the court will impose to ensure the true costs and scale of the sentence imposed is clear.³⁸³ DA Krasner created this directive as an effort to reduce overcriminalization and mass incarceration.³⁸⁴ Requiring prosecutors to similarly assess the true cost of a sentence by taking into consideration the particular “immigration cost” would achieve a similar result—reduce over-incarceration and overcriminalization of Black and Brown communities. This would ensure all

380. *Addressing Immigration Issues*, *supra* note 345.

381. Robert M.A. Johnson, *Collateral Consequences*, 16 CRIM. JUST. 32, 33 (2001).

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

383. Larry Krasner, *New Policies Announced February 15, 2018*, PHILA. OFF. OF DIST. ATT’Y, (Feb. 15, 2018), <https://perma.cc/A64V-M6LX>; Bobby Allyn, *Philadelphia’s New DA Wants Prosecutors to Talk Cost of Incarceration While in Court*, NPR, (Mar. 31, 2018), <https://perma.cc/GB5J-8CGK>.

384. See Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits—of His Office*, N.Y. TIMES (Oct. 30, 2018), <https://perma.cc/NF9Q-6K96>.

line district attorneys contemplate the worth of a crime before recommending a sentence.³⁸⁵ Additionally, requiring internal supervisory approval before suggesting a sentence in the case of an immigrant defendant would ensure consistency, transparency, and accountability within and outside the office. Written records could also provide the prosecutors' office with valuable data about trends and biases within their own offices to enact less harmful policies.

6. *Increase Accessibility to Diversion Opportunities, Such as Alternatives to Incarceration*

The progressive prosecution movement largely rejects the presumption of incarceration and embraces a presumption of alternatives to incarceration as a means to resolving criminal matters.³⁸⁶ This has commonly been achieved through two approaches—(1) growing specialized problem-solving courts³⁸⁷ and (2) offering programming, such as mental health or drug treatment,³⁸⁸ as a sentence to resolve cases arising in traditional criminal courts. Surprisingly, few progressive prosecutors ensure that immigrant defendants can safely participate in the range of alternatives to incarceration programs offered.³⁸⁹

Participation in such programs often requires defendants to plead guilty or enter a “no contest” plea before entering the program.³⁹⁰ Upon completion of the program, the case is often dismissed under state law.³⁹¹ However, under federal immigration law, an upfront guilty or “no contest” plea constitutes a “conviction” and could carry immigration consequences, rendering someone deportable or ineligible for a green card.³⁹² This necessitates policies that allow non-citizens to access problem-solving courts and other alternatives to

385. COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS § 19-2.4(a) (AM. BAR. ASS'N 3d ed. 2004) (indicating that sentencing courts ought to consider “applicable collateral sanctions in determining an offender’s overall sentence” and supporting the idea that the prosecutor should also be suggesting sentencing that take into account collateral consequences when recommending sentences).

386. See *Promising Practices in Prosecutor-Led Diversion*, FAIR & JUST PROSECUTION (2017), <https://perma.cc/MG82-RDD3>.

387. Specialized courts have been greatly criticized for continuing a punitive approach towards social problems rather than a health-based approach. See, e.g., DRUG POL’Y ALL., *supra* note 195.

388. See, e.g., *Improving Justice System Responses to Individuals with Mental Illness*, FAIR & JUST PROSECUTION (July 2018), <https://perma.cc/N566-ZQY5> (examples of mental health programs); *Harm Reduction Responses to Drug Use*, FAIR & JUST PROSECUTION (Aug. 2019), <https://perma.cc/5QHL-D3L8> (examples of drug treatment programs, from more punitive to less).

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

390. Philadelphia’s prostitution diversion, first time non-violent and drug felonies, other drug offenses and some misdemeanors require “no contest” pleas before entry into the program. *Diversion Unit*, DIST. ATT’Y, <https://perma.cc/A5AP-G722> (last visited Aug. 28, 2020).

391. See, e.g., *Pre-Trial Diversion*, TRAVISCOUNTYTX.Gov, <https://perma.cc/LC6A-DY77> (last visited Oct. 7, 2021).

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

incarceration programs.³⁹³ With this in mind, today some jurisdictions permit individuals to participate in diversion programs without requiring defendants to plead guilty upfront.³⁹⁴ Upon program completion, these cases are then dismissed.³⁹⁵ The easiest way to ensure fairness would be for prosecutors to offer pre-plea diversion resolutions across the board, for citizens and non-citizens alike.

Permitting individuals to participate in these programs without dangling a prior plea admission over their heads is consistent with self-described progressive prosecutors' broader goals of moving away from retribution. Encouraging broad participation in programs to resolve matters is "rehabilitative" and "restorative" at its core. However, this reform maintains court oversight over resolution,³⁹⁶ continuing to entrench punitive punishment.³⁹⁷

Progressive prosecutors could enact a policy that specifically allows non-citizens to avoid upfront pleas due to the serious concerns regarding the INA's definition of conviction.³⁹⁸ However, adopting a policy that applies equally to all and that is not limited to immigrants would be advisable. This policy would be much easier to administer and ensures that all non-citizens would benefit from it and no one who should benefit falls through the cracks.³⁹⁹ Deferred prosecution could also be utilized. Moreover, progressive

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

394. Some states have enacted legislation to permit pre-plea diversion in certain cases. *Cf.* A.B. 208, 18 Reg. Sess. (Cal. 2017); *Addressing Immigration Issues*, *supra* note 346 (including examples of pre-trial diversion programs in Cook County, Illinois, Seattle, and Washington, with California having proposed a bill that allows individuals to participate in a treatment program before entering a plea). The California bill was passed after FJP published its report.

395. *Pre-Trial Diversion*, *supra* note 391.

396. Most programs, even if run by outside agencies, require regular check-ins with the court for status updates. Generally, where an individual fails to comply with program requirements, they can face criminal sanctions by the court. *E.g.*, *Brooklyn Mental Health Court*, CTR. CT. INNOVATION, <https://perma.cc/KS48-BNTN> (last visited Aug. 30, 2020) (every participant is required to return to court regularly to meet with case managers and appear before the judge to report on progress. Defendants who comply with all treatment mandates have their charges dismissed or reduced).

397. Prosecutors must deeply consider whether certain matters require court involvement at all let alone ongoing court supervision. Embracing the goals of rehabilitation and restoration might naturally lead a prosecutor to support the expansion of pre-arrest diversion policies, seeking to resolve certain social problems that are treated as "criminal" today wholly outside of the criminal legal system, described in greater detail below in the following section.

398. The program could be similar to San Francisco's diversion program available for primary parents of minor children who can earn a dismissal through a rigorous diversion program that includes parenting classes. *San Francisco DA Chesa Boudin Announces Primary Caregiver Diversion Program*, CITY & CTY S.F. (Feb. 10, 2020), <https://perma.cc/CB29-5JML> (aiming to keep children united with their parents and end a generational cycle of incarceration).

399. Many non-citizens are uncomfortable talking about their immigration status. *See* Rose Cuisson Villazor, *The Undocumented Closet*, 92 N.C.L. REV. 1, 35–37 (2013). Given the complexities of immigration law, some non-citizens might not even know their own status. *See* Kari E. Hong, *Removing Citizens: Parenthood, Immigration Courts, and Derivative Citizenship*, 28 GEO. IMMIGR. L.J. 277, 281–82 (2015). Thus, it is advisable and more equitable to devise a universal policy that will impact non-citizens and

prosecutors can support legislative efforts to permit pre-plea diversion if such a statute does not exist in their jurisdiction.⁴⁰⁰

Progressive prosecutors, however, cannot stop there. There are ever-increasing critiques of “problem-solving courts”⁴⁰¹ and alternatives to incarceration that remain ultimately supervised by the courts.⁴⁰² If prosecutors are pursuing cases that they truly believe are rooted in mental health concerns or other social problems that can be resolved through treatment and social services, it begs the question of whether the criminal legal system is the proper venue to resolve the matter in the first place. Keeping these kinds of cases within the court system, even in “problem-solving” courts, maintains a punitive approach to social problems by holding the threat of incarceration over individuals while they engage in programming, regardless of whether upfront pleas are required. In such cases, compliance becomes coercive, and the programs reinforce the carceral paradigm rather than combat it. Further, the efficacy of this approach to address underlying causes of crime, such as addiction, has been greatly debated, and progressive prosecutors would be well-advised to contend with these critiques⁴⁰³ and explore resolutions outside of the legal system.

7. *Expanded Use of Pre-Arrest Diversion*

Progressive prosecutors who are serious about their commitment to combat incarceration and criminalization and their disparate racialized results naturally question whether the criminal legal system is in the best position to address certain social problems that undergird criminal activity. These prosecutors should support creating systems that allow for certain matters to be resolved outside of the criminal legal system. This requires prosecutors to engage in the difficult but necessary abolitionist task of reducing their own powers⁴⁰⁴ to allow for certain issues to resolve outside of their purview. Shrinkage of power moves closer towards another abolitionist goal—encouraging community resolution of wrongdoing. Yet, abolitionists make clear that this alone is insufficient to address root causes of crime; rather, there

citizens the same. Prosecutors should not be afraid to adopt policies that are designed to protect immigrants as they have wide latitude in their powers to enforce the laws as they see fit.

400. See, e.g., A.B. 208, 18 Reg. Sess. (Cal. 2017).

401. See DRUG POL’Y ALL., *supra* note 195 (describing how drug courts have not led cost savings, reduced incarceration, or improved public safety, and how they have made the criminal justice system more punitive toward addiction).

402. See Chaz Arnett, *From Decarceration to E-carceration*, 41 CARDOZO L. REV. 641, 692 (2019) (describing “how the use of surveillance technology acts to further social stratification and marginalization. That in a move from decarceration to e-carceration, there is the risk of producing a subgroup of surveillees who are increasingly divorced from the civic life of their community . . .”).

403. See Note, *The Paradox of “Progressive Prosecution,”* 132 HARV. L. REV. 748 (2018). In 2019, 15,990 noncitizens were deported for the manufacturing, distribution, sale, or possession of illegal drugs. Mike Guo, *Immigration Enforcement Actions*, DEP’T HOMELAND SEC.: OFF. OF IMMIGR. STATISTICS, 11, tbl. 8 (2019) <https://perma.cc/F4J6-R3RG> (constituting 10.3% of all crime-based removals, the highest number of any criminal category).

404. Steven Zeidman, *Some Modest Proposals for a Progressive Prosecutor*, 5 UCLA CRIM. JUST. L. REV. 23, 26–52 (2021).

must be a divestment of resources from the criminal legal system into community services like education and health care in order to ensure community safety.⁴⁰⁵ While it is surely difficult for anyone to reduce their own power, prosecutors should seriously contend with these questions and calls. This reckoning is important to meet some of the proclaimed tenets of the progressive prosecution movement, like decriminalization and framing of the underlying causes of crime as rooted in poverty and structural inequality.

Of course, prosecutors alone do not control whether matters will be resolved outside the criminal legal system. One important reason for this is that prosecutors only control whether to bring charges in court but do not control arrest decisions.⁴⁰⁶ Nevertheless, a progressive prosecutor could take steps with police and legislators towards moving certain matters outside of the criminal legal system. However, without changing the parameters of permissible arrests and police conduct, there could continue to be arrests for conduct that the prosecutors believe qualify for alternative resolution or dismissal.⁴⁰⁷ Even if prosecutors choose to dismiss charges altogether, this does not negate the host of harms attendant to arrest. One being ICE detention, which can occur upon arrest and fingerprinting alone.⁴⁰⁸

Due to this risk, progressive prosecutors should seriously consider supporting and expanding pre-arrest diversion efforts, especially for issues they agree are rooted in social problems that should not be dealt with criminally. Ensuring certain matters are never brought to court in the first place would address the concerns raised by continued court oversight discussed herein. It would also eliminate the innumerable harms associated with a criminal arrest.⁴⁰⁹ As an example, organizers in Atlanta successfully advocated for the development and implementation of a community-driven pre-arrest diversion program and repealed “40 quality of life ordinances.”⁴¹⁰ Prosecutors can

405. See *Freedom to Thrive—Reimagining Safety and Security in Our Communities*, *supra* note 126, at 79–80 (highlighting current or prospective campaigns that seek to divest resources away from police and prisons towards communities and their development, which the report refers to as “the invest divest framework”).

406. See Alexandra Natapoff, *When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26, 2018), <https://perma.cc/ZA5X-PXWQ>.

407. A prime example of this was during the summer of 2020 where the police continued to arrest peaceful protesters during the uprisings in New York City in the wake of the murder of George Floyd. Some local prosecutors refused to charge those cases in court or dismiss charges. Cf. Ali Watkins, *They Were Arrested During the Protests. Here’s What Happened Next*, N.Y. TIMES (Aug. 7, 2020), <https://perma.cc/P5LJ-DUNL>. This can be compared to the opposite course taken by federal prosecutors who aggressively prosecuted two activist lawyers arrested on federal charges for throwing a Molotov cocktail in a broken window of an empty police cruiser in New York City. See Murtaza Hussain, *Two Brooklyn Lawyers Accused of Throwing Molotov Cocktails Are the Public Face of Trump Administration’s Crackdown on Dissent*, INTERCEPT (June 19, 2020), <https://perma.cc/F333-A34Y>.

408. See *supra* Section I, Part B.

409. See Davis, *supra* note 7, at 3 (finding the collateral consequences of mass incarceration to include disenfranchisement, loss of public house and public benefits, difficulty finding employment, separation of families, and fiscal burdens on state and federal budgets).

410. See *Freedom to Thrive—Reimagining Safety and Security in Our Communities*, *supra* note 126, at 10.

work closely to support similar organizing and legislative efforts in their jurisdictions.

Furthermore, prosecutors generally work closely with police and are often tasked with training police officers in certain circumstances.⁴¹¹ This relationship presents an opportunity to influence the creation of a pre-arrest diversion policy.⁴¹² While prosecutors are not ultimately responsible for police policy, they are well-positioned to work closely and explore these issues with the police. Expansion of pre-arrest diversion would simultaneously advance many of the goals articulated by the progressive prosecution movement.

To achieve the promise of reduced incarceration and criminalization, progressive prosecutors need to seriously engage with pre-arrest diversion efforts to try to eliminate certain classes of cases before they even hit their desks.⁴¹³ As a result, migrant defendants would also be more protected from immigration enforcement because a wide range of conduct, including certain “quality of life offenses,” could no longer lead to arrest.⁴¹⁴ Such preemptive action would ensure that the “criminal to deportation pipeline” closes before it had the chance to open. This policy would also protect Black and Brown immigrants, who are disproportionately arrested for quality-of-life offenses, and meet some of the central goals of the progressive prosecutor movement.

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

412. While prosecutors do not ultimately decide police protocols, they certainly can have influence, depending on the local politics. Cf. Rahel Gebreyes, *The Close Relationship Between Prosecutors and Police Officers*, HUFFPOST (Jan. 12, 2016), <https://perma.cc/9DYS-AHY8> (describing how prosecutors have generally in the past worked closely with police departments to bring indictments and convictions, resulting in a cozy relationship between the two offices. The bond is described as going beyond day-to-day relationships, with police unions and fraternal orders being common contributors to the political campaigns of prosecutors.). However, tensions and conflict often emerge as well between police and prosecutors, as has been the case in some jurisdictions where progressive prosecutors have been elected. See Meg Hilling, *Relationship Between Prosecutors and Police May Be Changing*, NEWSY (June 18, 2020), <https://perma.cc/4XJM-LYAS> (discussing how progressive prosecutors are now seeking criminal justice reforms to better hold police accountable for wrongdoing).

413. To truly be “progressive,” some suggest that prosecutors have a duty to undo prior injustices by adopting policies expressly designed to repair. See *Freedom to Thrive—Reimagining Safety and Security in Our Communities*, *supra* note 126, at 79–80. This calls into question whether decriminalization of certain offenses is enough or if additional policies should be pursued to remedy the deep historical and current injustices of the criminal legal system. Progressive prosecutors should think through and support efforts that not only seek to decriminalize certain conduct but question whether more should be done to restore and repair the deep harms caused to Black and brown communities by the criminal legal system for centuries, including those harms suffered by Black and brown immigrants enmeshed within.

414. Some DAs have stopped shy of pre-arrest diversion but instituted other diversion efforts that avoiding booking and charging. For example, Dan Satterberg, the District Attorney in King County, Washington, cofounded the LEAD program, in which police officers immediately divert individuals in possession of less than a gram of illegal drugs or engaged in prostitution activity. “LEAD differs from other diversion programs because individuals in the program are never booked, charged, or brought to court.” Davis, *supra* note 7, at 13.

8. *Set Up an Independent Commission or Internal Board to Review Post-conviction Relief for Prior Convictions with Resultant Immigration Consequences*

The devastating immigration consequences that a criminal conviction may have on a non-citizen cannot be overstated.⁴¹⁵ With this in mind, lead prosecutors should set up a post-conviction review mechanism to consider motions to vacate old convictions.⁴¹⁶ This policy standing alone is not enough to prevent grave consequences. By the time people seek out this relief, they have generally already suffered unspeakable harms, such as family separation, immigration detention, and destabilization; post-conviction review would allow some reduction of these harms. In fact, there is nothing preventing prosecutors from setting up a process (externally or internally) to review old cases on their own initiative, absent a motion filed by a prior defendant, where there may be adverse immigration consequences. Prosecutors could explore mechanisms through which they could modify the resolution in cases where such an action is just.⁴¹⁷

Federal and state courts have varied on their treatment of post-conviction relief, based on ineffective assistance of counsel due to failure to advise on immigration consequences, for convictions that pre-date *Padilla*.⁴¹⁸ While courts ultimately render decisions in post-conviction matters, if the parties agree to a modification and propose a settlement, the matter need not be fully litigated.⁴¹⁹

For this reason, a centralized board could be used to review and develop the appropriate DA position on post-conviction relief for convictions both pre- and post-*Padilla*, without making a distinction. Additionally, central tenets to the progressive prosecution movement—fairness and transparency—

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

416. Often defendants will move by motion for post-conviction relief but will first try to seek prosecutorial agreement to move the court jointly, which could help avoid litigation of certain issues and make it theoretically more likely to succeed. *See* Rose Cahn, *Helping Immigrant Clients with Post-Conviction Legal Options*, IMMIGRANT LEGAL RES. CTR. & CALIFORNIANS FOR SAFETY & JUST., 63–66 (2019), <https://perma.cc/9WJS-9EU3>.

417. Analogously, Larry Krasner created various internal mechanisms to review prior convictions and to move to challenge convictions and/or sentences in certain circumstances. *Cf.* Tom Jackman, *As Prosecutors Take Larger Role in Wrongful Convictions, Philadelphia DA Exonerates 10 Men Wrongly Imprisons for Murder*, WASH. POST (Nov. 12, 2019) (the unit is part of a growing wave in prosecutors' offices nationwide, with 49 conviction review units in place in district attorneys' offices.). Something similar could exist rooted in immigration considerations.

418. Some states, as in New York, only permit vacatur where ineffectiveness claim arose after *Padilla*'s issuance. *New York State Court of Appeals Finds Padilla Not Retroactive*, IMMIGRANT DEF. PROJECT (June 30, 2014), <https://perma.cc/TRBC-83XN>. Others, like in Massachusetts, have found *Padilla*'s protections retroactive to cases pre-dating *Padilla*. *Student Project: Padilla v. Kentucky-Immigration Consequences of a Conviction: Retroactivity of Padilla in State Courts*, PACE L. SCH. LIBR., <https://perma.cc/4KZU-BMNZ> (last visited Aug. 30, 2020) (Other retroactive states include New Mexico; other non-retroactive states include South Dakota and Maryland.).

419. *See* Cahn, *supra* note 416, at 63–66.

support the creation of a streamlined process to review all prior convictions that have created immigration consequences.

Two important questions arise: who should sit on this board, and where should it be housed? The complexities of post-conviction relief and the rigid requirements for any conviction modification to be recognized for federal purposes⁴²⁰ suggest the board must comprise individuals who understand these specific nuances. Moreover, a systematic way to address errors in prior matters and/or to seriously consider fairness and equity surrounding convictions that create immigration consequences would advance accountability.

Due to the sensitivity of this group's work in reviewing the prior actions of other district attorneys within the same office, it could be wise to set up an independent commission outside of the DA's office, ideally made up of non-district attorneys. An external entity would ensure a less biased review of old cases⁴²¹ and could make recommendations to the DA regarding their position on a post-conviction matter. An independent commission would be the gold standard.

Were that not possible, this board could then be housed within the DA's office, perhaps with members of the IIU trained on the legal complexities surrounding these issues. For example, the Brooklyn DA's office set up an internal board of this kind immediately following *Padilla* to assess and decide their position on the slew of motions filed after the decision.⁴²² Similarly, Salt Lake City's DA's office has tasked a board to consider post-conviction relief motions not limited to the immigration context.⁴²³

Beyond establishing an independent commission or review board, progressive prosecutors should try to tackle other issues related to post-conviction more broadly. To this end, they may want to support efforts that seek to expand post-conviction options under the law.⁴²⁴ As one example, California has created a post-conviction remedy in instances where the defense attorney

420. There are stringent criteria for a conviction that has been vacated or modified under state or federal law to be treated as such under immigration law. In order for a conviction or sentence modification to be given weight, the vacatur must be for legal defect and not solely for immigration or rehabilitative purposes. See *In re Pickering*, 23 I&N Dec. 621 (BIA 2003) (“[I]f a court with jurisdiction vacates a conviction based on a defect in the underlying criminal proceedings, the respondent no longer has a ‘conviction’ within the meaning of section 101(a)(48)(A).”); *Matter Thomas/Matter of Thompson*, 27 I&N Dec. 674 (A.G. 2019) (extending the legal defect requirement for sentence modification). Therefore, prosecutors must be mindful that vacatur or modification ordered by the Court must be due to legal defect in order to be recognized by immigration. See also *Cahn*, *supra* note 417, at 21.

421. See *Jain*, *supra* note 30, at 1237 (discussing how prosecutors have no particular institutional competence to decide public policy for collateral consequences at large and thus might be led to seek collateral consequences based on their workloads or their views on public policy).

422. Interview with Ruben Loyo, Associate Director, Detention Project, National Immigrant Justice Center (July 31, 2020) (on file with author).

423. See *Salt Lake County District Attorney Office Forms a Conviction Integrity Unit*, SALT LAKE COUNTY DIST. ATT'Y, <https://perma.cc/6WJ3-EYEJ> (last visited Aug. 30, 2020).

424. Forty-five states, including California, Massachusetts, and New York, have some form of post-conviction procedure that allows defendants to have convictions vacated when they were not advised or defended against immigration consequences. See, e.g., CAL. PENAL CODE § 1473.7 (2016); MASS. CRIM. PROC. RULE 30 (1979); N.Y. CRIM. PROC. § 440.10. However, some are more restrictive than others. See CAL. PENAL CODE § 1016.3 (2016).

failed to apprise the defendant of an available immigration-safe alternative plea.⁴²⁵ Additionally, legislation can provide a more straightforward vehicle through which post-conviction relief can be achieved, which could lessen the work of the prosecutor in these matters. For example, California enacted a statute whereby non-citizens may vacate a case that had been previously dismissed for “deferred entry of judgment” under its prior definition, which nevertheless constituted a “conviction” under federal law.⁴²⁶ This legislation provides a straightforward vehicle and remedy in state law without a complex process or much involvement from the prosecutor’s office. These legislative efforts seek to address some of the inherent injustices in the immigration system’s treatment of prior criminal contacts. This is advantageous to both immigrant defendants and progressive prosecutors because it allows prosecutors to prevent unfair results from prior convictions but requires little involvement from them. Designing positions that seek to address immigrant defendants’ post-conviction concerns in a uniform and consistent way will help promote fairness and benefits both sides.

9. *Incorporate Immigration Considerations in Decarceration Efforts and Learning from COVID-19 Releases*

The progressive prosecution movement maintains decarceration as a goal and a tool to address racial disparities present in the jailed population.⁴²⁷ Yet, many prosecutors have engaged in decarceration efforts that do not adequately account for immigration concerns. In Philadelphia, DA Krasner engaged in an effort to reduce the sentences and release certain individuals serving long-term sentences,⁴²⁸ but there is no indication that he flagged consideration of the immigration consequences in those decisions. Certainly, shortening jail sentences is positive for most incarcerated individuals and should be pursued, but prosecutors can carefully consider ways in which these efforts might be made that do not neglect immigration considerations.⁴²⁹ For instance, prosecutors could consider, as part of release efforts, supporting formal sentence modifications in such a way that might avoid

425. CAL. PENAL CODE § 1473.7 (1) (2016).

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

427. *E.g.*, Davis, *supra* note 409, at 2–5.

428. *See* Mem. from Larry Krasner to Phila. Office of Dist. Att’y (2018), <https://www.documentcloud.org/documents/4415817-Philadelphia-DA-Larry-Krasner-s-Revolutionary-Memo.html> [archived at <https://perma.cc/V9PX-9RQ9>].

429. While it is true that more serious offenses tend to have more severe immigration consequences, individuals with convictions might still be eligible for certain defenses against deportation. Because it cannot be presumed that migrants serving long jail sentences will face certain deportation when released from criminal custody (or face immediate transfer to immigration custody), prosecutors should understand local rules in their jurisdiction regarding detainer policies, and consider the specifics of each case as part of their efforts to reduce incarcerated populations. This could mean ensuring that incarcerated immigrants receive immigration advice from independent immigration counsel while incarcerated to understand next steps in their immigration process *before* commuting a sentence. The right to counsel is not guaranteed in immigration proceedings. *See* KATE M. MANUEL, CONG. RESEARCH SERV., R43613,

immigration consequences altogether⁴³⁰ and/or not lead to a transfer to immigration custody upon the termination of criminal custody.⁴³¹ Moreover, prosecutors should, alongside decarceration, encourage local policymakers to adopt policies refusing to comply with immigration detainers, such that individuals may not be released to immigration custody upon their release from criminal custody.⁴³² A multipronged strategy to support meaningful decarceration efforts, both pre- and post-trial, would have more impact and would avoid layered harms to immigrant defendants. Simply releasing an individual into another carceral setting—immigration detention—where similar racial disparities are replicated would inadvertently undermine the purpose of the decarceration effort in the first place.

Much can be learned from the unprecedented number of individuals released from criminal carceral settings in 2020 in response to COVID-19 that could open new ways of thinking about decarceration efforts and their impact on immigrant defendants. Some jurisdictions agreed to release incarcerated individuals from criminal custody because jail settings are extremely dangerous hotbeds for COVID-19 transmission and outbreaks.⁴³³ The COVID-19 pandemic briefly placed the carceral system under the microscope. The folly of locking people in cages rose to the forefront; society was forced to question the purpose of incarceration both pre- and post-trial. Especially during the pandemic, leaders and communities grappled with the underlying premises of the United States punishment system and scrutinized whether incarceration really achieved those purposes. COVID-19 releases and changes in prosecutorial behavior, such as dropping certain cases altogether and changes in the frequency of asking for pre-trial custody,⁴³⁴ brought

Aliens' Right to Counsel in Removal Proceedings: In Brief 6 (2016). These efforts would help ensure that their decisions regarding decarceration meet their goals.

430. For example, if a sentence for a certain kind of theft offense is one year or more it might be considered and aggravated felony for immigration purposes but if the sentence is for less than one year it would not be. However, note under *Matter of Thomas/Thompson*, a sentence modification must be for a constitutional defect in order to be given force in immigration law. See Rose Cahn, Kathy Brady & Andrew Wachtenheim, *AG Overturns Sentence Modification Rule: Matter of Thomas & Matter of Thompson*, IMMIGRANT LEGAL RES. CTR. (Oct. 2019), <https://perma.cc/ZQP3-2ZNZ>.

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

432. See *supra* Section I, Part B. Numerous jurisdictions have adopted laws to stop the transfer of individuals into immigration custody despite the existence of a detainer. Some have adopted provisions with carveouts for certain non-citizens. See, e.g., N.Y., N.Y.C. ADMIN. CODE § 9-131, 14-154 (2017) (disallowing NYPD or DOC compliance unless there is a judicial warrant and the individual has either been convicted of a violent or serious crime or is identified as a possible match in the “terrorist screening database”).

433. E.g., The New Jersey Supreme Court approved an agreement for local law enforcement to release up to 1,000 people from county jails. *NJ Order to Release People in County Jails Breaks New Ground in COVID-19 Pandemic*, ACLU N.J. (Mar. 23, 2020), <https://perma.cc/DVW7-CTKN>. But see Colleen O’Dea, *NJ’s COVID-19 Release Program for Prisoners Is Slammed for Major Failings*, NJ SPOTLIGHT NEWS (May 26, 2020), <https://perma.cc/QDP4-CKKR> (criticizing the actual implementation of the release program in that many fewer than 1000 people were released and a number of individuals died in custody).

434. For examples of organizational responses and calls to action, see *Joint Statement from Elected Prosecutors on COVID-19 and Addressing the Rights and Needs of Those in Custody*, FAIR & JUST

into focus that perhaps incarceration is often not needed to address wrongdoing. This reckoning could lead to fundamental changes in the use of incarceration. Beyond the implications COVID-19 releases can have on the use of incarceration in specific cases, there is a larger lesson to draw for the progressive prosecutor.

When something is understood as a crisis, we are better positioned to closely scrutinize its purpose and function. What would happen if the “criminal to deportation pipeline” entered the popular consciousness as the national crisis that it truly is—one that has steadily increased and led to millions of deportations and family separations well beyond the recent focus on separations at the U.S.-Mexico border? If the entangled systems were understood as such, this too might create the conditions for close interrogation of the entanglement and would put into relief the urgency with which they should be separated. Progressive prosecutors should learn from the impact COVID-19 has had on framing and understanding incarceration⁴³⁵ to consider how to frame and promote understanding of the harms stemming from crimmigration for the electorate. Framing the criminal to deportation pipeline as the calamity it is could lead to support of changes to the criminal legal system that seek to reduce the harms caused by crimmigration.

10. *Prohibit Information Sharing and Cooperation with ICE*

Chief prosecutors are well within their powers to limit their attorneys’ cooperation with or information sharing with ICE. There is a wide range of actions prosecutors can take to this effect. Prosecutors can issue blanket policies forbidding prosecutors to contact ICE regarding individual cases of non-citizens,⁴³⁶ which sadly was not the case when my client Jacklyn was prosecuted in Queens in 2014. Lead prosecutors can also take other affirmative steps to stop systematic information sharing. For example, DA Krasner provided the second of the three necessary votes required to end the Preliminary Arraignment Reporting System (“PARS”) contract, an agreement that allowed ICE access to arraignment data from the Philadelphia Police Department’s database.⁴³⁷ As described above, local prosecutors can also

Prosecution (Mar. 2020), <https://perma.cc/3FJC-MMP3>; *Aligning Immigration and Criminal System Demands for COVID-19*, IMMIGRANT DEF. PROJECT (Apr. 2020), <https://perma.cc/BM8F-EMGL>.

435. For a discussion of how the current crisis led to the May 2020 uprisings and abolition becoming a “household term,” see *Resist Policing Summer 2020 Newsletter: Cooking Up Rebellion*, CRITICAL RESISTANCE (2020), <https://perma.cc/CLR8-R5B4>. For a discussion of how the crisis of COVID-19 highlights the failings of the prison and detention system, particularly with regards to pretrial detention, see Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U.L. REV. ONLINE 59, 60, 68 (2020) (describing the failings of the system in the overcrowding in the jails and how the large numbers of people held in jails is not because they present a true risk but because they are under-resourced, targeted by discriminatory laws and policing practices, unable to make bail, pay for a condition of release, or simply have nowhere else to go).

436. Policy Directive 2021-12: Policy Regarding Immigration and Immigration-Adjacent Issues, WASHTEAW CTY., OFF. OF THE PROSECUTING, ATT’Y, at 7–8 (2021).

437. See Claire Sasko, *Kenney Says City Will End ICE Data-Sharing Agreement*, PHILA. MAG. (July 27, 2018), <https://perma.cc/T23Z-A5LB>.

support local legislative initiatives forbidding local police or corrections departments' cooperation with immigration detainers, thereby stopping the turnover of immigrants to immigration custody at the end of criminal proceedings.⁴³⁸ Similarly, DA Boudin signed a moratorium on transferring people to immigration custody from local custody during the COVID-19 outbreak,⁴³⁹ setting an example of how prosecutors can take bold action and use their power in this way.

11. *Use Power to Challenge ICE Enforcement and Supporting State and Federal Immigration Legislative Efforts*

A robust immigration agenda is not limited to the progressive prosecutor modifying and reimagining their own policies and practices in ways to address disproportionate harms to immigrant defendants. Prosecutors can engage in other efforts, outside of using their direct authority, to challenge ICE's reliance on the criminal legal system to engage in enforcement. For example, several district attorneys have used their influence to speak out against ICE's common tactic of arresting non-citizens in criminal courthouses.⁴⁴⁰ Others have supported legislative efforts for the same ends, such as New York's Protect Our Courts Act, prohibiting ICE arrests inside or on the way to or from all state court appearances.⁴⁴¹ DA Rachael Rollins of Boston and DA Gonzalez of Brooklyn went further by filing lawsuits to try to keep ICE out of courts. They were victorious in federal district court in June 2020,⁴⁴² shortly before the passage of the Protect Our Courts Act.

438. For example, in June 2019, DA Rollins supported the Massachusetts Supreme Court's decision that attorneys cannot demand immigration status of witnesses in most cases, as well as telling her staff that if they observe ICE, DHS, or other civil immigration authorities "apprehending or questioning parties scheduled to appear in court about residency status in or around the public areas of any Suffolk County courthouse, they are to immediately notify me. . . my First Assistant, or my General Counsel." See Algarin, *Statement of District Attorney Rachael Rollins on Deployment of Tactical Units in Neighborhoods*, SUFFOLK CTY. DIST. ATT'Y'S OFF. (Feb. 19, 2020), <https://perma.cc/NRN6-TVLJ> (Rollins also spoke out against immigration authorities following the deployment of CBP Tactical Units in neighborhoods in her district.)

439. See *Criminal Justice Leaders Call for Protection of Immigrants in Midst of COVID-19 Pandemic*, FAIR & JUST PROSECUTION (May 1, 2020), <https://perma.cc/NRN6-TVLJ> (Chesa Boudin was among those who filed the amicus brief with the California Supreme Court.)

440. E.g., Noelle Phillips, *Mayor Hancock Tells ICE: Back off Arrests in Courthouses and Near Schools*, DENVER POST (Apr. 6, 2017), <https://perma.cc/5HHH-NUEK> (Denver DA Beth McCann condemning arrests); Catherine Shoichet, *L.A. Officials to ICE: Stop Calling Yourselves Police*, CNN (Mar. 13, 2017), <https://perma.cc/9MBJ-VGDC> (LA City Attorney Mike Feur condemning ICE's predatory enforcement practices).

441. Jonathan Sperling, *DAs Urge Legislature to Pass Protect Our Courts Act, Stanch ICE's Courthouse Presence*, QUEENS DAILY EAGLE (June 17, 2019), <https://perma.cc/B94N-RG6T> (District attorneys across New York State urging the legislature to pass the Protect Our Courts Act during June of 2019); Protect Our Courts Act, N.Y. ADVANCED LEGIS. SERV., 243d Annual Legislative Sess., Assemb. Bill 2176 (N.Y. 2020) (on July 22, 2020, the legislation was enacted); *Senator Brad Hoylman Applauds Signing of "Protect Our Courts Act, Protecting Immigrants from Warrantless ICE Arrests When Attending Court Proceedings"*, N.Y. STATE SENATE (Dec. 15, 2020), <https://perma.cc/6NQN-3YD6>.

442. *New York v. U. S. Immigration & Customs Enf't*, 2019 U.S. Dist. LEXIS 225031, at *1 (S.D.N. Y. Dec. 17, 2019); Catherine E. Shoichet & Bian Vitagliano, *Federal Judge in New York Rules ICE Courthouse Arrests Are Illegal*, CNN (June 10, 2020), <https://perma.cc/5CMW-WR3Z>.

While not legislators themselves, progressive prosecutors can work closely with local and state legislators to advance statutory reforms that systemically tackle harsh immigration consequences that arise out of the criminal legal system.⁴⁴³ For example, California,⁴⁴⁴ New York,⁴⁴⁵ Nevada,⁴⁴⁶ and Washington⁴⁴⁷ have enacted legislation reducing the maximum penalty for a misdemeanor conviction from one year to 364 days to avoid mandatory deportation under federal law.⁴⁴⁸

It is also imperative that progressive prosecutors see their role and work as intersectional. Because the criminal legal system is interconnected with other systems and creates a host of other consequences for those it punishes,⁴⁴⁹ progressive prosecutors should take a stand on issues outside of the four walls of their work and outside of the criminal legal system. Progressive prosecutors must use their clout and take a stand on immigration issues that brush up against their expertise as part of their immigration agenda. DA Boudin has done so through a series of actions: 1) disavowing ICE practices of detaining juveniles,⁴⁵⁰ 2) critiquing the ongoing detention of migrants during the COVID-19 outbreak, and 3) supporting efforts to close all immigration detention facilities in the state of California.⁴⁵¹

12. *Set an Agenda in Partnership with the Community and Implement Open Budgeting*

One of the biggest critiques of the prosecutor's office stems from the opaque nature of its operation. A way to address this might be to have more open processes for community members to help set the agenda and priorities of the

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

444. CAL. PENAL CODE § 18.5 (2014).

445. See NY CLS PENAL § 70.15(1) and (3) (2019), as amended by the Budget Bill, Part OO, § 1, and NY CLS PENAL § 70.15(1-a)(a), as added by the Budget Bill, Part OO, § 2.

446. NEV. REV. STAT. ANN. § 193.140 (2013).

447. REV. CODE WASH. (ARCW) § 9A.20.021 (2011).

448. See *Advocates Cheer as One Day to Protect New Yorkers Act Passes in NY Budget Deal*, IMMIGRANT DEF. PROJECT & FORTUNE SOC'Y (Apr. 1, 2019), <https://perma.cc/TSV3-KP6A>.

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

450. See Samantha Michaels, *Immigrant Kids Were Restrained to Chairs with Bags Over their Heads at a Juvenile Hall in Virginia*, MOTHERJONES (Jan. 22, 2020), <https://perma.cc/3G9H-3Y9N> (A group of district attorneys from around the country—including Chesa Boudin, have filed a brief citing concerns about the teens' treatment.).

451. See Tatiana Sanchez, *Coronavirus: SF D.A., Activists, Doctors Call for Undocumented Immigrants' Release*, S.F. CHRON (Mar. 26, 2020), <https://perma.cc/U2PR-MRVM> (Chesa Boudin, DA of San Francisco, was amongst those pressuring Governor Gavin Newsom to use his executive power to close the detention centers in the state.).

prosecutor.⁴⁵² This kind of engagement is paramount to setting an agenda that is responsive to the communities' needs and the realities on the ground. Prosecutors are tasked with representing "the people," and the electorate should have a say over response to crime.⁴⁵³ Too often, policies are adopted with no input from those impacted. Changing this is necessary to enact meaningful policy change on all fronts.⁴⁵⁴ Formal mechanisms for meaningful community input are essential, especially given the lack of diversity amongst prosecutors themselves.⁴⁵⁵

To devise an immigration agenda specifically, progressive prosecutors must build trust with immigrant communities and organizations serving them to better understand the realities of immigration enforcement in the area. Additionally, since there are significant differences in enforcement depending on where an individual is located in the country, it is vital to incorporate community desires and realities into policy and the immigration agenda.

Another way to address the lack of transparency of the prosecutor's office would be the creation of a participatory budgeting process for the allocation of prosecutorial funds, guided by the abolitionist principle of reducing the carceral budget. Doing so would provide increased transparency and accountability—a call the progressive prosecution movement has promised to answer. As Martin Luther King, Jr. famously said: "budgets are moral documents."⁴⁵⁶ This has renewed meaning today as cities have recently been pushed by organizing efforts and local uprisings to reinvest funds into social programs, diverted from the police.⁴⁵⁷ Abolitionist organizations have long demanded participatory city budget processes. As one example, the Black Youth Project 100 ("BYP100 Chicago") has pushed for participatory city budgeting in Chicago, arguing the public should have the power to defund city police and reallocate for reinvestment in service that can enhance Black and Brown communities' futures, like sustainable economic projects, public education, health care, etc.⁴⁵⁸

452. *E.g.*, DA Gonzalez launched a Justice 2020 Initiative whereby he included a host of community members including clergy, defense counsel and others to help set priorities for the future of his office. *E.g.*, Press Release, Brooklyn Dist. Att'y's Off., *supra* note 284.

453. *See* Ryan Grim & Akela Lacy, *Progressive Prosecutor Movement Makes Major Gains in Democratic Primaries*, INTERCEPT (Aug. 6, 2020), <https://perma.cc/KND8-SJGG> (Kim Gardner said that the broad coalition of people "came out against a powerful status quo" to elect her are evidence that voters support the need for change.).

454. *Id.*

455. *Tipping the Scales: Challengers Take on the Old Boys Club of Elected Prosecutors*, REFLECTIVE DEMOCRACY CAMPAIGN (Oct. 2019), <https://perma.cc/TA8Y-Y65D> (Ninety-five percent of prosecutors are white. Seventy-five percent are white men with only two-percent of prosecutors of prosecutors are women of color and three-percent men of color.).

456. *See Freedom to Thrive—Reimagining Safety and Security in Our Communities*, *supra* note 126, at 3 (discussing the moral nature of a budget).

457. *See id.* at 79–80 (describing participatory budgeting).

458. *See id.* at 20 (demanding a participatory city budget in which the public has the power to defund the Chicago Police Department and reinvest those resources in Black futures by setting a living wage and by fully funding healthcare, social services, public schools, and sustainable economic development projects).

While progressive prosecutors may be reluctant to open their budgets to participation from the public, it is worth seriously contemplating steps to make the process more transparent. Budget cuts resulting from the COVID-19 outbreak and the concurrent demands for racial justice could be the right moment for prosecutors and those seeking the office to rethink how budgets are made. If moving away from criminalization is an authentic goal, progressive prosecutors should think of ways to create budgets that reflect a move away from policies rooted in retributive punishment. Accordingly, prosecutors should grapple with the abolitionist calls to divest from criminalization at this moment where funds are scarce.⁴⁵⁹ However, simply taking money away is not enough to address the ills of the criminal legal system. Reinvestment in communities is critical to meet the communities' needs and to allow communities to thrive. Money should not just be cut from prosecutorial budgets but invested in efforts that seek to build community power and safety.⁴⁶⁰ To that end, prosecutors should follow the guidance of impacted communities in figuring out how to best do this through participatory budgeting.

CONCLUSION

The unjust and disproportionate criminalization of immigrant communities in this country requires urgent action. Self-described progressive prosecutors must engage with the ways their policies and decisions—sometimes neglectfully and other times intentionally—contribute to the deportation of thousands of immigrants of color every year, often in violation of the very principles that got them elected. By adopting the policies proposed herein, progressive prosecutors and those aspiring to the role would advance policies that reduce harms to non-citizen and citizen defendants alike and benefit the larger community.

This Article suggests concrete practices prosecutors could adopt to confront their roles as the drivers of mass deportation and mass criminalization. These proposals are meant as modes of harm reduction absent federal legislative change. I hope that others add to these ideas, challenge them, and refine them. Some proposals suggested in this Article could become obsolete if we move towards a world less oriented towards prosecution and punishment as modes of social control and/or enact meaningful immigration reform that ends the catastrophic double punishment of migrants accused of a crime. While prosecutors are not solely in control of the crimmigration system—legislative reform and changes to policing are also pressing—a prosecutor's

459. See *supra* Part IV, Section A.

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

action or inaction can greatly contribute to divorcing the criminal and immigration legal systems until that day comes.

The work of organized constituent groups provides hope that prosecutors might heed this call. In recent years, activists have developed and deployed strategic campaigns targeting prosecutors to demand accountability to the electorate. Organizers and community leaders have pushed the collective imagination and conversation regarding what a prosecutor can or should do, with some arguing that the district attorney's goal should ultimately be to create a system free from prosecution as we know it. Immigrant rights constituency groups have deepened alliances with these groups recognizing the common structures of oppression at the heart of their struggles.

As they continue to build power, one might expect these groups will increasingly join together to target prosecutors to demand that they implement carefully crafted policies that reduce harm to all defendants, including immigrants. Prosecutors can wait for an invitation or until they have no choice but to accede to these demands. However, to truly be "progressive," they should already be asking themselves what more they could be doing or not doing to support the communities they are meant to serve.