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Progressive Prosecution: It's Here, But Now What?

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PROGRESSIVE PROSECUTION: IT'S HERE, BUT NOW WHAT?

"If the world doesn't make sense, then I'd suggest you bend it to make sense."

—Thomas Wayne

Hao Quang Nguyen *

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I. INTRODUCTION

Mass incarceration, lengthy probationary periods, unreachable bail amounts, and felony criminal records feed the machine of our criminal justice system. The system is not broken; the assembly line of arrest, charge, conviction, and imprisonment is doing exactly what it was built to do. But this inherited system is a plague upon the cornerstone of the “Progressive Prosecutor” who is charged with the role of the “Minister of Justice.”¹ With nearly 10.6 million people rotating in and out of the U.S. jail system each

*Hao Quang Nguyen, JD 2010, Assistant Ramsey County Attorney. This paper is dedicated to Ronin & Asher Nguyen, my two beautiful boys.

¹ See *Berger v. United States*, 295 U.S. 78, 88 (1935) (holding that a government attorney is the representative “of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”); STANDARDS FOR CRIMINAL JUSTICE § 3-1.2(b) (AM. BAR ASS’N 2015) (“The primary duty of the prosecutor is to seek justice . . . , not merely to convict.”); Nat’l Dist. Attys. Ass’n, *Nat’l Prosecution Standards*, Standard 1.1 (2d ed. 1991) (“The primary responsibility of prosecution is to see that justice is accomplished.”).

year, the Progressive Prosecutor knows the old ways of doing things are no longer tenable.²

As a minister of justice, the role of the prosecutor is not to obtain a conviction above all else, rather it is to see that justice be done.³ “The role of an American prosecutor as a minister of justice is firmly established.”⁴ It is easy to see how even the most skilled prosecutor can still, even with the best of intentions, fail as a minister of justice. Prosecution work is one of the most emotionally challenging lines of public service one can choose. Secondary trauma from crime scene visits, autopsy reviews, and victim interviews added to the stress of battling opposing counsel in front of a jury who will ultimately decide guilt or innocence takes a toll on even the most resilient prosecutor.

What, then, is the path of least resistance when a prosecutor is already stressed and pushed to the limit?⁵ It is to achieve a conviction. After all, it is a measurable unit of success; guilty verdicts equal success—a simple and easy equation to understand.⁵ The prosecutor, at their core, is to be a minister of justice above all else. Their choices should consider what is best for the defendant as much as they consider what it does for the victim.

² See Brennan Ctr. for Justice & The Justice Collaborative, *21 Principles for the 21st Century Prosecutor*, FAIR AND JUST PROSECUTION 3 (2018), https://fairandjustprosecution.org/wp-content/uploads/2018/12/FJP_21Principles_Interactive-w-destinations.pdf [<https://perma.cc/L7KC-FFV6>].

³ See 9 MINN. PRAC., CRIM. LAW & PROC. § 34:3 n.7 (4th ed.) (2018) (quoting *State v. Clark*, 114 Minn. 342, 344, 131 N.W. 369, 370 (Minn. 1911)) (“The duties and obligations of a prosecuting officer are not simply those of an attorney in a civil action; for behind him, and largely at his command, are all the forces of organized society. He has by virtue of his office, if worthy of it, great influence with juries, and he should never forget that he is the representative of the sovereignty and justice of the state, and that he must bear himself, in the discharge of his official duties, as a minister of justice, and never as a partisan.”).

⁴ *State v. Ramey*, 721 N.W.2d 294, 300 (Minn. 2006) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)). See *In re Jacobs*, 802 N.W.2d 748, 752 (Minn. 2011) (quoting *State v. Penkaty*, 708 N.W.2d 185, 196–97 (Minn. 2006)) (“The prosecutor’s duty ‘to see that justice is done on behalf of both the victim and the defendant’ overrides any individual or governmental interest in winning cases.”); *State v. Cabrera*, 700 N.W.2d 469, 475 (Minn. 2005) (quoting *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993)) (“[The] prosecutor ‘is a minister of justice’ whose obligation is ‘to guard the rights of the accused as well as to enforce the rights of the public.’”); *State v. Henderson*, 620 N.W.2d 688, 701–02 (Minn. 2001) (citing *State v. Sha*, 193 N.W.2d 829, 831 (Minn. 1972)) (“Prosecutors have an affirmative obligation to ensure that a defendant receives a fair trial.”); *State v. Timmendequas*, 737 A.2d 55, 93 (N.J. 1999) (citing *State v. Ramseur*, 524 A.2d 188, 288 (N.J. 1987)) (“[T]he primary duty of a prosecutor is not to obtain convictions but to see that justice is done.”). See also STANDARDS ON PROSECUTORIAL INVESTIGATIONS § 1.2(a) (AM. BAR ASS’N 2008), https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pinvestigate/ [<https://perma.cc/X2AJ-NDZF>].

⁵ See Eric Rasmusen et al., *Convictions Versus Conviction Rates: The Prosecutor’s Choice*, 11 AM. L. & ECON. REV. 47, 48 (2009) (discussing the use of conviction rates as a measure of a prosecutor’s success).

The math is not simple anymore in the context of the justice system. Guilty verdicts no longer equal success—justice now equals success. Like it or not, prosecutors have been partly waning at their true duties for a while now. As an individual who has served as a prosecutor for ten years and, prior to that, as a law enforcement officer for nearly five years, it is clear to me that most prosecutors, at their core, are good people who want to do right by the public they serve. However, the system they inherited is not built to allow them much, if any, meaningful success in that goal. Court dockets are overcrowded with cases. Time and money are always low. Finding meaningful solutions often requires prosecutors to step off the assembly line of justice, many times demanding they do something entirely outside their training. The failure of the prosecution in the fulfillment of their role as minister of justice in the criminal justice system is not, in my humble opinion, intentional. Its ideals have just been long forgotten and set to the wayside—a frill that comes out once in a while when there is time to slow down and actually evaluate a case realistically. For this reason, it has simply become easier for prosecutors to go after the conviction and a sentence, both of which are very tangible measures of so-called success.

A. The Progressive Prosecutor: Fighting the Public's Historical Perception

Enter the rise of the Progressive Prosecutor. A Progressive Prosecutor is different from that of the ordinary prosecutor because he or she seeks to use their discretion not to punish or simply deal out heavy sanctions on the accused but rather divert criminal proceedings, expunge criminal records, limit jail sanctions, and even dismiss unnecessary prosecutions all together.⁶

These Progressive Prosecutors, when the facts call for it, actively prosecute police officers for criminal violations. Minnesota recently had two high profile cases involving the charging of police officers for murder. In Hennepin County, County Attorney Mike Freeman announced murder charges against Minneapolis police officer Mohamed Noor after he and a partner responded to a 911 call for help.⁷ At that call, Officer Noor shot and

⁶ Across the country, voters are electing these nontraditional, more Progressive Prosecutors. See *The Paradox of "Progressive Prosecution"*, 132 HARV. L. REV. 748, 751-52 (2018) ("Fundamentally, progressive prosecutors seek to rebalance the use of prosecutorial discretion. Where traditional prosecutors have used their enforcement powers in a heavy-handed manner to punish marginalized individuals, Progressive Prosecutors institute practices that pull back on those punitive measures, or, at least, divert them. And where traditional prosecutors have refused to exercise their expansive powers to hold police accountable for misdeeds, progressive prosecutors (sometimes) actively prosecute police officers.").

⁷ Brandt Williams, Mukhtar M. Ibrahim, Jon Collins, & Riham Feshir, *Freeman: Mpls. Cop Noor 'Abused' Deadly Force in Ruszczyk Shooting*, MPRNEWS (Mar. 20, 2018, 11:48 AM), <https://www.mprnews.org/story/2018/03/20/noor-booked-jail-ruszczyk> [<https://perma.cc/255B-78M7>].

killed an unarmed woman.⁸ Officer Noor was convicted and sentenced to 150 months in prison.⁹ This case was one of the first times “a Minneapolis officer has been charged with murder in a fatal shooting while on duty.”¹⁰

Similarly, in Ramsey County, County Attorney John Choi announced criminal charges against Officer Jeronimo Yanez of the Falcon Heights Police Department for the killing of a black male passenger seated in the front of an automobile during an investigatory traffic stop.¹¹ Choi stated that his “decision [would] be difficult for some in our community to accept, but in order to achieve justice, we must be willing to do the right thing no matter how hard it may seem.”¹² Officer Yanez was found not guilty by a jury verdict.¹³

The prosecution of police officers for wrongdoing from small offenses to manslaughter and murder set today’s Progressive Prosecutors apart from their historical counterparts. Traditionally, the public and the police viewed law enforcement and the prosecutor’s office as one and the same. This has never legally been the case, but it was certainly true in the court of public opinion and perception.¹⁴

The power of discretion wielded by a prosecutor is wide and over-reaching; how a prosecutor exercises that discretion can, and does, make a

⁸ *Id.*

⁹ Ralph Ellis & Melissa Alonso, *Mohamed Noor, former Minneapolis police officer, sentenced to 12½ years in fatal shooting of woman*, CNN (June 7, 2019, 4:10 PM), <https://www.cnn.com/2019/06/07/us/minneapolis-mohamed-noor-sentenced/index.html> [<https://perma.cc/H4AQ-ZYNR>].

¹⁰ *Id.*

¹¹ Tim Nelson, John Collins, & Riham Feshir, *Officer Charged in Castile Shooting*, MPRNEWS (Nov. 16, 2016, 10:30 AM), <https://www.mprnews.org/story/2016/11/16/officer-charged-in-castile-shooting> [<https://perma.cc/9GBC-K73J>].

¹² *Id.* (“[County Attorney John Choi] charged police officer Jeronimo Yanez in the July 6 killing of Philando Castile during a traffic stop in Falcon Heights. . . . During the announcement of the charges, Choi went over the timeline leading up to Castile’s death. He said Yanez signaled to another officer that he was pulling Castile’s car over because his ‘wide-set nose’ matched the description of a robbery suspect. Yanez turned on his squad lights, and Castile pulled over eight seconds later. It was just one minute later that Yanez shot Castile seven times, killing him.”).

¹³ Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES (June 16, 2017), <https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html> [<https://perma.cc/A6H4-7FYC>].

¹⁴ Letitia James, *Prosecutors and Police: The Inherent Conflict in Our Courts*, MSNBC (Dec. 5, 2014, 12:16 AM), <http://www.msnbc.com/msnbc/prosecutors-police-inherent-conflict-our-courts> [<https://perma.cc/4QEG-D4SA>] (discussing the potential dangers of the relationship between law enforcement and prosecutors); See Rahel Gebreyes, *The Close Relationship between Prosecutors and Police Officers*, HUFF POST (Jan. 12, 2016, 1:25 PM), https://www.huffpost.com/entry/police-prosecutor-relationship_n_56951b56e4b09dbb4bac9218?guccounter=1 [<https://perma.cc/42TA-8EYF>] (noting the questionable ties that may exist between the police and prosecutors).

monumental difference in the lives of the accused, victims, and families involved.¹⁵

Several principles and practices have emerged as useful tools for the 21st century Progressive Prosecutor aimed at two major goals: reduction of incarceration rates and increased fairness in the administration of justice.¹⁶ This paper discusses the ways Progressive Prosecutors use their broad discretionary authority as ministers of justice and argues that such methods should be used to renounce the conviction-driven system and promote more equitable and fair justice for all. Part II of this Article addresses the Progressive Prosecutor-based tools that other prosecutors should use to further the goal of reducing mass incarceration.¹⁷ Part III of this Article discusses tools prosecutors can rely on to increase the overall equity and fairness within the criminal justice system.¹⁸ Finally, Part IV of this Article furthers the proposition that such tools revert the core value of the prosecutor back to the role of the justice ministry.¹⁹

II. PROSECUTORIAL TOOLS FOR REDUCING MASS INCARCERATION

If it is not working, then stop doing it. Mass incarceration²⁰ is not the answer. Although society appears to care little about the incarcerated, mass incarceration does not need to be allowed, let alone perpetuated. One does not need mathematical prowess to see the solution. If mass incarceration is the problem, prosecutors should stop sending people to prison. Or, at the very least, prosecutors should send fewer people to prison.

A. Diversion Before All Else, Well Before Much Else

To combat the mass incarceration problem, Progressive Prosecutors are making diversion the rule.²¹ Diversion programs utilize prosecutorial discretion and move the flow of people away from the criminal justice system. These programs keep people free from unnecessary prosecution and lengthy probationary terms, all the while preserving valuable resources²²

¹⁵ Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW 360 (Apr. 7, 2019), <https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor> [https://perma.cc/KVJ9-WYM4] (describing a “no cash bail” policy to allow people to return to their families and lives).

¹⁶ Brennan Ctr. for Justice & The Justice Collaborative, *supra* note 2, at 4.

¹⁷ *Infra* at 9.

¹⁸ *Infra* at 27.

¹⁹ *Infra* at 34.

²⁰ See generally James Forman, Jr., *Why Care About Mass Incarceration?*, 108 MICH. L. REV. 993 (2010).

²¹ Brennan Ctr. for Justice & The Justice Collaborative, *supra* note 2.

²² Ashmini G. Kerodal, *Prosecutor Led Diversion A National Study*, CTR. FOR CT. INNOVATION (March 2019), <https://www.courtinnovation.org/publications/prosecutor-led-diversion-national-survey> [https://perma.cc/Z8W3-7K7P].

that would otherwise go into paying for the management of jails, prisons, probation officers, and costs of prosecution.²³

[Diversion] alternatives reroute defendants away from traditional criminal justice processing after arrest but prior to adjudication or final entry of judgment. Pretrial diversion is designed to address factors, called criminogenic needs that contribute to criminal behavior of the accused. Laws generally require that participation in diversion is voluntary and that the accused has access to counsel prior to making the decision to participate. Individuals are diverted prior to entry of judgment or conviction and a guilty plea may or may not be required. Successful completion of the program results in a dismissal of charges.²⁴

Diversion is not just a lofty goal; it is also established by statutory law.²⁵ Minnesota Statutes section 401.065 provides guidelines, definitions, and authority for the adoption and establishment of statewide diversion programs in Minnesota.²⁶ The statute governs pretrial diversion programs, outlines what county attorneys must do when establishing a pretrial diversion program, and provides guidance on what components are necessary for the program to be functional.²⁷ Finally, the statute sets forth data reporting requirements to the state legislature.²⁸ As of 2017, across the nation, forty-eight states and the District of Columbia have enacted pretrial diversion programs similar to Minnesota's statutory pretrial scheme.²⁹

²³ *Study: Replacing Prison Terms with Drug Abuse Treatment Could Save Billions in Criminal Justice Costs*, RTI INT'L (Jan. 8, 2013), <https://www.rti.org/news/study-replacing-prison-drug-treatment-could-save> [<https://perma.cc/V922-WFDW>] ("Sending drug abusers to community-based treatment programs rather than prison could help reduce crime and save the criminal justice system billions of dollars . . . Nearly half of all state prisoners are drug abusers or drug dependent, but only 10 percent receive medically based drug treatment during incarceration.").

²⁴ *Pretrial Diversion*, NAT'L. CONF. OF ST. LEGISLATURES (Sept. 28, 2017), <https://www.ncsl.org/research/civil-and-criminal-justice/pretrial-diversion.aspx> [<https://perma.cc/7A7L-Z97A>].

²⁵ MINN. STAT. § 401.065, subdiv. 2 (2019) (Minnesota's Pretrial Diversion Statute requires every county attorney to "establish a pretrial diversion program for adult offenders").

²⁶ *Id.*

²⁷ MINN. STAT. § 401.065, subdiv. 3 (2019) (These Pretrial Diversion Programs may include candidate screenings, chemical dependency assessments, and establish goals for offenders).

²⁸ MINN. STAT. § 401.065, subdiv. 4 (2019) (Each program shall report to the Bureau of Criminal Apprehension vital information regarding each offender participating in the program).

²⁹ NAT'L. CONF. OF ST. LEGISLATURES, *supra* note 24 ("Statutory diversion programs and treatment courts are often created by law to address the needs of a specific defendant population. Forty-three states and the District of Columbia have population-specific diversion programs which include: Thirty-nine states have diversion alternatives that address substance abuse. These programs or treatment courts are available to people charged with drug or alcohol-related offenses as well as defendants identified as having substance abuse or addiction needs. (The information below excludes DUI specific diversion programs and

The question is whether pretrial diversion programs actually work. There is no simple answer. The National Association of Pretrial Service Agencies put together a comprehensive framework that individual agencies can use to measure the successes, failures, and weaknesses of their individual programs.³⁰ What we can be sure about regarding pretrial justice and diversion programs is that diversion results in little-to-no criminal records for those given a chance through these programs. We know dismissal of a crime results in zero collateral damage to an accused's future in employment, work, and social stigma.³¹ However, the landscape of pretrial diversion and analysis of the programs' effectiveness would leave any researcher's mind boggled. The fact is there is no simple answer about whether diversion programs produce a benefit that outweighs the downfalls. Many prosecutors believe there cannot be a downside when giving people a second chance as well as opportunities to better themselves. Prosecutors should not rely on statistics alone to tell us that it is a good thing to help those who have made bad choices get out from underneath the foot of the government. We should instead rely upon the successes that such programs have the capability of producing.

B. Discretion in Charging Policy: Fairness First

Another major tool that must be utilized by the Progressive Prosecutor is charging fairly and appropriately. Progressive Prosecutors know they have broad discretion in their decision to bring forth charges. Prosecutors, like police officers, have charging authority, but the only difference between the two parties is that prosecutors have the final word in the charges brought against the accused.³² For example, if a prosecutor so desired, they have the authority to dismiss a police officer's charges against the accused entirely.³³

courts). Twenty-four states have diversion alternatives for individuals identified as having needs related to mental illness.”).

³⁰ *Measuring for Results: Outcome and Performance Measures for Pretrial Diversion Fields*, NAT'L. ASS'N. OF PRETRIAL SERVICES AGENCIES, <https://s3.amazonaws.com/static.nicic.gov/Library/029722.pdf> [https://perma.cc/LN4M-58BP].

³¹ See Simone Ispa-Landa & Charles E. Loeffler, *Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement-Seekers in Illinois*, AM. SOC'Y OF CRIMINOLOGY (2016), <https://www.sesp.northwestern.edu/docs/publications/279299815a1452bc75a5b.pdf> (Analyzing how individuals with criminal record histories “understand their experiences, strategize to overcome criminal record stigma, and respond to criminal record discrimination.”); see also Regina Austin, “The Shame of it All”: Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons, 36 *Colum. Hum. Rts. L. Rev.* 174, 174–75 (2004), [https://www.law.upenn.edu/cf/faculty/raustin/workingpapers/b36ColumbiaHumRtsLR173\(2004\).pdf](https://www.law.upenn.edu/cf/faculty/raustin/workingpapers/b36ColumbiaHumRtsLR173(2004).pdf).

³² MINN. R. CRIM. P. 2.02 (2019).

³³ MINN. R. CRIM. P. 30.01 (2019).

Prosecutors can also add or amend a police officer's charges.³⁴ Similar to the authority to dismiss recommended charges, prosecutors also have the authority to bring forth additional charges against an accused without relying on a police officer to do so.³⁵ In other words, prosecutors have significantly broad discretion when making charging decisions or declining prosecution.³⁶

With this discretionary charging power, Progressive Prosecutors review and analyze which cases fall into the category of "needless prosecution."³⁷ These defendants are thereby given second chances at a criminal-record-free life. Discretion and helping those who have been accused requires a major leap of faith from the prosecutor. Take, for example, a defendant that is very physically ill and mentally incapacitated. At his group home, the defendant pulls a knife out of a kitchen drawer and threatens the life of a staff member. At first blush, one could easily charge the defendant with second-degree assault and terroristic threats, and such charges would sound rather reasonable. In this scenario, it is easy to fall into the mindset that a prosecutor must get the conviction and send this defendant to prison. But when a Progressive Prosecutor reviews such a case, they must consider alternatives that truly attain justice.³⁸

In making such charging decisions, a Progressive Prosecutor must speak to the victim. One might learn that the victim is not mad at nor scared of the defendant. The victim may explain that the defendant had a mental health crisis and knew the defendant did not intend to cause harm. A Progressive Prosecutor would find that, in understanding mental illness, the victim wants the best for the defendant. A Progressive Prosecutor might then

³⁴ MINN. R. CRIM. P. 17.05 (2019).

³⁵ MINN. R. CRIM. P. 30.01 (2019).

³⁶ *State v. Strok*, 786 N.W.2d 297, 302 (Minn. Ct. App. 2010).

³⁷ *See generally*, *Rinaldi v. United States*, 434 U.S. 22 (1977) ("The overriding purpose of that policy is to protect the individual from any unfairness associated with *needless multiple prosecutions*, and accordingly the defendant should receive the benefit of the policy whenever its application is urged by the Government.") (emphasis added); *see also Statement from Governor Andrew M. Cuomo on MTA Fare Evasion*, NEW YORK STATE, <https://www.governor.ny.gov/news/statement-governor-andrew-m-cuomo-mta-fare-evasion> [<https://perma.cc/G4FF-EBWX>] ("We need to enact sensible reforms that strike the right balance by ensuring the safety of the subways, enforcing the law, and protecting New Yorkers from *needless prosecution*.") (emphasis added); *Julio Negrón*, THE NATIONAL REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5248> [<https://perma.cc/QTU4-7ZCN>] ("[T]he grand jury proceedings would have been different and that the grand jury would have determined that this was a *needless or unfounded prosecution . . .*") (emphasis added).

³⁸ David Chanen, *Hennepin County Prosecutor Won't Charge People Caught with Small Amounts of Marijuana*, STAR TRIBUNE (Mar. 15, 2019), <http://www.startribune.com/hennepin-county-attorney-won-t-prosecute-people-caught-with-small-amounts-of-marijuana/507174002/> [<https://perma.cc/5RW6-QLU3>]; Sarah Horner, *New Ramsey County Program Would Give More Offenders a Second Chance*, Pioneer Press (Aug. 8, 2019), <https://www.twincities.com/2019/08/19/new-ramsey-county-program-would-give-more-offenders-a-second-chance/> [<https://perma.cc/6FMV-6EM3>].

dig more into a defendant's mental illness by speaking with probation officers. The defendant was previously convicted of drug possession and was on probation. Aside from that conviction, the defendant had a clean criminal record since 2010, which coincidentally was about the time the defendant was formally diagnosed with schizophrenia.

The Progressive Prosecutor learns all of this important, and often overlooked, information before court. At his first appearance, the defendant can barely walk, and he needs help from his caregiver to get to the floor of the courtroom. His defense attorney keeps him steady as they stand before the judge. It is clear that this defendant, in his current accommodation, has access to services like housing, mental health treatment, recreational therapy, and cognitive therapy. From this set of facts, a Progressive Prosecutor must understand how to appropriately use his discretion. The wrong decision would be to convict the defendant and send him to prison. When he finally gets out in several years, all his services would be gone, his progress gone, and he would likely end up hurting himself or someone else. The perpetuation of this cycle is needless.

From a Progressive Prosecutor's prospective, the theoretical right thing to do in this case is to dismiss the charges. Although this is a "winnable" case and has all the legal elements necessary to sustain a conviction, the correct exercise of discretion is to simply do nothing. I have learned that sometimes by doing nothing, you are doing a lot for those involved. In the end, the victim, the defendant, and the probation officer felt as though justice had been done. For me, that was a successful prosecution.

C. Plea Bargain Discretion

Just as with charging, prosecutors have broad discretion in the plea bargain process.³⁹ This process has been widely utilized since the 1920s,⁴⁰ one in which even the court itself may not participate in.⁴¹ One common prosecutorial strategy used is to urge a defendant to plead to their charges and avoid trial. If a criminal defendant fails to settle a case, the prosecutor can bring more severe charges against a defendant. These added charges

³⁹ *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (likening the plea bargain process to horse trading between prosecutors and defense counsel).

⁴⁰ By the late 1920s, "plea bargaining had become a central feature of the administration of justice." Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 29 (1979). A number of factors may have influenced the development and increased use of plea bargaining, including urbanization, increased crime rates, increased criminal caseloads, expansion of substantive criminal law, and the growing complexity of the trial process. *See id.* at 42; *see also* John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 L. & SOC'Y REV. 261, 262 (1979); Brief for Appellant at 5, *Puckett v. United States*, 556 U.S. 129 (2009) (No. 07-9712), 2008 WL 4992692.

⁴¹ MINN. R. CRIM. P. 15.04, subdiv. 3 (2019) ("A district court judge must not participate in plea negotiations.").

often come with harsher punishments such as increased incarceration time and probationary terms. With plea bargain discretion, prosecutors have traditionally used this system to procure convictions while preserving the cost and resources that a criminal jury trial would otherwise consume.⁴² Courts recognize the plea bargain process is a critical stage in which an accused should be afforded due process.⁴³ The threat of additional and more severe charges applies pressure to the accused and, at times, procures a plea of guilty.

However, the plea bargain process is not without its critics. Plea bargaining has the effect of extorting guilty pleas from the innocent while also damaging the integrity of the American jury trial system.⁴⁴ Trial by a jury of one's peers, the presumption of innocence, and proof beyond a reasonable doubt: these rights are the bedrock of our criminal justice and jury trial system, and yet we know that the majority of cases that come through the scheme are dealt with via plea bargain.⁴⁵ The process then becomes dominated by plea deals as opposed to one that tests evidence against the standard of "proof beyond a reasonable doubt."⁴⁶ Given the

⁴² In many—perhaps most—countries of the world, American-style plea bargaining is forbidden in cases as serious as this one, even for the limited purpose of obtaining testimony that enables conviction of a greater malefactor, much less for the purpose of sparing the expense of trial. *See, e.g.*, STEPHEN THAMAN, *WORLD PLEA BARGAINING* 363–66 (S. Thaman ed. 2010). In Europe, many countries adhere to what they aptly call the "legality principle" by requiring prosecutors to charge all prosecutable offenses, which is typically incompatible with the practice of charge-bargaining. *See, e.g., id.* at xxii; John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 *MICH. L. REV.* 204, 210–11 (1979) (describing the "Legalitätsprinzip," or rule of compulsory prosecution, in Germany). Such a system reflects an admirable belief that the law is the law, and those who break it should pay the penalty provided. In the United States, we have plea bargaining aplenty, but until today it has been regarded as a necessary evil. It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense; and for guilty defendants it often—perhaps usually—results in a sentence well below what the law prescribes for the actual crime. But even so, we accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt. *See, e.g.*, Alschuler, *supra* note 40 at 31; *Laffer v. Cooper*, 566 U.S. 156, 185–86 (2012).

⁴³ *Frye*, 566 U.S. at 134 ("The Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected. That right applies to 'all "critical" stages of the criminal proceedings.'"); *see also* *Montejo v. Louisiana*, 556 U.S. 778 (2009); *Hill v. Lockhart*, 474 U.S. 52 (1985).

⁴⁴ RALPH ADAM FINE, *PLEA BARGAINING: AN UNNECESSARY EVIL*, 70 *MARQUETTE L. REV.* 615, 616–15 (1987).

⁴⁵ Christopher Wright Durocher, *The Rise of Plea Bargains and Fall of the Right to Trial*, *AM. CONST. SOC'Y.*, <https://www.acslaw.org/expertforum/the-rise-of-plea-bargains-and-fall-of-the-right-to-trial/> [<https://perma.cc/J735-R9QK>] ("Today, more than 95 percent of cases that resolve in conviction are the result of plea bargains.")

⁴⁶ *Laffer*, 566 U.S. at 170 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials."); *see also* *Missouri v. Frye*, 566 U.S. 134, 143 (2012).

dangers of the plea bargain trap, Progressive Prosecutors understand the importance of plea bargaining fairly, and that they should use the plea bargain as a tool to find just outcomes as opposed to using the process to wrangle a guilty plea just for the sake of obtaining expediency.

D. Decriminalize Mental Illness and Drug Addiction

We know that many people living with mental illness inevitably end up in the criminal justice system.⁴⁷ “In a mental health crisis, people are more likely to encounter police than get medical help. As a result, 2 million people with mental illness are booked into jails each year. Nearly 15% of men and 30% of women booked into jails have a serious mental health condition.”⁴⁸ The Progressive Prosecutor understands the importance of the treatment of mental illness over the criminalization of mental illness. Unfortunately, issues with mental illness and addiction became prominent in the early 1950s when the deinstitutionalization of state mental health care facilities forced those living with mental illness to become homeless and left them untreated.⁴⁹ But just because state-run mental health care facilities closed, those living with mental illness did not simply disappear. They reappeared before law enforcement, then in jails, and ultimately courtrooms.

The powder keg of defunding mental health care blew up. The criminal justice system—a process that was never intended to treat or properly care for those living with mental illness—was left to absorb the blast.⁵⁰ The Progressive Prosecutor knows that just because those living with mental illness are arrested and charged with criminal offenses does not mean that such individuals truly belong in the system. Being mentally ill is not a crime.

Progressive prosecutors have also turned their attention from the criminalization of those suffering from drug addiction to helping them manage and control their addict behaviors. Progressive Prosecutors’

⁴⁷ *Jailing People with Mental Illness*, NATIONAL ALLIANCE ON MENTAL ILLNESS, <https://www.nami.org/learn-more/public-policy/jailing-people-with-mental-illness> [https://perma.cc/2QAC-SJUJ].

⁴⁸ *Id.*

⁴⁹ Daniel Yohanna, *Deinstitutionalization of People with Mental Illness: Causes and Consequences*, AM. MED. ASS’N. J. OF ETHICS (Oct. 2013), <https://journalofethics.ama-assn.org/article/deinstitutionalization-people-mental-illness-causes-and-consequences/2013-10> [https://perma.cc/QX6E-K758].

⁵⁰ Stephen Raphael & Michael A. Stoll, *Assessing the Contribution of the Deinstitutionalization of the Mentally Ill to Growth in the U.S. Incarceration Rates*, 42 J. LEGAL STUD. 187, 187 (2013) (presenting research suggesting that “47 percent of incarceration growth between 1980 and 2000 is attributable to deinstitutionalization.”); *Mental Health and Criminal Justice Issues*, MENTAL HEALTH AM., <https://www.mhanational.org/issues/mental-health-and-criminal-justice-issues> [https://perma.cc/F8Z6-ETP7].

understanding of mental health care and treatment is similar to their understanding and approach to those who live and suffer at the hands of drugs addiction.⁵¹ The Progressive Prosecutor sees mental illness and substance abuse as ailments rather than criminal offenses and knows that treatment is worth more than incarceration.

Experience prosecutors should understand that the arrest and detention of those suffering from mental health or addiction crises is not the answer. Unfortunately, the police officers working the beat must often arrest or detain these individuals because there are very few alternatives; in other words, the choice is either the hospital or the jail.⁵² Hospitals do not have enough beds for mental health patients, so even if there is a hold on a patient, they eventually are released within 72 hours⁵³—that is if they are even held at the hospital in the first place.⁵⁴

The reality is that most people suffering from mental illness get brought to jail.⁵⁵ This is a failure of our system. Often times, the arresting officer and the prosecutor assigned to the file the following day understand this failure. So, what is the solution? It is lofty, but we as a society need to invest again in the treatment of our mentally ill.⁵⁶ We need to build more

⁵¹ Brentin Mock, *Maybe Marilyn Mosby Shouldn't Have the Power to Prosecute Weed Anyway*, CITY LAB, <https://www.citylab.com/perspective/2019/01/marilyn-mosby-baltimore-marijuana-cannabis-prosecute/581641/> [<https://perma.cc/3B7Z-K84A>]. Baltimore State's Attorney Marilyn Mosby recently announced that marijuana-related charges will no longer be prosecuted by the state. Baltimore was just one of several cities making these changes. "Progressive Prosecutors' in St. Louis, Philadelphia, Chicago, Houston, Manhattan, Brooklyn, Albany, Jersey City, Kansas City, and Norfolk, Virginia have all pledged to either downgrade the criminality of cannabis drug offenses or they have committed . . . to cease trying them altogether." *Id.*

⁵² See *Infra* note 55.

⁵³ MINN. STAT. § 253B.05(e) ("A person held under a 72-hour emergency hold must be released by the facility within 72 hours unless a court order to hold the person is obtained. A consecutive emergency hold order under this section may not be issued.")

⁵⁴ Torrey Fuller, *The Shortage of Public Hospital Beds for Mentally Ill Persons: A Report of the Treatment Advocacy Center*, MENTAL ILLNESS POLICY, <https://mentalillnesspolicy.org/wp-content/uploads/shortage-hosp-beds.pdf> [<https://perma.cc/AF7B-FP3F>]; *Nearly 1 in 5 Mental Health Bed Days in Minnesota Hospitals is Potentially Avoidable*, MINN. HOSP. ASS'N, <https://www.mnhospitals.org/newsroom/news/id/1958/nearly-1-in-5-mental-health-bed-days-in-minnesota-hospitals-is-potentially-avoidable> [<https://perma.cc/YKH8-3WAL>]; Samantha Raphaelson, *How The Loss Of U.S. Psychiatric Hospitals Led To A Mental Health Crisis*, NPR, (Nov. 30, 2017), <https://www.npr.org/2017/11/30/567477160/how-the-loss-of-u-s-psychiatric-hospitals-led-to-a-mental-health-crisis> [<https://perma.cc/XC5A-VNfy>].

⁵⁵ NATIONAL ALLIANCE ON MENTAL ILLNESS, *supra* note 47 ("Nearly 15% of men and 30% of women booked into jails have a serious mental health condition.")

⁵⁶ RTI INT'L, *supra* note 23, at 3 ("Untreated or inadequately treated inmates are more likely to resume using drugs when released from prison and commit crimes at a higher rate than non-abusers . . . [D]iverting substance-abusing state prisoners to community-based treatment programs rather than prison could reduce crime rates and save the criminal justice system billions of dollars relative to current levels. The savings are driven by immediate reductions

housing and fill that housing with mental health care providers, nurses, doctors, therapists, and other professionals who are trained and charged with caring for our addicted and our mentally ill.⁵⁷

*E. Deportation: Why Care Now?*²

Perhaps one of the biggest challenges that faces the Progressive Prosecutor is deciding what role they play in the collateral consequences of deportation and the ramifications of convicting someone whose immigration status is in flux.⁵⁸ Prosecutors are not legally responsible for the collateral consequences of deportation; the law places the burden on defense counsel to address deportation and immigration consequences.⁵⁹ It should be noted, however, that prosecutors often do—and the courts must in Minnesota—ensure that collateral consequences of deportation and immigration have been explained to the defendant by defense counsel.⁶⁰ When a guilty plea results in deportation, denied citizenship, or immigration status that is otherwise affected in some negative way, the law holds that the prosecutor is not the one responsible for the adverse effect; the party responsible is the defendant's attorney.⁶¹ This is most often because a defense attorney may fail to fully inform their client about how a criminal conviction may adversely affect their immigration status.⁶² Traditionally, the defense attorney is the only party obligated to make a clear

in the cost of incarceration and by subsequent reductions in the number of crimes committed by successfully-treated diverted offenders, which leads to fewer re-arrests and re-incarcerations. The criminal justice costs savings account for the extra cost of treating diverted offenders in the community.”).

⁵⁷ *Id.* (“Sending drug abusers to community-based treatment programs rather than prison could help reduce crime and save the criminal justice system billions of dollars . . . Nearly half of all state prisoners are drug abusers or drug dependent, but only 10 percent receive medically based drug treatment during incarceration.”).

⁵⁸ Hillary Blout, Rose Cahn & Miriam Aroni Krinsky, *The Prosecutor's Role in the Current Immigration Landscape*, CRIM. JUST. MAG. 35 (Winter 2018), <https://fairandjustprosecution.org/wp-content/uploads/2018/02/ProsecutorRole.CRIMINALJUSTICE.Krinsky.pdf> [<https://perma.cc/UPQ7-SPZJ>].

⁵⁹ It is counsel's responsibility, and not the court's, to advise an accused of a collateral consequence of a plea of guilty; the consequence of deportation has been held to be collateral. *See* Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir. 1976); Michel v. United States, 507 F.2d 461, 466 (2d Cir. 1974); Commonwealth v. Wellington, 451 A.2d 223, 225 (Pa. Super. Ct. 1982); People v. Correa, 485 N.E.2d 307, 310-11 (Ill. 1985).

⁶⁰ MINN. R. CRIM. P. 15.01 subdiv. 1 (6)(l) (“The judge must also ensure defense counsel has told the defendant and the defendant understands: If the defendant is not a citizen of the United States, a guilty plea may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.”)

⁶¹ Padilla v. Kentucky, 559 U.S. 356 (2010).

⁶² *Id.* at 368-69.

record that a plea or conviction would result in deportation.⁶³ If the defense attorney makes this record and the client acknowledges they have been informed of the likelihood of deportation, the obligation is met.⁶⁴ But that is the extent of protections for immigrants.

Traditionally, prosecutors have ignored immigration and deportation consequences as collateral to a conviction. Prosecutors are under no legal or duty-based obligation to be mindful of these immigration consequences because the sole responsibility was legally placed upon the defense attorney.⁶⁵ Progressive Prosecutors want to do more than just see a defense attorney meet the low bar of informing a client of their deportation and immigration consequences. Instead, today's Progressive Prosecutors are implementing policies to ensure the consequences to a conviction will not result in the unnecessary deportation of an individual.⁶⁶ Consider the example of two defendants both charged with a low-level, nonviolent theft offense. The first defendant is a United States citizen, and the second is not. Both defendants are convicted either by plea deal or trial. The first gets a fine, some time in jail, and probation for a few years. The second gets deported, loses her family, job, housing, and educational opportunities. The difference here is that for the second individual, her life is completely evaporated, whereas the first faces some relatively minor consequences. These results are inequitable. Across the country, Progressive Prosecutors are advocating for state attorneys to take deportation and immigration consequences into account when making any charging or plea bargaining decision.⁶⁷ Some prosecutors across the country have begun to hire

⁶³ *Id.* at 372.

⁶⁴ When the law is not succinct and straightforward as to whether a guilty plea will result in deportation, a criminal defense attorney, in order to provide effective assistance, need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences; but when the deportation consequence is truly clear, the duty to give correct advice is equally clear. U.S.C.A. Const. Amend. 6; *Padilla*, 559 U.S. at 356.

⁶⁵ *Padilla*, 559 U.S. at 367 (“The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.”); STANDARDS FOR CRIMINAL JUSTICE § 14-3.2(f) (AM. BAR ASS’N 1999) (“To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.”).

⁶⁶ Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 26–27, 54–56 (2012) (arguing for the adoption of policies that encourage prosecutors to agree to pleas and sentences that avoid risks of deportation).

⁶⁷ Christie Thompson, *How Prosecutors are Fighting Trump’s Deportation Plans*, THE MARSHALL PROJECT (May 16, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/05/16/how-prosecutors-are-fighting-trump-s-deportation-plans> [https://perma.cc/4UQU-NWSM] (“[P]rosecutors across the country, are looking for ways to shield some low-level offenders from deportation. Many of these policies are being implemented by the so-called Progressive Prosecutors who were recently elected,

immigration attorneys⁶⁸ and even make them a part of their staff to utilize resources for consultation before making plea deals and charging decisions.⁶⁹ It is this model that must be adopted by all state attorneys to promote equity in the justice system.

III. PROSECUTORIAL TOOLS FOR INCREASING FAIRNESS IN THE JUSTICE SYSTEM

A. High Cash Bail Is the Poor Person's Trap

There are issues outside of criminal procedure that call into question the idea of fairness in the justice system. The imposition of high cash bail⁷⁰ amounts is a wagon full of snares aimed at detaining mostly poor persons.⁷¹ If one cannot afford to post bail to allow them to be released pending their case's slow march to trial, then the accused essentially has two options: (1) wait and stay incarcerated for a crime of which they have not yet been convicted (which seemingly goes against the idea of a presumption of

as part of an effort to reassure their foreign-born constituents that the local D.A. isn't acting in lockstep with federal immigration officials.”).

⁶⁸ Christina Carrega, *Brooklyn DA Eric Gonzalez Hires Staff to Protect Immigrants from Deportation*, N.Y. DAILY NEWS (Apr. 24, 2017, 11:57 AM), <http://www.nydailynews.com/new-york/brooklyn/eric-gonzalez-hires-staff-protect-immigrants-deportation-article-1.3094689> [<https://perma.cc/NC9Y-75W5>] (“Acting DA Eric Gonzalez has hired two immigration attorneys to train all staff on immigrant issues and to advise on plea bargains for misdemeanors and sentencing recommendations to avoid deportation and other consequences.”).

⁶⁹ Shannon Prather, *Ramsey County Attorney John Choi Seeks to Make Punishments Fit the Crime*, STAR TRIB. (Feb. 19, 2019, 8:52 PM), <http://www.startribune.com/ramsey-county-attorney-john-choi-seeks-to-make-punishments-fit-the-crime/506076702/> [<https://perma.cc/9B4Q-FATS>] (“Ramsey County Attorney John Choi is directing his staff to consider how plea deals and sentencing might affect a defendant's immigration status, job or housing—and how, in some cases, prosecutors might make those consequences less severe.”).

⁷⁰ See *State v. Brooks*, 604 N.W.2d 345, 349 (Minn. 2000) (citing *Reynolds v. United States*, 80 S.Ct. 30, 32 (1959)) (“The United States Supreme Court has stated that the purpose of bail is to ensure an accused's appearance and submission to the court's judgment.”). See also *State v. Mastrian*, 122 N.W.2d 621, 622 (Minn. 1963)) (demonstrating that the Minnesota Supreme Court has also upheld such a purpose for bail); David Hall, *It's Time to End Cash Bail that Leads Unfairly to Time in Jail*, JUST. POL'Y INST. (June 28, 2017), <http://www.justicepolicy.org/news/11551> [<https://perma.cc/EVF3-NLL7>].

⁷¹ Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1127 (2018) (citing TODD D. MINTON & ZHEN ZENG, BUREAU OF JUST. STAT., JAIL INMATES AT MIDYEAR 2014, at 4 (2015), <https://www.bjs.gov/content/pub/pdf/jim14.pdf> [<https://perma.cc/B4WP-AA6C>]) (“Cash bail results in excessive detention, wealth- and race-based discrimination, and high costs to taxpayers and communities. Nearly two-thirds of the people in jails in the United States have not been convicted of a crime.”). Many individuals subject to higher bail really do not need to remain in jail; often times, “a judge has already determined that they are not a flight or dangerousness risk.” *Id.*

innocence) or (2) plead guilty via plea deal, which often leads to an easier negotiation of release terms pending the sentencing phase. The availability of other alternatives truly comes down to one's ability to have access to financial resources. Plainly put, rich people can pay for freedom while poor people cannot.⁷² Perhaps the worst possible outcome in allowing the poor to sit in jail is when it results in wrongful incarceration. That is, the prosecution finds that there is not enough evidence to proceed to trial and dismisses the case.⁷³ Although the accused is ultimately released from custody, it can come long after he or she served several months of unnecessary incarceration. Today's Progressive Prosecutor understands that bail should be set only when necessary in an amount that is attainable. Some prosecutors have developed noncash bail alternatives altogether.⁷⁴ Some counties have begun utilizing reminders and text messaging arrangements to ensure people's appearance at court.⁷⁵ Kim Foxx⁷⁶, the Cook County Attorney whose recent rise to the national stage as one of the country's most Progressive Prosecutors, has developed a policy in which

⁷² The Editors, *The Bail System Punishes the Poor—Here are Some More Just Alternatives*, AM. THE JESUIT REV. (Nov. 2, 2017), <https://www.americamagazine.org/politics-society/2017/11/02/bail-system-punishes-poor-here-are-some-more-just-alternatives> [https://perma.cc/2QZ6-LNVD]

(“Access to financial resources can determine whether someone accused of a crime can continue a normal life—including keeping a job, paying bills and caring for children—or must endure months or even years behind bars before going to trial. . . . Prosecutors can also use the threat of exorbitant bail to force people into pleading guilty simply to avoid jail time.”).

⁷³ See generally MINN. R. CRIM. P. 30.01 (“The prosecutor may dismiss a complaint or tab charge without the court's approval, and may dismiss an indictment with the court's approval”; see also MINN. R. OF PROF. CONDUCT 3.8(A) (“The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”)

⁷⁴ See Ariana K. Connelly & Nadin R. Linthorst, *The Constitutionality of Setting Bail Without Regard to Income: Securing Justice or Social Injustice?*, 10 Ala. C.R. & C.L. L. Rev. 115, 150–55 (2019) (describing numerous alternatives to reform monetary bail); Courtney Lam, *Pretrial Services: An Effective Alternative to Monetary Bail*, Ctr. on Juv. and Crim. J. (July 2014), http://www.cjcj.org/uploads/cjcj/documents/cjcj_pretrial_reform_july_2014.pdf [https://perma.cc/6BX4-UL6G].

⁷⁵ Jason Tashea, *Text-Message Reminders are a Cheap and Effective Way to Reduce Pretrial Detention*, A.B.A. J. (July 17, 2018, 7:10 AM), http://www.abajournal.com/lawscribbler/article/text_messages_can_keep_people_out_of_jail [https://perma.cc/N7FR-YDZP].

⁷⁶ Kimberly M. Foxx, Cook County State's Att'y, <https://www.cookcountystatesattorney.org/about/kimberly-foxx> [https://perma.cc/7HX8-Y64S] (“Kimberly M. Foxx is the first African American woman to lead the Cook County State's Attorney's Office—the second largest prosecutor's office in the country. Kim took office on December 1, 2016 with a vision for transforming the Cook County State's Attorney's Office into a fairer, more forward-thinking agency focused on rebuilding the public trust, promoting transparency, and being proactive in making all communities safe.”).

low-level, nonviolent offenders are released without bail or not having to post cash bonds whatsoever.⁷⁷

As prosecutors gain experience as ministers of justice, it is important to understand that high bail amounts typically are not the answer to securing return to court or public safety. Posting high bail should be considered absurd if the prosecutor fails to consider whether the defendant can actually post such an amount or fails to weigh the need for such bail with the interests of the defendant.⁷⁸ That is not to say that setting high bail amounts is an absurd tactic altogether. Setting high bail amounts due to public safety concerns is often completely appropriate where such safety would be ensured if the defendant could not post this bail amount. However, it is important for prosecutors to understand that the money posted for bail is often not his or her own money—it is their mother's, uncle's, aunt's, or the community's money.

The solution is for the courts to allow bail amounts that are attainable and proportional. It may even be appropriate to let go of the fear of not asking for any bail at all. The truth is, bail serves very little purpose when it comes to ensuring public safety and whether or not someone returns to court.⁷⁹ It is about having courage to give these low-level offenders the chance of returning on their word alone. It is a simple solution, but it is one that takes faith.

77 State's Attorney Foxx Announces Major Bond Reform, Cook County State's Att'y (June 12, 2017), <https://www.cookcountystatesattorney.org/news/state-s-attorney-foxx-announces-major-bond-reform> [<https://perma.cc/49NQ-4E8D>] (“Cook County State's Attorney Kim Foxx announced today that her office is recommending I-Bonds for defendants who don't present a risk of violence or flight. Under the new policy, prosecutors will recommend I-Bonds, which allow a person to be released on their own recognizance pending trial, in cases where there is no prior violent criminal history, the current offense is a misdemeanor or low-level felony, and there are no other risk factors suggesting a danger to the community or a failure to appear for court.”).

78 In my career, I have made thousands of bail arguments, so many that I have forgotten about most if not all of them. I have requested bail in the amount of \$1.5 million and had it granted. I have requested cash bail for fines on petty level offenses (albeit this was in the beginning of my career when I thought setting bail in the fine amount made sense). But looking back, it is rather absurd. When I began prosecuting, if a defendant failed to appear for, say, a speeding ticket, I would ask the court to set cash bail in the amount of \$187 plus surcharges and fees. This amount equaled the precise amount of the citation. I thought, “great, when they post the cash bail then the fine is paid and the case is closed.” Never did I think someone would not be able to post such a small amount. I obviously was wrong, and I am certain now looking back that my naivety led to many people being held for days and weekends until they could finally appear in court to address something as small as a nonappearance.

⁷⁹ See *Release: Money Bail Serves No Purpose in a Fair, Effective Justice System*, JUST. POL'Y. INST. (September 11, 2012), <http://www.justicepolicy.org/news/4365>; see also Colin Doyle, Chiraag Bains, & Brook Hopkins, *Bail Reform: A Guide for State and Local Policymakers*, HARVARD L. SCHOOL CRIM. JUST. POL'Y PROGRAM 1, 6 (2019) http://cjpp.law.harvard.edu/assets/BailReform_WEB.pdf.

B. Tackling an Internal Cultural Problem

With all this discretion at the Progressive Prosecutor's fingertips, why are their jurisdictions not flourishing and transforming as fast or even at all? The answer lies from within. Though county attorneys with the mentality of Progressive Prosecutors run for elections on platforms promising reform, they are in the end just the elected official. In each county office are frontline prosecutors that may or may not believe in reform or progressive prosecution at all. Some of these prosecutors see these reforms as an attack on their work and an inhibition on their ability to obtain conviction after conviction.⁸⁰ I believe that some of these prosecutors trust that it is not the job of a state attorney to worry about the defendant or what bad things may happen to defendants after their conviction. Unfortunately, these attorneys focus on the older way of prosecution, which is simply punishing any and all crime, no matter the circumstance.

The issue for the Progressive Prosecutor boils down to one question: how does one change office culture and law practice in a way that meaningfully impacts more progressive policies and outcomes? One way of tackling this culture problem is refocusing from the number of convictions a prosecutor obtains to whether or not the prosecutor sought a just or equitable outcome for all parties affected by the prosecution process. Reeducation and mandatory trainings in the areas of cultural competency, economic disparity, implicit bias, and false confessions may help prosecutors develop a more progressive lens in how they pursue convictions. Another way of enacting change or shifting office culture is simply by hiring prosecutors who will fit the direction and focus of the Progressive Prosecutor. Promoting diversity within the legal staff and the advancement of minorities underrepresented in the legal field and paving more ways for such individuals to move into key leadership roles can also help grow and shift cultural change.⁸¹

There is no denying that in several parts of this country, the public is demanding something more from their elected prosecutors than the same old way justice has been done.⁸² Demographics are changing along with the public perception of what a prosecution office should be focusing on.⁸³ If this were not the case, then prosecutors running on platforms of reform would not be winning district and county attorney races.

⁸⁰ See *The Paradox of "Progressive Prosecution,"* *supra* note 6, at 768 (quoting Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 384 (2001)) ("[P]ractitioners and scholars critique prosecutors' interest in securing a conviction; this interest is driven by 'the cultural and institutional presumption in most prosecutor offices . . . that *everybody is guilty*.' This desire to win does not necessarily lessen when the case is weak; rather it manifests itself through more generous plea offers from the prosecutor.").

⁸¹ Brennan Ctr. for Justice & The Justice Collaborative, *supra* note 2, at 14-15.

⁸² See *The Paradox of "Progressive Prosecution,"* *supra* note 6, at 751-52.

⁸³ See *id.*

IV. CONCLUSION

Although Progressive Prosecution is still on the rise, a fair and equitable justice system calls for quicker reform. Society finally understands what these progressive ideals entail. Progressive Prosecution is about caring for *all* those who are impacted by prosecution—including the accused. It is also about ensuring that prosecutors continue to serve United States citizens and noncitizens. Progressive Prosecution truly embraces the core value of what it means to be a prosecutor: a minister of justice. But the question remains whether a Progressive Prosecutor implements internal cultural change in an effective and meaningful way without more willingness from society to reform the system as a whole. For without change inside ourselves, we cannot expect to serve those outside of our walls to our fullest capability.

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