

A MIRAGE NOT A MOVEMENT: THE MISGUIDED ENTERPRISE OF PROGRESSIVE PROSECUTION

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ABSTRACT

The selling point of the progressive prosecutor movement is that the prosecutor—the player with the most discretion in the criminal legal system—is in the best position to effect change within the system. But when progressive prosecutors have tried reducing mass incarceration, their prosecutorial discretion diminishes. Progressive prosecutors like Larry Krasner, George Gascón, and Aramis Ayala fully intended to make good on the progressive policies they touted on the campaign trail, but once elected, they faced relentless institutional pushback. Case studies of those three progressive prosecutors demonstrate that progressive prosecution’s incremental change proposes too little and costs too much.

While progressive prosecution is an improvement on traditional prosecution, it does not offer a path to ending mass incarceration, and in fact may distract or detract from that goal. In this article, we lay out our argument for why that is, including evidence in the form of case studies. We then offer some potential ways forward toward abolition, such as distancing prosecutorial reforms from prosecution offices and building programs focused on achieving Transformative Justice.

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I. INTRODUCTION

Two decades ago, Professor Abbe Smith first asked the question, “Can you be a good person and a good prosecutor?”¹ Her answer: “I hope so, but I think not.”² Until that point, the question had not been broached in academic circles. Defense lawyers, she reported, were constantly asked, “How can you defend those people?”³ Nobody interrogated prosecutors. Indeed, as Professor Smith noted in her article, the very suggestion that prosecutors were anything but good people was controversial two decades ago.⁴ Professor Smith’s article provoked a debate within the legal community⁵ that has only intensified over the past twenty years, particularly as the progressive prosecution movement has sought to identify and create “good” prosecutors. Even some “good” prosecutors acknowledge that the traditional prosecution model—one that responds to social, economic, and racial inequities by warehousing people—is difficult to square with a commitment to social and racial justice.⁶

Mass incarceration has long been recognized as one of the most pressing civil rights issues of the modern era,⁷ and progressive prosecution has been heralded as a possible solution.⁸ Prosecutors have all the discretion,⁹ the argument goes, so if

¹ Abbe Smith, *Can You be A Good Person And A Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355 (2001).

² *Id.* at 396.

³ *Id.* at 357.

⁴ *Id.* at 355–56.

⁵ See *Fordham Law Review Online Symposia*, 87 FORDHAM L. REV. ONLINE (2018), available at <https://ir.lawnet.fordham.edu/flro/vol87/iss1/> [<https://perma.cc/ML2J-HETP>].

⁶ “Always remember prosecutors do harm. If you’re looking for harm a progressive prosecutor caused, you don’t have to look far.” Telephone Interview with Aramis Ayala, former Florida State Attorney for the Ninth Judicial Circuit (Apr. 20, 2021).

⁷ See, e.g., *Criminal Justice Reform*, EQUAL JUST. INITIATIVE, <https://eji.org/criminal-justice-reform/> [<https://perma.cc/VL39-NH6S>] (last visited Apr. 24, 2022) (“EJI believes ending mass incarceration is the civil rights issue of our time.”).

⁸ See, e.g., Katrina vanden Heuvel, *Opinion: How Progressive District Attorneys Are Leading the Charge to Fix Our Broken Justice System*, WASH. POST (Feb. 9, 2021), <https://www.washingtonpost.com/opinions/2021/02/09/how-progressive-district-attorneys-are-leading-charge-fix-our-broken-justice-system/> [<https://perma.cc/P3UN-9UKW>]; *About FJP: Our Work and Vision*, FAIR AND JUST PROSECUTION, <https://fairandjustprosecution.org/about-fjp/our-work-and-vision/> [<https://perma.cc/5987-FWD7>] (last visited June 4, 2022); ACCOUNTABLE JUSTICE ACTION FUND, <https://accountablejusticeaction.org/> [<https://perma.cc/7B2A-TYQ9>] (last visited June 4, 2022); *On the Issues*, LARRY KRASNER FOR DIST. ATT’Y, <https://krasnerforda.com/platform> [<https://perma.cc/N4UX-45ZD>] (last visited June 4, 2022) (including, as part of Krasner’s platform, a section titled “End mass incarceration”); CHESA BOUDIN, <https://www.chesaboudin.com/> [<https://perma.cc/YV8A-77RG>] (last visited June 4, 2022) (including, as one of the goals Boudin is working toward, “reducing mass incarceration”).

⁹ As Professor Paul Butler has noted, “[t]he head of a prosecution office is the most unregulated actor in the entire legal system. . . . There’s no law, for example, that says that simply because the prosecutor knows someone is guilty of a crime, that suspect must be charged. The lead prosecutor . . . can make whatever decision he wants about whether to prosecute and no judge or politician can overturn it.” PAUL BUTLER, *LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE* 106 (The New Press ed., 2009). It is undoubtedly true that prosecutors, especially head prosecutors, have enormous discretion. The scope of their discretion is intoxicating to supporters of the progressive prosecution movement, because, in theory, they could choose not to prosecute anyone at all. *Id.* And yet, as we discuss below, this

progressives are the ones exercising that discretion, the worst excesses of the criminal legal system can be constrained or even eliminated.¹⁰

We reject the view that prosecution will ever be the solution to the crisis of mass incarceration. We believe any movement that embraces prosecution cannot be considered progressive in any meaningful way. Our contribution to this debate is to suggest that “progressive prosecution” is an ineffective antidote that distracts—and detracts—from the wholesale dismantling and re-envisioning of an approach to harm necessary to meaningfully address the current system’s endemic problems.

We are indigent defenders in Seattle, WA, and Washington, DC. We obviously prefer that our adversaries be “good” people or “progressive prosecutors,” but we do not believe that even the most “progressive” of prosecutors can successfully alleviate the harm caused by the criminal legal system. Progressive policies do make a difference to our clients, and we are grateful that the public perception of the criminal legal system and law enforcement has become increasingly critical of traditional prosecution.¹¹ But at best, prosecutors can be less carceral. It is not “progressive” to put fewer people in cages inside violent prisons, and it is certainly not a pathway to the kind of radical transformation that the entrenched racism and oppression of our current system demands in response. We believe we must focus on a movement that will dismantle the criminal legal system. A diversion of attention and resources towards a handful of “progressive” prosecutors is an ill-advised detour on the path to abolition.¹² In this Article, we will demonstrate the ways in which this

unfettered discretion exists in theory only. Experience tells us that, when prosecutors seek to disrupt the institution, entrenched forces suddenly cause that theoretical discretion to evaporate, and even the most well-meaning prosecutors find themselves beholden to more punitive practices.

¹⁰ Darcy Covert, *The False Hope of the Progressive-Prosecutor Movement*, ATLANTIC (June 14, 2021), <https://www.theatlantic.com/ideas/archive/2021/06/myth-progressive-prosecutor-justice-reform/619141/> [https://perma.cc/BHJ9-GK49] (“These so-called progressive prosecutors promise to end mass incarceration and bring fairness to the criminal legal system—by doing things such as declining to prosecute certain low-level offenses, expanding diversion programs, and replacing hard-line assistants with reform-minded outsiders.”).

¹¹ This trend is evidenced by an influx of progressive prosecutors who beat their more traditional opponents in recent elections. See Cara Bayles, *A New Class Of Prosecutors: Reformers Win Races Nationwide*, (Nov. 8, 2020), <https://www.law360.com/articles/1326594/a-new-class-of-prosecutors-reformers-win-races-nationwide> [https://perma.cc/X346-CXBQ]. We are borrowing the term “traditional prosecution” from Benjamin Levin. See Benjamin Levin, *Imagining the Progressive Prosecutor*, 105 MINN. L. REV. 1415, 1427 (2021).

¹² The goal of abolition is not to reduce life sentences and replace them with fifteen-, ten-, or even five-year sentences. The goal is not to temper the system’s racism so that racial disparities in jail in any given big city are narrowed. The ideal is an abolitionist vision, toward a system in which harmful behavior is not criminalized, where “criminal behavior” is addressed through non-carceral interventions that reallocate resources from law enforcement into communities to repair harm, and affirm people’s right to live with dignity. As Professor Smith notes in a 2018 Article revisiting the topic, “the very nature of the job prosecutors do—locking people up—upholds our shameful system.” Abbe Smith, *Good Person, Good Prosecutor in 2018*, 87 FORDHAM L. REV. ONLINE, 3, 4 (2018) (emphasis in original). Our ideal is shaped by lifelong abolitionists who have advocated for and written about their visions for a world without police, prosecutors and prison. Ruth Wilson Gilmore and Angela Y. Davis founded Critical Resistance in 1997 to “challeng[e] the idea that imprisonment and policing are a solution for social, political, and economic problems.” *History*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/history/> [https://perma.cc/DSZ9-EYCV] (last visited Mar. 3, 2022). Other abolitionists including Mariame Kaba, Derecka Purnell, and Andrea Ritchie have deeply informed the politics that make up the foundation of this Article.

less-carceral approach to prosecution – while welcomed at the margins, and significant for the relatively few individuals it benefits – is doomed to remain at the margins, not worth our sustained focus.

In addition to the inherent flaws in progressive prosecution, the reforms that prosecutors try to implement are often undermined by those who wish to maintain the status quo. This Article takes an in-depth look at the institutional and structural barriers that head prosecutors face when they try to use prosecution to solve the problems created by prosecution. Informed by our original primary research into offices considered to be progressive, the Article proceeds in three parts.

In Part II, we seek to make sense of the term “progressive prosecution,” and then examine the ways self-proclaimed progressive prosecutors struggle to implement their policies within the current criminal legal system.

In Part III, we present three case studies that illuminate the institutional roadblocks progressive prosecutors face. First, we look at the issues Philadelphia District Attorney Larry Krasner has encountered, including resistance by police unions and disgruntled line prosecutors. Next, we describe the resistance Los Angeles District Attorney George Gascón has faced from his assistant district attorneys and the District Attorney Associations in Los Angeles County and California, including the lawsuit these groups filed against him in response to his sentencing reforms.¹³ Finally, we turn to Florida State Attorney Aramis Ayala, whose boldest reform was blocked in her first week in office, stripping her of her discretion, and ending her prosecutorial career at one term. For all three case studies, our analysis is informed by interviews with leading progressive prosecutors and those who work with them in the system.¹⁴

In Part IV, adopting Mariame Kaba’s two-pronged framework for abolitionist organizing,¹⁵ we propose concrete changes to current progressive programs in prosecutors’ offices that fit within an abolitionist framework. These are not just “more progressive” reforms. They are radical suggestions that, if implemented, will help to end mass incarceration and instead implement non-carceral methods of healing from harm. First, we discuss concrete changes that could be made to Conviction Integrity Units (CIUs) to expand the scope of cases they consider and remove them from the purview of prosecutors’ offices altogether. Then, relying on the work of abolitionist organizers, we discuss restorative justice, and the ways in which it could become community-led, instead of co-opted by prosecutors’ offices.

¹³ See Verified Petition for Writ of Mandate and/or Prohibition and Complaint for Declaratory and Injunctive Relief, Ass’n of Deputy District Attorneys for L.A. Cnty. v. Gascón, No. 20STCP04250 (Cal. Super. Ct. L.A. Cnty. 2021), available at <https://www.laadda.com/wp-content/uploads/2020/12/2020.12.29-Writ-Petition.pdf> [hereinafter Petition, *ADDA v. Gascón*].

¹⁴ Over the course of our research we interviewed San Francisco District Attorney Chesa Boudin; Demarris Evans, who leads the San Francisco District Attorney’s Restorative Justice Program; former Ninth Circuit Court of Florida state attorney Aramis Ayala; Jefferson County (Bessemer Division) District Attorney Lynniece Washington; and Meredith Gallen, a public defender in Los Angeles.

¹⁵ On Marc Lamont Hill’s podcast *Coffee & Books*, Mariame Kaba defined prison industrial complex abolitionist organizing as “a dual project” of “dismantling and destroying death-making institutions . . . including prisons, policing, surveillance, and sentencing” and of “building up a new world” by giving “resources to life-affirming and life-giving institutions.” *Coffee & Books, Marc and Mariame Kaba Discuss Mariame’s Book: We Do This ‘Til We Free Us: Abolitionist Organizing and Transforming Justice*, at 04:16 (Mar. 15, 2021) (downloaded using Apple podcast application).

Finally, we distinguish Transformative Justice from restorative justice and argue that any reimagining of the criminal legal system must be rooted in abolition.

II. “PROGRESSIVE PROSECUTION” AND ITS FUTILITY

“Discussions of ‘good’, ‘bad’, ‘progressive’, or ‘regressive’ prosecutors keep the focus on individuals and are a distraction that impedes the need for structural and systemic change.”

- Survived & Punished NY¹⁶

Prosecutors are the most powerful players in the criminal legal system because they are given broad discretion over decisions like which offenses to prosecute, what charges to bring, and what plea deals to offer.¹⁷ Progressive prosecutors should be no exception. Though the progressive prosecutors currently in power represent only a small fraction of the country’s 2,400 prosecutors, their districts account for large swaths of the incarcerated population in the US. Therefore, their potential to reduce incarceration is—in theory—great.¹⁸ So, it is important to understand what is meant when referring to progressive prosecutors

In this Part we attempt to define progressive prosecution using the language of self-proclaimed progressive prosecutors and academics. We then provide an overview of the challenges progressive prosecutors face by virtue of trying to advance a progressive agenda within a punitive and regressive criminal legal system.

A. Defining the Progressive Prosecutor

There is no clear consensus on what is required to be a progressive prosecutor. In his essay “Imagining the Progressive Prosecutor,” Benjamin Levin states that this uncertainty “is unsurprising given the historical lack of clarity or consensus regarding what prosecutors should do and what the prosecutorial role should entail.”¹⁹ According to Levin, “[g]enerally, progressive prosecutor campaigns or descriptions of the ‘progressive prosecutor movement’ sound in some sort of reformist discourse.”²⁰ “And, most definitions of ‘progressive prosecution’ consist less of a statement of over-arching goals, theories, or ideologies and instead focus on specific policies.”²¹

¹⁶ SURVIVED & PUNISHED NY, ABOLITIONIST PRINCIPLES & CAMPAIGN STRATEGIES FOR PROSECUTOR ORGANIZING, *available at* [https://www.survivedandpunishedny.org/anti-prosecution/\[https://perma.cc/43W9-DYE7\]](https://www.survivedandpunishedny.org/anti-prosecution/[https://perma.cc/43W9-DYE7]) (last visited Mar. 3, 2022).

¹⁷ BUTLER, *supra* note 9, at 106.

¹⁸ Mia Machado, *SF District Attorney Boudin, Other Progressive District Attorneys Share Challenges as Progressive Prosecutors*, DAVIS VANGUARD (Mar. 13, 2021), [https://www.davisvanguard.org/2021/03/sf-district-attorney-boudin-other-progressive-district-attorneys-share-challenges-as-progressive-prosecutors/\[https://perma.cc/X9YP-3FDS\]](https://www.davisvanguard.org/2021/03/sf-district-attorney-boudin-other-progressive-district-attorneys-share-challenges-as-progressive-prosecutors/[https://perma.cc/X9YP-3FDS]).

¹⁹ Levin, *supra* note 11, at 1426.

²⁰ *Id.* at 1924.

²¹ *Id.* at 1426.

Levin suggests four ways to define the “progressive prosecutor.” First, the “progressive who prosecutes”²² “is progressive in the sense of her general politics. That is, her voting patterns, endorsements, political beliefs, and so forth might . . . fall[] somewhere left of center on the political spectrum.”²³ But, her politics do not influence her work. Second the “proceduralist prosecutor”²⁴ “brings a sort-of good government liberalism to the DA’s office,”²⁵ emphasizing that “defendants deserve fair process, . . . ensuring that line-level prosecutors see their job as doing justice, not just obtaining convictions.”²⁶ Third, the “prosecutorial progressive”²⁷ leans left politically. They care about systemic inequality and substantive rights, working towards the goals of political progressives.²⁸ Fourth, the “anti-carceral prosecutor,” wants to “shrink” institutional structures, and has no illusions about these structures’ abilities to do good.²⁹

Our goal—and the movement’s goal—is abolition. So to us, the best a prosecutor can do is decarcerate. Currently, there is likely no city in the United States that would elect a prosecutor that openly supports abolition, or one who, using Levin’s framework, would be considered an anti-carceral prosecutor both because it would not be politically feasible and because prosecution and abolition are antithetical to one another. There are only less carceral prosecutors.

B. Structural Barriers to Progressive Prosecution

Even if an elected prosecutor were able to reform the culture of an office to the point where, for example, the metric of success is not securing convictions,³⁰ prosecution is structurally incompatible with a radical revisioning of our society’s approach to assessing and repairing harm for three reasons.

²² *Id.* at 1418.

²³ *Id.* at 1428.

²⁴ *Id.* at 1418.

²⁵ *Id.* at 1433. “The proceduralist prosecutor brings these progressive commitments to bear in her handling of her office. The proceduralist prosecutor focuses on getting her house in order: she is concerned about corruption and misconduct.” *Id.* at 1432–33.

²⁶ *Id.* at 1433.

²⁷ *Id.* at 1418.

²⁸ *Id.* at 1438.

²⁹ *Id.* at 1444.

³⁰ Reflecting on her time at the Public Defender Service for the District of Columbia, where she spent twelve years, Davis writes: “most prosecutors with whom I had experience seemed to focus almost exclusively on securing convictions, without consideration of whether a conviction would result in the fairest or most satisfactory result for the accused or even the victim.” ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 4 (2007). Reflecting on why he decided to become a prosecutor, Paul Butler writes: “I began the work, however, as a liberal critic of American criminal justice—the avenging Undercover Brother who would change the system from the inside. What happened instead was that I collaborated with the system’s injustice.” BUTLER, *supra* note 9, at 101. On what happened after he joined the office, Butler continues: “What happened to that progressive guy who joined the office? My aspirations of changing the system got shot down because I liked winning too much, and I was good at it. I wanted to be well regarded by my peers, to be successful in my career, and to serve my community. And the way to do that, I learned on the job, was to send as many people to jail as I could. I wasn’t so much hoodwinked as seduced.” BUTLER, *supra* note 9, at 105.

First, prosecutors rely on the police to choose their cases.³¹ Criminal cases at the state level are initiated when a police officer makes an arrest. We know that poor Black and brown communities are more heavily surveilled and policed, which necessarily means that Black and brown people are arrested at disproportionate rates.³² In addition, the police also frame cases for prosecutors: they write the reports prosecutors rely on to make important decisions.

Second, prosecution—even so-called progressive prosecution—is guided by and reinforces respectability politics.³³ Elected prosecutors, including ones that run on the promise to seriously curtail their office’s power, must make judgment calls about which people deserve leniency.³⁴ That leniency will likely be afforded to the “deserving poor,” those deemed non-violent offenders: the drug offenders, the petty thieves.³⁵ People who commit acts of sexual or physical violence, arguably the

³¹ See Paul Butler, *How Can You Prosecute Those People?*, in HOW CAN YOU REPRESENT THOSE PEOPLE? 15, 19 (Abbe Smith & Monroe H. Freedman eds.) (“Prosecutors don’t usually have time to second-guess the police or even to corroborate their work.”); Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 191-92 (2019) (“If I wanted to influence criminal justice outcomes and could control either police or prosecutors, I would choose police...Police dominate cases before they get to court, well before other officials get involved. This gives them great freedom to operate outside the justice system — something prosecutors generally lack.”).

³² Several studies cited in a Washington Post article show that Black people and people of color are not only surveilled at higher rates than white people, they are also arrested at disproportionate rates. Radley Balko, *There’s Overwhelming Evidence That the Criminal Justice System Is Racist. Here’s the Proof*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/#Policing> [<https://perma.cc/P9DX-ANFV>].

³³ Paul Butler, *Locking Up My Own: Reflections of a Black (Recovering) Prosecutor*, 107 CA. L. REV. 1983, 1984 (2019) (“At the time I did not know the phrase ‘politics of respectability,’ but I did know how, when I cross-examined a defendant, to mock his diction and references to his ‘baby’s mama.’ I knew how, at the end of my frothy mouthed closing statement, to button up my jacket and let my eyes roam from the defendant to the jury in a way that communicated that the jurors and I were good Negroes, but that the defendant was a thug who needed to be locked up. I won most of my cases, and Forman’s book [Locking Up Our Own] helps me understand that it was not only because of my trial advocacy skills.”).

³⁴ See David E. Patton, *A Defender’s Take on “Good” Prosecutors*, 87 FORDHAM L. REV. ONLINE 20, 23 (2018) (“Prosecutors do not approach cases from an unbiased neutral role; they spend their time learning about cases primarily from law enforcement agents and complaining witnesses. To the extent that they receive a contrary view, it typically comes from the defense lawyer—an adversary whose story they understandably view with some amount of skepticism. As a result, prosecutors routinely make ‘ministerial’ decisions from a very slanted viewpoint.”); Alec Karakatsanis, *The Punishment Bureaucracy, How to Think about “Criminal Justice Reform,”* 128 YALE L.J.F. 848, 929 (2019) (“Prosecutors are political actors responding to incentives and, like most of the country, they have been socialized in mass human caging. If left on their own, they will largely preserve mass human caging, if only because none of them has the power to dismantle such a mammoth system even if they wanted to without a social movement articulating it clearly and demanding it. So, although electing different prosecutors and then pushing them to be better can be important in itself and as an organizing tool, anyone interested in significantly dismantling the punishment bureaucracy must have a strategy for creating a reality in which organized political power demands big changes.”).

³⁵ For example, Rachael Rollins believes that although more people should be diverted to treatment programs and fewer low level crimes should be charged, violent criminals should still be prosecuted. Mark Berman, *These Prosecutors Won Office Vowing to Fight the System. Now, the System is Fighting Back*, WASH. POST (Nov. 9, 2019), https://www.washingtonpost.com/national/these-prosecutors-won-office-vowing-to-fight-the-system-now-the-system-is-fighting-back/2019/11/05/20d863f6-afc1-11e9-a0c9-6d2d7818f3da_story.html [<https://perma.cc/6J6G-HFVP>]. Larry Krasner has told his assistant district attorneys to start their reforms at the bottom of the sentencing guidelines instead of the top.

people who would benefit most from support and mercy and who, in any event, populate our prisons and jails in great numbers, will remain in the carceral system. Professor Butler, a former federal prosecutor, believes that even a progressive prosecutor with the right intentions will be thwarted by the adversarial system, which “forces lawyers to choose sides,” and the law-and-order culture, where “defendant sob stories about growing up in foster care, getting beat up by the police, or not being able to afford rehab are obstacles to [prosecutors’] success.”³⁶

Finally, and, most importantly, being a prosecutor requires prosecuting.³⁷ In this country, that means sending poor people to prison, most of them Black and brown.³⁸ There is no dearth of evidence about how violent—both physically and sexually—prisons are.³⁹ There is nothing progressive about deciding that non-violent people should be spared that violence and abuse, but people who commit more serious harm deserve it.⁴⁰ In fact, the violent/nonviolent dichotomy can actually “bolster the penal system” as “politicians . . . increase the length of prison sentences for ‘violent’ offenses to compensate for the shortening of sentences for nonviolent offenses.”⁴¹

In our adversarial system, prosecutors may be able to decide whether or not to drop drug charges, or seek the death penalty, but prosecution can *never*—and does not purport to—address the conditions that lead to crime or meaningfully break cycles of violence that contribute to crime and poverty.⁴² Additionally, any

New Thinking Podcast, *Emily Bazelon: When Power Shifts*, at 8:45-8:57 (May 2019), <https://www.courtinnovation.org/publications/emily-bazelon> [<https://perma.cc/J8JF-LJXW>].

³⁶ BUTLER, *supra* note 9, at 115, 116. See generally Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006) (describing how cognitive and confirmation bias make it difficult to change the culture of prosecution). In another article on the topic, Gajwani and Lesser write: “While hiring progressive prosecutors may slow the rate of punishment at the beginning, it will not change the trajectory. With time, three phenomena—salience, reductionism, and transference—all work to erode a prosecutor’s tolerance for forbearance and make them more punitive.” Seema Gajwani & Max G. Lesser, *The Hard Truths of Progressive Prosecution and a Path to Realizing the Movements Promise*, 64 N.Y.L. SCH. L. REV. 70, 79 (2019–2020).

³⁷ “Becoming a prosecutor to help resolve unfairness in the criminal justice system is like enlisting in the army because you are opposed to the current war. It’s like working as an oil refiner because you want to help the environment.” BUTLER, *supra* note 9, at 102.

³⁸ Writing about his time as a federal prosecutor in D.C., Butler observes: “You had to wonder whether the 200,000 white residents of the city ever smoked pot, got into fights, or stole from their offices. The racial composition of the superior court lockup list suggests that white people in DC do not commit crimes. Does anyone who actually knows white folks believe this?” *Id.* at 106.

³⁹ For example, at Rikers Island, a jail in New York City, twelve detained individuals have died in 2021, including five by suicide. The conditions at Rikers have been deemed an emergency. Those held on Rikers have reported incessant fights, stabbings, misgendering of individuals when placed in housing, and dangerously unsanitary conditions. Beth Schwartzapel, *Dispatch From Deadly Rikers Island: “It Looks Like a Slave Ship in There.”* MARSHALL PROJECT (Oct. 5, 2021), <https://www.themarshallproject.org/2021/10/05/dispatch-from-deadly-rikers-island-it-looks-like-a-slave-ship-in-there> [<https://perma.cc/6ACD-UB4N>].

⁴⁰ “The adversarial nature of the justice system, the culture of the prosecutor’s office, and the politics of crime pose insurmountable obstacles for prosecutors who are concerned with economic and racial justice.” *Id.* at 101–02.

⁴¹ JACKIE WANG, *CARCERAL CAPITALISM* 39 (2018).

⁴² Rachel Foran, Mariame Kaba, & Katy Naples-Mitchell, *Abolitionist Principles for Prosecutor Organizing: Origins and Next Steps*, 16 STAN. J. CIV. RTS. & CIV. LIBERTIES 496, 519 (2021) (“Prosecutors are not social workers, therapists, housing advocates, or any other service-oriented role.

prosecutor with a cursory understanding of prison conditions and dynamics knowingly seeks the incarceration of human beings in physically and sexually violent institutions. Therefore, any investment in criminal prosecution—whether “progressive” or not—only serves to legitimize our current system.⁴³

C. Political Barriers to Progressive Prosecution

Finally, politics constrains the ability of prosecutors to follow through on their promises. According to San Francisco District Attorney Chesa Boudin, “being elected inherently requires compromise.”⁴⁴ Sometimes those compromises undermine the very principles on which prosecutors campaign.⁴⁵ Progressive prosecutors have to walk the line of delivering on their campaign promises while not upsetting their constituents, judges, line prosecutors, and other politicians.⁴⁶ Boudin emphasized that head prosecutors have no direct client. Their job is to “do justice,” an abstract concept that means something different to every prosecutor and means something different to the family of the accused, and the family of the victim.⁴⁷ In carrying out this function of their jobs, progressive prosecutors inevitably compromise one of those parties’ definitions of justice.⁴⁸

For example, Boston’s progressive prosecutor Rachel Rollins campaigned on the promise to categorically refuse to prosecute misdemeanors. Her platform was informed by a Boston study spanning fifteen years that showed that non-prosecution of nonviolent misdemeanors decreases the likelihood of a new arrest by 58% and decreases the number of new criminal complaints by 69%.⁴⁹ Once in office,

They cannot and should not provide services to people who are in need. This is inherently in conflict with their pledge to serve and maintain the criminal punishment system.”)

⁴³ Keeanga-Yamahatta Taylor, *The Emerging Movement for Police and Prison Abolition*, NEW YORKER (May 7, 2021), <https://www.newyorker.com/news/our-columnists/the-emerging-movement-for-police-and-prison-abolition> [https://perma.cc/9PYP-XVCN].

⁴⁴ Zoom Interview with Chesa Boudin, S.F. Dist. Att’y (April 26, 2021). Because of backlash to progressive policies, Boudin has had to compromise his own definition of justice as well. Boudin has been unable to address homelessness in the way he had initially hoped. He has not been able to convince the city to implement safe injection sites in line with his view of drug use as a public health issue. He has not been able to increase public restrooms or housing. He has also prosecuted as many drug crimes as before he took office even though “he believes strongly that such prosecutions are usually futile.” Benjamin Wallace-Wells, *The Trial of Chesa Boudin*, NEW YORKER (July 29, 2021), <https://www.newyorker.com/news/annals-of-inquiry/the-trial-of-chesa-boudin> [https://perma.cc/K9FT-7EFC].

⁴⁵ During his campaign, New Orleans District Attorney Jason Williams “emphatically and repeatedly asserted that, if he won, kids would always be tried as kids. . . . For Williams, it was absolutely no exceptions.” Nonetheless, within one year of being elected, Williams announced that two 15-year-olds charged with murder and armed robbery would be tried as adults. James Gill, Opinion, *Jason Williams Made This Bold Promise to Get Elected. He Has Already Broken It*, NOLA.COM (May 30, 2021), https://www.nola.com/opinions/james_gill/article_e1ac4622-bf11-11eb-8918-4beb4942a13d.html [https://perma.cc/SF5Z-RJQ2].

⁴⁶ Interview with Chesa Boudin, *supra* note 44.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Amanda Agan, Jennifer Doleac & Anna Harvey, *Misdemeanor Prosecution*, 3–4, 21 (Nat’l Bureau of Econ. Rsch., Working Paper, No. 28600, Mar. 2021).

however, caving to political pressure, she reverted to “flipping the presumption” to ask whether prosecution is appropriate on a case-by-case basis.⁵⁰

Even liberal head prosecutors are still “beholden to politics, and to their communities’ often media-driven sense of what it takes to keep them safe.”⁵¹ Chesa Boudin told us about how his ambitions to stop requesting sentencing enhancements under the three strikes law were constrained by the pushback he saw his progressive colleague in Los Angeles endure: “[Los Angeles District Attorney George] Gascón got sued by his own staff and the judge issued an injunction on his policies. Public defenders are mad at me for not having a blanket no 3 strikes [policy] but Gascón’s policy . . . got enjoined. So my policy [a case-by-case evaluation] can continue even if one client gets a prior strike.”⁵²

Boudin believes he will be more successful in the long run if he is careful and intentional in the changes he makes.⁵³ He admits it’s a “tough line to walk between the risks inherent in moving quickly to decarcerate and moving slowly.”⁵⁴ The same was true in San Francisco nearly twenty years ago. Former San Francisco District Attorney Terence Hallinan was “a progressive’s dream prosecutor” because he was against the death penalty and the Patriot Act, he did not prosecute people charged with using medical marijuana, and he promised to dismiss cases that arose from racial profiling. Hallinan’s campaign for a second term “included developing alternatives to incarceration for nonviolent offenders and holding the police accountable for police misconduct.”⁵⁵ But he was never re-elected. His opponent “accused [him] of being soft on crime.”⁵⁶ That opponent was none other than self-proclaimed “top cop” Kamala Harris,⁵⁷ who was decidedly not progressive.⁵⁸

III. ILLUSTRATING THE ROADBLOCKS: CASE STUDIES

⁵⁰ Michael Jonas, *Rachael Rollins on Vindication of Her Decline-to-Prosecute Policy*, COMMONWEALTH (Apr. 5, 2021), <https://commonwealthmagazine.org/criminal-justice/rachael-rollins-on-vindication-of-her-decline-to-prosecute-policy/> [<https://perma.cc/XWW4-RPEE>].

⁵¹ BUTLER, *supra* note 9, at 118.

⁵² Interview with Chesa Boudin, *supra* note 44.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ BUTLER, *supra* note 9, at 118–19.

⁵⁶ *Id.*

⁵⁷ Danny Hakim, Stephanie Saul, & Richard A. Opiel, Jr., *Is a 'Top Cop' Now a Reformer? Wrestling With Harris's Record*, N.Y. TIMES (Aug. 10, 2020), <https://www.nytimes.com/2020/08/09/us/politics/kamala-harris-policing.html> [<https://perma.cc/85YH-A4YW>].

⁵⁸ See, e.g., Lara Bazelon, Opinion, *Kamala Harris Was Not a 'Progressive Prosecutor'*, N.Y. TIMES (Jan. 17, 2019), <https://www.nytimes.com/2019/01/17/opinion/kamala-harris-criminal-justice.html> [<https://perma.cc/9JJG-L9N2>]; Levin, *supra* note 11, at 1416 (“Critics noted that Harris endorsed incarcerating parents of truant children; she defended line-level prosecutors accused of withholding exculpatory evidence; she continued to praise the use of long prison sentences in response to violent crime; and throughout her career, she had failed to prosecute aggressively police officers alleged to have used excessive force against civilians.”). Kamala Harris’s prosecutorial career raises another concern with the movement: if anyone can call themselves a progressive prosecutor, “are we simply witnessing a rebranding of tough-on-crime politics to appease an increasingly anti-carceral electorate?” Levin, *supra* note 11, at 1418

In Chicago . . . since Kim Foxx took office [as State’s Attorney] in late 2016, there has been a decline in prison sentences along with a decrease in overall crime. But last year, along with white nationalist organizations, the Fraternal Order of Police staged a protest at her office in which police officers rubbed photos of her over their genitals and crudely heckled her. The police group also organized white police chiefs from the suburbs to denounce Ms. Foxx at a news conference. At the same time, supporters of the police forced a member of her staff to go on leave by harassing her with phone calls, berating her as an “N-word whore.”

-Rashad Robinson, New York Times Opinion
Columnist⁵⁹

The case studies presented in this Part demonstrate the ways that institutional players do not allow prosecutors to stop prosecuting. Considering this, we should not be investing time, organizing power, political capital, and money into their elections.⁶⁰ Instead, anti-mass incarceration activists and organizations should focus on effective transformation and harm reduction measures, such as decriminalizing behavior that is now criminalized, disaggregating prosecutors’ offices from social services, and otherwise dismantling an institution that, at its core, only excels at securing convictions.

This Part illustrates how political barriers prevent even the most “progressive” prosecutors from implementing reforms and leads us to our conclusion in Part IV. It tells the stories of three progressive prosecutors: Larry Krasner, George Gascón, and Aramis Ayala. Each case demonstrates a different set of institutional forces blocking progressive change. Krasner illustrates the prosecutor-police dynamic and how law enforcement, typically a partner to prosecution, is capable of thwarting progressive goals when they threaten police objectives. The prosecutorial resistance in Gascón’s narrative shows how a top-down approach can lead line prosecutors and judges to reinforce the status quo. Ayala’s story teaches us that institutional pushback can be so powerful as to both prevent meaningful progressive change and drive the progressive prosecutor out of office.

A. Larry Krasner

You might call me a prosecutor with *compassion*.
Or a public defender with *power*.

⁵⁹ Rashad Robinson, Opinion, *The People Who Undermined Progressive Prosecutors* (Jun. 11, 2020), N.Y. TIMES, <https://www.nytimes.com/2020/06/11/opinion/george-floyd-prosecutors.html?searchResultPosition=24> [https://perma.cc/VE4W-8PX3].

⁶⁰ In the Philadelphia District Attorney primaries, candidates and Independent Committees alone spent more than \$5.5 million dollars. George Soros reportedly contributed close to an additional \$1.7 million to Krasner’s campaign. Dave Davies, Opinion, *Soros Put Nearly \$1.7 Million in Philly DA’s Race*, WHYY (June 21, 2017), <https://whyy.org/articles/soros-weighed-in-with-even-more-money-in-das-race/> [https://perma.cc/5A5W-8CHG].

– Larry Krasner⁶¹

Larry Krasner of Philadelphia is perhaps the most well-known example of a “true progressive” who significantly propelled the progressive prosecutor movement forward. At the time of his election, the idea that Krasner—who had never prosecuted a crime—would be the next DA was “hilarious” to the city’s police union chief.⁶² But shortly after Krasner’s sweeping win,⁶³ the amusing novelty of his success gave way to the police union’s vicious public censure of his progressive policies,⁶⁴ his own assistant DAs’ vigorous rebellion,⁶⁵ and Assistant United States Attorneys usurping his cases.⁶⁶ In many ways Krasner was the test case for progressive prosecution, a movement he calls “the most important civil rights movement of our time.”⁶⁷

While Krasner initially expressed doubt when asked about running for a second term, he later changed his tune saying, “we’ve woken up the giants,”⁶⁸ referring to the institutional actors who recognize the threat he poses to the status quo. Krasner savvily framed the burgeoning strength of the anti-reform movement in Philadelphia as a proper reflection of his achievements. Reflecting on his first term in an interview with *The Appeal*, Krasner said, “We took a lot of heat. Oh boy, was there heat. But that is to be expected when you are in year 11 of a 30-year arc of being part of a movement for social justice. You take a lot of heat because you’re getting things

⁶¹ Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power—and Learns the Limits of—His Office*, N.Y. TIMES MAGAZINE (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html> [<https://perma.cc/ZB84-PMBW>]. Krasner was quoted while speaking to a room full of public defender law school students, recruiting them to join his office and progressive prosecution. *Id.*

⁶² Beth Daley, *Progressive Prosecutors Scored Big Wins in 2020 Elections, Boosting a Nationwide Trend*, CONVERSATION (Nov. 18, 2020) <https://theconversation.com/progressive-prosecutors-scored-big-wins-in-2020-elections-boosting-a-nationwide-trend-149322> [<https://perma.cc/EX6G-55SP>].

⁶³ Krasner won his election with 75% of the vote. *Id.*

⁶⁴ Second Amended Complaint, *Fraternal Order of Police v. City of Philadelphia*, 2019 WL 7816597 (Ct. C.P. Phila. Cnty.)

⁶⁵ Bobby Allyn, *Philly’s New DA Fires 31 from Office*, WHY? (Jan. 5, 2018), <https://why.org/articles/phillys-new-da-fires-31-office/> [<https://perma.cc/HU5H-TRWA>].

⁶⁶ Larry Platt, *Larry Krasner’s Inconvenient Truth*, PHILA. CITIZEN (Oct. 8, 2020), <https://thephiladelphiacitizen.org/larry-krasners-inconvenient-truth/> [<https://perma.cc/777Y-3DB3>].

⁶⁷ Russell Berman, *Why Larry Krasner’s Defeat Would Be ‘Disastrous’ for Criminal-Justice Reform*, ATLANTIC (May 3, 2021), <https://www.theatlantic.com/politics/archive/2021/05/larry-krasner-philadelphia-criminal-justice-reform/618764/> [<https://perma.cc/8S5V-3EB7>]. Many prosecutors who labeled themselves as progressive were elected before Krasner—for example, Cyrus Vance Jr. of Manhattan, John Chisholm of Milwaukee, and Dan Satterburg of Seattle. However, the movement to elect progressive prosecutors at large began with PACs like Real Justice and Color of Change backing them, funded by George Soros. Darcy Covert, *Transforming the Progressive Prosecutor Movement*, 2021 WIS. L. REV. 187, 195-96.

⁶⁸ Steven Volk, *Larry Krasner vs. Everybody: Inside the Philly DA’s Crusade to Revolutionize Criminal Justice*, PHILA. MAG. (November 23, 2019), <https://www.phillymag.com/news/2019/11/23/larry-krasner-criminal-justice-reform> [<https://perma.cc/RZ79-L78H>].

done.”⁶⁹ The problem with waking the giants, though, is that they are now mobilizing to create an anti-reform movement of their own.⁷⁰

Unlike the nascent progressive prosecutor movement, the anti-reform movement has the benefit of being able to work through strong existing institutions, like police unions. Police unions, emboldened by their largely untouchable position of power, pose one of the greatest obstacles to the movement to end mass incarceration. In the 1960s, police unions won the right to collective bargaining, joining the ranks of other labor unions but far surpassing them in political power,⁷¹ in part due to the alignment between their interests and the affluent. Labor unions had long rejected the idea that police be afforded the protection of the labor movement. As the American Federation of Labor put it, “[i]t is not within the province of the trade union movement to especially organize policemen, no more than to organize militiamen, as both policemen and militiamen are often controlled by forces inimical to the labor movement.”⁷² The distinction between most labor and police unions is apparent not only in their different political priorities but also in their political status: as the labor movement declined, law enforcement unions were empowered.⁷³ Their amassed power has since been used as a weapon against progressive reforms and a shield from the consequences of police violence.⁷⁴

Krasner has faced police union obstruction firsthand. A year into his tenure, Philadelphia’s largest police union, Fraternal Order of the Police (FOP), sued Krasner over a policy requiring prosecutors to notify defense counsel of any allegations of police misconduct when particular officers were called to testify as a

⁶⁹ Joshua Vaughn, *The Successes and Shortcomings of Larry Krasner’s Trailblazing First Term*, APPEAL (March 22, 2021), <https://theappeal.org/the-successes-and-shortcomings-of-larry-krasners-trailblazing-first-term/> [https://perma.cc/K4Z6-N7MC].

⁷⁰ See *Can the ‘Progressive Prosecutor’ Movement Survive?*, CRIME REPORT (March 8, 2021), <https://thecrimereport.org/2021/03/08/can-the-progressive-prosecutor-movement-survive/> [https://perma.cc/6UXD-QTJQ].

⁷¹ Steven Greenhouse, *How Police Unions Enable and Conceal Abuses of Power*, NEW YORKER (June 18, 2020), <https://www.newyorker.com/news/news-desk/how-police-union-power-helped-increase-abuses> [https://perma.cc/4EH3-9YZU]. The origins of policing had different purposes in the North and South. In the North the police were created to break labor union strikes, and were backed by corporations and upper class populations. In the South, policing was used to enforce slave codes and “to control ‘the movements of [B]lack people.’” *Id.*

⁷² *Id.*

⁷³ For example, California’s prison union CCPOA depended on California’s ballooning prison population for its success. It is now one of the most powerful lobbying groups in California and has a vested interest in maintaining the Three Strike Laws to continue the employment of its members. *Turning the Key: California’s Prison Guards*, AM. RADIO WORKS, <http://americanradioworks.publicradio.org/features/corrections/guards3.html> [https://perma.cc/A4AV-3494] (last visited Mar. 13, 2022).

⁷⁴ See, e.g., *St. Louis Prosecutor Facing Relentless Resistance as She Works to reform Justice System*, 60 MINUTES at 9:00 (Mar. 11, 2021), <https://www.cbsnews.com/news/kim-gardner-st-louis-prosecutor-60-minutes-2021-03-11/> [https://perma.cc/CE2N-7JAA] (describing how Kimberly Garner was called a “cop hater” by the police union in St. Louis, and how the union has lobbied against her reforms throughout her time as progressive D.A.); Noam Scheiber, Farah Stockman and J. David Goodman, *How Police Unions Became Such Powerful Opponents to Reform Efforts*, N.Y. TIMES (June 6, 2020) <https://www.nytimes.com/2020/06/06/us/police-unions-minneapolis-kroll.html> [https://perma.cc/DZY9-QGWC].

witness.⁷⁵ Krasner's office had a list of such officers, which served as a database of officers who committed misconduct.⁷⁶ Notably, the lawsuit was not in response to a radical shift in the prosecutor-police relationship in Philadelphia, because the list, though updated and expanded by Krasner, was actually created by the previous District Attorney.⁷⁷ In effect, the police union's lawsuit—which framed Krasner's practice as a radical departure from prosecutorial conventions—was over Krasner asserting his office would follow well established laws requiring the disclosure of *Brady* and *Giglio* material.⁷⁸

The lawsuit posed a substantial and time-consuming hurdle to Krasner's progress.⁷⁹ Over a year later, Krasner's progressive policy creating a database of officers with a history of misconduct was given the judicial stamp of approval, but police unions in other jurisdictions, such as LA, have asserted their power and won against district attorneys who have sought to implement similar practices.⁸⁰

Krasner also faced resistance from his own staff, a phenomenon we discuss in more depth in our second case study. The success of progressive reform within the prosecutor's office is premised, in part, on the assumption that assistant DAs are the ones who decide whether to charge someone, or what punishment to argue for after conviction. Of course, a top-down leniency approach is helpful; in the authors' experience, junior line prosecutors often cite their supervisors as the reason they are not authorized to offer whatever resolution a defense lawyer is seeking. But Krasner's experience calls into question whether this approach can transform the

⁷⁵ *Fraternal Order of Police v. City of Philadelphia*, 267 A.3d 531, 553 (Pa. Cmwlth. 2021). George Gascón faced a similar obstruction in getting police misconduct records turned over to his office. He wrote a letter requesting the names of officers “who engaged in acts of moral turpitude,” pursuant to a California supreme court decision saying law enforcement can alert prosecutors of histories of misconduct. When the former LA County Sheriff tried to give prosecutors the names for a “Brady list,” the Association for LA Deputy Sheriffs sued to block the disclosure. Alice Tchekmedyan, James Queally, & Ben Poston, *D.A. Gascón Seeks Information on Officers with Histories of Misconduct in Latest Reform Move*, L.A. TIMES (Feb. 19, 2021), <https://www.latimes.com/california/story/2021-02-19/da-george-gascon-officers-misconduct> [<https://perma.cc/VGD2-SUTG>].

⁷⁶ *Fraternal Order of Police v. City of Philadelphia*, 2019 WL 7816597 (Ct. C.P. Phila. Cnty.).

⁷⁷ *Id.*

⁷⁸ *Id.* See also *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Commonwealth v. Clancy*, 192 A.3d 44, 55 (Pa. 2018) (affirming rules governing exculpatory evidence and a prosecutor's duty to disclose set forth in *Brady v. Maryland* and *Giglio v. United States*); Pa. R. Crim. P. 573 (b)(1)(a).

⁷⁹ The lawsuit was filed on November 13, 2018 and was dismissed on August 21, 2019. FOP then appealed and the Court dismissed the case for the second time on November 18, 2019. *Fraternal Order of Police v. City of Philadelphia*, 2019 WL 7816597 (Ct. C.P. Phila. Cnty.). Subsequently, the Commonwealth Court of Pennsylvania held that the trial court erred by concluding police officers are not entitled to notice or opportunity to be heard with regards to the Do Not Call List. However, the court affirmed the trial court's dismissal of the complaint seeking to enjoin the DA from fulfilling their *Brady* and *Giglio* obligations. *Fraternal Order of Police v. City of Philadelphia*, 267 A.3d 531, 553 (Pa. Cmwlth. 2021).

⁸⁰ In California the Sheriff's Department union was able to stop the Los Angeles District Attorney's office from obtaining records of officer misconduct. Maya Lau, *A Court Is Blocking L.A. County Sheriff from Handing Over a List of 300 Problem Deputies*, L.A. TIMES (Feb. 20, 2017), <https://www.latimes.com/local/california/la-me-sheriff-deputies-misconduct-list-20170219-story.html> [<https://perma.cc/LGU4-CWQW>]. The law in California has since changed to allow open disciplinary records. S.B. 1421, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

priorities of junior prosecutors. Krasner encouraged and sometimes required non-prosecution⁸¹ and quickly faced a rebellion from his own prosecutors. Krasner notoriously fired 31 defiant assistant DAs who, viewing the new policies as an abdication of their duties, refused to follow them.⁸² The progressive prosecution movement sees changing the culture of DA offices as a necessary condition for meaningful change.⁸³ By firing noncompliant ADAs, progressive prosecutors are attempting to do just that. But if we have learned anything from the continued police shootings of disproportionately Black people,⁸⁴ it takes more than eliminating those 31 “bad apples.” Change requires dismantling the rotten institution.

Krasner’s explanation for the struggle to implement new policy in the DA’s office and, more broadly, the criminal legal system, is that “[c]ulture eats policy.”⁸⁵ For example, one aspect of entrenched culture in prosecutors’ offices is not questioning the costs of prosecution. When Krasner instructed his line DAs to state, on the record, in court, the price tag of every sentence they requested, some judges rebuked the policy, not appreciating the education of taxpayers.⁸⁶ Recognizing the influence a judge can have on their career, line DAs stopped the practice.⁸⁷

Krasner now has another four years to navigate the thicket of policing politics in Philadelphia.⁸⁸ But the entrenched opposition to his policies from both police and

⁸¹ Jonah E Bromwich, *Can a Prosecutor Survive a 40% Spike in Homicides?* N.Y. Times (May 17, 2021), <https://www.nytimes.com/2021/05/17/us/philadelphia-prosecutor-election-Larry-Krasner.html>

⁸² Bobby Allyn, *Philly’s New DA Fires 31 from Office*, WHYY (Jan. 5, 2018), [https://whyy.org/articles/phillys-new-da-fires-31-office/\[https://perma.cc/88HA-PCL6\]](https://whyy.org/articles/phillys-new-da-fires-31-office/[https://perma.cc/88HA-PCL6]).

⁸³ See generally ETHAN LOWENS, RENA PAUL, & JOHNATHAN TERRY, INSTITUTE FOR INNOVATION IN PROSECUTION AT JOHN JAY COLLEGE, PROSECUTORIAL CULTURE CHANGE: A PRIMER (2020). One recommendation for changing the culture of a prosecutor’s office is to “regularly communicate office goals, policy positions, and successful uses of non-incarceratory dispositions through the head prosecutor.” *Id.* at 3.

⁸⁴ The Washington Post maintains a database of police shootings. As of 2015, the database shows, the police shoot and kill nearly 1,000 people annually. The Washington Post found Black people are disproportionately shot and killed by the police, making up less than 13% of the population but killed at more than twice the rate of white people in the US. *Fatal Force*, WASH. POST, [https://www.washingtonpost.com/graphics/investigations/police-shootings-database/\[https://perma.cc/QT6X-EMFK\]](https://www.washingtonpost.com/graphics/investigations/police-shootings-database/[https://perma.cc/QT6X-EMFK]) (last visited Mar. 16, 2022).

⁸⁵ Austen, *supra* note 61.

⁸⁶ Bobby Allyn, *Philadelphia’s New DA Wants Prosecutors To Talk Cost Of Incarceration While In Court*, NAT’L PUB. RADIO (Mar. 13, 2018), <https://www.npr.org/2018/03/31/598318897/philadelphias-new-da-wants-prosecutors-to-talk-cost-of-incarceration-while-in-cou> [https://perma.cc/K2QA-Z5F5]. Publicizing the cost of incarceration is a tactic reformers use to activate the taxpayer base who should both know how their tax dollars are used and be outraged by the cost of incarceration. It is important to note that abolitionists are not seeking to save money. “What [abolitionists] want is for the money to be spent, to enhance, and support human life...” Intercepted, *Ruth Wilson Gilmore Makes the Case for Abolition (Part 2)*, INTERCEPT (June 10, 2020), [https://theintercept.com/2020/06/10/ruth-wilson-gilmore-makes-the-case-for-abolition/\[https://perma.cc/7A5E-XAYH\]](https://theintercept.com/2020/06/10/ruth-wilson-gilmore-makes-the-case-for-abolition/[https://perma.cc/7A5E-XAYH]).

⁸⁷ See Austen, *supra* note 61.

⁸⁸ Krasner won the primary on May 18, 2021 with 65% of the vote. “According to a recent poll by Data for Progress, many of the reforms Krasner enacted remain popular with voters in Pennsylvania. Sixty-four percent of people surveyed expressed support for limitations to the use of cash bail, 60 percent were in favor of the decriminalization of drug possession, 75 percent favored sentence reductions for good behavior, and 68 percent supported terminating probation when supervision is no longer needed.” Akela Lacy and Alice Sperti, *Philadelphia District Attorney Larry Krasner Trounces Police-Backed Primary Challenger*, INTERCEPT (May 18, 2021), <https://theintercept.com/2021/05/18/larry-krasner>

line prosecutors has taken a toll. While voters affirmed him as a progressive figure, they “[e]ft in place the same systemic vulnerabilities and weaknesses that were there before.”⁸⁹ Krasner should be emboldened by his re-election. But the cumulative effect of the unrelenting opposition Krasner faced in his first term has landed him in-between the activists he is accountable to and conservative or traditional institutional actors. For example, even though Krasner has called cash bail “imprisonment for poverty,”⁹⁰ his office’s policy did not come close to ending it: instead, anyone charged with any of 25 low-level offenses did not have bail set, which only affected about 10% of cases.⁹¹ Undoubtedly Krasner would have enacted policies that decriminalize poverty had he not been hamstrung by the system he knew would reject even the more modest version.⁹² Instead, community bail funds with far fewer resources than Krasner’s office were left to pick up the slack.⁹³ Additionally, the perception that Krasner does not prosecute led him to release a statement confirming his office is still securing guilty convictions in the vast majority of homicide cases.⁹⁴ While Krasner has staunchly opposed the death penalty and has not sought it, he has prosecuted dozens of cases where convictions resulted in life without the possibility of parole, while also making statements he supports giving a chance at parole.⁹⁵ In the current legal system, where the only condition that changed is the prosecutor’s office, Krasner has to constantly toggle between progressive change and regressive assurance.⁹⁶

B. George Gascón

“Indeed, a prosecutor has a mandatory duty to exercise discretion in favor of prosecuting crimes.”

carlos-vega-philadelphia/ [https://perma.cc/C24X-2E27]. Katie Meyer, *Philly DA Larry Krasner Cruises to Reelection Victory*, WHYY.org (Nov. 2, 2021), https://whyy.org/articles/philly-da-larry-krasner-cruises-to-reelection-victory/ [https://perma.cc/H3ZQ-HJFS].

⁸⁹ See New Thinking Podcast, *Emily Bazelon: When Power Shifts*, *supra* note 35.

⁹⁰ Austen, *supra* note 61.

⁹¹ *Id.*

⁹² See *Id.*

⁹³ See, e.g., *Our Mission*, PHILA. COMMUNITY BAIL FUND, https://www.phillybailout.org/ [https://perma.cc/CP34-P8A3] (last visited Mar. 16, 2022).

⁹⁴ Philadelphia District Attorney’s Office, *Release: Homicide Unit Shows Early Success Under DA Krasner*, MEDIUM (June 4, 2018), https://medium.com/philadelphia-justice/release-homicide-unit-shows-early-success-under-da-krasner-dda0dc2a119f [https://perma.cc/4H3L-NCXG].

⁹⁵ Vaughn, *supra* note 69.

⁹⁶ We would be remiss if we omitted the fact that those trying to block Krasner’s progressive policies are not the only critics of his conduct thus far. He has also been scrutinized by grassroots community groups and activists who played pivotal roles in his election. They are doing what they promised they would do, which is hold him accountable when his actions fall short of the progressive values he ran on. See, e.g., Abraham Gutman, *I Was Krasner’s Biggest Supporter, and I Can’t Wait to Protest His Office*, WHYY (Nov. 10, 2017), https://whyy.org/articles/krasners-biggest-supporter-cant-wait-protest-office/ [https://perma.cc/5RHF-XB3D].

-Superior Court Judge James C. Chalfant, *ADDA v. Gascón*⁹⁷

In 2020, George Gascón ran for Los Angeles District Attorney against incumbent Jackie Lacey. His campaign promised criminal justice reform and a reduction of the Los Angeles prison population.⁹⁸ Gascón, a former San Francisco police chief and District Attorney,⁹⁹ won with 53.5% of the vote.¹⁰⁰

After his election, Gascón immediately announced several reforms, including a refusal to apply harsh sentencing laws, such as the so-called “three strikes” law.¹⁰¹ Citing racial disparities and mass incarceration, Gascón’s Special Directive 20-08 instituted a policy prohibiting prosecutors from filing sentencing enhancements.¹⁰² He then declared his intent to re-examine the sentences of people who had already served 15 years, potentially expanding the policy to apply retroactively in some cases.¹⁰³ To justify the policy and pre-empt opponents’ attacks, Gascón prefaced Special Directive 20-08 with the following: “[s]tate law gives District Attorneys broad authority over when and whether to charge enhancements.”¹⁰⁴

Gascón’s line prosecutors and the Association of Deputy District Attorneys of LA County (ADDA) immediately challenged his reforms.¹⁰⁵ This is typical of District Attorney associations, which tend to advocate for punitive policies and oppose reform.¹⁰⁶ Within three days, Gascón succumbed to backlash, rolling back

⁹⁷ *ADDA v. Gascón*, No. 20STCP04250, at 21 (Super. Ct. L.A. Cnty. 2021) (decision on application for preliminary injunction), available at <https://www.laadda.com/wp-content/uploads/2021/02/20STCP04250-Gascon-prelim-inj.pdf>.

⁹⁸ *George Gascón: 43rd Los Angeles District Attorney*, GEORGEGASÓN.ORG, <https://www.georgegascon.org/> [<https://perma.cc/LNZ9-PVJS>] (last visited Apr. 25, 2022) (“As Los Angeles District Attorney, I will make our neighborhoods safer, hold police accountable to the communities they serve, and reform our justice system so it works for everyone. I have reduced violent crime in every leadership position I’ve held while pioneering reforms to reduce racial disparities and end mass incarceration.”).

⁹⁹ Marisa Lagos, *Fight Over George Gascon Los Angeles Criminal Justice Reform Speaks to Larger National Debate*, KQED (Mar. 2, 2021), <https://www.kqed.org/news/11862532/fight-over-george-gascons-l-a-criminal-justice-reforms-speaks-to-larger-debate> [<https://perma.cc/XTE5-N6F6>].

¹⁰⁰ Elizabeth Marcellino, *LA County Leaders Affirm Crime Victims Remain Priority Amid Criminal Justice Reform*, L.A. DAILY NEWS (Feb. 23, 2021, 4:25 PM), <https://www.dailynews.com/2021/02/23/la-county-leaders-affirm-crime-victims-remain-priority-amid-criminal-justice-reform/>. [<https://perma.cc/J8W5-PY4R>].

¹⁰¹ Angela J. Davis, *The Carceral Force of Prosecutor Associations, Explained*, APPEAL (Feb. 26, 2021), <https://theappeal.org/the-lab/explainers/the-carceral-force-of-prosecutor-associations-explained/> [<https://perma.cc/6VJ9-KDYS>].

¹⁰² Special Directive 20-08, 1, Los Angeles District Attorney’s Office (Dec. 7, 2020).

¹⁰³ Special Directive 20-14, 3, Los Angeles District Attorney’s Office (Dec. 15, 2020).

¹⁰⁴ Special Directive 20-08, *supra* note 102, at 3.

¹⁰⁵ Jeremy B. White, *Los Angeles Prosecutors Overwhelmingly Want to Oust Their Progressive Boss*, POLITICO (Feb. 22, 2022), <https://www.politico.com/news/2022/02/22/los-angeles-prosecutors-progressive-da-gascon-00010798> [<https://perma.cc/2N7K-SPBW>].

¹⁰⁶ District Attorneys associations are “among the most punitive forces in the criminal legal system.” Jerry Iannelli, *Los Angeles D.A. George Gascón Leaves California’s Powerful D.A. Association*, APPEAL (Feb. 16, 2021), <https://theappeal.org/politicalreport/george-gascon-leaves-californias-district-attorney-association/> [<https://perma.cc/C2CP-NXUU>]. They are nonprofit professional organizations that exist in most states, with members who pay dues and participate in lobbying and

portions of his sentencing directive and allowing sentencing enhancements for six categories of crimes and other specified “extraordinary circumstances” with approval.¹⁰⁷ For the reforms that stuck, it was not uncommon for prosecutors to read the directive verbatim into the record, and immediately argue against it, stating that, because they were forced to act contrary to their commitment as a prosecutor, the directive violated the California Code of Ethics.¹⁰⁸ In response, judges denied the motion to dismiss strikes or enhancements.¹⁰⁹ Outside the courtroom, conservatives from the DA Association referred to Gascón’s reforms as acquiescing to “certain fringe groups.”¹¹⁰ As James Nelson, formerly incarcerated organizer with Dignity

public education. Jessica Pishko, *Prosecutors Are Banding Together to Prevent Criminal-Justice Reform*, NATION (Oct. 18, 2017), <https://www.thenation.com/article/archive/prosecutors-are-banding-together-to-prevent-criminal-justice-reform/> [<https://perma.cc/5WDV-ZCL7>]. They regularly oppose reforms, including ones aimed at the institution of prosecution itself, “by trading on paranoia and fear, and convincing voters and lawmakers alike that, without harsh criminal sanctions for even the most minor offenses, crime will run rampant and legislators who vote for reform will be at fault.” Josie Duffy Rice, *Prosecutors Aren’t Just Enforcing the Law — They’re Making It*, APPEAL (Apr. 20, 2018), <https://theappeal.org/prosecutors-arent-just-enforcing-the-law-they-re-making-it-d83e6e59f97a/> [<https://perma.cc/KT76-ZDEY>]. They often use rhetoric that distorts the truth to push back against prosecutors they view as stepping out of line. See, e.g., Davis, *The Carceral Force of Prosecutor Associations*, *supra* note 101 (“When Kim Foxx of Chicago dismissed charges against actor Jussie Smollett for allegedly filing a false police report, the Illinois Prosecutors Bar Association issued a statement condemning her actions, calling them ‘abnormal,’ ‘highly unusual,’ and an ‘affront’ to the public. The National District Attorneys Association issued a similar statement, despite the fact that prosecutors dismiss cases against defendants every day, often behind closed doors and without providing reasons, in the ordinary exercise of their vast power and discretion.”). In Oregon, the DA association ODAA, displayed an effort to maintain power through the preservation of Measure 11, known as the “one strike you’re out” law, by discounting its disparate impact on people of color. Piper French, *Oregon’s Tough-on-Crime D.A. Association Faces a Reckoning*, APPEAL (Apr. 9, 2021), <https://theappeal.org/politicalreport/oregon-prosecutors-measure-11/> [<https://perma.cc/JFQ9-5EW5>]. In 2018, APAAC, the Arizona prosecutors group, released a report claiming Arizona was “lead[ing] the way in criminal-justice reform,” despite having one of the higher incarceration rates nationally. It was later revealed that a Fox News columnist was paid \$34,000 of public money by the Maricopa County attorney to research and write the report. See Davis, *The Carceral Force of Prosecutor Associations*, *supra* note 101. In one counterexample to this trend, in Virginia, a group of eleven prosecutors formed a progressive District Attorney Association as a response to the Virginia Association of Commonwealth’s Attorney’s consistent tough on crime lobbying. Daniel Nichanian, *Eleven Prosecutors Form a Progressive Alliance in Virginia*, APPEAL (July 28, 2020), <https://theappeal.org/politicalreport/virginia-prosecutors-form-progressive-alliance/> [<https://perma.cc/PW56-QY8P>].

¹⁰⁷ Special Directive 20-08.2 allowed sentencing enhancements for (1) hate crimes (2) elder and dependent abuse (3) child physical abuse (4) child and adult sexual abuse (5) human sex trafficking (6) financial crimes, and (7) with approval, when there are extraordinary circumstances such as extensive physical injury or the type of weapon used represents a distinct threat to human life. Special Directive 20-08.2, Los Angeles County District Attorney’s Office (Dec. 18, 2020).

¹⁰⁸ Interview with Meredith Gallen, Assistant Public Defender in L.A. (May 7, 2021).

¹⁰⁹ Because the bench is largely composed of former prosecutors, judges would deny the motions to dismiss enhancements in the interest of judgment, openly “maligning Gascón from the bench.” *Id.*

¹¹⁰ Far from the “fringe,” many advocates and scholars across California and the country have denounced sentence enhancement policies such as the STEP act and Three Strikes law as racially discriminatory, excessively punitive, and ineffective to reducing crime. The Street Terrorism Enforcement and Prevention (STEP) Act was passed in 1998 to allow law enforcement to label

and Power Now,¹¹¹ recalls, “[p]eople were getting more time for enhancements than the crime they were being charged for,” an issue that persisted despite Gascón’s directive.¹¹²

Less than three weeks after Gascón’s first Directive, the ADDA, with the support of the California District Attorneys Association (CDA),¹¹³ sued Gascón over the lawfulness of his “radical” Directives.¹¹⁴ The ADDA and CDA claimed that the progressive policies were an abuse of discretion in conflict with prosecutors’ legal and ethical obligations and the separation of powers doctrine.¹¹⁵ To bolster their accusation, the ADDA quoted the examples of local judges refusing to accept line DAs motions to strike prior convictions in the furtherance of justice.¹¹⁶ Chesa Boudin, who replaced Gascón as San Francisco District Attorney, noted in an interview the undeniable hypocrisy in that “[a]lmost no one — and certainly none of the folks attacking George from the right — ever raised concerns about prosecutorial discretion when prosecutors were seeking to send people to prison for life for stealing a pizza.”¹¹⁷

The lawsuit against Gascón is a win for the ADDA. The court granted the ADDA’s preliminary injunction in large part. The court held that Gascón, as district attorney, is enjoined from directing his deputy district attorneys not to plead and prove strike priors under Three Strikes law and enjoined from compelling them to dismiss strike priors without legal basis.¹¹⁸

community members as gang affiliated and create a sentencing enhancement for gang affiliation. The Three Strikes law, which mandated a 25 years to life sentence for third time offenders, was enacted in 1994. Gascón campaigned on ending policies like this, which likely boosted his voter support at a time of intense organizing by Black Lives Matter LA and other local racial justice groups. These reforms were part of his voter mandate. Piper French, *The Prosecutors’ Union That’s Suing George Gascón Has a History of Zealous Opposition to Reform*, APPEAL (Jan. 27, 2021), <https://theappeal.org/george-gascon-lawsuit-prosecutors-union/> [<https://perma.cc/X62J-N7YQ>].

¹¹¹ “[A] Los Angeles based grassroots organization founded in 2012 that fights for the dignity and power of all incarcerated people, their families, and communities.” *About Us*, DIGNITY AND POWER NOW, <http://dignityandpowernow.org/about-us/> [<https://perma.cc/V3M8-JCFR>].

¹¹² French, *supra* note 110.

¹¹³ For context, the CDA was recently caught misappropriating \$3 million, some of which was used “to fund its lobbying efforts against criminal justice reforms. See Davis, *The Carceral Force of Prosecutor Associations*, *supra* note 101.

¹¹⁴ *Id.* The CDA filed an amicus brief in support of the ADDA’s lawsuit. See Jerry Iannelli, *Los Angeles D.A. George Gascón Leaves California’s Powerful D.A. Association*, APPEAL (Feb. 16, 2021), <https://theappeal.org/politicalreport/george-gascon-leaves-californias-district-attorney-association/> [<https://perma.cc/5PNH-TZ5G>]. The lawsuit included Special Directives 20-08, 20-08.1, 20-08.2 and 20-14. Petition, *ADDA v. Gascón*, at 2.

¹¹⁵ Petition, *ADDA v. Gascón*, at 2–3. The ADDA asserts the Directives violate the separation of powers doctrine because the California legislature, elected by citizens of California, enacted the Three Strikes Law and the D.A cannot effectively repeal it unilaterally. *Id.* This isn’t the first time a district attorney association claimed a reform was unconstitutional. The Louisiana District Attorneys Association (LDAA) claimed that a law requiring that all police shootings where someone was injured or killed be reviewed by grand juries was unconstitutional. Josie Duffy Rice, *Prosecutors Aren’t Just Enforcing the Law — They’re Making It*, APPEAL (Apr. 20, 2018), <https://theappeal.org/prosecutors-arent-just-enforcing-the-law-they-re-making-it-d83e6e59f97a/> [<https://perma.cc/KZ8Y-8XAQ>].

¹¹⁶ Petition, *ADDA v. Gascón*, at 13.

¹¹⁷ Lagos, *supra* note 99.

¹¹⁸ *ADDA v. Gascón*, No. 20STCP04250 (Super. Ct. L.A. Cnty. 2021). Another example of a judge rejecting a progressive prosecutor’s non prosecution comes from Boston. There, a judge tried to force

Since the lawsuit defeat, Gascón has taken a tempered approach to progressive change, a far cry from the bolder sentencing overhaul he enacted on his first day in office. For example, Gascón played the role of supporting actor for progressive sentencing legislation by promoting Assembly Bill 1127, which would allow a juvenile conviction to be vacated rather than used as a strike for unduly harsh sentences down the road in adult court.¹¹⁹ This is despite the fact that arguably one of the strongest selling points of the progressive prosecution movement is that the most powerful actor in the system would not have to play the politics required for legislative change and could act unilaterally. Gascón has also proposed the relocation of some prosecutors to police stations to decentralize the power in the hopes of strengthening community ties.¹²⁰ This milder, misguided reform misdiagnoses the problem¹²¹ and does not advance radical change. In fact, the reform actively detracts from transformation to a society where accountability and healing occurs outside the criminal legal system, by strengthening ties between prosecutors and the police. At the very least, stationing prosecutors in the community does not change the nature of prosecution, much like community policing does not solve the issues inherent to policing.¹²²

Like Krasner, Gascón has faced insubordination from his deputy DAs.¹²³ The head of the child abuse unit went on TV to call his boss “pro-criminal, anti-victim” and someone “who refuses to follow the law.”¹²⁴ Line DAs also spoke out in outrage to the downsizing and renaming of the Hardcore Gang Unit to the Community Violence Reduction Division.¹²⁵ Neighboring DAs counteracted his sentencing reforms by fighting to reclaim cases from his offices because of the risk they could

Rachel Rollins to prosecute protestors of a straight pride parade. Rollins appealed to the Massachusetts Supreme Court and won a judgment stating the local judge overstepped his authority in trying to require the prosecution. *Commonwealth v. Webber*, 2019 WL 4263308 (Mass. 2019).

¹¹⁹ Assemb. B. 1127, Reg. Sess. (Ca. 2021-2022).

¹²⁰ Steven Rosenberg, *D.A. George Gascón Pushes for Bill to Eliminate Juvenile ‘Strikes’ in Adult Sentencing* (Apr. 9, 2021), <https://www.dailynews.com/2021/04/09/da-george-gascon-pushes-for-bill-to-eliminate-juvenile-strikes-in-adult-sentencing/> [<https://perma.cc/HYN8-RRM8>].

¹²¹ Terrell Jermaine Starr, *Community Policing Is Not the Solution to Police Brutality. It Makes It Worse*, WASH. POST (Nov. 3, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/11/03/community-policing-is-not-the-solution-to-police-brutality-it-makes-it-worse/> [<https://perma.cc/PM7T-YMRC>] (“As sincere as the philosophy of community policing might be, it’s not the solution to police brutality. The bad relationship between police and residents is not the cause of excessive force . . . it’s the result.”).

¹²² See Cameron Rasmussen & Kirk “Jae” James, *Trading Cops for Social Workers Isn’t the Solution to Police Violence*, TRUTHOUT (July 17, 2020), <https://truthout.org/articles/trading-cops-for-social-workers-isnt-the-solution-to-police-violence/> [<https://perma.cc/E4NY-T4QG>].

¹²³ While some credit the insubordination to the manner in which Gascon announced his reforms publicly on his first day of office, without first consulting his line DAs, Meredith Gallen, LA public defender, told us she thinks the rollout didn’t cause the outcome. Gascón was open with his policies throughout the campaign, so even if people said they were caught off guard, it’s really the case that “they were choosing not to listen.” Interview with Meredith Gallen, *supra* note 108.

¹²⁴ Jason McGahan, *A Media Savvy Deputy D.A. is Leading a Noisy Crusade Against George Gascon*, L.A. MAG. (Apr. 15, 2021), <https://www.lamag.com/citythinkblog/gascon-jon-hatami-district-attorney/> [<https://perma.cc/EN2X-T5TN>].

¹²⁵ Jake Dima, *LA County District Attorney to Downsize Gang Unit Drawing Ire from Police and Prosecutors*, WASH. EXAM’R (Apr. 1, 2021), <https://www.washingtonexaminer.com/news/los-angeles-da-george-gascon-downsize-rename-gang-unit-criticism> [<https://perma.cc/Z9K4-KBTC>].

receive lighter sentences if prosecuted by Gascón.¹²⁶ Following in Krasner's footsteps, Gascón sought to shake up his office dynamic by hiring former deputy public defender Tiffany Blacknell, who identifies as an abolitionist, to executive staff.¹²⁷ The hiring decision was characterized as creating an echo chamber by the head of the prosecutor's union and called "unconscionable" by the police union president.¹²⁸ In hiring public defenders, Gascón is aiming to overhaul the tough on crime mentality and shift the culture towards a more rehabilitative and restorative oriented office.¹²⁹ But, given the amount of pushback by the unions, the turnover created a larger fissure in the fault lines between the new class and veteran line DAs.¹³⁰

There are now calls to recall Gascón.¹³¹ The LA County sheriff, along with deputy district attorneys working under Gascón, are fervently supporting his recall.¹³² Victim vigils have become a rallying site to fuel momentum for the recall effort.¹³³ A resolution was passed by two city councils in Los Angeles affirming votes of no confidence in response to the Special Directives concerning sentencing reform.¹³⁴ The recall effort exposes the fragility of DA reforms because "demanding prosecutors decline to prosecute certain charges is a discretionary decision that depends on the particular prosecutor in power (and follow-through by individual line prosecutors)."¹³⁵

Gascón has found himself "surprised by the lengths [his opponents] are willing to go to mislead" and to target his policies.¹³⁶ The devastating reality is that Gascón's

¹²⁶ Sam Levin, *LA's Top Prosecutor Adopted Major Reforms. Law Enforcement Is Fighting to Block Every Police*, GUARDIAN (Mar. 10, 2021), <https://www.theguardian.com/us-news/2021/mar/10/george-gascon-los-angeles-district-attorney-prison-reform> [<https://perma.cc/E3JL-JBCU>].

¹²⁷ Scott Schwabke, *Union Blasts District Attorney George Gascón's Hiring of Controversial Prosecutor*, L.A. DAILY NEWS (Feb. 25, 2021), <https://www.dailynews.com/2021/02/25/unions-blast-district-attorney-george-gascons-hiring-of-controversial-prosecutor/> [<https://perma.cc/SU85-KGYT>].

¹²⁸ *Id.*

¹²⁹ The culture of the L.A. DA office has been described as "very hierarchical with almost a military-like adherence to that hierarchy." Interview with Meredith Gallen, *supra* note 108.

¹³⁰ James Queally, *D.A. Gascón's Panel of Advisors Attracts Security*, L.A. TIMES (Mar. 8, 2021), <https://www.latimes.com/california/story/2021-03-08/district-attorney-george-gascon-advisors-under-scrutiny> [<https://perma.cc/6MJN-Q48V>].

¹³¹ Leanne Suter, *Recall Effort Launched Against LA County D.A. George Gascón, With Support from Sheriff Villanueva*, EYEWITNESS NEWS (Mar. 1, 2021), <https://abc7.com/george-gascon-recall-los-angeles-da-sheriff-alex-villanueva/10380939/> [<https://perma.cc/6MR6-H8Z9>].

¹³² *Id.*

¹³³ McGahan, *supra* note 124.

¹³⁴ *City Council Unanimously Adopts Resolution Affirming Vote of No Confidence in Gascon*, SCVNEWS.COM (Apr. 6, 2021), <https://scvnews.com/city-council-unanimously-adopts-resolution-affirming-vote-of-no-confidence-in-gascon/> [<https://perma.cc/762V-4G45>]; Emma Colton, *Beverly Hills City Council Issues a Vote of 'No Confidence' for LA District Attorney George Gascón*, WASH. EXAM'R (Mar. 17, 2021), <https://www.washingtonexaminer.com/news/george-gascon-no-confidence-beverly-hills> [<https://perma.cc/JLN8-X667>].

¹³⁵ SURVIVED & PUNISHED NY, *supra* note 16. In their organizing, abolitionists question if their demands rely on a prosecutor using individual discretionary power or requiring more permanent policy change within their offices, recognizing how tenuous those changes can be because progressive DAs rely on electoral politics. *Id.*

¹³⁶ Sam Levin, *supra* note 126.

progressive reforms, which had the potential to impact 20,000 currently incarcerated individuals and 10,000 people with active cases,¹³⁷ have faced so much opposition from institutional actors that they have already been significantly stunted. Gascón's failure to implement many of the reforms he promised demonstrates how the money and organizing power used to elect him may have been better spent on more effective and permanent measures, such as direct campaigns to repeal harsh sentencing laws.

C. Aramis Ayala

Always remember prosecutors do harm. If you're looking for harm a progressive prosecutor caused, you don't have to look far. Because you have to incarcerate. I've had to do that within the system in which I've had to work.

– Aramis Ayala¹³⁸

Aramis Ayala's progressive prosecutor story is a sobering account of the movement. Florida's first Black state attorney,¹³⁹ Ayala's experience is an example of what happens when the institutional resistance wins—not only was she prevented from implementing progressive policies, but she was effectively pushed out of office. After her term ended, we were fortunate to have a conversation with her about her experience as a prosecutor elected under a progressive mantle and her decision not to run for a second term. Instead, Ayala is running for Congress in Florida's 10th district,¹⁴⁰ turning away from progressive prosecution as a locus of reform and focusing instead on legislative advocacy.

Just four days into her time as State's Attorney of the Ninth District of Florida, Ayala refused to seek the death penalty.¹⁴¹ In fact, she decided her office would never seek the death penalty.¹⁴² She cited the death penalty's lack of deterrent value, the hierarchy of victims that prosecutors create in deciding when to seek death, the costly and lengthy process, and the retraumatization of victims throughout the process as reasons for discontinuing it.¹⁴³ Then-Governor Rick Scott refused to accept her decision to take death off the table, a response which regrettably, has been common among Attorney Generals.¹⁴⁴ Via executive order, in an encroachment on

¹³⁷ *Id.*

¹³⁸ Interview with Aramis Ayala, *supra* note 6.

¹³⁹ Robinson, *supra* note 59.

¹⁴⁰ *Aramis Ayala for Congress*, <https://www.aramisayala.com/> [<https://perma.cc/CS6R-RU7P>] (last visited Mar. 16, 2022).

¹⁴¹ Interview with Aramis Ayala, *supra* note 6.

¹⁴² Monivette Cordeiro, *Orange-Osceola State Attorney Aramis Ayala to Leave Office When Term Ends But Says 'I'm Not Out of the Fight,'* ORLANDO SENTINEL (Oct. 31, 2019, 9:08 PM), <https://www.orlandosentinel.com/news/crime/os-ne-aramis-ayala-leaves-state-attorney-20191031-uz25n7oiv5bhpn7cvcmmojafaa-story.html> [<https://perma.cc/NP8C-HLMR>].

¹⁴³ Interview with Aramis Ayala, *supra* note 6.

¹⁴⁴ “Here’s the bottom line: rather than having ‘power,’ line prosecutors have delegated authority that is subject to several layers of review. In the federal system, the ‘big boss’ is the attorney general, and he or she is usually not shy about reminding the legal underlings who’s in charge. . . . Bush’s next attorney general, Alberto Gonzales, required prosecutors to seek the death penalty in cases in which the prosecutors had concluded it wasn’t warranted.” BUTLER, *supra* note 9, at 108.

Ayala's power and discretion, the Governor reassigned all death-eligible cases in her district to another state's attorney who would seek the death penalty.¹⁴⁵ In an effort to maintain her jurisdiction over those cases and discretion not to seek to the death penalty, Ayala sued.¹⁴⁶ All nineteen elected district attorneys in the state of Florida, with the institutional backing of their DA association, joined the Governor in supporting the removal of her discretion.¹⁴⁷ They were affirmed by Florida's supreme court ruling against Ayala.¹⁴⁸ To further punish Ayala's progressive aspirations, her budget was also cut.¹⁴⁹

Ayala's decision not to run again has everything to do with the institutional roadblocks she faced and nothing to do with her commitment to change the criminal legal system. In our conversation with her, she acknowledged that one deficiency of progressive prosecution is prosecutors only interact with a person in the moment their case is pending. There is a lot of front-end work that prosecution misses, including the norm of criminalizing social inequities. Ayala is also sensitive to the backend re-entry work that exists outside the purview of prosecution.¹⁵⁰

Despite her experience, Ayala thinks it is worth continuing to invest in the election of progressive prosecutors because "the value of their progressive goals does not depreciate because of the institutional obstacles they face."¹⁵¹ But, it will require changing the mindset of the institutional actors trying to maintain power who feel they are being threatened. In Ayala's view, that will require using metrics, like falling crime rates, that irrefutably support reform, and it will take time.¹⁵²

The people of Orlando-Osceola County once again voted in a self-proclaimed progressive to succeed Ayala, but the other three candidates, including Ayala's chief assistant, ran on platforms focused on increased prosecution, rather than reformation.¹⁵³ Ayala's successor states she will not undo the reforms Ayala was able to implement, but she could. While a progressive successor may quell Ayala's consternation about the impact of the changes she was able to accomplish, it could easily be upended if the tides turn. Ayala's trajectory from pushed-out prosecutor to congressional candidate illustrates our point: the resources and brainpower used to

¹⁴⁵ The Governor cited the Take Care Clause and his authority under Florida Law 27.14(1) to reassign cases "if, for any...good and sufficient reason, the Governor determines that the ends of justice would be best served." *Ayala v. Scott*, 224 So.3d 755, 757 (Fla. 2017). FPAA, the DA Association, also advocated for her cases to be reassigned despite her membership with the organization. Davis, *The Carceral Force of Prosecutor Associations*, *supra* note 101.

¹⁴⁶ *Ayala v. Scott*, 224 So.3d 755.

¹⁴⁷ Interview with Aramis Ayala, *supra* note 6.

¹⁴⁸ *Ayala v. Scott*, 224 So.3d 755.

¹⁴⁹ Interview with Aramis Ayala, *supra* note 6.

¹⁵⁰ Ayala pointed out in our conversation with her that rehabilitation of an offender is no longer a goal of sentencing in Florida's Criminal Punishment Code. *Id.* The statute reads "[t]he primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment." Fla. Stat. Ann. § 921.002(1)(b) (West 2020).

¹⁵¹ Interview with Aramis Ayala, *supra* note 6.

¹⁵² *Id.*

¹⁵³ Adrienne Cutway, *Monique Worrell Wins Orange-Osceola State Attorney Primary*, CLICK ORLANDO (Aug. 18, 2020, 9:21 PM), <https://www.clickorlando.com/news/politics/2020/08/13/meet-the-candidates-heres-whos-running-for-orange-osceola-state-attorney/> [https://perma.cc/N4DH-AKJP].

elect progressive prosecutors are better spent on advancing the more permanent and effective solution of transformative justice.

Ayala is now “keenly aware” that the law “impacts people in a way that doesn’t necessarily empower individuals on the ground but reinforces power at the top.”¹⁵⁴ The attacks she faced as a Black woman—the first Black state’s attorney in Florida—and progressive prosecutor were unmistakably personal racist affronts targeting her identity as well as her political position.¹⁵⁵ If she, as the supposed most powerful actor in the criminal legal system, was unable to reform the system according to her vision, how can progressive prosecution deliver on its promises?

IV. IN PLACE OF PROGRESSIVE PROSECUTION: SHORT-TERM AND LONG-TERM SOLUTIONS

I first encountered the idea of a new racial caste system in the mid-1990s when I was rushing to catch the bus in Oakland, California and a bright orange poster caught my eye. It screamed in large bold print: THE DRUG WAR IS THE NEW JIM CROW. I recall pausing for a moment and skimming the text of the flyer. A radical group was holding a community meeting about police brutality, the new three-strikes law in California, the drug war, and the expansion of America’s prison system. The meeting was being held at a small community church a few blocks away; it had seating capacity for no more than fifty people. I sighed and muttered to myself something like, “Yeah, the criminal justice system is racist in many ways, but it really doesn’t help to make such absurd comparisons. People will just think you’re crazy.” I then crossed the street and hopped on the bus. I was headed to my new job, director of the Racial Justice Project for the ACLU in Northern California.

- Michelle Alexander¹⁵⁶

We know the abolitionist vision will not be realized tomorrow.¹⁵⁷ It is simply not possible to jump from where we are today to a world with equal resources and

¹⁵⁴ Interview with Aramis Ayala, *supra* note 6.

¹⁵⁵ Ayala had to testify in federal court about a County Clerk of Court employee writing she should be “tarred and feathered if not hung from a tree” following her decision not to seek the death penalty. Cordeiro, *supra* note 142. Like Ayala, Kim Foxx of Chicago, who is African American, “has been the victim of vicious racist attacks throughout her tenure as state’s attorney. Neither the state nor the National District Attorney Association have come to her defense.” Davis, *The Carceral Force of Prosecutor Associations*, *supra* note 101. Kimberly Garner, progressive prosecutor in St. Louis, sued the police union and the city under the KKK Act arguing “a racist conspiracy was preventing her from doing her job”. *St. Louis Prosecutor Facing Relentless Resistance*, *supra* note 74.

¹⁵⁶ Michelle Alexander, *The New Jim Crow*, 9 OHIO STATE J. CRIM. L. 7, 7–8 (2011).

¹⁵⁷ “Contrary to the beliefs of their critics, abolitionists are not impervious to the realities of crime and violence. But they have a fundamental understanding that crime is a manifestation of social deprivation and the reverberating effects of racial discrimination, which locks poor and working-class communities of color out of schooling, meaningful jobs, and other means to keep up with the ever-escalating costs of life in the United States. These problems are not solved by armed agents of the state or by prisons, which sow the seeds of more poverty and alienation, while absorbing billions of dollars that might

without police or the prison industrial complex. But because reformist reforms¹⁵⁸ “continually fail to substantially alter the material conditions of the majority of Black people,” transformative change is non-negotiable.¹⁵⁹ Even if it takes a lifetime of struggle. Activists have won this type of change before. For example, in response to former Chicago police commander Jon Burge’s torture of over one hundred Black men, Mariame Kaba helped organize an “unprecedented campaign and outcome, which mirrored the professed values of the growing abolitionist movement: repair and restoration.”¹⁶⁰ Jon Burge’s victims and their families were awarded reparations including a “five-and-a-half-million-dollar compensation fund,” “waived tuition at the City Colleges of Chicago, a mandatory curriculum for Chicago public schools about the police torture, and a public memorial.”¹⁶¹ Kaba and other organizers “develop[ed] initiatives that could repair the harms done by the Chicago Police Department”¹⁶² without relying on the criminal legal system and the prison industrial complex.

In this Part, we first discuss two reforms that many “progressive” prosecutors have embraced: Conviction Integrity Units and restorative justice. As currently constituted, these reforms demonstrate how in the hands of prosecutors, even the most progressive measures are undermined by the inherently carceral nature of prosecution. Recognizing that prosecutors’ offices won’t be abolished anytime soon, we still see the value in providing some concrete, near-term suggestions that will have a more significant decarceral effect than what currently passes for progressive reform. To that end, we offer suggestions aimed at improving these reforms, primarily by severing their operation from the prosecution function, and envisioning them as a model of a decentralized, community-based approach to addressing harm. Finally, we discuss what we believe is truly necessary to put us on the path to abolition, which is a commitment to Transformative Justice.

A. Conviction Integrity Units

Conviction Integrity Units (CIUs) are units within prosecutors’ offices that review old convictions based on claims of actual innocence. In theory, they work to

otherwise be spent on public welfare. The police and prisons aren’t solving these problems: they are a part of the problem.” Taylor, *supra* note 43.

¹⁵⁸ “Non-reformist reforms” is a term coined by Andre Gorz in his writing in *Strategy for Labor*. ANDRE GORZ, STRATEGY FOR LABOR: A RADICAL PROPOSAL 7 (Martin A. Nicolaus & Victoria Ortiz trans., 1967). Non-reformist reforms are those that reduce incarceration and undermine the institutions that support it and are often pursued by prison abolitionists as incremental steps towards abolition. The Movement for Black Lives characterizes “reformist reforms” as those that work to “re-entrench and legitimize current power arrangements.” Marbre Stahly Butts & Amna A. Akbar, *Transformative Reforms of the Movement for Black Lives* 4 (unpublished manuscript) (2017), available at <https://perma.cc/6A24-H87Y>. The reforms instituted by progressive prosecutors are necessarily reformist because they rely on and entrench prosecution as an institution.

¹⁵⁹ Butts & Akbar, *supra* note 158, at 3. While the focus of Butts & Akbar’s piece was Black communities, reformist reforms do not address underlying societal conditions that lead to mass incarceration for any communities.

¹⁶⁰ Taylor, *supra* note 43.

¹⁶¹ *Id.*

¹⁶² *Id.*

right wrongs by overturning prior convictions where prosecutorial misconduct, improper police work, shoddy forensic evidence, or witness error led to the conviction of an innocent person.¹⁶³ But, in practice, CIUs are subject to several limitations.¹⁶⁴ First, the same office that prosecuted the case then reviews it for actual innocence, potentially creating misaligned incentives and subjecting review to confirmation bias.¹⁶⁵ Second, CIUs as they currently operate put the onus on the person subjected to the misconduct to prove their innocence¹⁶⁶—an incredibly difficult feat, especially considering that those applying for relief are incarcerated.¹⁶⁷ Third, most CIUs focus only on actual innocence.¹⁶⁸ Even when CIUs successfully free innocent people, the stories we hear about CIUs are typically extreme.¹⁶⁹

¹⁶³ We spoke to progressive District Attorney Lynnece Washington about the CIU she created in Bessemer, Alabama. She told us that the CIU faced some resistance because people saw she was starting something new, viewed it as a progressive policy, and felt there was no reason to dig up old convictions. Despite that resistance, the CIU is up and running. The process involves an incarcerated individual filling out an application explaining why they are innocent (as Washington explained, the CIU is not a thirteenth juror); the unit then will begin to review the application for actual innocence. Telephone Interview with Lynnece Washington, Bessemer District Attorney (March 23, 2021). Aramis Ayala, former State’s Attorney in Orlando, Florida said her CIU required a showing of innocence or such a miscarriage of justice that the unit would not even be able to get to the truth. Interview with Aramis Ayala, *supra* note 6. Similarly to the CIU in Bessemer, the eligibility determination requires an application process. *Id.*

¹⁶⁴ According to the National Registry of Exonerations, fifty of ninety-one CIUs have no exonerations recorded. *Conviction Integrity Units*, NAT’L REGISTRY EXONERATIONS (Apr. 14, 2021), <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> [<https://perma.cc/W8CK-UFWU>].

¹⁶⁵ See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1604, 1606 (2006) (discussing impact of confirmation bias in prosecutors’ offices).

¹⁶⁶ See, e.g., *Justice Services*, VENTURA CNTY. DIST. ATT’Y, <https://www.vcdistrictattorney.com/services/justiceservices/> [<https://perma.cc/3BME-GNN2>] (last visited Apr. 26, 2022) (requiring that “[d]efendants claiming that they are innocent of a crime of which they have been convicted have the initial burden to produce evidence of innocence.”)

¹⁶⁷ For example, the Riverside County, California, conviction review unit requires that the applicant still be incarcerated. *Conviction Review Committee*, OFF. DIST. ATT’Y, CNTY. RIVERSIDE, <https://rivcoda.org/resources/conviction-review-committee> [<https://perma.cc/V7GU-BBEL>] (last visited Apr. 26, 2022). The Birmingham division of Jefferson County’s Conviction Review Unit similarly requires that applicants be incarcerated. *Conviction Review Unit (CRU)*, DIST. ATT’Y: 10TH CIR., <https://www.jeffcoda.org/cru/index.php> [<https://perma.cc/V86S-WK3T>] (last visited Apr. 26, 2022). In our view, being incarcerated is a significant barrier to applying to have a case reviewed given that extensive documentation is usually required.

¹⁶⁸ There are dozens of examples of this. See, e.g., *Application for Conviction Review*, OFF. DIST. ATT’Y, CNTY. SAN DIEGO, STATE CAL., available at <https://www.sdcda.org/content/office/convictionreview/SDDA%20CRU%20Application1.pdf>; *Request for Conviction Review*, Sacramento Cnty. Dist. Att’y’s Off., available at <https://www.sdcda.org/content/office/convictionreview/SDDA%20CRU%20Application1.pdf> (describing how the conviction review unit will not accept cases where the claims are “purely legal,” and cases resulting from guilty pleas are subjected to a higher standard of review); *Conviction Review Committee*, OFF. DIST. ATT’Y, CNTY. RIVERSIDE, *supra* note 167 (describing how the unit will not accept cases where the applicant pled guilty or confessed without a “significant showing of coercion or lack of voluntariness”); *Justice Services*, VENTURA CNTY. DIST. ATT’Y, *supra* note 166 (reviewing only claims of factual innocence).

¹⁶⁹ See, e.g., Oren Yaniv, *Brooklyn Prosecutors Identify 14 More Cases Handled by Disgraceful Former NYPD Detective Louis Scarcella*, N.Y. DAILY NEWS (July 30, 2014),

Prosecutors will “cherry-pick the cases, overturn the obviously worst ones, thump their chests about all the good being done.”¹⁷⁰ Relief is granted so infrequently through CIUs because wrongful conviction is thought to be like a “plane crash[]”¹⁷¹—a rare and extraordinary event.¹⁷² Moreover, we believe that a CIU devoted to cases of actual innocence sends the harmful and inaccurate message that only the conviction of an innocent person can lack integrity or be “wrongful.” Surely that is not the case, and the limitation on innocence is a serious structural flaw in the concept of every CIU of which we are aware.

In seeking to repair harm through prosecutorial accountability, CIUs have potential to facilitate reconciliation. In our view, this potential would be far more accessible and effective if (1) CIUs were not housed in prosecutor offices, (2) eligibility was expanded beyond factually innocent people, and (3) justice through a CIU included monetary or other restitution from the state to the person harmed.¹⁷³

<https://www.nydailynews.com/new-york/brooklyn-prosecutors-id-14-cases-handled-disgraced-nypd-detective-louis-scarcella-article-1.1884893> [<https://perma.cc/PJE6-WLDL>] (reporting that “Scarcella, a renowned detective during the 1980’s and 1990’s, had his hands in hundreds of murder prosecutions, but has since been accused of repeatedly using the same . . . witness, threatening suspects and employing other improper tactics,” and that the Brooklyn District Attorney’s Conviction Review Unit was reexamining seventy-one cases tied to Scarcella); Sean Piccoli, *A Former Detective Accused of Framing 8 People for Murder is Confronted in Court*, N.Y. TIMES (Apr. 1, 2019), <https://www.nytimes.com/2019/04/01/nyregion/nypd-detective-louis-scarcella.html> [<https://perma.cc/WW5D-RXR8>]; Maurice Chammah, *After Drug Lab Scandal, Court Continues to Reverse Convictions*, TEX. TRIB. (Mar. 27, 2013), <https://www.texastribune.org/2013/03/27/after-drug-lab-scandal-court-reverses-convictions/> [<https://perma.cc/NQ5Y-XBJ4>] (reporting that nearly 5,000 convictions may be in jeopardy due to a forensic scientist’s misconduct).

¹⁷⁰ Josie Duffy Rice, *Do Conviction Integrity Units Work?*, APPEAL (Mar. 22, 2018), <https://theappeal.org/do-conviction-integrity-units-work-a718bbc75bc7/> [<https://perma.cc/V8RX-C6P8>] (quoting Phil Locke of the Ohio Innocence Project advisor). In Brooklyn, a CIU was created to review cases of a detective who repeatedly engaged in misconduct by framing innocent people. *Brooklyn DA to Dismiss 90 Convictions that Relied on Detective Charged with Perjury*, ABC7NY (Apr. 7, 2021), <https://abc7ny.com/joseph-franco-eric-gonzalez-convictions-dismissed-nypd-corruption/10494599/> [<https://perma.cc/45FG-2YP2>]. Once those cases were reviewed and corrected, the Brooklyn CIU’s exonerations steeply declined: in 2020, the Brooklyn CIU exonerated only two people. *Conviction Review Unit Exonerations*, BROOKLYN DIST. ATTY. OFF. (June 30, 2021), <http://brooklynda.org/wp-content/uploads/2021/06/TIMELINE-Rev-June-30-2021.pdf> [<https://perma.cc/4V6H-C6JL>].

¹⁷¹ Tracey Kaplan, *David Angel — Prosecutor Relights County’s Conviction Integrity Unit*, MERCURY NEWS (Mar. 27, 2019) <https://www.mercurynews.com/2011/03/27/david-angel-prosecutor-relights-countys-conviction-integrity-unit/> [<https://perma.cc/95AD-D8F8>] (quoting head of Santa Clara County Conviction Integrity as saying that “[w]rongful convictions are like plane crashes,” and “[t]here aren’t many plane crashes, but have to pay attention when they do happen”).

¹⁷² There are also instances in which prosecutors “hands are tied.” In Missouri, for example, the state’s highest court held that an elected prosecutor does not have the power to overturn a wrongful conviction “despite extensive evidence that police and prosecutorial misconduct compromised [the] case and the fact that the real perpetrators have come forward to take responsibility for the crime.” Jordan Smith, *Missouri Prosecutors Lack the Power to Right a Wrongful Conviction*, INTERCEPT (Mar. 14, 2021), <https://theintercept.com/2021/03/14/missouri-prosecutor-wrongful-conviction-lamar-johnson/> [<https://perma.cc/5FFW-5734>]; see also *State v. Johnson*, 617 S.W.3d 439, 445 (Mo. 2021) (finding no “authority to appeal the dismissal of a motion for a new trial filed decades after a criminal conviction became final”).

¹⁷³ Currently, an exoneree seeking payment from the state or municipality who harmed them must file a civil lawsuit under 42 U.S.C. § 1983.

CIUs should serve as a form of reparations, because “[w]ithout remedying the accumulated impact of past harms, we are destined to perpetuate them.”¹⁷⁴ That requires “acknowledging and materially addressing past, and continuing, harms” with measures such as official apologies, financial reparations, and potentially other benefits like those won in Chicago.

Of course, prosecutors would have an explicit role in this process (including funding it), but they cannot be gatekeepers of a process when their own misconduct caused the harm. There is an inherent conflict of interest between a prosecutor in the CIU reviewing a case prosecuted by their coworker with whom they may be having lunch the next day.¹⁷⁵

One possible solution would be to construct a CIU funded by the DAs office, but not housed there, that is run by formerly incarcerated individuals. Formerly incarcerated people understand most accurately the hurdles that people in prison face when they try to prove their innocence from behind bars. Additionally, formerly incarcerated people understand the range of people who are incarcerated much better than prosecutors do. As such, for basic—but critical—features of the CIU like the intake form or the initial criteria, they are better-positioned to create effective systems.¹⁷⁶ Finally, incarcerated people have a deeper understanding of conviction integrity and what constitutes a wrongful conviction that should fall within the purview of the CIU: not only cases of actual innocence, but also cases in which someone’s rights are violated in a way that undermines the process or the reliability of a conviction. Predictably, the changes to CIUs we are proposing would beget much more opposition than the existing CIUs because of their transformative nature, but also would provide substantially more justice to those harmed.

B. Restorative Justice

Restorative justice is a practice that “can be applied both reactively in response to conflict and/or crime, and proactively to strengthen community by fostering communication and empathy.”¹⁷⁷ It is a form of healing both for those who have been harmed as well as those who exacted the harm. The practice is rooted in the peacemaking principles used by some Native American tribes.¹⁷⁸ The objective is

¹⁷⁴ Butts & Akbar, *supra* note 158, at 9–10.

¹⁷⁵ Even if CIUs hire outside actors, like former public defenders, that would not resolve other issues of narrow eligibility and failing to center those who were formerly incarcerated in the process.

¹⁷⁶ We are not suggesting that lawyers not be involved—we believe that former public defenders who have experience with post-conviction work would be uniquely suited to participate in these units; however, having someone who knows what it is like to navigate the system is invaluable.

¹⁷⁷ *What is Restorative Justice*, RESTORATIVE JUST. INITIATIVE, <http://restorativejustice.nyc/what-is-restorative-justice> [https://perma.cc/77HL-R83A] (last visited Mar. 8, 2022).

¹⁷⁸ SUVI HYNYNEN LAMBSON, CTR. FOR CT. INNOVATION, PEACEMAKING CIRCLES: EVALUATING A NATIVE AMERICAN RESTORATIVE JUSTICE PRACTICE IN A STATE CRIMINAL SETTING IN BROOKLYN, at iii, 13–14 (2015), <https://www.courtinnovation.org/sites/default/files/documents/Peacemaking%20Circles%20Final.pdf> [https://perma.cc/RM9B-PBKX].

for everyone entrenched in the conflict to reach a shared insight into what caused the harm or injustice and address the needs of those harmed.¹⁷⁹

Prosecutor-led restorative justice programs are generally a good thing—they can divert people from prison—and an example of a practice that a less carceral (but—we still maintain—not truly progressive) prosecutor tends to embrace. Unfortunately, as the examples below show, restorative justice has been co-opted by prosecutors who sort cases into categories of eligibility.¹⁸⁰ The progressive prosecutor movement’s commitment to alternatives to incarceration, like restorative justice, can be seen as a “course correction,” but it certainly does not meet the Transformative Justice alternative Mariame Kaba and other abolitionists are seeking.¹⁸¹

The ties between restorative justice and prosecutor offices should be severed,¹⁸² relinquishing that power and responsibility to communities themselves. If that were to happen, once a prosecutor referred a case to a community-led restorative justice program, they would not later prosecute the individual for failure to complete that program. In our view, there is nothing additive that the prosecutor’s office provides by being involved in the process. The facilitation, programming, and healing all come from the community. Restorative justice “cannot be ‘co-governed’ with/by community organizations” and prosecutor offices.¹⁸³ Abolitionist values ask us to find a way of addressing harm that doesn’t further violence through punishment. With prosecutor-driven restorative justice, future harm is still on the table.

Danielle Sered, founder and director of restorative justice organization Common Justice, is right when she says “we cannot incarcerate our way out of violence.”¹⁸⁴ As an alternative to incarceration, Sered has been able to create a

¹⁷⁹ See RESTORATIVE JUST. INITIATIVE, *supra* note 194. One example is the model used by Common Justice. There, parties sit with those they have harmed, along with supporters of both sides, and a trained facilitator in what’s called a restorative justice circle. The purpose is to address anything required, through conversation in the circle, for healing and to come to an understanding as to what is needed for healing. *The Common Justice Model*, COMMON JUSTICE, https://www.commonjustice.org/the_common_justice_model [<https://perma.cc/M6JV-5TJJ>] (last visited June 4, 2022).

¹⁸⁰ See, e.g., *infra* notes 191, 192.

¹⁸¹ The authors of this Article call on prosecutors to “course correct” for mass incarceration, taking the view that because prosecutors are largely responsible for mass incarceration they should be the ones to work towards a more just system. See Miriam Krinsky & Taylor Phares, *Accountability and Repair: The Prosecutor’s Case for Restorative Justice*, 64 N.Y.L. SCH. L. REV. 32, 37–38, 41 (2020). For an overview of the Transformative Justice movement, see Section C, *infra*.

¹⁸² On Restorative Justice Initiative’s website, there is a directory of restorative justice organizations and practitioners that operate outside the criminal legal system. *New York City Restorative Justice Directory*, RESTORATIVE JUST. INITIATIVE, <https://restorativejustice.nyc/new-york-city-restorative-justice-directory/> [<https://perma.cc/7UYN-SLZ4>] (last visited Mar. 8, 2022). For example, Hidden Water is an organization that works with families in a twelve-week healing circle in “a restorative justice approach to breaking the cycle of childhood sexual abuse and transforming harm into shared healing.” The organization works with families in a twelve week healing circle with the opportunity to continue restorative justice practices after. HIDDEN WATER, <https://hiddenwatercircle.org/> [<https://perma.cc/GH9K-FMWF>] (last visited Mar. 8, 2022).

¹⁸³ SURVIVED AND PUNISHED NY, *supra* note 16, at 4.

¹⁸⁴ DANIELLE SERED, VERA INST. FOR JUST., ACCOUNTING FOR VIOLENCE: HOW TO INCREASE SAFETY AND BREAK OUR FAILED RELIANCE ON MASS INCARCERATION 4 (2017),

restorative justice program in the Bronx and Brooklyn.¹⁸⁵ The program offers the opportunity for those harmed by violent crime to opt into their restorative justice program as an alternative to incarceration. Common Justice’s experience proves that retribution is not what those who have been wronged want. Over 90% of people victimized choose Common Justice over incarceration.¹⁸⁶ This is unsurprising given that healing is more valuable when the accountability comes from the individual who caused harm, rather than the state through conviction and sentencing.¹⁸⁷

Restorative justice programs like Common Justice go beyond traditional rehabilitative or diversion programs because they “address the underlying causes of violence [to] help foster a long-term process of transformation for individuals and communities.”¹⁸⁸ Common Justice recognizes that reducing mass incarceration requires addressing violence.¹⁸⁹ But when restorative justice programs are deeply tied to the criminal legal system, there’s always a catch, even in a model like Common Justice. For example, Common Justice requires the DA to opt into the program by agreeing to offer it.¹⁹⁰ And not all crimes qualify for restorative justice programs offered by prosecutors.¹⁹¹ Many exclude the most serious crimes like

<https://www.vera.org/downloads/publications/accounting-for-violence.pdf> [<https://perma.cc/89V2-EBH7>].

¹⁸⁵ *Our Work*, COMMON JUSTICE, https://www.commonjustice.org/our_work [<https://perma.cc/7NBM-4YBA>] (last visited Apr. 26, 2022).

¹⁸⁶ DANIELLE SERED, COMMON JUSTICE: STORIES FROM OUR WORK 6 (2016); *see also* ALL. FOR SAFETY AND JUST., CRIME SURVIVORS SPEAK 13 (2016) (finding the overwhelming majority of crime victims believe that the criminal justice system over-incarcerates and prefer investments in prevention in treatment instead).

¹⁸⁷ Additionally, a study by the Smith Institute conducted in the UK found that restorative justice practices reduce post-traumatic stress as opposed to going through the court system, which detracts from the healing process. LAWRENCE W. SHERMAN & HEATHER STRANG, SMITH INST., RESTORATIVE JUSTICE: THE EVIDENCE 8 (2007). The current criminal legal system is inept when dealing with those victimized because it is not set up with victims as the focal point. *See* Zvi D. Gabbay, *Justifying Restorative Justice: A Theoretical Justification for the Use of Restorative Justice Practices*, 2 J. DISP. RESOL. 349, 352 (2005) (“A criminal trial is focused on proving the legal components of the specific violated norm. If these legal components are proven beyond a reasonable doubt, the discussion moves to the appropriate sanctions or treatment that is to be imposed on the defendant. The entire focus is on the offender. The protected interests behind the offenses are those of the commonwealth, the people or the state, rather than those of the particular victim.”)

¹⁸⁸ *The Common Justice Model*, *supra* note 179.

¹⁸⁹ *See* SERED, COMMON JUSTICE: STORIES FROM OUR WORK, *supra* note 186, at 7 (“[T]he country will not get anywhere close to reducing the number of people incarcerated by 50 percent—or better, to 1970s levels—without taking on the issue that most of these campaigns avoid: the question of violence. It is not just a matter of morality and strategy, though it is both of those things. It is a matter of numbers.”)

¹⁹⁰ In 2018, the Brooklyn DA’s Office screened 76 defendants and referred 44 as potential candidates for Common Justice. The DA’s Office first screens candidates, and they must plead guilty before entering the program. BROOKLYN DISTRICT ATTORNEY ERIC GONZALEZ, ANNUAL REPORT, 44-45 (2018), *available at* <http://brooklynda.org/wp-content/uploads/2019/10/Annual-Report-2019-Single-Page-Format.pdf>.

¹⁹¹ For example, the Red Hook Community Justice Center—a community court—that employs peacemaking techniques from Native American peacemaking circles, does not open the process to those charged with intimate partner violence, child abuse, elder abuse, sexual assault or those suffering from severe mental illness or substance use issues. The program also requires the consent of the prosecutor, defense lawyer, and judge assigned to the case. *See* HYNYNEN LAMBSON, *supra* note 178, at iv.

murder or some of the most common crimes like intimate partner or family violence and sexual assault.¹⁹²

San Francisco’s “Make it Right”¹⁹³ restorative justice program is an example of a program that largely operates outside of the prosecutor’s office¹⁹⁴ but is ultimately controlled by it. Significantly, and in contrast to other DA’s offices that have restorative justice programs, once the case has been handed over to a nonprofit called Community Works, district attorneys do not participate in the process.¹⁹⁵ Community Works provides status updates regarding the stages of the case (e.g., enrolled, conference completed, agreements completed); everything else is confidential.¹⁹⁶ For people whose case is diverted, the goal is to engage in dialogue to accept accountability and create an agreement designed to address the root causes of their behavior. The person who caused harm must complete all of the agreements and then the case can be discharged.

Like Common Justice, “Make it Right” is a worthy program that falls short of our vision. It comes with a robust set of caveats. For example, only felony cases that are in the pre-charge stage are eligible for diversion.¹⁹⁷ Additionally, the person

¹⁹² For example, San Francisco’s restorative justice program is available only to nonviolent misdemeanor cases that would otherwise be prosecuted. *Neighborhood Courts*, S.F. DIST. ATT’Y, <https://www.sfdistrictattorney.org/policy/restorative-justice/neighborhood-courts/> [https://perma.cc/D3EV-RC65] (last visited Mar. 20, 2022). Similarly, the Restorative Response Program in Philadelphia only accepts those accused of nonviolent offenses. *Restorative Response Program*, DEF. ASS’N OF PHILA., <https://phillydefenders.org/rr/> [https://perma.cc/PM7J-QMBE] (last visited Mar. 20, 2022). The Neighborhood Justice Program in Los Angeles says those arrested for first-time, non-violent offenses are eligible. *Neighborhood Justice Program (NJP)*, MIKE FEUER L.A. CITY ATT’Y, <https://www.lacityattorney.org/community-justice> [https://perma.cc/8FL3-7Y2M] (last visited Apr. 27, 2022). Limitations like these are seen in other restorative justice programs run by progressive prosecutor offices nationally. For example, Following the murders of George Floyd and Walter Wallace that sparked mass protests in March 2020, Larry Krasner proposed a restorative justice program called the Civil Unrest Restorative Response to “make damaged businesses whole.” The goal was to avoid prosecution for over 500 people who were arrested for property damage or burglary. The program is couched in this specific instance—which Krasner said, “was warranted given the unique motivation of the crimes: ‘an outcry’ during the historic moment of protest against the police killings of George Floyd.” Samantha Melamed, *Hundreds Arrested in Philly Uprisings May Avoid Prosecution Through Restorative Justice*, PHILA. INQUIRER (Mar. 26, 2021), <https://www.inquirer.com/news/philadelphia-unrest-restorative-justice-george-floyd-larry-krasner-20210326.html> [https://perma.cc/5VZV-Y3DE]. In D.C., the Attorney General accepted a restorative justice program for youth, but the program excludes violent crimes and crimes involving sexual misconduct. Carrie Johnson, *D.C. Prosecutors, Once Dubious, Are Becoming Believers in Restorative Justice*, NAT’L PUB. RADIO (July 2, 2019), <https://www.npr.org/2019/07/02/735506637/d-c-prosecutors-once-dubious-are-becoming-believers-in-restorative-justice> [https://perma.cc/MG89-A9NT].

¹⁹³ Make it Right was established in 2014 by former San Francisco DA and current Los Angeles DA George Gascón. IMPACT JUST., RESTORATIVE COMMUNITY CONFERENCING 17 (2017), available at https://impactjustice.org/wp-content/uploads/CWW_RJreport.pdf.

¹⁹⁴ Telephone Interview with Demarris Evans, San Francisco Restorative Justice Program (May 24, 2021).

¹⁹⁵ See IMPACT JUST., *supra* note 193, at 17.

¹⁹⁶ Interview with Demarris Evans, *supra* note 194.

¹⁹⁷ *Id.*; see also IMPACT JUST., *supra* note 193, at 17 (“Several studies have shown that low-risk youth do better *without* intervention. Indeed, interventions of any sort for low-risk youth have been found to increase recidivism. Severity of the crime is a factor in determining risk. Relatedly, international studies

charged cannot have used a weapon, and the victim’s injuries cannot be severe.¹⁹⁸ According to the Impact Justice report,

“[T]he DA’s office purposely aligned eligibility criteria to include crimes for which youth of color are disproportionately arrested, charged, and incarcerated. And by making the charging decision prior to the diversion decision, [the DA’s office] can be certain that it is not sending cases to restorative justice that it would not have otherwise taken seriously.”¹⁹⁹

Unfortunately, for restorative justice to become widespread, programs would need to commit to accepting serious cases like sexual assaults and homicides.

Our vision of community-led restorative justice comes with its own set of limitations. Because the fulcrum of restorative justice is individual relationships, issues of race, class, gender, and other social constructs or conditions that lead to the harm are left unaddressed. That’s why Transformative Justice, focusing on systemic inequities, is necessary to work in tandem with the healing and accountability of restorative justice.

C. Transformative Justice

The case studies in this Article teach us that we need to transform, rather than reform, the system. Angela Y. Davis provides the necessary framing by pointing out that

“if we want to imagine the possibility of a society without racism, it has to be a society without prisons. . . . security is a main issue, but not the kind of security that is based on policing and incarceration. Perhaps Transformative Justice provides a framework for imagining a very different kind of security in the future.”²⁰⁰

As Mariame Kaba explains, the focus of Transformative Justice is “transform[ing] the conditions that led to interpersonal harm and violence that you’re dealing with at the moment.”²⁰¹ Instead of investing in progressive prosecution, and thereby decreasing time, money and energy for transformative change, we should be making investments “that transform the political and social order, including ‘meaningful justice reinvestment to strengthen the social arm of the state and improve human welfare,’ decriminalization, and restorative justice projects.”²⁰²

show that restorative justice is more effective for addressing more serious crimes.”) (internal citations omitted).

¹⁹⁸ Interview with Demarris Evans, *supra* note 194.

¹⁹⁹ IMPACT JUST., *supra* note 193, at 18.

²⁰⁰ ANGELA Y. DAVIS, FREEDOM IS A CONSTANT STRUGGLE 55 (2016).

²⁰¹ MARIAME KABA, WE DO THIS ‘TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 149 (2021).

²⁰² Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U.L. REV. 405, 462 (2018) (quoting Allegra M McLeod, *Prison Abolition and Grounded Justice*, 62 U.C.L.A. L. REV 1156, 1161 (2015)).

Mariame Kaba distinguishes Restorative and Transformative Justice in her book, “We Do This ‘Til We Free Us.” She explains that Transformative Justice is more expansive and focused on changing the root societal causes of crime.²⁰³ Restorative justice is narrower in that it specifically focuses on the relationships that are broken through harm, and any community involvement is focused on repairing the broken relationship.²⁰⁴ However, both understand that the “victim” and “perpetrator” identities are deeply intersectional, and Transformative Justice rejects the dichotomy altogether.²⁰⁵ Restorative justice has been legitimized in some spaces within the criminal legal system, whereas Transformative Justice operates outside of it entirely.²⁰⁶

While restorative justice provides an avenue to restore fractured relationships and demand accountability, Transformative Justice recognizes that “structural and state violence that exists is a mirror of the interpersonal violence that exists.”²⁰⁷ Generation Five, an organization dedicated to preventing child sexual abuse through Transformative Justice, explains that the three core beliefs of Transformative Justice are: the individual and the collective are “equally important, mutually supportive, and fundamentally intertwined”; conditions that perpetuate violence must be transformed for individual impact; and state responses to violence not only fail to address violence, but perpetuate it.²⁰⁸

Transformative Justice is imperative because

“[t]he community’s intervention stops the harm. It also enables the actor to acknowledge the act as harmful or violent, to take responsibility for the act in the face of oppressive conditions, and to understand the relation between this act and the oppressive social context. Going through this intervention process is itself one of the most vivid forms of community education available to us. The education involved in calling and stopping the harm is key in preventing more harm.”²⁰⁹

²⁰³ KABA, *supra* note 201, at 149.

²⁰⁴ *See Id.* at 148.

²⁰⁵ *Id.* at 149.

²⁰⁶ Mia Mingus, *Transformative Justice: A Brief Description*, TRANSFORMHARM.ORG, <https://transformharm.org/transformative-justice-a-brief-description/> [https://perma.cc/P9RG-5Y5W] (last visited Apr. 27, 2022) (“Transformative Justice responses and interventions . . . do not rely on the state (e.g. police, prisons, the criminal legal system, I.C.E., foster care system (though some TJ responses do rely on or incorporate social services like counseling) . . .”).

²⁰⁷ Josie Duffy Rice & Clint Smith, *Justice in America Episode 20: Mariame Kaba and Prison Abolition*, APPEAL (Mar. 20, 2019) <https://theappeal.org/justice-in-america-episode-20-mariame-kaba-and-prison-abolition/> [https://perma.cc/DEA5-JPVY].

²⁰⁸ GENERATION FIVE, TOWARD TRANSFORMATIVE JUSTICE 5 (2007), *available at* <http://relationshipanarchy.com/wp-content/uploads/2016/07/Toward-Transformative-Justice-06-2007.pdf>.

²⁰⁹ Queer Transformative Justice Working Group, *Principles/Concerns/Strategies/Models 4* (Critical Resistance, Working Document, 2018), *available at* http://criticalresistance.org/wp-content/uploads/2014/05/TJ_Interim_Principles_09_21_08.pdf.

Transformative Justice goes beyond any state-sponsored solution because it does not just allow the person affected by the harm to return to their previous condition. Therein lies the transformative power. It requires the person who exacted harm to be “an active participant in this rebuilding of community for the person harmed[.]”²¹⁰ This can mean a communal denouncing of the act, an intervention with the person who exacted harm and the community and an understanding the relationship between the act and oppressive conditions so that those conditions can be improved.²¹¹ “[A] deep transformation of the actor accompanies the transformation of the community.”²¹²

Additionally, “Transformative [J]ustice calls on us to shatter binaries,”²¹³ especially the victim-offender dichotomy.²¹⁴ That binary “only works if you’re looking at one specific incident at a point in time, because usually the very same people who are victimized in one context have perpetrated in another.”²¹⁵ Further, a national survey of victims proves that those harmed long for solutions beyond prosecution and conviction, such as investments in education and jobs over investment in prisons and jails.²¹⁶

Calls for Transformative Justice are often met with the demand for proof of its efficacy by skeptics reluctant to accept a total overhaul of the status quo.²¹⁷ Mariame Kaba says we should reject this demand because the current system “has all the resources while [those] on the ground trying to build these tiny experiments have none of them.”²¹⁸ If police and prisons are never asked to produce metrics of success—in terms of reducing harm to communities—to secure more funding, communities should not have to prove themselves, before receiving funding, to be taken seriously.²¹⁹ Nonetheless, there are successful local examples to draw on.

²¹⁰ *Id.* at 5.

²¹¹ *Id.* at 4-5.

²¹² *Id.*

²¹³ Josie Duffy Rice & Clint Smith, *supra* note 207.

²¹⁴ The victim-offender dichotomy ignores the trauma and history of someone who commits a crime, rather than seeking to understand what role they play in the offense. See Georgia Coughlan, *The Victimization of Criminalized Women and Trauma Trails: Pathways to Criminalization and the Dichotomy of the Victim Offender*, 5 INVOKE 5 (2019), available at <https://journals.library.ualberta.ca/invoke/index.php/invoke/article/view/48986/40991>.

²¹⁵ Josie Duffy Rice & Clint Smith, *supra* note 207.

²¹⁶ ALLIANCE FOR SAFETY AND JUSTICE, CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS’ VIEWS ON SAFETY AND JUSTICE 17, available at <https://allianceforsafetyandjustice.org/wp-content/uploads/documents/Crime%20Survivors%20Speak%20Report.pdf>.

²¹⁷ Mariame Kaba points out that underfunded Transformative Justice organizations are asked to produce results and write reports about safety while no prison is asked to produce recidivism rates. Coffee & Books, *supra* note 15, at 29:55-30:15.

²¹⁸ *Id.* at 29:34-41. Another false dichotomy is “between community-based strategies focused on meeting material needs and strategies focused on creating and building Transformative Justice processes to address conflict, harm, and need beyond policing. The reality is that both are needed: investments in meeting people’s material needs through direct income support and service provision, and investments in untested experiments to address current gaps in community-based safety strategies, which are often perceived as risky, but are in fact essential to building the skills, relationships, and infrastructure necessary to achieve genuine and lasting community safety.” ANDREA J. RITCHIE, INTERRUPTING CRIMINALIZATION, THE DEMAND IS STILL #DEFUNDTHEPOLICE: LESSONS FROM 2020, at 38 (2021).

²¹⁹ Coffee & Books, *supra* note 15, at 30:09-38.

To prevent conditions that cause crime, the LA for Youth campaign practices Transformative Justice, advocating for the reinvestment of the law enforcement budget in youth—to create 15,000 jobs and paid internships for youth and 350 jobs for community-based peacebuilders and interventionists.²²⁰ Critical Resistance in Oakland developed medical kits that include information and resources for responding to emergencies, including overdoses and mental health crises, for those who want to avoid calling 911—an act which frequently ends in prosecution.²²¹ Project NIA’s Transformative Justice curriculum guide highlights the Storytelling and Organizing Project’s real world examples of Transformative Justice.²²² One example illustrates a man responding to a person with a gun in crisis by calling a community organization to de-escalate, rather than 911, and then mapping out everyone in the community²²³ to call instead of the police.²²⁴ Another example is a woman who called a community organization called UBUNTU, which works to “prevent, disrupt, transform and heal sexual violence,” for help ending an abusive relationship.²²⁵ Together with those from the organization who responded to the relationship violence, the woman was able to accomplish all of her goals—remaining in her home, keeping her children safe and ending the relationship.²²⁶ The organization set up a schedule for someone to be with her for the first period, and then provided her with a list of people to call from the organization instead of the police.²²⁷ As these examples show, in reality, Transformative Justice is sought out and practiced daily by those aiming to keep each other safe and healthy.

D. Responding to Critique

There is no doubt that the solutions we propose, which have been demanded for as long as the criminal legal system has existed, will provoke resistance. The

²²⁰ Akbar, *supra* note 202, at 470.

²²¹ Critical Resistance also created workshops called “Know Your Options” to respond to emergencies without calling 911, to avoid relying on punishment, incarceration, or policing. BEYOND SURVIVAL, STRATEGIES AND STORIES FROM THE TRANSFORMATIVE JUSTICE MOVEMENT 188–190 (Ejeris Dixon & Leah Lakshmi Piepzna-Samarasinha, eds., 2020).

²²² PROJECT NIA, TRANSFORMATIVE JUSTICE: A CURRICULUM GUIDE 26-27 (2013), available at https://niastories.files.wordpress.com/2013/08/tjcurriculum_design_small-finalrev.pdf.

²²³ The Bay Area Transformative Justice Collaborative (BATJC) uses the practice of pod mapping to identify relationships within Transformative Justice work. “Your pod is made up of people that you would call on if violence, harm, or abuse happened to you; if you wanted support in taking accountability for violence, harm, or abuse that you’ve done; if you witnessed violence; or if someone you care about was being violent or being abused.” BATJC also found that “[m]any people do not have any pod people. This is a reality for many oppressed and isolated communities and individuals because of how capitalism, oppression, and violence shape our lives... We hope that by beginning to build and grow pods where they already exist (or could exist). We can build the conditions to support people who do not have pods.” BEYOND SURVIVAL, *supra* note 221, at 102–106.

²²⁴ PROJECT NIA, *supra* note 222, at 24–25.

²²⁵ About UBUNTU, UBUNTU, <https://iambecauseweare.wordpress.com/> [<https://perma.cc/2QJE-QLME>] (last visited Mar. 21, 2022).

²²⁶ PROJECT NIA, *supra* note 222, at 26–28.

²²⁷ *Id.* at 26–27 (citing StoryTelling and Organizing Project, *Community Responds to Domestic Violence*, CREATIVE INTERVENTIONS, <https://www.creative-interventions.org/community-responds-to-domestic-violence/> (last visited Feb. 11, 2022)).

progressive agenda proposed by the prosecutors discussed in this Article is more modest than Transformative Justice, defunding, or abolition. But what our current system makes clear, and what we have argued above, is that the criminal legal system offers no solutions. To prosecute is to do harm.²²⁸

According to Mariame Kaba, in thinking about getting from where we are to where we want to be, we must first ask whether our solutions “rely on these current death-making institutions,” and second, whether they “expand the scope of the current death-making institutions.”²²⁹ The proposals we set forth in the preceding sections are worthwhile because they do not rely on or expand the scope of the prison industrial complex. They address mass incarceration before an arrest, a charge, or a conviction. Community-led restorative justice and Transformative Justice focus on addressing the root causes and conditions that led to harm and repairing the relationships affected by that harm. To be sure, these solutions are not accepted by the mainstream criminal legal system, but if provided with more resources, they could be, given that organizations are already doing this work locally.²³⁰

In their current state, we believe that the Transformative Justice programs we propose do not appear scalable and would therefore require an influx of resources. Because abolition will require defunding prosecution offices and building up community organizations, it is useful to compare their current budgets, even in broad strokes. The 2020-2021 budget allocated to Los Angeles District Attorney George Gascon’s office is \$454.5 million.²³¹ Last year, Philadelphia District Attorney Larry Krasner’s office operated on a budget of \$38.27 million, which he argued was insufficient.²³² The disparity between these progressive prosecutors’ budgets and the community organizations to which we cite is striking. For example, Community Works, the organization working with the Make it Right Program, received a \$1.9 million grant from the District Attorney’s office in San Francisco to expand its program.²³³ Investing in prison abolition requires building up community

²²⁸ In the words of Aramis Ayala, “always remember prosecutors do harm.” Interview with Aramis Ayala, *supra* note 6.

²²⁹ Coffee & Books, *supra* note 15, at 9:10–9:27.

²³⁰ The concept of divesting from police departments has gained mainstream attention in this way. See Taylor, *supra* note 43 (“You’ve already got folks on the ground over there that have had two cycles of budget fights around defunding the police based on divestment. So the part of this people don’t understand is the continuity of these ideas. They don’t just come out of nowhere. People aren’t just yelling stuff randomly. It got picked up nationally because people were, like, ‘This makes sense.’”).

²³¹ CNTY. OF LOS ANGELES, 2020-21 FINAL BUDGET, 127–28, available at <https://ceo.lacounty.gov/wp-content/uploads/2020/12/LA-County-2020-21-Final-Budget-Book.pdf>.

²³² Michael D’Onofrio, *Krasner Fights Impending \$8.7M Budget Cut to D.A.’s Office*, PHILA. TRIBUNE (June 8, 2020), https://www.phillytrib.com/news/local_news/krasner-fights-impending-8-7m-budget-cut-to-das-office/article_1f2d4a56-39ea-5415-8c95-be9419e94223.html [https://perma.cc/V9AK-HFJR].

²³³ Press Release, *San Francisco Dist. Att’y, \$1.9 Million Grant to Community Works Will Allow the San Francisco Dist. Att’y’s Off. to Expand Restorative Just. Diversion Program* (June 11, 2020), <https://www.sfdistrictattorney.org/press-release/grant-to-expand-restorative-justice-program/> [https://perma.cc/SXU8-MVL7]. We were unable to find operating budgets for Transformative Justice organizations, like Project NIA and Generation Five. We assume their budgets pale in comparison to those of progressive prosecutors. Project NIA wrote a report based on interviews of community organizations in Chicago about their operating budgets in order to determine the costs of alternatives to incarceration for youth in Chicago. Project NIA found that the five organizations that operated

organizations and reallocating the funds dedicated to public safety away from prosecutors to non-carceral programming.

Progressive prosecutors like Krasner, who request budget increases, claim that additional funding is needed to decarcerate and to build alternatives within the prosecutor's office.²³⁴ But the abolitionist framework requires that we expand those programs outside the purview of prosecutors and within community organizations, giving the latter the ability to address harm currently handled by the criminal legal system. Funding is often a zero-sum game. We can direct dollars towards less carceral prosecutors who call themselves progressive, or we can direct those resources to transformative programs that do not rely on prosecution. Given that resources are finite, we likely cannot meaningfully do both.

In addition to skepticism about resources for transformative approaches to harm, another unavoidable question is how to deal with domestic and sexual violence through restorative and Transformative Justice, without prosecutors. This question is closely related to the conventional wisdom that the criminal legal system and the prison industrial complex are necessary vehicles for delivering justice to victims of violent crime, particularly sex crimes.²³⁵

First, prosecutors are not victims' lawyers,²³⁶ and as such, they do not represent victims' interests. Paul Butler writes, "As a prosecutor, I had several occasions to tell victims, 'I don't represent you.' The prosecutor's client is the government, not the victim. Victims are simply witnesses, with all the baggage that implies."²³⁷ Second, because victims are "just" witnesses, they are subject to tactics prosecutors use to win cases—"[t]his may involve coercion, for example subpoenaing people to make them come to court even if they don't want to. It may involve harsh questioning or threats. The victim is supposed to tolerate it, based on the understanding that it's all in the service of punishing her victimizer."²³⁸ Additionally, racism and classism undoubtedly affect prosecutors' perceptions of who will be a good witness.²³⁹ Thus, the idea that prosecutors are necessary to

independently of the court system but provided alternatives to incarceration had a collective budget of \$1.25M. MICHELLE VANNATTA & MARIAME KABA, PROJECT NIA, "WE'RE IN IT FOR THE LONG HAUL": ALTERNATIVES TO INCARCERATION FOR YOUTH IN CONFLICT WITH THE LAW, available at <https://project-nia.org/uploads/documents/Research-Reports/were-in-it-for-the-long-haul.pdf>.

²³⁴ See D'Onofrio, *supra* note 232.

²³⁵ Cf. DEREKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM 8 (2021) ("People often ask me, 'What will we do with murderers and rapists?' Which ones? The police kill about a thousand people every year, and potentially assault, threaten, and harm hundreds of thousands more. After excessive force, sexual misconduct is the second-most-common complaint against cops.")

²³⁶ See DAVIS, ARBITRARY JUSTICE, *supra* note 30, at 61. ("The prosecutor does not have a client. Instead, she represents the state, which consists of everyone who lives in the jurisdiction she serves, including the defendant.")

²³⁷ Butler, "How Can You Prosecute Those People?", *supra* note 31, at 20.

²³⁸ *Id.*

²³⁹ DAVIS, ARBITRARY JUSTICE, *supra* note 30, at 63 ("Most prosecutors naturally feel more comfortable working with the victim who is cooperative, sympathetic, and interested in the prosecution of the case than with the victim who is uncooperative and difficult to reach. Class and cultural differences also play a role. The prosecutor may find it easier to communicate with a victim who is highly educated and articulate than with someone who has difficulty expressing himself and may feel intimidated by the court system and its procedures. Race and class issues sometimes affect charging and plea bargaining

protect victims is complicated by the fact that they do not represent them and accordingly do not prioritize their desires or needs.

As for the question of whether some form of traditional prosecution is needed to hold perpetrators of sexual violence accountable,²⁴⁰ abolitionists are well-versed in responses to this common inquiry. They recognize that police and prosecutors do not prevent the harm from happening in the first place and that the majority of people victimized by sexual violence do not turn to the criminal legal system for justice.²⁴¹ The call is not to just defund the state, but to “deny the state punishment as the primary mode of governance, and redirect its involvement into other spheres of governance (schools, housing, health care, jobs).”²⁴² The problem is that putting those perpetrators in prison “does nothing to change a culture that makes this harm imaginable, to hold the individual perpetrator accountable, to support their transformation, or to meet the needs of the survivors.”²⁴³

Both restorative and transformative practices are suitable to address the harm caused by sexual violence. Restorative justice can be used as a way to restore the wellbeing of the harmed party and move forward in a number of ways including a safe breakup or finding a healthy and safe way to co-parent.²⁴⁴ Addressing intimate partner violence through community-based restorative justice both respects an individual’s choice not to rely on police or courts and “lead[s] [restorative justice] practitioners to be accountable to the community, rather than the courts.”²⁴⁵ Generation Five, an organization dedicated to preventing child sexual abuse, has written extensively on the use of Transformative Justice.²⁴⁶ To them, it is necessary to address economic exploitation, male supremacy, and homophobia because it is the culture that normalizes sexual violence and creates the conditions for its prevalence.²⁴⁷ Unlike progressive prosecution, Transformative Justice will prioritize

decisions, resulting in cases with poor victims and/or victims of color being prosecuted less zealously than other cases. . . .”)

²⁴⁰ The definition of accountability we are using is one used by Mia Mingus that requires “self reflection, apology, repair, and changed behavior.” Josie Duffy Rice, Mariame Kaba & Reina Sultan, *Opinion: What Does Accountability Look Like Without Punishment?*, YES MAG. (May 25, 2021), <https://www.yesmagazine.org/opinion/2021/05/25/abolition-accountability-without-punishment> [<https://perma.cc/ZBX2-H8C5>].

²⁴¹ More than 2 out of 3 sexual assaults are not reported to the police. *The Criminal Justice System: Statistics*, RAINN <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/4ENP-5JCX>] (last visited Mar. 22, 2022). See also Sammy Caiola, *Sexual Assault Survivors Want Less Police, More Trauma-Informed Professionals—Especially For Black Victims* CAPRADIO (July 28, 2020), <https://www.capradio.org/articles/2020/07/28/sexual-assault-survivors-want-less-police-more-trauma-informed-professionals-especially-for-black-victims/> [<https://perma.cc/GX7C-YRLV>] (“For every 1,000 sexual assaults reported in the United States, fewer than five rapists will be incarcerated, according to the Rape, Abuse and Incest National Network’s analysis of federal criminal justice data.”).

²⁴² Akbar, *supra* note 202, at 472.

²⁴³ Taylor, *supra* note 43.

²⁴⁴ ERIKA SASSON & CHARLENE ALLEN, CTR. FOR COURT INNOVATION, USING RESTORATIVE APPROACHES TO ADDRESS INTIMATE PARTNER VIOLENCE, A NEW YORK CITY BLUEPRINT 7 (Oct. 2020), *available at* https://www.courtinnovation.org/sites/default/files/media/document/2021/Guide_RJBlueprint_01282020.pdf.

²⁴⁵ *Id.* at 11.

²⁴⁶ See GENERATION FIVE, *supra* note 208.

²⁴⁷ *Id.* at 14–15.

shifting power to those harmed and their communities to both address past harm and prevent future harm.

V. CONCLUSION

In *Freedom is a Constant Struggle*, Angela Y. Davis writes: “[t]he very existence of the prison forecloses the kinds of discussions that we need in order to imagine the possibility of eradicating these behaviors.”²⁴⁸ Dressing up prosecution as “progressive” ignores the fact that prosecution has never addressed the conditions that lead to crime. Even diversion programs, drug courts,²⁴⁹ and prosecution-provided social services do not address the underlying causes of crime, and instead create more mechanisms for surveillance and punishment.²⁵⁰ As Davis points out in the context of prisons, reform has “always only created better prisons.”²⁵¹ To pretend that mass incarceration is simply the result of the wrong *kind* of prosecution misses the mark, and distracts us from the reality that mass incarceration is fueled and sustained by prosecution itself. Furthermore, as our case studies show, even the most well-meaning progressive prosecutors face pushback from other prosecutors, courts, and police organizations that force them to compromise or abandon the reforms they propose. Prosecution—progressive or otherwise—is not the solution.

We have spent much of this Article discussing *why* alternatives to progressive prosecution are the answer, but it is much harder to write about the *how*.²⁵² As the authors of *Beyond Survival: Strategies and Stories from the Transformative Justice Movement* write, “[t]heory without practice can be irresponsible, and it can drive people who need immediate solutions away from the support they need.”²⁵³

For this reason, we conclude with an example of the *how*. In Berlin, Transformative Justice is used to *prevent* child sexual abuse, as opposed to the United States, which “treats” child sexual abuse with prosecution.²⁵⁴ In the latter, there is neither space, nor incentive, for those who abuse to admit their behavior or take accountability because doing so will result in incarceration and a lengthier sentence, not transformation. “In contrast, Prevention Project Dunklefeld developed a program in 2005 in Berlin, Germany that offered treatment and support to anyone who stepped forward to seek help with pedophilic urges.”²⁵⁵ The program has since grown into a nationwide network called “Don’t Offend,” treating over 1,000

²⁴⁸ DAVIS, *FREEDOM IS A CONSTANT STRUGGLE*, *supra* note 200, at 42.

²⁴⁹ Daniel Abrahamson, *Legal Experts Urge UN to Reject Drug Courts*, DRUG POLICY ALLIANCE: BLOG (Apr. 6, 2016), <https://drugpolicy.org/blog/legal-experts-urge-un-reject-drug-courts> [https://perma.cc/AD23-PG3D].

²⁵⁰ SURVIVED & PUNISHED NY, *supra* note 16 (“Prosecuting offices should not receive more resources to provide social services or survivor/victim support, nor bolster other forms of confinement, stripping of rights, or institutions that use threat of punishment to force treatment or coerce services (such as drug courts and other forms of diversion court; mental health jailing).”).

²⁵¹ DAVIS, *FREEDOM IS A CONSTANT STRUGGLE*, *supra* note 200, at 41.

²⁵² For a deeper discussion of the latter, see *Beyond Survival*, which was written “to explain not *why* but *how* to do Transformative Justice.” BEYOND SURVIVAL, *supra* note 221, at 12.

²⁵³ *Id.*

²⁵⁴ *Id.* at 145–46.

²⁵⁵ *Id.* at 145.

individuals to date.²⁵⁶ Initially, the project was funded by the government, the Volkswagen Foundation, and supported by various nonprofits.²⁵⁷ Now, the German public health insurance system funds the program,²⁵⁸ which does not report those who have sexually offended, but instead provides accessible preventative treatment through group therapy, individualized protection plans, and sometimes medication.²⁵⁹ The project works to distinguish between sexual desire, of which you should not be guilty, and sexual behavior, for which you are responsible.²⁶⁰ The same could be done in the United States. The money used to elect one progressive prosecutor alone could be transformative.

We offer the example of preventative Transformative Justice programs like “Don’t Offend” because they challenge the notion that reforming our oppressive system depends on prosecution. It does not. However, like the German program, it likely requires buy-in from the government, community organizations and private funders. Transformative Justice gives us a more powerful, effective, and inclusive solution in which to invest our time, money, and organizing power than progressive prosecution will ever be able to provide.

²⁵⁶ Jordan Michael Smith, *Can a Radical Treatment for Pedophilia Work Outside of Germany?* UNDARK MAG. (June 7, 2021), <https://undark.org/2021/06/07/radical-and-controversial-treatment-for-pedophilia/> [<https://perma.cc/8ESY-CTSZ>] (“[A]ccording to the project, Dunkelfeld has heard from potential patients from 40 countries; as of June 2019, more than 11,000 individuals had contacted Dunkelfeld for help and 1,099 were treated.”).

²⁵⁷ Klaus M. Beier, Janina Neutze, Ingrid A. Mundt, Christoph J. Ahlers, David Goecker, Anna Konrad & Gerard A. Schaefer, *Encouraging Self-Identified Pedophiles and Hebephiles to Seek Professional Help: First Results of the Prevention Project Dunkelfeld (PPD)*, 33 CHILD ABUSE & NEGLECT 545 (2009).

²⁵⁸ In contrast, the U.S. spends \$5.25 billion per year incarcerating people convicted of sexual offenses involving minors, not including pre-incarceration or post incarceration expenses. *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.* (describing a poster for the program that stated, “You are not guilty because of your sexual desire, but you are responsible for your sexual behavior,” and another that read, “There is help! Don’t become an offender!”).