

A PUBLIC DEFENDER DEFINITION OF PROGRESSIVE PROSECUTION

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INTRODUCTION

As public defenders, we represent people who are subjected to prosecutorial power. We sit in jail and juvenile hall interview rooms and talk to people charged with crimes by county prosecutors, everything from alleged gang offenses to robberies to sexual assault to child sexual abuse to homicide. We stand beside the people we serve at counsel tables, represent them in plea negotiations with prosecutors in judges' chambers, zealously advocate for their rights before juries and judges, and plead for their humanity at sentencing hearings.

While carrying out this constitutionally-mandated role at every stage of the post-filing criminal process, we witness prosecutors use their power in ways that are destructive.¹ We witness prosecutors coerce guilty pleas, perpetuate police misconduct, prosecute kids as adults, obtain racially disparate sentences through gang enhancements, pursue disproportionate, inhumane prison sentences pursuant to three strikes laws, and seek the death penalty. We see the harm these practices cause to our people and our communities.

We are critical participants in and observers of a system that has fallen short. The criminal system as it is currently constituted does not prevent crime, protect public safety, or vindicate principles of justice and dignity.² It could do so much better. We see how some of the worst aspects of the system could be mitigated through *real* progressive prosecutorial practices and we want *real* progressive prosecutors to bring about meaningful reform.

“Progressive prosecutor” has become a fashionable, oft-cited, but ill-defined term to describe modern district attorneys. The progressive prosecutor label is squishy enough that any person prepared to say, “We need to be smart on crime,” can claim to be a card-carrying member.

True progressive prosecution requires wholesale, bold, dramatic reform in how prosecutors view people accused of law violations, how they adjudicate and punish violent crime, and the way they pursue convictions. Progressive prosecution must mean a change in culture and priorities in district attorneys' offices.

We define “progressive prosecution” as the model of prosecution committed to truth-telling about systemic racism, shrinking mass criminalization, addressing root causes of crime, and bringing the criminal legal system in line with basic notions of justice and humanity.

1. AM. CIV. LIBERTIES UNION, *It's Time to Transform What It Means to Be a Prosecutor* (Feb. 18, 2018), <https://perma.cc/ME9P-F4DQ>.

2. *See generally On Mass Incarceration*, DAEDALUS, Summer 2010, <https://perma.cc/6YR5-BGQS>.

The aim of this definition is to provide a framework that enables differentiation between real progressive prosecution that reduces crime and make our communities safer versus prosecution practices that cause harm and perpetuate the status quo. Several ideas, discussed below, emanate from this definition. These ideas are based on our experiences as practitioners and witnesses to the system and are united by the premise that progressive prosecutors can undo past harms and do much good by refraining from practices that drive criminalization, perpetuate mass incarceration, foster systemic racism, and ultimately make our communities less safe.

I. END THE TRIAL TAX AND COERCIVE PLEA BARGAINING.

Prosecutors must be vanguards of the constitutional rights of the criminally accused, not purveyors of coercive plea bargaining and the trial tax.³ The practice of attaching an expiration date to plea offers and revoking those offers upon an arbitrary deadline must end. The practice of threatening to add charges unless the accused accepts a plea offer must cease.

Too often, in our experience, prosecutors exploit people's custodial status to secure convictions by offering the accused to get out of jail immediately in exchange for a guilty plea.⁴ If a person is safe and fit to be released, their freedom should not be conditioned upon a conviction. This exploitative tactic must end.

In addition, prosecutors must breathe life into the Sixth Amendment right to a jury trial. No person should ever be penalized for exercising their constitutional rights. Prosecutors must no longer ask for enhanced penalties, known in our practice as the "trial tax," if the accused rejects a pretrial offer and is ultimately convicted at trial.⁵

In order to protect meaningful review of pleas and trials, progressive prosecutors must also refrain from seeking a waiver of appellate rights as a condition of a plea agreement or in exchange for some consideration after trial.

II. STOP PROSECUTING CHILDREN AS ADULTS.

Prosecutors continue to charge children, primarily Black and Latinx youth, in adult court and punish them with adult prison sentences.⁶ This inhumanity

3. Somil Trivedi, *Coercive Plea Bargaining Has Poisoned the Criminal Justice System. It's Time to Suck the Venom Out*, AM. CIV. LIBERTIES UNION (Jan. 13, 2020), <https://perma.cc/E9CX-9NDG>.

4. Rachel Rossi, *The Power of Plea Bargaining: Prosecutorial Discretion Can Be Good in The Right Hands*, BLACK VOICE NEWS (Oct. 23, 2020), <https://perma.cc/U5L5-JTP3>.

5. See NAT'L ASSOC. OF CRIM. DEF. LAWYERS, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (July 2018), <https://perma.cc/3ZBP-QE7R>; Emily Yoffe, *Innocence is Irrelevant*, ATLANTIC (Sept. 2017), <https://perma.cc/8PEF-XNTZ>.

6. HUM. RTS. WATCH & W. HAYWOOD BURNS INST., *Futures Denied, Why California*

persists despite clear science that teenagers have less developed brains than adults, are particularly vulnerable to peer pressure, engage in riskier behavior for perceived immediate reward without considering long-term consequences, and possess unique capacities for rehabilitation.⁷

Even the United States Supreme Court has found that “children are constitutionally different from adults for sentencing purposes.”⁸ In *Miller v. Alabama*, the Court recognized that juveniles have diminished culpability because of their immaturity, underdeveloped sense of responsibility, vulnerability to negative influences, and their lack of ability to extricate themselves from horrific, crime-producing settings.⁹ The Court also acknowledged that juveniles have greater prospects for reform because a child’s character is not as “well formed” and is less fixed than an adult’s.¹⁰

Fundamental notions of morality, humanity, and justice require the unconditional end of prosecuting children as adults.

III. STOP SEEKING OR THREATENING THE USE OF THE DEATH PENALTY.

The death penalty lives on, although in 2019 California Governor Gavin Newsom issued a moratorium on capital punishment.¹¹ Still, over 700 people currently sit on California’s death row.¹²

Prosecutors in California continue to seek the death penalty in certain cases, and in others threaten its imposition to coerce guilty pleas that often involve life prison sentences from defendants too afraid to literally risk their lives at trial.¹³

Capital punishment is inhumane, cruel, expensive, ineffective, arbitrary, discriminatory, prone to mistakes, and coerces plea bargains.¹⁴ Prosecutors must be at the forefront of abolishing, not just suspending, the death penalty. To that end, they must stop seeking the death penalty and threatening its use and must move to re-sentence people from their jurisdictions sitting on death row.

Should Not Prosecute 14- and 15-Year-Olds As Adults 14-16 (2018), <https://perma.cc/9D23-YXKW>.

7. Miriam Aroni Krinsky & Marcy Mistrett, *L.A. and S.F. Have It Right: No Children Should Be Prosecuted As Adults*, S.F. CHRON. (Dec. 27, 2020), <https://perma.cc/T2FQ-HY8C>.

8. *Miller v. Alabama*, 567 U.S. 460, 471 (2012).

9. *Id.* (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

10. *Id.* (quoting *Roper*, 543 U.S. at 570).

11. Tim Arango, *California Death Penalty Suspended; 737 Inmates Get Stay of Execution*, N.Y. TIMES (Mar. 12, 2019), <https://perma.cc/YA64-M6SV>.

12. CAL. DEP’T OF CORR. & REHAB., *Condemned Inmate List*, <https://perma.cc/3X2L-K73D> (last visited Jan. 17, 2021).

13. Bob Egelko, *Newsom, California District Attorneys Seek Tighter Standards for Application of Death Penalty*, S.F. CHRON. (Oct. 26, 2020), <https://perma.cc/SJ26-3DZS>.

14. Cal. Gov. Gavin Newsom, Exec. Order N-09-19 (Mar. 13, 2020), <https://perma.cc/PZG2-CAR9>; Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY 475, 549 (2013), <https://perma.cc/4TN4-ND3M>.

IV. END GANG ENHANCEMENTS.

Gang enhancement prosecutions are rooted in racist stereotypes and disproportionately target young men of color.¹⁵

Gang prosecutions are premised upon police tactics that target, traumatize, and dehumanize communities of color. Police roam particular neighborhoods and stop, detain, frisk, and photograph young, primarily Black and brown males. They then create field identification (FI) cards, generate police reports, and place these youth in gang databases merely because of where they live, who their family members are, what colors they wear, the tattoos on their body, childhood nicknames, or on which street corner they spend time with their friends.¹⁶ Once an individual is placed in a gang database or has a set of FI cards, there's no way out.

Thereafter, in our experience, every crime these young men allegedly commit is deemed to be gang-related. Prosecutors, whenever possible, attach heavy-handed gang enhancements to charges against these perceived gang members, thereby subjecting them to additional prison time and strike priors that will follow them forever.¹⁷

True progressive prosecution requires the termination of these racist gang enhancements and the racist policing tactics that they stem from.

V. STOP PURSUING MANDATORY LIFE WITHOUT THE POSSIBILITY OF PAROLE (LWOP) SENTENCES.

A life without the possibility of parole (LWOP) sentence means just that—a person so sentenced must serve their entire life inside a prison cage with no hope or possibility of ever paroling. Over 5,000 people are serving LWOP sentences in California prisons, disproportionately people of color, and the majority sentenced to death by incarceration for crimes committed when they were under the age of twenty-five.¹⁸

We must choose to believe that no person is beyond redemption. Prosecutors must never seek charges or enhancements that subject anyone to death by incarceration, let alone youthful offenders under the age of twenty-five. Instead, prosecutors must give people, even those convicted of the most violent, heinous crimes, meaningful parole consideration to prove they can live safely in our communities, free of shackles.

15. Abené Clayton, *92% Black or Latino: The California Laws That Keep Minorities in Prison*, GUARDIAN (Nov. 26, 2019), <https://perma.cc/MG3L-QMP3>.

16. Emily Galvin-Almanza, *California Gang Laws are Normalized Racism*, APPEAL (Oct. 4, 2019), <https://perma.cc/3XN9-R7L8>.

17. See Clayton, *supra* note 15.

18. Eddie Conway, *California Activists March to End Life Without Parole*, REAL NEWS NETWORK (Apr. 6, 2020), <https://perma.cc/R9P4-E7LV>.

VI. HOLD THE POLICE ACCOUNTABLE.

Prosecutors have the authority and responsibility to police the police. When prosecutors fail to hold police accountable, communal liberties and freedoms are lost, police violence and abuse is left undeterred, and the community trust in law enforcement and the government erodes.¹⁹

Prosecutors must be vanguards of the constitutional right of people to be free from unreasonable government searches and seizures.²⁰ If police violate the Fourth Amendment in securing evidence, prosecutors should recognize as much and not charge those cases, and should concede suppression motions when meritorious claims are raised by the defense.

In the last five years in the Bay Area, police officers killed 110 people, including nineteen killed by San Jose police. Nearly two-thirds of those people killed were Black, Latinx, or Asian. Not a single police officer who killed any of these people was prosecuted.²¹

These numbers don't capture the daily inhumanity and brutality inflicted by police upon our communities that, in our experience, goes unprosecuted by district attorneys' offices and falls below the headlines: when officers unlawfully and unreasonably pull over, stop, tase, frisk, search, baton, handcuff, photograph, shoot, and sic dogs upon our fellow human beings, particularly human beings of color, and often under the guise of "gang" policing and prosecutions.

Prosecutors must hold police accountable when they use unlawful, excessive force, including when they unjustifiably kill. District attorneys must prosecute those officers and not shield them from liability by charging their victims with frivolous crimes like resisting arrest or assaulting a peace officer.

VII. EXPAND USE OF MENTAL HEALTH DIVERSION AND PROMOTE EXPANSIVE TREATMENT ALTERNATIVES TO ADDRESS UNDERLYING CAUSES OF CRIME, INCLUDING SUBSTANCE USE AND TRAUMA.

Violations of criminal statutes are often connected to some underlying issue. A progressive prosecutor must be interested in the questions, "What's going on?" and "What can we do?"

In California, the Legislature enacted a statutory scheme for mental health diversion.²² This law creates a path to having a case dismissed when a court finds

19. Kristy Parker, *Prosecute the Police*, ATLANTIC (June 13, 2020), <https://perma.cc/6SA6-C7EW>.

20. Renee McDonald Hutchins, *Policing the Prosecutor: Race, the Fourth Amendment, and the Prosecution of Criminal Cases*, CRIM. JUST. MAG., Fall 2018, at 14, <https://perma.cc/87XT-HZBX>.

21. Thomas Peele, David DeBolt, Robert Salonga & Nate Gartrell, *Exclusive: Blacks Are Only 7% of the Bay Area, But 27% of Those Killed by Police*, SAN JOSE MERCURY NEWS (Sept. 2, 2020), <https://perma.cc/6VGU-39AY>.

22. CAL. PENAL CODE §§ 1001.35, 1001.36.

a person suffers from a mental health condition that played a significant factor in the offense, provided the person's condition would respond to treatment. Progressive prosecutors should not resist mental health diversion.

They should also use this model in other areas. Where trauma or substance use play a significant role in the offense, progressive prosecutors should promote paths away from conviction. For example, California's drug diversion programs currently have many disqualifying factors and are only available to people accused of simple use or possession of controlled substances, but not for other offenses where substance use is a central precipitating factor.²³

Where substance use played a significant role in the commission of the charged offense, even if the accused has a criminal history and even if the offense involves something like a residential burglary or the sale of drugs, they should be eligible for diversion. Where the accused would respond to substance treatment and would not pose an unreasonable risk to public safety, they should receive diversion centered on treatment rather than felony convictions and incarceration.

Through this methodology, prosecutors can address and remedy the root causes of crime and thereby make our communities safer.

VIII. PROSECUTE "WOBBLERS" AS MISDEMEANORS TO CURTAIL COLLATERAL CONSEQUENCES AND REDUCE CRIME.

The consequences of a felony conviction are far-reaching and devastating. People lose housing and employment. They suffer family separation. They are subject to societal shame and face long sentences.²⁴

In California, offenses like auto theft, commercial burglary, or vandalism can be charged as either misdemeanors or felonies. These offenses are called "wobblers."²⁵ If a criminal court intervention is necessary to address the alleged harm, prosecutors should only charge "wobblers" as misdemeanors, absent identified aggravating factors such as prior record of serious criminal conduct, particular vulnerability of the victim, physical or emotional injury, or use of a weapon, that merit accountability in the form of a felony.²⁶

This measure would counter overuse of felony charging and over-imposition of felony punishment. In California, Proposition 47, enacted by voters in 2014,

23. *Id.* § 1000.

24. Cynthia A. Golembeski, *Being Convicted of a Crime Has Thousands of Consequences Besides Incarceration—And Some Last a Lifetime*, CONVERSATION (June 15, 2020), <https://perma.cc/73XN-CTMG>.

25. *People v. Park*, 299 P.3d 1263, 1266-67 (Cal. 2013). See also Micah Schwartzbach, *What is a Wobbler?*, NOLO, <https://perma.cc/492X-QWU8> (last visited Jan. 18, 2021).

26. See also CAL. R. CT. 4.414, *Criteria Affecting Probation*, <https://perma.cc/Q6C3-MTXX> (last visited Jan. 18, 2021). These criteria, which guide judges on whether to grant probation to an offender, should also be utilized by prosecutors in deciding whether to prosecute a "wobbler" as a misdemeanor or felony.

turned several wobbler offenses into non-alternative misdemeanors. The reform reduced recidivism for covered offenses²⁷ while also reducing racial disparities.²⁸

This proposal would presumptively extend the type of protections in Proposition 47 to all eligible offenses to further reduce recidivism and racial disparities.

IX. STOP FIGHTING LAWS THAT HUMANIZE, REPAIR, AND DECARCERATE OUR SYSTEM.

California's legislature and voters, in a concerted effort to undo the harms and prevalence of systemic racism and mass incarceration, are passing laws that transform and humanize our criminal legal system.

In 2018, California lawmakers passed S.B. 1391 to end the prosecution and punishment of fourteen- and fifteen-year-old children as adults.²⁹ That same year they also passed S.B. 1437, which amended and curtailed the outdated felony murder rule and eliminated the natural probable consequences doctrine as a basis for murder culpability.³⁰ The felony murder rule has been used to punish people for first-degree murder if a death occurs during the commission of certain felonies like robberies, even if an individual did not intend for a killing to occur or aid the killing in any way.³¹ A 2018 survey of California prisons concluded that the felony murder rule prior to S.B. 1437 disproportionately impacted youth of color and women.³² Effective January 2019, S.B. 1437 ended the practice of sentencing a person who did not commit a homicide, or even have knowledge that a homicide occurred, in the same way as someone who actually committed the homicide.³³

More recently, California legislators enacted A.B. 2542, the California Racial Justice Act, a bill enacted with the intent "to eliminate racial bias from California's criminal justice system because racism in any form or amount, at any stage of a criminal trial, is intolerable, inimical to a fair criminal justice system."³⁴ The bill also sought to address implicit bias "to ensure that race plays no

27. MIA BIRD, MAGNUS LOFSTROM, BRANDON MARTIN, STEVEN RAPHAEL & VIET NGUYEN, PUB. POL'Y INST. OF CAL., *THE IMPACT OF PROPOSITION 47 ON CRIME AND RECIDIVISM 16-18* (2018), <https://perma.cc/9ETR-J9JQ>.

28. *See generally* MAGNUS LOFSTROM, BRANDON MARTIN & STEVEN RAPHAEL, PUB. POL'Y INST. OF CAL., *PROPOSITION 47'S IMPACT ON RACIAL DISPARITY IN CRIMINAL JUSTICE OUTCOMES* (2020), <https://perma.cc/5H88-CBEV>.

29. S.B. 1391, 2017-18 Leg. (Cal. 2018), <https://perma.cc/J5JL-WGGB>.

30. S.B. 1437, 2017-18 Leg. (Cal. 2018), <https://perma.cc/WA4R-MJGS>.

31. RE:STORE JUST., *Senate Bill 1437 (SB1437): The BESTT Practices Act*, <https://perma.cc/N5N2-Z95A>.

32. Alexandra Mallick & Kate Chatfield, *California Accomplices to a Felony Shouldn't Be Sentenced Like the One Who Committed the Murder*, JUV. JUST. INFO. EXCH. (Aug. 8, 2018), <https://perma.cc/77VT-A8DJ>.

33. RE:STORE JUST., *supra* note 31.

34. A.B. 2542, 2019-20 Leg. (Cal. 2020), <https://perma.cc/NCS4-8V3Z>.

role at all in seeking or obtaining convictions or in sentencing.”³⁵ The legislation provided remedies “that will eliminate racially discriminatory practices in the criminal justice system, in addition to intentional discrimination.”³⁶ Through this new law, a person accused of an offense could challenge the case against them if they can prove evidence of explicit or implicit bias at any stage of the prosecution or from actors involved in the investigation and prosecution of the case.

Instead of embracing these reforms, the California District Attorneys Association (C.D.A.A.), including Santa Clara County D.A. Jeff Rosen, contested the passing of these critical, groundbreaking pieces of legislation.³⁷ In the cases of S.B. 1391 and S.B. 1437, the C.D.A.A. and Mr. Rosen have stubbornly and vehemently litigated against the laws, claiming that they are unconstitutional.³⁸

True progressive prosecutors must fight for this type of transformation, not against it.

X. SEEK INPUT FROM PEOPLE WHO HAVE EXPERIENCED HARM.

In advance of charging decisions and trial, it is rare, in our experience, that prosecutors talk to the witnesses who have experienced harm in their cases. This is out of an apparent concern that anything said during those contacts would have to be turned over to the defense and that the interactions could result in exculpatory evidence like an inconsistent statement or new information.

Prosecutors must talk and listen to witnesses who have experienced harm to understand what they actually want to happen in the case, what would make them whole and what justice under the circumstances means to them.³⁹ This would help prosecutors identify appropriate, tailored, restorative answers to the alleged harms caused by the offender and permit true centering of the persons who have

35. *Id.*

36. *Id.*

37. Daniel Nichanian, *California Prosecutor Quits State’s D.A. Association: “Let’s Accept Responsibility for the Mistakes We’ve Made”*, APPEAL (Jan. 23, 2020), <https://perma.cc/L9DA-FLGZ>; Robert Solanga, *South Bay Prosecutor’s Past Monkey Anecdote Raised Amid Debate Over Racial Justice Bill*, SAN JOSE MERCURY NEWS (Aug. 10, 2020), <https://perma.cc/6J2B-MPLC>.

38. *See, e.g.*, *People v. Alaybue*, 264 Cal. Rptr. 3d 876, 880 (Cal. Ct. App. June 25, 2020); *People v. Battle*, No. B298678, 2020 WL 2122866, at *1 (Cal. Ct. App. May 1, 2020); *People v. Superior Ct. of Santa Clara Cnty.*, 253 Cal. Rptr. 3d 39, 41 (Cal. Ct. App. Sept. 20, 2019); Cassidy Block, *How Prosecutors Fuel Mass Incarceration*, KNOCK (Apr. 1, 2019), <https://perma.cc/T9UV-DZZL>; Robert Solanga, *Santa Clara County DA Argues New Juvenile Prosecution Law is Unconstitutional*, SAN JOSE MERCURY NEWS (Oct. 9, 2018), <https://perma.cc/TK88-P99U>.

39. *See generally* Andrew Cohen, *When Victims Speak up in Court—In Defense of the Criminals*, ATLANTIC (Jan. 28, 2014), <https://perma.cc/W2ZC-THN5>; JEAN PETERS BAKER & LENORE ANDERSON, INST. FOR INNOVATION IN PROSECUTION, PROSECUTORS AND CRIME SURVIVORS: HOW CAN PROSECUTORS BETTER ADDRESS THE NEEDS OF CRIME SURVIVORS? (June 2019), <https://perma.cc/7UYJ-Q4S6>.

experienced harm and their needs in the case.⁴⁰

Additionally, these contacts can aid in assessing the credibility and reliability of these witnesses and thereby help prosecutors make appropriate, measured decisions about charging, plea bargain, and trial.

XI.END THREE STRIKES.

Prosecutors must commit to no longer prosecuting Three Strikes enhancements that punish people for prior crimes, not for the current alleged conduct.⁴¹ These prior offenses, commonly known as “strikes,” include certain crimes committed by people as young as sixteen and include crimes that did not involve physical violence or bodily injury, such as residential burglaries of unoccupied residences, verbal threats, or gang-related vandalism.⁴²

Three Strikes laws exacerbate racial disparities and mass incarceration, result in disproportionate, excessive sentences, and do not make our communities safer.⁴³ These enhancements result in probation ineligibilities, perpetuate prison as our only answer to harmful behavior, and fail to address the root causes of those behaviors.

XII.SUPPORT PAROLE AND RESENTENCING.

California houses the second-largest prison population and the largest population of people serving long-term sentences in the country.⁴⁴ Many of these long-term sentences are excessive or overly punitive and are no longer in the interest of justice.

In September 2018, Governor Jerry Brown signed A.B. 2942, which amended the California Penal Code to allow district attorneys to revisit past sentences to determine whether further confinement is no longer in the interest of justice.⁴⁵ Prosecutors must utilize this mechanism to review and revisit past cases and advocate for the resentencing and release of people who have paid their debt to society and no longer pose a risk to public safety.

In addition, parole is recognized as an effective process to reduce recidivism,

40. BAKER & ANDERSON, *supra* note 39, at 14.

41. CAL. PENAL CODE §§ 667(d), 667(e), 1170.12(a), 1170.12(c).

42. See generally Kristen Orlando, *People v. Nguyen: A Modern Look at the Use of Juvenile Adjudications as Strike Offenses Under the Three Strikes Law*, 55 SANTA CLARA L. REV. 917 (2015), <https://perma.cc/FF37-5GWL>.

43. AM. CIV. LIBERTIES UNION, *10 Reasons to Oppose “3 Strikes, You’re Out”*, <https://perma.cc/NY8R-6AHS> (last visited Jan. 18, 2021). See also George Gascon, District Att’y of L.A. Cnty., *Special Directive 20-08* (Dec. 7, 2020), <https://perma.cc/US8A-Q8MH> (barring prosecutors from filing Three Strikes enhancements).

44. *Assembly Bill AB 2942*, FOR THE PEOPLE, <https://perma.cc/UQ3G-82VJ> (last visited Feb. 2, 2021).

45. A.B. 2942, 2017-18 Leg. (Cal. 2018), <https://perma.cc/TU3Z-6AU6>.

ensure public safety, and assist people in rejoining society.⁴⁶ For example, the California Department of Corrections' own statistics show that people who are paroled from life terms have a recidivism rate of less than four percent.⁴⁷ We also know that there are thousands serving lengthy or life sentences sitting in California prisons. Seven thousand are "third strikers," and approximately 33,000 inmates are serving sentences of life or life without parole.⁴⁸

Prosecutors should not resist the return of people to our communities who have been rehabilitated and are fit for release on parole, particularly the elderly. Prosecutors should not attend parole hearings to oppose parole release and instead should support the grant of parole for a person who has already served their mandatory minimum period of incarceration and are deemed safe to return to the community.⁴⁹

XIII. STOP LOCKING PEOPLE UP FOR TECHNICAL, NON-CRIMINAL PROBATION VIOLATIONS.

Progressive prosecutors must be leaders in the movement to end mass supervision. Our national mass incarceration epidemic is fueled by the caging of people for minimally violating the terms and conditions of their probation.⁵⁰ This practice causes loss of employment, loss of housing, and family separation, and it does not make us safer or reduce crime.

Sending a human being to jail or prison should never be justified by technical, non-criminal probation violations like missing a meeting with a probation officer, smoking weed, leaving the county without permission, or not paying restitution. We must move beyond incarceration as our only response to people's mistakes and shortcomings.

XIV. STOP SEEKING ADMISSION OF PRIOR BAD ACTS OF THE ACCUSED AT TRIAL UNLESS TRULY RELEVANT TO AN ISSUE IN DISPUTE.

Generally, federal and state laws prohibit the introduction of character evidence, such as prior criminal conduct, against the accused.⁵¹ A prosecutor's role is to pursue justice and promote truth, not to secure convictions by any means

46. George Gascon, District Att'y of L.A. Cnty., *Special Directive 20-14* (Dec. 7, 2020), <https://perma.cc/94L9-WEQR> (directing line prosecutors to promote rather than inhibit the parole process).

47. *Id.* at 8.

48. HEATHER HARRIS, JUSTIN GOSS, JOSEPH HAYES & ALEXANDRIA GUMBS, PUB. POL'Y INST. OF CAL., CALIFORNIA'S PRISON POPULATION (2019), <https://perma.cc/AKP7-2RBP>.

49. See, e.g., Gascon, *Special Directive 20-14*, *supra* note 46, at 8.

50. See Tim Walz & Mike Parson, *Criminal Justice Reform Shouldn't Just Focus on People Behind Bars. Here's How We Can Improve the Lives of Millions More*, TIME (Oct. 15, 2019), <https://perma.cc/HA9D-FJJT>.

51. See, e.g., FED. R. EVID. 404; CAL. EVID. CODE § 1101.

possible.⁵² But in our experience, to bolster their odds of “winning” a conviction at trial, prosecutors will sometimes attempt to circumvent the rules prohibiting introduction of prejudicial, irrelevant character evidence—also known as propensity or prior bad act evidence—against the accused. In our experience, this occurs despite prosecutors’ not having truly legitimate grounds to admit the damning evidence of prior criminal conduct. This win-at-all-costs approach to trials by prosecutors must end.

This use and abuse of prior criminal history raises concerns about racial disparities as well. Research indicates that Black people, for example, are more likely than similarly situated white people to suffer police stops, searches, and arrests.⁵³ Black people are more likely to be prosecuted and endure higher rates of pretrial detention, harsher plea bargaining outcomes, and more severe sentences than similarly situated white people.⁵⁴

It is reasonable to infer, therefore, that people of color are more likely to face the admission of prejudicial, irrelevant prior criminal history at trial because they are more likely to have criminal histories like prior arrests and convictions. Admission of such evidence, absent true relevance to an issue in dispute⁵⁵ and minimal relative prejudicial impact,⁵⁶ increases the risk of unfair outcomes and the perpetuation of systemic, racial disparities.

XV. STOP USING JUNK SCIENCE AND SCRUTINIZE EYEWITNESS IDENTIFICATIONS, INFORMANT TESTIMONY, AND CONFESSIONS.

Among the most common causes of wrongful convictions are junk science, eyewitness misidentifications, informant testimony, and false confessions.⁵⁷

Prosecutors must prioritize due process and justice, not convictions. Evidence they seek to admit at trial should be scrutinized and vetted for accuracy and reliability. Prosecutors must adopt and honor the role of gatekeeper against the introduction of “junk science,” such as testing methods that have little or no scientific validation and with inadequate assessments of their significance or reliability.⁵⁸

52. Am. Bar Ass’n, *Criminal Justice Standards for the Prosecution Function: Standard 3-1.2* (4th ed. 2017), <https://perma.cc/6YSP-TNJS>.

53. ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, VERA INST. OF JUST., *AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 1-2* (2018), <https://perma.cc/8H2Q-ZWRD>.

54. *Id.*

55. See CAL. EVID. CODE § 1101.

56. See FED. R. EVID. 403; CAL. EVID. CODE § 352.

57. INNOCENCE PROJECT, *The Causes of Wrongful Conviction*, <https://perma.cc/T6HA-LVYH> (last visited Jan. 18, 2021).

58. INNOCENCE PROJECT, *Overturning Wrongful Convictions Involving Misapplied Forensics*, <https://perma.cc/7WX5-5YXW> (last visited Jan. 21, 2021).

The same holds true for eyewitness identifications, particularly those resulting from suggestive lineups or “showups,” where police have witnesses view and identify suspects at or near the scene of alleged crime.⁵⁹ Additionally, informant testimony where witnesses have tangible incentives to fabricate or embellish must be heavily scrutinized.⁶⁰

The same is true of confessions, especially when secured using coercive techniques.⁶¹ Progressive prosecutors should not only look at interrogations with an eye to what they might be able to introduce at trial. They should work with investigating agencies to promote reliable interview practices. This means providing counsel when a person requests counsel, even if their request does not include some magic word or tone. This means questioning the spontaneity of spontaneous statements. It also means instructing investigators not to use religious appeals and to seek corroboration when a confession is the product of a ruse.

XVI. PRACTICE PROACTIVE AND OPEN DISCOVERY.

A common source of wrongful convictions is government misconduct in the form of discovery violations.⁶²

Prosecutors should not be afraid of more information. They should welcome a broader base of evidence in their evaluation of cases and pursuit of justice, even if it means uncovering material that could diminish the likelihood of conviction.

Prosecutors should not wait for defense attorneys to investigate and expose exculpatory evidence. Instead, prosecutors should commit to a proactive discovery approach where they affirmatively seek out potential evidence like records of police misconduct, potential impeachment evidence against prosecution witnesses and juvenile records of witnesses that may be relevant to a proceeding.⁶³

In addition, prosecutors must maintain transparency. They must fulfill their discovery obligations and commit to immediately turning over exculpatory evidence, and to permit defense counsel to view their files upon request.

XVII. EXERCISE GREATER DISCRETION IN LIMITING IMPEACHMENT OF

59. CAL. INNOCENCE PROJECT, *Eyewitness Identification*, <https://perma.cc/X989-LZ4M> (last visited Jan. 18, 2021); INNOCENCE PROJECT, *Eyewitness Identification Reform*, <https://perma.cc/G2E3-6DM3> (last visited Jan. 18, 2021).

60. INNOCENCE PROJECT, *Informing Injustice: The Disturbing Use of Jailhouse Informants* (Mar. 6, 2019), <https://perma.cc/56RU-D59X>.

61. INNOCENCE PROJECT, *False Confessions & Recording of Custodial Interrogations*, <https://perma.cc/2LL9-TA6Y> (last visited Jan. 21, 2021).

62. See generally Brian Gregory, Brady is the Problem: Wrongful Convictions and the Case for “Open File” Criminal Discovery, 46 UNIV. S.F. L. REV. 819 (2012), <https://perma.cc/5J6G-4MYC>.

63. See Jonathan Abel, Prosecutors’ Duty to Disclose Impeachment Evidence in Police Personnel Files: The Other Side of Police Misconduct, WASH. POST (July 11, 2016), <https://perma.cc/9W5B-XVM9>.

PROSECUTION WITNESSES.

In our experience, prosecutors sometimes fight zealously to prevent the introduction of relevant impeachment evidence against their witnesses, especially police officers who have engaged in misconduct.⁶⁴ This results in a false aura of veracity for those witnesses and paints an incomplete picture for jurors.

Instead, prosecutors should include credible impeachment against their witnesses in deciding what charges, if any, to prosecute. They should be unafraid of the presentation of such evidence to grand juries, judges, and trial juries and should avoid “hiding the ball” from finders of fact. The goal of prosecutors must be truth and justice, not a guilty verdict.

CONCLUSION

Prosecutors hold tremendous power in our criminal legal system. As public defenders, we have witnessed prosecutors often wielding that power to perpetuate systemic racism, drive mass incarceration, and sanction police violence. But we also maintain belief that true progressive prosecutors can instead use those seats of power to push back against mass incarceration, help us heal from the institutional dehumanization of people of color, prevent crime, hold police accountable, and vindicate principles of justice, safety, and dignity for all.

Our hope is that this proposed definition of progressive prosecution—i.e., the model of prosecution committed to truth-telling about systemic racism, shrinking mass criminalization, addressing root causes of crime, and bringing the criminal legal system in line with basic notions of justice and humanity—and the ideas outlined here will help guide a new wave and mold of prosecutors, as well as our greater community, towards transformational reform of our criminal legal system.

64. *Id.*