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When Public Defenders and Prosecutors Plea Bargain Race – A More Truthful Narrative

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“Change will not come if we wait for some other person or some other time. We are the ones we’ve been waiting for. We are the change that we seek.”

Barack Obama¹

I. INTRODUCTION

This paper challenges prevailing stereotypes about public defenders and prosecutors and updates those stereotypes with a more accurate narrative about how reform-minded public defenders and prosecutors can plea bargain race to yield more equitable justice outcomes.²

I was invited to the discussion about criminal justice reform in plea bargaining, because of my work in dispute resolution, dispute system design, and discrimination.³ Plea bargaining is a justice system negotiation that is used in upwards of 97% of criminal case dispositions.⁴ Unlike many of my colleagues in criminal justice reform who have also had years of experience working in the criminal justice system, I have little experience in the criminal justice system.⁵ Thus, I approached this work with a beginner’s mind.

With this fresh perspective, I was struck by the biases that existed toward public defenders and prosecutors.⁶ *Public defenders are basically good*

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1. President Barack Obama, Night of Super Tuesday Speech (Feb. 5, 2008) (found at obamaspeeches.com/E02-Barack-Obama-Super-Tuesday-Chicago-IL-February-5-2008.htm).

2. See *infra* Part IV.A-B.

3. See, e.g., Elayne E. Greenberg, *Unshackling Plea Bargaining from Racial Bias*, 111 J. CRIM. L. & CRIMINOLOGY 93 (2021).

4. NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT* 3, 14 (2018) (found at www.nacdl.org/trialpenaltyreport).

5. See *Elayne E. Greenberg*, ST. JOHN’S UNIV. SCH. L., <https://www.stjohns.edu/law/faculty/elayne-e-greenberg>.

6. See *infra* Part II.

people who are overworked and rendered incompetent by their unmanageable caseloads.⁷ Prosecutors wield unfettered discretion solely to advance their conviction rates, not to achieve just outcomes.⁸ Unspoken, but lived, a disproportionate number of Black defendants are the casualties of these biases.⁹ Ironically, I also couldn't help but observe how even some of the most respected criminal justice scholars who have devoted their careers to ending biased justice outcomes, acknowledged their own long-held biases about public defenders and prosecutors based on their personal work experiences in the criminal justice system.¹⁰

These biases are so entrenched in our worldviews that they made their way into the 2020 Democratic presidential debates.¹¹ When voters were trying to assess each presidential candidates' biases toward criminal justice reforms, as one measure, voters took note of who had served as a prosecutor and who served as a public defender.¹² During the debate, President Biden proudly stated that he left work at a large law firm and chose instead to work as a public defender.¹³ Vice President Harris talked about what she had accomplished as a prosecutor.¹⁴ We know what inferences were drawn based on the criminal justice role each candidate had chosen.¹⁵

A distorting consequence of these stereotypes is that public defenders and prosecutors, the primary legal actors in plea bargaining, are held responsible

7. Ed Lyon, *Appointed Defense Lawyers, Public Defenders: Overworked, Underpaid, Ineffective*, CRIM. LEGAL NEWS (MAY 15, 2019) (<https://www.criminallegalnews.org/news/2019/may/15/appointed-defense-lawyers-public-defenders-overworked-underpaid-ineffective/>). See also Ofra Bikel, *The Plea: Introduction*, PBS: FRONTLINE (June 17, 2004), <https://www.pbs.org/wgbh/pages/frontline/shows/plea/etc/synopsis.html> (describing the ineffectiveness of public defenders and the abuse of power by prosecutors leading to innocent people to plead guilty pursuant to a plea bargain).

8. Stuart Diamond, *The Law; Prosecutorial Discretion: Worthy of Defense?*, N.Y. TIMES, July 22, 1988, at B20, found at <https://www.nytimes.com/1988/07/22/us/the-law-prosecutorial-discretion-worthy-of-defense.html> (describing how the ineffectiveness of public defenders and the abuse of power of prosecutors causes innocent people to plead guilty).

9. Elizabeth Hinton, et al., *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System*, VERA: INSTITUTE OF JUSTICE (2018), found at www.vera.org/for-the-record-unjust-burden; THE SENTENCING PROJECT, *Report of The Sentencing Project to the United Nations Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance 2* (2018), found at <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [hereinafter "Report to the United Nations"].

10. See, e.g., Maybell Romero, *Rural Spaces, Communities of Color, and the Progressive Prosecutor*, 110 J. CRIM. L. & CRIMINOLOGY 803, 818 (2020).

11. Grullón Paz, *Kamala Harris and Joe Biden Clash on Race and Busing*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/politics/kamala-harris-joe-biden-busing.html>.

12. *Id.*

13. *Id.*

14. *Id.* See also Reginald Dwayne Betts, *Kamala Harris, Mass Incarceration and Me*, N.Y. TIMES (Nov. 8, 2020), <https://www.nytimes.com/2020/10/20/magazine/kamala-harris-crime-prison.html>. ("Harris argued that the ongoing struggle for equality needed to include both prosecuting criminal defendants who had victimized Black people and protecting the rights of Black criminal defendants.")

15. Paz, *supra* note 11.

for the disparate justice outcomes when they plea bargain race.¹⁶ They are blamed for the historical branding of Black defendants as dangerous criminals.¹⁷ They are blamed for the fact that African Americans are 5.9 times more likely than their white counterparts to be incarcerated.¹⁸ They are blamed for the fact that eighteen and nineteen year old Black males are 12 times more likely to be imprisoned than their white counterparts.¹⁹ They are held responsible for the disparate number of Black defendants who receive longer sentences compared to their white counterparts accused of similar crimes,²⁰ the disparate number of Black defendants who plead guilty even when they are innocent²¹ and the disparate number of Black defendants who are sentenced as adults even when they are teenagers.²²

These legal actors are blamed for perpetuating a retributive justice system that focuses on punishment, rather than rehabilitation of Black defendants.²³ Prosecutors and public defenders are blamed for a retributive justice system that punishes the crime at hand rather than addressing the systemic racist etiology that causes the crime.²⁴ And, they are blamed for a retributive system that views crime as a state-centered response often at the exclusion of the community and victim concerns.²⁵

16. See, e.g., Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2364-35 (2013) (elaborating on the concept of “defender triage”); Alexander Testa & Brian D. Johnson, *Paying the Trial Tax: Race, Guilty Pleas, and Disparity in Prosecution*, 31 CRIM. JUST. POL’Y REV. 500, 503 (2020) (discussing the different considerations employed by prosecutors and public defenders when plea bargaining).

17. Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, THE SENTENCING PROJECT (Sept. 3, 2014), <https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/>.

18. Report to the United Nations, *supra* note 9, at 6-7.

19. Jennifer Bronson & E. Ann Carson, *Prisoners in 2017*, BUREAU OF JUSTICE STATISTICS 15 (2019), found at <https://perma.cc/GW6C-KAW7>.

20. *Id.* at 9.

21. Samuel R. Gross, et al., *Race and Wrongful Convictions in the United States*, NATIONAL REGISTRY OF EXONERATIONS 1 (2017). See also Daniele Selby, *8 Facts You Should Know About Racial Injustice in the Criminal Legal System*, INNOCENCE PROJECT (Feb. 5, 2021), <https://innocenceproject.org/facts-racial-discrimination-justice-system-wrongful-conviction-black-history-month/> (highlighting that half of people exonerated since 1989 are Black).

22. See, e.g., Sarah Gonzalez, *Kids in Prison: Getting Tried as An Adult Depends on Skin Color*, WNYC NEWS (Oct. 10, 2016), <https://www.wnyc.org/story/black-kids-more-likely-be-tried-adults-cant-be-explained/> (stating that in New Jersey, nearly 700 minors were tried as adults during a five year period, and nearly 90% were Black or Latino).

23. See, e.g., FANIA E. DAVIS, *THE LITTLE BOOK OF RACE AND RESTORATIVE JUSTICE* 64 (2019).

24. See, e.g., *id.* See also Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313, 2316-17, 2319-20 (2013) (“Adjudication becomes unnecessary in many cases, when the parties agree to a plea bargain.”); Bruce A. Green & Lara Bazelon, *Restorative Justice From Prosecutors’ Perspective*, 88 FORDHAM L. REV. 2287, 2296-97 (2020) (describing prosecutors’ predisposition to disliking a restorative justice process).

25. See Davis, *supra* note 23, at 67; Dancig-Rosenberg & Gal, *supra* note 24, at 2317-19 (In punitive justice systems, “[t]he role of the sovereign is to regulate behavior, and in doing so, to determine guilt and punishment.”); Green & Bazelon, *supra* note 24, at 2297 (“Unless the prosecutor has received

Another disabling consequence of these stereotypes is that public defenders and prosecutors are publicly cast as enemies, expressing scorn for the other and the roles they represent.²⁶ Negotiation scholars teach us that such an adversarial and polarizing stance is toxic in plea negotiations, especially when justice is at stake.²⁷ Instead, a more collaborative, problem-solving mindset is more likely to yield a responsive and equitable justice outcome.²⁸

While some of the stereotypes about public defenders and prosecutors may have represented the status quo at an earlier time and may still hold some truth, these biases are frozen in time.²⁹ They obscure a growing trend in which many public defenders and prosecutors are now actually criminal justice reform activists.³⁰ These stereotypes of prosecutors and public defenders omit how public defenders and prosecutors are now incentivized to help reform racialized criminal justice outcomes in plea bargaining race,³¹ and they omit what affirmative steps can be taken to mitigate the problem³².

This paper refocuses the plea bargaining race discussion on a more truthful narrative about how public defenders and prosecutors are changing how they plea bargain race to yield more racially justice outcomes.³³ This more accurate narrative describes how public defenders and prosecutors are expanding the plea bargaining process from a solely retributive focus to include a restorative focus.³⁴ This restorative focus looks at the Black defendant as a human being who should take responsibility for any crimes committed, and be rehabilitated, not punished.³⁵ A restorative justice focus

state or private funding to support a restorative justice program, as some have, such a program may not seem feasible even if the prosecutor is enthusiastic.”)

26. See, e.g., Abbe Smith, *Good Person, Good Prosecutor in 2018*, 87 *FORDHAM L. REV.* 3, 3-4 (2018) (stating that from a public defender’s perspective, choosing to become a prosecutor is a “moral choice” which requires one to choose to lock people up as part of the United States’ “shameful system.”).

27. See, e.g., ROGER FISHER ET AL., *GETTING TO YES* (3rd ed. 2011); ROBERT H. MNOOKIN, ET AL., *BEYOND WINNING* (2nd ed. 2000); WILLIAM URY, *GETTING PAST NO* (1991).

28. See, e.g., Fisher et al., *supra* note 27; Mnookin, *supra* note 27; Ury, *supra* note 27.

29. See, e.g., George Joseph, *He Spent 24 Years Behind Bars Because Queens Prosecutors Broke the Rules. Was This Their Only Wrongful Conviction?*, *GOTHAMIST* (Apr. 5, 2021, 7:00 AM), <https://gothamist.com/news/he-spent-24-years-behind-bars-because-queens-prosecutors-broke-rules-was-their-only-wrongful-conviction>; David Leonhardt, *Two Men, Two Decades, No Evidence*, *N.Y. TIMES* (Feb. 16, 2021), <https://www.nytimes.com/2021/02/16/briefing/winter-storm-adam-kinzinger-pelosi-congress.html>; Jan Ransom & Ashley Southall, *Prosecutors Sometimes Behave Badly. Now They May Be Held to Account.*, *N.Y. TIMES* (Apr. 5, 2019), <https://www.nytimes.com/2019/04/05/nyregion/ny-prosecutors-cuomo.html>.

30. See *infra* Part III.A.

31. See *infra* Part IV.A.

32. See *infra* Part IV.B.

33. See *infra* Part IV.A-B.

34. See *infra* Part III.B-C.

35. See, e.g., Davis, *supra* note 23, at 69; Dancig-Rosenberg & Gal, *supra* note 24, at 2317-19 (In punitive justice systems, “[t]he role of the sovereign is to regulate behavior, and in doing so, to determine guilt and punishment.”); Green & Bazelon, *supra* note 24, at 2297 (“Unless the prosecutor has received

encourages public defenders and prosecutors to take a more holistic perspective on crime etiology and include the community, the victim and the defendant to consider more responsive justice options for case disposition.³⁶ This restorative focus mobilizes the resources of the community and concerns of the victim to help shape a responsive justice process.³⁷ Additionally, a restorative justice focus helps mitigate the systemic racism in the criminal justice system.

This more truthful narrative describes how prosecutors and public defenders are shifting from working combatively against each other to working collaboratively to help mitigate the disparate racial justice outcomes that occur in plea bargaining.³⁸ Also, it highlights how emerging plea bargaining scholarship encourages public defenders and prosecutors to apply negotiation theory and skills in the plea bargaining process that will help to mitigate racially disparate pleas.³⁹

My focus is on plea bargaining, because plea bargaining is the decision hub in which upwards of 97% of criminal cases receive justice dispensation.⁴⁰ Moreover, plea bargaining is the process in which motivated public defenders and prosecutors have the power to discount racially compromised policing and replace it with more racially neutral information that will help decide more equitable justice outcomes.⁴¹ The immediate goal is to strengthen the individual negotiation and collaborative skills of public defenders and prosecutors when they plea bargain race to promote fairer and less racialized justice outcomes in plea bargaining.⁴²

state or private funding to support a restorative justice program, as some have, such a program may not seem feasible even if the prosecutor is enthusiastic.”).

36. See Davis, *supra* note 23, at 69-71; Dancig-Rosenberg & Gal, *supra* note 24, at 2316, 2318 (“The criticism of [a punitive] criminal justice system [is] related both to its ineffectiveness in reducing criminality and to its failure to address victims’ needs.”); Green & Bazelon, *supra* note 24, at 2299-2300 (discussing the pros and cons of a restorative justice approach to prosecution).

37. See Davis, *supra* note 23, at 71-72; Dancig-Rosenberg & Gal, *supra* note 24, at 2318 (stating that the purpose of a restorative justice system is to have input from the victims and the community); Green & Bazelon, *supra* note 24, at 2305 (“[R]estorative justice processes ar by their nature individualized, community-oriented, and victim-centered.”).

38. Davis, *supra* note 23, 71-72.

39. See, e.g., CYNTHIA ALKON & ANDREA KUPFER SCHNEIDER, *NEGOTIATING CRIME* (2019) (recommending how to incorporate negotiating skills into the plea bargaining process); Greenberg, *supra* note 3, at 131-37 (describing how to develop an organizational structure and specific negotiation skills that will yield more racially equitable plea bargaining outcomes); Jenny Roberts & Ronald F. Wright, *Training for Bargaining*, 57 WM. & MARY 1445, 1471-72 (2016) (urging for public defenders to receive training in negotiation theory and skills); Ronald F. Wright et al., *The Shadow Bargainers*, CARDOZO L. REV. (forthcoming) (manuscript at 20-21) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3577322) (surveying public defenders’ mindsets and actual practices when plea bargaining).

40. *Guilty Pleas on the Rise, Criminal Trials on the Decline*, INNOCENCE PROJECT (Aug. 7, 2018), <https://innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/>.

41. Greenberg, *supra* note 3, at 139-40.

42. *Id.* at 134-36.

This discussion will continue in four parts. In the first section, I discuss why the prosecutors and public defenders need to change how they plea bargain race.⁴³ The second section describes how the common practice of plea bargaining race, ignores the lessons of cognitive behavioral psychologists and negotiation scholars and yields racially disparate justice outcomes.⁴⁴ In the third section, I spotlight how progressive prosecutors are changing the plea bargaining race status quo.⁴⁵ Contrary to the stereotypes about prosecutors, I report how progressive prosecutors are using their broad discretionary power to implement criminal justice reform.⁴⁶ As part of this reform, they are working with public defenders to expand the plea bargaining culture from one that has a retributive focus to one that also considers restorative justice practices.⁴⁷ As part of this discussion I showcase the initiatives of Fair and Just Prosecution, a network of progressive prosecutors.⁴⁸ I then shift the focus to public defenders and discuss the specific negotiation skills that public defenders can use to plea bargain race.⁴⁹ I also extrapolate lessons from two groundbreaking scholarships on plea bargaining race: *The Shadow Bargainers*⁵⁰ and *Unshackling Plea Bargaining From Racial Bias*.⁵¹ The final section concludes with an updated narrative of how public defenders and prosecutors can plea bargain to mitigate racially disparate justice outcomes.

II. PLEA BARGAINING RACE AS PRACTICED YIELDS RACIALLY DISPARATE OUTCOMES

In this section, I explain how the plea bargaining process, as traditionally practiced by the stereotypical public defender and prosecutor, is likely to yield racially disparate justice outcomes. The speed of the process,⁵² the

43. See *infra* Part II.

44. See *infra* Part III.

45. See *infra* Part IV.

46. *Id.*

47. See, e.g., Davis, *supra* note 23, at 94-95; Dancig-Rosenberg & Gal, *supra* note 24, at 2335-36 (“[S]ymbolic reparation can indeed occur within our criminal law system once we understand restorative justice as part of it.”); Green & Bazelon, *supra* note 24, at 2313 (“[P]roponents must argue that restorative justice serves the public consistently with conventional criminal justice philosophies, policies, objectives, and principles.”).

48. *About FJP: Our Work and Vision*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/about-fjp/our-work-and-vision/> (last visited Aug. 4, 2021) [hereinafter “About FJP”].

49. See *infra* Part IV.B.

50. Wright et al., *supra* note 39, at 1.

51. Greenberg, *supra* 3, at 94.

52. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 86-87 (2011) (explaining how System I thinking, also known as fast, unconscious thinking, allows implicit biases to emerge).

unfettered discretion of the prosecutor,⁵³ and the retributive focus⁵⁴ coalesce to create a justice negotiation that is compromised by racial bias. Furthermore, the positional posture of plea negotiations in which public defenders and prosecutors maintain a narrow focus on retributive justice precludes any meaningful discussion about what would be an appropriate and responsive justice outcome for that defendant.⁵⁵

*A. Traditional Plea Bargaining Practice*⁵⁶

A common plea bargaining scene: A public defender and a prosecutor, both assigned to the same case, meet by happenstance in a busy courthouse corridor.⁵⁷ Even though neither prosecutor or public defender has spent much time preparing for this negotiation, they still decide to seize the moment, check one more item off their “to do” list and plea bargain the case.⁵⁸ Together they seek refuge in a corner of the corridor and throw out possible pleas and prison sentences, framed within the contours of what the prosecutor is willing to consider a just resolution.⁵⁹ This negotiation may take place in under five minutes.

B. Cognitive Behavior Psychologists: The Plea Bargaining Structure Is Conducive to Allowing Prosecutors’ and Public Defenders’ Implicit Racial Biases to Emerge

Cognitive behavioral psychologists teach that our implicit biases are more likely to emerge and influence our decision making when we are required to make fast decisions and when we have broad discretion, rather than a defined structure, about how to make that decision.⁶⁰ Thus, “[t]he speed of the plea bargaining process itself makes it more likely that the implicit racial biases” of public defenders and prosecutors may emerge and further prejudice the plea negotiation.⁶¹ Moreover, the broad discretion of the prosecutor to decide the appropriate contours of the plea and sentence make

53. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U.L. REV. 795, 805 (2012) (describing how prosecutors’ unfettered power leads to implicit bias at every phase of a criminal case).

54. Dancig-Rosenberg & Gal, *supra* note 24, 2317 (In a retributive justice system, “[p]unishment is proportional to the severity of the crime and is influenced by mitigating and aggravating circumstances.”).

55. Greenberg, *supra* note 3, at 130.

56. Most cases are “settled through plea bargains in which a defendant agrees to plead guilty in exchange for a reduced sentence.” Bikel, *supra* note 7.

57. Greenberg, *supra* note 3, at 122.

58. *Id.*

59. *Id.*

60. *Id.* at 127.

61. *Id.* at 94.

it more likely that the prosecutor's implicit racial bias will emerge and demand more punitive and harsher sentences for Black defendants.⁶² Consequently, the speed and lack of procedural structure in plea bargaining make it more likely that the implicit racial biases of the public defenders and prosecutors will contaminate the plea bargaining process.⁶³

C. Retributive Justice Focus Narrows the Justice Options

For the most part, the plea bargaining focus maintains a narrow focus on retributive justice: *what is the appropriate amount of prison time a defendant should serve for the crime committed?* Retributive justice focuses on punishment at the exclusion of rehabilitation.⁶⁴ This narrow focus precludes a broader understanding of why, if at all, the defendant committed the crime, and what are possible responsive options for the defendant to acknowledge and take responsibility for the crime committed.⁶⁵ Moreover, since retributive justice is doled out by the state, there is no meaningful input from the community or the victim.⁶⁶ Thus, the focus on retributive justice in plea bargaining race narrows the possible value added that could be had if plea bargaining race was expanded to include a restorative justice focus.⁶⁷

D. Negotiation Scholars: Plea Bargaining As Practiced Ignores Good Negotiation Practice

Plea bargaining scholars have called out to prosecutors and public defenders to heed the lessons taught by negotiation scholars and integrate the lessons into their plea bargaining process.⁶⁸ As one lesson, renowned negotiation scholar William Ury states that in effective negotiations, it is vital to “go slow to go fast.”⁶⁹ In other words, plea bargaining race, as in all negotiations, requires a slower, more deliberate process to achieve a more equitable justice outcome.⁷⁰ As part of a slower negotiation process, public defenders and prosecutors must prepare for the negotiation.⁷¹ Part of that

62. Greenberg, *supra* note 3, at 129-30.

63. *Id.* at 130.

64. Dancig-Rosenberg & Gal, *supra* note 24, 2317-18.

65. *Id.* at 2320-21.

66. Dancig-Rosenberg & Gal, *supra* note 24, at 2320 (describing that a restorative justice system, unlike a retributive justice system, requires input from the offender and the victim in order to be effective).

67. Dancig-Rosenberg & Gal, *supra* note 24, at 2320-21 (discussing the benefits of a restorative justice approach to criminal punishment).

68. *See, e.g.*, Alkon & Schneider, *supra* note 39; Roberts & Wright, *supra* note 39, at 1471-72 (“[S]tudies about the effectiveness of using particular elements from negotiation theory more generally support the claim that training matters.”).

69. Ury, *supra* note 27, at 187.

70. Greenberg, *supra* note 3, at 127 (recommending plea bargainers slow down the negotiation process in order to “manage implicit biases.”).

71. Ury, *supra* note 27, at 15.

preparation for plea bargaining race includes figuring out each side's prioritized interests,⁷² considering viable options,⁷³ using objective standards to help select an option,⁷⁴ and identifying the best alternative to a negotiated agreement if your plea bargaining fails.⁷⁵ It is important to note that racial bias, like any bias, contributes to making plea bargaining a subjective process swayed by the preferences of the negotiators, the public defenders, and prosecutors.⁷⁶ Therefore, objective data about the ultimate sentences received by other similarly situated white defendants will help keep the race plea bargaining process a fairer process in which Black defendants do not receive harsher sentences than their white counterparts who committed a similar crime.⁷⁷

Negotiation scholars also advise how to shift the traditional in person plea bargaining process from a positional one in which public defenders and prosecutors trade charges and sentences back and forth to an interest-based negotiation in which public defenders and prosecutor share information and problem-solve to arrive at an equitable and responsive justice resolution rather than just going back and forth about acceptable charges and sentences.⁷⁸ Rather than have a case be just one more file to dispense with among an overflowing pile of case files, together the public defender and prosecutor should meet to consider the justice options for a particular case.⁷⁹ A central distinction in an interest-based negotiation is that the prosecutor and public defender share information.⁸⁰ According to an interest-based plea bargaining process, the prosecutor readily shares all evidence, including exculpatory evidence, with the goal of working with the public defender to arrive at an equitable resolution.⁸¹ A public defender participating in an interest-based plea bargaining shares information about the defendant that helps humanize the defendant, explain any extenuating circumstances, and contribute to the public defender's independent investigation. Together the prosecutor and public defender consider what is a just, equitable resolution for each defendant, given the particular circumstances of their case.

72. *Id.* at 17.

73. *Id.* at 19.

74. *Id.* at 20.

75. *Id.* at 22.

76. Wright et al., *supra* note 39, at 23.

77. Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 *NEW CRIM. L. REV.* 434, 457 (2019).

78. Fisher et al., *supra* note 28 (explaining how to focus on interests, not positions); Mnookin et al., *supra* note 28; Ury, *supra* note 27, at 11 (discussing how to manage the tension between creating and distributing value by sharing information).

79. Greenberg, *supra* note 3, at 127-29.

80. *Id.* at 139-40.

81. *Id.*

How likely is it that public defenders and prosecutors actually implement these plea bargaining changes? The remainder of the paper will discuss how these changes are being implemented and how progressive prosecutors are creating reform in the criminal justice culture that incentivize prosecutors and public defenders to implement these plea bargaining process changes.

III. PROGRESSIVE PROSECUTORS ARE CHANGING THE PLEA BARGAINING RACE CULTURE

In this section, I report on a new breed of prosecutors, *Progressive Prosecutors*,⁸² and highlight the work of Fair and Just Prosecution, a network of progressive prosecutors.⁸³ Progressive prosecutors, as the label connotes, opt to use, rather than misuse, their broad prosecutorial powers to enact criminal justice reform measures designed to mitigate racially disparate justice outcomes. In their role, progressive prosecutors develop policies, implement procedures and follow-through with practices that yield race-neutral and just outcomes.⁸⁴ These prosecutors keep data about their efforts to ensure that their outcome is consistent with their intent, and when it isn't, to take corrective measures.⁸⁵ Progressive prosecutors have created Conviction Integrity Units (CIUs) to help correct the wrongs of past prosecutorial conduct by reinvestigating past cases in which there may have been abuse that may have resulted in "wrongful convictions or injustice."⁸⁶

Progressive Prosecutors are also rethinking how they might integrate a more restorative justice approach in appropriate cases to ameliorate past injustices.⁸⁷ After all, these prosecutors consider it their obligation to decide whether referring defendants to diversion programs or seeking appropriate justice by not requesting the maximum sentence is more appropriate than the traditional prosecutorial process.⁸⁸

82. See EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 159 (2019) ("[A]s long as we have an adversarial system, we will be in urgent need of prosecutors who are committed to social and racial justice."); Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1 (2019) ("In recent years, some elected prosecutors have sought to . . . [use] their power and discretion with the goals of . . . reducing mass incarceration, eliminating racial disparities, and seeking justice for all.")

83. About FJP, *supra* note 48.

84. *Id.*

85. *Id.*

86. *Conviction Integrity Unit Best Practices*, INNOCENCE PROJECT (Oct. 15, 2015), <https://www.innocenceproject.org/wp-content/uploads/2016/09/Conviction-Integrity-Unit.pdf>.

87. Green & Bazelon, *supra* note 24, at 2287 (describing prosecutors' predisposition to disliking a restorative justice process).

88. *Id.*

A. Fair and Just Prosecution (FJP)

Founded in 2017, FJP is a national network of newly-elected prosecutors, who are using their prosecutorial powers to enact criminal justice reform.⁸⁹ Miriam Krinsky, the Executive Director of Fair and Just Prosecution, explains that the organization is founded on a “different vision of a justice system, one that is grounded in principles of fairness, equity and compassion.”⁹⁰ These organizational principles are brought to life through mentoring, educational resources, and collaborative justice reform projects.⁹¹ Together, this network is creating a criminal justice culture shift in which progressive prosecutors are using their broad powers to produce equitable justice outcomes.⁹²

FJP has three projects of note—the Justice Collaborative, 55 Prosecutorial Performance Indicators, and Restorative Justice Issues at a Glance.⁹³ These projects change the criminal justice reform conversation about prosecutorial misconduct from a conversation about “what’s wrong with prosecutors” to a conversation about “what and how prosecutors can do” to remedy these wrongs.⁹⁴ Moreover, FJP’s projects provide a strategic map of affirmative steps progressive prosecutors can take to foster a more equitable justice system.⁹⁵ Consequently, these initiatives are creating a more responsive and less racially disparate plea bargaining culture in which public defenders and prosecutors plea bargain race.⁹⁶

B. FJP 21 Principles for the 21st Century Prosecutor

FJP co-authored “21 Principles for the 21st Century Prosecutor,” a guidebook that outlines affirmative steps to help progressive prosecutors enact their vision of criminal justice outcomes that “reduce incarceration,” “increase fairness,” and strengthen the health of communities.⁹⁷ The handbook was produced in collaboration with the Brennan Center of Justice and the Justice Collaborative.⁹⁸ Reading the twenty-one principles is like a criminal justice reformer’s dream list for Santa. The handbook discusses how

89. *News: Voices of Change*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/news/voices-of-change/> (last visited Aug. 9, 2021) [hereinafter “Voices of Change”].

90. Fair & Just Prosecution, *The New Normal: 21st Century Prosecutors Building a Fair and Just Future*, VIMEO (May 1, 2019), <https://vimeo.com/333604917>.

91. About FJP, *supra* note 48.

92. *Id.*

93. FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/> (last visited Aug. 16, 2021).

94. About FJP, *supra* note 48.

95. *Id.*

96. *Voices of Change*, *supra* note 89.

97. See generally Fair & Just Prosecution, *21 Principles for the 21st Century Prosecutor* (2018) https://www.brennancenter.org/sites/default/files/2019-08/Report_21st_century_prosecutor.pdf.

98. *Id.* at 2.

to create a more transparent culture in the district attorney's office by redefining of the prosecutor's prosecutorial power, re-characterizing the relationship between prosecutors and defense attorneys, and reinforcing the need for prosecutorial accountability.⁹⁹ The focus is on mitigating racial disparities, including restorative practices, and on committing prosecutors to monitor their efforts to mitigate racial disparities on an ongoing basis.¹⁰⁰

When read in their entirety, all the principles address the individual contributors of the racially disproportionate outcomes in plea bargaining and create a more equitable playing field when plea bargaining race.¹⁰¹ Yet, specific principles are directly relevant to making plea bargaining race a fairer and more just process. Foremost, progressive prosecutors are to address racial disparities.¹⁰² Progressive prosecutors should charge with restraint and plea bargain fairly so that the charge and concomitant punishment is commensurate with other defendants who have committed similar crimes.¹⁰³ When considering which defendants to charge, progressive prosecutors must minimize misdemeanors to help minimize the systemic racist policing,¹⁰⁴ treat Black children who are defendants as children to help cut off the school to prison pipeline,¹⁰⁵ and encourage the treatment, not criminalization, of mental illness¹⁰⁶ and drug addiction.¹⁰⁷

When considering the appropriate case disposition, progressive prosecutors are to promote restorative justice options where appropriate,¹⁰⁸ and make diversion the rule.¹⁰⁹ Such an expanded prosecutorial mindset about appropriate justice outcomes will minimize the disproportionate number of Black defendants incarcerated and punished without rehabilitation.¹¹⁰ This restorative focus is also likely to minimize the recidivism of formerly incarcerated defendants, because, as part of a

99. *Id.* at 19-20.

100. *Id.* at 15-16.

101. *Id.* Prosecutors can confront these issues in ways such as publicly committing to reducing racial and ethnic disparities, promoting racial equity, and implicit bias training within their role in the communities they serve. *Id.*

102. *21 Principles, supra* note 97, at 15-16. Prosecutors can confront these issues in ways such as publicly committing to reducing racial and ethnic disparities, promoting racial equity, and implicit bias training within their role in the communities they serve. *Id.*

103. *Id.* at 5-6. Prosecutors should evaluate cases early to dismiss if they are weak, avoid the maximum possible charge as a matter of course, refrain from withdrawing plea offers while defendants wait to hear from a jury, and limit the use of sentencing enhancements. *Id.*

104. *Id.* at 10-11. Prosecutors should avoid charging misdemeanors associated with poverty, mental illness, and homelessness, nor should they charge sex workers or clients who are both 18 years of age and consent, and they should develop cite and release programs to keep people out of jail. *Id.*

105. *Id.* at 9-10.

106. *Id.* at 7-8.

107. *21 Principles, supra* note 97, at 8-9.

108. *Id.* at 12-13.

109. *Id.* at 4.

110. *Id.* at 27, note 9.

restorative focus, the defendant will also receive necessary rehabilitation.¹¹¹ Of significance, in the restorative process, the community and victim will play a role in ensuring that the defendant is held accountable for their crimes and that their community is kept safe.¹¹²

*C. 55 Prosecutorial Performance Indicators*¹¹³

Stated principles about a new justice paradigm to mitigate disparate justice outcomes are just words unless prosecutors take affirmative steps to follow through on these principles.¹¹⁴ Thus, FJP, in collaboration with criminologists from Loyola University at Chicago and Florida International University, has also created 55 Prosecutorial Performance Indicators.¹¹⁵ The purpose of these performance indicators is to ensure that the articulated aspirations and goals of each district attorney's office are actually supported by data.¹¹⁶ Included in these 55 items are indicators used to determine if district attorneys are protecting and servicing victims and whether they are allocating adequate time to achieve these priorities.¹¹⁷ As discussed, a more thoughtful plea bargaining process takes more time than the traditional courthouse in-the-corner-exchange-of-charges-and-sentences.¹¹⁸ Therefore, the performance indicator is an accountability measure for progressive prosecutors to synchronize their goals with their allocation of time and resources.¹¹⁹

Restorative Justice Briefing Paper

The FJP briefing paper on Restorative Justice, part of FJP's Issues at a Glance series, educates interested prosecutors about how the restorative justice approach provides an alternate lens in which to respond and provide justice.¹²⁰ The paper explains how prosecutors can collaborate with the community to develop more responsive justice outcomes for the community, the victim and the defendant and offers strategies for them to do so.¹²¹ This

111. *21 Principles*, *supra* note 97, at 4.

112. *Id.* at 12.

113. See generally PROSECUTORIAL PERFORMANCE INDICATORS, <https://prosecutorialperformanceindicators.org> (last visited Aug. 9, 2021).

114. See FLA. INT'L U. & LOY. U. CHI., *Implementation Guide for Prosecutorial Performance Indicators* (2020), <https://ppibuild.wpengine.com/wp-content/uploads/2020/09/2020-PPL-Implementation-Guide-FINAL-with-links.pdf>.

115. *21 Principles*, *supra* note 97, at 12.

116. *Id.*

117. *Id.*

118. Greenberg, *supra* note 3, at 127-29.

119. *21 Principles*, *supra* note 97, at 12.

120. *Resources: Issues at a Glance Briefs*, FAIR & JUST PROSECUTION, <https://fairandjustprosecution.org/resources/issues-at-a-glance-briefs/> (last visited Aug. 16, 2021).

121. *Id.*

paper is more than selling a pipe dream. Of significance, this paper provides a national sampling of state models and legislation that have successfully adopted a restorative justice approach.¹²²

D. *Progressive Prosecutors In Action*

Progressive prosecutors are gaining national traction.¹²³ State's Attorney Kim Foxx in Cook County, Illinois; District Attorney Larry Krasner in Philadelphia, Pennsylvania; Prosecuting Attorney Dan Satterberg in King County Washington; State Attorney Monique Worrell in Orlando, Florida; Gordon McLaughlin in Colorado's Eighth Judicial District; District Attorney Chesa Boudin in San Francisco; and District Attorney Eric Gonzalez in Brooklyn, New York are among the increasing number of progressive prosecutors who are implementing criminal justice reforms in their jurisdictions.¹²⁴

A Frontline eight-part documentary on the work of District Attorney Larry Krasner in Philadelphia, Pennsylvania highlights the trials and tribulations of being a progressive prosecutor.¹²⁵ For example, Larry Krasner was elected in 2017 in a landslide victory, promising to end mass incarceration and to eradicate the systemic racial structure that perpetuated mass incarceration.¹²⁶ Yet, this same criminal justice reform stance that got him elected, created antagonistic relationships with those he needed to work with to implement such change such as within the police force.¹²⁷

Additionally, it is important to note that the decision to elect a progressive prosecutor is a politicized one¹²⁸ and is less likely to take hold in small, insular areas that prefer maintaining the status quo.¹²⁹ Moreover, not all elected

122. *Id.*

123. Caren Morrison, *Progressive Prosecutors Scored Big Wins 2020 Elections, Boosting A Nationwide Trend*, THE CONVERSATION (Nov. 16, 2020, 8:22 AM), <https://theconversation.com/progressive-prosecutors-scored-big-wins-in-2020-elections-boosting-a-nationwide-trend-149322> (discussing how the 2020 election showed a growing trend for "reform-minded prosecutors."); Alison Young, *The Facts on Progressive Prosecutors*, CTR FOR AM. PROGRESS (Mar. 19, 2020, 9:01 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/19/481939/progressive-prosecutors-reforming-criminal-justice/>.

124. Morrison, *supra* note 123 (vowing to bring more accountability to police shootings, keep a closer eye on police misconduct, address mass incarceration, including alternatives to incarceration, and reduce the prosecutions for nonviolent crimes).

125. Ted Passon et al., *Philly D.A.*, PBS: INDEPENDENT LENS (Apr. 20, 2021), <https://www.pbs.org/independentlens/documentaries/philly-da/>.

126. *Id.*

127. *Id.*

128. Young, *supra* note 123 (discussing how the 2020 election showed a growing trend for "reform-minded prosecutors.>").

129. Romero, *supra* note 10, at 815-16. Given that the decision to elect a progressive prosecutor is a politicized one, a locality is less likely to be incentivized to elect a progressive prosecutor if most residents are satisfied with the justice outcomes, prefer to maintain the status quo, and do not see a need for a justice reformer. *Id.* at 817.

progressive prosecutors are welcomed with open arms. For example, St. Louis Missouri Prosecutor Kim Gardner has received resistance and push back for her reform activism against police brutality.¹³⁰

In their engagement with public defenders, progressive prosecutors are creating a plea bargaining culture change.¹³¹ Through their activism, these prosecutors are transforming their once highly adversarial relationship when plea bargaining with public defenders into a more collaborative one.¹³² Public defenders are now having informed conversations with prosecutors rather than just trading charges and sentencing numbers.¹³³ Instead, the conversations the attorneys are having during plea bargaining are more productive conversations about responsive justice.¹³⁴ This culture change is resetting the plea bargaining table. Furthermore, those prosecutors who are committing to adopt a restorative justice stance that involves community and victims, are mobilizing community support and winning elections.¹³⁵

E. But . . .

Even though for many the status quo is unbearable, and the constructive use of prosecutorial power is a welcome fix to an untenable situation, there are still those doubters and naysayers who do not support the concept of progressive prosecutors.¹³⁶ Doubters point to the paucity of data about the efficacy of progressive prosecutors and question the zealotry of those who are jumping on the progressive prosecutorial bandwagon without that data.¹³⁷ Also, there are naysayers who prefer an abolitionist approach rather than the

130. Bill Whitaker, *Prosecutor Kim Gardner's Fight to Reform the St. Louis Justice System*, CBS NEWS: 60 MINUTES (Mar. 14, 2021), <https://www.cbsnews.com/news/kim-gardner-st-louis-prosecutor-black-woman-60-minutes-2021-03-14/>.

131. Green & Bazelon, *supra* note 24 (describing the difference between traditional “law-and-order prosecutors” and progressive prosecutors as a culture war).

132. Matt Watkins, *Prosecutor Power #2: A Public Defender on the Urgency of Reform*, CTR. CT. INNOVATION (May 2018), <https://www.courtinnovation.org/publications/public-defender-power-prosecutors>.

133. *Id.*

134. *Id.*

135. See Dancig-Rosenberg & Gal, *supra* note 24, at 2318 (listing a prosecutor’s community as a stakeholder to a restorative approach to prosecution).

136. Romero, *supra* note 10, at 816.

137. See, e.g., Charles Stimson & Zack Smith, “*Progressive*” Prosecutors Sabotage the Rule of Law, Raise Crime Rates, and Ignore Victims, HERITAGE FOUND. (Oct. 29, 2020), <https://www.heritage.org/crime-and-justice/report/progressive-prosecutors-sabotage-the-rule-law-raise-crime-rates-and-ignore> (claiming data does not exist to support progressive prosecutors’ claims that traditional prosecutors are ineffective in achieving justice); Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 1, 11 (2007) (“There are . . . claims that restorative justice does not meet its own claims.”).

criminal justice reform approach of progressive prosecutors.¹³⁸ Accordingly, they believe the criminal justice system is so broken, it cannot be fixed.¹³⁹

Still there are others, who believe that nothing is broken, and nothing needs to be fixed.¹⁴⁰ For example, more insular and conservative regions are happy with the status quo, and consider racial justice to be less of a priority.¹⁴¹ The population of such communities might be less diverse, and the voices of those suffering from racial disparate outcomes are less likely to be heard.¹⁴² Thus, in such intransigent communities resistant to racial justice reform, the incentives for change are weaker.¹⁴³

Law schools must accept responsibility for maintaining the status quo and resisting these criminal justice reforms.¹⁴⁴ For example, many law schools who have criminal justice clinics, structure the clinic selection so that students can take either the criminal defense clinic or the prosecution clinic.¹⁴⁵ A more helpful pedagogical model would be one that requires those students who are interested in criminal justice to take both clinics, so that students develop a balanced perspective of the role of prosecutors and public defenders.¹⁴⁶ Education about restorative justice should be part of that clinical experience.¹⁴⁷ As part of a more realistic criminal justice experiential learning, law schools should also teach students plea bargaining.¹⁴⁸

Progressive prosecutors are reforming the criminal justice system and the plea bargaining process. Next, public defenders should consider how they, in the midst of this cultural reform, can enhance their plea bargaining race skills to achieve more racially equitable outcomes.

138. See, e.g., *The Paradox of Progressive Prosecution*, 132 HARV. L. REV. 748, 758-68 (2018) (comparing reform to eating a piece of moldy bread and questioning whether it is a preferable alternative to simply throwing it out) [hereinafter “The Paradox”].

139. *Id.* at 758-68.

140. Green & Bazelon, *supra* note 24, at 2299.

141. Romero, *supra* note 10, at 818 (describing the author’s discussion of race with other attorneys in Utah).

142. Green & Bazelon, *supra* note 24, at 2308.

143. See Dancig-Rosenberg & Gal, *supra* note 24, at 2318.

144. See Mariah Stewart, *Law Schools Have Started a Criminal Justice Reform Movement*, INSIGHT INTO DIVERSITY (June 24, 2020), <https://www.insightintodiversity.com/law-schools-have-started-a-criminal-justice-reform-movement/> (“Mass incarceration, overworked public defenders, and a lack of rehabilitation programs are . . . problems plaguing the nation’s criminal justice system. . . . Law schools play a critical role in redressing such wrongs.”).

145. See *Public Interest Clinics*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/center-pro-bono/resources/directory_of_law_school_public_interest_pro_bono_programs/definitions/pi_pi_clinics/ (listing the different clinics offered by participating law schools).

146. See Stewart, *supra* note 144 (“Legal clinics are a ‘prime space’ for law schools to address criminal justice reform because students can help people who might otherwise not get representation.”).

147. *Id.*

148. *Id.*

IV. PUBLIC DEFENDERS CAN ENHANCE PLEA BARGAINING RACE SKILLS

This section will spotlight two recent articles about plea bargaining: *The Shadow Bargainers*¹⁴⁹ and *Unshackling Plea Bargaining from Racial Bias*¹⁵⁰. These articles provide an understanding of how public defenders plea bargain race and what they can do to improve their plea bargaining skills.¹⁵¹

A. *The Shadow Bargainers*

This study shows that junior public defenders with less than eight years of experience already approach plea bargaining with a restorative justice mindset which the authors label “shadow of the client.”¹⁵² This study also indicates that there is a need for public defenders to hone their plea bargaining skills so that when they bargain for their client’s justice, their negotiation strategies are consistent with advancing their client’s prioritized goals.¹⁵³

The researchers sent a survey to 2,265 public defenders working in 21 offices across 13 states. They received responses from 579 attorneys.¹⁵⁴ The researchers then surveyed the responding public defenders about their preparation for plea bargaining and the actual bargaining strategies they used when plea bargaining with prosecutors.¹⁵⁵ The study revealed two important insights.¹⁵⁶ First, junior public defenders with up to eight years of experience, prepared for plea negotiation by bargaining in the “shadow of the client” compared to more senior public defenders who prepared for plea bargaining by bargaining in the “shadow of the trial.”¹⁵⁷ Second, those attorneys who reported to bargain in the “shadow of the client” did not follow through and continued to prioritize their client’s concerns in the actual plea bargaining process.¹⁵⁸ Thus, there is a gap in how public defenders self-report and what they actually do in plea bargaining.¹⁵⁹

The researchers explained that public defenders prepare for plea bargaining by comparing their possible negotiated outcome with one of two world views: the “shadow of the trial” or the “shadow of the client”¹⁶⁰ Their study showed that more senior public defenders, those with more than eight

149. Wright et al., *supra* note 30.

150. Greenberg, *supra* note 3, at 93.

151. *See infra* Part IV.A.-B.

152. Wright et al., *supra* note 39, at 48-49.

153. *Id.* at 20-22.

154. *Id.* at 16.

155. *Id.* at 4.

156. *Id.* at 27-28.

157. Wright et al., *supra* note 39, at 27-28.

158. *Id.*

159. *Id.*

160. *Id.* at 5.

years of experience, prepare for plea bargaining by considering the strength of their evidence and the likely adjudicated outcome if this case was not plea bargained, but resolved by trial.¹⁶¹ It is likely that public defenders who prepare for plea bargaining in the “shadow of trial,” find a more trial-centered focus will be more aligned with negotiating with a prosecutor who shares a retributive justice frame.¹⁶²

In a different alignment, those public defenders who prepare for plea bargaining in the “shadow of the client” category, are more likely to be aligned with those prosecutors who are negotiating within a restorative justice frame.¹⁶³ Such public defenders bargaining in the “shadow of the client” consider the client’s wants and needs, life circumstances, the client’s pre-trial custody, the client’s “blameworthiness,” and other equitable factors and any collateral consequences that may result from any conviction.¹⁶⁴ All these needs are more easily addressed within a restorative, rather than retributive, justice framework.¹⁶⁵

Interestingly, this study also cracked the stereotype about public defenders being ineffective because of an overwhelming caseload.¹⁶⁶ Some of the public defenders minimized the effects of their caseloads on their plea bargain preparation.¹⁶⁷ Rather, public defenders reported that the size of their caseload did not adversely impact their negotiation outcomes.¹⁶⁸ The authors of the study opined that the reason for this minimization is that public defenders might regard the time needed to prepare for plea bargaining as significantly less than preparing for trial.¹⁶⁹

There are gaps between what public defenders do in plea bargaining and how they self-report.¹⁷⁰ For example, the public defenders surveyed voiced the importance of a good reputation and a good relationship between negotiating partners.¹⁷¹ Yet, in their surveys, they ranked interpersonal relationships and reputation at the bottom of the important factors in a negotiation.¹⁷² There were also other gaps in what public defenders said were a part of good practice and in how they ranked the time spent in that practice.¹⁷³ For example, less time is spent on factual investigation of

161. *Id.* at 26.

162. Wright et al., *supra* note 39, at 27.

163. *Id.* at 48.

164. *Id.* at 22-24.

165. *Id.* at 48-49.

166. *Id.* at 29.

167. Wright et al., *supra* note 39, at 32.

168. *Id.* at 29.

169. *Id.* at 31.

170. *Id.* at 36-39.

171. *Id.* at 31.

172. Wright et al., *supra* note 39, at 35.

173. *Id.* at 39-41.

witnesses, site visits,¹⁷⁴ and on legal research, especially in cases involving misdemeanors where legal research may make a difference in the outcome.¹⁷⁵ Furthermore, during the actual bargaining process itself, public defenders do not engage in the strategic sharing of information, and often wait for the prosecutor to make the first move.¹⁷⁶ In fact, this is a lost opportunity for public defenders who bargain in the “shadow of the client,” because they not only withhold relevant information about their client, but they make offers that were, for the most part, unfavorable for their client.¹⁷⁷

The article also reported on how little time the public defenders reported spending on plea bargaining a case including the time spent on bargaining discussions and advising clients.¹⁷⁸ For misdemeanors, public defenders reported spending 20 minutes plea bargaining and 17 minutes advising the client about the offer.¹⁷⁹ To the horror of this author, the researchers commented that they thought these estimates were inflated and that public defenders actually spent less time on plea bargaining.¹⁸⁰ When asked how plea bargaining was conducted, public defenders ranked in order of use— in person in courthouse, email, telephone, in person in office, text message, letter via fax or postal service.¹⁸¹

Thus, the *Shadow Bargainers* identifies the more junior public defenders as already having a restorative justice mindset, the “shadow of the client,” when they prepare for plea bargaining.¹⁸² This mindset is aligned with those of progressive prosecutors.¹⁸³ However, once the actual bargaining begins, the public defenders would benefit from additional negotiation training.¹⁸⁴ For example, devoting adequate time and preparation for the negotiation, appreciating the value of sharing information, becoming comfortable with initiating the discussion and conducting the negotiation in person in a location without distraction will help public defenders advance their clients’ interest and plea bargain race more effectively.¹⁸⁵

174. *Id.* at 39.

175. *Id.* at 43.

176. *Id.* at 41.

177. Wright et al., *supra* note 39, at 42.

178. *Id.* at 47.

179. *Id.*

180. *Id.*

181. *Id.* at 48.

182. Wright et al., *supra* note 39, at 48.

183. See The Paradox, *supra* note 138, at 752.

184. Alkon & Schneider, *supra* note 39.

185. Greenberg, *supra* note 3, at 131-37.

B. Unshackling Plea Bargaining from Racial Bias

Unshackling Plea Bargaining from Racial Bias ties together the social activism of progressive prosecutors and the research about public defenders and provides a road map that integrates the organizational values, structures, procedures, and individual skills both public defenders and prosecutors need to plea bargain race.¹⁸⁶

First, the offices of public defenders and district attorneys need to make equitable justice outcomes a stated priority.¹⁸⁷ Flowing from that priority, there needs to be an organizational and procedural alignment with that goal.¹⁸⁸ Each office should develop an operational plan delineating the steps needed to achieve that goal.¹⁸⁹ For example, office policies and procedures need to be modified to ensure that attorneys have adequate time and support to prepare for plea bargaining race.¹⁹⁰ Time is needed to conduct a thorough client interview, make a site visit, question witnesses and conduct adequate legal research, beyond a cursory review of the file.¹⁹¹ Moreover, a data collection process should be implemented to ensure that each office is actually achieving their stated goal—minimizing disparate racial justice outcomes.¹⁹² If needed, budgetary adjustments should be made to accommodate these necessary programmatic changes.¹⁹³

Both group and individual de-biasing training will help heighten legal actors' awareness of their own implicit biases about race and need to be part of this commitment to mitigate racially disparate justice outcomes.¹⁹⁴ Prosecutors and public defenders should hold joint office trainings on implicit bias so that each side shares and appreciates the biases both hold.¹⁹⁵ Joint de-biasing training will also help to foster and strengthen the collaboration necessary in a more problem-solving plea bargaining stance.¹⁹⁶ Besides joint training, individual lawyers should self-administer the IAT to reinforce their own awareness of their own racial biases.¹⁹⁷ With this self-awareness about their own biases, prosecutors and public defenders can prepare for plea bargaining race.¹⁹⁸

186. *See generally id.*

187. *Id.* at 132.

188. *Id.* at 131.

189. *Id.* at 132.

190. Greenberg, *supra* note 3, at 132.

191. *Id.*

192. *Id.* at 136.

193. *Id.* at 133.

194. *Id.* at 132.

195. Greenberg, *supra* note 3, at 135.

196. *Id.*

197. *Id.* at 145.

198. *Id.* at 142.

An essential focus is to ensure that public defenders and district attorneys hone their plea bargaining race skills. Prior to beginning plea bargaining race, public defenders and district attorneys should complete a plea bargaining worksheet.¹⁹⁹ The preparation of the worksheet slows down the plea bargaining preparation process and reminds attorneys of the important and qualitative information they need before they actually begin bargaining—the education, familial background and employment history of the individual, including a photo;²⁰⁰ previous criminal history, disposition and overall compliance with parole;²⁰¹ a description of the alleged crime and witness interviews; extenuating circumstances;²⁰² political or social factors that influence how the crime is perceived;²⁰³ self-awareness about the lawyer’s own bias(es) about the individual or alleged crime;²⁰⁴ consideration of how the other side will complete the worksheet;²⁰⁵ information you wish to get from the other side during the bargaining;²⁰⁶ information you wish to convey to the other side during the bargaining;²⁰⁷ and clarification about the client’s prioritized interests.²⁰⁸

The preparation of the plea bargaining worksheet should not take place in a vacuum. Rather, each office should create teams whose members are resources for each other in plea bargaining preparation and provide a check on any plea bargaining bias.²⁰⁹ Furthermore, offices should hold regular case debriefs to ensure that plea bargaining race outcomes align with the stated goals – minimizing racially disparate outcomes.²¹⁰ If the plea bargaining race outcomes still yield disparate justice outcomes, then the office needs to rethink their process and take additional remedial measures that will yield more equitable outcomes.²¹¹

Then, the public defender and prosecutor will be ready for the actual bargaining.²¹² The meeting should take place in a setting where there are no distractions so that the prosecutor and public defenders can focus on the important task at hand, negotiating racial justice for this client.²¹³ Throughout

199. *Id.*
 200. Greenberg, *supra* note 3, at 142.
 201. *Id.*
 202. *Id.* at 143.
 203. *Id.*
 204. *Id.*
 205. Greenberg, *supra* note 3, at 143.
 206. *Id.*
 207. *Id.*
 208. *Id.*
 209. *Id.* at 133.
 210. Greenberg, *supra* note 3, at 133.
 211. *Id.* at 136.
 212. *Id.*
 213. *Id.* at 139.

the meeting each side will share information and maintain a collaborative tenor—what is appropriate and responsive justice for this client given the facts of this case.²¹⁴ During this more client-focused discussion, the prosecutor and public defender will have a restorative justice focus.²¹⁵ This broader focus will incentivize the prosecutor and public defender to consider not only an appropriate punishment, but to also consider which rehabilitative approach will help the defendant return to the community as a constructive, contributing member.²¹⁶ At the conclusion of the meeting, the public defender will then meet with the client, present the plea bargain option, counsel the client about any collateral consequences of accepting the plea and help the client assess if the proposed plea bargain option advances the client’s prioritized interests.²¹⁷

One should note that this type of plea bargaining is deliberate, thoughtful, and likely to minimize disparate racial justice outcomes in plea bargaining.²¹⁸ As informed by cognitive behavioral the speed, lack of awareness and broad discretion that allows implicit racial biases to influence decision making are tempered by the slower pace, heightened awareness and alternate structure of this type of plea bargain.²¹⁹ Learning from negotiation theorists, both public defenders and prosecutors spend meaningful time preparing for the plea bargain.²²⁰ They appreciate that plea negotiations take time, and dedicate adequate time for this process.²²¹ During the bargaining process, they share information about the client, the crime, and extenuating circumstances.²²² They problem-solve to consider viable justice options. Both are never forgetting an overriding justice goal—to ensure equitable justice for all.²²³

V. IN CONCLUSION, WE THROW OUT THE OLD STEREOTYPES AND BEGIN A NEW NARRATIVE . . .

It is fitting that this paper begins and ends with the quote from President Obama. “Change will not come if we wait for some other person or some other time. We are the ones we’ve been waiting for. We are the change that we seek.”²²⁴ Some public defenders and progressive prosecutors have heeded

214. *Id.* at 139-40.

215. Greenberg, *supra* note 3, at 139-40.

216. *Id.* at 138.

217. *Id.* at 140.

218. *Id.* at 141.

219. *Id.* at 139-40.

220. *See* Greenberg, *supra* note 3, at 137-40.

221. *Id.* at 139-40.

222. *Id.* at 137-40.

223. *Id.* at 141-42.

224. Obama, *supra* note 1.

this message and are becoming agents of change for plea bargaining race.²²⁵ Significantly, they are changing the way they plea bargain race by adopting a broader restorative justice approach where appropriate and honing their negotiation skills.²²⁶

As with any culture change, a few lead the way before the mainstream follows. How do we incentivize such criminal justice influencers like law schools, politicians, and communities to maintain this reform momentum? Public defenders and prosecutors committed to moving the justice reform movement forward, should also take heed of the expressed concerns of the naysayers.²²⁷ Presenting a greater challenge, public defenders and prosecutors, as part of their plea bargaining race reform efforts, need to right the wrongs done by past public defenders and prosecutors, so that going forward, communities have greater trust in plea bargaining race, specifically, and the criminal justice system as a whole.²²⁸

At this juncture in the plea bargaining reform efforts, there is value in telling a more truthful narrative about public defenders and prosecutors.²²⁹ That narrative both captures the reform efforts that are making a difference without ever losing sight of the deleterious wrongs of maintaining the plea bargaining status quo.²³⁰ For, it is those past wrongs that guide and educate reformers about the reforms that are needed in this new plea bargaining race process and the safeguards that need to be implemented to ensure that plea bargaining race never reverts back to the status quo.²³¹ That more truthful narrative is an important marker that tells us where we are, where we've been, and where we still need to go.

225. *See supra* Part III.A.

226. *See supra* Part III.B-D.

227. *See supra* Part III.E.

228. *See supra* Part IV.A.

229. Cheryl L. Wade & Elayne E. Greenberg, *July 4, 2020: How Will We Celebrate?*, JURIST (July 4, 2020, 9:10 AM), <https://www.jurist.org/commentary/2020/07/wade-greenberg-systemic-racism-4th-of-july/>.

230. *Id.*

231. *Id.*