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HOW A CHECKLIST COULD IMPROVE PROSECUTION

By Lars Trautman

INTRODUCTION

Prosecution tends to be a highly balkanized affair and this fragmentation of authority and culture strikes at every level. At the top, each county and city has its own lead prosecutor charged with managing prosecutorial efforts in that jurisdiction.¹ These lead prosecutors in turn delegate the implementation of policy – if not its outright creation in some regards – to supervisors in each unit or courthouse. And, finally, every line prosecutor must make myriad decisions with often little training and official policies that do not come anywhere close to providing the answer in every case. With so much potential for variation, it is no small wonder that “equal justice under the law” remains aspirational throughout the country.

High caseloads and a lack of relevant data exacerbate these problems. Line prosecutors frequently handle hundreds or even over a thousand cases a year, transforming case

1. Jurisdictions utilize a variety of terms for their lead prosecutor, including district attorney, state attorney and prosecuting attorney. For simplicity's sake, this paper will refer to this group collectively as lead prosecutors.

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management into an exercise in triage.² Consulting with a supervisor or peer is a luxury that many cannot afford on a regular basis. At the same time, information relating to prosecutorial decisions that might provide insight into how other prosecutors handled similar cases is nonexistent and outcome data is equally rare.³ Each line prosecutor becomes her own case processing island working to stem an ever-rising tide of cases.

The result is a system of quick decisions based on rules of thumb and gut-level analyses of cases. Line prosecutors generally need not articulate in great detail—if at all—why they made any particular decision and may have only the vaguest sense of where each case falls within the wider universe of cases. This encourages risk avoidant behaviors and conceals potential implicit bias or other unhealthy rationales. Meanwhile, at the office level, leaders may not know what decisions their prosecutors are making, let alone why they are making them.⁴ If this environment does not exacerbate racial and ethnic disparities or mass incarceration, at the very least, it is not conducive to remedying those issues either.

This is a huge problem. The United States incarcerates a disproportionate number of its people and keeps nearly 7 million under some form of correctional supervision at any given time.⁵ These burdens are not shared equally by any stretch. Minorities are over-represented as arrestees, crimi-

2. Prosecutor caseloads in some jurisdictions can reach as high as 1,500 cases annually. See, e.g., Peter A. Joy and Kevin C. McMunigal, “Overloaded Prosecutors,” *Criminal Justice* 33:31 (Summer 2018). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3359801.

3. See, e.g., Robin Olsen et al., “How Do Prosecutors Collect and Use Data in Decision-making?” Urban Institute, Sept. 25, 2018. <https://www.urban.org/urban-wire/how-do-prosecutors-collect-and-use-data-decisionmaking>.

4. Ibid.

5. Wendy Sawyer and Peter Wagner, “Mass Incarceration: The Whole Pie 2020,” Prison Policy Initiative, March 24, 2020. <https://www.prisonpolicy.org/reports/pie2020.html>.

nal defendants, pretrial detainees and incarcerated individuals.⁶ Likewise, conviction rates are higher and sentences longer for Black defendants.⁷

Prosecutors can and must address these inequities, but this requires innovative strategies. A few offices have increased training relating to implicit bias, introduced reforms to help eliminate unnecessary incarcerations and reworked policy to be more data driven.⁸ While these represent necessary and beneficial initiatives, the present study suggests complementing them by experimenting with methods to alter the process and psychology of prosecutorial decisions.

Specifically, it recommends exploring the introduction of a uniform prosecutor decision checklist to guide key prosecutorial decisions. Such a device could potentially force line prosecutors to slow down, consider additional mitigating or exculpatory factors, and attempt to place each decision and case into a broader systemic context. Lead prosecutors would be able to harness this information to make policy more iterative and adaptive. Taken altogether, this could improve the consistency of prosecution, encourage prosecutors to exercise greater restraint, and help reduce the problems of over-incarceration and racial disparities.

THE DECISION-MAKING STATUS QUO

Among the many decisions that prosecutors must regularly make, three stand out as especially important and subject to broad individual discretion: charging, pretrial release and disposition recommendations. Each of these represents chokepoints in the criminal justice process in which prosecutorial decisions can dramatically alter the volume and composition of cases. As such, the checklist herein proposed seeks to address these issues directly.

At least theoretically, charging decisions involve almost unbridled prosecutorial discretion. In order to charge an individual with a crime, a prosecutor merely needs to assert that there is probable cause to support each element of that offense. There is no legal requirement to meet a higher evidentiary threshold at that stage or to consider other factors such as alternatives to prosecution, the likely impact on the defendant, their family or community, or even any victim's wishes. To the extent that prosecutors consider each of these

factors, it is purely a matter of office policy or individual discretion.⁹

Generally, there are also no requirements that prosecutors state why they have chosen to pursue particular charges. This means that there is no record of the basis of the decision. As a result, a defendant can only challenge the decision on the basis of that initial legal determination regarding probable cause, or potentially if they can somehow show a pattern of discriminatory conduct – an exceedingly difficult task.

Pretrial release decisions, on the other hand, tend to leave a little bit more in the public record. Although individual court practices may vary, generally, a prosecutor will reveal her reasons for a particular bail or pretrial detention request in open court in the course of a bail argument. An improvement over the black box of charging decisions, this nevertheless still presents the information in a disorganized and idiosyncratic manner. Further, it is in a purely verbal format, making it difficult to categorize and aggregate.

These pretrial release decisions are also often guided by explicit factors for consideration beyond evidentiary sufficiency. The law will typically direct courts to take into account such matters as the defendant's reputation in the community, whether the offense was one of violence, the defendant's physical and mental condition, and the defendant's ties to the community.¹⁰ Notably, however, this guidance tends to be directed at judges rather than prosecutors. Obviously, prosecutors may still want to cite one or more factors to lend added persuasiveness to their arguments, but they are under no requirement to do so. The result is that underlying prosecutorial rationales may be that much more difficult to discern.

The transparency and legal structure of disposition recommendations depends, in part, on whether parties make them before or after a trial. Those resulting from plea bargains tend to be the product of an opaque process with few rules attached.¹¹ Prosecutors and defense attorneys negotiate over convictions and sentences in private conversations; judges and the public will hear the outcomes but may never know

6. "Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System," Prison Policy Initiative, April 19, 2018. <https://www.sentencingproject.org/publications/un-report-on-racial-disparities>.

7. Ibid.

8. See, e.g., Bill Rankin, "DeKalb DA takes action to rid her office of implicit bias," *Atlanta Journal-Constitution*, Aug. 29, 2019. <https://www.ajc.com/news/local/dekalb-takes-action-rid-her-office-implicit-bias/jBRb9uV3z9g8mpKI3eNzYK>; Liane Jackson, "Change Agents: A new wave of reform prosecutors upend the status quo," *ABA Journal*, June 1, 2019. <https://www.abajournal.com/magazine/article/change-agents-reform-prosecutors>.

9. As part of its professional guidance to attorneys, the American Bar Association includes a non-exhaustive list of valid non-evidentiary reasons to decline to file charges, though these are nonbinding and described as 'aspirational' or 'best practice.' See: American Bar Association, "Discretion in Filing, Declining, Maintaining, and Dismissing Criminal Charges," *Criminal Justice Standards for the Prosecution Function* (4th edition, 2017). https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.

10. See, e.g., Mass. Gen. Law 276 §58. <https://www.mass.gov/info-details/mass-general-laws-c276-ss-58>; Code of Va. 19.2-120. <https://law.lis.virginia.gov/vacode/title19.2/chapter9/section19.2-120>.

11. See, e.g., Jenia I. Turner, "Plea Bargaining," in *Reforming Criminal Justice Volume 3: Pretrial and Trial Processes*, ed. Erik Luna (The Academy for Justice, 2017), pp. 77-80. https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_3.pdf.

the rationales unless the judge inquires during the acceptance of the plea. Sentencing recommendations offered after a trial, on the other hand, typically involve more information placed on the record as each side argues for a given sentence in open court. This public back and forth can also force parties to adhere closer to any statutory rules on acceptable sentencing factors, which typically include factors such as criminal history and offense severity.¹²

Within these broader regimes, prosecutor's offices can, of course, create their own guidance and records. For example, some offices have instituted higher evidentiary requirements for charging decisions¹³ or created policies that require line prosecutors to factor in various additional considerations such as collateral consequences into their decisions more broadly.¹⁴ Offices may also require prosecutors to write notes in paper files that indicate their rationales or to otherwise document the reasoning behind various decisions.¹⁵ These systems, however, may be ad hoc and involve little to no meaningful office-wide data collection or analysis.¹⁶

A PROSECUTOR DECISION CHECKLIST

The general concept of a prosecutor decision checklist is relatively straightforward. For every charging, pretrial or disposition recommendation, line prosecutors must complete and submit to their superiors a checklist specifically tailored to that decision. Through its questions and listed answers, each checklist prompts these line prosecutors to consider certain factors or possible outcomes.

Naturally, such a checklist will only be effective if it has the buy-in of line prosecutors. If it is overly burdensome, they will likely either give it only a cursory glance, thereby undermining its effectiveness, or become bogged down in its completion, thereby stretching prosecutors even thinner. As such, a checklist should contain a relatively short list of concise questions as well as boxes from which to select possible answers.

This type of policy may appear foreign to many offices, but it is not unheard of in prosecution. In particular, offices have created checklists to serve procedural ends. For example, some offices employ checklists with questions designed to ensure that prosecutors find and turn over relevant discovery on a case, or otherwise take all necessary steps to prepare a case for trial.¹⁷ In addition to these checklists aimed at encouraging greater prosecutorial thoroughness, a handful of offices have sought to address prosecutorial decisions more directly. For example, the Manhattan District Attorney's Office employs a special checklist for cases that involve a potentially disputed identification of a defendant that pushes prosecutors to consider common possible flaws in the case.¹⁸ Similarly, prosecutors in New Orleans have used a charge declination checklist that requires prosecutors to select from a list of possible rationales.¹⁹

The proposal here is thus not so much a wholly novel policy as it is an expansion of checklists to new decision points while designing them to influence the decision itself. In contrast to many of the 'best practices' checklists in use, this type will be more forward focused. Rather than asking whether a line prosecutor has taken certain actions, they will prompt that prosecutor to assess future actions and their consequences. In addition, these checklists are not solely to nudge the line prosecutors; checklist results should be collected and aggregated into easily accessible and usable data that can drive office wide policy.

Further, as will be discussed in detail later in this paper, the questions and answers themselves are likely to alter the decision-making of line prosecutors. Indeed, this is partly the point. However, this means that each office should determine the precise questions and answers that reflect their priorities. This is not to say that overarching guidance is impossible. For each decision point, there are a few areas, typically relating to recommendation severity and effect, that stand out as especially important to include on the given checklist in one form or another. In addition to these potential core provisions, prosecutors willing to expand the scope of the checklist in the interest of further advancing justice could consider tailoring some version of a handful of supplemental

12. See, e.g., Heather Young Keagle, "Manual on New Jersey Sentencing Law," Appellate Division, New Jersey Superior Court, July 6, 2020. <https://www.njcourts.gov/attorneys/assets/attyresources/manualsentencinglaw.pdf?c=gEx>; "Felony Sentencing Quick Reference Guide," Ohio Criminal Sentencing Commission, December 2019. <https://www.supremecourt.ohio.gov/Boards/Sentencing/resources/judPractitioner/felonyQuickRef.pdf>.

13. See, e.g., "Section 1.4: The DA's Standard for Charging Cases," City and County of San Francisco Board of Supervisors, last accessed July 16, 2020. <https://sfbos.org/section-14-das-standard-charging-cases>.

14. Rachael Rollins, "The Rachael Rollins Policy Memo" Suffolk County District Attorney's Office, March 2019. <https://static1.squarespace.com/static/5c671e8e2727be4ad82ffe9/t/5d44a5f79807850001acc3d9/1564780028241/The+Rachael+Rollins+Policy+Memo.pdf>.

15. Robin Olsen et al., "How Do Prosecutors Collect and Use Data in Decision-making?," Urban Institute, Sept. 25, 2018. <https://www.urban.org/urban-wire/how-do-prosecutors-collect-and-use-data-decisionmaking>.

16. Ibid.

17. See, e.g., Kristine Hamann and John Delaney, "Investigating Violent Crime: The Prosecutor's Role," Police Foundation, June 2018. <https://crimegunintelcenters.org/wp-content/uploads/2018/09/Investigating-Violent-Crime-The-Prosecutors-Role-Lessons-Learned-from-the-Field-NRTAC-June-2018.pdf>; "Establishing Conviction Integrity Programs in Prosecutors' Offices," Center on the Administration of Criminal Law, New York University Law School, 2011. http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecn_pro_073583.pdf.

18. "Establishing Conviction Integrity Programs in Prosecutors' Offices," p. 56. http://www.law.nyu.edu/sites/default/files/upload_documents/Establishing_Conviction_Integrity_Programs_FinalReport_ecn_pro_073583.pdf.

19. Marc L. Miller and Ronald F. Wright, "The Black Box," Iowa Law Review 94:1 (2008), pp. 125-96. <https://wakespace.lib.wfu.edu/bitstream/handle/10339/16121/Wright%20Black%20Box.%20The.pdf>.

provisions for each checklist. The following represents an illustrative, non-exhaustive series of such provisions.

Charging Checklist

Core provisions:

- Rate the strength of the evidence available at the time of charging (probable cause; preponderance; clear and convincing; beyond a reasonable doubt)
- Rate the priority level of the alleged conduct (on a sliding numerical scale)
- Is the defendant a candidate for a diversion program (yes or no)
- Can the conduct in question be adequately addressed by an alternative to prosecution (community service; fine; restorative justice; restitution; other)

Supplemental provisions:

- Does the defendant have under-addressed mental health or substance abuse issues (yes or no)
- Does the case implicate any potentially controversial or inappropriate policing practices? (arrest occurred in “high crime area” or other location with enhanced police presence; stop appears pretextual in nature; inappropriate use of force; other)
- Do any of the officers or witnesses involved have any known credibility issues (yes or no)
- Anticipated procedural posture (likely motion to dismiss or suppress; likely guilty plea; likely trial)

Pretrial Release Checklist

Core provisions:

- Do you expect the defendant to make your proposed bail (yes or no)
- Rate the public safety risk of the defendant (on a sliding numerical scale)
 - Is there an identifiable person at risk (yes or no)
- Rate the flight risk of the defendant (on a sliding numerical scale)
- Would you recommend a period of incarceration if the defendant is convicted? (yes or no)

Supplemental provisions:

- Does the defendant have childcare obligations (full-time; part time; none)
- Would detention result in a possible job loss for the defendant (yes or no)
- Can the jail service the mental health or substance abuse needs of the defendant (yes or no)
 - Does the defendant qualify for an alternative to pretrial detention that could service this need (yes or no)
- What is the anticipated procedural posture of this case (likely motion to dismiss or suppress; likely guilty plea; likely trial)
 - What is the anticipated duration of this case (0-1 pretrial hearings; 2-5 pretrial hearings; 6+ pretrial hearings)

Disposition recommendation checklist

Core provisions:

- Rate the relative severity of the sentencing recommendation (on a sliding numerical scale)
- Is there an identifiable risk to anyone in the community if the defendant is released (yes or no)
- Is the defendant a candidate for any alternative to prosecution or alternative to incarceration program (yes or no)

Supplemental provisions:

- If this is a change of plea, rate the strength of the case (on a sliding numerical scale)
- Does the defendant have childcare obligations (full-time; part time; none)
- Would detention result in a possible job loss for the defendant (yes or no)
- Can the jail/prison service the mental health or substance abuse needs of the defendant (yes or no)
- What is the estimated direct cost of the sentence (with cost bands based on local averages)

In addition to potentially influencing the decision-making of line prosecutors, these checklists should inform office-wide

policy and practices. This means that each office will have to devise a strategy for collecting these checklists and aggregating their results. This also provides additional support for the notion that each checklist question should have pre-provided answers for line prosecutors to select from, as this will create more easily analyzed results.

HOW AND WHY A CHECKLIST WORKS

A prosecutor decision checklist would operate at two levels. First, it would force line prosecutors to pause briefly in the administration of justice and consider each decision in the context of larger criminal justice goals. Second, the information collected could inform office-wide policy, with lead prosecutors using them as part of a policy feedback loop to improve prosecutorial practices more broadly. In concert, these two mechanisms could help offices to improve prosecution, particularly by better addressing racial and ethnic disparities, as well as an overreliance on incarceration.

It may be difficult at first glance to see how a literal check-the-box exercise could alter prosecutorial decision-making. Yet, a recent example from the policing world shows how powerful requiring individuals to slow down and more formally consider the basis of a critical decision can be. In 2018, the Oakland police department, in conjunction with Stanford University researchers, added a box to the short form that police officers filled out whenever they completed a traffic stop. This box asked “Was this stop intelligence-led? Yes or no.”²⁰ Simply prompting officers to consider whether a stop had an evidentiary basis and was therefore a priority stop helped to reduce the number of discretionary stops by 37 percent compared to the prior year.²¹

The proposed prosecutor decision checklist aims to replicate this kind of effect. As has been noted already, many line prosecutors make decisions in a rapid-fire environment, which can stymie introspection and analysis. A checklist encourages them to slow down and expressly consider the factors their office deemed worthy of inclusion. Indeed, this could be the difference between a prosecutor requesting a relatively low bail under the assumption that it will be posted and being reminded by a bail affordability question to make inquiries into the defendant’s financial status. Likewise, simply asking certain questions, such as whether diversion is available for each defendant, can create an implicit mark in favor of that resolution. Further, line prosecutors would have to feel confident enough in their reasoning to record it in a readily accessible format for review by their superiors. It would

20. Lara O'Reilly, “How Oakland police cut traffic stops by 40% with a simple checkbox,” Yahoo Finance UK, July 1, 2019. <https://finance.yahoo.com/news/how-the-oakland-police-cut-traffic-stop-numbers-by-40-with-a-simple-checkbox-070000004.html>.

21. Ibid.

simultaneously serve as a nudge and an instant mechanism of accountability.

It could also operate as a useful tool to counteract implicit bias, which can otherwise infect all manner of prosecutorial decisions.²² Research has shown that making individuals more aware of potential sources of bias and slowing down the decision-making process accomplishes this.²³ A decision checklist would naturally force a slight pause, and an office could include questions explicitly aimed at counteracting implicit bias to magnify these effects. Indeed, a handful of jurisdictions successfully curbed bias in some judicial decision-making through judicial bench cards that asked judges to consider sources of implicit bias.²⁴ This has led some researchers to suggest similar questions could improve prosecutorial decision-making.²⁵

Offices could further attempt to alter line prosecutor decisions by using bureaucratic friction to maximum effect. If offices condition the requirement to fill out a checklist on a particular outcome—filing felony charges or requesting detention, for example—they will naturally incentivize prosecutors to avoid that outcome and thereby minimize their own paperwork. As an alternative to its selective deployment, offices could consider lengthening the checklist or otherwise increasing its requirements for those kinds of outcomes. This would provide some of the same incentive to avoid any outcomes the office seeks to reduce, while still ensuring the checklist is providing data in some quantity for all outcomes. This strategy would also better reflect the weight of particular decisions. For example, recommending felony charges or detention should involve greater analysis than a misdemeanor charge or probation.

The collection of checklist results could similarly guide office-wide policy. As an initial matter, it would provide a wealth of new information relating to why line prosecutors made the decisions they did. This would help offices see how closely prosecutors adhered to official priorities and target areas in which decisions did not live up to expectations or their potential more generally. For example, did line prosecutors actually rank the correct categories of offenses as ‘high priority’ at the charging stage?

22. See, e.g., Rachel D. Godsil and HaoYang (Carl) Jiang, “Prosecuting Fairly: Addressing the Challenges of Implicit Bias, Racial Anxiety, and Stereotype Threat,” *CDA4 Prosecutor’s Brief* 40:2 (Winter 2018), pp. 147-49. <https://mlac.org/wp-content/uploads/2019/07/Godsil-2018-Prosecuting-Fairly.pdf>.

23. Ibid., p. 150. <https://mlac.org/wp-content/uploads/2019/07/Godsil-2018-Prosecuting-Fairly.pdf>.

24. Pamela M. Casey et al., “Helping Courts Address Implicit Bias,” National Center for State Courts, 2012. <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.259.1089&rep=rep1&type=pdf>.

25. Godsil and Jiang. <https://mlac.org/wp-content/uploads/2019/07/Godsil-2018-Prosecuting-Fairly.pdf>.

Similarly, the checklist results could match prosecutor expectations with actual outcomes, and allow offices to reformulate policy or training wherever the two suffer from a significant gap. The bail request example above is once again instructive; if prosecutors routinely request bails that turn into unintentional de facto detention requests, this might reflect a policy that weights certain pretrial release factors poorly or that prosecutors are misjudging defendants' financial means. In addition, the data could reveal whether prosecutors made decisions consistently throughout the office's branches or with respect to defendants of various demographic groups. In particular, how do line prosecutors rate the severity of their recommendations vis-à-vis their peers, and are they individually consistent across defendants?

The adaptive nature of the checklist would allow for more iterative and responsive policy. Once offices begin to see the results—both in terms of the answers selected by line prosecutors and the actual outcomes—they could alter the checklist's composition to address any undesired results. If, for example, an office discovered that its line prosecutors selected self-described 'severe' sentences too frequently, it could add new questions to highlight valid mitigating factors. Likewise, the perpetuation of significant racial, ethnic or other disparities in prosecutorial recommendations might counsel in favor of further questions relating to implicit bias.

POTENTIAL COSTS AND COMPLICATIONS

Although a decision checklist could deliver numerous benefits to prosecution, it would inevitably come with a series of costs and complications for which prosecutors must account. To begin with, it would entail startup costs in terms of money and time. Each office would have to develop a checklist uniquely suited to its own goals and needs, and distribute it to all of its relevant line prosecutors. Further, it would have to train them on its use.

Special effort and consideration would have to be devoted toward ensuring that there is maximum buy-in from those line prosecutors. This would require education on the checklist's importance for the office and its anticipated benefits. The office would further have to address the increased work that the checklists would create. Presumably, offices would have to reduce caseloads—at least slightly—to make sure that line prosecutors could adequately complete them. In the long run, the checklist's potential to incentivize lower charge rates could help to free-up this time by reducing prosecutorial caseloads. Nevertheless, any additional task in the short term can still provide a hurdle to already overtaxed offices.

Offices will also have to work to identify and remediate any unintended side effects. In particular, this means accounting for the checklist's ability to incentivize certain actions. For example, selective deployment of checklists or questions

could prevent positive actions: for example, one would not want to reduce a general overcharging problem by disincentivizing necessary charges. Similarly, nudging prosecutors to consider variables that correlate strongly with race could exacerbate rather than ameliorate disparities if the questions and answers are not designed properly. Likely, the best strategy for addressing these issues will involve careful initial planning and drafting as well as transparency coupled with a willingness to quickly make any necessary adjustments to the checklists and other office policies.

CONCLUSION

For all the steps taken in recent years, prosecution remains in need of significant change. Disparate outcomes and an over-reliance on detention are still the norm in most jurisdictions. Transforming prosecution to be more fair and effective will require structural shifts within offices and the justice system more generally. This should include efforts to modernize the decision-making process by adding more science to the art of prosecutorial decisions. A prosecutor decision checklist could serve as such a means, nudging prosecutors toward more productive outcomes and collecting critical information on the results of their decisions.

While a prosecutor decision checklist has great promise, the benefits—and costs—remain largely speculative. Accordingly, a carefully constructed and analyzed program, which leverages a strong research partnership to rigorously test the results, should precede widespread adoption. To the extent that any prosecutor's office already employs a checklist or similar device, it should enter into a research agreement with qualified partners in order to improve its design, collect and analyze data, and ultimately make the results replicable as appropriate. Programs using such a checklist could also serve as a model for other offices, providing another critical component of prosecutorial innovation.

Offices have already demonstrated the importance of establishing updated goals for prosecution and metrics of success. To supplement these reforms, offices should consider new approaches to the decision-making process itself that can both consciously redirect it and further tap the potential of unseen aspects of decisions. Only with this kind of comprehensive strategy to modernize prosecution are offices likely to achieve the benchmarks they set for themselves and push the bounds of good prosecution a bit further.

ABOUT THE AUTHOR

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