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Udi Ofer

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**Defunding Prosecutors and Reinvesting in Communities:
The Case for Reducing the Power and Budgets of Prosecutors to Help
End Mass Incarceration**

*Udi Ofer*¹

INTRODUCTION

The movement to end mass incarceration has grown significantly over the past decade, with new alliances being built and public opinion shifting to support reforms. Yet despite hundreds of laws passed to tackle mass incarceration, the criminal legal system's footprint has not been reduced substantially and extreme racial disparities persist. Tens of thousands of people are out of prison thanks to reforms, but the nation has not achieved the transformational change necessary to end mass incarceration.

This article argues for a new strategy to tackle mass incarceration, one that relies on a similar strategy deployed by the current movement to defund the police: reduce the budget and power of prosecutors. The aim of this strategy is to force the criminal legal system to significantly narrow its scope and to reinvest resources in alternatives to incarceration models and in proactive measures that prevent entanglements with the criminal legal system.

As the United States adopted a tough-on-crime approach beginning in the 1970s, prosecutors, who are elected in all but three states and Washington DC, responded accordingly. They utilized newly-created mandatory minimum laws and harsh sentencing schemes, including habitual offender and truth-in-sentencing laws, to become tougher in their practices.

Prosecutors have extraordinary discretionary power in bringing charges, proposing bail, and deciding on plea deals. They face little interference from defense attorneys or even judges. During the law-and-order era, prosecutors began to face additional pressures to engage in extreme sentencing practices. They were now armed with new tools that gave them even more power to exercise their discretion in a punitive manner. As the police began to arrest more people, prosecutors also began to use their

1. Udi Ofer is the Deputy National Political Director of the American Civil Liberties Union (ACLU), and Director of the ACLU's Justice Division. Mr. Ofer is a visiting lecturer at the Princeton University School of Public and International Affairs.

own discretion to influence incarceration rates by charging individuals more aggressively and becoming tougher in their plea-bargaining tactics.

Prosecutor offices have grown dramatically during the era of mass incarceration. Between 1994-2007 alone, prosecutor budgets increased by at least \$3 billion. In some cities, like New York City, prosecutor staffing has tripled over the past 40 years despite crime rates in New York City being at historic lows. New York City alone spends nearly half a billion dollars a year on its five borough prosecutors and citywide Special Narcotics Prosecutor. During the 10 years of Cy Vance, the number of staff in the Manhattan District Attorney office grew by 25 percent. And like in the rest of the nation, Black and Latinx communities have disproportionately faced the consequences of these new resources being poured into prosecution. In Manhattan, 56 percent of people arrested in 2018 were Black, 34 percent were Latinx, and just 14 percent were white.

Yet in New York City, as in other cities across the nation, the large majority of the prosecutor docket consists of low-level offenses, many of which should not involve the criminal legal system in the first place. Nationwide, about 70-80 percent of cases are for misdemeanors.

It's time to rethink this entire system and to do so by dramatically narrowing its scope and power, including by removing criminal legal system actors, such as prosecutors, from the equation altogether whenever possible. At the heart of this must be a reorientation from the tough-on-crime era to a prioritization of social welfare, public health, and alternatives to policing, prosecution, and incarceration as the primary mechanisms to build community safety.

The United States has spent decades investing in extreme punishment as a way to address behaviors that shouldn't involve the criminal legal system in the first place. Now it must spend the time and resources doing the opposite: investing in alternative models of public safety.

Part I of this article reviews the rise of mass incarceration in the United States and the impact of law-and-order politics on driving incarceration rates. This began with a shift in presidential politics and both Republican and Democratic candidates beginning to call for more incarceration. The ideological shift flowed down to policing and prosecution, which became the front lines in the new tough-on-crime era that criminalized Black communities across the nation. This section explains how both police and prosecutors began to use their extraordinary discretion to push for more arrests, incarceration, and tougher sentences. Part I ends with a review of reform efforts, including to elect progressive prosecutors, and how these

efforts have not succeeded in achieving the type of transformational change needed to end mass incarceration.

Part II makes the case for defunding prosecutors, by reducing their scope, size and budgets, as part of the solution to ending mass incarceration. It explains the need to deemphasize reforms that continue to rely on the criminal legal system instead of focusing on reducing the size and scope of criminal legal system actors, including prosecutors. It documents how prosecutorial budgets have increased dramatically during the rise of mass incarceration and how even newly elected progressive prosecutors have pushed for more funding and staffing, while the majority of their docket continues to focus on many behaviors that shouldn't involve the criminal legal system in the first place, like prosecuting thousands of drug arrests. Part II ends by making the case for reducing the prosecutorial footprint as part of the strategy to end mass incarceration and emphasizes that the movement cannot rely solely on system actors, including progressive prosecutors, to be the ones pushing for these transformational reforms.

Part III lists eight recommendations under five categories of reforms, including: (1) policymakers should restrict prosecutorial authority by (a) decriminalizing laws that will lead to fewer arrests and prosecutions, (b) declining to prosecute broad categories of cases, and (c) regulating prosecutorial discretion, through legislation, as a strategy to advance decarceration. (2) State, local and federal policymakers and prosecutors should cut prosecutor budgets, given that they will have fewer cases to prosecute under the changes contained in the first recommendation. (3) Local district attorney races should become referenda on a candidate's willingness to divest from prosecutors and to commit to declining to prosecute categories of arrests. (4) Savings from defunding prosecutors should be invested in Black and other communities historically targeted by police and prosecutors. And (5) The system as a whole should reimagine how to tackle offenses involving violence, redirecting those cases away from prosecutors and the criminal legal system whenever possible.

The majority of prosecutor office dockets are comprised of misdemeanors and low-level offenses that should not involve the criminal legal system. Prosecutor budgets have increased by billions of dollars, while many social welfare programs have been cut or remained stagnant. We need to shrink prosecutorial budgets so that prosecutors no longer spend their time on matters that should involve social welfare programs, not the criminal legal system. The savings should be reinvested in alternative mechanisms to improve community safety as well as in proactive measures that prevent people from becoming entangled in the criminal legal system in the first place.

I. Rise of Mass Incarceration Nation

a. Incarceration rates quintuple in the United States

The United States incarcerates more people, both per capita and by volume than any other nation in the world.² On any given day, there are 2.3 million people incarcerated in 3,134 local jails, 1,833 state prisons, 218 immigration detention facilities, and 110 federal prisons.³ In comparison, the United Kingdom has one-fifth of the United States' prison incarceration rate, while Canada has one-sixth and Germany one-tenth.⁴

Victimization rates cannot explain this American exceptionalism, as the United States ranks about the same as countries in Western Europe.⁵ Rather, it is explained by a cultural and political backlash that began in the United States during the 1960s in reaction to civil rights protests and growing calls for racial justice. Crime did increase in the 1960s, as it did outside of the United States, but the United States suffered a unique backlash driven by racism and that outlasted any temporary increase in crime rates. This backlash led to the implementation of a destructive tough-on-crime approach to public safety that continues to have a devastating impact on people of color in the United States.⁶

During a span of 40 years, states and the federal government began to pass laws and institute practices that criminalized more behaviors and increased jail and prison sentences dramatically.⁷ In the 1970s, the rate of incarceration in the United States began to increase, eventually quintupling over four decades.⁸ Once out of prison, people began facing approximately

2. Michelle Ye Hee Lee, *Yes, U.S. Locks People up at a Higher Rate Than Any Other Country*, WASH. POST (July 7, 2015).

3. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POLICY INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html>.

4. Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POLICY INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html>.

5. *International Crime Victims Survey*, UNITED NATIONS INTERREGIONAL CRIME AND JUSTICE RESEARCH INSTITUTE (1989-2010), http://www.unicri.it/services/library_documentation/publications/icvs/; Zack Beauchamp, *America Doesn't Have More Crime Than Other Rich Countries. It Just Has More Guns*, VOX (Feb. 15, 2018) (the United States does have a higher homicide rate, but that is explained by greater availability of guns, which leads to more use of deadly force).

6. JEREMY TRAVIS, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 106 (Jeremy Travis et al. eds., 1st ed. 2014).

7. *Id.* at 130.

8. *Id.*

45,000 legal restrictions that make it nearly impossible to reintegrate back into society,⁹ creating a legalized form of discrimination that deprives millions of people of their right to vote and other basic human rights. The impact has been dramatic, changing the character of the nation.¹⁰

While mass incarceration grew both in size and budget, many social services programs faced cuts or remained stagnant, resulting in prisons and jails becoming the primary institution to house people with medical, mental health, and substance abuse needs. For example, while deinstitutionalization freed hundreds of thousands of people with mental illness from brutal facilities, community mental health services have not filled the need for care as the federal government failed to provide funding for mental health community services and states cut their budgets for mental health hospitals without replacing those services.¹¹

The incarcerated population today suffers from extreme racial and ethnic disparities due to racist policies and practices. A Black boy born today has a 1-in-3 chance of being incarcerated, compared to a 1-in-17 chance for a white boy.¹² Black and Latinx people represent about 30 percent of the

9. A.B.A., *Collateral Consequences of Criminal Convictions: Judicial Bench Book*, OFFICE OF JUSTICE PROGRAMS (Mar. 2018).

10. The two decades that saw the biggest spike in incarceration each had their own policy themes. In the 1980s, the US Congress and most state legislatures enacted laws mandating a minimum length prison sentence for drug offenses and offenses involving violence. President Ronald Reagan also formalized the war on drugs, first announced by Richard Nixon. The Reagan administration focused on crack cocaine, particularly in Black neighborhoods, as a way to build support for his war on drugs. *Id.* at 120. In this decade legislatures passed laws mandating mandatory minimums of 5, 10, and 20 years. *Id.* at 86. The 1980s saw the largest increase in state incarceration rates, with state incarceration rates growing 107 percent. *Id.* at 54. The 1990s were all about increasing length of sentences and making sure people don't get out once in prison. In the 1990s, Congress and more than half of the states passed "three strikes you're out" laws that mandated minimum sentences of 25 years or longer for repeat offenders. *Id.* at 73. A majority also adopted "truth-in-sentencing" laws requiring people to serve at least 85% of their prison sentence. *Id.* During this period state incarceration rates grew by 55 percent, although from a much larger base compared with 1980. In this decade, time served replaced imprisonment per arrest as the leading factor in growth in incarceration rates. For example: In 1986, people released after serving time for a federal drug offense had spent an average of 22 months in prison. By 2004, people convicted on federal drug offenses were expected to serve almost three times that length: 62 months in prison. At the state level, the number of people in prison for drug offenses increased ten-fold since 1980. *Id.* at 56.

11. The existing mental health system today fails to provide adequate treatment. *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness*, HUMAN RIGHTS WATCH (Oct. 21, 2003), <https://www.hrw.org/report/2003/10/21/ill-equipped/us-prisons-and-offenders-mental-illness#>.

12. *Trends in U.S. Corrections*, THE SENTENCING PROJECT (Aug. 25, 2020), <https://www.sentencingproject.org/wp-content/uploads/2020/08/Trends-in-US-Corrections.pdf>.

United States population, yet 60 percent of the nation's people in prison.¹³ A majority of people in prison have drug, alcohol, or mental health needs,¹⁴ and 40 percent suffer from at least one chronic health condition.¹⁵ Due to extreme sentences, nearly 200,000 people age 55 and older are incarcerated in the United States.¹⁶ And while mass incarceration impacts many more men by sheer volume and rate, incarceration rates have increased more rapidly for women than for men since the early 1970s, particularly incarceration rates of Black women.¹⁷

b. Law-and-order politics drive mass incarceration

Incarceration rates increased in the United States as a result of political decisions made by policymakers on the federal and local levels.¹⁸ Presidential politics have driven this shift, shaping the national narrative and influencing both political parties. These policies seep down to state and local politics. It was during this period that both police and prosecutorial practices began to transform, becoming the front lines in the new tough-on-crime era that criminalized Black communities across the nation in the name of a failed War on Drugs.¹⁹

i. Presidential politics push a law-and-order narrative

Law-and-order politics, and in particular their exploitation by presidential campaigns, have played a key role in the rise of mass

13. *Id.*

14. DORIS J. JAMES & LAUREN E. GLAZE, NCJ 213600, BUREAU OF JUSTICE STATISTICS: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006), <https://www.bjs.gov/content/pub/pdf/mhppji.pdf>.

15. Amy J. Harzke & Sandi L. Pruitt, *Chronic Medical Conditions in Criminal Justice Involved Populations*, 41 J. OF HEALTH & HUM. SERVICES ADMIN. 306, 310 (2018).

16. Matt McKillop & Frances McGaffey, *Number of Older Prisoners Grows Rapidly, Threatening to Drive Up Health Costs*, THE PEW CHARITABLE TRUSTS (Oct. 7, 2015), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/10/07/number-of-older-prisoners-grows-rapidly-threatening-to-drive-up-prison-health-costs>. One of the results of mass incarceration policies has been that sentence lengths have increased dramatically. We are still feeling this impact on the level of incarceration. An analysis done by The Sentencing Project found that the number of people serving life sentences continues to grow even while serious violent crime has been declining for the past 20 years. *Id.* The lifer population has nearly quintupled since 1984. *Id.*

17. THE SENTENCING PROJECT, *supra* note 12.

18. TRAVIS, *supra* note 6, at 104.

19. *Id.* at 50.

incarceration.²⁰ The 1964 presidential election between United States Senator Barry Goldwater and incumbent president Lyndon Johnson marked a turning point for law-and-order politics in the United States, as recounted by Michelle Alexander in her seminal book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*.²¹ Goldwater ran an unabashed law-and-order campaign, deploying race-based appeals to a white electorate opposed to racial justice and slamming the civil rights movement as being violent and un-American.²²

Goldwater lost the 1964 election, but his candidacy provided a boost for both the conservative movement and the tough-on-crime narrative that is still felt today.²³ Crime rates increased in the 1960s in the United States and internationally, yet law-and-order became a persistent narrative in national and local politics even after crime rates began to dip.²⁴ Politicians pledged their support for punitive policies without evidentiary support for these policies' long-term effectiveness in addressing crime rates, let alone consideration for whether certain behaviors should be criminalized in the first place.²⁵ Even though Lyndon Johnson was the less punitive-minded candidate in the 1964 election, he launched his own war on crime in 1966.²⁶ It was Johnson, the creator of the "War on Poverty," who first used the term "War on Crime" and created the Law Enforcement Assistance Administration, a federal agency that funded state and local law enforcement, dramatically expanding the federal government's role in local police.²⁷

During the 1968 election, candidate Richard Nixon showed that a law-and-order candidate could win and expand the base of the Republican Party by appealing to southern white Democrats who opposed the civil rights movement.²⁸ As president, Nixon lived up to his tough-on-crime mantra. In

20. *See, e.g., Id.* at 106.

21. *Id.* at 108.

22. *Goldwater 1964 Campaign Commercials*, C-SPAN (Nov. 1, 1964), <https://www.c-span.org/video/?31232-1/goldwater-1964-campaign-commercials>.

23. Arthur Rizer & Lars Trautman, *The Conservative Case for Criminal Justice Reform*, THE GUARDIAN (Aug. 5, 2018).

24. Michael Tonry, *Why Crime Rates Are Falling Throughout the Western World*, 43 CRIME & JUST. 1 (2014).

25. The calls for tough-on-crime policies have little connection to actual crime rates, as these calls have persisted when crime is down and when crime is up.

26. ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* (Harv. Univ. Press 2016).

27. *Id.*

28. Nixon made law-and-order a central theme of his campaign, dedicating 17 speeches solely to the topic. His paid media campaign also focused on the issue, with one of his TV ads

1971, he launched a new War on Drugs, proclaiming, “public enemy number one in the United States is drug abuse...it is necessary to wage a new, all-out offensive.”²⁹ The declaration of the War on Drugs was more political in nature than a genuine response to a public health problem.

Law-and-order politics gained even more steam under President Ronald Reagan. He not only ran on the platform but also launched his own more aggressive War on Drugs that pumped hundreds of millions of dollars into law enforcement.³⁰ His media offensive was just as damaging, perpetuating racist images of a crack-cocaine epidemic plaguing American cities and Black communities, showing none of the empathy seen today in response to the opioid epidemic in rural white communities.³¹ Within a few years of launching a new War on Drugs in 1982, both funding for drug law enforcement and the political focus on the drug war had increased substantially.³² As a result, there was a surge of arrests for drug offenses beginning in the 1980s, particularly in low-income communities of color, which continues today.³³

Reagan’s successor, President George H.W. Bush, boosted the racist message even further when he ran the infamous Willie Horton campaign ad featuring a Black man convicted of murder who, while on work furlough, raped a white woman.³⁴ But by the late 1980s, many more Democratic politicians adopted the tough-on-crime rhetoric, seeking to wrest control of

explicitly calling on voters to reject the “lawlessness” of the civil rights movement. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 59 (The New Press 2012). Nixon tapped into white voter fear over the riots (or what many would call rebellions) taking place across the country, including following the murder of Martin Luther King Jr. in 1968.

29. Chris Barber, *Public Enemy Number One: A Pragmatic Approach to America’s Drug Problem*, RICHARD NIXON FOUND. (June 29, 2016), <https://www.nixonfoundation.org/2016/06/26404/>.

30. Ronald Reagan, U.S. President, Address to the Nation on the Campaign Against Drug Abuse (Sept. 14, 1986), <https://www.reaganlibrary.gov/archives/speech/address-nation-campaign-against-drug-abuse>.

31. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 55 (The New Press 2012).

32. *Id.*

33. *Id.*

34. Brian Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars Are Still Fresh*, N.Y. TIMES (Dec. 3, 2018). The ad blamed Bush’s opponent, Massachusetts governor Michael Dukakis, for the rape. *Id.* This racist ad played on TVs across the nation for months during the 1988 presidential election. *Id.*

crime issues from Republicans.³⁵ In fact, the two parties began a bidding war calling for increased penalties for drug use and other offenses.³⁶ Senator Joseph R. Biden was one of the biggest proponents of this strategy.³⁷ According to *The New York Times*, in 1989, Senator Biden criticized President George H. W. Bush for “not doing enough to put ‘violent thugs’ in prison.”³⁸ According to the *Times*:

In a 1994 Senate floor speech, [Biden] likened himself to another Republican president: “Every time Richard Nixon, when he was running in 1972, would say, ‘Law and order,’ the Democratic match or response was, ‘Law and order with justice’ — whatever that meant. And I would say, ‘Lock the S.O.B.s up.’”³⁹

But it was Bill Clinton who as a Democrat most seized on this strategy while running for president in 1992.⁴⁰ Clinton, the then Governor of Arkansas, left the presidential campaign trail right before the first primary to oversee the execution of Ricky Ray Rector, a mentally impaired Black man who had such little conception of reality that he asked for the dessert from his last meal to be saved until the morning.⁴¹ Once elected, Clinton championed habitual offender and truth-in-sentencing laws and the 1994 Crime Bill, all of which continue to lead to extreme sentences and exacerbate racial disparities in incarceration.⁴²

By the late 1990s, there were few differences between many Democrats and Republicans on matters of crime and law-and-order. According to the National Academy of Sciences, by 1994, every state had adopted at least one

35. Sheryl Gay Stolberg & Astead W. Herndon, ‘*Lock the S.O.B.s Up*’: *Joe Biden and the Era of Mass Incarceration*, N.Y. TIMES (June 25, 2019); German Lopez, *The controversial 1994 crime law that Joe Biden helped write, explained*, VOX (Sep. 29, 2020).

36. Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019), <https://www.aclu.org/blog/smart-justice/mass-incarceration/how-1994-crime-bill-fed-mass-incarceration-crisis>; TRAVIS, *supra* note 6 at 122.

37. Stolberg & Herndon, *supra* note 35.

38. *Id.*

39. *Id.*

40. ALEXANDER, *supra* note 31. See also Gwen Ifill, *THE 1992 CAMPAIGN: The Democrats; Clinton, in Houston Speech, Assails Bush on Crime Issue*, N.Y. TIMES (July 24, 1992).

41. Ron Fournier & National Journal, *The Time Bill Clinton and I Killed a Man*, THE ATLANTIC MONTHLY (May 28, 2015). Following the execution, Clinton said “no one can say I’m soft on crime.” Michael Kramer, *Frying Them Isn’t the Answer*, TIME MAGAZINE: THE POLITICAL INTEREST (Mar. 14, 1994).

42. Ofer, *supra* note 36.

mandatory minimum law.⁴³ What constituted a liberal versus a conservative politician became unclear, at least when it came to questions of criminal justice.

ii. Police Respond with a Broken Windows and tough-on-crime approach

As the law-and-order narrative swept the United States, mayors and police departments responded to these changes in political incentives accordingly and began implementing their own versions of tough-on-crime strategies.

In the 1980s, as Presidents Reagan and Bush pushed the tough-on-crime narrative, a new theory of policing began to take hold: Broken Windows. First introduced in a 1982 Atlantic Monthly article, proponents of this theory argued that the appearance of disorder breaks down community controls and leads to community members feeling less committed to their neighborhoods, thus allowing for the introduction of criminal elements into a community.⁴⁴

43. TRAVIS, *supra* note 6, at 83.

44. George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC MONTHLY (Mar. 1982). According to the article, “social psychologists and police officers tend to agree that if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken...[O]ne unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing.” *Id.* “We suggest that “untended” behavior also leads to the breakdown of community controls. A stable neighborhood of families who care for their homes, mind each other’s children, and confidently frown on unwanted intruders can change, in a few years or even a few months, to an inhospitable and frightening jungle...Such an area is vulnerable to criminal invasion. Though it is not inevitable, it is more likely that here, rather than in places where people are confident they can regulate public behavior by informal controls, drugs will change hands, prostitutes will solicit, and cars will be stripped.” *Id.* Thus, they concluded, “serious street crime flourishes in areas in which disorderly behavior goes unchecked,” and this disorder must be checked and stopped. *Id.* Broken windows policing has been widely criticized. See Bernard Harcourt, *Policing Disorder: Can We Reduce Serious Crime by Punishing Petty Offenses?*, BOS. REV.: CRIME AND PUNISHMENT, Apr./May 2002 (criticizing the lack of an adequate definition of disorder, and suggesting that what proponents of broken windows policing might call disorder may be perceived entirely differently by another segment of the population, and may actually mean strong community bonds –graffiti is one example. The article also provides alternative theories for the decline in crime in New York City by providing examples of declining crime rates in other cities that did not implement broken windows policing); Benjamin Bowling, *The Rise and Fall of New York Murder: Zero Tolerance or Crack’s Decline?*, 39 BRIT. J. CRIMINOL. 531 (1999) (attributing the decrease in homicide rates in the 1990s to the decrease of the crack cocaine epidemic, which had begun before the implementation of broken windows policing); and Bernard Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998) (disputing the claim that reducing public disorder deters serious crimes).

Police can stop serious crimes from occurring by aggressively cracking down on minor crimes and any appearance of public disorder—such as graffiti, drugs, loitering, trespassing, intoxication, disorderly conduct, and fare-beating.⁴⁵

The authors of this theory, George Kelling and James Wilson, conceded that police officers responding aggressively to the appearance of public disorder and minor offenses (even those that are not criminal) raises Fourth Amendment and racial profiling concerns.⁴⁶ They recognized that these policies and practices might disproportionately target black and Latinx residents.⁴⁷ But ultimately, they largely ignored these concerns.⁴⁸

These aggressive strategies—relying primarily on arrests but also on stop-and-frisk and other surveillance tactics—have had devastating impacts on people of color. Nationwide arrests began to soar during this period. In 1980, police conducted 10,458,260 arrests.⁴⁹ By 1997, arrests had peaked at 15,290,920, an increase of 46 percent.⁵⁰ A 2008 study found that one out of three young adults—and nearly half of all black men—had an arrest record by age 23.⁵¹

New York City under Mayor Rudolph Giuliani was the first to experiment with Broken Windows policing (also known as order maintenance policing), offering important insight into the changes in policing practices nationwide.⁵² Giuliani made law and order his signature issue as mayor,

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* “The concern about equity is more serious. We might agree that certain behavior makes one person more undesirable than another but how do we ensure that age or skin color or national origin or harmless mannerisms will not also become the basis for distinguishing the undesirable from the desirable? How do we ensure, in short, that the police do not become the agents of neighborhood bigotry? . . . We can offer no wholly satisfactory answer to this important question. We are not confident that there is a satisfactory answer except to hope that by their selection, training, and supervision, the police will be inculcated with a clear sense of the outer limit of their discretionary authority. That limit, roughly, is this—the police exist to help regulate behavior, not to maintain the racial or ethnic purity of a neighborhood.”

49. HOWARD N. SNYDER, NCJ 234319, BUREAU OF JUSTICE STATISTICS: ARREST IN THE UNITED STATES, 1980-2009 at 14 (2011), <https://www.bjs.gov/content/pub/pdf/aus8009.pdf>.

50. HOWARD N. SNYDER, NCJ 239423, BUREAU OF JUSTICE STATISTICS: ARREST IN THE UNITED STATES, 1990-2010 at 16 (2012), <https://www.bjs.gov/content/pub/pdf/aus9010.pdf>.

51. Erica Goode, *Many in U.S. Are Arrested by Age 23, Study Finds*, N.Y. TIMES (Dec. 19, 2011).

52. Shankar Vedantam, *How a Theory of Crime and Policy Was Born, and Went Terribly Wrong*, NPR: HIDDEN BRAIN (Nov. 1, 2016, 12:00AM), <https://www.npr.org/2016/11/01/>

encouraging NYPD officers to implement Broken Windows policing by responding aggressively to so-called quality of life offenses.⁵³ Concentrating policing on low-level offenses in neighborhoods with signs of “disorder” brought massive numbers of poor Black and Latinx people into the criminal legal system. According to research conducted by Issa Kohler-Hausmann, in New York City, misdemeanor arrests increased four-fold and summonses three-fold compared to pre-Broken Windows levels.⁵⁴ These increases were the greatest for Black and Latinx individuals, measured both by total individuals and by arrest-per-individual.⁵⁵

Following Giuliani, Mayor Michael Bloomberg continued the Broken Windows strategy and increased dramatically another so-called preventive measure meant to reduce serious crimes: stop-and-frisk. During Bloomberg’s first year in office, the NYPD conducted 97,296 stops.⁵⁶ By 2011, the number of stops increased to 685,724.⁵⁷ The vast majority of people stopped-and-frisked were innocent of any crime. Black and Latinx residents comprised 86.8 percent of stops of innocent people, and 51.5

500104506/broken-windows-policing-and-the-origins-of-stop-and-frisk-and-how-it-went-wrong.

53. *Rudolph Giuliani Interview*, ACADEMY OF ACHIEVEMENT (May 3, 2003), <http://www.achievement.org/autodoc/page/giu0int-1>. (“Well, I very much subscribe to the “Broken Windows” theory, a theory that was developed by Professors Wilson and Kelling, 25 years ago maybe. The idea of it is that you had to pay attention to small things, otherwise they would get out of control and become much worse...Aggressive panhandling, the squeegee operators that would come up to your car and wash the window of your car whether you wanted it or not—and sometimes smashed people’s cars or tires or windows—the street-level drug-dealing; the prostitution; the graffiti, all these things that were deteriorating the city.”); see also Catherine S. Manegold, *Giuliani, On Stump, Hits Hard at Crime and How to Fight It*, N.Y. TIMES (October 13, 1993); William J. Bratton, *The New York City Police Department’s Civil Enforcement of Quality-of-Life Crimes*, 3 J. OF L. AND POL’Y 447 (1995). William J. Bratton, Mayor Giuliani’s first police commissioner, had previously implemented this strategy as head of the New York City Transit police and under Giuliani expanded it to the entire city. *Id.*

54. See ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* 43 (2018).

55. As documented by Kohler-Hausmann, this was the outgrowth of the extreme concentration of misdemeanor arrests in precincts with high levels of poverty and serious crime and, given residential segregation, majority-Black-and-Latinx populations. *Id.* at 55.

56. Emma G. Fitzsimmons and Joseph Goldstein, *‘I Was Wrong,’ Bloomberg Says. But This Policy Still Haunts Him.*, N.Y. TIMES (Jan. 21, 2020).

57. Donna Lieberman, Art Eisenberg, Chris Dunn, Udi Ofer, *Bloomberg Letter: Stop and Frisk*, NYCLU (Oct. 4, 2012), https://www.nyclu.org/sites/default/files/releases/Bloomberg_letter_StopandFrisk_10.04.12.pdf. While the program was conducted in the name of retrieving guns—which as framed was not a constitutional legal basis for a stop since it lacked individualized suspicion—only 0.1 percent of stops and 0.2 percent of frisks resulted in the recovery of a gun.

percent of these stops were of individuals age 14-24.⁵⁸ In 2011, the number of stops of young black men (ages 14 to 24) exceeded the entire city population of young black men (168,126 as compared to 158,406).⁵⁹

As police began to emphasize street-level drug arrests, it became a primary driver in increasing arrest rates in New York City and across the nation. Nationwide, between 1980 and 2015, arrests for drug offenses nearly tripled, rising from 580,900 arrests in 1980 to 1,558,862 in 2019.⁶⁰ Of those total arrests, the vast majority, 86.7 percent in 2019, were for possession.⁶¹

c. Prosecutors act as the frontline in mass incarceration nation

As the politics of mass incarceration infiltrated presidential politics and policing practices, they also influenced prosecutorial practices. The rise in prosecutorial power is linked to the changing politics of mass incarceration. As the United States adopted a tough-on-crime approach, prosecutors,⁶² who are politicians elected in all but three states (AK, CT, and NJ) and Washington DC, responded accordingly by utilizing newly created mandatory minimum laws and doubling down on a new War on Drugs.

Prosecutors work closely with police and take over the case following an arrest. They have extraordinary discretion to bring charges, propose bail, and decide on plea deals with little interference from defense attorneys or even judges. Prosecutors can bring charges that are higher than warranted and pressure defendants to negotiate in plea discussions and accept unfair plea deals rather than face more severe consequences at trial. People who can afford a vigorous defense can fight off this pressure, but most people cannot.

The same pressures faced by police to become tougher on crime also encouraged and even incentivized prosecutors to become more punitive in

58. *Id.*

59. *Id.*

60. Sawyer & Wagner, *supra* note 3.

61. *Arrests for Drug Abuse Violations*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/arrest-table.xls> (last visited Dec. 7, 2020). Few of those entering prison because of drug offenses were kingpins or major traffickers. *Id.* A substantial number were convicted of no greater offense than personal drug use or possession. *Id.* In 2019, nearly 24 percent of people in state prisons for drug offenses were incarcerated simply for drug possession. *Id.*

62. In total, there are more than 2,300 prosecutor offices. STEVEN W. PERRY & DUREN BANKS, NCJ 234211, BUREAU OF JUSTICE STATISTICS: PROSECUTORS IN STATE COURTS (2011), https://www.bjs.gov/index.cfm?ty=pb_detail&iid=1749.

their practices and in the discretion that they exercise.⁶³ As prosecutors began to adopt harsher law-and-order viewpoints, sentencing outcomes began to reflect these new priorities. A prosecutor's political views played a determinative role in their sentencing practices.⁶⁴ The number of people serving time in prison and the length of sentences under a prosecutor's jurisdiction were heavily influenced by a prosecutor's political leanings and whether they subscribe to the tough-on-crime philosophy.⁶⁵

Emily Bazelon gives the example of a prosecutor's office in Memphis handing out the "Hammer Award" for prosecutors who win heavy sentences.⁶⁶ As incentives changed, and prosecutors were rewarded for aggressive and punitive practices, prosecutors became a more dominant force in the criminal legal system. As the police brought more people into the criminal legal system, prosecutors became more empowered politically to use their discretion to lock more people up for the longest period possible.⁶⁷

Being a prosecutor has also been a golden ticket to a successful political career. Among public officials who held office between 2007-2017, 38 percent of state attorneys general, 19 percent of governors, and 10 percent of U.S. senators had prosecutorial backgrounds.⁶⁸ This was true in Republican as well as Democratic circles. Being tough-on-crime has been good politics for a prosecutor and their ambitions. As this article argues, the political incentives have come from up top, as the top office holders in both political parties advanced tough-on-crime platforms.

63. See, e.g., TRAVIS, *supra* note 6, at 104.

64. Ashna Arora, *Too Tough on Crime? The Impact of Prosecutor Policies on Incarceration*, AM. ECON. ASS'N (Dec. 31, 2018), <https://www.aeaweb.org/conference/2019/preliminary/paper/9bQ48ZTA>.

65. *Id.*

66. Sean Illing, *How Bad Prosecutors Fuel America's Mass Incarceration Problem*, VOX (May 15, 2019).

67. There is little oversight of prosecutorial discretion, The Model Rules of Professional Responsibility require that prosecutors make "reasonable" charging decisions. *Criminal Justice Standards: Prosecution Function*, A.B.A. The federal Equal Protection Clause prohibits prosecutors from acting with racial bias, but at the same time the United States Supreme Court has granted prosecutors absolute immunity from claims brought under § 1983 when acting within the scope of their duties. Bidish Sarma, *Private: After 40 Years, Is It Time to Reconsider Absolute Immunity for Prosecutors?*, AMERICAN CONSTITUTION SOCIETY (July 19, 2016), <https://www.acslaw.org/expertforum/after-40-years-is-it-time-to-reconsider-absolute-immunity-for-prosecutors/>.

68. Wendy Sawyer & Alex Clark, *New Data: The Rise of the "Prosecutor Politician"*, PRISON POL'Y INITIATIVE (July 13, 2017), <https://www.prisonpolicy.org/blog/2017/07/13/prosecutors/>.

Prosecutors have always had tremendous power and discretion. Eighty years ago, in 1940, Attorney General Robert Jackson said: “The prosecutor has more control over life, liberty, and reputation than any other person in America.”⁶⁹ But during the law-and-order era, prosecutorial practices became even more aggressive, as prosecutors began to face additional pressures to engage in extreme sentencing practices and were now armed with new tools that gave them even more power to exercise their discretion in a punitive manner.⁷⁰ As the police began to arrest more people, prosecutors also began to use their own discretion to influence incarceration rates by charging individuals more aggressively.

According to findings by John Pfaff, during the 1990s, prosecutors began to charge many more arrestees with felonies.⁷¹ In 1994, about one of every three arrests turned into a felony case.⁷² By the end of the 2000s, it was two out of every three arrests.⁷³ According to Pfaff’s analysis, about half of the increase in felony filings came from cases of misdemeanors being charged as felonies.⁷⁴ Prior to the 1990s and this change in prosecutorial behavior, many of these arrests would not convert to felony cases and would never lead to the type of prison time that they do now.

The growing number of mandatory minimum laws and harsh sentencing schemes, such as habitual offender and truth-in-sentencing laws,⁷⁵ only increased the power of prosecutors. Mandatory punishments transferred

69. He continued: “His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations... The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial.” Robert H. Jackson, *The Federal Prosecutor*, ROBERT H. JACKSON CENTER (Dec. 1, 1940), <https://www.roberthjackson.org/speech-and-writing/the-federal-prosecutor/>.

70. Richard A. Oppel Jr, *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES (Sep. 25, 2011), (“No matter how strongly defendants believe they are innocent, he said, they could be taking dangerous risks by, for example, turning down a one-year plea bargain when the prosecutor threatens additional charges that carry a mandatory sentence 10 times as long.”)

71. JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM* (Basic Books 2017). The data Pfaff relied on has been criticized by some. See Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835 (2018).

72. *Id.*

73. *Id.*

74. *Id.*

75. According to the National Academy of Sciences, between 1975 and 1996, mandatory minimums law proliferated. By 1994, every state had adopted at least one mandatory minimum law, including for drug offenses and serious felonies. TRAVIS, *supra* note 6, at 83.

tremendous discretion in handling cases to prosecutors, who were now armed with the discretion to charge individuals or not charge them under laws that would mandate extreme sentences.

One of the most powerful ways that prosecutorial power gets manifested is through the culture of plea deals. Jury trials are exceedingly rare in the criminal legal system, as the vast majority of people across all categories of offenses and at the state and federal level resolve their cases through guilty pleas.⁷⁶ According to a recent Vera Institute report, a criminal case is disposed of by plea bargaining every two seconds.⁷⁷ Ninety-seven percent of convictions in large urban state courts and 90 percent in federal court are decided through guilty pleas.⁷⁸ Of these, more than 90 percent are a result of plea bargaining.⁷⁹ For this reason, former Supreme Court Justice Anthony Kennedy stated in 2012 that “criminal justice today is for the most part a system of pleas, not a system of trials.”⁸⁰

Many prosecutors use the threat of adding charges and sentencing enhancements or the promise of dropping charges to pressure defendants into agreeing to a plea deal and giving up their right to a trial.⁸¹ The more draconian the punishment that a prosecutor has at their disposal—high mandatory minimums or the ability to charge a young person as an adult—the more leverage they have to persuade someone to take a plea bargain instead of risking a trial.⁸² As Emily Bazelon illustrated in her book *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration*, in New York, a prosecutor can charge a shoplifter with misdemeanor theft, felony theft, or burglary under certain circumstances.⁸³ The punishments for these crimes range from a few months of probation to seven years in prison.⁸⁴ That is extraordinary discretion in the hands of one

76. Ram Subramanian, Léon Digard, Melvin Washington II & Stephanie Sorage, *In the Shadows: A review of the Research on Plea Bargaining*, VERA INST. OF JUST., 1 (Sept. 2020).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

81. *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, HUMAN RIGHTS WATCH (Dec. 5, 2013), <https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead>.

82. Oppel, *supra* note 70.

83. David Garland, *The Road to Ending Mass Incarceration Goes Through the DA's Office*, THE AMERICAN PROSPECT (Apr. 8, 2019), <https://prospect.org/justice/road-ending-mass-incarceration-goes-da-s-office/>.

84. *Id.*

person.⁸⁵

Similar to the changes in policing, the criminal docket today for prosecutors is mostly comprised of low-level offenses and misdemeanors, which feature extreme racial disparities. Black people make up nearly 30 percent of national misdemeanor arrests, although they represent 12 percent of the population.⁸⁶ Misdemeanor charges make up around 70-80 percent of state criminal dockets, doubling since 1972, according to the ABA, rising from about 5 million to 10 million cases⁸⁷ (although by some estimates, the number is as high as 13 million⁸⁸). These are charges of drug possession, driving with a suspended license, simple assault, disorderly conduct, or public intoxication, classic Broken Windows arrests.⁸⁹ And prosecutors decline to prosecute few of these misdemeanor arrests. Misdemeanor declination rates range from two percent⁹⁰ to 12 percent (felony arrests are declined at much higher rates, 25-50 percent).⁹¹ In a study of the Manhattan District Attorney's office, the Vera Institute found that four percent of misdemeanor cases and 11 percent of violations were declined for prosecution when initially presented by police.⁹²

85. *Id.*

86. Alexandra Natapoff, *When the Police Become Prosecutors*, N.Y. TIMES (Dec. 26, 2018).

87. A.B.A. Comm. On Ethics & Prof'l Responsibility, Formal Op. 486 (2019). *See also*, Shina Baradaran Baughman & Megan S. Wright, *Prosecutors and Mass Incarceration*, 94 USC L. REV. 1, 6-7, (forthcoming 2021).

88. Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 Bos. U. L. REV. 731, 737, 745, 747, 764-65, 771 (2018). *See also* Alexandra Natapoff, *supra* note 87.

89. K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. OF L. & SOC. CHANGE 271, 273, 282, 289, 299, 303-04 (2009).

90. Alexandra Natapoff, *Criminal Misdemeanor Theory and Practice*, in OXFORD HANDBOOKS ONLINE 1, 7 (2020), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-9?print=pdf>.

91. KOHLER-HAUSMANN, *supra* note 54. On felony declination rates, *see*, Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1716, 1719-20 (2010).

92. Cases will get dismissed at subsequent phases of the criminal process, up to 36 percent of felonies and 18 percent of misdemeanors, excluding cases adjourned in contemplation of dismissal. *See*, Besiki Luka Kutateladze & Nancy R. Andiloro, *Prosecution and Racial Justice in New York County*, VERA INST. OF J., (Jan. 31, 2014). Erik Luna, *Prosecutorial Decriminalization*, 102 J. OF CRIM. L. & CRIMINOLOGY 785, 795 (2013) (as with all issues related to criminal justice, the practice varies tremendously based on the jurisdiction, and definition vary across jurisdictions, as some include in declination data a case that is diverted and later dismissed).

As prosecutor budgets grew, so did cases of low-level offenses, comprising a large majority of the criminal docket. Potentially billions of dollars a year are spent on prosecuting cases that many would argue should not be before the criminal legal system in the first place.

d. Ten years of reforms result in inadequate progress

Nationwide incarceration rates peaked in 2009 and since then have slowly begun to decrease.⁹³ This reduction has come from a growing movement, sometimes bipartisan, to reform past practices that have led to high incarceration rates.⁹⁴ The movement has focused on changing sentencing policies, pretrial and police practices, parole, and probation, as well as removing some of the tens of thousands of legal barriers that have been placed on people living with a criminal record.⁹⁵ Hundreds of laws have been passed at the local, state, and even federal levels, many of them pushed by new alliances of progressives and liberals with conservatives⁹⁶ and libertarians.⁹⁷

93. John Gramlich, *America's incarceration rate is at a two-decade low*, PEW RESEARCH CENTER (May 2, 2018), <https://www.pewresearch.org/fact-tank/2018/05/02/americas-incarceration-rate-is-at-a-two-decade-low/>.

94. *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, ACLU (Nov. 16, 2017), <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds>.

95. See, e.g., Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, THE SENTENCING PROJECT (Nov. 5, 2018), <https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/>; *Sentencing Policy and Practices*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/research/sentencing_policy_and_practices/; *What's at Stake*, ACLU, <https://www.aclu.org/issues/smart-justice>.

96. Even though the tough-on-crime narratives originated to a large extent with conservative Republicans, with many willing champions among Democrats, recent years have even seen some Republicans change their tune with red states also passing reforms, even deep red states. In 2016, for example, Oklahoma voters, responding to a ballot initiative put forward by the ACLU and our allies on the right, approved a law to defelonize simple drug possession and raise the monetary threshold for felony property offenses, while reinvesting savings into a wide range of alternatives to incarceration like mental health services and drug treatment programs. States like Louisiana have also seen significant reforms in recent years. See *SQ 780 and 781*, ACLU OF OKLAHOMA, <https://www.acluok.org/en/campaigns/sq-780-and-781>.

97. Inimai Chettiar, *The 'Tough on Crime' Wave Is Finally Cresting*, THE DAILY BEAST (Jan. 14, 2018), <https://www.thedailybeast.com/the-tough-on-crime-wave-is-finally-cresting>. Reforms have passed in both blue states and red states, although the pace and audacity of reforms have been greater in blue states, which have seen a higher rate of decarceration, particularly in places like New Jersey, Connecticut and New York, which have witnessed incarceration levels fall from 36 to 39 percent from their peak. Nazgol Ghandnoosh, *U.S. Prison Population Decline: Insufficient to Undo Mass Incarceration*, THE

This movement also began to change presidential politics. In 2008, under the candidacy of Barack Obama, Democratic politics began to shift, adopting a “smart on crime” platform, a major reversal from the Democrats’ 1990s tough-on-crime platforms that boasted, among other things, that “President Clinton made three-strikes-you’re-out the law of the land.”⁹⁸ Even the Republican National Committee platform began to evolve, and by 2012 stated, “Prisons should do more than punish; they should attempt to rehabilitate.”⁹⁹ At the same time, many within the Republican Party continue to perpetuate a tough-on-crime narrative, including President Donald Trump, who has consistently run on a tough-on-crime platform, invoking language

SENTENCING PROJECT (May 19, 2020), <https://www.sentencingproject.org/publications/u-s-prison-decline-insufficient-undo-mass-incarceration/>. In New Jersey, for example, incarceration levels peaked in 1999, and since then a series of reforms, including improving the parole process to allow for more early release and reducing re-incarceration for technical violations of parole, as well as changes to the states’ drug free zone laws have led to almost a 40 percent decrease in the state’s prison population. *Id.* New Jersey’s jail population has also dramatically decreased since the passage of bail reform in 2014. *Id.* While New Jersey leads the nation in decarceration, it also has among the highest rates of racial disparities in incarceration. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf>.

98. By 2012, the Democratic Party committed to “continue to fight inequalities in our criminal justice system.” Maurice Chammah, *Two Parties, Two Platforms on Criminal Justice*, MARSHALL PROJECT (July 18, 2016). Today, candidates who in the past supported tough-on-crime measures, like Joe Biden and Kamala Harris, have had to repudiate some of their past stances in order to survive a Democratic primary. Michael Kranish, *Harris and Biden once were at odds on criminal justice issues. Finding common ground helped lead him to pick her as his running mate.*, THE WASHINGTON POST (Aug. 11, 2020). Joe Biden, who at the time of the writing of this article is the president elect of the United States, in particular has had to walk back his championing of the 1994 Crime Bill, which created dozens of new federal capital crimes, mandated life sentences for some offenses, and authorized more than \$16 billion for state prison grants and expansion of state and local police forces. *Id.* By 2020, at least within the Democratic Party, the rhetorical shift has been significant. During the 2020 primary, the ACLU was able to get 14 of Democratic presidential candidates to commit to a 50 percent decarceration goal should they win. RIGHTS FOR ALL, <https://rightsforall.org> (last visited Nov. 27, 2020). Whether this was just lip-service during a contested primary or genuine commitments remains to be seen.

99. Chammah, *supra* note 98.

more racist than the platforms of Barry Goldwater and Richard Nixon,¹⁰⁰ even while supporting some criminal justice reforms.¹⁰¹

As the national narrative on mass incarceration began to change, the issue started to resonate differently in down-ballot races. Advocates began to recognize that these often-ignored races can have an even larger impact on criminal justice policies. At the top of the list are prosecutor races. Historically, the public hardly paid attention to prosecutorial elections. A poll conducted by the ACLU in November 2017 found that 47 percent of voters across party lines did not know that prosecutors are elected.¹⁰² More than half of voters said they would skip or didn't know if they would vote in the next election for prosecutor.¹⁰³

Yet when asked about what the role of a prosecutor should be, voters clearly wanted someone committed to ending mass incarceration and racial bias in the criminal legal system. Eighty-nine percent of voters said it was very important for prosecutors to actively work towards ending mass incarceration.¹⁰⁴ Eighty-eight percent of voters are more likely to support a prosecutor who believes in reducing racial bias in the criminal justice system, and 91 percent believe it is important for a prosecutor to prioritize reducing racial inequality, including 90 percent of white voters, 90 percent of Latinx voters, and 95 percent of Black voters.¹⁰⁵

Seeing this opportunity, over the past several years, a movement to influence the role of prosecutors through the ballot box has emerged. For the first time ever, advocates are paying close attention to local races for prosecutor, forcing candidates to commit to reforms that will lead to

100. Austin Sarat, *Trump's law-and-order campaign relies on a historic American tradition of racist and anti-immigrant politics*, THE CONVERSATION (Sep. 8, 2020), <https://theconversation.com/trumps-law-and-order-campaign-relies-on-a-historic-american-tradition-of-racist-and-anti-immigrant-politics-145366>. Moreover, many prominent figures within the Republican Party have begun to attack some of the strategies deployed to reduce mass incarceration, and in particular, to hold prosecutor's accountable for reducing mass incarceration. See John Pfaff, *A No-Holds-Barred Assault on Prosecutors*, THE APPEAL (Aug. 13, 2019), <https://theappeal.org/bill-barr-prosecutors/>. Those who support reform candidates have been deemed as "radicals" who are hurting public safety. See Pat Nolan, *Beware Of George Soros' Trojan Horse Prosecutors*, THE AMERICAN CONSERVATIVE (Sep. 11, 2020), <https://www.theamericanconservative.com/articles/beware-of-george-soros-trojan-horse-prosecutors/>.

101. German Lopez, *The First Step Act, explained*, VOX (Feb. 5, 2019).

102. *New Polling of Voters' Opinions Towards Prosecutors*, ACLU (Dec. 12, 2017), <https://www.aclu.org/fact-sheet/new-polling-voters-opinions-towards-prosecutors>.

103. Detailed poll findings on file with author.

104. *Id.*

105. *Id.*

decarceration, educating voters on candidate stances, and mobilizing voters to come out on election day.

The same tactics used to build mass incarceration are now being positioned as tools to dismantle mass incarceration: prosecutorial discretion.¹⁰⁶ Advocates are applying pressure on prosecutorial candidates to commit to using their discretion to change the way they treat people, including in their charging, bail, and plea bargaining decisions.¹⁰⁷ Pressure is being applied to decline prosecution for a range of offenses and to stop asking for cash bail that could lead to pretrial detention.¹⁰⁸ The discretion used to respond to law-and-order political pressures is now being used to respond to a racial justice and end mass incarceration message.¹⁰⁹

When I joined the national ACLU staff in October 2016 to lead the organization's campaign to end mass incarceration, one of the first things I did was launch a campaign to engage voters in prosecutorial races.¹¹⁰ This was the first time in the ACLU's 96-year history that we launched a voter education and mobilization campaign in candidate races. I couldn't see how we could end mass incarceration without engaging in prosecutor races, given their tremendous influence over incarceration rates. I hired Taylor Pendergrass to help execute this strategy.

Our first race was in Philadelphia, where there was a crowded open-seat DA race, which is a rare occurrence, particularly in a high incarceration city like Philadelphia. Philadelphia district attorneys have historically been tough-on-crime prosecutors, and this was a chance to change that. We worked in close coordination with a local coalition comprised of numerous grassroots organizations, the Philadelphia Coalition for a Just District Attorney.¹¹¹ The ACLU focused on the 11,438 ACLU members registered to vote in Philadelphia (around 20 percent of what a candidate would need during a normal primary for DA to win), conducted 26,788 door knocks, and

106. German Lopez, *If you care about ending mass incarceration, look at what Philadelphia just did*, VOX (Nov. 8, 2017).

107. *Prosecutorial Reform*, ACLU, <https://www.aclu.org/issues/smart-justice/prosecutorial-reform> (last visited Nov. 19, 2020).

108. *After Cash Bail: A Framework for Reimagining Pretrial Justice*, BAIL PROJECT, <https://bailproject.org/after-cash-bail/> (last visited Nov. 19, 2020).

109. *Reducing Disparity in the Criminal Justice System: A Manual for Practitioners and Policymakers*, THE SENTENCING PROJECT, 2008, at 1.

110. The initiative launched officially in April 2017. *See Initiative is Part of Broader Effort to Reduce U.S. Jail and Prison Population*, ACLU (Apr. 26, 2017) <https://www.aclu.org/press-releases/aclu-launches-new-initiative-overhaul-prosecutorial-practices>.

111. *Philadelphia Coalition for a Just District Attorney*, DECARCERATE PA, <https://decarceratepa.info/content/philadelphia-coalition-just-district-attorney> (last visited Nov. 19, 2020).

hired and trained 51 canvassers who were formerly incarcerated to educate and mobilize the thousands of ACLU members who lived in the city.¹¹² We held candidate debates, sent tens of thousands of mailers, made phone calls, and sent text messages.¹¹³ Larry Krasner won and is today one of the nation's leading proponents of using prosecutorial discretion to dismantle mass incarceration.¹¹⁴

This movement has only grown in intensity and scope. Even before the election of Larry Krasner, reform candidates had won, like Kim Foxx in Chicago and Aramis Ayala in Orange County, Florida. But since that election, the movement has spread much further, with more reform candidates winning, like Rachael Rollins in Boston, Chesa Boudin in San Francisco, Stephanie Morales in Portsmouth, Virginia, Parisa Dehghano-Tafti in Arlington, Virginia, and others. Candidates who have personal experience with the criminal legal system are winning, such as Rollins, who has talked about her two siblings who are incarcerated.¹¹⁵ As of this writing, there are competitive races in Phoenix, Los Angeles, New Orleans, and other jurisdictions that are largely referenda on a prosecutor's role in reducing mass incarceration.

Over the past four years, the ACLU alone has engaged in 45 district attorney races in 15 states, knocking on more than 400,000 doors, placing tens of thousands of phone calls, sending questionnaires to hundreds of candidates, paying for campaign materials seen by millions of people, and organizing election events attended by thousands of people.¹¹⁶ There are numerous organizations across the nation, particularly grassroots organizations, who have taken charge of their local DA races. National political action committees, like George Soros's Justice and Public Safety

112. Udi Ofer, *The 2017 Elections Show Criminal Justice Reform Could be a Winning Issue*, ACLU (Nov. 8, 2017), <https://www.aclu.org/blog/smart-justice/2017-elections-show-criminal-justice-reform-can-be-winning-issue>.

113. Ben Wofford, *The ACLU's Radical Plan to Fight Jeff Sessions*, POLITICO (May 16, 2017), <https://www.aclu.org/blog/smart-justice/2017-elections-show-criminal-justice-reform-can-be-winning-issue>.

114. Larry Krasner has been criticized, including by the ACLU for not living up to his progressive promises. *See, e.g.*, Reggie Shuford, *Larry Krasner is Not living up to His Reputation as a Progressive Reformer*, INQUIRER (Aug. 3, 2020) (criticizing Krasner for failing to use his authority to drop charges against those accused of low-level offenses, or to request that cash bail be suspended in cases where a payment is the only thing keeping a person incarcerated).

115. Mark Berman, *These Prosecutors Won Office Vowing to Fight the System. Now, The System is Fighting Back*, WASHINGTON POST (Nov. 9, 2019 04:52 PM).

116. Taylor Pendergrass, *In District Attorney Races Across the Nation, Reform is Still on the Agenda*, ACLU (Oct. 29, 2018), <https://www.aclu.org/blog/smart-justice/mass-incarceration/district-attorney-races-across-nation-reform-still-agenda>.

PAC, Color of Change PAC, and Real Justice PAC are focusing on electing progressive prosecutors.¹¹⁷

But these reforms have been slow and inadequate to address the core problem of mass incarceration. Incarceration rates are still at the 1990s levels. According to the Sentencing Project, all but six states have reduced their prison populations since reaching their peak levels, but in 25 states, the reduction in imprisonment levels was less than 10%.¹¹⁸ Six states had their highest ever prison populations in 2018: Wyoming, Nebraska, Iowa, Wisconsin, Kansas, and Oregon.¹¹⁹

By 2019, the prison population in the United States was at 1.4 million people, declining by 11 percent since reaching its peak level in 2009 (the prison incarceration rate declined 17 percent).¹²⁰ This followed a nearly 700 percent growth in the prison population between 1972 and 2009.¹²¹ At the pace of decarceration since 2009, averaging one percent annually, it will take 65 years—until 2085—to cut the U.S. prison population in half.¹²² Meanwhile, jails have seen an even slower pace of decarceration, with the volume of incarceration declining only six percent since 2008.¹²³ The United States continues to be an international anomaly, with exponentially higher incarceration rates than similar countries.¹²⁴ Other metrics of mass incarceration also paint a bleak picture. Police violence continues at the same rate, with about three people, disproportionately Black, shot and killed by police a day.¹²⁵ Law-and-order rhetoric continues to be deployed, including in campaigns for the highest office in the land.¹²⁶

117. *Endorsements*, REAL JUSTICE, <https://realjusticepac.org/endorsements/> (last visited Nov. 19, 2020).

118. Ghandnoosh, *supra* note 97.

119. *Id.*

120. See Press Release, U.S. Dep't of Justice, U.S. Imprisonment Rate at its Lowest Since 1995 (Oct. 22, 2020), https://www.bjs.gov/content/pub/press/p19_pr.pdf.

121. Ghandnoosh, *supra* note 97.

122. *Id.*

123. See Press Release, U.S. Dep't of Justice, Jail Incarceration Rates Decreased by 12% from 2008 to 2018 (Mar. 31, 2020), <https://www.bjs.gov/content/pub/press/ji18pr.pdf>.

124. Wagner & Sawyer, *supra* note 4.

125. Frank Edwards & Michael Esposito, *Police kill about 3 men per day in the US, according to new study*, THE CONVERSATION (Aug. 6, 2018), <https://theconversation.com/police-kill-about-3-men-per-day-in-the-us-according-to-new-study-100567> (study finds about three men killed everyday by police, with Black men being three times more likely to be killed by police than white men).

126. As of the time of writing, it is yet to be seen whether this message will resonate with voters, as early polling shows that fewer voters believe in Trump's law and order narrative. But that story is yet to be told and in 2016 it did allow candidate Trump to win. See Geoffrey Skelley, *Trump's Law and Order Message Isn't Resonating with Most Americans*,

Continuing down the same path of reforms is not enough. We need a new ideological framework and strategy.

II. The case for defunding prosecutors as part of the solution to ending mass incarceration

Despite more than a decade of reforms and hundreds of laws passing to tackle mass incarceration, the footprint of the criminal legal system is still expansive and an international anomaly.¹²⁷ Tens of thousands of people are out of prison due to reforms, but we have not achieved the transformational change needed to end mass incarceration, let alone come close to bringing the United States in line with other wealthy democratic nations. At this point, the solution must go beyond attempting to pass better laws: the system needs to be starved of resources and forced to dramatically narrow its focus and size.

At the heart of this must be a reorientation from the tough-on-crime era to a prioritization of social welfare, public health, and alternatives to policing, prosecution, and incarceration as the primary mechanisms to build community safety. Billions are spent on prosecution, policing and corrections, dwarfing investments in mental health care and other services and programs designed to prevent and interrupt violence. The United States has spent decades investing in extreme punishment as a way to address behaviors that shouldn't involve the criminal legal system in the first place.¹²⁸ Now it must do the opposite and invest in alternative models of public safety.

A large majority of a prosecutor office's docket today involves misdemeanor cases.¹²⁹ Prosecutor offices spend a substantial amount of their

FIVETHIRTYEIGHT (Sept. 4, 2020), <https://fivethirtyeight.com/features/trumps-law-and-order-message-isnt-resonating-with-most-americans>.

127. Wagner & Sawyer, *supra* note 4.

128. A recent note in the Harvard Law Review captured this point perfectly: "Insistence on maintaining the status quo in the criminal legal system due to some delusion that it's not oppressive is akin to eating the moldy bread. Advocating for more progressive prosecutors is akin to cutting around the spores. That might be better than going hungry, but it's still unsatisfying, and risky. This Note pleads with people to stop eating moldy bread." See *The Paradox of "Progressive Prosecution"* 132 HARV. L. REV. 748, 758 (Dec. 10, 2018). Similar points have been made by the Movement for Black Lives and individuals like Marbre Stahly-Butts and Amna Akbar. See also *id.* at 759. ("Fix[ing] broken systems without realizing that these systems are working to re-entrench and legitimize current power arrangements" is not going to work).

129. *America's Massive Misdemeanor System Deepens Inequality*, Equal Justice Initiative (Jan. 9, 2019), <https://eji.org/news/americas-massive-misdemeanor-system-deepens-inequality/>.

time prosecuting cases that do not pose a significant, let alone serious threat to public safety. These dockets are a reflection of the increase of misdemeanor cases during the tough-on-crime era, with police enforcing Broken Windows and order-maintenance policing strategies and prosecutors being encouraged to crack down on all offenses, no matter how small.

It's time to rethink this entire notion of public safety and deemphasize reforms that continue to rely primarily on the criminal legal system. Solutions should focus on removing criminal legal system actors, prosecutors included, from the equation altogether whenever possible. It means forcing our nation to rethink how we administer accountability and how we spend our resources. Reforms around avoiding wrongful convictions, one of the main mantras for progressive prosecutors,¹³⁰ are important, but not enough as they ignore the convictions that are technically "lawful" but not ethically right.

This reimagining of public safety will not occur voluntarily, and rarely by the actors who benefit financially, politically, and reputationally from it, including even those actors who ran on reform agendas. A system awash in resources will always find ways to spend those resources. For progressive prosecutors, this often means trying to create a criminal legal system that is fairer, which is understandable. But creating a fairer process to adjudicate an arrest that should not be handled by the criminal legal system in the first place is inadequate, even if well-meaning. Law enforcement offices, even those headed by progressives, cannot be relied upon to be the primary agents of change that will lead to loss of jobs, budgets, and power for these very same offices.

This is at the heart of the Black Lives Matter movement to defund the police—taking the billions of dollars spent on policing and reinvesting it in both preventive measures, like public health and education, but also in alternatives to police, like crisis intervention teams that can respond to a person suffering from a mental health breakdown without resorting to law enforcement tactics. It's about beginning the process of ending the culture and ideology that relies primarily on punishment in the criminal legal system and about moving away from an overreliance on procedural reforms, such as more trainings and body cameras, as the primary solutions to end police violence.

The same principle must be applied to prosecutors. The United States has seen an exponential growth in incarceration because of law-and-order

130. David A. Sklansky, *The Progressive Prosecutor's Handbook*, 50 U.C. DAVIS L. REV. 25 (2017).

politicians, including prosecutors, pushing policies and practices that have led to more activities and more people being criminalized and for longer periods.¹³¹ The solution to this problem is to stop criminalizing people and these activities and to remove prosecutors altogether from many of the situations currently before them.¹³²

a. Prosecutor offices grow significantly, including under reformers

Prosecutor offices have grown significantly during the era of mass incarceration. The nationwide data on prosecutorial budgets are limited, but even with this limited data, we know that during the rise of mass incarceration, prosecutor offices nationwide experienced tremendous increases in their staff size and their budgets. And data from local jurisdictions bolster this point.

In 2007, the last year for which we have nationwide data, prosecutor offices reported a total budget of \$5.8 billion (\$7.3 billion in 2020 dollars).¹³³ The earliest year for which we have reliable nationwide data is 1994, and the 2007 amount represents an increase of \$3 billion, or 71 percent, over the span of just 13 years.¹³⁴

In 2007, prosecutor offices employed nearly 78,000 staff, including 25,000 full time assistant prosecutors.¹³⁵ Tens of thousands of people earned their livelihood based on the current functioning of the criminal legal system. And these numbers do not include municipal attorneys or county attorneys,

131. Sarah Childress, *Michelle Alexander: "A System of Racial and Social Control,"* PBS (Apr. 29, 2014), <https://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/>.

132. A recent report found that the state of California and its cities and counties spend approximately \$50 billion a year on the criminal legal system. In comparison, this spending is about three times what California spends from its General Fund on higher education) and is roughly equivalent to state General Fund support for K-12 education. *See* Scott Graves & Chris Hoene, *How Much Does California Spend on Law Enforcement, the Criminal Legal System, and Incarceration?*, CAL. BUDGET & POLICY CTR. (Jun. 2020), <https://calbud.getcenter.org/resources/how-much-does-california-spend-on-law-enforcement-the-criminal-legal-system-and-incarceration/>. There must be a reprioritization of these investments, including in prosecutors.

133. Steven W. Perry & Duren Banks, *Prosecutors in State Courts, 2007 – Statistical Tables*, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STAT. (Dec. 2011), <https://www.bjs.gov/content/pub/pdf/psc07st.pdf>.

134. Carol J. DeFrances et al., *Prosecutors in State Courts, 1994*, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STAT. (Oct. 1, 1996), https://www.bjs.gov/index.cfm?ty=pb_detail&iid=1129.

135. Steven W. Perry & Duren Banks, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STAT. (2011), <https://www.bjs.gov/content/pub/pdf/psc07st.pdf>.

who primarily operate in courts of limited jurisdiction and handle almost exclusively low-level offenses.

Prosecutor offices reported closing 2.9 million cases charged as felonies in 2007, a 334 percent increase from 1990.¹³⁶ No data was reported for misdemeanors by the Bureau of Justice in the 2007 report, but recent studies estimate that there were 13.2 million misdemeanor cases filed in the United States in 2016, with the number of cases hitting their peak during the height of Broken Windows policing in the 1990s.¹³⁷

While nationwide data on prosecutorial budgets are not current, we do have access to updated data from the largest city in the United States, New York City. Crime rates in New York City have plummeted over the past 30 years, yet the five district attorney offices in the city only grew. New York City spends \$456 million a year to fund its five district attorney offices, one for each borough, and a citywide Special Narcotics Prosecutor.¹³⁸ The federal government and New York State spend an additional \$13 million.¹³⁹

According to an analysis by the Independent Budget Office, New York City-funded prosecutor staffing has tripled since 1980, from 1,551 individuals in 1980 to 4,688 in 2020.¹⁴⁰ This occurred even though felony arrests are down by 49 percent since 1989, and misdemeanor arrests are down 55 percent since peaking in 2010.¹⁴¹ In fact, although total arrests have fallen 45 percent from their peak in 2010, prosecutorial staffing during this same period increased by 31 percent.¹⁴²

The Manhattan DA office alone employs 1,551 staff people, the same number that all the DAs in New York City had combined 40 years ago.¹⁴³ During the 10 years of Cy Vance, who has run as a reformer and regularly speaks at reform conferences, the number of staff in the Manhattan DA office

136. *Id.*

137. Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731 (2018); *see also* Alexandra Natapoff, *supra* note 91.

138. N.Y. City Indep. Budget Office, *When Arrests Fell in New York City, Did Staffing of the District Attorney and Special Prosecutor Offices Also Decline?*, NEW YORK CITY BY THE NUMBERS (Aug. 26, 2020), <https://ibo.nyc.ny.us/cgi-park2/2020/08/when-arrests-fell-in-new-york-city-did-staffing-of-the-district-attorney-and-special-prosecutor-offices-also-decline/>.

139. *Id.* (“City taxpayer funds account for over 97 percent of appropriations for the six prosecutorial agencies, with the balance consisting of state or federal grants.”)

140. Some of that increase offset a drop in positions, from almost 500 in 1980 to less than 150 by May 2020, fully funded by state or federal grants. *Id.*

141. N.Y. CITY INDEP. BUDGET OFFICE, *supra* note 139.

142. *Id.*

143. Melanie Gray, *NYC’s District Attorneys Went on Hiring Spree as Arrests Plunged, Data Shows*, N.Y. POST (Sept. 19, 2020).

grew by 21 percent.¹⁴⁴ In 2019, DA Vance requested \$12 million for additional personnel and resources.¹⁴⁵ Similar requests came from the other boroughs. In Queens, staffing has surged by 42 percent since 2010.¹⁴⁶ And the Bronx DA's Office has increased staffing by 47 percent over the past decade.¹⁴⁷ Many of these staffing increases have been justified by claims that they are focusing on "community outreach," "launching initiatives to guarantee equal justice," and to launch "anti-drug initiatives to fight the opioid epidemic."¹⁴⁸

But what type of cases did New York City's prosecutors actually handle with this money? In 2018, the Manhattan DA prosecuted 52,224 cases, 81 percent of which were misdemeanors or violations.¹⁴⁹ By far, the most common charges of all of the cases were petit larceny¹⁵⁰ (8,225), third-degree assault (6,428), and possession of drugs, including marijuana (5,223).¹⁵¹ These are all low-level offenses, many of which shouldn't involve the criminal legal system in the first place.

Other jurisdictions, including those led by progressive prosecutors, have also sought budget increases or have fought against cuts while continuing to focus heavily on misdemeanor prosecutions.¹⁵² Just this year, District Attorney Larry Krasner requested an 11 percent increase in his budget and criticized a proposed \$8.7 million budget cut to his office, saying it would hamper prosecutions.¹⁵³ "There's absolutely no way this office can perform properly," Krasner said.¹⁵⁴

So, let's take a look at the Philadelphia DA docket. There is no question that significant changes have occurred under DA Krasner's leadership. There

144. David Brand, *As Arrests Plummeted, NYC Das Hired 900 New Employees Over Past Decade*, QUEENS DAILY EAGLE (Sep. 8, 2020), <https://queenseagle.com/all/as-arrests-plummeted-nyc-das-hired-900-new-employees-over-past-ten-years>.

145. *Id.*

146. *Id.*

147. *Id.*

148. *NYC's district attorneys went on hiring spree as arrests plunged, data shows*, THE WORLD NEWS (Sept. 19, 2020).

149. MANHATTAN DISTRICT ATTORNEY OFFICE, KEY DATA AND TRENDS (2020), <https://www.manhattanda.org/data/>.

150. Unlawful taking of property or services valued at no more than \$1,000. N.Y. Penal Law § 155.25.

151. MANHATTAN DISTRICT ATTORNEY OFFICE, *supra* note 150.

152. Rory Fleming, *Don't Forget Prosecutors When it Comes to Defunding*, FILTER (June 11, 2020).

153. Michael D'Onofrio, *Krasner Fights Impending \$8.7M Budget Cut to DA's Office*, PENNSYLVANIA CAPITAL-STAR (Jun. 9, 2020).

154. *Id.*

has been a 24 percent drop in the number of charges brought by the Philadelphia DA office during Larry Krasner's time.¹⁵⁵ District Attorney Krasner has worked with Mayor Jim Kenney and others to institute diversion programs to keep people away from incarceration.¹⁵⁶ While the ACLU and others have voiced criticisms of DA Krasner, he has been a leader in the progressive prosecutor space. I know from personal conversations with him that he is genuinely committed to tackling mass incarceration.

But even under his leadership, there have been an average of 3,625 drug possession charges a year, 2,221 charges a year for simple assault, hundreds of charges a year for sex work or threats of violence, and thousands charged a year for property offenses.¹⁵⁷ This represents thousands of charges a year for drug possession alone that should not involve the criminal legal system in the first place, making it difficult to justify a request for additional resources.¹⁵⁸

A more compelling position would be for Krasner to advocate for a reduction in his budget, a decision to decline prosecutions for drug possession and select additional categories, and to redirect savings from this to alternative community-based models for addressing harm and community safety.¹⁵⁹

Harris County District Attorney Kim Ogg is probably the most infamous example of a prosecutor running on a reform platform and then going against community wishes and demanding more money. In February 2019, Harris County commissioners rejected DA Ogg's request for an additional \$20 million to hire 102 additional prosecutors.¹⁶⁰ Ogg had requested a 40 percent increase in her budget, which was opposed by local organizations such as the Texas Organizing Project, which campaigned for

155. *Public Data Dashboard*, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, https://data.philadao.com/Charge_Report.html (last updated Nov. 17, 2020).

156. *City Announces Police-Assisted Diversion (PAD) to Fight Opioid Epidemic*, CITY OF PHILADELPHIA (Mar. 16, 2020), <https://www.phila.gov/2018-03-16-city-announces-police-assisted-diversion-pad-to-fight-opioid-epidemic/>.

157. *Public Data Dashboard*, PHILADELPHIA DISTRICT ATTORNEY'S OFFICE, https://data.philadao.com/Charge_Report.html (last updated Nov. 24, 2020).

158. See Ryan Briggs, *DA Krasner Fought Against Civil Asset Forfeiture. But Under His Watch, the Practice Continues*, WHY? (Sept. 11, 2019) (explaining that other criticisms of Krasner have included his office's continued use of civil asset forfeiture).

159. See, e.g., Elias Rodriguez, *Prosecutors Have No Place in Truth, Justice, and Reconciliation Commissions*, TRUTHOUT (Aug. 22, 2020), <https://truthout.org/articles/prosecutors-have-no-place-in-truth-justice-and-reconciliation-commissions/>.

160. Katie Watkins, *Harris County Leaders Vote Against District Attorney's \$20 Million Budget Request To Hire More Prosecutors*, HOUSTON PUBLIC MEDIA (Feb. 12, 2019).

Ogg when she ran for DA in 2016.¹⁶¹ The organizations accused Ogg of violating her pledge to reform the criminal legal system, remarking that additional prosecutors will lead to more people in jail.¹⁶²

This is a tension point that will only increase as some progressive prosecutors fight for an expansion of their budgets, rationalizing it by arguing that additional funding will be used to divert people from incarceration. Yet every dollar spent by the government on prosecutors and courts is a dollar not spent on funding resources that will allow people to thrive outside of the criminal legal system. I would argue that for many of these cases, there is no need for a diversion program or any contact with the criminal legal system. Drug possession remains the number one arrest in the United States. Yet in those cases where an individual is consuming drugs for their own use and not harming others, there is no need for criminal intervention. Police should not make these arrests, and if they do, prosecutors should immediately decline to prosecute them without spending resources on drug courts or diversion programs.¹⁶³ If there are substance abuse needs, then public health agencies should respond.

In fact, even during the height of the Black Lives Matter movement in the summer of 2020, DA offices were getting bigger budgets, including for activities such as marijuana enforcement. In July 2020, the Santa Barbara County Board of Supervisors approved a \$20.5 million increase for public safety, including hundreds of thousands of dollars for “cannabis enforcement-related requests from the Sheriff’s and District Attorney’s offices.”¹⁶⁴

While prosecutorial budgets grew, indigent defense spending went down, according to an analysis by the Brennan Center. Between 2009 and

161. Andrew Schneider, *Ogg’s Push To Hire More Prosecutors Stirs Backlash From Criminal Justice Reform Groups*, HOUSTON PUBLIC MEDIA (Feb. 5, 2019).

162. Katie Watkins, *supra* note 161.

163. Compare Eleanor Dearman, *Nueces County District Attorney Makes Mark After Year in Office*, CALLER TIMES (Feb. 9, 2018) (District Attorney Mark Gonzalez has kept thousands of people out of jail through a marijuana possession diversion program, where people have to pay a \$250 fee and attend a mandatory drug class. While well-meaning, this program, which has generated hundreds of thousands of dollars in revenue, perpetuates the criminal legal system by leading to unfair practices against lower-income people who may not be able to afford the fee and who should not be required to attend a drug class based solely on marijuana possession.), with Madison McWithey, *Taking a Deeper Dive Into Progressive Prosecution: Evaluating the Trend Through the Lens of Geography*, 61 BOS. COLL. L. REV. 48, 49-50 (2020) (arguing that district attorneys should decline to prosecute these cases altogether, instead of attempting to do so with an arguably lighter touch).

164. Mike Hodgson, *Santa Barbara County 2020-21 Budget Sees Increase in Public Safety Funding for Personnel*, SANTA MARIA TIMES (Jun. 9, 2020).

2014, 18 states increased indigent defense spending, while 26 decreased it.¹⁶⁵ Nationwide, spending went down 4.3 percent over that time, as \$2.2 billion was spent by states on indigent defense in fiscal year 2012 — the lowest amount in the previous five years.¹⁶⁶ By comparison, the total budget for prosecutors was \$5.8 billion in 2007, equivalent to \$6.4 billion in 2012 dollars, close to triple the amount spent on defense (assuming no increase in prosecutorial budgets between 2007-2012, which is unlikely).¹⁶⁷

Some prosecutors have recognized the need to reduce their own budgets. Stephanie Morales recently said:

If the community wants to defund the police, that means that the entire criminal legal system will hopefully shrink. That means that my office will lose resources, and I am perfectly fine with that. If you are truly a person with a public servant's heart, and you want to get this right, we should want to shrink the system.¹⁶⁸

Commonwealth Attorney Stephanie Morales is right.

- b. Reducing the power and budgets of prosecutors to shrink the carceral footprint

The majority of the criminal court docket today is comprised of misdemeanor cases. Estimates range from 9 to 13 million cases a year, and data suggest that few misdemeanor and violation arrests are declined by prosecutors (range from 2-12 percent).¹⁶⁹ This means that billions of dollars a year are spent to maintain offices that adjudicate matters that in many cases can be handled outside of the criminal legal system.

As arrests and prosecutions increased during the rise of mass incarceration and the era of Broken Windows policing, so did prosecutorial

165. Oliver Roeder, *Just Facts: A Different Kind of Defense Spending*, BRENNAN CENTER FOR J. (July 25, 2014), <https://www.brennancenter.org/our-work/analysis-opinion/just-facts-different-kind-defense-spending>.

166. *Id.*

167. *Id.*

168. Leily Arzy, *A Prosecutor Makes the Case for Transforming the System*, BRENNAN CENTER FOR J. (Oct. 9, 2020), <https://www.brennancenter.org/our-work/research-reports/prosecutor-makes-case-transforming-system>.

169. See Natapoff, *supra* note 91; see also KOHLER-HAUSMANN, *supra* note 40; Jeffrey Toobin, *The Milwaukee Experiment*, THE NEW YORKER (May 4, 2015).

budgets. In some offices, staffing has tripled.¹⁷⁰ Nationwide, billions of additional dollars are spent on prosecutions, while 70-80 percent of the criminal docket continues to be comprised of misdemeanors.¹⁷¹

The time has come to disentangle the criminal legal system from many of these cases that are a byproduct of the tough-on-crime era. If the nation is to ever move beyond the mass incarceration era, and genuinely embrace a new approach to community safety, then it must include removing police and prosecutors from involvement in many behaviors that currently fall under the criminal legal system umbrella.¹⁷² For example, the 1.2 million drug possession arrests currently processed by police each year should not be handled by the criminal legal system, and prosecutors should decline them when they come before their offices.

This reimagining of public safety will not occur voluntarily, and certainly not by the actors who benefit the most from it. Prosecutorial budgets have increased by billions, even though crime is at a low, and arrests are down across the board. Prosecutors continue to ask for more money and threaten lawmakers and voters when their budgets come under scrutiny.¹⁷³

The status quo cannot continue. The criminal legal system today is too large and its jurisdiction too wide. It is a product of political decisions that have been made for decades to over-police and over-incarcerate communities of color and low-income communities. It does not make us safer, but it does perpetuate racial inequality. While billions of dollars have been spent to grow and maintain this system, other public health and community services have been ignored or cut. The majority of people in prison suffer from chronic health conditions or have mental health or substance abuse needs. Yet, instead of being provided basic services, they have been locked in cages and forgotten.

For these reasons, the movement to end mass incarceration should begin pressuring stakeholders to cut prosecutorial budgets and decriminalize many of the offenses currently adjudicated by prosecutors that do not belong in the

170. N.Y. CITY INDEP. BUDGET OFFICE, WHEN ARRESTS FELL IN NEW YORK CITY, DID STAFFING OF THE DISTRICT ATTORNEY AND SPECIAL PROSECUTOR OFFICES ALSO DECLINE?, (Aug. 26, 2020), <https://ibo.nyc.ny.us/cgi-park2/2020/08/when-arrests-fell-in-new-york-city-did-staffing-of-the-district-attorney-and-special-prosecutor-offices-also-decline/>.

171. EQUAL JUSTICE INITIATIVE, *supra* note 98.

172. Many cases, like drug possession, should not be handled by anyone. An individual who chooses to consume drugs for personal use should not face any government intervention unless they are causing harm to others or seeking addiction services. Yet, there are more than 1.3 million arrests a year for personal drug possession. FBI: UCR, *supra* note 61.

173. See, e.g., Ed Treleven, *Lacking State-Funded Staff Increases, DA Turns to County, May Pare Caseload*, WISCONSIN STATE J. (Oct. 25, 2017).

criminal legal system. Millions of cases are prosecuted on an annual basis that could be better resolved outside of the criminal legal system. There are too many prosecutions in the United States, and in order to reduce the number of these prosecutions, crimes should be decriminalized and budgets should be cut. Simultaneously, real investments should be made to address the urgent need to provide services to people who have mental health, substance abuse, and chronic health needs or who have low educational attainment or housing insecurity.

Progressive prosecutors in particular should begin to adopt this position instead of relying on more funding to implement reforms that only bolster the criminal legal system. In order to end mass incarceration, we must narrow the footprint of the criminal legal system and remove prosecutors from many of the cases they currently handle. It is rare for prosecutors to see a reduction in their budgets. This must change.

These cuts can help achieve transformational change that moves the nation away from the mass incarceration path. Reforms that focus on procedural changes or that rely primarily on the criminal legal system for fairer practices can be important to reduce the harm currently experienced by people, but they won't end mass incarceration. In fact, they can even take the wind out of the sails of the movement, as observed in a recent Harvard Law Review note: "diversion programs might be celebrated as acts of grace, but they also divert energy from challenging the power of a prosecutor to make an individual submit to state monitoring."¹⁷⁴

Politics have driven the rise of mass incarceration, and politics from the bottom-up must drive its dismantling. The Black Lives Matter movement has forced the United States to begin reckoning with its racism and its dehumanization of Black lives. A key part of this reckoning must be the dismantling of the systems that have criminalized Black and Latinx communities. We know what community safety can look like if done right—it is the system in place in white affluent communities. It is time to bring this same approach to communities of color in the United States who have been targeted for decades by mass incarceration.

III. How to reduce the power and budgets of prosecutors

In order for the United States to be in line with other wealthy democratic nations, incarceration rates will need to be reduced by 80 or 90 percent. This

174. *The Paradox of "Progressive Prosecution," supra note 129.*

would bring us in line with countries like Germany and Canada.¹⁷⁵ More of the same will not achieve this goal.

Years of advocacy to change laws have not led to the substantial reduction in incarceration necessary to end mass incarceration. For example, electing progressive prosecutors has led to some reforms, but not the seismic shift that is needed to end mass incarceration. What this article proposes is that instead of relying on the criminal legal system to reduce its own power, advocates should focus more of their energies on narrowing the scope of the criminal legal system, reducing the number of people whose jobs and responsibilities rely on the operations of the criminal legal system as well as their budgets, and proactively reinvesting savings into alternatives to policing, prosecution and incarceration, and preventive measures that have been neglected for too long.

Prosecutors have seen tremendous growth in staff and resources during the tough-on-crime era. By reducing their budgets and narrowing their scope and jurisdiction, fewer people will be processed by the system. Cases that shouldn't involve the criminal legal system in the first place will be avoided, while those cases that require a government response of some sorts will have the option to be processed outside of the criminal legal system. This call for divestment must also begin to guide the progressive prosecutor movement. Something is fundamentally wrong when prosecutors who run on platforms with commitments to end mass incarceration are seeing double-digit increases in their budgets. It reflects a dissonance between those who are calling for dramatic changes and a criminal legal system that still relies on arrest, prosecution, and incarceration as its primary tactics.

Here are the top eight recommendations, in five categories, to guide advocates and policymakers to reduce the power and budgets of prosecutors.

- a. Restrict prosecutor jurisdiction and direct discretion towards decarceration

States and municipalities should decriminalize more laws to remove prosecutors from cases that do not necessitate a criminal legal system response. In 2019, there were 10,085,207 arrests.¹⁷⁶ The number one arrest

175. See Ram Subramanian & Alison Shames, *Sentencing and Prison Practices in Germany and the Netherlands: Implications for the United States*, VERA INST. OF J. (Oct. 2013), <https://www.vera.org/publications/sentencing-and-prison-practices-in-germany-and-the-netherlands-implications-for-the-united-states> (last visited Nov. 24, 2020).

176. *2019 Crime in the United States*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested>.

in the United States, by far, was for drug abuse violations, with 1,558,862 arrests, and of these, around 80 percent were for simple drug possession.¹⁷⁷ Eighty percent of the 10 million arrests a year are for misdemeanors, with more than a million for minor misbehaviors such as disorderly conduct, vagrancy, and loitering.¹⁷⁸ While around 25 percent of arrests are for drugs and trivial offenses, about five percent are for serious offenses involving violence.¹⁷⁹

These low-level misdemeanors are the activities that are most ripe for decriminalization and that could have a substantial impact on current prosecutorial dockets.¹⁸⁰ Most misdemeanor arrests result in charges – misdemeanor declination rates range from 3 to 12 percent depending on the charge and jurisdiction.¹⁸¹ By decriminalizing these offenses, the dockets of prosecutor offices will decrease significantly, thus allowing for the downsizing of the budget and staff of prosecutorial offices and the reinvestment of savings into proactive measures that build healthy and safe communities.

Second, state legislators should direct prosecutors to exercise their discretion whenever possible to avoid incarceration or to achieve lower sentences. State lawmakers have the authority to regulate prosecutorial behavior. They should pass laws that push prosecutors to exercise their discretion in favor of decarceration. For example, lawmakers should direct prosecutors to decline to prosecute a case if it serves no protective purpose. This would be similar to tactics deployed by some chief prosecutors that encourage a certain outcome based on policy preferences. When Eric Holder became Attorney General, he issued a memorandum directing his United States Attorneys to determine whether there is no adequate non-criminal alternative to prosecution before charging a person with a crime.¹⁸² State lawmakers can codify this sort of direction into state law.

177. *Table 29: Estimated Number of Arrests*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-29> (last visited Nov. 20, 2020). *See also id.*

178. 2019 Crime in the United States, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-29>, (last visited Nov. 19, 2020).

179. *Id.*

180. As of this writing, voters in Oregon approved a measure to decriminalize all personal drug possession. *See* Allen Kim, *Oregon becomes the first state to decriminalize small amounts of heroin and other street drugs*, CNN (Nov. 9, 2020), <https://www.cnn.com/2020/11/09/politics/oregon-decriminalize-drugs-trnd/index.html>.

181. Natapoff, *supra* note 87.

182. Memorandum from Eric Holder, The Attorney General (Aug. 12, 2013), <https://www.justice.gov/sites/default/files/ag/legacy/2014/04/11/ag-memo-substantial-federal-interest.pdf>.

By requiring that prosecutors use their discretion to decline cases whenever appropriate, state lawmakers will reorient prosecutors away from the tough-on-crime approach, placing an emphasis on declinations and pressuring police to arrest fewer people.¹⁸³

Third, prosecutors should restrict their own authority by designating more categories of cases to be declined. When police officers arrest, prosecutors then have to decide whether that arrest is going to convert into a criminal case or whether it's going to be declined and remain merely an arrest. Prosecutor offices currently spend a substantial amount of their time prosecuting cases for minor infractions, behaviors that shouldn't be addressed by the criminal legal system. Chief prosecutors should issue guidelines directing their line attorneys to follow these declinations.

There are examples of this happening. Suffolk County District Attorney Rachael Rollins has reduced the prosecution of more than a dozen offenses, including drug possession, trespassing, and larceny under \$250, although it is unclear whether this has been fully implemented.¹⁸⁴ In Chicago, Cook County State's Attorney Kim Foxx stopped prosecuting people arrested for driving on a driver's licenses suspended for financial reasons.¹⁸⁵ Brooklyn DA Eric Gonzalez and Manhattan DA Vance issued policies to no longer prosecute fare evasion.¹⁸⁶ Philadelphia DA Krasner and St. Louis City Circuit Attorney Kim Gardner have directed their staff not to charge most cases of marijuana possession.¹⁸⁷

At the very least, prosecutors must decline prosecution of simple drug possession cases, which have no business in the criminal legal system. But the list should go much further and include classic Broken Windows charges

183. Moreover, this would provide clear legislative guidance to address the concerns raised by some about prosecutors using their individual discretion, without legislative guidance, to decline to prosecute certain categories of offenses. Critics argue that such practices violate separation of powers. I disagree with this argument, and believe that prosecutors should be encouraged to be transparent about their preferences because it enhances democratic accountability, but even so, state lawmakers can make it clear that they want prosecutors to exercise their discretion if it means fewer people are incarcerated. See Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603 (2020).

184. Eoin Higgins, *Progressive DA Rachael Rollins Hasn't Stopped Prosecuting Petty Crimes, Despite Pledge. Police Are Still Furious*, THE INTERCEPT (Mar. 24, 2019).

185. Megan Crepeau, *Cook County to stop prosecuting some traffic offenses because it lacks resources, Foxx's office says*, CHICAGO TRIBUNE (Jun. 15, 2017).

186. Madina Toure, *Manhattan DA to End Prosecution of Most Turnstile Jumpers*, OBSERVER (Feb. 2, 2018).

187. Philadelphia DAO, *St. Louis to end prosecution of low-level marijuana crimes*, THE JUSTICE WIRE (June 15, 2018), <https://medium.com/philadelphia-justice/st-louis-to-end-prosecution-of-low-level-marijuana-crimes-5e37e96eef9e>.

such as disorderly conduct, trespass, underage drinking, and petit larceny, to name a few examples. Individuals may need to be held accountable in many of these circumstances, but not by the criminal legal system.

b. Cut prosecutor budgets

Prosecutor offices are funded through a variety of sources. In 2005, the last year of nationwide data, half of prosecutor offices received at least 82 percent of their funds from county governments, about half of offices received state funds, and 40 percent received state and federal funds.¹⁸⁸

Advocates should pressure policymakers, including city council members, mayors, county commissioners as well as federal actors, to begin cutting prosecutorial budgets, particularly as more laws are decriminalized and arrests declined. These cuts would force prosecutors to focus only on the most serious arrests and decline to prosecute those arrests that should not be within the criminal legal system. By narrowing the focus of prosecution, police officers will also be forced to begin reconsidering their practices.

The arguments should be that the majority of the docket for prosecutorial offices are misdemeanor and low-level offenses that should not involve the criminal legal system. Prosecutorial budgets have increased by billions of dollars, while social welfare programs have been cut or stayed stagnant, failing to see the same increases as the criminal legal system. We need to shrink prosecutorial budgets so that prosecutors no longer spend their time on matters that should not involve the criminal legal system, and the savings should be reinvested in alternative mechanisms to address any underlying misbehavior or need, including preventive measures that keep people from becoming entangled in the criminal legal system in the first place.

Second, prosecutors already in office should start reducing their own budgets. Progressive prosecutors can show their commitment to reducing the footprint of the criminal legal system by cutting their own budgets. They should not ask for additional funding to implement new programs within their office, including programs being considered in the name of a less punitive criminal legal system. Every dollar spent on the criminal legal system is a dollar not spent on alternatives. Instead, progressive prosecutors should divest their office from cases that do not belong in the criminal legal system and reduce their budgets appropriately.

188. Steven W. Perry, *Prosecutors in State Courts*, 2005, U.S. DEP'T OF JUSTICE (July 2006), <https://www.bjs.gov/content/pub/pdf/psc05.pdf>.

For both, cutting the budget should include disbanding specialized units that are relics of the past, such as narcotics units that are a product of the War on Drugs.

- c. Make prosecutor elections about who will be better at reducing budgets and dockets

Reformers and progressive prosecutors who are seeking elections to be chief district attorney should provide a vision for how they will reduce their own budgets and dockets if elected. They should set clear reduction goals, explaining how much they will cut their budgets and dockets by and how. Doing so will provide a vision for this re-imagining of community safety and force conversations during the electoral process about the bloated criminal legal system.

These commitments will be similar to pledges recently made by some candidates to cut incarceration rates in their jurisdictions by a certain percentage during their tenure if elected.¹⁸⁹ For example, in 2018, as a candidate, Dallas District Attorney John Creuzot committed to cutting incarceration by 15-20 percent by the end of his first term.¹⁹⁰ The ACLU pushes for these commitments in all of the DA races we engage in.

Candidates should commit to reducing their budgets and to not requesting additional funding to implement reforms that may seem appealing but in reality just increase the reach of the carceral system. Similarly, candidates for office should release the categories of offenses that they would immediately decline to prosecute and provide a vision for how they will reduce their office dockets.

Candidates should be prepared to defend these policies during the electoral process and provide a vision for reimagining community safety. Making these commitments during elections will also make the process easier to implement once elected since it will have the stamp of approval from voters and help newly elected chief prosecutors face hostile line prosecutors, police officers, and their unions.

189. Taylor Pendergrass, *The 2018 Midterm Elections Demonstrate Criminal Justice Reform Is a Winner at the Ballot Box*, ACLU (Nov. 14, 2018), <https://www.aclu.org/blog/smart-justice/2018-midterm-elections-demonstrate-criminal-justice-reform-winner-ballot-box>.

190. Shawn Shinneman, *The Era of Dallas County District Attorney John Creuzot Is Almost Here*, DMAGAZINE (Nov. 26, 2018).

d. Reinvest savings in alternative models

Once prosecutor budgets are cut, savings must go towards delivering safety in a manner that does not involve the criminal legal system. This should include investing in resources that promote health and social stability in communities that have been targeted by aggressive policing and prosecutions. It also means investing in programs related to mental health and addiction and investing in more housing and educational opportunities that have been proven to reduce crime and violence.

There are a growing number of examples of alternatives to police responses that do not include arrests or citations, such as emergency responders and community-led safety responses that do not involve police.¹⁹¹ Instead of relying solely on police to respond to emergency situations, health care workers or emergency response teams that do not include police can handle many incidents, such as when someone calls 911 to report a drug overdose or someone experiencing a mental health breakdown. In Austin, Texas, the 911 dispatchers are trained to ask whether mental health services are needed and then dispatching appropriate non-police professionals.¹⁹² Eugene, Oregon has been deploying the Crisis Assistance Helping Out On the Streets (CAHOOTS) teams for years in response to emergency calls that require crisis interventionists and a medic, and not police.¹⁹³ Some jurisdictions are deploying conflict interrupters and restorative justice teams to mediate situations and prevent further violence from occurring.¹⁹⁴ Violence interruption programs are led by people from the community that they are dispatched to and who have personal experience navigating these difficult situations.

By cutting prosecutorial budgets, savings can be reinvested in these preventive alternatives to policing and prosecution models. Prosecutor budgets have increased by billions while the significant majority of the

191. Jesse Jannetta et al., *Federal Investment in Community-Driven Public Safety*, URBAN INST. 2 (2020), <https://www.urban.org/sites/default/files/publication/102877/federal-investment-in-community-driven-public-safety.pdf>.

192. Matt Vasilogambros, *'If the Police Aren't Needed, Let's Leave Them Out Completely'*, PEW TRUSTS (Jun. 23, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/06/23/if-the-police-arent-needed-lets-leave-them-out-completely>.

193. Rashawn Ray, *What does 'defund the police' mean and does it have merit?*, BROOKINGS (June 19, 2020), <https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/>.

194. Philip V. McHarris & Thenjiwe McHarris, *No More Money for the Police*, N.Y. TIMES (May 20, 2020).

criminal docket consists of low level offenses and while alternative programs lack adequate funding. Fourteen million students attend schools that have on-site police but no counselor, nurse, psychologist, or social worker. Communities looking to prevent violence should invest in the things people need to thrive.

e. Reimagining responses to offenses involving violence

Much of this article has focused on prosecutors declining to charge many of the 80 percent of arrests that come into their office that are misdemeanors. Doing so will cut a significant slice of the prosecutorial budget and will help millions of people.

But in order to more substantially reduce mass incarceration, prosecutors will need to also reduce incarceration for offenses involving violence. This will obviously be a more difficult task, as prosecutors will face tremendous internal and external resistance to showing any sort of perceived leniency to people arrested for offenses involving violence. But this work is needed if we are ever to end mass incarceration, as more than 50 percent of people in state prisons are incarcerated for offenses involving violence.¹⁹⁵

First, there needs to be a recognition that people who are accused of committing violent crimes are often themselves victims of violence and trauma. Research has demonstrated that people who are convicted of violent crimes often live under circumstances where violence is pervasive and in environments that lack basic social safety nets and include economic uncertainty.¹⁹⁶ They are likely to have been exposed to poverty, inequality, high unemployment, and lack of educational and economic opportunities. We should think of a person who may have caused serious harm as someone who has themselves suffered serious harm.

This is important not only because it humanizes the individual, but also because it presents a broader range of options for holding that individual accountable and ensuring that they do not commit serious harm again. Accountability mechanisms should consider the underlying needs that led to the misbehavior while also holding the individual accountable for their actions. Programs focused on people suspected of committing crimes

195. Sawyer & Wagner, *supra* note 3.

196. Alexi Jones, *Reforms without Results: Why states should stop excluding violent offenses from criminal justice reforms*, PRISON POL'Y INITIATIVE (2020), <https://www.prisonpolicy.org/reports/violence.html>.

involving violence, like Common Justice, provide alternative to incarceration models. These programs are based on restorative justice principles that try to repair the harm caused by the violence but to do so in a rehabilitative and holistic manner, while also holding the individual accountable for their actions.¹⁹⁷

Another alternative is to adopt a public health approach to violence as a crime reduction strategy. Studies have shown that exposure to violence increases the likelihood of acting violently¹⁹⁸, similar to how exposure to a virus increases a person's chances of becoming ill with the virus. Organizations like Cure Violence take a public health approach to reduce the spread of violence by detecting and interrupting potential violent conflicts.¹⁹⁹ Similarly, investing in programs targeted at young people to mitigate the likelihood they engage in violent behavior has been shown to decrease a young person's chances for violence.²⁰⁰

When it comes to transforming how we respond to violent offenses, some states have already begun taking small steps towards reform. For example, Iowa passed legislation a few years ago that allows judges greater discretion when sentencing certain robberies.²⁰¹ Similarly, prosecutors can set internal guidelines mandating the lowest possible charge for robbery, which often has a wide range of charging possibilities. Prosecutors can even mandate declining an arrest when there are extenuating circumstances that require a response from outside of the criminal legal system, such as substance abuse needs that lead to the behavior or economic hardship that pushed an individual to act this way. According to the Justice Policy Institute, the average sentence length for robbery in the United States is 7.5 years, while in England and Wales, it's just over 3 years. In Finland, it's just under 1.5 years.²⁰² Prosecutors can help reduce these sentence lengths and encourage the exploration of alternatives.

197. COMMON JUSTICE, <https://www.commonjustice.org/> (last visited Nov. 19, 2020).

198. Chelsea M. Weaver et al. *Violence Breeds Violence: Childhood Exposure and Adolescent Conduct Problems*, 26 JOURNAL OF CMTY. PSYCHOLOGY 96 (2008).

199. Jones, *supra* note 198.

200. *Id.*

201. Kathy A. Bolten, *Branstad signs bill allowing early release of hundreds of drug felons*, DES MOINES REGISTER (May 12, 2016).

202. *Finding Direction: Expanding Criminal Justice Options by Considering Policies of Other Nations*, J. POL'Y INST. (2011).

CONCLUSION

It's time to rethink the entire criminal legal system by dramatically narrowing its scope, size and power, including by removing criminal legal system actors, such as prosecutors, from the equation altogether whenever possible. In order for the United States to be in line with other wealthy democratic nations, incarceration rates will need to be reduced by 80 or 90 percent, which would bring us in line with countries like Germany and Canada.²⁰³ More of the same will not achieve this goal.

At the heart of this must be a reorientation from the tough-on-crime era to a prioritization of social welfare, public health, and alternatives to policing, prosecution, and incarceration as the primary mechanisms to build community safety. While it may seem daunting to rely less on police and prosecutions, the truth is that this different world already exists in communities that are largely white and affluent, where policing and prosecution look very different than in communities of color. The time has come to bring to the entire United States the same values of safety with dignity that has been historically reserved for affluent white Americans. Reducing the scope, power, and budgets of prosecutors is core to this re-imagination.

203. WORLD PRISON, BRIEF, <https://www.prisonstudies.org/highest-to-lowest/prison-population-total> (last visited Nov. 19, 2020).