Dear workshop readers: attached are excerpts from a book I am working on. I have provided the introduction as well as the introduction to each of the subparts of the book so you can see how the chapter I am including fits within the book’s overall structure. I look forward to your questions and comments.

Prisoners of Politics:
How Tough-on-Crime Populism Feeds Mass Incarceration and Makes Us Less Safe

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Introduction

No one would think to establish air pollutant limits or workplace safety conditions by popular vote. Instead, experts with specialized knowledge set policies based on studies of what maximizes public safety and an analysis of the costs and benefits of different courses of action. This is the well-established path for just about every public health and safety area in American life because we recognize that voters lack the requisite data and knowledge to make decisions in these areas. It is hard to imagine anyone suggesting that the better approach would be to rely on the emotional preferences of the body politic or politicians’ common sense guesses about what is likely to work.

Yet that is precisely what we do when it comes to decisions about public safety and crime control. We do not rely on experts or use studies and rational assessment to minimize crime. Instead, criminal justice policy in the United States is set largely based on emotions and the gut reactions of lay people. Donald Trump’s rise to the presidency provides only the most recent, high-profile example of how public fear based on misinformation translates into policy. Trump campaigned on the false idea that we have record-high homicide rates and crime is rampant throughout America, with violent gangs of illegal immigrants roaming the streets and torturing innocent citizens. He described inner-city neighborhoods in cities like Chicago as places where people cannot walk down the street without being shot. This rhetoric, with its racist overtones, primes many voters to support harsh punishments and tactics – and the candidates who endorse them – because the public is ill informed about actual crime rates or what works to prevent crime. We have seen this kind of tough-on-crime rhetoric for decades, and it typically works because the public lacks accurate information about crime and continues to assume incorrectly that violent crime is rising, even as it has plummeted. This makes the electorate easily swayed by politicians like Trump, who pursue ever tougher policies, and skeptical of those who want to take a different approach, particularly with respect to anything labeled as violent crime.¹

The result is that jurisdictions throughout America have produced the highest incarceration rate in the world among major nations, with more than 2.2 million people incarcerated and one in three adults in America with a criminal record.² Millions more are on probation or parole.³ Our policies are unquestionably tough on budgets, tough on individuals, and tough on communities, but are they really tough on crime itself? Do they in fact reduce crime and improve public safety? Politicians and the public who
In fact, many of America’s criminal justice policies have no effect on crime and do nothing to promote public safety. They take limited public funds that could be better spent on more effective measures. Even worse, many of our crime policies increase the risk of crime instead of fighting it – all while producing racially discriminatory outcomes and devaluing individual liberty. Unfortunately, counterproductive policies like these are not rare; on the contrary, they abound in every jurisdiction in the United States.

If the definition of insanity is doing the same thing over and over again but expecting different results, it is would seem to be insane to rely on our current political system and institutional structures to meaningfully address problems with criminal justice and mass incarceration in America. Lay people will always have a visceral reaction to particular high-profile crimes that will prompt them to support an ever more punitive response without sufficient attention to details or a focus on data about what actually works to reduce crime. Politicians, for their part, seek to gain an electoral advantage by catering to these instincts and pandering to public anxiety and intuitions with ever-more severe policies instead of pursuing policies that would be more effective at maximizing public safety. Criminologists have labeled this setting of policy based on the emotional response of the public penal populism, and it is an embedded feature of United States politics. John Pratt explains that penal populism, like populism more broadly, rests on the “disenchantment and disillusionment” with established experts. The public is moved by “feelings and intuitions” rather than evidence, and “the authority and influence of the criminal justice expert has been decried and reduced.” The tragic result of a process fueled by ignorance of data and analysis is excess incarceration instead of better strategies at reducing crime and protecting the public.

If we want better outcomes that will improve public safety, we need to change the institutional framework we currently use to make criminal justice policy. Instead of policies designed to appeal to the emotions of voters who lack basic information about crime, we need to create an institutional structure that creates a space for experts who look at facts and data to set policies that will improve public safety outcomes, even if they are not easily reduced to soundbites or fail to provide emotional appeal. We need to demand that prosecutors focus on policies that work instead of unthinkingly pursuing approaches that sound tough but do little to improve public safety. And we need to have our courts make sure that governmental actors are playing by the rules.

This institutional model is a well-traveled path for better outcomes. Indeed, this is the model we use in most other areas of governance, from fiscal policy to environmental regulation. We do not have our elected officials set policies based on their intuitive reactions to outlier stories that make the news and arouse the public. We do not, for instance, jettison a vaccine based on one bad outcome. We do not abolish all air travel because of one accident. Instead, we rely on expert agencies to set policies on the best data available to minimize risks and achieve the greatest benefits at the lowest costs. But all too often crime policy in America is based on a reaction to a single crime without support these approaches intuitively think they work and that they make us safer, thus justifying their human and economic costs.
any evaluation of overall programs or approaches. The political system and voter ignorance feed this kind of response.

To get better outcomes, we need a new model. People who care about mass incarceration and want to improve criminal justice need to push for changes in the institutions that set criminal justice policy in America. This is not to say that this shift from policy by populism to expertise will be easy. There is an anti-elite, anti-expert sentiment in America, and large segments of the public are likely to be particularly resistant to the idea that crime policy is something for experts instead of the regular man or woman on the street. But the public remains concerned about public safety and the current approach is failing to maximize it. Moreover, with one out of every three adults possessing a criminal record, the effects of harsh criminal justice policies impact more and more lives. Many Americans now believe that there is something wrong with criminal justice in America, and there are engaged and active citizens fighting for change. Politicians on the left and right agree there is a problem and are receptive to at least some changes. This is thus the most promising window of opportunity we have had for fundamental change in decades.

The key is to channel that energy for change to the right targets, and institutional reform must be at the top of the list. Until we make institutional changes, criminal justice policy will remain subject to populist whims, and history teaches us that those whims ultimately lead toward severe sentencing policies that do not promote greater public safety.

Indeed, it is one of the great tragedies of American domestic policy that many of our strategies for combatting crime ruin millions of lives but do nothing to promote public safety and in many cases, our policies actually increase the risk of crime instead of fighting it. If the goal in America is to keep us safer, we are failing miserably. We are wasting billions of dollars on policies that achieve the worst of both worlds: they do not protect victims or increase public safety, while at the same time they have catastrophic effects on communities and on millions of lives, particularly in poor communities of color. One could say our approach to crime is a failed government program on an epic scale, except for the fact it is not a program at all. It is the cumulative effect of many isolated decisions to pursue tough policies without analyzing them to consider whether they work or, even worse, are harmful.

It may be hard to believe that we continue to pursue policies that cost a fortune, destroy lives, and make us less safe in the process. After all, our elected leaders constantly talk about public safety issues, so one would think they would be especially vigilant in monitoring results and ensuring that we follow best practices. But in jurisdiction after jurisdiction, we see just the opposite: failed approaches are pursued time and again.

The reason for we have so many ill-considered policies is that we have a pathological political process that caters to populist fears and emotions without any institutional safeguards or checks for rationality. Although one might think the public is
attuned to public safety outcomes and not simply rhetoric about being tough, the reality is quite different. The public is susceptible to symbolic gestures that yield poor results because the public is not well informed about crime in America. Voters tend to hear only about the worst crimes, priming them emotionally for responses that sound as tough as possible because they want to satiate their desire for vengeance and justice in the here and now. The public often has little if any knowledge of crime rates or the actual composition of those in prison or how they are sentenced. Indeed, most people in America are completely unaware that almost every person in prison is ultimately released and that roughly ten thousand people return to society from a term of incarceration every week in the United States. But because this regular return of citizens is not news, the public has no interest in whether or how these individuals have been prepared to reenter society or whether their time in prison has made them more likely to commit crimes.

The political process is also not equipped to discuss these issues in a reasoned way. Any discussion about overall strategies or long-term responses and results can be derailed with a single story. All it takes is one example of an individual convicted of a violent crime who would benefit from a reform to kill its chances. That one person ends up being the public’s image of the reform, and if it looks like the law is going to coddle that individual, the public will resist no matter what the overall benefits are. Politicians know this dynamic well, at least since George H.W. Bush successfully created a campaign ad against former Massachusetts Governor Michael Dukakis featuring Willie Horton, an individual on a furlough program in Massachusetts who brutally attacked a couple and raped a woman. Even though the furlough program in Massachusetts had a success rate over 99%, the public cared only about Horton’s case. Bush defeated Dukakis, and no politician since has wanted to risk having their own Willie Horton moment. So even if a reform will bring more benefits than costs, including benefits in violent crime reduction, politicians won’t risk supporting it if their opponents can trot out a story of a violent individual who will be let out early as a result of the change in policy.  

Arkansas provides a recent example of how a populist emotional response to a single crime can upend an entire program without any consideration of the program’s overall costs and benefits. Incarceration rates spiked in Arkansas since it limited parole availability in 2013 in the wake of the senseless murder of an 18-year-old by a man with a lengthy history of arrests and parole violations. As soon as the murder gained widespread publicity, state politicians began calling for “wholesale changes,” concluding that “we’ve known all along that parole doesn’t work.” The state’s Board of Corrections swiftly enacted sweeping changes aimed at tightening parole. One reform mandated parole revocation hearings for all parolees merely charged — not convicted — of any felony or violent or sex-related misdemeanor, “a policy possibly unique among states with parole.” Other reforms included harsher consequences, often including parole revocation, for technical violations like failure to report for meetings or hearings. Predictably, these changes to the state’s parole policies led to a 17.7% increase in the state’s prison population in just one year, the fastest increase among all fifty states and more than seven times the national average. In 2015, Arkansas housed 70% more people in prison than it did in 2012, with the growth driven almost entirely by probation.
and parole violators. From 2012 to 2013, the number of parole violators sent back to prison increased approximately 135%. One-third of these violators were returned to prison for an average of 12 to 15 months for technical violations, which costs the state an estimated $20 million annually.

Critically, the huge costs of these parole reforms have not been counterbalanced by public safety benefits. From 2004 to 2014, Arkansas’s neighboring states saw violent crime rate reductions averaging 14% over the same period that Arkansas’s violent crime rate decreased by only 4%. And whereas these neighboring states saw a slight decrease in their incarceration rates, Arkansas witnessed a large increase. So Arkansas’s neighbors were able to obtain greater public safety benefits while lowering their incarceration rates. Between 2012 and 2014, the years immediately before and after Arkansas’s hasty reforms, the prison population nationally grew only .2%, whereas in Arkansas, the population grew 22%, by far the largest increase of any state. These reforms carried a hefty price tag. Arkansas currently spends half a billion dollars on corrections annually, and without large-scale reforms (including undoing its parole restrictions), its prison population is projected to climb an additional 35% over the next decade, costing Arkansas $1.3 billion in additional spending. That is money that could be spent on more effective crime-fighting strategies. Given that Arkansas’s prison population was actually on the decline in the years immediately preceding the changes to the parole laws, it is no exaggeration to say that one crime and the populist fervor around it upended the state’s entire criminal justice system and without tangible safety benefits.

We unfortunately lack experts in our system who can keep an eye on decisions like these to make sure we are making the right calls to maximize public safety and spend our resources most effectively. On the contrary, those responsible for law enforcement – the people who should be the experts on public safety – often fail to advocate for policies that would benefit the overall public interest because their professional self-interest clouds their judgment. Soft-on-crime charges leveled at would-be reformers often come from those inside the law enforcement community – and particularly prosecutors – because they benefit from the existing set of laws and practices and are all too willing to use high-profile cases to advance their agenda even if it is not tied to proven public safety outcomes. Prosecutors control the vast architecture of criminal law administration in the United States, and they benefit from the existing stable of broad laws with severe sentences because of the leverage it gives them to process their cases. They are often the first to complain when there are efforts to reform the system in ways that undermine their power. Nebraska prosecutors, for example, ardently opposed a Nebraska law enacted in 2015 that reduced many maximum sentences for both violent and nonviolent crimes. “It’s nothing but being soft on crime,” said one career prosecutor, angry for losing the leverage which “will help you wrap up a case.” In Louisiana, local prosecutors soundly defeated a 2014 bill that would have reduced Louisiana’s draconian marijuana possession laws, under which a second possession charge is a felony and the third can land an individual up to 20 years in prison. Louisiana’s more recently passed criminal justice reforms had bipartisan support with one notable exception: the Louisiana District Attorneys Association (LDAA). The organization actively lobbied against almost every suggestion. The Indiana Prosecuting Attorneys Council lobbied against a bill that...
reduced the radius of drug-free school zones from 1,000 to 500 feet, despite evidence that the current law disproportionately impacted minorities living in urban areas by essentially encompassing entire regions of large cities like Indianapolis under the sentence enhancement.\textsuperscript{27} One prosecuting attorney argued that the 1,000-foot buffer was an “important tool” that makes prosecutors’ cases “easier to prove.”\textsuperscript{28} The National Association of Assistant United States Attorneys (NAAUSA), a group that represents some federal prosecutors, sent an open letter to then-Attorney General Holder expressing opposition to the 2013 Smarter Sentencing Act, which would have, among other things, reduced mandatory minimums for those convicted of nonviolent drug offenses.\textsuperscript{29} NAAUSA was explicit that its opposition was based on the fact the law would make their jobs more difficult because it would “prevent[] the government from obtaining benefits gained through concessions during bargaining.”\textsuperscript{30}

This is a common course for prosecutors. Prosecutors typically claim they are the guardians of public safety when they advocate for longer sentences to stay on the books.\textsuperscript{31} But if prosecutors cared about public safety, they would be just as vocal about other issues that affect the successful reentry or reform of individuals who have committed crimes. Except for a few recently elected prosecutors who ran on a reform agenda, most prosecutors have instead been silent on these issues and have spoken out only on those issues that would affect the ease with which they do their day-to-day jobs. NAAUSA, for example, has repeatedly provided congressional testimony and issued myriad press releases, open letters, and policy statements resisting even modest reductions in federal sentencing, but it has not weighed in on the debate on collateral consequences or prisoner rehabilitation programming despite the fact those areas are critical for public safety.\textsuperscript{32} In 2015, for example, the Obama Administration announced the creation of the Second Chance Pell Pilot Program, which allowed some prisoners to obtain grants for postsecondary education. Support for the program, as well as for legislation that would reverse a 1994 Act that made prisoners ineligible for Pell Grant funding, was widespread and diverse, and the American Bar Association passed a formal resolution encouraging Congress to restore Pell funding.\textsuperscript{33} Yet neither NAAUSA nor the National District Attorneys Association, the two leading prosecutor organizations in the country, released press reports or made any type of public showing in support of the policy.

Why are prosecutors vocal about maintaining longer sentences even though study after study shows they fail to deter crime, but silent when it comes to a range of other policies that have been proven to promote public safety? Keeping sentences long and mandatory makes prosecutors’ jobs easier because it gives them the leverage they need to get guilty pleas and avoid trials; but because they get no credit or benefit from other measures that have been shown to reduce recidivism, they lack the incentives to focus on them, even when those policies would benefit public safety. The result is we lack influential forces to lobby for things that work, and we have a powerful prosecutor and law enforcement lobby that stands in the way of all but the most modest sentencing reforms.
This, in a nutshell, is the political dynamic that brought us to the state of mass incarceration and criminalization that we have now, which yields few public safety benefits and leaves so much human misery and racial injustice in its wake. Elected leaders fear being labeled as soft on crime, so they aim to appear as tough as possible even if there is no empirical grounding for the approaches they endorse. The public responds positively to this posture because they do not understand the ways in which these various policies backfire in the long run and make us less safe. They have only the most violent cases profiled by the media in mind when they think of crime in America, and those images tend to skew the public into thinking those crimes are overwhelmingly committed by people of color with white victims, even though the media reported crimes do not represent the reality of most crimes. And law enforcement officials stand ready to fight any significant changes that would undermine their almost complete discretion to operate this system to their own advantage. No one, it seems, is minding the store in the name of tangible public safety results, so we have countless policies that undermine it.

If there is any good news in this grim picture, it is that there is finally a growing consensus across the political spectrum that we need to do something to address the mass incarceration of Americans and the expansive reach of the criminal justice system. A sizable number of people are finally paying attention to the fact that our approach to crime is misguided. We are paying a fortune—in real dollars and human lives—for an approach that does not make us safer and often does just the opposite. This is thus the ideal time to pursue the kind of lasting institutional change that will produce better outcomes. And, in fact, the reform movement has begun to recognize the need to make at least one key institutional change: to elect prosecutors who promise to focus on real results instead of the old tough-on-crime posturing. Changing conceptions about the role of prosecutors is a key ingredient to lasting institutional change, and we should continue this push, which is only just getting started. Indeed, there is so much more that could be done to hold prosecutors accountable, including creating new benchmarks for judging their performance.

While demanding more from prosecutors is a necessary step in achieving greater public safety and real reform, it is not sufficient. Prosecutors are powerful, but they do not control all criminal justice policies. We also need to create expert agencies and commissions who are charged with using data and facts to make policies that maximize public safety and that are designed to withstand political pressures if they adopt policies that, on the surface, do not seem sufficiently tough. While it is important not to overstate how insulated an agency can be—they are, after all, susceptible to control by political overseers—we also know from the experience of agencies like these that already exist that they can and have been successful in making fundamental changes to criminal justice policies that have resulted in better public safety outcomes, lower incarceration rates, cost savings, and far less human misery. The federal Sentencing Commission, an agency insulated to some degree from political pressure, reduced more than 30,000 drug sentences retroactively based on its evaluation of data and recidivism studies. Those sentencing reductions caused the federal prison population to drop considerably and freed up resources for other public safety initiatives. We need to empower more agencies to
make decisions like these and design them so that they can let their expertise, not ill-informed public emotional responses, guide their policy making.

We also know that courts are critical checks on criminal law excess. If you care about criminal justice reform, you must pay attention to who occupies the bench and support judges who are committed to reinvigorating constitutional protections that have largely been ignored. The biggest drop in incarceration at the state level – California’s reduction in prison population – came about because of a Supreme Court decision that finally put some teeth into the Eighth Amendment. Supreme Court appointments matter greatly for the fate of criminal justice reform, but all too often voters concerned about those issues have ignored those appointments and what they mean for mass incarceration. Other judges matter, too, because they are guardians of constitutional protections and because their discretionary decisions (especially on sentencing) affect millions of cases and lives.

So if we are serious about achieving better public safety outcomes and addressing mass incarceration, we must pay attention to institutional change. If we keep the existing decision making structure in place – with traditional tough-on-crime politicians and prosecutors setting our policies – we will achieve little more than token reforms that only tinker around the edges of bad policies. At most, the existing political process is capable of producing only modest reforms, focused predominantly on the harshest punishments for nonviolent drug and property offenders who do not have much in the way of a criminal record. For example, jurisdictions have repealed certain mandatory minimum sentences for nonviolent offenses, as South Carolina did in 2010 when it eliminated mandatory minimums for first-time drug convictions, including the 10-year minimum for selling drugs within a half-mile radius of a school, park, or playground. Only Alabama had defined “school zone” more broadly, so curbing this mandatory minimum in South Carolina was hardly revolutionary. Other jurisdictions have reduced sentences for low-level felonies, such as Missouri changing its maximum for low-level felonies from five years to four years, or Iowa’s reduction in sentences for burglaries of cars and boats. Some states have touted alternatives to incarceration, such as drug treatment programs for nonviolent drug offenders or those convicted of DUls. States that passed tough three-strikes laws have modified them to allow those whose strikes consisted of property and drug crimes to earn good-time credits in prison for earlier release, but the core of those three-strikes laws otherwise remained unchanged. For example, in response to some high-profile examples of egregiously long sentences for minor misconduct – one man received a 25-years-to-life sentence for stealing videotapes worth $150 and another received the same sentence for stealing one pair of socks – California passed a law to remove the mandatory 25-year sentence for those whose third strike is not deemed “serious or violent.” But even while it made that change, California still permitted the 25-years-to-life penalty if the third strike was for “certain non-serious, non-violent sex or drug offenses or involved firearm possession.”

These reforms are laudable and important, and I do not mean to suggest we should not keep striving to achieve more like them. But efforts like these will not make much of a dent in the overall sweep of incarceration or criminal punishment in the United
States. As the Sentencing Project recently documented, at our current pace of reform and decarceration, it will take 75 years to cut the prison population in half.\(^{41}\)

To understand why the current approach falls short, consider, for instance, Oklahoma’s recent sentencing reform efforts. In April of 2016, Oklahoma made common sense, yet minor, adjustments to its sentencing laws: allowing certain non-violent crimes to be charged as misdemeanors instead of felonies, lowering some drug trafficking mandatory minimums, increasing the use of drug courts, and raising the minimum damage required for something to be charged as a felony property crime from $500 to $1000.\(^ {42}\) Oklahoma’s Governor Mary Fallin claimed these sentencing changes would “control costs and reduce incarceration rates,” and the conservative advocacy group Right On Crime called them “comprehensive criminal justice reforms” to “right-size [Oklahoma’s] prison system.”\(^ {43}\) While these reforms are sensible improvements, no one should be fooled into thinking that they will have a meaningful impact on Oklahoma’s incarceration rate – the second highest in the nation.\(^ {44}\) Oklahoma’s prisons are currently operating at 123% capacity, yet staffed at only 60% due to budgetary shortfalls, two statistics which taken together earn Oklahoma the distinction of the highest inmate to staff ratio in the country.\(^ {45}\) The April 2016 reforms, however, do little to address the existing incarcerated population. Oklahoma’s interim director of the state’s Department of Corrections admitted as much, saying these four reforms amount to merely “nibbling around the edges” of the problem.\(^ {46}\) He lamented that the prisons are “overcrowded and the criminal justice system keeps cramming [people] into bed space that doesn’t exist.”\(^ {47}\) “Until we start readjusting our criminal justice code,” he warned, “this is going to continue.”\(^ {48}\) He also estimated it would take years before such reforms would have any meaningful impact on Oklahoma’s overall costs of corrections.\(^ {49}\)

Louisiana provides another example of how reform efforts fall far short of having a significant impact on the overall sweep of criminal law. Its legislature recently passed a criminal justice package that the Executive Director of the ACLU of Louisiana claimed was a “landmark reform to [the state’s] broken criminal justice system,” including lowering sentences for theft and burglary and eliminating some mandatory minimums, making individuals with drug felonies eligible for food stamps and other welfare benefits, giving judges greater discretion to reduce or waive fines for formerly incarcerated people who cannot afford to pay them, and allowing people in prison to earn good time credits more quickly by participating in educational and drug treatment programs.\(^ {50}\) These reforms, like Oklahoma’s, deserve praise. But they should not be mistaken for the kinds of changes that will make a dent in Louisiana’s incarceration rate, which is the highest in the country.\(^ {51}\) Many of the proposed reforms for people convicted of violent crimes were removed from the final legislation package,\(^ {52}\) thus rendering about half of the state’s prison population ineligible to benefit from any of the policy changes.\(^ {53}\) In total, these reforms are estimated to reduce the prison population by just ten percent, which will still leave Louisiana with an incarceration rate that is higher than just about every state in the country.\(^ {54}\)

Georgia, too, has gained widespread publicity for “leading the nation with meaningful justice reform.”\(^ {55}\) The state’s many reforms include increased educational programming for inmates, restoring access to food stamps and other public benefits upon
release, and preventing state licensing boards from requiring one to disclose a criminal history.\textsuperscript{56} Despite these praiseworthy initiatives, the state’s harsh sentencing laws remain largely intact, and the state’s prison population decreased only 6.5\% over Governor Deal’s first four years in office, leaving Georgia’s incarceration rate among the highest in the country.\textsuperscript{57} A vivid example of the limited promise of these reforms is Georgia House Bill 328, which took effect in July of 2015; one provision aims to give drug dealers originally sentenced to lengthy mandatory minimums under Georgia’s harsh habitual offender law an opportunity for parole.\textsuperscript{58} The law applies to individuals with an impeccable behavior record after serving at least 12 years of their original sentence.\textsuperscript{59} Again, while a notable improvement, the reform itself is actually quite limited in scope.\textsuperscript{60} With its current requirements, the reform will apply to approximately 50 people, but there are more than 50,000 currently incarcerated in Georgia.\textsuperscript{61}

This is largely the state of criminal justice reform right now, to the extent it exists at all: Modest efforts that improve the status quo, mostly focused on drug sentencing and minor property crimes. Individuals serving time for drug convictions make up only 15 percent of those in prison.\textsuperscript{62} Even if reformers expanded their efforts to include a rollback of sentence lengths for additional non-violent offenses, that still would cover less than a third of the people who are incarcerated.\textsuperscript{63} And the reforms we have seen thus far for even these groups of people are incremental, not sweeping. Jurisdictions still impose substantial punishments on these offenders that typically result in time in jail and prison. Very few are diverted outright from the criminal justice system. Instead, many churn in and out of the system repeatedly, such that even when incarceration rates fall, prison admission rates in many places are rising.\textsuperscript{64} None of these reforms should be mistaken for reforms that will address mass incarceration and criminalization in any meaningful way or that represent a wholesale evaluation of policies to maximize public safety. But these are the only kinds of reforms that will pass given the populist politics of criminal law. If anyone suggested rolling back the punishment or collateral consequences for offenses involving violence, for example, they would likely be voted out of office. So the reform proposals remain modest because that is, at best, all the current system is capable of producing.

Even more discouraging is that, even as this process gives modestly with one hand, it takes away with the other. Despite the rhetoric of bipartisan agreement to rollback mass incarceration, we continue to see the proposal and passage of new criminal laws and the extension of criminal sentences to address whatever the latest public panic happens to be, whether it is a sentence viewed as too lenient for a campus rape, sex offenses against children, the scourge of opioids and fentanyl, a new fraudulent scheme or practice, or crimes committed by undocumented immigrants. Prison populations have been growing in about half the states, even while they have declined in the other half.\textsuperscript{65} If we continue to pursue substantive policy changes directly from elected officials, the results will continue to disappoint because populist political dynamics will take hold once anything moves beyond the most modest of changes.

Politicians have tried to shift the rhetoric from “tough on crime” to “smart on crime,” but if they really want to get smart on crime, they need to create a space for the
people who have actual knowledge and expertise to make the key policy decisions. Put another way, if we want to be smart about public safety, we need to seek changes to the decision-making structure responsible for getting us to the sorry state we are in now – with emotional responses to high-profile crime stories setting policy instead of data and studies about what works. If we are serious about tackling mass incarceration and preserving public safety, we need to minimize the direct role of politics in crime policy and create incentives for key decision makers to be accountable for public safety – not simply high-profile stories.

The path to better results requires us to identify the kind of failed policies that undermine public safety. Part One thus begins by providing a range of specific illustrations to prove the point that many laws and policies generated by the current approach to crime fail to protect public safety, spend limited resources inefficiently, lead to unnecessary confinement, and produce gross disparities and disproportionate punishments that are not tied to culpability or risk. They are examples of policies produced by political dysfunction, not an objective commitment to public safety. These are the kinds of policies we can and should change and that would both lower incarceration rates and make us safer.

Part Two then details the dysfunctional political and institutional dynamics that produce these policies. These political forces explain why state after state, along with the federal government, all end up reaching the same irrational decisions even though jurisdictions have vastly different cultures and ideologies. It is critical to understand the mechanisms that create our irrational policies because better policy making will require us to move away from this failed paradigm.

Part Three outlines institutional changes that will help break the hold of populism and this cycle of irrationality. The key is to create and foster institutions that use data, not stories, to drive decision-making. The actors responsible for making criminal justice decisions must be held accountable for improving public safety and not simply using tough rhetoric. More attention needs to be paid to the costs and benefits of different policy approaches to find the approaches that minimize risk overall, and courts must insist on reasoned decision-making and actively police constitutional boundaries.

Change will not be easy because criminal policy making cannot be completely removed from politics, and we know that political pathologies produced the reality in which we now leave. But there is a growing bipartisan consensus that we have gone off the rails in criminal law, and more and more people are focusing on criminal justice reform, so this is the best opportunity we have had in decades for real change. We have so many policies that are a lose-lose for everyone: policies that fail to achieve public safety and lead to grave individual injustice and discriminatory effects. Rational reflection will lead to the conclusion that these approaches need to change, so we just need to get the institutional architecture in place that allows for that rational reflection to take hold instead of continually getting swept away by populist emotions that ultimately lead to decisions that undermine the very public safety goals that the public so urgently wants to achieve. We have recognized the need to defer to experts when it comes to
everything from workplace safety to making safer cars. We live longer and more productive lives because we recognize experts can set better policies than we could using our own gut instincts. This model is consistent with democracy because these experts are pursuing the goals set by the public. It is long past the time we recognized the same model is preferable when it comes to criminal law and policy. Here, too, we can get better outcomes if we think about the long-term goal of public safety instead of short-term emotional catharsis and if we let experts look at the entire set of crimes and people committing them, instead of just focusing on the grisliest crimes that make headlines. This is that rare policy public space where we can achieve better outcomes across the board – those that make us safer, save money, reduce racial disparities, and bring families and communities closer together instead of tearing them apart. It is thus in all of our interests to demand more out of our criminal justice policies. One of the government’s primary functions is keeping us safe, and we should make sure we are getting results and not rhetoric from our leaders. If we demand real accountability, the need for institutional reform will necessarily follow because that is the only way it will be achieved.
Introduction to Part One

All too often people discussing criminal justice policies in America speak in general terms: we are too tough or not smart enough on crime. We hear vague calls to end mass incarceration but get no specifics on who in prison should no longer be there or what sentences should change. Or we might get anecdotes about particularly egregious cases. But real reform requires specifics. That might not be as interesting as emotional stories or rhetorical flourishes, but one of the reasons we have so many ill-functioning criminal justice policies is lack of attention to detail.

In the next five chapters, I will explore some of the most important policies across the range of the criminal justice process that fail to promote public safety and lead to unnecessary confinement, the misallocation of resources, and disproportionate impact on poor and minority communities.

Chapter One begins with how any criminal case has to begin: with how we define crimes in the first place. All too often criminal laws sweep far more broadly than the target problems that prompted their passage or they lump together offenders of widely varying culpability. These laws then place misleading labels on the people who violate them, which in turn sparks the public to believe they are far more dangerous or blameworthy than their actual criminal behavior. The problem with these misleading labels is exacerbated by the fact that laws often mandate punishments designed for the very worst offender in a category.

Chapter Two turns to sentencing and highlights the ways in which criminal punishments undermine public safety. The criminology research is clear that would-be offenders are deterred when they believe they will be caught, and the odds of detection matter far more than their possible prison sentence when they are deciding to commit crime. We also know that the more time an individual spends in prison, the harder his or her reentry will be and therefore the more likely he or she is to reoffend upon release. A rational approach to criminal justice would therefore recognize these costs to long sentences and make sure the public safety benefits associated with the time the individual spends in prison and off the streets – the time he or she is incapacitated – are worth it. In fact, however, Chapter Two shows that politicians almost never recognize the downsides to longer sentences and therefore excessively rely on them, to the detriment of deterrence and public safety.

The problems outlined in Chapters One and Two are exacerbated by the fact that American jails and prisons do almost nothing to rehabilitate offenders, as Chapter Three explains. Most correctional facilities offer minimal to no programming; instead, their primary function is to warehouse offenders until their release date. Without programming to counterbalance the negative effects of being housed with other individuals struggling with a range of problems, the psychological damage from social isolation, and the inability to receive treatment for a variety of mental and physical needs, our jails and prisons release individuals who are often more damaged at the end of their sentences than when they went in.
Chapter Four explores the disuse of mechanisms to correct errors in the system and to adapt sentences as more information about individuals and crimes becomes available over time (what are sometimes called second-look mechanisms). Specifically, despite the fact that people and social conditions can change dramatically over time, our criminal justice systems in the United States all too often take the view that a punishment determination is a one-time event, never to be reconsidered with new knowledge or updated data. Increasingly, jurisdictions have abandoned parole or other second-look mechanisms that would allow them to recalibrate their approaches based on new knowledge. The result is that bad initial decisions remain in place, and decisions that may have made sense at one point but no longer do similarly stay entrenched.

Unfortunately irrationality in policymaking does not end when one’s sentence does. The same political imbalances and lack of adequate checks in the system that corrupt decisions about how to define and punish crime also infect the process for deciding what should happen to people after they have served their time. Chapter Five explores the legions of collateral consequences that attach to felony and other convictions that undermine an individual’s ability to reenter society and therefore increase the risk that he or she will reoffend. All too often, policies are set in angry response to a caricature of who an offender is or as a reflexive reaction to a particularly heinous offense. But these consequences end up applying automatically to almost everyone in the system. No actor in the system has the ability to make exceptions once the collateral consequences are triggered by a charge, and few avenues exist to get these consequences lifted even after it is clear they are undermining reentry and thus public safety.

It is a sad irony that a political process that obsessively uses the rhetoric of public safety ends up producing so many policies that in fact undermine it. But that is the outgrowth of the institutional arrangement we have now, as these chapters will document.
Introduction to Part Two

Part One shows that we have numerous criminal justice policies that make no sense as a matter of public safety, poorly allocate our limited resources, and lead to unnecessary confinement. How did we end up with so many counterproductive policies and how do they stay in place when we could be pursuing a better course? We have a political environment where no elected official wants to be labeled as soft on crime, so they have either encouraged more incarceration or sat on the sidelines as America amassed a rate of imprisonment that leads the world. Little attention is paid to what actually goes on in those prisons and jails to rehabilitate the millions of people who cycle through them and ultimately rejoin society. It is a system designed to be symbolically harsh but with almost no accountability for achieving real public safety or cost effective results.

Chapter Six explains that the public, elected officials, and powerful groups all tend to support harsher laws, while the groups seeking to reduce sentences or to promote other reform efforts that focus on results instead of symbolically tough responses tend to have less power and face an uphill battle. In a political world that focuses on sound bites and where most of the public gets its information about crime indirectly from the media, it is difficult to get politicians to shift from superficially tough, but ultimately ineffective, responses to crime because of widespread voter ignorance about the issues. Even as a nascent bipartisan movement has emerged to try to shift the balance, we see only modest shifts away from the most punitive approach, and at the same time, we continue to see efforts to increase sentences and maintain a harsh approach, even as the evidence makes clear that approach fails as a matter of public safety.

The public’s receptivity to punitive responses to crime is not new – even the Framers recognized how populism could produce harsh outcomes. But there was a noticeable shift in approach in the past forty years, so something changed to light the spark of punitiveness. Chapter Seven explains the institutional factors that allowed penal populism to flourish in recent decades in ways that did not exist previously. Specifically, it describes how critical checks that once existed decayed, allowing populist impulses for severity to take hold without any mediating force focused on rationality or results to rein in the excess. Understanding these political and institutional dynamics are critical to finding solutions because they point the way to kinds of mediating institutions and public information that is necessary to improve criminal justice policymaking.
Introduction to Part Three

It is a cruel irony, for those affected by mass incarceration and the thousands of criminal laws and long sentences on the books, that we have it almost by accident. No central planner sat down to craft it as a solution to so many of society’s ills. Indeed, we do not have anything remotely close to a central criminal justice system in the United States. We have 51 jurisdictions making criminal laws and more than 2300 prosecutors’ offices making their own decisions about how to enforce them. Yet somehow these different sovereigns and government officials have all more or less coalesced around the same punitive policies.

To be sure, there is wide variation among states in incarceration rates and among localities in enforcement practices. Incarceration rates range from Louisiana, which currently has America’s highest incarcerating rate of 1,143 persons for every 100,000 residents, to Massachusetts, which has the lowest rate of 300 individuals per 100,000 residents. These rates reflect differences in various practices and policies, from how the jurisdiction treats juveniles who commit crimes to the way they charge recidivists. Nor is all the variation at the state level. Within each state, counties and districts differ from one another. For example, all of the executions since the death penalty was reinstated in 1976 have been carried out by only 15% of the counties in the United States. Communities in southern states that have higher income inequality, a larger number of evangelists/fundamentalists, and/or higher crime rates are particularly punitive.

This variation reflects the fact that the politics and institutions in different states diverge. But even Massachusetts would lead most of the rest of the world in incarceration, so American jurisdictions have more in common with each other than with the rest of the world when it comes to crime policies.

Indeed, most of the various irrational policies described in Part One have sprouted up everywhere in the United States – sometimes with other jurisdictions deliberately borrowing the same flawed ideas from other places. Political forces and emotional responses have taken charge throughout the nation, leaving any concern with rational evaluation to the side. Case-by-case, statute-by-statute, the carceral state metastasized, without anyone looking to see whether it made any sense overall or even policy-by-policy.

But it is not enough to point out the flaws. Reformers and critics have been shouting from the rooftops about many of the policies outlined in Part One, begging for reform. They are often shot down by the usual tough-on-crime rhetoric or dismissed as insufficiently attentive to public safety, even when the status quo is doing little to protect the public and often creates greater dangers in the long run.

The problem, as Part Two makes clear, is that the political system is not the right location for debating and addressing the flaws in criminal justice. The politics of fear take charge, and without institutional checks to inject rationality into the process and with prosecutors firmly in charge, we will continue to get the same irrational policies.
To get better outcomes, we need a better institutional structure and process. The Framers knew it. They worried that legislators would tend to excess, so they created significant constitutional checks for individual cases. But those checks are in disrepair. And even if they were working as intended, they would be insufficient because they tend to focus on checking abuses in individual cases and do not provide a safeguard against broader irrational policy decisions.

Because of the politics of criminal law, legislators often fail to assess the costs and benefits of particular policies. They focus only on the benefits of long sentences and severity without recognizing the tradeoffs. They do a poor job assessing risk tradeoffs, often opting for policies that serve a short-term retributive impulse to deprive offenders of some benefit (whether it is a lower sentence, programming in prison, or the opportunity for public benefits on release), but that over the long-term increase the risks of crime.

The traditional checks of individualization do little to address these problems because the problem is at a higher level of policymaking. What is needed to check these flaws are different institutional actors that can assess the bigger policy calls and check them for irrationality.

The solution to the over-politicization of criminal law – and the corresponding lack of rational deliberation it brings – is thus to make sure that there are appropriate checks in individual cases and that there is better broad-scale decision-making. This Part takes up the task of describing a better institutional model for criminal justice decision-making that insulates the worst self-destructive impulses of populism and injects rationality in the system so that public safety is maximized at the lowest cost and on the best available evidence.

Chapter 8 begins by offering an administrative framework to replace the unchecked power that prosecutors currently exercise. No solution to criminal law’s excesses can ignore the powerful role prosecutors play in the system, so one key is to reconceive that role and recognize its enormous power and scope – and then seek to make sure those powers are exercised rationally and responsibly. Voters have a big role to play here by electing district attorneys committed to more rational, data-driven decision making instead of stale rhetoric about long sentences.

It is not sufficient to create a better institutional oversight model for prosecutors because, while powerful, they do not control all criminal justice policies. Chapter 9 thus explains the need for using an expert agency model to address criminal justice policymaking and to coordinate policies among key actors. These expert bodies should use empirical data and studies to guide their decisions about criminal justice policy to maximize public safety. At the same time, these agencies must be designed to withstand the political pressures they will inevitably face to adopt superficially tough, but actually ineffective, measures to address crime.
Chapter 10 then turns to the judiciary. The courts are critical checks on criminal law excess. At the federal level, the Supreme Court must reinvigorate the constitutional checks that already exist to police excess in individual cases and to prevent arbitrary and capricious enforcement. And at both the state and federal level, more attention needs to be paid to who occupies the bench. Currently, judges are overwhelmingly former prosecutors, making them particularly ill-suited to provide the meaningful second look of prosecutorial decision making that is necessary to bring rationality to the system.
Chapter Eight
Policing Prosecutors

Meaningful institutional reform must begin with changing the way prosecutors operate. They have all of the powers of traditional civil regulators – and then some – but none of the checks designed to ensure they make rational, non-arbitrary decisions. This chapter explores a variety of needed reforms to improve the operation of prosecutors’ offices in the United States. Many of the proposed reforms will sound familiar to anyone who deals with other regulatory and enforcement agencies because they are taken from the administrative law and policy realm. The United States has a long history of checking excess agency behavior, but until now those institutional safeguards have bypassed prosecutors. This chapter outlines how those traditional administrative law and other institutional checks can be translated to fit the realm of criminal prosecution.

In addition, there is another way to check prosecutors in the U.S. that is not available in the traditional civil regulatory context: elections. For most of American history, elections have resulted in the failed policies discussed in Part One. Populist fears and impulses among the electorate create pressure on prosecutors to make ill-advised short-term decisions that end up compromising public safety in the long-run, and few voters pay attention to anything other than the usual tough-on-crime campaign strategies, even when those policies produce poor results. This chapter discusses how voters can better assess candidates for district attorney by focusing on metrics associated with public safety and fiscal responsibility instead of empty rhetoric that ends up being counterproductive.

Bringing Administrative Law and Better Institutional Design to the Prosecutor’s Office

Prosecutors’ offices in the United States engage in both individualized enforcement actions and setting broader criminal justice policies. Unlike just about every other government agency, they face almost no oversight or scrutiny in either of these roles. The result is that they often pursue policies that are in their professional interest but not necessarily in the public interest and that abuses in individual cases go unchecked. Although changing the way these offices have operated for decades will not be an easy task, if the momentum exists for any kind of criminal justice reform, it is ideally channeled to improve prosecutorial decision-making and to check prosecutorial abuses.

Let’s start with prosecutorial policymaking. Prosecutors’ offices throughout the United States play a key role in setting punishment policy in America. As discussed in the previous chapter, their control over charging and their leverage in plea bargaining effectively gives them sentencing power. Their charging policies are thus some of the most important policy calls being made about criminal law in the United States today.

Even when prosecutors do not control sentencing outright – either by charging a statute with a mandatory minimum punishment or working out a plea deal with an agreed-upon sentence – they influence outcomes in cases because of the deference they receive from courts. Judges defer to their recommendations on bail and sentencing, thus
making prosecutors’ own benchmarks about pretrial release and sentencing key policy decisions.

Prosecutors often exercise control over other aspects of criminal law as well. The Department of Justice, for example, is an agency run by prosecutors that also sets policy with respect to forensics, corrections, and clemency, in addition to its policy calls on charging and sentencing. While most states use departments independent of their prosecutors to administer corrections policy and tend not to give prosecutors an official role in clemency, they often allow prosecutors to play a key role in setting forensic policies. Even when prosecutors are not formally in charge, they influence many key policy decisions through their lobbying efforts.

So what can be done to improve the content of those policies, given that prosecutors’ positions on criminal justice policies will inevitably be clouded by their self interest in making their jobs easier, even if that comes at the expense of the broader public interest? One key institutional change is to make sure that prosecutors are not put in charge of areas outside their core law enforcement responsibilities. There is no reason prosecutors should be in charge of criminal justice policies that do not involve charging and prosecuting criminal conduct. Forensics, corrections, clemency, and other criminal justice policies should be made by individuals who do not have a conflict of interest in the substance of those policies, as prosecutors do. Prosecutors will inevitably view these issues through a prism of what would be good for them and their cases and will not be able to assess objectively other interests that conflict with their own. For example, commentators have observed that the Bureau of Prisons “has become captive to the Justice Department’s prosecutorial agenda.” That explains why so few elderly or terminally ill individuals in federal prison get compassionate release even though they pose low recidivism risks, would ease up pressure on an overcrowded BOP, and would save taxpayer dollars. Prosecutorial bias also accounts for various scandals at crime labs throughout the country where scientists had, in the words of one former lab director, too often viewed “their role as members of the state’s attorney’s team.” It also explains why local, state, and federal law enforcement organizations, including the Department of Justice and the National District Attorneys Association, resisted the findings of expert scientific panels of the need to change their practices with respect to forensic science. They simply dismissed a National Academy of Science report documenting the flaws with current practices, urging the creation of an independent agency federal agency, and encouraging states to use independent administrative units to handle forensics because having forensics controlled by prosecutors and law enforcement could make them “subject to subtle contextual biases” and “[t]he potential for conflicts of interest between the needs of law enforcement and the broader needs of forensic science are too great.”

The broader literature on how agencies handle conflicting missions explains prosecutors’ behavior. When agencies have multiple goals and they come into conflict, they adhere to their primary mission. An agency like the Department of Justice has a dominant mission of law enforcement and prosecution. Any other mandate – to set forensic policy, to run prisons, to administer a clemency process – will take a back seat to the main goal of pursuing what is in the interests of prosecutors. Policy calls will thus
be made with prosecution, and not other interests (including the public’s), at the forefront. The solution to this conflict is to remove it. At the federal level, for example, that means taking the Bureau of Prisons, clemency, and forensic science out of the Department of Justice and allowing independent experts to set those policies. While prosecutors can weigh in on those issues, they should not be in charge of them. To the extent any state follows a similar model of giving their prosecutors control of any of these policy areas, they, too, could create independent bodies to handle these issues. Empirical evidence and data should govern these decisions, not gut reactions by prosecutors to defend decisions they have already made or to choose policies that would make their burden of proof easier to meet even if the science says otherwise. Because prosecutors are elected in most places, their positions are likely to be tainted further still by what will hold up in campaigns, thus further corrupting their ability to make decisions objectively.

So a crucial first step in getting better outcomes is to remove all but core prosecutorial decisions from prosecutors. This is the kind of institutional change that is unlikely to garner the same kind of opposition by voters that surrounds substantive changes in policy. To say the sentences for drug trafficking will be reduced is to set off the usual alarms about being soft on crime. But to say that a jurisdiction will establish an independent forensics commission to decide matters of science is not nearly as contentious. To be sure, vested interests (namely prosecutors) will object, but if there is enough momentum among reformers, this is the kind of structural shift that can get bipartisan agreement.

That takes care of the tangential policy portfolio that some prosecutors have, but what about those areas that will stay within the hands of prosecutors because they are part of their function in the system? They will inevitably make charging and sentencing policies. One key institutional check to improve prosecutors’ core decisions is for legislatures to allow other actors to check those decisions. That means eliminating mandatory minimum sentences or binding sentencing guidelines so that judges have the discretion to use their authority over sentencing to correct prosecutors that go too far. Just as agencies face judicial review of their decisions, prosecutors need to face judicial review of theirs. But if judges’ hands are tied because a sentence is mandatory, they cannot exercise their critical role as a check on excess government.

This reform will be tougher to achieve than shifting institutional responsibility for policy decisions from prosecutors to other agencies because eliminating a mandatory sentence allows prosecutors to claim not just that they are losing a turf battle but that sentences are being reduced and public safety is at risk. Indeed, that has been their playbook when jurisdictions have sought to rollback or eliminate mandatory minimum sentences. Prosecutors attack those proposing such changes as being soft on crime if they remove mandatory minimum floors. So this suggestion is not an easy one to accomplish. But to the extent this is feasible politically – because prisons are overcrowded and costs are too high, thus presenting a need for sentencing reform that is in the interests of legislators – it is a crucial check and balance to prosecutorial decision-making. This is a
substantive change that will have enormous institutional consequences because it will allow judges to check prosecutorial overreach.

Parole and clemency also serve as fundamental back-end checks on prosecutorial decision-making. People change over time, not the least because they age out of criminal behaviors, but also because people learn and develop. But prosecutors make their decisions before they know what the future holds. Without someone else in the system to take a look at how a person may have changed from the point at which he or she engaged in criminal conduct, the prosecutor’s decision will be set in stone. So even if someone gets a sentence of decades, there will be no opportunity to revisit it. Prosecutors cannot anticipate how much someone will change, so lacking second-look mechanisms places too great a burden on their initial assessment. Having an active back-end review process that takes a look at how people change over time and their progress at rehabilitation is critical. Typical administrative agencies revisit their own decisions over time, rescinding and changing prior rules as new facts become known or as administrations change their political priorities. Prosecutors, in contrast, decide individual cases and then do not revisit those decisions, thus ossifying prior judgments even when the evidence would point in a different direction as time passes.

While some prosecutors may accept the idea of a back-end review process to assess rehabilitation and changed circumstances, many may object. So this kind of reform will likely face political obstacles in jurisdictions where it does not already exist or, where it does exist, if it is going to be used more robustly. But a system dedicated to promoting public safety has to reconsider sentences and the people who receive them at various points in time to decide what the appropriate course should be. At a certain point, long sentences themselves become criminogenic because of the barriers to reentry they create. And while some criminal justice policies are hard to explain to voters, the notion that people change over time is not foreign to the average person. We all see it with the people in our own lives, whether it is our children, our siblings, our friends, or anyone else we know over a period of years. To be sure, any one decision to release someone who goes on to commit a violent crime runs the risk of derailing second looks for everyone. There are some institutional designs to help insulate the decisions, such as the use of cost benefit analysis to show the value in giving people a second chance or prison capacity caps to create the incentive to take those second looks. But there is no denying that the risk will always be there that one person’s early release will create a firestorm that derails an entire second-look program. This fear may mean that parole and robust second-look review does not get off the ground in some jurisdictions. But as more formerly incarcerated people speak out and show through their own example how important it is to recognize the potential in people because of the contributions they can make to society, this may become more viable. It is a critical step worth taking and those interested in changing the institutional dynamics discussed in Part Two must press for back-end review as a check.

Even with these institutional changes, prosecutors will still be making important policy calls about charging and sentencing. Sometimes an office will do so explicitly with formal guidelines or written rules about how to charge cases (for example, what
quantity thresholds will trigger certain drug trafficking charges or requests for cash bail, or what factors make someone eligible or ineligible for diversion). Prosecutors should also be held accountable for the costs of their decisions, including the impact those decisions have on jail and prison budgets.

When prosecutors make these judgments, they should be required to use the best available data available in setting their policies and should face review. This can be done in a variety of ways. One option would be to place a cap or limit on how many or what share of state resources each local prosecutor’s office is allowed to use so they do not “overspend” those resources. Without imposing cost or other constraints, prosecutors will have an incentive to overuse prisons and jails to avoid the risk of being blamed if someone who could have been detained pretrial or given a longer sentence ends up committing another crime after release. Because prosecutors currently do not have to pay for the use of prison or jail resources, they have no incentive to think of them as scarce resources that should be reserved for people who commit the most serious offenses.

Another option for achieving this goal would be to require prosecutors to submit their policies to an oversight body within the government structure that is charged with reviewing those policies to make sure that they represent the most cost effective option and that the costs of the policies are outweighed by the benefits. This kind of outside check can assure that the prosecutors’ decisions are based on empirical evidence and not professionally risk averse preferences to seek too much cash bail or prison terms that end up creating a greater public safety risk for society. A variant of this model is used in Washington, which has the Washington State Institute for Public Policy analyze its criminal justice policies to make sure they are cost-benefit justified. The federal system also uses this kind of oversight for civil regulatory agencies. The idea behind this kind of check is that it will give prosecutors the right incentives to use the best information out there and maximize limited resources. Reformers should thus push for laws and oversight that hold prosecutors accountable for the costs of their policies and to make sure they are choosing policies that maximize public safety given what we know about works and what does not. Voters are always concerned with costs and public, so this is the kind of design change that is more easily accomplished than substantive changes to laws or sentences.

Often, however, prosecutors’ offices will have no written policies or general guidelines about a particular issue. They may instead rely on informal advice by supervisors or veterans in the office about how to handle individual cases. To better get better outcomes in the inherent policy decisions that guide case-by-case decisions, there are some structural changes offices can make to improve things. Currently, very little thought goes into how prosecutors’ offices should be structured or what kind of oversight they should face. If prosecutors engage in poor decision-making, the only real check in most places comes at the ballot box when the head prosecutor faces reelection. Even if individual prosecutors misbehave – by intentionally or negligently violating the law – there are typically few consequences. It is almost impossible to bring a successful civil suit against a prosecutor because of the absolute immunity they enjoy for any conduct
“intimately associated with the judicial phase of the criminal process.” Prosecutors are rarely sanctioned by state bars or by their supervisors, even when they engage in intentional misconduct (such as making a deliberate decision not to disclose exculpatory evidence to a defendant), and even when prosecutors repeatedly engage in misconduct. What, if anything, can be done to yield better outcomes and police prosecutors’ individual decisions?

Administrative law again offers some insights. One concern posed by prosecutors is their ability to combine enforcement power with adjudicative power. Because prosecutors can typically choose from a range of charges, some of which might have mandatory punishments attached, prosecutors have leverage to extract pleas and cooperation from defendants and thus control the ultimate outcome and sentence in a case. Their power to enforce thus turns into the power to adjudicate. This is a classic concern of separation of powers because it puts law enforcers in positions to judge their own cause. After spending time investigating a case and pursuing a particular defendant, it is too much to ask prosecutors to be impartial in deciding what should happen to that defendant because they develop a “will to win” that clouds their judgment. This was a central concern of the administrative state because Congress was establishing agencies that combined enforcement and adjudicative powers. So Congress put in place internal separations within agencies to guard against bias. Specifically, the Administrative Procedure Act disallows “[a]n employee or agent engaged in the performance of investigative or prosecution functions for an agency” from also participating in formal adjudicatory proceedings.

Translated to the prosecutor’s office, this means that a prosecutor who has been involved in the investigation of a case or who has obtained information about a defendant in a proffer session or in discussions with an investigative agent should not be the same person who decides what charges to bring or whether to accept or offer a plea deal. Charging and plea decisions are properly viewed as adjudicative because they effectively determine the outcome in cases. It is also important to separate prosecutors who will represent the government in court (either at trial or in pretrial proceedings) from those who make charging and plea decisions because representing the government in court puts prosecutors in an advocacy position that is at odds with their role as impartial adjudicators. This basic framework – where an attorney involved in investigation or advocacy before judges is not involved with adjudicative decisions in a prosecutor’s office – can be adopted in most offices because there are enough lawyers to make it work. Ideally those individuals who make the adjudicative decisions about charging and pleas will be the people in the office with more experience because that longevity of service will give that person perspective on how any one case fits in with the larger caseload before the office and will also make any particular decision about a case less important to that attorney’s overall record of decisions.

It is important not to oversell what this model can accomplish. Because everyone involved in these decisions will be a prosecutor and will be part of a larger team of people working for the same office, there is only so much objectivity it will achieve. Additionally, the prosecutor making the adjudicative decision will likely be getting most
of his or her information from the prosecutor doing the investigation, so the setting will not parallel a court in terms of having both sides equally represented. But this set-up is still preferable to a model that makes no effort at separating the different roles prosecutors assume in a case. Moreover, this is the kind of reasonable change in practice that should appeal to lead prosecutors. Some offices already do versions of this successfully, so its viability has been established.\textsuperscript{15} And it serves the interests of lead prosecutors to exercise greater control of case management to ensure uniformity in how the office treats similar cases and to get unbiased assessments of how cases should be settled.

In the misdemeanor context, there are just too many cases to expect a division of labor or anything more than a few minutes for each case. But if substantive changes are made, such as the elimination of cash bail and limits on the pretrial conditions of release, prosecutors will lose some of the leverage that enables them to seek excessive amounts of confinement and supervision in these cases that end up undermining public safety.

Prosecutors’ offices could make other internal improvements to check against abuses and further public safety. While many offices have the most junior attorneys screening cases at the outset to decide which ones should be dismissed at how they might be charged, those lawyers lack the experience to sift through cases as effectively as more experienced prosecutors. A new prosecutor might think everything looks serious or that all cases should be charged because they lack the perspective of having seen the overall caseload of the office for a number of years. Veteran prosecutors can more easily recognize the kinds of minor cases that should be dismissed or if particular defendants would be better served by treatment or diversion. They also have more credibility and confidence if it is necessary to push back against law enforcement officers who might want more serious charges.\textsuperscript{16}

Other mechanisms exist to guard against abuse by agencies that could be adapted to prosecutors’ offices. Government agencies have long been subject to review by independent monitors to make sure that they are complying with the law and to improve their accountability. These monitors can take different forms, from inspectors general to internal affairs bureaus to civilian oversight boards.

Some prosecutors’ offices already have oversight bodies such as these. The Department of Justice, for example, is subject to oversight by an independent Inspector General, and the Department pursued some of its most significant reforms after prompting by critical IG reports. Inspector General Michael Horowitz, in particular, offers a model for how an oversight body like an IG can prompt valuable changes in the name of public safety. Horowitz did not see his role as limited to finding instances of misconduct or fraud, which is the typical IG model. Instead, he audited Department practices to find irrational policy decisions that resulted in wasteful allocation of government resources that could not be justified as a matter of public safety. For instance, Horowitz highlighted the fact that overcrowded federal prisons took up a vast chunk of the Department’s budget and looked for ways to free up funds on corrections to use for other law enforcement needs.\textsuperscript{17} He highlighted the Department’s flawed approach
to compassionate release as one such example where the Department could pass needed reforms to free up prison beds without compromising public safety. While the Department did not adopt all his recommendations, it did change some of its practices and likely would not have done anything without his prompting. The Department similarly responded with policy changes after critical IG reports on its use of private prisons and on BOP’s failure to adequately prepare individuals for reentry. Horowitz’s influence shows that an IG charged with auditing policies to point out areas where resources could be more effectively allocated – and where those reports are public so that voters can see the areas that should be changed – can make a difference. To be sure, the right kind of person needs to be appointed IG, so it is helpful to get someone with strong investigative experience, a commitment to data and evidence-based evaluations, and with the necessary independence from prosecutors to point out where their approach is flawed. But if reformers focus on getting these kind of oversight bodies in place and pay attention to the people who occupy the posts, they can be helpful advocates for reform.

A related model for reforming prosecutors’ offices comes from the area of corporate misconduct and compliance. Companies share in common with prosecutors’ offices conditions that give individuals incentives to cut corners to make their jobs easier and to show results (in companies because they want raises and in prosecutors’ offices because they want to win their cases). Sometimes that means there are incentives to violate the law. Both contexts are also characterized by poor oversight or insufficient resources to monitor employee behavior, making it more likely that negligent violations will occur. Prosecutors have recognized the need to change company structure and incentives to stop misconduct and have used the leverage of criminal charges to get companies to agree to a variety of organizational changes to incentivize future compliance with the law. Those very same techniques could be applied to prosecutors’ offices themselves.

The core idea is to “promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.” To achieve that end, organizations must make specific people responsible for compliance and ethics, and those people must report to other individuals at the highest levels of the organization. Thus, in a larger prosecutors’ office, one of the attorneys could be designated in charge of office ethics and compliance and that person should report directly to the district attorney or a top deputy. In smaller offices, the district attorney himself or herself should take charge of ensuring that the attorneys in the office are meeting their obligations.

To ferret out wrongdoing, an organization must monitor and audit activities to detect unlawful or inappropriate conduct. In a prosecutors’ office, this means looking for things like compliance with disclosure obligations and making sure prosecutors are turning over exculpatory evidence, or monitoring prosecutors to check that they are not asking for excessive bail or threatening excessive charges or sentences to coerce guilty pleas. If the office finds such violations are occurring repeatedly or systematically, it can institute reforms to address the root cause of the problems. For example, if the reason prosecutors are failing to turn over exculpatory information is poor recordkeeping within the office, the office can establish new protocols for keeping track of evidence and
witnesses. If instead the office discovers that prosecutors are committing violations because they are unaware of their obligations or office policies, the solution might be improved training, written guidelines distributed to all attorneys, or a staff meeting to discuss their duties. If instead the office discovers that prosecutors are committing violations because they are unaware of their obligations or office policies, the solution might be improved training, written guidelines distributed to all attorneys, or a staff meeting to discuss their duties.20 Offices should also make clear to the public what they are doing to address violations and problems. This means publicizing their written standards and manuals and providing the public with information on how they have handled any discovered violation of the law. Offices should also have in place a reporting system so that employees can confidentially or anonymously alert the leaders of the organization when they suspect or know of wrongdoing.

A final key is to make sure the organization has the right incentives in place to reward ethical behavior and to sanction non-compliance with the law or misconduct. Office leadership should praise those attorneys who discover errors and disclose them and who pursue policies that promote public safety even when those policies look lenient. One hallmark of a successful conviction integrity program within a prosecutor’s office, for example, is the praise it gives to those attorneys who discover and remedy wrongful convictions.21 Offices cannot expect to promote ethical behavior if the only rewards and accolades go to those who get convictions or long sentences. They must also praise successful diversions from the criminal justice system, efforts to limit the population who are detained pretrial, prosecutors who assist with someone’s successful reentry to society, and any other instance of a prosecutor making sure that justice is done and public safety is prioritized.

Prosecutors will need to be pushed to adopt these institutional changes within their offices, as it will be the rare head prosecutor who opts to do this on his or her own. While some prosecutors may see the light on their own, most will need a nudge. The next chapter will discuss how another agency in government can help spark and oversee these kinds of changes. But voters also have the power to push these kinds of reforms by choosing prosecutors who are committed to policies that promote public safety instead of pursuing a tired and failed rhetoric of superficial toughness that locks people away only to release them far worse off than when they went in.

Democratic Accountability

Most prosecutors in the United States are elected so if they are not using their authority to maximize public safety or are otherwise behaving improperly, they can, in theory, be voted out of office. In practice, however, incumbents win a whopping 95% of the time when they are up for reelection. Most of the time, they do not even face a challenger. When races are contested, the candidates tend to focus on their own personal attributes or particular high-profile crimes and cases, not overall patterns or policies.22 And as with most popular elections that touch on criminal justice issues, tough-on-crime rhetoric has been dominant.23

That dynamic has recently started to change, and this shift holds promise for future improvements to this process.24 Some criminal justice reformers have made a targeted effort to unseat incumbent district attorneys with troubling records. In many
instances, the key triggering event was a prosecutor’s deficient performance in addressing a police shooting of an unarmed citizen. In Cayahuga County, Ohio, which includes Cleveland, the incumbent Timothy McGinty lost after failing to indict the police officer who fatally shot 12-year-old Tamir Rice. The challenger, Michael O’Malley, all but conceded that his main attraction for voters was that “I am not Tim McGinty.” O’Malley did not have a broader reform agenda, so all the activism around that election centered on the Rice case.

But in other jurisdictions, interest in the DA’s handling of a police shooting served as an entry point to deeper scrutiny into the office’s practices and criminal justice reform more broadly. For example, in Cook County, which includes Chicago, Kim Foxx successfully campaigned against the incumbent, Anita Alvarez, who had been widely criticized for her handling of the Laquan McDonald case, which involved an officer shooting a 17-year-old that was captured on video and did not support the officer’s claim that McDonald was a threat to his safety. Alvarez failed to show the surveillance video to the public for more than a year and released it only after a judicial order required her to do so. It was not until the video’s public release and the public outcry that followed that Alvarez finally brought charges against the officer. The protests surrounding Alvarez suggest that the election was more about getting her out of office for her treatment of the McDonald case than it was an affirmative embrace of Foxx. But Foxx ran a campaign that went much further than distinguishing her approach to cases involving officers shooting unarmed civilians; Foxx criticized Alvarez for creating a culture in the office that was “tough on crime, as opposed to thoughtful or smart on crime” and emphasized the need for reforming the office’s approach to juvenile justice and bail. Activists have warned Foxx that they stand ready to oppose her at the next election and will be watching her to not only change the “culture of police impunity” but also to “cut off the school to prison pipeline, end prosecutions for low-level drug possession and work with us to create mass expansion of alternatives to incarceration”.

So while a police shooting triggered an incumbent DA’s fall in Chicago, the activism around it has broader criminal justice goals.

One can see a similar storyline out of Harris County, Texas, which includes Houston. Kim Ogg unseated the incumbent, Devon Anderson, after Black Lives Matter activists set their sights on defeating Anderson for failing to hold law enforcement accountable after the death of Sandra Bland. Bland had been pulled over for allegedly failing to signal when changing lanes. Because she could not afford the $500 bail bondsman fee, she was put in jail, where she was found dead 65 hours later, hanging from a noose made out of a garbage bag. While Bland’s death seemed to spark the initial movement to remove Anderson from office, other criticisms emerged. Anderson came under fire for her decision to jail a mentally ill rape victim to ensure her availability for trial, for her comments blaming Black Lives Matter for the fatal shooting of an off-duty officer, and for the disproportionate number of death sentences sought by her office. Thus, as was the case in Chicago, the race became as much about the incumbent’s broader criminal justice policies as it was about the handling of law enforcement misconduct. And Ogg was just as vocal as Foxx in asserting her desire for broader reforms. Ogg acknowledged the “human toll” misdemeanor criminal convictions
take and promised not to prosecute misdemeanor marijuana offenses. She also emphasized the need for bail reform, calling the current system “an unjust ‘plea mill’” and a “tool to oppress the poor.”

The reform spirit also triumphed in St. Louis. When incumbent Jennifer Joyce decided not to run for election, it set the stage for a crowded Democratic primary that included a challenger who received the endorsement of Joyce and the St. Louis Police Officers Association, which would be the traditional tough-on-crime endorsement that would signal victory. But the primary also included Kim Gardner, who tried to appeal to voters eager for reforms to the justice system in the wake of Michael Brown’s killing by a police officer. Gardner won the crowded primary with 47% of the vote and went on to win the general election.

The tragic deaths of unarmed citizens at the hands of law enforcement thus served in these districts as canaries in the coal mine, raising larger issues about the need for reform in these offices. And the successful campaigns of the challengers demonstrate that with the right narrative to grab attention – in these cases, innocent lives lost after interactions with law enforcement – voters can be as moved about over-aggressive but ineffective prosecutors who are too friendly to law enforcement as they are to narratives that focus on the fear of violent crime.

Importantly, the narratives that grab public attention about prosecutorial overreach do not have to involve police shootings for incumbents to lose elections. In some instances, incumbent prosecutors have been successfully challenged because of misconduct in their office. Kenneth Thompson, for example, beat incumbent Charles Hynes, who had held his office in Brooklyn for 23 years, in part based on allegations that Hynes failed to adequately investigate cases of wrongful convictions and on other claims of misconduct under Hynes’ leadership. Thompson unabashedly ran as a reformer, pledging to not only clean up the alleged misconduct under Hynes, but also to work for racial justice and combat excessive stop-and-frisk tactics by the police. Scott Colom likewise defeated incumbent Forrest Allgood in the Sixteenth District of Mississippi, which encompasses Jackson, both by highlighting Allgood’s pattern of aggressive prosecutions and his failure to investigate a wrongful conviction that received significant media attention, and by emphasizing Colom’s own agenda to “find better ways to transition some . . . people out of the criminal justice system, or avoid the criminal justice system altogether.” In Nueces County, Texas, which includes Corpus Christi, a career defense attorney beat the long-time incumbent with a similar approach. The challenger Mark Gonzales proudly touted the “not guilty” tattoo on his chest and the fact that he has “more in common with my defendants than with my colleagues across the bar.” Gonzales’s platform emphasized a plan to be smarter about charging decisions and the importance of turning over exculpatory evidence to defense attorneys in a timely manner. Gonzales thus won by explicitly highlighting his reform agenda as well as noting several cases of prosecutorial misconduct under the incumbent where exculpatory evidence had been improperly withheld. One can see the same blueprint in Hillsborough County, which contains Tampa, where Andrew Warren unseated the incumbent, Mark Ober, both by highlighting the incumbent’s handling of a sex offense
case involving a 17-old victim and by running his own progressive campaign that promised “a renewed focus on rehabilitation and reducing recidivism” and that pointedly criticized Ober’s approach as overly punitive and behind the times – or what he called “the rotary phone of criminal justice.” Another reform candidate, Aramis Ayala, likewise rode to victory in the wake of a scandal involving the incumbent. In the district that includes Orlando, Florida, the incumbent, Jeff Ashton lost his election after voters discovered he had signed up for the Ashley Madison dating site, which caters to married men and women seeking to have affairs. Ayala’s criticisms of the incumbent were broader than his personal moral failings. she criticized Ashton for pursuing racially discriminatory criminal justice policies and advertised herself as a reform candidate who understood the concerns of communities of color. She noted her own husband’s criminal record and her background as both a prosecutor and a public defender.

It does not always take misconduct or a high-profile police shooting for prosecutor elections to be about reform. In Henry County, Georgia, Darius Pattillo won his election with goals of “establish[ing] a pre-trial diversion program, a domestic violence/crimes against children unit, and a community outreach program.” In Bernalillo County, New Mexico, which has Albuquerque as its county seat, the two candidates vying for the DA position after the incumbent stepped down presented two different visions for voters: one emphasized his police officer background and pledged to be tough and no-nonsense, whereas the other, who ultimately won, emphasized that “being tough on crime doesn’t mean we can’t be smart on crime” and arguing that “nonviolent offenders need treatment and rehabilitation.”

Larry Krasner represents the biggest win for a progressive approach to criminal prosecution. Krasner was a civil rights attorney who represented activist groups, including Black Lives Matter, and had sued the police 75 times. He won a crowded Democratic primary in Philadelphia with almost 40 percent of the vote on a platform of ending mass incarceration. He emphasized the need for diverting individuals with drug problems to treatment instead of incarceration, abolishing bail, and lowering sentences. His opponent in the general election, a career prosecutor, received the endorsement of the police union and chided that the city already had a public defender’s office and didn’t “need the district attorney to be a second.” Yet Krasner emerged victorious, demonstrating the willingness of voters to upend the status quo under the right electoral circumstances. Krasner himself observed that a big part of the reason for his win was that the black voters in Philadelphia “are more likely to have a family member who is a police officer, a family member who is in jail, and a family member who has been killed or severely victimized. They are more likely to have seen this whole thing in three dimensions.” These voters, in other words, were informed enough to know that a “tough on crime” campaign was ineffective and a better approach was needed.

This reform-minded approach does not always work. For example, a well-financed challenger to the incumbent DA in Denver lost after campaigning with a promise to end mass incarceration and to “[s]top incarcerating non-violent drug users.” But the fact that is has worked in many places of late shows that prosecutors could be accountable through elections for policies that are too harsh, costly, and ineffective.
The key is to identify what made these challenges work. In many cases, the Black Lives Matter movement and affiliated groups have been key ingredients to unseating incumbents in several jurisdictions. Krasner had huge support among movement activists, as did Foxx. Some of the activist groups focused their efforts on negative campaigns against the incumbent without endorsing an alternative, whereas other groups not only protested against incumbents but also affirmatively supported challengers. The political organizing group Color of Change, for example, supported Foxx and has also focused on helping challengers win races in Columbus, Cincinnati, Tampa, and Houston.

Those interested in reform of prosecution practices would do well to continue to get movement activists interested in problematic prosecutorial practices. While a prosecutor’s failure to pursue a police shooting case in many of these instances has correlated with other problematic practices, there are countless jurisdictions with troublesome practices that have not yet been scrutinized because no high-profile police shooting or case of wrongful conviction brought the office into the public’s eye in the same way. Those who care about prosecutorial reform thus need to be as focused on practices that needlessly promote mass incarceration as they are on police misconduct, and to hold prosecutors accountable for following policies that reduce crime, maximize limited state resources, and pose the least amount of damage to communities and individual liberty interests.

Another critical takeaway from successful reform elections is that they were often fueled by campaign donations by people who are interested in criminal justice reform. The most notable contributor has been liberal billionaire George Soros, who has in many cases contributed millions to races that ordinarily seldom exceed five-figure fundraising. Krasner, for example, received more than a million dollars of funding from a Soros-backed group. In at least two instances, Soros’s injection of financing prompted a competing candidate to drop out of the race. Of the first ten candidates Soros supported, only two failed to unseat the incumbents. But Soros is not the only one funding challenges. Kim Foxx in Chicago received sizable donations from, among others, the Civic Participation Action Fund, the Service Employees Union International, and a local millionaire known for backing Democratic initiatives. Kim Ogg in Houston received funds not only from Soros, but also from a Democratic trial lawyer. Regardless of who supplies the funds, the key is that, with enough financial support to get out their message, challengers have been able to win on progressive agendas.

*The Right Metrics*

It is not enough to get reform-minded prosecutors elected. Criminal justice reformers and activists must police and monitor these newly elected prosecutors and other prosecutors claiming a more progressive, “smart on crime” agenda to make sure they really are performing well. As David Sklansky points out, one key to this effort will be to have transparent metrics that allow outside groups and reformers to assess prosecutorial performance. Traditionally prosecutors have touted guilty verdicts in high-profile cases or their own qualifications in their election campaigns, and the public’s
focus has largely remained there. But these markers say little about whether a DA’s office is working well overall to reduce crime and recidivism.

Other metrics do a better job alerting voters to whether a prosecutor’s office is working well to serve the public interest. One key indicator is how prosecutors plan to lower incarceration rates (both pretrial detention and for those serving sentences after convictions), or for those seeking reelection, what they have done to lower rates. We know jurisdictions can reduce crime rates or keep rates low and reduce incarceration rates at the same time, so prosecutors need to explain their plans for decreasing incarceration rates. They can also be pressed on how much their offices’ prosecutions cost voters in terms of the number of prison years served by defendants charged by the office.

Prosecutors also need to explain their strategies for reducing crime rates, and particularly those violent crimes that may have low clearance rates within a community that seem to be of greatest concern to the public. Nationwide, the police solve on average fewer than half of all violent crimes; while more than 59% of the murders are solved, only about 37% of rapes and 30% of robberies. And those are averages from across the country. In some communities, the rates are even worse. For example, the murder clearance rate in Chicago for the past three years has been less than 30%. Prosecutors should explain how they hope to improve those rates through investigations and prosecution strategies that target the most serious crimes in a jurisdiction, not low hanging fruit just because some cases are easier to prosecute. In addition, prosecutors should make clear what their enforcement priorities are at the outset, and then issue reports detailing the allocation of their resources and the cases they are pursuing so the public can readily see whether they are, in fact, taking their stated priorities seriously or whether the rhetoric is not matched by reality. Prosecutors should also be promoting social services for victims of violent crimes, and that should occur whether or not the victim has his or her own record of criminal activity. Given the high rates of past victimization among those who commit crimes, providing counseling and support services to victims will also improve public safety.

Another key metric is how prosecutors are aiding people with reentry. Prosecutors should be accountable for how their decisions affect recidivism. This is critical to public safety because most individuals will be released into the community, and how prosecutors handle their cases has an enormous effect on how they will reintegrate. Prosecutors’ commitment to reentry and recidivism reduction can be assessed in several ways.

Prosecutors can first affect reentry at the front-end of a case – with decisions they make about bail, charging, and diversion. Prosecutors can improve recidivism results by supporting the elimination of cash bail and not seeking bail for those individuals who are not a high risk of flight or of committing a violent crime. All too often people who cannot afford bail are held because prosecutors reflexively ask for it, but those individuals pose no risk to the public. But because they are held pending their trials, these individuals lose jobs, child care, educational services, and other connections to their community. This pretrial detention makes them more likely to commit crimes later
because their lives have been so disrupted. A prosecutor concerned with public safety should recognize this risk and allow more people to be released pending trial unless a validated risk tool shows they pose a risk of violence or of flight. Prosecutors should use a tool that does not rely on factors such as education or employment that can have a disproportionate impact on the poor and communities of color. To be sure, criminal history is the key ingredient in any validated risk tool, and it can also have a disproportionate impact on these same communities because of the way they are policed. But it is still preferable to use a validated risk instrument that uses criminal history as a predictor than to use the gut instincts of prosecutors and judges, who also rely on criminal history but do so with implicit biases and without a strong track record of predicting public safety risks. A validated tool such as the one developed by the Arnold Foundation both lessens racial disparities compared to the individualized decisions by judges and prosecutors and improves public safety outcomes.69 Indeed, for those reasons, prosecutors should push for the use of risk assessments instead of money bail with their state legislatures. New Jersey, for example, switched to this model and now uses risk assessment tools to make pretrial release determinations so that low-risk and moderate-risk defendants are released with few monitoring conditions, while only high-risk defendants are kept in jail pending disposition.70 The switch away from money bail and toward risk assessments saves money, reduces recidivism and risks, and maximizes human liberty. It is the kind of policy that makes sense on any measure, and prosecutors have no reason not to support it.

Prosecutors can also be assessed by whether they are seeking to improve safety outcomes by making greater use of diversion programs that target underlying problems such as drug use or mental illnesses that make individuals more likely to commit crimes. Juveniles are another population that can be served better by diversion to programs that focus on self-esteem and peer pressure. Because so many individuals who commit crimes are themselves victims of crime, prosecutors can also make sure they are getting the services they need to address trauma. Prosecutors should collect data on these programs to make sure they are using ones that work and can make adjustments if needed.

Another yardstick for prosecutors’ commitment to reentry is making sure that they have more experienced prosecutors in their offices screening cases for diversion and determining which charges to bring when a case is appropriately resolved through criminal charges. Less experienced prosecutors often lack perspective on what is a serious offense, thus leading them to overcharge or not to recognize a diversion opportunity. But a more experienced attorney in the office can help make sure that cases are treated proportionally. Prosecutors can also help with reentry outcomes by considering whether their charging decisions will trigger collateral consequences that may harm an individual’s reentry prospects later. This consideration may counsel against certain charges because the collateral consequences are too severe and deleterious to public safety.

Prosecutors should also pay more attention to what happens to criminal defendants while they are in prison and when they get out, and voters should assess
prosecutors on that basis. If the goal is maximizing public safety, prosecutors need to be on the front lines making sure that prisons are offering the kind of programming that will aid people when they reenter society. This means educational programming, cognitive behavior therapy, job training, and drug treatment. Prosecutors are not finished with cases once an individual is convicted. As the chief law enforcement official in a jurisdiction, they should be at the front lines in making sure that defendants have reentry plans and educating the public and relevant members of the community about how important it is for these individuals to get housing, jobs, and educational opportunities. Today they are often seen lobbying for longer sentences or mandatory minimum terms of imprisonment or opposing anything that seems to reduce sentences. This makes sense if they are only thinking about their professional self-interest because they want greater leverage over defendants in plea bargaining. While they claim their positions are about public safety, they have been conspicuously absent arguing for measures that are proven to reduce recidivism and make communities safer in any area that does not make their own jobs easier.

For real change to occur, reformers must continue to place electoral pressure on prosecutors to bring about fundamental change in how their offices pursue cases – not just in police shootings, but across a range of matters and with the metrics identified here. They need to support those candidates who want to bring about real change and who show the management and administrative skill sets to achieve it. Because the facts and data are on their side – so many reforms are in the interest of public safety as well as racial and social equality – it may be possible to push back on the worst populist impulses that are based on voter ignorance. District attorney races are local and tend to have a low turnout. Thus those with the greatest interest in change and who know the shortfalls in the system (such as those Philadelphia voters that Krasner described) can mobilize enough voters who share that interest to shift the balance, as we are starting to see. Coupled with the structural changes outlined above, the most important institutional actor in criminal justice, the prosecutor, can be freed of answering only to populist fears and instead focus on the root cause of those fears, which is public safety.
To be sure, the tactic does not always work, particularly if other electoral concerns are pressing. In a recent governor’s race in Virginia, for example, Republican Ed Gillespie tried to paint his Democratic opponent, Ralph Northam, as weak on crime committed by immigrant gangs. Northam prevailed, but that victory could be as much a backlash against Trump as it is disapproval of the soft-on-crime attack. More importantly, Northam responded to the attack by highlighting that he would be tough on crime and would prosecute anyone who commits a felony regardless of immigration status. Fenit Nirappil and Laura Vozzella, “Gillespie Rolls Out ‘Kill, Rape, Control’ Attack Ad Against Northam,” Washington Post, September 29, 2017, https://www.washingtonpost.com/local/virginia-politics/gillespie-quietly-rolls-out-second-kill-rape-control-attack-ad-against-northam/2017/09/28/8540cd24-a46f-11e7-8cfe-d5b912fabc99_story.html. Politicians know better than to try to debate whether one should be tough on crime. Instead the question is how to prove to voters that they are sufficiently so.


Ibid., 24.


Pratt, Penal Populism, 12.

Ibid., 12, 18-19.


Millar, “Arkansas’s Prison Population.”

Moritz, “Lawmakers.”

Millar, “Arkansas’s Prison Population.”

Lindsey Millar, “More Reminders of How Bad Arkansas’s Prison, Parole, and Probation Systems Are,” Arkansas Times, June 22, 2016,

18 Ibid.
20 Ibid., 12.
21 Ibid., 8.
22 Ibid., 10-11.
2016 Legislative Goals,” December 9, 2015, 
http://www.in.gov/ipac/files/2016_Association_Legislative_rollout_PR.pdf.


38 Ibid.


Haugen, “Oklahoma.”


Ibid.

Ibid.


Hannan, “Incarceration Capital.”

See O’Donoghue, “Legislature.”


Teegardin, “Georgia’s Bold Step.”

Ibid.

61 Teegardin, “Georgia’s Bold Step.”


63 See Carson, *Prisoners in 2014*, 16-17, tbls.16-17.


5 Wagner and Walsh, “States of Incarceration.”


3 Barkow, “Prosecutorial Administration,” 298 (internal quotation and citation omitted).

4 Ibid., 301-302.


7 Ibid., 336-341.


15 Ibid., 915-917.


Yee, “Thompson Defeats Hynes.”


Ibid.


56 Wesley Lowery, “How Civil Rights Groups.”


59 He supported the following candidates as of November 2016: Scott Colom (Mississippi); James Stewart (Louisiana); Kim Foxx (Chicago); Jake Lilly (Denver); Morris Overstreet (Houston); Kim Ogg (Houston); Arami Ayala (Orlando); Kim Gardner (St. Louis); Darius Pattillo (Georgia); Raúl Torrez (New Mexico). Pattillo denied any knowledge of Soros’s contributions, and Pattillo’s opponents dropped out of the race before any known Soros-funded advertising was released. Of these, Ogg and Lilly lost; Soros went on to support Ogg’s opponent, Morris Overstreet, in the Houston race against the incumbent.


63 Policing the Black Man: Arrest, Prosecution and Imprisonment, ed. Angela Davis (New York: Pantheon, 2017); Wright, “Prosecutor Elections,” 601 tbl.3.

Wright, “Prosecutor Elections,” 608.


See generally CACL, Disrupting the Cycle.
