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## Prosecuting With Compassion, Defending With Power: Progressive Prosecutors And The Case For Rehabilitative Justice

Cody McGraw

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**PROSECUTING WITH COMPASSION,  
DEFENDING WITH POWER:  
PROGRESSIVE PROSECUTORS AND THE  
CASE FOR REHABILITATIVE JUSTICE**

*By Cody McGraw\**

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## INTRODUCTION

When Christopher Williams and Theophalis Wilson were convicted in 1993 for a 1989 triple murder that occurred in Philadelphia, no one questioned their involvement.<sup>1</sup> If you were paying attention to the Philadelphia news around this time, you likely heard the story of what occurred on the night of September 25, 1989, when Otis Reynolds, Kevin Anderson, and Gavin Anderson were all murdered in North Philadelphia's Germantown neighborhood.<sup>2</sup>

The three victims, who were known drug dealers from New York, met with a local North Philadelphia gang to purchase firearms in the housing projects.<sup>3</sup> However, the arrangement turned out to be a set-up, and the three victims were shot execution-style, loaded into a van, and dumped in different locations around North Philadelphia.<sup>4</sup> Williams and Wilson were charged for the crime after the Philadelphia District Attorney's Office obtained a statement from another suspect in the murders, James White, implicating the two men in exchange for a reduced sentence plea agreement.<sup>5</sup> Fast forward to 2013, and James White recanted his confession and admitted he was coerced by a number of former District Attorneys

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<sup>1</sup> See Samantha Melamed, *A 'Perfect Storm' of Injustice: Philly Man Freed After 28 Years as DA Condemns 'Decades' of Misconduct*, THE PHIL. INQUIRER (Jan. 21, 2020), <https://www.inquirer.com/news/philadelphia-da-larry-krasner-conviction-integrity-unit-exoneration-theophalis-wilson-christopher-williams-20200121.html>.

<sup>2</sup> See *id.*

<sup>3</sup> See Samantha Melamed, *A Brutal Triple Murder, An Eager Informant, Hidden Evidence, and Now, Exoneration*, THE PHIL. INQUIRER (Jan. 8, 2020), <https://www.inquirer.com/news/philadelphia-da-larry-krasner-exoneration-christopher-williams-theophalis-wilson-20200106.html>.

<sup>4</sup> See *id.*

<sup>5</sup> See *id.*

into making false accusations about Williams' and Wilson's involvement.<sup>6</sup>

Decades later, Williams and Wilson were exonerated of the crime and were finally able to walk free.<sup>7</sup> Their exoneration came from the recent interest of Philadelphia's new District Attorney, Larry Krasner, in reviewing past convictions that smell of corruption.<sup>8</sup> However, after spending twenty-eight years in jail for a crime that neither man committed, the justice served when Williams and Wilson walked free from jail can never outweigh the grave injustices they faced behind bars for nearly three decades. Unfortunately, this story is not one that is unique to Philadelphia, as D.A. Offices all across the country have contributed to the wrongful detention of an estimated 240,000 U.S. citizens in American prisons.<sup>9</sup> Although this is just one corner of a crumbling justice system, overturning these wrongful convictions has become a leading point of a new movement currently emerging all across the U.S. A movement that seeks to reverse America's obsession with being 'tough on crime' and lenient on justice: progressive prosecution.

Progressive prosecutors generally characterize their movement as an attempt to evolve the United States' largely retributivist judicial system into one that focuses on the rehabilitation and reintegration of convicted criminals back into society. Their mission is to completely transform the way we think about crime, and their goal is focused largely on ending mass incarceration by reversing years of legislation that, in retrospect, embraced differing degrees of

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<sup>6</sup> See Melamed, *supra* note 1.

<sup>7</sup> See *id.*

<sup>8</sup> See *id.*

<sup>9</sup> See John Grisham, *Eight reasons for America's shameful number of wrongful convictions*, L.A. TIMES (Mar. 18, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-grisham-wrongful-convictions-20180311-story.html> (noting that an estimated two to ten percent of America's 2.3 million inmates were wrongfully convicted for crimes they had no involvement in).

tolerance to discrimination, racism, and classism, both in and along cultural and economic lines.<sup>10</sup>

This comment explores the relatively new wave of “progressive prosecutors” who are increasingly being elected throughout the U.S. It argues that the reforms pursued by most progressive prosecutors are not only based on the authority and scope of their respected offices – and thus a constitutional exercise of power – but also that such reforms are necessary and beneficial to the judicial system as a whole.

Part I provides an in-depth analysis of the current state of the U.S. criminal justice system. It explores the current problem of mass incarceration in America, which is heavily influenced by the War on Drugs and the cash-bail system, and it looks at the injustices of the death penalty. Part II provides a comparative analysis of the retributive justice found in the U.S. criminal justice system as compared to a system based on rehabilitative justice, as used most notably in Germany. Part III looks at the various tools and strategies being used by progressive prosecutors to implement their reforms, specifically focusing on the power of prosecutorial discretion. Finally, Part IV provides an argument in favor of supporting these efforts in light of current economic, social, and political problems present in the U.S.

#### I. TOUGH ON CRIME, SOFT ON JUSTICE: THE NEED FOR CRIMINAL JUSTICE REFORM IN AMERICA

Speaking to a crowded room full of aspiring lawyers, Philadelphia’s District Attorney (D.A.), Larry Krasner, explained how transforming America’s criminal justice system could be best achieved: from a position of power within the system itself.<sup>11</sup>

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<sup>10</sup> See Allison Young, *The Facts on Progressive Prosecutors*, CTR. AM. PROGRESS (Mar. 19, 2020), <https://www.americanprogress.org/issues/criminal-justice/reports/2020/03/19/481939/progressive-prosecutors-reforming-criminal-justice/>.

<sup>11</sup> See Ben Austen, *In Philadelphia, a Progressive D.A. Tests the Power – and Learns the Limits – of His Office*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/magazine/larry-krasner-philadelphia-district-attorney-progressive.html>.

Elaborating on this point, Krasner said that “a progressive D.A. is not the same thing as a traditional D.A. You might call me a prosecutor with *com-passion*. Or a public defender with *pow-er*.”<sup>12</sup>

As one of the most high-profile prosecutors in the country, Krasner was elected by an overwhelming majority in the City of Philadelphia following an aggressive campaign rooted in his progressive vision of prosecution.<sup>13</sup> Now in office, Krasner is currently implementing those policies in the “City of Brotherly Love.”<sup>14</sup> To date, there are an increasing number of non-traditional prosecutors being elected to public office throughout the country who, like Krasner, identify as progressive prosecutors.<sup>15</sup> The most well-known of these progressive prosecutors include: St. Louis County’s Prosecutor, Wesley Bell; Massachusetts’ Suffolk County D.A., Rachael Rollins; the Illinois State’s Attorney for Cook County, Kim Foxx; and the most recent addition to this list, Los Angeles County D.A. George Gascón.<sup>16</sup>

Although progressive prosecutors may differ from city to city in terms of their specific reforms that are being implemented, it is clear that every one of them was elected to serve as the leader of a movement – one that seeks to reverse the consequences from decades of ruthless policy in America’s criminal justice system.<sup>17</sup>

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<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> See Daniel A. Medina, *The Progressive Prosecutors Blazing a New Path for the US Justice System*, THE GUARDIAN (Jul. 29, 2019, 2:00 PM), <https://www.theguardian.com/us-news/2019/jul/23/us-justice-system-progressive-prosecutors-mass-incarceration-death-penalty>.

<sup>15</sup> See *id.*

<sup>16</sup> See Sam Reisman, *The Rise of the Progressive Prosecutor*, LAW 360 (Apr. 7, 2019, 8:02 PM), <https://www.law360.com/articles/1145615/the-rise-of-the-progressive-prosecutor>; see also Caren Morrison, *Progressive Prosecutors scored big wins in 2020 elections, boosting a nationwide trend*, THE CONVERSATION U.S. (Nov. 18, 2020), <https://theconversation.com/progressive-prosecutors-scored-big-wins-in-2020-elections-boosting-a-nationwide-trend-149322> (noting that progressive prosecutors have also been elected in Orlando, Detroit, Colorado, and Maricopa County, Arizona).

<sup>17</sup> See Allan Smith, *Progressive DAs are Shaking Up the Criminal Justice System. Pro-Police Groups aren't Happy*, NBC NEWS (Aug. 19, 2019, 4:47 AM),

These consequences stem largely from the traditional role of prosecutors in the United States. Historically, this role focused on mostly harsh punishment of those who are convicted of a crime, regardless of the individual circumstances of each case. In the legal community, such use of harsh punishment is known as “retributive justice.”<sup>18</sup> Retributive justice has caused a number of issues in the criminal justice system among areas like recidivism, overpopulation in prisons, wasteful spending of taxpayer money, and perceptions of injustice in the overall system at large.<sup>19</sup>

From the very first formal stages of every criminal prosecution – where an individual is first charged with a crime – to the point where that individual has been convicted and is being sentenced by a judge, retributive prosecutors generally seek the full punishment of law over other mechanisms of rehabilitation that could be available to the offender.<sup>20</sup> As described by D.A. Krasner, the retributive prosecutor does not truly seek justice. Rather, “[t]hey are political. What they are involved with has elements of racism, classism, picking on the poor. What they do is connected not to the best but to the worst elements of policing.”<sup>21</sup> While Krasner and many other like-minded prosecutors across the country have admittedly allowed political goals to influence their office’s general policies of prosecution, they have done so in a way that puts rehabilitation over retributivism without undermining the rights of

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<https://www.nbcnews.com/politics/justice-department/these-reform-prosecutors-are-shaking-system-pro-police-groups-aren-n1033286>.

<sup>18</sup> See Daryl V. Atkinson, *A Revolution of Values in the U.S. Criminal Justice System*, CENTER FOR AM. PROGRESS (Feb. 27, 2019, 9:00 AM), <https://www.americanprogress.org/issues/criminal-justice/news/2018/02/27/447225/revolution-values-u-s-criminal-justice-system/> (noting that the current retributive policies in the criminal justice system mainly originated during the 1970s and 1980s, “when the primary theory of criminal justice shifted from rehabilitation to retribution and crime control.”).

<sup>19</sup> See Janita Kan, *Progressive Prosecutor’s Pushing ‘Social Reform’ Earn Praise and Criticism*, EPOCH TIMES (Dec. 20, 2019), [https://www.theepochtimes.com/progressive-prosecutors-pushing-social-reform-earn-praise-and-criticism\\_3170669.html](https://www.theepochtimes.com/progressive-prosecutors-pushing-social-reform-earn-praise-and-criticism_3170669.html).

<sup>20</sup> See Austen, *supra* note 11.

<sup>21</sup> See *id.*

victims.<sup>22</sup> Put another way, progressive prosecutors seek to reform the criminally diseased mind of a convicted person through various instruments of rehabilitation and compassion; yet, this is a stark contrast to the retributive approach that aims to lock up convicts for the maximum time allowed by law while throwing away the key.<sup>23</sup>

It is nearly impossible to understand why District Attorney Krasner equates the traditional roles of the very office he holds in such negative terms without first understanding the realities faced in the modern U.S. criminal justice system by an entire class of citizens. More often than not, these citizens come from impoverished areas known for criminal behavior and lucrative, violent “black markets.”<sup>24</sup> Overcoming such harsh realities is the primary motive behind the policies pushed by Krasner and the other like-minded prosecutors elected throughout the entire country.<sup>25</sup> The main push among these progressive prosecutors is to reform the criminal justice system, not on the legislative level, but from within both the walls of their respected offices by using the full scope of the constitutional power held by every prosecutor across the U.S.<sup>26</sup>

In truth, it is hard to gauge every individual factor that has led to the deteriorated state of the criminal justice system in the U.S. today. Even so, it is equally hard to dispute that such circumstances – those that are both known and unknown – continue to propel the progressive prosecutor movement and place these attorneys into positions of power. Once in such positions of power, progressive prosecutors gradually enact and implement real reforms in the hopes of one day shifting the landscape of the American justice system from punishment and cruelty to rehabilitation and compassion.<sup>27</sup>

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<sup>22</sup> See Julia Wick, *Newsletter: What Does it Mean to be a Progressive Prosecutor?*, L.A. TIMES (Nov. 12, 2019, 3:30 AM), <https://www.latimes.com/california/story/2019-11-12/progressive-prosecutor-gascon-chesa-boudin>.

<sup>23</sup> See Atkinson, *supra* note 18.

<sup>24</sup> See *id.*

<sup>25</sup> See Austen, *supra* note 11.

<sup>26</sup> See Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. JUST. L. REV. 1, 4–5 (2019).

<sup>27</sup> See *id.*

This section focuses primarily on the harsh realities and consequences from over half a century's worth of rotten policy in the U.S. criminal justice system. Not coincidentally, these are the same realities currently being sighted in the crosshairs of progressive prosecutors elected around the country.<sup>28</sup> Such harsh realities include: the state of mass incarceration and supervision in the United States; the outdated cash-bail system widely used throughout the country, which disproportionately impacts people of color, immigrants, and the poor; the continued use of the death-penalty, even after multiple offenders on death row have been exonerated; and the continued prosecution of drug addicts for simple possession charges.<sup>29</sup>

#### A. Mass Incarceration and Mass Supervision in America

If America is the “shining city on the hill,” then its prisons must be hidden closely below in the dark valleys surrounding that hill. It is nearly impossible to comprehend how the world’s most established – and longest surviving – constitutional democracy to ever exist is able to imprison so many of its own citizens. At just five percent of the world’s total population with 327.2 million people, the United States currently accounts for roughly twenty-five percent of the world’s prisoners as nearly 2.3 million of its citizens sit behind bars, which is more than any other country on Earth.<sup>30</sup> The reasons, though hard to quantify, are likely a result of the increased use of federal resources by state and local governments in an effort to “get-tough-on-crime” and oversee policies that are, at least on the surface, seemingly based on the Nixonian doctrine of “law and order.”<sup>31</sup>

The alarming rate of incarceration in the U.S. is most apparent when compared to the rates of imprisonment among every other country on Earth, including authoritarian regimes and countries

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<sup>28</sup> See Atkinson, *supra* note 18.

<sup>29</sup> See Medina, *supra* note 14.

<sup>30</sup> See Lorna Collier, *Incarceration Nation*, 45 MONITOR ON PSYCHOLOGY 9 (Oct. 2014), <https://www.apa.org/monitor/2014/10/incarceration>.

<sup>31</sup> See *id.*

that have recently faced large struggles with armed conflict.<sup>32</sup> For instance, The Peoples Republic of China, which places as the second highest country for the amount of people it imprisons, still has a stunning 500,000 less inmates than the United States.<sup>33</sup> Worse still is the fact that twenty-three states in the U.S., if considered independent countries, would top that list as having higher incarceration rates than even the U.S. as a whole does.<sup>34</sup> Even Massachusetts, which has the lowest incarceration rate of any state in the country, would rank as the ninth most incarcerated country in the world when separated from the U.S. as a whole.<sup>35</sup>

In the U.S. today, nearly 85.9 million people have a criminal record of some form.<sup>36</sup> This already alarmingly high number is hard to digest when viewed in light of the fact that convictions in the U.S. have increasingly resulted in some form of confinement for much of the past one hundred years.<sup>37</sup> Some estimates claim that nearly seventy percent of criminal convictions result in a sentence that includes some length of time behind bars.<sup>38</sup> Aside from actual prison sentences, many ex-convicts also face the harsh reality of having to

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<sup>32</sup> See Peter Wagner & Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (Jun. 2018), <https://www.prisonpolicy.org/global/2018.html>.

<sup>33</sup> See Muhammad B. Sardar, *NOTE: Give Me Liberty or Give Me . . . Alternatives? Ending Cash Bail and Its Impact on Pretrial Incarceration*, 84 BROOK. L. REV. 1421, 1422 (2019).

<sup>34</sup> See Wagner & Sawyer, *supra* note 32 (these twenty-three states, listed in order from highest to lowest incarceration rate, includes: Oklahoma, Louisiana, Mississippi, Georgia, Alabama, Arkansas, Texas, Arizona, Kentucky, Missouri, South Dakota, Tennessee, Wyoming, Florida, New Mexico, Virginia, Nevada, Delaware, South Carolina, Idaho, Montana, Pennsylvania, and Indiana).

<sup>35</sup> See *id.*

<sup>36</sup> See Julia A. Ebenstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoner's Political Representation*, 45 FORDHAM URB. L. J. 323, 326 (Feb. 2018).

<sup>37</sup> See Wagner & Sawyer, *supra* note 32.

<sup>38</sup> See *id.* (noting that incarceration rates in the United States do not account for “minors held in juvenile residence facilities, people detained by the U.S. Marshals Service (many pre-trial), people detained for immigration offenses, sex offenders indefinitely detained or committed in ‘civil commitment centers’ after completing a sentence, and those committed to psychiatric hospitals as a result of criminal charges or convictions.”).

undergo post-confinement supervision programs, such as probation or parole release, either in place of a longer sentence or as an additional constraint on their freedom once they are released from prison.<sup>39</sup> In fact, there are currently over 4.6 million citizens in the U.S. who are under some form of a community supervision program.<sup>40</sup>

For example, in Philadelphia County alone, which has a total population of approximately 1.5 million people, nearly 40,000 ex-convicts are on probation, with a majority those individuals living below the poverty line.<sup>41</sup> Furthermore, a large percentage of the inmates inside the Philadelphia Prison System are incarcerated for violations of their probation or parole, not because of a conviction for a new crime.<sup>42</sup> This category of inmates comprised over a third of Pennsylvania's entire statewide prison population in 2017, costing the taxpayers in that state a staggering \$420 million per year.<sup>43</sup> Although this is just one example of an American city plagued with the repercussions of mass incarceration and supervision, these statistics hold true for most prison systems at the state level in the United States.

The ramifications of mass incarceration and supervision are obvious: by imposing lengthy jail-sentences that are followed by, at times, even lengthier probation and parole conditions, people are

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<sup>39</sup> See James M. Binnall, *Divided We Fall: Parole Supervision Conditions Prohibiting "Inter-Offender" Associations*, 22 U. PA. J. L. & SOC. CHANGE 25, 26 (2019) (noting that "each year, roughly 500,000 [inmates] return to their communities under some form of supervision. More than 840,000 former inmates now live supervised, . . . " which is an increase of 100,000 former inmates under supervision since 2009).

<sup>40</sup> See Ebenstein, *supra* note 36, at 326.

<sup>41</sup> See Debra Cassens Weiss, *Philadelphia DA Plans to End 'Mass Supervision' by Cutting Length of Probation and Parole*, A.B.A. J. (Mar. 22, 2019, 4:54 PM), <http://www.abajournal.com/news/article/philadelphia-da-plans-to-end-mass-supervision-by-cutting-length-of-parole-and-probation>.

<sup>42</sup> See Matt Rourke, *D.A.'s New Probation Policy Makes Sense*, THE PHILA. TRIB. (Mar. 29, 2019), [https://www.phillytrib.com/commentary/d-a-s-new-probation-policy-makes-sense/article\\_8b6cd7d6-edc2-5c26-9bc4-9c14cc2613fd.html](https://www.phillytrib.com/commentary/d-a-s-new-probation-policy-makes-sense/article_8b6cd7d6-edc2-5c26-9bc4-9c14cc2613fd.html).

<sup>43</sup> *Id.*

kept from obtaining and maintaining work. This process naturally perpetuates the problem of black-market drug dealing and theft, since former inmates are unable to obtain other employment while under supervision, and it sets that same individual up for being subject to criminal prosecution once again.<sup>44</sup> Often, those who comprise this group of former inmates are members of racial, ethnic, or economic classes of minorities. It is for this reason that District Attorney Krasner refers to the traditional roles of prosecutors as mostly being focused on elements of racism, classism, and feeding off the poor.<sup>45</sup>

For example, although African Americans and Latinos comprise just thirty percent of the general population in the U.S., they account for nearly fifty-one percent of the overall jail population in America.<sup>46</sup> In New York City alone “blacks are jailed at nearly [twelve] times the rate of whites and Latinos more than five times the rate of whites.”<sup>47</sup>

As alarming as these statistics sound, the unfortunate truth is that they only scratch the surface of an upward trend in America’s incarceration problem over the past fifty years. Almost certainly beneath this rise in the amount of people who are incarcerated is the impact that traditional prosecutors at the state and federal level had on society: namely, the tendency of many prosecutors centering their goals around a “get-tough-on-crime” theme because it is good politics and – at least historically – improves their chances of reelection.<sup>48</sup>

The U.S. historically embraced a narrow concept of justice: one that seeks to incarcerate anyone who causes another person to be victimized, which is a notion that is deeply rooted in fear, prejudice, and a “raw desire for revenge.”<sup>49</sup> This “eye-for-an-eye” mentality of punishment – *i.e.*, retributive justice – is already deeply ingrained into the values and social fabric of both the U.S. as a whole and its

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<sup>44</sup> *Id.*

<sup>45</sup> *See Austen, supra* note 11.

<sup>46</sup> *See Sardar, supra* note 33, at 1422.

<sup>47</sup> *See id.*

<sup>48</sup> *See Collier, supra* note 30.

<sup>49</sup> *See Austen, supra* note 11.

criminal justice system throughout the past five decades.<sup>50</sup> As a result of embracing such values, jails are becoming overcrowded, families are being broken apart, and states are spending absurd amounts of money on detention rather than rehabilitation. Ironically, the increase in prison funding by the states has coincided with a drastic reduction in mental-health funding since the 1970s.<sup>51</sup> For instance, some estimates show that states have reduced mental health funding by over \$4 billion since the 2008 recession.<sup>52</sup>

Meanwhile, as Congress continued to reduce funding for public health and safety programs following the implementation of Nixonian justice, the push to make room for a new wave of criminals went into full force. New prisons were built, more people were locked up, and new laws were passed that carried with them harsh mandatory sentences. And who was the target of such punitive enforcement? As recent studies have indicated, those most impacted were racial, economic, and educationally disadvantaged groups who often lived within the most impoverished areas of America's inner cities.<sup>53</sup> The result for those under-privileged persons is a perpetual and viscous circle of criminal behavior, which occurs inside of a world drained of opportunity.<sup>54</sup>

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<sup>50</sup> See generally Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1204 (2012).

<sup>51</sup> See generally Fred Osher, *We Need Better Funding for Mental Health Services*, N.Y. TIMES (May 9, 2016), <https://www.nytimes.com/roomfordebate/2016/05/09/getting-the-mentally-ill-out-of-jail-and-off-the-streets/we-need-better-funding-for-mental-health-services>.

<sup>52</sup> See *id.*

<sup>53</sup> See generally Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENT'G PROJECT (June 14, 2016), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

<sup>54</sup> See Weisberg, *supra* note 44 (noting that Hispanic populations comprise 19% of the prison population compared to 15% of the general population. Similarly, African Americans make up 44% of the prison population but account for only 12% of the general population. In contrast, about 35% of the prison population is white while that group comprises over 70% of the total United States' population).

## B. Once An Addict, Always a Criminal: America's Failed War On Drugs

Of all the factors giving rise to the mass incarceration problem in the U.S., one category has resulted in more people being thrown behind bars than any other crime: drug convictions. These convictions often include possession, distribution, and intent to use or sell.<sup>55</sup> In what has famously been dubbed as the “War on Drugs,” America’s solution to drug addiction centered on criminalizing simple possession of drugs and substantial prison sentences for millions of users who could not exercise self-control.<sup>56</sup> Although these laws have existed in the United States Code for over one-hundred years in one form or another, the 1960s gave rise to a whole new wave of using law-enforcement and criminal prosecution to curb America’s drug problems.<sup>57</sup> This wave has become known as the starting point of the War on Drugs, and it officially began with the passage of The Controlled Substances Act (“CSA”), which was signed into law by President Nixon on October 27th, 1970.<sup>58</sup>

The consequences of using local, state, and federal prosecutorial powers and law-enforcement measures in the War on Drugs was catastrophic for America’s social fabric in various respects, especially with regard to the number of offenders locked up for marijuana convictions.<sup>59</sup> In this regard, progressive prosecutors have decided to tackle the criminalization of marijuana head-on in jurisdictions that have yet to recreationally legalize its use and possession.<sup>60</sup> Furthermore, they have crafted a number of creative policies geared towards placing drug abusers, regardless of their drug of choice, in programs designed to treat their underlying addictions.<sup>61</sup> This is a stark contrast to the War on Drugs, which encouraged the

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<sup>55</sup> *The Drug War, Mass Incarceration, and Race*, DRUG POLY ALLIANCE (Jan. 2018), [http://www.drugpolicy.org/sites/default/files/drug-war-mass-incarceration-and-race\\_01\\_18\\_0.pdf](http://www.drugpolicy.org/sites/default/files/drug-war-mass-incarceration-and-race_01_18_0.pdf) (noting that over eighty percent of the 1.5 million drug arrests in the U.S. during were “for possession *only*”).

<sup>56</sup> See Alex Kreit, *Drug Truce*, 77 OHIO ST. L. J. 1323, 1328–31 (2016).

<sup>57</sup> See *id.*

<sup>58</sup> See Kreit, *supra* note 55, at 1331.

<sup>59</sup> See *id.*

<sup>60</sup> See Medina, *supra* note 14.

<sup>61</sup> See *id.*

criminal prosecution and incarceration of addicted users who often suffered from a range of mental illnesses, but once in prison would likely be turned into hardened criminals.<sup>62</sup>

To fully understand the context of just how large of a role the War on Drugs has played in the United States faulty criminal justice system, and its impact on mass incarceration, this section focuses on two main areas: first, a brief overview of how drug policy has evolved in the United States since the first drug laws were passed by Congress in the early twentieth century; and second, the consequences these policies have had on society as a result.

### 1. A Brief Overview of American Drug Enforcement Legislation

The first piece of federal legislation designed to address the use of mind-altering substances by the American public was the 1914 Harrison Narcotics Act.<sup>63</sup> Despite the dangers presented by opioid drugs, the act primarily dealt with regulating the techniques used to market and sell opioids by requiring drug stores to register as official dispensaries.<sup>64</sup> While the Act also required all dispensaries to be operated by medical professionals, it was also designed to use the registration fees collected as another source of revenue for the federal government.<sup>65</sup>

Although numerous other statutes were created to regulate the marketing and sale of mind-altering substances following the passage of the 1914 Harrison Narcotics Act, none resulted in costs to the American public – *i.e.*, the amount of money spent, personnel

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<sup>62</sup> See generally Christian Jarrett, *How Prison Changes People*, B.B.C. (May 1, 2018), <https://www.bbc.com/future/article/20180430-the-unexpected-ways-prison-time-changes-people>.

<sup>63</sup> See Erik Luna, *Drug War and Peace*, 50 U.C. DAVIS L. REV. 813, 830–31 (Dec. 2016).

<sup>64</sup> Jeremy Lesser, *Today is the 100th Anniversary of the Harrison Narcotics Tax Act*, DRUG POLY ALLIANCE (Dec. 16, 2014), <http://www.drugpolicy.org/blog/today-100th-anniversary-harrison-narcotics-tax-act>.

<sup>65</sup> See Luna, *supra* note 62.

required, and number of incarceration of violators – quite like those that occurred following the implementation of the CSA in 1970.<sup>66</sup>

The CSA restructured traditional federalist relationships between states and the federal government in several respects. First, it drastically restructured already existing agencies to create the Drug Enforcement Agency (“DEA”).<sup>67</sup> Second, the Act replaced all existing drug laws at the federal level and implemented a “comprehensive statutory scheme to criminalize the possession, distribution, and manufacture of all drugs for recreational use.”<sup>68</sup> Third, the CSA granted the U.S. Attorney General discretion to administratively outlaw substances as they were deemed to negatively impact public health and safety.<sup>69</sup> Although the CSA marked the first comprehensive piece of federal legislation to ban the “recreational market for all mind-altering substances[.]” Congress explicitly provided the alcohol and tobacco industries an exemption from the bill’s scope.<sup>70</sup>

Despite establishing a means of federal resources for states and local governments to begin strictly enforcing drug use and possession, officially marking the start of the War on Drugs, President Nixon wanted to focus primarily on the treatment of drug users, which has been referred to by historians as “a ‘therapeutic golden age’ for U.S. drug policy.”<sup>71</sup> In fact, to the satisfaction of progressives at the time, the CSA repealed mandatory drug sentences that were enacted in the 1950s.<sup>72</sup>

However, when President Ronald Reagan began his “Just Say No” campaign in the 1980s, funding for treatment programs were subsequently cut by upwards of twenty-five percent while the DEA’s budget increased to over ten times the amount it was designated

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<sup>66</sup> See Alex Kreit, *Drug Truce*, 77 OHIO ST. L. J. 1323, 1328–31 (2016).

<sup>67</sup> See *id.* at 1330.

<sup>68</sup> See *id.*

<sup>69</sup> See *id.* at 1331.

<sup>70</sup> See *id.*

<sup>71</sup> See *id.* (quoting alcohol historian David T. Courtwright).

<sup>72</sup> See *id.* (noting that then-Congressman George H.W. Bush supported the measure, stating that “the change would result in better justice and more appropriate sentences”).

when President Nixon first established the agency.<sup>73</sup> President Reagan also signed into law a number of new mandatory minimum sentences that were determined by “the type of controlled substance and number of prior drug convictions,” depending heavily on the quantity of drugs in possession and allowing for the charging of attempts and conspiracies.<sup>74</sup> These changes resulted in a substantial increase of federal drug sentences by allowing for authorities to prosecute even low-level drug offenders.<sup>75</sup>

In addition to these changes, the Anti-Drug Abuse Act of 1986 established new sources of funding for state and local authorities to use with drug enforcement efforts, drastically increasing the number of police and special task force members, who were granted the power to seize personal assets of suspects in drug cases.<sup>76</sup>

All of the above developments in federal drug laws have had a profound impact on the number of people incarcerated for drug crimes. After decades of deteriorating conditions in America’s inner cities and rural areas, resulting in thousands of families being ripped apart due to imprisonment, the U.S. has finally started to embrace a trend of eliminating marijuana from the list of illegal substances. In this respect, progressive prosecutors seek to transform the system from within already established roles of the offices they hold. They represent a specific instance where prosecutorial discretion, discussed in-depth in Part III, allows such a transformation to occur given the controlling law in their respective jurisdictions.

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<sup>73</sup> Caryn Devins & Stuart Kauffman, *The Ultimate Crackdown: We Know Not What We Do*, N.P.R. (Jun. 25, 2012), <https://www.npr.org/sections/13.7/2012/06/25/155699660/the-ultimate-crack-down-we-know-not-what-we-do>.

<sup>74</sup> See Kreit, *supra* note 66 (noting a 2004 report from the Sentencing Commission, which stated that “no other decision of the Commission has had such a profound impact on the federal prison population”).

<sup>75</sup> See *id.*

<sup>76</sup> See *id.* (comparing state and local police to “foot soldiers,” the article notes how the number of task forces nearly doubled from 1988 to 1991 and accounted for 220,000 and 280,000 arrests each year in the United States).

## 2. The Impacts of the War on Drugs

As would be expected from a strict drug enforcement policy like the CSA – *i.e.*, the War on Drugs – the amount of people incarcerated for drug convictions in the United States following the bill’s signing into law ballooned significantly in the decades that followed.<sup>77</sup> The role, scope, and size of the executive agencies charged with overseeing implementation of the CSA on the federal level were increased significantly as a natural result of this extraordinary use of federal resources being assigned to drug policy.<sup>78</sup> In addition to this increase, the use of federal resources, such as money and old military equipment, being distributed to state and local agencies to pursue aggressive counter-drug policies substantially expanded.<sup>79</sup> In fact, a vast majority of drug-enforcement, such as the prosecution and incarceration of individuals arrested for simple possession of controlled substances, is still achieved on the state level in comparison to the federal government.<sup>80</sup> In essence, the War on Drugs has had an extreme and profound impact on the U.S. judicial system, reaching local, state, and federal sources of power and enforcement. In the years preceding the CSA, a number of consequences have resulted in the United States, including the expansion of executive agencies and a large spike in the total number of incarcerated individuals in the United States.<sup>81</sup>

Before the CSA was controlling law in the U.S, the executive agency tasked with drug enforcement and control measures was allocated approximately three million dollars on an annual basis.<sup>82</sup> However, by 1973, the Bureau of Narcotics and Dangerous Drugs (“BNDD”), the main predecessor of the DEA, had an annual budget that was increased nearly thirty times to seventy-four million dollars.<sup>83</sup> This increased budget created a number of new roles for the agency aside from the power of drug regulation and enforcement,

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<sup>77</sup> See Devins & Kauffman, *supra* note 73.

<sup>78</sup> See Kreit, *supra* note 66.

<sup>79</sup> See *id.*

<sup>80</sup> See *id.*

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

including the use of American resources in foreign drug affairs.<sup>84</sup> By the time the DEA was established as the official federal agency responsible for drug policy and regulation in the United States, the government's footprint in drug enforcement at both the federal and state level had been rapidly expanding. As a result, the U.S. saw the rise of both the size of federal employees in the DEA, and a rise in the number of people it locked up for violating the CSA.<sup>85</sup>

For example, following the CSA, the BNDD created twenty-six new field offices in foreign countries by the time Congress created the DEA.<sup>86</sup> In addition, the BNDD was granted the power to form the first ever drug task force with multijurisdictional authority, which was implemented all the way to the local level.<sup>87</sup> By the time the DEA took charge, it inherited an already large pool of federal drug enforcement employees that totaled approximately 1,470 special agents.<sup>88</sup>

The DEA's entrance into the local enforcement of drug laws, which until then was largely viewed as a constitutionally delegated state power under the Tenth Amendment, created a number of new programs.<sup>89</sup> For instance, the agency was delegated the power to: (1) distribute military equipment to local police; (2) restrict the access of American citizens applying to receive public benefits who also had a prior drug conviction; and (3) assist private entities who drug-tested employees.<sup>90</sup>

Although largely overlooked by the American public, the use of the country's criminal justice system to tackle its drug problem has

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<sup>84</sup> *See id.*

<sup>85</sup> *See id.*

<sup>86</sup> *See* Erik Luna, *Drug War and Peace*, 50 U.C. DAVIS L. REV. 813, 830–31 (Dec. 2016).

<sup>87</sup> *See id.*

<sup>88</sup> *See id.*

<sup>89</sup> *See* Kreit, *supra* note 66.

<sup>90</sup> *See id.* (However, the “one notable exception to the steady stream of increasingly punitive drug policies during this period was the 1994 ‘safety valve’ law, which created an exception to mandatory minimum drug penalties for offenders with very minimal criminal history who also meet a handful of other requirements.”).

had a profound impact on the amount of discretionary spending required annually to fund the DEA and other related agencies.<sup>91</sup> The cost of drug-prohibition in 2008 alone was over 67.1 billion dollars in combined federal, state, and local expenditures.<sup>92</sup> These expenditures required the allocation of other public and private project funding, which often reduced or completely eliminated those projects.<sup>93</sup> Rather than attempt to rehabilitate drug-users who were severely addicted to a substance or depended on it financially to survive – as many drug dealers do in America’s inner cities by engaging in the black market drug trade – the goal of the criminal justice system became to punish such individuals.<sup>94</sup> Consequently, as the U.S. saw its use of federal resources in drug enforcement rise, it also saw the amount of people it incarcerated increase substantially.<sup>95</sup>

In addition to punishing people with substance abuse problems, the War on Drugs manifested an ideology that aimed to punish “casual, nonaddicted drug users.”<sup>96</sup> In 1970, which was the first year the CSA was enforced by the federal government, there was about 400,000 drug arrests in the U.S. as a whole.<sup>97</sup> Just four years later, that number climbed by fifty percent to 600,000.<sup>98</sup> For the following decade, the number of drug-related arrests continue to climb annually on a steady basis.<sup>99</sup>

When President Reagan revamped the War on Drugs, it was not solely an attempt to curb drug use among America’s youth with the famous “Just Say No” campaign. In addition to this publicity ploy, President Reagan substantially expanded the DEA’s funding and size, once again in an effort to enforce drug use through prosecution and incarceration.<sup>100</sup> The result was a dramatic increase in the number of drug arrests annually, rising from roughly 580,000

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<sup>91</sup> See Luna, *supra* note 86.

<sup>92</sup> See *id.*

<sup>93</sup> See *id.*

<sup>94</sup> See Alex Kreit, *Drug Truce*, 77 OHIO ST. L. J. 1323, 1328–31 (2016).

<sup>95</sup> See *id.* at 1357–60.

<sup>96</sup> See *id.*

<sup>97</sup> See *id.*

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> See *id.*

in 1980 to 1.5 million in 2013.<sup>101</sup> Today, the amount of drug arrests are two-and-a-half times greater than in 1980.<sup>102</sup>

The increased number of drug arrests in the U.S. has become a problem for many reasons. While the rise of drug arrests is a self-evident consequence of the CSA, the number of drug arrests that comprise the total amount of nationwide arrests has also dramatically increased.<sup>103</sup> Drug offenses were roughly six percent of all arrests in 1980, before continually rising to approximately fourteen percent today.<sup>104</sup> In 2006 alone, the number of people arrested for drug offenses in the United States topped all other categories of arrests, with a total of approximately 1.9 million arrests.<sup>105</sup>

Following Congress' passage of numerous crime bills in 1990, simple possession of marijuana offenses constituted the highest number of drug arrests.<sup>106</sup> In fact, during that same period, arrests for drug sales or manufacturing actually decreased.<sup>107</sup> However, the number of drug possession arrests were eighty percent higher than arrests for drug sales or manufacturing during the same period, with nearly 750,000 arrests for simple possession occurring in 2010 alone.<sup>108</sup> Of these, marijuana was responsible for approximately eighty percent of all new drug arrests; and, while arrests for all offenses decreased by three percent in this period, marijuana arrests increased by an incredible 113 percent.<sup>109</sup>

As drug arrests tripled from 1980 to 2005, the number of incarcerated drug offenders also increased by an astounding 1100

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<sup>101</sup> *See id.*

<sup>102</sup> *See id.*

<sup>103</sup> *See Alex Kreit, Drug Truce, 77 OHIO ST. L. J. 1323, 1328–31 (2016).*

<sup>104</sup> *See id.*

<sup>105</sup> *See id.* (noting the next category of offenses that comprised the most arrests were for property-related offenses, which totaled approximately 1.5 million arrests).

<sup>106</sup> *See id.* at 1341–43.

<sup>107</sup> *See id.*

<sup>108</sup> *See id.*

<sup>109</sup> *See id.*

percent.<sup>110</sup> When President Obama was elected in 2008, the amount of people jailed for all drug offenses in the United States was larger than the total amount of incarcerated people for all offenses in 1980.<sup>111</sup> Among those most impacted by this unfortunate phenomenon were African Americans and Latinos. Although this traditional treatment, which marginalized racial minorities, is largely gone from modern drug enforcement policies, the impact on people of color remains troubling for many reasons.<sup>112</sup>

African Americans comprise roughly thirteen percent of the United States' total population.<sup>113</sup> Additionally, numerous studies indicate that the use, manufacturing, and sale of drugs occurs at an equal rate among all ethnicities.<sup>114</sup> Yet, in 2013 African Americans accounted for nearly thirty-one percent of drug arrests and roughly forty percent of incarcerated people on the state level.<sup>115</sup>

A 2013 report released by the American Civil Liberties Union (“ACLU”) found that a Black person is nearly 3.7 times as likely to be arrested for simple possession of marijuana as a White person: an increase of nearly forty percent since 2001.<sup>116</sup> Although during this same time period the rate of marijuana arrests among Whites remained constant at 197 per 100,000 people, the rate of arrests among African Americans increased to 716 per 100,000 people.<sup>117</sup> As noted by the ACLU, “the increase in marijuana arrests between 2001 and 2010 was almost entirely due to an increase in arrests of African Americans for marijuana.”<sup>118</sup>

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<sup>110</sup> See *id.* (noting that 41,100 drug offenders were behind bars in 1980, as compared to 493,800 in 2005).

<sup>111</sup> See *id.*

<sup>112</sup> See *id.*

<sup>113</sup> U.S. Census Bureau, *QuickFacts: United States*, <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

<sup>114</sup> See Luna, *supra* note 63.

<sup>115</sup> See Kreit, *supra* note 66 at 1342–44.

<sup>116</sup> AM. CIV. LIBERTIES UNION, REPORT: THE WAR ON MARIJUANA IN BLACK AND WHITE (2013), <https://www.aclu.org/report/report-war-marijuana-black-and-white>.

<sup>117</sup> See *id.*

<sup>118</sup> See *id.*

It is self-evident how the prohibition of drugs like marijuana – enforced through the use of CSA-established federal resources and subsequent congressional drug bills – has become a self-perpetuating problem, and for the attempts to curb their use and sale. This is especially true among minority groups living in the country’s most economically disadvantaged communities.<sup>119</sup> In this respect, violent crime has become “business as usual” in the drug trade. In fact, an analysis of other countries as compared to the United States shows that aggressive enforcement of drug policy coincides with an increase in drug-related violence as “market participants substitute guns for lawyers in the resolution of disputes.”<sup>120</sup> Additionally, many people with substance abuse issues engage in theft-based crimes to pay for their addictions, resulting in injury or death to others when force is used to accomplish the theft.<sup>121</sup>

Coinciding with the self-perpetuating cycle of drug use and enforcement caused by the War on Drugs is the rise in police misconduct, especially within America’s inner cities where African Americans make up the majority of drug arrests. One infamous misconduct case, known as the Rampart Scandal, occurred in Atlanta when law enforcement relied on questionable information from an informant who purposefully lied to obtain a no-knock warrant from the jurisdiction’s judge.<sup>122</sup> When police knocked down the door of the location given to them by the informant, they found a ninety-two-year-old African American woman inside. As officers handcuffed the woman and planted drugs in her basement so they could arrest another resident of the house at a later date, the woman was injured, and she died as a result.<sup>123</sup> Unfortunately, instances of misconduct like the Rampart Scandal have occurred for far too long and are not unusual in the United States as a result of the War on Drugs. When “war” is declared on something, as it was on drugs in the late 1960s,

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<sup>119</sup> See Luna, *supra* note 63 at 845.

<sup>120</sup> See *id.*

<sup>121</sup> See *id.*

<sup>122</sup> See *Rampart Scandal Timeline*, PBS (May 2001), <https://www.pbs.org/wgbh/pages/frontline/shows/lapd/scandal/cron.html>.

<sup>123</sup> See *Editorial: Ghosts of Rampart are Hovering Over LAPD’s Latest Gang Scandal*, L.A. TIMES (Jan. 21, 2020, 3:00 AM), <https://www.latimes.com/opinion/story/2020-01-21/ghost-rampart-lapd-gang-scandal>.

justice becomes corrupted by a false sense of authority, and the constitutional rights and liberties of all Americans are severely undermined.<sup>124</sup>

Although the public goal of the CSA and the War on Drugs was to achieve a “drug free” society, the results have been nothing short of the exact opposite.<sup>125</sup> While many still believe that aggressive enforcement and “uncompromising criminal justice measures” are the most effective means of keeping drugs out of Americans’ reach, this approach has done nothing but perpetuate the problem of drug use while also substantially increasing the amount of people incarcerated.<sup>126</sup> Of those most negatively impacted, African Americans have undergone decades of biased treatment within our criminal justice system as the amount of spending on the War on Drugs has continually increased.<sup>127</sup> As a result, the progressive prosecutor movement has been elected to reform the system with this trend in mind. By choosing not to prosecute marijuana crimes in jurisdictions where it is still illegal, these prosecutors have sought reform, even in the absence – and sometimes direct opposition to – legislative means being employed at the same time.<sup>128</sup>

### C. No Cash, No Bail, Just Stay In Jail: America’s Flawed Money Bail System

It is important to note that many underlying causes of the United States’ decaying criminal justice system overlap, such as the increased incarceration rate and the impact that America’s money bail system has on imprisonment. For example, of the 1.6 million people currently incarcerated in the United States, approximately 450,000 of them are awaiting trial in their local county jail because they have no disposable income to post bail.<sup>129</sup> America’s cash bail system has

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<sup>124</sup> See Kreit, *supra* note 66.

<sup>125</sup> See Luna, *supra* note 63.

<sup>126</sup> See *id.*

<sup>127</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> See Nicholas P. Johnson, *Cash Rules Everything Around the Money Bail System: The Effect of Cash-Only Bail on Indigent Defendants in America’s Money Bail System*, 36 BUFF. ENVTL. L.J. 29, 30–31 (2019).

provided progressive prosecutors with another flaw within the judicial system that desperately needs reform, especially given its disproportionate impact on economically disadvantaged Americans.<sup>130</sup>

Recent data obtained from state court systems around the country shows that, of those who are detained for failure to post bail during the pretrial phase of a criminal proceeding, sixty percent belonged to the poorest third of Americans.<sup>131</sup> In addition, an astounding eighty percent lived below the poverty line.<sup>132</sup> The consequences of requiring bail to the poorest Americans to avoid detention before they are even convicted of a crime is disastrous for both the United States' criminal justice system and those implicated in it. For example, a large majority of persons jailed for not posting bail are people accused of non-violent offenses, such as simple possession of marijuana or a related controlled substance.<sup>133</sup> More alarming is that this self-perpetuating system of incarceration has occurred during the same period that overall crime rates in America are actually decreasing.<sup>134</sup>

The pretrial detention of a non-violent defendant who is unable to post bail has profound implications for someone who is otherwise assumed innocent until proven guilty.<sup>135</sup> For instance, the organization of the cash bail system often causes those jailed to lose their job, experience a family breakdown, inadequately prepare a criminal defense, and, ironically, even increases their likelihood of conviction.<sup>136</sup>

Aside from the impact pretrial detention has on those accused, it also greatly strains American taxpayers, costing over nine billion in 2011 alone. Even though the United States Constitution

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<sup>130</sup> See Nicholas P. Johnson, *Cash Rules Everything Around the Money Bail System: The Effect of Cash-Only Bail on Indigent Defendants in America's Money Bail System*, 36 *BUFF. ENVTL. L.J.* 29, 30–31 (2019).

<sup>131</sup> See *id.* at 31–33.

<sup>132</sup> See *id.*

<sup>133</sup> See *id.*

<sup>134</sup> See *id.* at 30–31.

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

prohibits the government from imposing excessive bail, recent jurisprudence has afforded trial judges a great deal of discretion in requiring defendants to post “high, but not excessive bail amounts.”<sup>137</sup> In fact, some jurisdictions require defendants to post the entire bail amount before allowing a judge to release them, which are known as cash-only bail systems and are used in a number of states across the country for certain crimes.<sup>138</sup>

A recent study of over 150,000 defendants jailed in a Kentucky prison who were awaiting trial found that those who are detained “for the entire pretrial period are much more likely to be sentenced to jail and prison.”<sup>139</sup> Specifically, the study found that, compared to defendants who are released at some point prior to trial, defendants who spend the entire pretrial portion behind bars are faced with a five-and-a-half percent higher chance of being sentenced to jail and a roughly four percent higher chance of being sentenced to prison.<sup>140</sup> Additionally, the study revealed that those who are unable to post bail prior to trial face a post-conviction sentence that is nearly three times longer than those who are released after posting bail prior to trial.<sup>141</sup>

While these results are only from one prison in Kentucky, the results are indicative of the entire United States prison system as a whole.<sup>142</sup> The reliability of this test went unchanged even when tested against control factors such as the seriousness of the charges, prior convictions, and the evidence against the defendant.<sup>143</sup>

With consequences as serious as those implied by the findings of the Kentucky study, the underlying rationales for keeping America’s money bail system in place must outweigh the negative effects it has on those accused of a crime in order for it to be justified. However, although some estimates show that only twenty

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<sup>137</sup> *See id.*

<sup>138</sup> *See id.*

<sup>139</sup> *See* Johnson, *supra* note 130.

<sup>140</sup> *See id.*

<sup>141</sup> *See id.*

<sup>142</sup> *See id.*

<sup>143</sup> *See id.*

percent of criminal defendants fail to appear when released on bail, it is fair to conclude that money bail is relatively insignificant in making sure defendants appear for their trial.<sup>144</sup>

While the shining principle of the American judicial system claims to be the presumption of innocence granted to criminal defendants, pre-trial detention and its impoverishing results on those who are simply unable to post bail. This is especially true when a non-violent offense is in question, which seems to undermine every principle that the United States was founded on.<sup>145</sup> While the economic inefficiencies caused by the money bail system are sufficient enough to seek its reform, the disastrous consequences imposed on those who find themselves in the middle of it only further that argument.<sup>146</sup> Many who cannot afford to post bail are forced to accept guilty pleas to crimes they did not actually commit.<sup>147</sup>

In essence, the money bail system is another example of a broken judicial system. It disproportionately impacts the poor, people of color, and those who are actually innocent. Further, it barely promotes justice or fairness given the improper bias those who fail to comply with the bail system face when convicted for a crime and sentenced to jail or prison. Progressive prosecutors have decided to reform this system in the absence of legislative initiative by implementing a wide array of policies designed to, in the short term, alleviate the problem, with the long-term goal of eliminating the cash bail system all together. These policies will be discussed at length in Part III.

#### D. Life, Liberty, and the Pursuit of Capital Punishment: America's Death Penalty

Benjamin Franklin once furthered the scope of a common law doctrine known as "Blackstone's ratio" when he famously stated

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<sup>144</sup> *See id.* (noting that between 1994 and 2003, only twenty to twenty-four percent of criminal defendants failed to appear for trial after being released on bail).

<sup>145</sup> *See id.*

<sup>146</sup> *See Sardar, supra* note 33.

<sup>147</sup> *See id.*

that it is better to let one hundred guilty people go free than to jail one innocent.<sup>148</sup> While it is hard to justify this statement by its face-value assertion, understanding its rationale is important in realizing its meaning. By granting the presumption of innocence to a criminal defendant, those who are wrongly accused are afforded a substantial benefit when a state government's case is against them. This founding principle of the American judicial system – also a constitutional guarantee to criminal defendants – is even more true when applied to those who are wrongly accused of capital murder and sentenced to death following a conviction.<sup>149</sup> In the modern world, the United States remains one of the last Western countries to permit the death penalty in its constitution. And, after numerous technological advances exonerated those on death row (and, in some cases, those who were already put to death), progressive prosecutors hope to use their prosecutorial power to fully investigate each conviction that already resulted in a death sentence and to stop seeking the death penalty altogether.

In as early as 1932, a study of capital punishment in the United States and Great Britain revealed sixty-two American cases and three British cases of innocent people being convicted of felonies and sentenced to death.<sup>150</sup> By the 1970s, accessible data sets showed the existence and likelihood of an erroneous conviction in capital punishment cases, and all cases in general, which allowed the issue of falsely convicted persons on death row to be examined more precisely.<sup>151</sup>

From 2003 to 2008 alone, DNA exonerated over 233 defendants in the United States, and information from the Death Penalty Information Center further identified an additional 340 felony convictions from 1980 to 2003.<sup>152</sup> Most alarmingly, since 1973, DNA evidence exonerated 130 inmates sentenced to death by

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<sup>148</sup> See Sardar, *supra* note 33.

<sup>149</sup> See Reality Check Team, *Death Penalty: How Many Countries Still Have it?*, BBC (Dec. 11, 2020), <https://www.bbc.com/news/world-45835584>.

<sup>150</sup> See Michael L. Radelet, *The Role of The Innocence Argument in Contemporary Death Penalty Debates*, 41 TEX. TECH. L. REV. 199 (2008).

<sup>151</sup> See *id.*

<sup>152</sup> See Radelet, *supra* note 150.

execution, a large majority of which were already carried out by the time it was realized the person was wrongfully convicted.<sup>153</sup> Some organizations, such as the Death Penalty Information Center, found over 1,200 erroneous convictions documented in American history in total.<sup>154</sup>

Approximately two-and-a-half percent of defendants who were sentenced to death since 1973 have been exonerated by DNA evidence following their conviction.<sup>155</sup> However, researchers quickly point to the small percentage of potential wrongful convictions that have been explored to date due to this small sample size; instead, the proportion of wrongly convicted inmates on death row is unquestionably higher, they argue.<sup>156</sup> Some estimates pin the number of erroneous capital punishment convictions around five percent, while others claim it to be well under one percent.<sup>157</sup> Regardless of what estimates are actually correct, the fact that innocent people are subjected to death, the most severe punishment of all, is in itself a problem for the judicial system.

While this issue is discussed in more detail in Part III by examining the policies of progressive prosecutors like D.A. Krasner on existing death penalty laws, it is important to understand the impact that capital punishment has had on propelling the rot currently within the United States' judicial system. This rot is caused by the War on Drugs, mass incarceration, and the American money bail system, and it has caused a vicious perpetuating cycle in the United States of injustice. It is with this in mind that progressive prosecutors have captured the moment and turned it into a movement with the primary goal of fundamentally changing the way the justice system impacts everyday Americans, particularly, indigent defendants.” Most remarkably, given the lack of legislative action aimed at fixing the broken system across the country, these reforms are all being pursued from within the already existing roles of respected DAs and prosecutor offices across the country.

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<sup>153</sup> *See id.*

<sup>154</sup> *See id.*

<sup>155</sup> *See id.*

<sup>156</sup> *See id.*

<sup>157</sup> *See id.*

## II. REHABILITATING A RETRIBUTIVE SYSTEM: LEARNING FROM THE GERMAN PRISON MODEL

Arguably, one of the hardest questions to objectively answer in modern day criminal justice is what the law's purpose is, and from that purpose, what is the result society hopes to achieve by implementing its laws. The purpose of law in society is a topic that can easily comprise hundreds of pages of research and analysis, and is beyond a basic understanding of the subject of this comment, so it will not be addressed in-depth here. However, understanding whether the law is designed to solely protect victims and punish offenders with criminal prosecution and incarceration – *i.e.*, retributive justice – versus protecting societal values and rehabilitating or reintegrating convicted persons back into everyday life – *i.e.*, rehabilitative justice – is paramount to finding the right course of corrective action to the United States' criminal justice system. Progressive prosecutors are on the forefront of answering such questions in their attempts to reform the American incarceration system, and they look no further than to the prison system models employed in countries such as Germany.

### A. The German Model

In contrast to the goals of the American incarceration system, the German prison model rejects punishment of the convicted person as the basis of its efforts to pursue justice, and instead views the loss of freedom suffered by those incarcerated as the full extent of punishment allowed for in their system.<sup>158</sup> The underlying principle of the German prison system is rehabilitation that teaches inmates how to return to their communities and live law-abiding lives as productive members in society. The German Prison Act carves this goal into law by stating:

[T]he sole aim of incarceration is 'to enable prisoners to lead a life of social responsibility free of crime

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<sup>158</sup> See Amy L. Solomon, *Out From the Holocaust*, THE MARSHALL PROJECT (Dec. 20, 2018, 9:59 PM), <https://www.themarshallproject.org/2018/12/20/out-from-the-holocaust>.

upon release, requiring that prison life be as similar as possible to life in the community (sometimes referred to as ‘the principle of normalization’) and organized in such a way as to facilitate reintegration into society.<sup>159</sup>

When compared to the main objectives of the American judicial system, which primarily focuses on incarcerating people and “punitive sanctions”, it is easy to see how the American system has a larger prison population than Germany.<sup>160</sup>

Take, for example, the sole fact that America’s incarceration rate hovers around ten percent higher than its German counterpart. Further, in Germany, only six percent of people convicted in court receive a prison sentence, yet ninety percent of which are for terms of less than two years, while the rest of those convicted for a crime are sentenced to community-based sanctions, such as day fines or community service.<sup>161</sup>

As the goals of the German prison model can be said to revolve around rehabilitative objectives that successfully prepare convicted persons to become better members of society, the adopted measures to further such goals are often in the form of teaching inmates how to become “better parents, neighbors, and colleagues.”<sup>162</sup> As such, German prisons are structured to resemble life on the outside of a jail-cell’s metal bars as much as possible, often by rewarding good behavior by removing some of the restrictions on an inmate’s liberty and by deterring bad behavior by imposing further restrictions as deemed appropriate.<sup>163</sup> For example, typical rewards

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<sup>159</sup> RAM SUMBRAMANIAN & ALISON SHAMES, SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES, CTR. ON SENT’G AND CORRECTIONS (2013), [https://www.vera.org/downloads/Publications/sentencing-and-prison-practices-in-germany-and-the-netherlands-implications-for-the-united-states/legacy\\_downloads/european-american-prison-report-v3.pdf](https://www.vera.org/downloads/Publications/sentencing-and-prison-practices-in-germany-and-the-netherlands-implications-for-the-united-states/legacy_downloads/european-american-prison-report-v3.pdf).

<sup>160</sup> See *id.* at 3.

<sup>161</sup> See Solomon, *supra* note 158.

<sup>162</sup> See Solomon, *supra* note 158.

<sup>163</sup> See Bill Whitaker, *German-Style Program at a Connecticut Maximum Security Prison Emphasizes Rehab for Inmates*, CBS NEWS: 60 MINUTES (Mar. 31, 2019),

for good behavior often involve granting benefits to an inmate such as longer family visitation periods, increased time for entertainment, classes that teach technical skills, or even decent-paying jobs within the prison.<sup>164</sup>

While it's hard to imagine the American criminal justice system embracing a sentencing cap for violent offenders, the German criminal justice system indirectly accomplishes such an objective when reviewing petitions of incarcerated individuals for release on parole.<sup>165</sup> For instance, nearly seventy-five percent of all life sentences in Germany are released on parole in twenty years or less.<sup>166</sup> Such aims of the German system are justified by recent research that shows that increasing sentences to long periods does virtually little to combat crime and may lead to more crimes being committed inside of the prison walls.<sup>167</sup> Consequently, inmates miss opportunities to pursue a meaningful life in society with both their family and careers and become entrapped in an environment with un-rehabilitated inmates who are tied to the criminal world.<sup>168</sup> Additional research suggests that people often mature out of criminal behavior, especially during their late thirties and forties.<sup>169</sup>

The German Prison model embraces such empirical data while pursuing a modern vision of criminal justice; the goal of reforming a criminal, not punishing improper behavior.<sup>170</sup> As a result, sentences are shorter. Life in prison resembles, as much as possible, life in society; and jail sentences are designed to encourage socially acceptable and productive behavior, not punishing an individual by

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<https://www.cbsnews.com/news/german-style-true-program-at-cheshire-correctional-institution-emphasizes-rehab-for-inmates-60-minutes/>.

<sup>164</sup> See *id.*

<sup>165</sup> See Bill Whitaker, *This is Prison? 60 Minutes Goes to Germany*, CBS NEWS: 60 MINUTES (Mar. 31, 2016), <https://www.cbsnews.com/news/this-is-prison-60-minutes-goes-to-germany/>.

<sup>166</sup> See *id.*

<sup>167</sup> See German Lopez, *The Case for Capping All Prison Sentences at 20 Years*, VOX (Feb. 12, 2019, 7:30 AM), <https://www.vox.com/future-perfect/2019/2/12/18184070/maximum-prison-sentence-cap-mass-incarceration>.

<sup>168</sup> See *id.*

<sup>169</sup> See *id.*

<sup>170</sup> See Whitaker, *supra* note 165.

imposing harsh and inhumane-like conditions. Although Germany serves as the best model for such rehabilitative systems, it is not alone in its progressive structuring of the criminal justice system.<sup>171</sup> For example, Norway embraces reduced jail terms and, with a few exceptions, caps all sentences at twenty-one years while still maintaining lower violent crime and reoffender rates than the United States.<sup>172</sup>

Given the current state of the United States' criminal justice system, it follows that the system's objectives are largely rooted in retributive justice, meaning an "eye-for-an-eye", including its prison model. In essence, the goal of American criminal justice is to punish convicted offenders. The reasons for this likely stem from the effects of slavery, segregation, and Jim Crow laws that have yet to be fully eliminated from America's modern-day legal system.<sup>173</sup> And just like the War on Drugs, the cash bail system, and the death penalty amongst others, those impacted the most are often minority and low-income citizens.<sup>174</sup>

Germany's prison system, as well as a large majority of its present-day culture, was constructed to avoid the horrific and unthinkable tragedies that occurred during World War II. In this way, Germany has learned from its history and produced a modern criminal justice system as a result.<sup>175</sup> Its prison model is no exception. In stark contrast to Germany, the United States has yet to collectively embrace a wide-sweeping reform of its incarceration system so that it mirrors rehabilitative justice.<sup>176</sup> The consequences of this, in combination with the current policies also at play and discussed above at length, have produced the rotting legal system that progressive prosecutors hope to remove to the fullest extent possible. And, given that Germany has a recidivism rate that is half of that in

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<sup>171</sup> See Lopez, *supra* note 167.

<sup>172</sup> See *id.*

<sup>173</sup> See Solomon, *supra* note 158.

<sup>174</sup> See *id.* (citing a report which found that "one in three black men will be incarcerated in their lifetimes, one in thirteen black adults cannot vote due to felony convictions, and one in nine black children has a parent in jail or prison.").

<sup>175</sup> See *id.*

<sup>176</sup> See Whitaker, *supra* note 165.

the United States, the time has come to reconsider the underlying goals and objectives of the American criminal justice system.<sup>177</sup>

#### B. Recent Efforts in the U.S. to Form a Rehabilitative System

One recent attempt at rehabilitative prison reform within the United States is in a Connecticut prison known as “the Rock.”<sup>178</sup> For the past two years, prison officials inside the Rock have implemented a program called T.R.U.E.: which stands for “truthful, respectful, understanding, and elevating to success.” T.R.U.E. is based on research that shows that eighteen to twenty-five-year-olds are still developing and are therefore more likely to change (*i.e.*, more likely to be reformed).<sup>179</sup> Looking towards the German prison system, Connecticut officials designed T.R.U.E. to provide therapy to adult criminals who are convicted for crimes ranging from drugs to violent assault. Inmates are selected for T.R.U.E. after they apply to the program and are evaluated by their behavior in the general population.<sup>180</sup> In the Rock’s general population, dangerous inmates wear yellow uniforms and are often engaged in physical fights with other inmates and guards. However, in the T.R.U.E. wing of the Rock, not a single recorded instance of violent behavior has occurred since T.R.U.E. was created in 2017.<sup>181</sup>

Much like the German prison model, it would appear that T.R.U.E. views incarceration as the inmates’ only form of punishment. Good behavior is rewarded with incentives like increased free time and family visitation hours. Bad behavior, especially when repeated, will get an inmate shipped back to general population and disqualified from the program; however, to this date only twelve inmates have so far been placed back into general population.<sup>182</sup> Although the results of T.R.U.E. have yet to be fully shown and analyzed, it is without a question one of the first attempts

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<sup>177</sup> *See id.*

<sup>178</sup> *See* Whitaker, *supra* note 165.

<sup>179</sup> *See id.*

<sup>180</sup> *See id.*

<sup>181</sup> *See id.*

<sup>182</sup> *See id.*

in the United States' criminal justice system to implement a rehabilitative-like prison program.<sup>183</sup>

While progressive prosecutors aim to turn the American criminal justice system into a rehabilitative model that embraces reintegration of a convicted person back into society, prosecutors have no power to: change prison conditions; write or pass prison reform legislation; or even determine what exact sentence a convicted criminal will receive from a judge. In this sense, their power is limited. However, prosecutors do possess the power to determine when someone is charged for a crime, or if that person will even be charged for a crime at all, a power known as prosecutorial discretion. In this respect, progressive prosecutors currently in office use this power to impact who is sent to prison versus who is sent to pretrial diversionary programs, community service, rehab, and many other community-based measures available for judges to impose on criminal offenders.

Until Congress and state legislatures take it upon themselves to reform the broken prison system, cash-bail system, drug policies, and sentencing guidelines, the United States' criminal justice system will not be able to fully progress into a rehabilitative model and will likely stay rooted in retributive justice. However, with the German prison system and the overall German criminal justice system in mind, progressive prosecutors are attempting to at least carve away at the internal rot inside the legal system here in the United States with prosecutorial discretion as their main tool.

### III. THE PROGRESSIVE PROSECUTOR'S TOOLBOX: PROSECUTORIAL DISCRETION

It would be remiss to suggest that currently incarcerated people in the United States were randomly placed into such a position. It is safe to assume – at least in most circumstances – that if someone is serving a jail-sentence, they were formally charged, prosecuted, and convicted of a crime. Before being sent to jail, that person must first stand before a sentencing judge, who is responsible

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<sup>183</sup> *See id.*

for analyzing a variety of factors that help determine what length of imprisonment best serves the underlying crime. Such factors often include: (1) the severity of the crime; (2) the convicted person's prior criminal record; and, most significantly, (3) the sentencing guidelines and prior record scores, which are created by a legislature and are used as an advisory – and sometimes mandatory – mechanism among most judges around the country.<sup>184</sup>

Since the scope and authority of every DA across the country is to decide who gets charged for a crime, and what crime can be charged under a state or federal statute, it is undisputed that the thousands of DAs across the country possess a unique power within the U.S. criminal justice system. This power, which progressive prosecutors use as their main tool to build criminal justice reform, is known as “prosecutorial discretion.”<sup>185</sup>

When progressive prosecutors talk about reforming the system from within a position of power already established by law, they are largely referring to the function that prosecutorial discretion can play in the overall process of convicting a defendant and determining their sentence. If the prosecutor determines a crime should not be charged, then no other actor in the system can threaten the use of criminal prosecution.<sup>186</sup>

Local prosecutors, who handle ninety-five percent of the criminal cases brought in this country, are well-positioned to take reform into their own hands because of their broad discretion over whether and how to prosecute cases and what bail they decide to seek against defendants.<sup>187</sup> Currently, progressive prosecutors are exercising their discretion in new ways, and for valuable reasons

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<sup>184</sup> See Ian Weinstein, *Fifteen Years after the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing Perspectives on the Federal Sentencing Guidelines and Mandatory Sentencing*, 40 AM. CRIM. L. REV. 87, 90–94 (2003).

<sup>185</sup> See Colloquium, *DACA, Government Lawyers, and the Public Interest*, 87 FORDHAM L. REV. 1879 (2019).

<sup>186</sup> See generally *id.*

<sup>187</sup> See Colloquium, *supra* note 185.

given the vast number of injustices the United States has allowed to occur since the start of Nixonian justice.<sup>188</sup>

Recent studies indicate that incarcerating convicted persons for long periods of time does little to correct or reform their behavior; conversely, doing so actually makes them more likely to commit another offense in the future.<sup>189</sup> With this in mind, progressive prosecutors use prosecutorial discretion to benefit not only the convicted person themselves but the community as a whole.<sup>190</sup> For instance, instead of seeking maximum jail sentences for simple possession convictions, progressive prosecutors have turned to pre-trial interventions and diversionary programs for persons with substance or drug abuse who are otherwise peaceful citizens.<sup>191</sup> And since those addicted to drugs ordinarily suffer from some form of a mental health illness, these diversionary intervention programs often include substantial access to mental health treatment programs as a way to target the user's addiction.<sup>192</sup>

For instance, D.A. Krasner recently announced that his office will no longer prosecute people who were arrested for possession of an addiction treatment drug, which extended the policies he initially implemented immediately after taking office in 2017, which stopped prosecuting most marijuana charges.<sup>193</sup> In addition to this, D.A. Krasner established a Convictions Integrity Unit (“CIU”) in the Philadelphia D.A.’s Office after he was elected that has the primary purpose of reviewing prior convictions for life and death penalty sentences that occurred in his office before he was sworn in.<sup>194</sup> To

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<sup>188</sup> See generally *id.*

<sup>189</sup> See generally *id.*

<sup>190</sup> See Emily Bazelon & Miriam Krinsky, *There’s a Wave of New Prosecutors. And They Mean Justice.*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/opinion/how-local-prosecutors-can-reform-their-justice-systems.html>.

<sup>191</sup> See *id.*

<sup>192</sup> See *id.*

<sup>193</sup> See *id.*

<sup>194</sup> See Samantha Melamed, *A ‘Perfect Storm’ of Injustice: Philly Man Freed After 28 Years as DA Condemns ‘Decades’ of Misconduct*, THE PHILA. INQUIRER (Jan. 21, 2020), <https://www.inquirer.com/news/philadelphia-da-larry-krasner-conviction-integrity-unit-exoneration-theophalis-wilson-christopher-williams-20200121.html>.

date, Krasner's CIU exonerated twelve people since its beginnings in 2017, with every case uncovering prior instances of prosecutorial misconduct as the driving force behind each conviction.<sup>195</sup> Additionally, D.A. Krasner began considering the costs of incarceration when his Assistant D.A.s are arguing a sentence following a conviction, which is being done as a means to deter unnecessarily lengthy sentences and provide taxpayers with an opportunity to analyze the decisions being made by government officials that result in substantial sums of funding being used.<sup>196</sup>

Whether it's pursuing pre-trial diversionary programs, reviewing the files of a conviction that occurred thirty years ago, or providing citizens with a transparent look inside the office of a prosecutor and the costs associated with the decisions being made there, progressive prosecutors like D.A. Krasner are finding creative solutions to address the injustices that America's criminal justice system has created. Although the image of progressive prosecutors may be saturated in left-leaning political ideologies, in practice their policies are largely non-partisan.

The use of their 'prosecutor's toolbox' is neither wrong nor groundbreaking, since prosecutorial discretion has always served as an available mechanism to check against police misconduct, unfair sentencing, and inhumane treatment of those engaged in criminal activity. The only problem is that, until progressive prosecutors came into office, D.A.s rarely used their powers to pursue compassionate prosecution. If the prison system currently in place in the United States has shown itself to be a complete failure in transforming

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<sup>195</sup> See Samantha Melamed, *A Brutal Triple Murder, an Eager Informant, Hidden Evidence, and now, Exoneration*, THE PHILA. INQUIRER (Jan. 8, 2020), <https://www.inquirer.com/news/philadelphia-da-larry-krasner-exoneration-christopher-williams-theophalis-wilson-20200106.html> (noting that many of these prior convictions have included a "catalog of deep problems in Pennsylvania's legal system . . . [such as] concealed evidence, undisclosed deals in exchange for testimony, corrupt relationships with informants, and a direly inadequate system of appointing and funding defense counsel . . .").

<sup>196</sup> See Lars Trautman, *The Criminal Justice Reforms Pushed by 'Progressive Prosecutors' are Surprisingly Conservative*, R STREET (Nov. 26, 2019), <https://www.rstreet.org/2019/11/26/the-criminal-justice-reforms-pushed-by-progressive-prosecutors-are-surprisingly-conservative/>.

criminals into law-abiding citizens, then until that system is reformed, prosecutorial discretion serves as a meaningful route for D.A.'s to use in hoping to reverse the injustices plaguing America's criminal justice system.

#### IV. THE NEED FOR PROGRESSIVE PROSECUTION IN THE MODERN ERA

Whether or not the United States is willing to admit that its policies have failed with regards to drugs, sentencing, cash-bail, and the death penalty, this is not itself determinative towards reaching one main conclusion about America's overall criminal justice system: it is causing far too many people to be locked up away from their families, careers, and everyday lives. Being guilty of a crime does not justify the long sentences, strict parole policies, or harsh conditions inside of most American jails today given that the current prison system in America is not reducing recidivism or decreasing crimes.<sup>197</sup> In contrast to this approach, Germany has embraced as main goal of its prison system rehabilitating convicted inmates and reintegrating them back into society: a goal that values the life of all humans and views the loss of freedom and personal liberties as the ultimate and only available form of meaningful punishment in the realm of criminal corrections.<sup>198</sup>

Although the United States' only true means of reforming its prison system, sentencing guidelines, and criminal code into a structure that resembles a rehabilitative model is by legislative initiative, on both the federal and state levels, prosecutors are still crucial actors in the system who are capable of utilizing prosecutorial discretion as a means of reform. For example, progressive prosecutors who aim to reduce incarceration often can, and should, place offenders for drug and other non-violent crimes in pretrial diversionary or rehab programs designed to teach socially acceptable and productive behaviors to the offenders. In addition, progressive

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<sup>197</sup> See TCR Staff, *Recidivism Rates 'Unacceptably High,' says Sessions*, THE CRIME REP. (Apr. 9, 2018), <https://thecrimereport.org/2018/04/09/recidivism-rates-unacceptably-high-says-sessions/>.

<sup>198</sup> See Solomon, *supra* note 158.

prosecutors who aim to reduce the terms of prison sentences can choose which crimes to pursue charges for and which ones to drop while negotiating plea agreements. By intentionally selecting which crimes to pursue charges for against a non-repeat offender, progressive prosecutors are able to present a judge with a substantially reduced recommended sentence during a plea hearing. In addition, progressive prosecutors can seek lower bail amounts or even request that no bail be lodged against certain offenders of non-violent crimes, especially in circumstances where the defendant poses little to no flight risk. Although measures like these are not themselves guaranteed to ensure a rehabilitative outcome in all instances, some effect will be felt because of the benefit of the doubt given to criminal defendants during each step of their judicial process, until proven guilty.

While some old-school actors in the system claim these approaches to be a radical abuse of power by progressive prosecutors, the argument in favor of progressive initiatives at the prosecutor level far outweigh such criticisms.<sup>199</sup> Does it make sense to place those arrested for possession and intent to use a drug in jail, where general populations are crowded with career criminals?<sup>200</sup> Or is it rational to place a former convict in jail because they failed a drug test while on probation, but were otherwise abiding by the policies set forth by their sentencing judge? Or is it justified that our system holds low-income, and usually African American or Latino criminal defendants in jail without proving their guilt simply because such individuals lack the financial means to post ten percent of bail? As should be obvious, incarceration without rehabilitation only leads to more incarceration.

What is clear is that this system, which is locking up so many of its own citizens for crimes that are more effectively prevented and rehabilitated in other countries, is a failing system. Unfortunately for America, our system is doing exactly this. A natural consequence of

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<sup>199</sup> See Bobby Allyn, *U.S. Attorney Slams Philadelphia DA Over 'Culture of Disrespect for Law Enforcement'*, NPR (Aug. 17, 2019), <https://www.npr.org/2019/08/17/752051788/u-s-attorney-slams-philadelphia-da-over-culture-of-disrespect-for-law-enforcement>.

<sup>200</sup> See Jarrett, *supra* note 62.

this rotting system combined with inaction by politicians who, at least partly, are responsible for creating and reforming our legal system, has caused the American public to lose a great amount of respect for the law of the United States as a whole.

Prosecutorial discretion is the vehicle available to all prosecutors in overseeing the “gatekeeper” role between criminals and peaceful, law-abiding citizens. Progressive prosecutors have found a way to use this vehicle in attempting to turn the United States’ system into one that truly values human life and dignity instead of blind punishment. In this sense, prosecutorial discretion is a tool that can be found in every prosecutor’s toolbox, and one that is currently being utilized by progressive prosecutors all over the country to carve away the infectious rot currently ruining the United States’ criminal justice system. Whether or not such attempts will be successful is yet to be seen. But, in the age of partisan standoffs that hold legislatures everywhere hostage while politicians continue to ignore (and often perpetuate) the problem of mass incarceration and the destruction of America’s social fabric, at least some affirmative action is being taken by people in positions of power: progressive prosecutors.

Perhaps progressive prosecutors would be better suited by being referred to as “discretionary prosecutors,” or as put by Krasner, “compassionate prosecutors.” Either way, one thing is for certain: such discretion is crucial in the present moment to fix the American criminal justice system and reverse generations of racist, segregationist, and classist policies that have been rooted in the system since the age of slavery, including policies that were amplified by the Nixonian age and retributive justice throughout much of the twentieth century. Today, these policies remain at the core of our justice system. And for that reason alone, the progressive prosecutor movement, while by no means perfect or without its own flaws, is at least an attempt to do something corrective and is therefore a movement that is *necessary*. Without such attempts to fix a system that is so blatantly broken and continuing to pursue punitive policies covered in a retributive cloak, the problem currently faced everywhere in America will only be perpetuated. Until Congress and state legislatures everywhere decide to reform our system into a

rehabilitative model, progressive prosecutors everywhere should, and must, continue their reforms from within the walls of their offices. Progressive prosecutors are a crucial component in a larger vision that values *all* human life, freedom, and protection of society in the long run.