COLOR OF CHANGE

WINNING JUSTICE

THE PROSECUTOR PROJECT

1. DECLINE LOW-LEVEL PROSECUTIONS
2. INCREASE POLICE ACCOUNTABILITY
3. PRETRIAL JUSTICE AND DISCOVERY
4. END HARMFUL CHARGING PRACTICES
5. COMMUNITY-LED DIVERSION
6. SENTENCING REFORM
7. PROBATION AND PAROLE
8. IMPLEMENT POST-CONVICTION REVIEW
9. UPDATE INTERNAL OFFICE POLICIES

INTRODUCTION

Prosecutors play a critical role at every stage of the criminal process, from initial charging decisions to post-conviction sentencing. Every day, prosecutors utilize broad discretion to decide who to charge with what offense as well as recommending the severity of the punishment for the alleged violation. For decades, overzealous prosecution has fueled mass incarceration and the overcriminalization of Black communities and other communities of color.

Today, a new approach is needed to reverse these trends while building meaningful public safety. Through changes in official policy directives and practices, prosecutors can make the communities they serve safer, without causing harm or relying on incarceration and other forms of punitive sanctions as the only forms of justice.

Based on pragmatic and achievable goals, the following roadmap provides prosecutors across the country with evidence-based recommendations for employing the tools at their disposal to improve prosecutorial outcomes. Some of the practices below are already a legal requirement of prosecutors, but may require additional action to address current failures in implementation and to ensure compliance. Other recommendations encourage community and agency partnerships to increase transparency, accountability and advance reform-minded policies. Together, these recommendations, supported by extensive quantitative research, are necessary to ensure prosecutors promote fair and equal treatment throughout the criminal legal process.

We must also acknowledge that in the years since the rise of the reform prosecutors movement, several reformers have come under attack from right-wing conservatives, and some have been removed from office. We will not give up. We will stand up and fight back.

The roadmap that follows mirrors the flow of the criminal legal system and provides specific recommendations for prosecutors to follow at each stage of decision making.

01 LOW-LEVEL PROSECUTIONS
02 POLICE ACCOUNTABILITY
03 PRETRIAL JUSTICE AND DISCOVERY
04 CHARGING
05 DIVERSION
06 SENTENCING
07 PROBATION AND PAROLE
08 POST-CONVICTION REVIEW
09 INTERNAL OFFICE POLICIES
10 CONCLUSION

1 LOW-LEVEL PROSECUTIONS

Decline low-level prosecutions and increase police accountability.

Racial profiling and bias in policing lead to racial inequality in arrests that are then compounded at later stages of the criminal legal process. These early-stage disparities are fueled by facially neutral policies that are enforced more frequently and severely against communities of color.

Although individual officers hold responsibility for executing non-public safety stops, invasive searches and arrests (sometimes on thin or false justification) prosecutors' can enable and incentivize pretextual behavior. Presumably, a police officer will be less likely to arrest someone if they have reason to believe the prosecutor will not bring charges.

At a minimum, prosecutors should:

- Decline to prosecute low-level offenses, such as those that criminalize poverty, including homelessness, sex work (purchase and sale), drug possession, and so-called "nuisance" crimes.
- Decline to prosecute "resisting arrest" charges.
- Limit the use of bench warrants for failure to appear.



2 POLICE ACCOUNTABILITY

Prosecutors should also work to curb the disparate impact of pretextual policing. This will require prosecutors to implement policies categorically declining and unambiguously making clear which offenses will not result in charges.

The working relationships between prosecutors and police officers can complicate the pursuit of justice, including when officers are alleged to have engaged in misconduct. It is essential that prosecutors display neutrality and maintain the integrity of the prosecution when working with police officers.

As such, prosecutors must comply and affirmatively enforce existing laws to:

- Decline to prosecute charges resulting from pretextual non-public safety stops, including minor traffic offenses such as broken taillight, tinted windows, and more.[1]
- Develop and publish a Brady/Giglio list of non-credible law enforcement officers whose testimonies prosecutors will not seek nor use in court.
- Actively seek and obtain police misconduct records and share them with the defense as part of discovery.
- Track, record, and publish "decline to prosecute" decisions on cases involving use-of-force with officers.
- Establish a separate division, walled off from the rest of the office, to investigate and prosecute cases against police officers alleged to have committed crimes while on duty. Ensure this office reports only to the elected prosecutor.



3 PRETRIAL JUSTICE AND DISCOVERY

Support pretrial justice

On any given day, more than 83% of people incarcerated in U.S. jails have not been convicted of their alleged crime.[2] Of those detained before trial, nearly 60% are in jail because they cannot afford bail.[3] People of color are 10% to 25% more likely than white people to be detained pretrial or to have to pay money bail.[4]

Additionally, the office should hold regular trainings on bias, racism and racial equity. Prosecutors must engage in expectation setting with staff, prioritizing evidence-based solutions and reforms that actually promote public safety and health over a commitment to filling cages.

Even if someone is never convicted of an alleged crime, pretrial incarceration — being removed from one's life and community for months or years at a time — often has disastrous effects on the accused, their loved ones and, by extension, their community. Pretrial detention can result in swift loss of employment and income, destabilization of housing, family separation and family trauma. Research has further confirmed that cash bail or pretrial supervision does not increase the likelihood of failure to appear in court or recidivism.[5]

- Prosecutors must create a wide net of people eligible for mandatory and presumptive pre-booking release without conditions.
- For the vast majority of offenses, recommend releasing people on their own recognizance (ROR) with the least restrictive conditions to their freedom.
- End the use of money bail for all offenses.
- Do not utilize incarceration as punishment for nonpayment of fines and fees, and decline to prosecute the nonpayment of fines and fees, including those associated with driving.
- Do not rely on algorithmic risk assessment tools to inform pretrial decisions.

Expand discovery

The discovery process is critical to protecting innocent people from wrongful convictions, resolving cases in a timely manner and building public confidence in the legal system.

- Ensure early and broad disclosures of information with the defense, including turning over witness statements and other evidence before it is required.
- Actively seek and obtain police misconduct records and share them with the defense as part of discovery.
- Implement punitive consequences for prosecutors who fail to provide discovery expeditiously in accordance with Brady.[6]

4 CHARGING

End stacking and coercion in plea bargaining

Plea deals have become such standard practice that the constitutional right to a trial has been virtually eliminated. No less than 94% of state convictions are the result of plea bargains.[7] This, of course, is not necessarily because all of those individuals are guilty, but because, when facing stacked charges and trial penalties, individuals often are intimidated into pleading guilty.

Prosecutors must stop engaging in harmful practices that drive convictions and long prison sentences.

- Charge one count per offense and limit charge-stacking.
- Decline to charge children (anyone under 18) as adults, and do not oppose transferring cases back to juvenile court.
- Require line prosecutors to fully consider and disclose all collateral consequences to an individual prior to acceptance of a plea deal.



Gender Equity And Reproductive Justice

Sweeping attempts to criminalize pregnancy and restrict access to reproductive care threaten the well-being of communities and erode trust in the legal system. Prosecutors, however, have the discretion to not criminalize such decisions that are deeply personal and to ensure the safety of patients and providers in these cases.

Prosecutors must make a firm commitment to not prosecute abortion as well as other pregnancy outcomes. By instituting a declination policy, prosecutors can ensure that child-bearing people will not be prosecuted for their pregnancy outcomes and that feticide laws will not be used as a proxy for punishing pregnancy loss. These policies should include, but not be limited to:

- Refusal to exploit digital data in abortion-related cases.
- Refusal to prosecute pregnant people related to miscarriages, stillbirths or any form of pregnancy loss.
- Refusal to prosecute pregnant people related to actions during pregnancy, including medically-assisted or self-managed abortion, drug use/possession/distribution during pregnancy where the fetus, embryo or fertilized egg is the alleged recipient, attempted suicide, fighting or car accidents.

Ensure Immigration Protections

Under federal immigration laws, undocumented immigrants can be subject to unanticipated mandatory deportation for low-level, non-violent offenses, such as traffic violations and theft. Immigrants should not be targeted and used to drive up conviction rates when it routinely leads to unnecessary and unjust deportations. Harsh collateral consequences also can deter people from cooperating and seeking resources from prosecutors' offices.

Prosecutors can use discretion to minimize collateral immigration consequences, keep families together and serve justice while building public trust in our legal system. At the minimum, prosecutors should:

- Notify line prosecutors that it is the policy of the office to avoid immigration consequences for people in charging and plea-bargaining.
- Make clear to defense counsels (in every case, to encourage defense to ask the right questions of the defendant) their openness to consider immigration circumstances if they are relevant and pursuant to their office policy to avoid negative consequences for people.
- Decline to cooperate with U.S. Immigration and Customs Enforcement and the U.S. Department of Homeland Security in the identification of people who may be subject to deportation.
- Require line prosecutors to factor potential immigration consequences in decision making and to use discretion to mitigate collateral consequences.
- Hire special immigration counsel to train line prosecutors on how to handle cases that have potential immigration consequences.



5 DIVERSION

Community-led diversion

Alternatives to incarceration minimize contact with the legal system through specialized diversion initiatives that aim to address the root causes of system involvement. Examples of diversion programs include drug, mental health and homelessness courts or electronic monitoring and the use of invasive surveillance technologies. While well-intended, many of these programs deal with public health or quality-of-life conditions that would be more appropriately addressed outside of the justice system. As legal experts, prosecutors are not properly trained or adequately able to treat these needs.

Prosecutors should not lead or house any diversion program. Specialty courts should be used specifically for crimes associated with the underlying condition and not the condition itself (e.g. drug courts should be used for crimes occurring because of drug use, such as car theft, not the drug use itself). A prosecutor's role is to determine criminal charges to bring forward. If, in that assessment, prosecutors determine that a case should be dismissed outright, they must not then route the case to diversion. Instead, prosecutors should prioritize working closely with community advocates to support investments in community and needs-specific alternatives to incarceration and allow these community advocates to lead.



6 SENTENCING

Sentencing reform

The proliferation of harsh sentencing policies has been an important driver of mass incarceration, leading to excessive sentences that undermine reform efforts. The stacking effect of long sentences has disproportionately affected Black people and other people of color[8] and has led to a rapid rise in elderly incarcerated populations.[9] To move beyond maximalist incarceration-driven approaches, prosecutors must implement policies that carefully evaluate and consider individual sentences and the collateral consequences that follow.

- Eliminate sentencing enhancements related to alleged gang involvement, habitual offender status or enhancements made under three strikes laws.
- Require prosecutors to consult the National Inventory of Collateral Consequences of Conviction when making sentencing recommendations to ensure that line prosecutors consider the impact of collateral consequences when making those recommendations.
- Require line prosecutors to provide a rationale for sentencing, including a fiscal analysis for taxpayers, when sentencing above the minimum recommendation.
- Implement a maximum sentence of 20 years.



1 PROBATION AND PAROLE

Mass supervision often has been called the “evil twin” of mass incarceration. More than 3.7 million, or 1 in 69, adults were on probation in the United States in 2021 (the most recent year for which national statistics are available.[10] That is more than triple the number of people on probation in 1980.[11] Nationwide, on any given day, more people are on probation than in prisons and jails and on parole combined.[12]

- Establish reasonable probation and parole terms (maximum of one year for a misdemeanor, and two years for a felony)
- Limit the number of special conditions imposed when seeking probation.
- Do not recommend prison or jail time for technical violations, including missed appointments, failed drug tests and drug or alcohol use.
- If a person’s new charge has resulted in a dismissal, stet, or acquittal, prosecutors should not pursue the violation of probation.



8 POST-CONVICTION REVIEW

Implement post-conviction review

Even after a conviction, a prosecutor's decisions can determine whether a person remains incarcerated unnecessarily and unjustly. Prosecutors must take every step to implement post-conviction sentencing review.

- Vacate convictions for all people whose charges have since been decriminalized.
- Create or expand a Conviction Integrity Unit to investigate wrongful convictions and exonerate innocent people. Ensure the office is walled off from the rest of the prosecutor's office and fully independent, reporting only to the elected prosecutor.
- Create or expand a Sentencing Review Unit to review and reduce sentences for people serving life sentences, with priority for elderly people and those sentenced as juveniles. Ensure the office is walled off from the rest of the office, is fully independent and reports only to the elected prosecutor.



9 INTERNAL OFFICE POLICIES

A shared progressive vision of prosecution

- Prosecutors cannot address critical reforms without challenging a culture that has shaped our current criminal legal system. A culture shift is critical to creating a fair and equitable justice system where all line prosecutors are trained to understand their job, not as the arbiters of punishment, but as standard bearers of justice.

- Conduct swift removal or reassignment of staff who ignore, reject or challenge the policies associated with these recommendations and those developed throughout your campaign.
- Refer to people by name rather than “the defendant” to ensure their humanity is recognized and respected throughout the legal process.
- Focus hiring and recruitment on creating pathways for formerly incarcerated people, practitioners of civil rights law and individuals from historically marginalized communities to join the prosecutor’s office.
- Routinely train staff on implicit bias, explicit and systemic racism and racial equity.
- Do not accept political contributions or endorsements from police unions or foundations.

Increase office transparency

- Publish guidelines on charging decisions.
- Commit to monthly meetings with community-based organizations to share data and concerns and to hear recommendations.

Collect and make public criminal justice data

- Create a public dashboard that includes data on pretrial decisions, court cases, sentences and demographics.
- Collect and publish data on diversions, misdemeanors, juvenile prosecutions and sentencing recommendations and outcomes for adult felony cases; Data should be broken down by offense type and race, ethnicity, gender and indigency status of people charged.
- Track the average length of sentence recommended by prosecutors by offense disaggregated by race, ethnicity, gender and indigency.
- Conduct a racial disparity audit to ensure proactive accountability for the processes that seek to eliminate racial bias in the prosecutor’s office.

10 CONCLUSION

The road to meaningful reform runs directly through the prosecutor’s office. Prosecutors must continuously and proactively reflect on and address conflicts that impede reform, including those arising from personnel, working relationships with other agencies and internal policies that affect outcomes at every stage of the criminal legal system. Using this roadmap as guidance, prosecutors can achieve justice, minimize harm and take meaningful steps toward redefining the meaning and practice of public safety.

ENDNOTES

[1] https://sfdistrictattorney.org/wp-content/uploads/2020/11/Declination-of-Contraband-Charges-Based-on-Pretextual-Stops.pdf

[2] Mass Incarceration: The Whole Pie 2023, Prison Policy Initiative (2023), https://www.prisonpolicy.org/reports/pie2023.html.

[3] Marik Xavier-Brier, The Civil Rights Implications of Cash Bail, U.S. Commission on Civil Rights (January 2022), https://www.usccr.gov/files/2022-01/USCCR-Bail-Reform-Report-01-20-22.pdf.

[4] Wendy Sawyer, How race impacts who is detained pretrial, Prison Policy Initiative (Oct. 19, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

[5] Allie Preston & Rachael Eisenberg, Cash Bail Reform Is Not a Threat to Public Safety, Center for American Progress (Sept. 19, 2022) https://www.americanprogress.org/article/cash-bail-reform-is-not-a-threat-to-public-safety/.

[6] To ensure due process, prosecutors must be held accountable for acting unethically. Examples of consequential action could include publicizing the prosecutor's record, limiting case allocation, and employment consequences (suspension, implications to promotions, firing). Kelly Gier, Note, Prosecuting Injustice: Consequences of Misconduct, 33 AM. J. CRIM. L. 191, 193 (2006)

[7] The Truth About Trials, The Marshall Project (Nov. 11, 2020), https://www.themarshallproject.org/2020/11/04/the-truth-about-trials.

[8] Edwin Rios, Racial inequality over long US prison sentences growing, report finds, The Guardian (July 21, 2022), https://www.theguardian.com/us-news/2022/jul/21/prisons-us-racial-equality-black-white-americans.

[9] Marc Mauer, Long-Term Sentences: Time to Reconsider the Scale of Punishment, The Sentencing Project (Nov. 5, 2018), https://www.sentencingproject.org/reports/long-term-sentences-time-to-reconsider-the-scale-of-punishment/. .

[10] Danielle Kaeble, Probation and Parole in the United States, 2021. U.S. Dept. of J., Bureau of Justice Statistics. NCJ 252072 (2023), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ppus21.pdf.

[11] On December 13, 1980, 1.1 million adults in the United States were serving probation sentences. See Jane Maxwell, Adult Probation and Parole, 1981. U.S. Dept. of J., Bureau of Justice Statistics. NCJ 983647 (1982), https://bjs.ojp.gov/content/pub/pdf/pp81.pdf.

[12] In 2016, the most recent year with data available for all types of correctional systems reported, about 3,673,100 people in the U.S. were on probation, while a total of 3,037,200 were on parole, in jail, or in prison. See Danielle Kaeble & Mary Cowhig, (2018). Correctional Populations in the United States, 2016. U.S. Dept. of J., Bureau of Justice Statistics. NCJ 251211, https://bjs.ojp.gov/content/pub/pdf/cpus16.pdf.

